ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION (EUROPEAN ECONOMIC AREA) ORDER 1994

The Association welcomes this initiative of the Government to seek to implement into domestic law the rights of certain persons to free movement and residence in accordance with the UK's obligations under European Union (EU) law.

We respectfully ask your Lordships carefully to consider the legislation before you and satisfy yourselves that it fulfils the UK's obligations under European Union law. We have some concerns that the objective is not wholly fulfilled by the Order. These concerns are set out in this memorandum.

It is, of course, an obligation of the Member States to implement EU legislation through national law. The UK has been somewhat tardy in bringing national law into line with its EU obligations as regards free movement of persons relying in the interim on administrative practices. Leaving aside the confusion this may create in the minds of individuals seeking to exercise their rights, such delays put the UK Government at risk of enforcement proceedings by the European Commission under Art 169 EC. This is expensive and futile in view of the case law of the European Court of Justice (eg Commission v Italy [1986] ECR 2951). However, failure to implement EU law correctly also requires the European Commission to take enforcement action against the offending Member State.

It is particularly important that EU obligations are implemented into national law clearly and faithfully (Art 5 EC). Long and expensive litigation both for individuals and governments may otherwise result. The history of the UK's implementation of Directive 77/187 EC on safeguarding employees' rights in the event of a transfer of the employer's business is a salutary example. Over ten years of diverse litigation on the compatibility of national legislation with the Directive has still not resulted in satisfactory national provisions. The European Commission has again had to take enforcement action against the UK Government on the implementation of this Directive. It is hoped that such expense and uncertainty may be avoided in the area of free movement rights.

We would also request a particularly anxious scrutiny of this legislation in view of the inequality of arms between those who will be controlled by the legislation and those applying it. This legislation will be applied by the state in respect of individuals (s6). Wealthy individuals are unlikely to fall foul of the legislation (s6). Individuals with limited resources and therefore least able to pursue their claims are most likely to be adversely affected.

ILPA · 115 OLD STREET · LONDON EC1V 9JR · TELEPHONE: 071 250 1671 · FAX: 071 253 3832

We will here set out our particular concerns regarding the draft Order. We hope these points may be of interest.

ISSUES ARISING FROM THE DRAFT ORDER

This Order is intended, inter alia, to bring into force s7(1) of the Immigration Act 1988 which should implement EU law regarding the freedom of movement of workers and others in the Union and, inter alia, the finding of the European Court of Justice that EU migrant workers do not require 'leave' to enter the UK (R v Pieck [1980] ECR 2171).

This occasion is also being taken to implement a number of other EU measures including the June 1990 Directives of residence for students, pensioners and the economically inactive. The full list of EU legislation being enacted is appended to the explanatory note at the end of the Order.

1. S 2: interpretation - On 1 November 1993 all nationals of Member States of the European Community became citizens of the European Union. It may be surprising in view of the position of some Member States on dual citizenship that on that date all these nationals, including British citizens, became dual citizens - citizens of their own state and citizens of the Union.

In the context of the Order this observation is not irrelevant. While the duties, obligations and rights of citizens of the Union are perhaps not as clear as might be hoped, nonetheless, it would be unwise to proceed as if none existed. Certainly, citizens of the Union have the right of residence in any part of the Union (Art 8A EC). However this right may be interpreted, and judicial interpretation seems necessary, it is likely that it has some content.

It has been suggested that by virtue of Art 8A EC citizens of the Union are entitled to reside wherever they wish in the Union without hinderance and subject only to measures of exclusion justified on the grounds of public policy, public security and public health (Directive 64/221 EC). Such a construction reverses the position as expressed in this Order that citizens of the Union may only enjoy residence rights in the UK where they establish an entitlement to do so under some other provision of EU law (s6).

This may seem a fine distinction. However what is at issue here is the burden of proof. Is there a presumption in favour of a citizen of the Union ipso facto or must he or she prove some other criteria before becoming entitled to residence?

Bearing this in mind, to disregard entirely as has happened in this Order the qualitative difference between the rights of citizens of the Union and third country nationals (being persons with citizenship of no Member State) with whose governments the

Union has entered into a multilateral agreement (specifically the Nordic countries whose nationals benefit under the EEA Agreement) seems both unwise and, we would respectfully suggest, rather insulting.

To the extent that the order elides the rights of citizens of the Union with the rights of persons from Nordic countries benefitting from the European Economic Area Agreement it fails to take account of Art 8A EC.

The Government has chosen to use the term 'EEA national' to cover all those persons with equivalent free movement rights. The term is defined to **exclude** in all circumstances British citizens. To this extent it fails to implement the ECJ decision in **Surinder Singh** [1992] 3 All ER 798, a decision specifically against the UK Government. That decision indicates that British citizens who exercise an EU right of free movement to work in another Member State are entitled to continue to rely on EU law as regards family reunion when returning to the UK.

It may not be wise to disregard a judgment of the European Court of Justice against the UK Government which is directly relevant to the scope of this Order.

2. S 2 'family members' and 'family permits': the definition of family members who are entitled to instal themselves with a person exercising a right under this Order follows the prescribed list contained in Regulation 1612/68 EC Art 10 (1) relating to EU migrant workers. This includes spouse, descendants under 21 or dependent and dependent relatives in the ascending line. However, the Government has overlooked its obligation to facilitate or favour the admission of other family members who are dependent on the EU citizen (worker or self employed) as required under Art 10(2) of Regulation 1612/68 EC and Art 1(2) of Directive 73/148 EC. These rights are absent from the Order.

We are puzzled by the definition of a family permit. This does not correspond to any provision of which we are aware in Union law. Indeed, Directive 68/360 EC Art 4(4) requires the UK to issue to family members a residence document which has the same validity as that issued to the worker etc upon whom the family member is dependent. If this is the provision of Union law which is purporting to be transposed here we suggest the wording be identical to the Directive.

3. S 2(2) The Government has defined 'spouse' for the purposes of the Order as **excluding 'a party to a marriage of convenience'**. There does not appear to be any legal basis for this exclusion. There is no definition of a marriage of convenience. We consider this to be one of the most cardinal failings of the Order. A restriction has been placed on a Union law right which is not countenanced by Union law.

We are not arguing in favour of marriages of convenience. We are arguing that there is no domestic power to restrict Union law rights. The mischief which we see resulting from this

restriction is that it would purportedly give the state the power to investigate marriages between citizens of the Union (and EEA nationals) and third country nationals.

Those of our members who advise couples on national immigration law requirements for admission of foreign spouses confirm that inquiries into the primary purpose of the marriage and its genuineness can result in months if not years of correspondence, interviews not just with the couple but with other family members and the necessity of disclosing to public officials intimate details of private life.

Throughout the period of investigation the foreign spouse is usually excluded from the UK and the enjoyment of family life is prevented.

European Union law will not interfere with our national decisions on how we wish to treat ourselves. However, it will prevent us from subjecting citizens of the Union (other than British citizens who have not exercised EU rights of movement) to the humiliation which we may consider appropriate for ourselves.

According to the case law of the European Court of Justice, where we treat our own nationals more favourably than is required by Union law, those benefits must apply to all citizens of the Union (The State (Netherlands) v Reed [1987] 2 CMLR 448). However, citizens of the Union who have exercised their EU movement rights cannot be made subject to more stringent national requirements not contained in Union law (Surinder Singh supra).

4. S 3(1): the Order requires that all EEA nationals produce, on arrival, a valid identity card or passport. Your Lordships are well familiar with the debate which has taken place in legal circles as to the compatibility of passport checks at UK borders with Art 7A EC. It appears likely that the issue is one which will be determined in due course by the European Court of Justice. The UK Government has gone on record stating that it believes it has such power. The European Commission has published its position that such power no longer exists.

It would seem a particularly inappropriate response to this serious legal issue for the UK Government at this time to purport to legislate in favour of its argument. Decisions of the European Court of Justice, unlike those of our national courts, cannot be rendered ineffective by passing domestic legislation.

The haste of the Government on this point contrasts markedly with its record regarding the transposition of the EU Regulations and Directives which give rights to EU citizens.

S 3(2): There is no power to Member States to require the family members of an EU citizen exercising free movement rights to prove the relationship on entry. We refer your Lordships to Directive 68/360 EC Art 3. Admission must be granted to family members. The Member States may require evidence of relationship at the time the applicants apply for the right of residence in

accordance with Art 4 of the Directive. This necessarily postdates the date of admission.

5. S 4(2): No attempt has been made to deal with the issue of family members of persons exercising rights under the Order who cease to be family members, or in the case of parents and children cease to be dependent. Once a child arrives at 21 and ceases to be dependent then the Order excludes the child from its ambit. Similarly, in the event of marriage breakdown the Order is silent as to the position of the former spouse.

Under our Immigration Rules (HC 251 as amended), where a foreign spouse and children are admitted to join a sponsor settled in the UK after a one year probationary period the spouse and children are granted an independent residence right. Considering the judgment of the European Court of Justice in Reed (supra) such an advantage must be afforded to EU citizens exercising free movement rights. This may be an appropriate occasion to bring UK law into line with European Union law on this point.

6. S 6: This defines 'qualified person', ie who can take advantage of Union free movement rights. At s6(2)(a) 'worker' is quite properly defined by reference to Art 48 EC. 'Self employed person' at s6(2)(b), however is not defined by reference to Art 52 EC, the corresponding provision of Union law guaranteeing the right of free movement for self employment. This oversight needs to be corrected.

No provision is made for persons who, having worked in the UK, cease their economic activity. Such provision is set out in Regulation 1251/70 EC and ought properly to be included in the Order.

The residence rights of pensioners coming to the UK to retire and referred to in s6(2)(g) are covered by a different provision of EU law (Directive 90/365 EC) and subject to different qualifying requirements.

No provision is likewise made for workers who form part of the work force of a service provider based in another Member State and who are sent as part of the work force to the UK to fulfil contractual obligations of the service provider. The position of these workers has been the subject of one judgment of the European Court of Justice (Rush Portuguesa Limitada v Office National d'Immigration [1991] 2 CMLR 818) which found that the service provider may not be subjected to national restrictions which would limit its right to send its work force to another Member State including the requirement of obtain work permits for its labour force.

A second case is pending before the Court of Justice and is expected to receive its oral hearing shortly (van der Elst).

Similarly, personnel of enterprises who are exercising the enterprise's Art 52 EC right of establishment are not provided for in the Order.

7. S 11(2) permits a residence document to a family member who is not an EEA national to take the form of a stamp in the person's
passport. It is difficult to see how this can fulfil the requirement of Directive 68/360 EC Art 4(4). Member States are required to issue residence documents, a stamp in a passport is not a residence document. This may at first sight appear a minor point. However, non-EEA national family members have rights deriving from Union law. They cannot easily establish their identity as persons entitled to those rights from a stamp in a passport which resembles the stamp given to other foreign nationals whose rights stem only from domestic law.

For example, the Ukrainian wife of a Danish national living in the UK may return to the UK from a trip to the Ukraine. If she is relying on nothing more than a stamp in her passport the Immigration Officer may consider he or she is entitled to make inquiries far beyond the limit permitted by EU law about her circumstances applying domestic rules. If she had a residence document clearly showing her status, such unlawful indignities would be less likely to occur.

8. S 13(2): This provision purports to transpose Art 7 of Directive 68/360 EC. However, there are a number of shortcomings to the provision. First, the Directive only permits a limitation on renewal of a residence permit where the worker has been unemployed for more than twelve **consecutive** months. This continuous aspect of the unemployment is not reflected in the Order. It is also questionable whether Art 7 of the Directive permits a residence permit to be limited where the period of unemployment occurred **after** the first year of the residence permit.

9. S 15: This provision finally acknowledges that appeal rights to the statutory Immigration Appellate Authority are available to EU citizens (and EEA citizens) exercising EU free movement rights. This is a jurisdiction which the Appellate Authority has itself determined that it had. We welcome this clarification of the law.

Refusal of admission on the grounds of public policy, public health and public security only gives rise to an right of appeal after removal from the UK (s13(1) Immigration Act 1971).

10. S 19 extends the Immigration (Carriers' Liability) Act 1987 to visa nationals with rights of entry and residence derived from their relationship with an EEA national. Again this would appear to be an attempt to preempt the legal debate on the compatibility of carrier sanctions in respect of internal European Union travel with Art 7A EC. We understand this has been a matter of some discussion recently in the European Parliament which is applying pressure on the European Commission to take action against such sanctions.

11. S 18 & 20: For third country national family members of EEA nationals, the appeal right would appear to be limited in

accordance with the Immigration Act 1988. This would mean that if the EEA national upon whom their residence right rested left the UK or otherwise ceased to qualify for residence these family members would have a very limited right of appeal against deportation. At the moment there is no consideration of the compassionate circumstances on such appeals unless the appellant can establish that there is no power in law to deport him or her; he or she has been in the UK in excess of 7 years; or he or she is entitled to protection as a refugee in accordance with the Geneva Convention on the Status of Refugees 1951 and 1967 Protocol.

12. S 20(e): this permits Schedule 2 of the Immigration Act 1971 to apply to EU citizens and non EU-EEA citizens. This would permit persons exercising free movement rights to be required to submit to secondary examination and render them liable to detention. It is indeed difficult to see how such powers can be compatible with Art 3 of Directive 68/360 which simply states: "Member States shall allow the persons referred to in Article 1 [nationals of the Member States and their families] to enter their territory simply on production of a valid identity card or passport."

It is even more difficult to see how such powers may be compatible with Arts 7A and 8A EC regarding the creation of the Single Market and the right of residence of citizens of the Union.

We hope these comments have proved of interest. If we can be of any assistance please contact Mrs Rowlands at the ILPA office.

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