ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

RESPONSE TO WORK PROGRAMME: IMMIGRATION

AD HOC GROUP IMMIGRATION REPORT OF 3.12.91

BACKGROUND

The Ad Hoc Group Immigration, the forum of the Ministers responsible for immigration of the Member States of the European Community, prepared a report to the European Council meeting in Maastricht on immigration and asylum policy dated 3rd December 1991. That report included a work programme concerning immigration policy which set out the matters which the Group considered should be harmonised before the entry into force of the Treaty on Political Union (sic).

This Association now seeks to assist the Group by providing to the UK representatives the views of UK immigration lawyers on the proposals. For ease of reference, the subjects are set out as in the report with our commentary below.

A) HARMONISATION OF ADMISSION POLICIES

Harmonisation of policies on admission for purposes such as family reunion and formation and admission of students.

ILPA RESPONSE

Family Life

The principle of the right to family life has been

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accepted by all European Community States both in the context of international instruments such as the European Convention of Human Rights and in Community law. This Association fails to see the need or indeed the efficacy of dividing the concept of family life into family reunion and family formation. Were any such division incorporated into legislation we foresee great difficulties in determining the point at which a family is formed which can then be the subject of reunion. We foresee only one point at which a division could be made which would be sufficiently clear so as not to give rise to legal uncertainty, that being the date of marriage. If such a division were made and the third country national intended spouse were not permitted to come to the UK, for instance, in order to marry but only after the marriage had been conducted we foresee this causing unnecessary hardship and distress to couples who wish to marry in the UK with the support and presence of the UK resident intended spouses' family.

In terms of the UK Immigration Rules, already difficulties arise where a non-UK resident third country national comes to the UK as a visitor and subsequently marries. Where there is any indication that marriage might have been contemplated no matter how vaguely in respect of nationals of certain countries this may be a ground to refuse the issue of an entry clearance or admission at the Port. The ground in such cases is usually that the entry clearance or immigration officer is not satisfied the applicant intends to leave at the end of his or her visit.

We fail to see how the public interest is protected or furthered by forcing couples to marry abroad rather than in the UK.

Turning to the question of substantive provisions relating to family life we cannot but comment on the peculiar situation now existing in the UK where British residents have no right to family life with their third country national spouses and families whereas nationals of other EC Member States who happen to be present in the UK in accordance with EC law do have such rights. We find it offensive that British residents have fewer rights in their own country than Community nationals.

We submit that this anomaly could very easily be rectified by the incorporation into domestic law of the family life right guaranteed to other EC nationals under Community law.

However, for the position of the spouse and family to be protected we strongly support the early approval by the Council of Ministers of the proposed amendments to the Council Regulation (1612/68) and Council Directive (68/360) which contain the family life provisions as presented by the Commission on 29th March 1989. This proposal has been considered by the European Parliament and is only awaiting Council's approval. Its provisions as regards family members would give security to family members upon death of the principal worker or dissolution of the marriage. Such provisions are

necessary to enable family members to participate fully in the Community without fear of withdrawal of residence rights.

Following on from the above, we would strongly oppose any attempt to establish different rules on family reunion for British citizens and third country nationals resident in the UK. The importance of integration of third country nationals as a goal of a united Europe has recently been set out most persuasively in the Council of Europe's report Community and ethnic relations in Europe. That report stresses the need for equal opportunities for participation by people of immigrant origin in the different sectors of society.

We consider it self evident that participation by ethnic minorities can only be successfully pursued where under the law they benefit from equal rights - the so called level playing field approach. To create differentials in such a fundamental field as the opportunity to be joined by a spouse and family can only create resentment and provide substantiation for the charge that ethnic minorities are treated as "second class" residents.

Students

This is an area of greater importance in the UK then in some Member States of the Community because of the UK's long history of making available educational opportunities to overseas students particularly from

Commonwealth countries. The Treaty on European Union contains a commitment in Title VIII Chapter 3 Article A.3 to fostering co-operation with third countries in the sphere of education. We support this commitment and the recognition it evidences of the importance of making educational opportunities in the EC available to third country nationals in order to promote understanding and development. As currently existing, the UK Immigration Rules on admission of students are both clear and easily administrable.

We support the position currently obtaining in the UK whereby the wife and children of a student may join the husband in the UK for the duration of the studies but it is with chagrin that we note the continuation of sex discrimination in this provision. We urge the Government to amend this provision to allow the husband of women students to enjoy the same benefits as the wives of men students.

We submit that the admission of third country nationals for the purposes of study should be dependent on the passenger either having obtained an offer of a place on a course or having a reasonable prospect of obtaining such an offer. We accept that overseas students should not be a burden on public funds and it is quite proper that students or intended students show that they can support and accommodate themselves either from their own funds or through the sponsorship of friends or relatives wherever they may be. The application of the support

and accommodation principle must be reasonable and any negative decision give rise to a right of appeal.

However there are 3 aspects of the UK law regarding students which seem to us to be unnecessary and cause problems for overseas students. These are:

1) the prohibition on changing status from visitor to student by visa nationals;

2) the application of the requirement that the student support him or herself without working in those circumstances where the student is lawfully permitted to work; and

3) the involvement of the Employment Department in decisions on permission to take part-time employment.

It seems to us unnecessary that someone who comes to the UK as a visitor and subsequently decides that he or she wishes to undertake a course of study albeit a short one, for instance, to study English should be required to go back to the country of origin and obtain a visa in order to return to the UK to commence that course of study. This creates unnecessary expense for the applicant and in view of the time involved can result in the applicant losing the opportunity to embark on the course of study.

As regards the second issue, as students once here are permitted to work part-time during term and full-time during the holidays it is absurd that on an extension application they must prove that they support themselves exclusively from overseas funds or sponsorship. This requirement only creates muddle and encourages deception.

On the third point, a student who wishes to take part time employment must obtain Employment Department consent. Through ignorance of the requirements, students not infrequently find themselves in technical breach of the Immigration Rules because such authority had not been obtaining and are therefore liable to deportation which necessarily results in the permanent disruption of their studies in the UK and often the permanent loss of educational opportunity. Equally some students are well placed to give private lessons such as music students, but as there is no easily identifiable employer Employment Department approval is difficult to apply for.

If the authorisation for part time employment were granted by the Home Office automatically on an extension application or on entry these difficulties would not apply. There would also be substantial savings in administrative costs for the Government.

Harmonisation of policies on admission for other purposes such as humanitarian aims and work as an employed or self-employed person.

ILPA RESPONSE

We assume that the reference to humanitarian aims relates to persons who are not refugees within the definition of the 1951 UN Convention but to people whom it would not be acceptable to return to their country of origin because of the situation in that country.

Such persons may come within the definition of Article 3 of the European Convention of Human Rights, that is to say persons liable to torture, inhuman or degrading treatment or punishment if returned to their country of origin or last residence.

All efforts which give rise to more comprehensive and better quality information on countries of origin are to be encouraged. However, harmonisation in this field must not be pursued without effective programmes for obtaining such information. All information which gives rise to a decision must be available to the applicant and his or her representative and capable of examination by a court in the event of a negative decision. The collection of such information should be from all reputable sources, for instance Amnesty International and other organisations concerned with human rights.

Further, any harmonised policy must take into consideration the time lag between change of circumstance in country of origin and the point at which it is safe for a national to return. The recent example

of events in Haiti is a sad reminder of the need for caution in such policies.

In respect of harmonisation of policies of admission as an employed or self-employed person we would highlight the need for Member State governments to consult with industry on this subject. We agree with the government that protection of the domestic and EC labour market is a very important concern but any policy must take into account the needs of businesses in the Community if they are not to be hampered unreasonably.

All too often in the UK context we find the Overseas Labour Section of the Employment Department fails to comprehend the needs of business, the lack of certain types of skills in the EC labour market or the potentially positive impact on domestic employment opportunities by the admission of some overseas personnel who will, for instance, head up new divisions, enable expansion of business to take place in some sectors etc.

Also, we would highlight the unsatisfactory nature of the UK rules on self-employment particularly in the area of the business rule. The high financial investment requirement coupled with a low job creation threshold seems to us perverse. We suggest that a high threshold of job creation, whether full-time or part-time for domestic labour should be the fundamental criteria for the admission of self-employed persons. We submit that

investment of substantial sums of capital is less important than the expansion of labour market opportunities.

Harmonisation of legal provisions governing persons authorised to reside.

ILPA RESPONSE

It is in the interests of successful integration of third country nationals into the Community that the rights and obligations of persons authorised to reside here mirror the rights and obligations of EC nationals. Any negative decision taken in respect of such third country nationals must give rise to a right of appeal on the merits exercise of which has suspensive effect. Again we refer you to the report of the Council of Europe on the Community and ethnic relations in Europe. This report is the result of a five year European wide study authorised by the Council of Europe's Committee of Ministers in 1987.

At paragraph 265 of the Report the Committee of Experts considers "the basis of a good community relations policy is a sound legal status and equal opportunities for participation by people of immigrant origin in the different sectors of society."

If this aim is to be achieved security of residence for long term resident third country nationals must exist.

We strongly support the UK position which is to grant indefinite leave to remain to persons after a reasonable period of residence in the UK. The grant of indefinite leave to remain to such persons should enable them to participate equally in the Community with British citizens.

We would recommend that the rights attaching to such leave should be strengthened. In view of the prohibition on dual nationality which exists in many EC states and the complex and discretionary rules which apply to naturalisation in some states we suggest a status with the security in immigration terms of citizenship should be granted. The UK precedent for this is of course the right of abode, the holder of which status while still subject to immigration control has the security of readmission to the UK.

We strongly recommend the extension of full Community free movement and voting rights to permanently resident third country nationals. We would also suggest that successful integration of third country nationals in the Community is the pre-requisite for the successful combating of racism and xenophobia.

B) <u>COMMON APPRPOACH TO THE QUESTION OF ILLEGAL IMMIGRATION</u>

- Co-operation on border controls within the framework of the Convention on the crossing of external borders.

<u>ILPA RESPONSE</u>

As this convention is a confidential document we have not been able to comment upon it. We are indeed concerned at the lack of public debate on such an important issue and the unwillingness of the Member States Governments to consult with interested parties on the form which this is taking.

The European Court of Justice has frequently stated that transparency is a necessary characteristic of all Community legislation. We would suggest it is also a highly beneficial characteristic of the procedure by which draft legislation is finalised.

We would however take this opportunity to remind the Group of the need for effective judicial remedies for all persons adversely affected by any such convention in order to ensure that the convention is both fair in application and uniformly applied.

Harmonisation of conditions for combating unlawful immigration and illegal employment and checks for that purpose within the territory and at border.

ILPA RESPONSE

We understand from the Commission's Communication on immigration that most unlawful immigration in the Community occurs where people who have entered a Member State lawfully remain beyond the time permitted to them. We also understand that it is in this context

that most illegal employment occurs ie, persons who are admitted subject to a prohibition on employment who subsequently take employment. We would refer the Group to the UN Convention on the Protection of Migrant Workers which has now been ratified by some European states. We suggest that any harmonisation in this area should be in conformity with that Convention which sets out the principles acceptable to the international community.

We strongly oppose any increase in internal immigration checks, those being spot checks in the territory of the immigration status of persons here. It is difficult to see how such checks if permitted would not be carried out in a discriminatory way focusing on black people. If police officers are charged with carrying out regular immigration status checks we foresee further race relations problems for police forces and an unfortunate increase in the perceived marginalisation of black communities.

Similar problems arise in respect of combating illegal employment. It is clearly not reasonable to place a burden on employers to identify the immigration status of employees. The varieties of categories of persons permitted to work and the enormous number of different types of documents which evidence this permission make it virtually impossible for employers to carry out checks without risking court challenges of discrimination.

Harmonisation of principles on expulsion, including the rights to be guaranteed to expelled persons.

ILPA RESPONSE

We would first draw the attention of the Group to the jurisprudence of the European Court of Human Rights as set out in the recent cases of Beldjoudi, Moustaquim and Djeroud where the Court has consistently ruled that the expulsion of third country nationals who have spent substantial periods of time in a country is contrary to Article 8 of the Convention, the protection of private and family life.

All the Member States of the Community are signatories of the European Convention on Human Rights and are bound to comply with the rulings of the European Court of Human Rights. We would refer the Group to the most recent decision of this Court on expulsion, Beldjoudi v France, published on 26th March 1992. In the concurring opinion of Judge Martens he states "I believe that an increasing number of Member States of the Council of Europe accept the principle that such "integrated aliens" should be no more liable to expulsion than nationals, an exception being justified, if at all, only in very exceptional circumstances" (p.27).

In the UK context, the protection of persons subject to decisions to deport is not satisfactory. The fundamental problem arises in respect of a right of

appeal in order to assess the extent to which the person has established permanent ties in the UK. While a right of appeal against a decision to deport exists except in cases where national security is invoked (a matter under consideration by the Home Office at the moment) the matters which can be raised before the Immigration Appellate Authority appear to us to be arbitrary and unfair. For example, the Appellate Authority cannot consider the merits of a case, including the application of the integration test, if the person last entered the UK seven years previously. The only exception is where the person claims there is no power in law to deport him or her or that she or he is a refugee.

Why should a person who has been lawfully in the UK for 7 years have a full right of appeal on the merits against a decision to deport whereas someone who has been in the UK lawfully for 10 years but made a trip abroad in the middle of that period and was granted fresh leave to enter on return be refused such a right of appeal? We suggest that harmonisation in this area should include a right of appeal on the merits with suspensive effect for every person who is subject to an expulsion decision.

We suggest that only such a right of appeal can satisfy the duty on the UK contained in Article 8 of the European Convention on Human Rights as it is now being interpreted by that Court. The integration of a third country national into his or her community must be

capable of assessment by a court or tribunal in any case where expulsion is contemplated.

Definition of guiding principles on the question of policy regarding third country nationals residing unlawfully in Member States.

ILPA RESPONSE

Any guiding principles for a policy on unlawful residents in the Community must take into consideration the following:

1) The policy must not offend against Article 8 of the European Convention on Human Rights, the protection of private and family life, detailed above. The Convention applies to all persons on the territory of Signatory states irrespective of the legality of their presence.

2) The application of any policy must not give rise to discrimination either direct or indirect on the bases set out in Article 14 of the European Convention on Human Rights that is to say, sex, race, colour, language, religion, political or other opinion national or social origin, association with a national minority, property birth or other status.

3) There must be the possibility of regularisation of

persons unlawfully present on the territory where the circumstances so require.

4) Any policy must avoid the creation of a permanent underclass of persons whose presence on the territory is unlawful but who are tolerated for economic or other reasons.

We support the UK policy in respect of unlawful residence insofar as the barrier between unlawful residence and lawful residence is permeable. Where someone is in the UK unlawfully it is appropriate that a discretion should exist and be exercised to permit that person to come back within the "lawful net" where there are good reasons for doing so. We also support the UK policy of granting indefinite leave to remain to persons who have been unlawfully resident in the UK for a substantial period of time.

Again we would stress the need for a right of appeal on the merits for any person who is subject to an expulsion decision or who is refused regularisation of his or her position on the territory.

Co-operation with countries of departure and transit in combating unlawful immigration, in particular as regards re-admission.

ILPA REPSONSE

We would remind the Group that the current position in international law is that there is no obligation on States to admit any person who is not a national of the State. Therefore where a person is being expelled it is incumbent on the expelling State to ensure that the person is admissible in the country to which he or she is being sent.

We are aware of the recent Agreement between the "Schengen" states and Poland whereby any person who has gained access to the "Schengen" state through Poland and is found to be unlawful in a "Schengen" state maybe returned to Poland rather than to a country of origin. We are concerned about such Agreements as we see the result as being to place a very substantial financial burden on poor countries on the periphery of the Community to return to third countries persons not admissible in EC Member States. The cost of such onward return can be very high. We understand that already in Poland there are insufficient resources to expel Romanians unlawfully on the territory and the situation is unlikely to change.

We are also concerned about the position of individuals returned to third states under such agreements. Rather than being returned to their home state where they speak the language, have family and other connections and can adjust back into their society they may be dumped, like unclaimed baggage, in a third state where they may have no knowledge of language or means of support.

If the "receiving" state cannot afford the cost of repatriation the individual may stay in limbo in that state indefinitely. Not only may this action potentially constitute inhuman or degrading treatment as defined in Article 3 of the European Convention of Human Rights but it may create an incentive for the individual to seek to re-enter the state from which he or she has been expelled.

Pushing this burden to the fringes of the Community can only increase the likelihood of persistent unlawful re-entry into the Community of those persons whom the third state does not have the economic means of expelling to the country of origin.

C) POLICY ON MIGRATION OF LABOUR

Harmonisation of national policies on admission % to employment for third country nationals taking account of possible labour requirements in Member States over the years to come.

Those members of this Association who specialise in the area of approved employment under the work permit scheme consistently advise that the needs of business for overseas labour are complex and difficult to foresee. Any policy on admission for employment must be sufficiently flexible to take into account changes in labour requirements and economic environments which may occur very quickly.

Under the auspices of the Organisation for Economic Co-operation and Development (OECD) a continuous reporting system on migration has been developed which reports on an annual basis on movement of persons in OECD countries. We would strongly recommend that the Group take advantage of the expertise available through the OECD before reaching any policy on migration of labour.

Increased mobility of Community nationals, in particular by improving the functioning of the SEDOC system.

ILPA RESPONSE

The unhampered mobility of labour within the Community is of course a cornerstone of the Community. We agree that the effective functioning of the SEDOC system would be of assistance to Community nationals looking for work or considering a change of employment. However we are of the opinion that long term resident third country nationals should also be able to take advantage of the SEDOC system. Indeed under the provisions of the Co-operation Agreements between the European Community and Tunisia, Algeria and Morocco and the Association Agreement with Turkey the exclusion of nationals of those states resident in the Community from use of the SEDOC system maybe unlawful.

D) SITUATION OF THIRD COUNTRY NATIONALS

Examination, within the appropriate fora, of the possibility of granting third-country nationals who are long-term residents in a Member State certain rights or possibilities, for example, concerning access to the labour market, held by Member States nationals once nationals of the 12 Member States enjoy the same conditions of freedom of movement and access to the labour market.

ILPA RESPONSE

"The Committee considers that the basis of a good community relations policy is a sound legal status and equal opportunities for participation by people of immigrant origin in the different sectors of society." 265, Council of Europe report Community and ethnic relations in Europe 1991.

In an increasingly unified Community the exclusion of third country national long term residents from the benefits of Community law as regards free movement is not acceptable. The need for increased efforts by the Community to implement successful integration policies for such third country nationals has been underlined by the rise of xenophobia and racism in the Community. Already the possibility of discrimination against long term resident third country nationals in the area of advancement in employment exists on the ground that such third country nationals cannot easily be transferred from one Member State to another within the Community.

We understand that no legal challenge has yet been commenced on the ground that this is a contravention of Article 14 of the European Convention of Human Rights as applicable to Community law but in accordance with the Treaty on European Union such a challenge cannot be ruled out.

We urge the Group to make progress as quickly as possible to harmonise the rights of third country nationals long resident in the Community with those of Community nationals.

E) MIGRATION POLICY IN THE BROAD MEANING OF THE TERM

Preparation of agreements on re-admission with countries of origin and transit of unlawful immigration.

ILPA RESPONSE

We refer the Group to our comments under Section B5. We do not consider it appropriate that the Community seek to divest itself of its responsibility to consider applications for political asylum by seeking to return asylum seekers to a "safe" country of transit. Similarly, third country nationals who are found to be unlawfully on the territory of a Community state should not become the "problem" of a country of transit.

Establishment of an information programme and preparation of training and apprenticeship contracts for

East European and North African countries in particular.

ILPA RESPONSE

We strongly support an extension of the training and apprenticeship opportunities in the Community for third country nationals. Such a policy is instrumental to achieving the goals set out in Title 17, Article A of the Treaty on European Union to foster lasting economic and social development of the developing countries and most especially the most disadvantaged among them.

We submit that the UK example of the Commonwealth working holidayworker scheme is both valuable and useful as a guide towards achieving this goal. The advantages of the Commonwealth working holidaymaker scheme include flexibility and easy administration, and leaves to the young people seeking training or work experience the initiative and possibility of choosing the type of experience which best suits their needs.

The aspect of the working holidaymaker scheme which is not applicable to a training and apprenticeship programme is, of course, the requirement that a young person taking advantage of the scheme intends, primarily, to take a holiday. However, we do not see why a variation on the outline of the scheme could not accommodate the goals of increasing training opportunities for third country nationals. We suggest that a pilot scheme could be established in respect of

one or more of the countries immediately identified in order to assess the efficacy of such a programme.

Strengthening of the rapid consultation centre.

ILPA RESPONSE

The main concern of this Association is that any rapid consultation procedure ought not to be used to hinder the flight of refugees from countries where they are being persecuted.

CONCLUSIONS

The greatest concern of this Association in respect of the work programme concerning migration policy of the Group is the failure to include any reference to judicial appeal rights. In order that any immigration policy be fair there must be built into it at every level a right of appeal against a negative decision which right of appeal enables the court to consider the merits of the case and the exercise of which right of appeal has suspensive effect.

Further, if the Group is seriously seeking to harmonise aspects of substantive immigration law in the 12 Member States such harmonisation can only be effective if there is a judicial control over national application.

18.5.92

EHG