An Area of Freedom, Security and Justice Five Years On

Immigration and Asylum for the Next Five Years

Joint submissions to the European Commission

by

Immigration Law Practitioners' Association, and The Standing Committee of Experts on International Immigration, Refugee and Criminal Law

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The first five years following the entry into force of the Amsterdam Treaty heralded the beginning of the legislative programme on EU immigration and asylum law regarding third country nationals. This programme is an integral part of the development of an EU area of freedom, security and justice which itself constitutes a contribution to the completion of the internal market. The objectives of the area were laid down at the Tampere meeting of the European Council in 1999. As regards third country nationals, the Tampere milestones, as they have become known, acknowledged the centrality of the UN Convention relating to the status of refugees: "the aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention…" The Geneva Convention provides the internationally recognised definition of a refugee and establishes the duty of all signatory states not to return any individual seeking protection to a country where he or she is likely to suffer persecution. The Tampere milestones also confirm the duty of the Union to comply with other relevant human rights instruments. The most important of these other instruments is, of course, the European Convention on Human Rights, which is already referred to in the Treaty on European Union. As regards third country nationals generally, the milestones call for the development of an area of freedom, security and justice which "ensures fair treatment of third country nationals who reside legally on the territory of the Member States". Further the milestones state "The legal status of third country nationals should be approximated to that of Member States' nationals."

The deadline set in the EC Treaty for the achievement of the legislative programme ended on 1 May 2004. This is then an important moment to take stock of what has been adopted and where further legislative work is required in the next five years. However, it must be acknowledged from the start that, in the view of many, this first period of the Tampere process has been marked by a cascade of legislation partly of dubious quality and content. Although the statements in Tampere were well received, their application has been much less satisfactory. The fact that both the European Parliament and the Commission have brought proceedings against the Council for measures adopted in this field indicates that the legitimacy of the measures is not universally accepted. The European Parliament has begun proceedings against the Council as regards the family reunification directive which the Parliament attacks on the basis that it fails to meet the minimum requirements of the European Convention on Human Rights; the Commission has begun proceedings against the Council challenging its assumption of delegated powers regarding the visa and borders rules and the European Parliament has sought the opinion of the European Court of Justice regarding the legality of the Commission's proposal to enter into an agreement with the USA which would permit personal data exchange.

A new programme for the next five-year period of an area of freedom, security and justice is in preparation. This has now been incorporated into a Communication from the Commission dates 18 May 2004, which according to the Note from the Presidency to the Permanent Representatives Committee of 12 May 2004 (Council Document 9415/04) that at its meeting in June the European Council, "is expected, on the basis of a Communication from the Commission, to initiate the process for the further development of policies in the area of justice and home affairs, building on the achievements of the Tampere programme." Unless greater care is taken in this task, the challenges and mistakes of the first five-year period are likely to be repeated and exacerbated. The legitimacy of the European Union is being placed

in question as a result of sloppy law making in one field of particular sensitivity. In order to avoid the errors of the first period, dialogue with civil society and non-governmental organizations should be welcomed. In this context two lists of measures are presented here: the first sets out the new measures which need to be adopted in the second five year period of the area of freedom, security and justice; the second list sets out those measures which need correction and change resulting from legislative mistakes which have been made in the first five years.

There is a logic between the two lists. In the first list are to be found the measures which need to be taken to give effect to the objectives of the area of freedom security and justice as a European space which embraces the international human rights obligations of the Member States. The second list contains the measures which have already been adopted in the first five years in a spirit of exclusion and marginalisation of third country nationals and which are having the effect of actively thwarting the achievement of the Tampere objectives.

A. New measures to be adopted:

1. *Measures to reverse the trend which has made it increasingly difficult for asylum seekers to access protection in Europe*

   Notwithstanding the commitment in the Tampere milestones to the protection of refugees, far too many measures have had the effect of limiting access to an asylum procedure within the EU. The rules on visas, carrier sanctions, the fight against irregular migration and the developing asylum acquis have had the effect of making it increasingly difficult for asylum seekers to get access to protection in Europe. Two steps need to be taken urgently to reverse this trend: first, a study needs to be undertaken on all the measures in the border and asylum acquis as regards their consequences for access to asylum procedures; second, a new measure is needed which guarantees the right to protection and access to the EU territory for the purposes of a procedure in which protection needs can be determined. In order to comply with the Tampere objective the focus of EU policy in the area of border controls, immigration and asylum must be reoriented towards access to and protection within the EU, rather than interception outside the EU and deflection or rejection.

2. *A directive on rights of appeal and procedural guarantees for all third country nationals in relation to decisions on immigration in the EU*

   There is a critical need for a consistent approach to rights of appeal and procedural guarantees in an area of freedom, security and justice. The rule of law, which forms one of the foundations of the European Union, can only be respected if there are full procedural guarantees and appeal rights for third country nationals as regards their status in the Union. A draft directive on minimum guarantees for individual freedom, security and justice in relation to decisions regarding movement of persons has been produced in March 2003 by the Dutch Standing Committee of Experts in

International Immigration, Refugee and Criminal Law which provides a format for an EU measure[1].

3. *A right to a short stay visa unless refusal can be justified on the grounds of insufficient resources, public policy, public security or public health; any decision on short stay visa should be taken within three weeks*

The incoherence of the short stay visa system which the EU inherited from the Schengen acquis urgently needs to be rectified. The rules on what individuals must provide in order to obtain visas, how their applications are assessed and the grounds on which refusals are made are inconsistent across the consulates of the Member States and highly opaque. This causes great difficult to third country nationals subject to the visa regime and seeking to travel. It also causes serious resentment and reinforces the image of Europe as a fortress against third country nationals based on their religion and colour. A new directive is needed which contains clear provisions on the documentation, which must be provided with a visa application, the way in which the assessment of applications must take place, notification of refusals, and an explicit non-discrimination provision. Further there must be a mechanism for monitoring the application of such a directive through a visa ombudsman or a similar post. The remedies against refusal should be tied with the proposal above at (2).

4. *A measure providing that where a short stay visa is to be refused this be based on transparent and acceptable rules and any such decision be the subject of a reasoned refusal and appeal; where the refusal is on the grounds of insufficient resources, the burden of proof must be on the state to justify its refusal*

This proposal is closely aligned both to proposals (2) and (3). It is included as a separate item as it is so important to the fair treatment of third country nationals. The vast majority of refusals of short stay visas to persons seeking to come to the EU are made on the basis that the consular authorities are not satisfied about the resources of the individual. This ground of refusal rarely gives rise to an appeal right at the moment in the Member States yet is the subject of much rancour from individuals who consider the refusal of a visa on this grounds has not been justified in light of the money they have available and the purpose of their visit to the EU. In order to deal with this point of friction and to ensure that it no longer poisons the good relations of the EU with the rest of the international community, a specific provision needs to be adopted.[2]

5. *A measure abolishing the visa requirements for countries neighbouring the EU and in the Western Balkans unless retention is justified on serious grounds of public security*

The European Union has launched its vision for security in Europe in the Wider Europe policy. It is time to embrace our neighbours, including their nationals and

[1] "Border Control and Movement of Persons – *Towards effective legal remedies for individuals in Europe*" February 2004. Publication available for download on the website of the Standing Committee (Meijers Committee), http://www.commissie-meijers.nl .

[2] It is advisable to extend this measure also to refusal of an individual at the border. However, this category is much smaller than that of refusal of visas and those countries whose nationals do not require visas to come to the EU are less likely to be refused entry than those who must obtain visas.

accept that their security and ours are intrinsically linked. Good relations with our neighbours (including candidate countries such as Bulgaria, Romania and Turkey but also other states such as Russia, Ukraine, the Western Balkans, the Maghreb etc) are at the heart of the Wider Europe policy. If the states on our borders are not secure we will not be either. One of the most important mechanisms to show our solidarity with neighbouring countries is the abolition of visa requirements. Among the benefits of entry into the European Union, which the new Member States' populations could see, was the right of free movement of persons. Visas are the other extreme. The gradual abolition of these visa restrictions is a very important first step to the creation of normal relations with our neighbours.

6. *Employment permit free access to the seasonal labour market of the EU for nationals of states sharing a common border with a EU Member State but also including those states bordering the southern shores of the Mediterranean*

Access to the EU labour market is one of the sensitive issues, which informs relations with the states on the EU borders. A closed labour market, which excludes all those living on the other side of the EU border, leads to irregular migration and problems of enforcement. On the other hand, a relaxed labour migration regime leads to good relations, diminishes the sense of injustice which the creation of 'hard' borders creates, fosters security in the region, and diminishes the exploitation of the workers who are no longer irregular. It may be that the introduction of a system of permit free seasonal labour movement is gradually implemented. In such circumstances the introduction of a system of multi-entry permit for seasonal employment could be a valuable interim measure. Such a permit could be stamped on entry and exit of the common territory thus indicating the regularity of the individual's employment.

7. *Minimum standards regarding expulsion which protect third country nationals from arbitrary expulsion or exclusion and which respect the standards laid out by the European Court of Human Rights in its jurisprudence*

The issue of expulsion has become increasing sensitive over the first five-year period of the area of freedom, security and justice. One Member State has already been condemned by the European Court of Human Rights regarding the conditions of expulsion, and the act of collective expulsion of aliens; others are awaiting decisions on cases against them. The reluctance of Member States to take seriously the conditions of expulsion of third country nationals is a disgrace. Throughout Europe the press is full of stories of excessive violence being used against persons being forcibly expelled. In a number of cases this has lead to the death of the third country national being expelled. The EU is obliged, in its commitment to create an area of freedom, security and justice which complies with the European Convention on Human Rights, to establish proper humane rules which limit the exercise of violence against persons being expelled. It should be remembered that state killing of the nationals of another state never leads to security and good relations within the international community. The EU needs to adopt measures covering the substantive grounds on which individuals can be expelled, the procedural safeguards for the individual regarding the expulsion decision, the physical conditions of the expulsion and the temporal application of expulsion decisions. There is clearly a complementarity here with the proposal made in (2) above.

8. *A directive providing subsidised language courses in at least one EU language for all new immigrants in the EU*

The call for greater integration of third country nationals in the European Union has come from a number of sources. Unfortunately the concept of integration appears at risk of being hijacked by those who seek to impose on their own communities constraints about the right of individuals to choose how they live. Those who demand "integration" for third country nationals rarely want them to integrate into new age traveller communities. Instead of a vision of coercive integration, what third country nationals most want are free language courses so that they have a chance to improve their labour skills within their community. The provision of subsidised language courses would help greatly in the objective of integration.

9. *Adoption of a recommendation endorsing the substantive provisions of the European Convention on the participation of foreigners in public life at the local level 1992*

The European Convention on the participation of foreigners in public life at the local level has provided the starting point of the development of political rights for citizens of the Union. The possibility to participate in political expression within the state of residence is an important part of integration of foreigners. It is now time to extend these rules, which have been embraced by many EU countries, into the area of freedom, security and justice.

10. *Adoption of a recommendation endorsing the substantive provisions of the European Convention on Nationality 1997*

While nationality remains beyond the competence of the EU, the convergence of rules among the Member States regarding the acquisition of nationality has been well documented. This voluntary process would be assisted by the adoption at the EU level of the commitments, which Member States, have already undertaken within the context of the Council of Europe. It is time to accept that there is a need for a gradual legislative convergence of nationality law in the EU.

11. *A directive spelling out the scope of the right to good administration for all persons affected by the immigration and asylum provisions of the area of freedom, security and justice which gives remedies in EU law to the aggrieved individual*

The (draft) EU Constitution contains a right to good administration at article II-41 as follows: "Right to good administration

1.Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union.

2. This right includes:
   (a) the right of every person to be heard, before any individual measure, which would affect him or her adversely, is taken;
   (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   (c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its Institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States."

This provision has inspired the right to good administration which has been inserted into the new EU regulation on co-ordination of social security 883/2004 (OJ 2004 L 166) at article 76 "the institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation".

In light of the importance of this field which touches on fundamental freedoms and human rights of the individual, it is imperative that the right to good administration be included in every legislative measure adopted in this field and be enforced.

12. *An overarching, independent, data protection body with responsibility to ensure the protection of all personal information held on citizens and third country nationals under EU law*

The collection of personal data, its exchange and use are issues of fundamental rights covered by Article 8 of the European Convention on Human Rights and Article II-7 EU Constitution (draft). Over the past ten years an increasing number of supra national bodies have been granted authority to collect information on individuals and powers regarding the use of that data. The Schengen Information System, the Eurodac database, the proposed Visa Information System, the proposed database on EU passports (and eventually identity cards) are only the most visible of these. In addition there are private bodies which are obliged to obtain and pass on personal data such as carriers under the passenger information exchange measures. The interest of the individual in protection of his or her personal information must be guaranteed by a properly financed, independent authority with wide powers to control how information is collected; how and for how long it is stored; its accuracy; the right of the individual to correction; the use of the data; the security of the databases; the limitations on exchange of data; compliance with restrictions on use and exchange; deletion of data and the respect of time limits regarding data.

B. Measures adopted or proposed under Articles 62 or 63 ECT which need to be changed or withdrawn:

1. *The Schengen acquis should urgently be redrafted in a clear and understandable form*

Currently, the ambiguity and the complexity of the acquis may easily lead to misunderstandings as to its legal character and is hard to access and understand, even for experts. In our proposals hereunder, we do not make an explicit choice concerning the legislative form in which they should be realised.

2. *Delete the provisions on integration conditions in the Directive on the right to family reunification (2003/86/EC) and in the Directive on the status of third-county nationals who are long-term residents (2003/109/EC)*

The negative sanctions provided for in those provisions will weaken the legal status of the legal immigrants and, hence, not facilitate their integration in the receiving society but create obstacles to that integration.

3. *Withdrawal of the Directive on the mutual recognition of expulsion decisions (2001/40/EC)*

   The Directive in its present form does not provide a practical solution to the problems related to the actual enforcement of expulsion decisions concerning third-country nationals. Instead it induces Member States to introduce new grounds for the expulsion of third-country nationals who have been admitted to the country. The Directive risks doing far more harm to lawful immigrants than providing assistance with the expulsion of illegal immigrants.

4. *Shorten the delays and waiting periods in the Directive on the rights to family reunification (2000/86/EC)*

   This is necessary to bring the Directive into line with Article 8 ECHR and to avoid the bureaucratic barriers which operate by transforming the right to family reunification to a favour in practice. The judgement of the Court in the case of the Parliament against the Council (C-540/03) may create the need for further changes of this Directive in order to make it compatible with the minimum standards of Article 8 ECHR.

5. *Introduce a proposal on the right to family reunification for EU citizens who have not used their freedom of movement within the EU*

   The Commission has promised the introduction of this proposal. This would be an opportunity to end the reverse discrimination practised by some Member States, that in their national law apply more restrictive conditions for the family reunification of their own citizens than the conditions for EU migrants under Community law. It would also end the odd situation that family reunion of third country nationals and EU citizens who have used their freedom of movement are regulated by Community law, but for other EU citizens this "right" is left to the discretion of the Member States.

6. *Adoption of the Directive on admission for employment*

   The proposal for this Directive was introduced by the Commission in July 2001 (COM(2001)386). The Council should resume its discussions on this proposal. The EU migration law is incomplete and incoherent without a set of rules on one of the major sources of migration, i.e. migration for employment. The sectoral approach to admission for employment, which is apparent in the recent Commission proposal on researchers, is not necessarily a negative step. But it does not resolve the need for a comprehensive directive.

7. *Amend and simplify the Dublin II Regulation*

   Such amendment and simplification to be on the basis of the principle that the EU Member State where the first asylum application is made should be the one

responsible for handling and deciding the application unless the principle of family reunification requires otherwise (and with the consent of the individual).

8. *Introduce more specific provisions in the Eurodac Regulation to guarantee that the data in the system cannot be misused by Member States' authorities for other purposes than establishing whether an asylum seeker has already filed an asylum application in another Member State*

   The present guarantees look promising on paper, but are not effective in practice. Some Member States have used finger print data on asylum seekers for criminal law purposes or have even merged the fingerprints of asylum seekers in one system with the fingerprints of persons subject to criminal prosecution. In the Netherlands this happened until 2002, notwithstanding repeated promises by the government that the two types of data would be kept separate.

9. *Undertake a systematic review of the present EC migration and asylum law*

   The undertaking of a systematic review of present EC migration and asylum law adopted under Title IV EC Treaty is crucial in order to establish gaps, overlaps, failings or incorrect cross references.

10. *Improve the guarantees against misuse and the remedies for individual persons registered in the Schengen Information System*

    This is a particularly important issue. The Commission has begun proceedings against Spain on its refusal to remove the data on individuals who are family members of Community nationals from the SIS (case C-503/03). The lack of remedies for individuals in the SIS is compounded by the relative weakness of the supervisory authority. At the same time that remedies for the individual must be strengthened so too the powers and independence of the supervisory authority must be augmented.
    Moreover the new regulations on SIS should include uniform, clear, and limited criteria on the categories of data to be entered into SIS, this should guarantee that the use of SIS is no longer based on mutual recognition of national decisions, but on harmonised criteria.

11. *Ensure that sufficient guarantees against misuse of the system are built into the forthcoming Visa Identification System (VIS)*

    The purpose of this proposal is to restrict the multipurpose use of the data, such as aimed at by the USA, and to use the system also to the advantage of bona fide travellers (obligatory quick decision making on visa applications). There should be no central registration of biometric data, no registration of EU citizens or third country nationals who invite persons from outside the EU. There must be short periods for retention of the data, effective remedies and a European supervisor with competence to ensure effective compliance with the rules by national and EU authorities, and periodical evaluation whether the system actually produces the expected results and has unwanted negative side-effects for individual persons (cost-benefit evaluation) (see also point 12 of list A).

12. *The recent Directive on the transfer of passenger data should be withdrawn*

    The Directive does not respect the principles of proportionality and subsidiarity. The Directive also lacks an appropriate legal basis, as data may be transferred both for immigration and for law enforcement purposes.

13. *Remove the provision of the reception conditions directive which permits Member States to leave asylum seekers in destitution because of the manner in which they arrived in the state*

    This iniquitous provision was inserted at the insistence of the UK authorities during the final stages of negotiation of the reception conditions directive in order to reflect changes to national law. The result is a loophole in the protection system envisaged by the directive, which diminishes substantially its value as a key to solidarity among the Member States.

Other Areas

There are many other areas where steps need to be taken in the second five years of the area of freedom, security and justice. The above two lists are only a starting point to which other matters will no doubt be added. For instance, at the time of writing, the Directive on procedures and appeals for asylum appears to have reached political agreement. This directive had already been criticised by UNHCR before its protections for refugees were further reduced in negotiations since March 2004. Undoubtedly this measure must take a very high priority on this list of necessary developments. Other issues in the field of asylum are also pressing, such as family reunification for those with subsidiary protection, a single asylum procedure and the issue of resettlement.

The proposals for increasing collection of biometric data on individuals and the uncertainty of the breadth of access, use and retention raise very important questions of fundamental rights. The latest proposals for the inclusion of biometric data in EU passports and the creation of a data base of such information has been considered by some to be the foundation for the creation of a European population register. The proposal to extend this database to include also information on identity documents has reinforced this perception.

Above all, what is hoped from the second five years of the area of freedom, security and justice is the development of a body of law regarding third country nationals which is more consistent with the international human rights commitments of the Member States and more compatible with the position of the European Union within a community of nations at the international level.

Respect for nationals of other countries is a key element in good international relations. Where nationals of third countries are treated with dignity and efficiency by officials representing the EU (even though they may belong to Member State ministries) the image of the EU as a worthy and honourable part of the international community is reinforced. Where, however, nationals of third countries are treated with contempt and violence by those same

officials, the reputation of the whole of the EU is harmed. Relations between the EU and third states are progressively poisoned by accounts of ill treatment of the citizens of those third countries at the hand of EU immigration authorities. The temptation within JHA ministries is to avoid this issue by making the authorities of the home state complicit in the humiliating treatment of the their nationals. This takes place first and foremost through the EU's insistence on readmission agreements with third countries where by the authorities of the third country are engaged as agents of EU states in the expulsion of their nationals from EU countries and required to carry out controls to prevent their nationals from using their fundamental right to leave their own state. This policy of demanding readmission agreements so far had no noticeable effect on the efficiency of EU state expulsion policies. However, it contains very great dangers for the EU at the international level. This is because these policies can have the effect of de-legitimating the governments of third countries in the eyes of their own citizens. Their citizens see their governments as acting in the interests of EU states against the duty to protect the citizen against arbitrary treatment at the hands of foreign governments. It also highlights the impotence of the governments of poor and unstable countries before the force of the EU. All too often, the governments which are quickest to agree to readmission agreements imposed by the JHA ministries are those which are most in need of mechanisms to enhance their legitimacy at home before their own population. Instead of assisting in this process of helping third countries gain the confidence of their populations through the reinforcement of the rule of law, the protection of human rights and the development of market economies, the EU becomes complicit in destroying their legitimacy by coercing the leaders to accept and participate in the humiliation of their citizens. This policy must be re-considered as a matter of priority.

The field of justice and home affairs at the EU level can promote or poison the EU's international reputation and ability to participate in the international community as a respected actor. Without greater attention being given both to the measures being adopted in this field and to their consequences in the larger picture, the EU risks undermining its own policies in many other fields, not least security.

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