

JOINT COMMITTEE ON HUMAN RIGHTS:**INQUIRY ON CHILDREN'S RIGHTS****SUBMISSION OF THE IMMIGRATION LAW PRACTITIONERS' ASSOCIATION****A. ABOUT ILPA**

1. The Immigration Law Practitioners' Association (ILPA) is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups

B. EXECUTIVE SUMMARY

2. ILPA's submission deals with the UK's protection of all children¹ subject to UK immigration control in the UK, whether accompanied or unaccompanied, seeking asylum or not. We have dealt with the following matters highlighted by the Committee as being of particular interest:
 - children in detention
 - the practical impact of the withdrawal of the UK's reservation on immigration... to the UN Convention on the Rights of the Child (UNCRC);
 - asylum seeking children;
 - child trafficking victims
 - discrimination against children in education
 - the right of every child to an adequate standard of living under Article 27 UNCRC;
 - criminalisation of children
3. Inevitably all these give rise to questions of discrimination against these children on the grounds of their status as children under immigration control. We have paid close attention to the UN Committee on the Rights of the Child Conclusions on the

¹ The term 'children' is used here to mean children in the UK and abroad subject to immigration control. Including: children seeking asylum; children seeking entry to the UK; children who are separated from caregivers or within families; children with refugee status or leave to remain. The term also refers to children under 18, but may include siblings of the children of the above and those who are entitled to services under The Children (Leaving Care) Act, despite attaining the age of 18.

UK's periodic report under the Convention, published 3 October 2008² and concur with the Committee's observation that:

26. *The Committee regrets that the principle of the best interests of the child is still not reflected as a primary consideration in all legislative and policy matters affecting children, especially in the areas of... immigration...*
27. **The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of... immigration.**

C. THE PRACTICAL IMPACT OF THE WITHDRAWAL OF THE UK RESERVATION TO THE UNCRC ON IMMIGRATION

4. The Convention on the Rights of the Child does not have direct effect in domestic legislation in the UK and the UK must use its national laws, including the Human Rights Act 1998, in combination with those international obligations that do have direct effect, such as certain provisions of European Community Law, guidance and practice, to give effect to it.
5. Prior to lifting of the reservation Liam Byrne MP (then Home Office Minister of State for Immigration, citizenship and nationality) stated:
*"There are two reviews which are currently being undertaken, first about how we implement the Home Secretary's commitment to sign the Council of Europe Convention on Human Trafficking Secondly, we are also looking at how we lift the immigration reservation on the UN Convention of the Child, so if we are to implement commitments in those two areas it is quite likely that there will have to be carve-outs across not just immigration legislation but also benefits legislation and potentially NHS legislation as well."*³
6. The current Minister, Phil Woolas MP's stated in a written answer on the timescale for ensuring full compliance with the UNCRC that, apart from the UK Border Agency's Code of Practice *"no additional changes to legislation, guidance or practice are currently envisaged."*⁴
7. As set out in this submission, ILPA considers that substantial changes are necessary to ensure full compliance with the UNCRC and to give effect to the recommendations of the Committee and that the UK is currently acting in ways contrary to its obligations under the Convention.

C.1 Section 21 of the UK Borders Act 2007 and the Code of Practice on keeping children safe from harm

² Committee On The Rights Of The Child Forty-Ninth Session, *Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4*, 3 October 2008 at www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf

³ Oral evidence before the Joint Committee on Human Rights, 19 February 2008

⁴ *Hansard*, HC Report, 24 November 2008 col 825W.

8. Section 21 of the UK Borders Act 2007 introduced a statutory Code of Practice on keeping children safe from harm. During the passage of the Children and Young Persons Act 2008 the House of Lords voted in favour of the UK Border Agency's being subject to a duty equivalent to that in s 11 of the Children Act 2004 and the government made a commitment to give effect to this. Clause 51 of the Borders, Citizenship and Immigration Bill currently before Parliament is intended to fulfil this commitment. Minister of State Phil Woolas MP is quoted as stating

*'It is right that the UK Border Agency is judged by the same standards as every other authority that deals with children.'*⁵

C.2 The Code of Practice

- The Code of Practice was issued on 6 January 2009.⁶ It is too soon to assess the effect of the Code on practice and procedure. We are concerned at the overall limitations of the Code, in particular: The Code makes only one reference to the UNCRC⁷
 - The Code makes no reference to the child's need for legal representation⁸ and none to the need for a guardian, despite the UN Committee on the Rights of the Child specific recommendation on guardianship⁹
 - The Code focuses on safeguarding and says little about promoting children's welfare, which is required of all agencies subject to s.11 Children Act 2004.
 - Despite the specific recommendation of the UN Committee on age disputes¹⁰, the Code is silent on age assessment procedures and process or on the duties owed to those whose age has yet to be determined, many of whom¹¹.
 - The Code fails to place a duty on UK officials abroad i.e. entry clearance posts
 - Despite the specific recommendation of the UN Committee¹² The Code envisages for the continued detention of children and for excessive periods
9. Evaluation and monitoring will be essential in ensuring that the Code is adhered to and that it is implemented in accordance with the UNCRC. It is unclear how this will be achieved, and in particular wholly unclear how the UK Border Agency will monitor and evaluate compliance with the Code by its private contractors. **There is a need for clear, transparent procedures by which UK Border Agency officials and private contractors are trained and reviewed on their observance of the Code.**

⁵ UK Border Agency commits to keep children safe from harm, UK Border Agency www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/keepingchildrensafefromharm Press Release 6 January 2009

⁶ The UK Borders Act 2007 (Code of Practice on Children) Order 2008 SI 2008/3158

⁷ At paragraph 1.5, where it lists it with other international conventions.

⁸ There is one reference to the legal representative, at paragraph 6.4 on staff training

⁹ See the UN Committee's report, *op.cit.* at 71.1.(c). There is one reference to a 'legal guardian' in paragraph 6.4, but this is in a different context, that of 'parent or legal guardian'

¹⁰ See the UN Committee's report, *op.cit.* at 71.1.(e).

¹¹ See ILPA's report *When is a child not a child?* May 2007 available from www.ilpa.org.uk

¹² See the UN Committee's report, *op.cit.* at 71.1.(a).

C.3 Clause 51 of the Borders, Citizenship and Immigration Bill

10. Clause 51 of the Borders, Citizenship and Immigration Bill does extend beyond safeguarding to promoting children's welfare. It is not clear when the duty enshrined in clause 51 will come into force and the government should be pressed on this. Nor is it clear how the government will ensure that that this separate clause is given the same meaning and effect of s.11 of the Children Act 2004, in particular in ensuring that guidance issued under s.11 is also binding upon the UK Border Agency.¹³
11. The clause imposes a duty only on staff 'in the UK'. Thus it does not cover UK Border Agency officials based abroad for example in consular posts and at juxtaposed controls. This has particular implications for the early identification and support for trafficked children and suggests a risk of breach of Article 11 of the UNCRC. Further, ILPA members have also encountered cases in which UK Border Staff at consular posts have failed to accept applications for refugee family reunion made by children and have instead expected children to travel, alone, to neighbouring countries, without the necessary funds or travel documentation. For example, in one case, the children were refused the right to make an application for family reunion to join a parent who had been accepted as a refugee in the UK. It took several years of litigation before a challenge to this refusal succeeded. During this time the children suffered severe psychological and physical ill health.
12. It has been suggested by UK Border Agency officials in conversations that to impose a duty on those outside the UK would give them wide-ranging obligations to examine and intervene in the situations of children in their countries. This reflects a failure to understand the legislation. The duty is confined to the exercise of functions of the Secretary of State relating to immigration, nationality, customs and the immigration acts. The British High Commission in Ghana, if it suspects that a document submitted to it as part of an application is not genuine, refers this to the appropriate Ghanaian authority so that prosecution of the person presenting the document can be considered. No one is suggesting that this entails a general duty on the High Commission to seek out false documents in Ghana in general¹⁴. If this can be done, why cannot a British High Commission or Embassy concerned that a child is at risk make the appropriate referrals in accordance with the Code to child welfare authorities in the country, or consider the implications of that risk for the issuing of a visa?

C.4 Forced Returns of Children

¹³ See the Joint Committee on Human Rights 17th report of session 2004-2005 23 March 2005 *Review of international human rights instruments*, HL 99/HC 264 at para 48 on this subject.

¹⁴ See the report of the Independent Monitor for Entry Clearance Refusals *Report on my visit to Accra* May 2008 www.ukvisas.gov.uk/resources/en/docs/2258700/2258742/imvisitaccramay08

13. One area where the UK must look at the practical impact of removal of the reservation is that of forced returns of children. The effect of its policies and practices here are not limited to children seeking asylum. The UK is failing to respect its obligations under Article 3 of the UNCRC, that the interests of the child be a primary consideration.
14. UK Border Agency practices in this area risk placing a child at possible risk of serious harm contrary to national law and the UK's international obligations. The EU Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers¹⁵ reads as follows (extracts only):

Article 19

Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.

...

3. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety...

15. Thus Article 19(3) does not give free rein to family tracing. There is the qualification 'protecting the unaccompanied minor's best interests' and the caveat beginning 'In cases where there may be a threat...'. .
16. Nor is it anywhere suggested that it is appropriate for the enquiries to be made by the immigration authorities of the State. The Asylum Seekers (Reception Conditions) Regulations 2005¹⁶, state:

Tracing family members of unaccompanied minors

6. - (1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum.

...

(2) In cases where there may be a threat to the life or integrity of the minor or the minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety.

17. This is incompatible with telephoning a number stated to be that of the child's family and announcing oneself as the UK authorities as has been done by the UK Border Agency in cases where children were represented by ILPA members, including cases

¹⁵ OJ L31/18 6.2.2003

¹⁶ SI 2005/7

where the child has subsequently been found to have been trafficked and been recognised as a refugee.

18. The Asylum Policy Instruction on Disclosure and Confidentiality has been under review since at least June 2008¹⁷. The last known version states:

5.4. Authorities in the claimant's country of origin

The Statement of Confidentiality tells the asylum claimant that 'information you give us will be treated in confidence and the details of your claim for asylum will not be disclosed to the authorities of your own country'.

*Caseworkers **must not** disclose any information about an individual's asylum claim to the country of origin while the claim is under consideration, unless the claimant has given his explicit consent for the transfer of the data. To do so may be unlawful and may also jeopardise the safety of the claimant in the event that he returns to his country of origin or the safety of members of his family who have remained there.*

19. We also recall the Home Secretary's evidence to the Home Affairs Committee on 13 November 2008:

'Q76 Ms Buck: ...

Jacqui Smith: First of all, can I just be completely clear. Any asylum claim is completely confidential... The UK Border Agency would never disclose information to the authorities of an applicant's country of origin which would identify that person as an asylum applicant. That is a very important part of our role in maintaining our tradition of providing protection to individuals in fear of persecution. If an application then is refused the claimant has got the right of appeal to the Asylum and Immigration Tribunal, an opportunity to seek judicial review through the higher courts. Once somebody has gone through all of those processes and if their claim is not upheld then of course the responsibility of the Government is to facilitate the return of that person as quickly as possible. ... In those circumstances, and those circumstances only, it is sometimes the case that we work with officials of other countries solely to help us pursue the documentation of those individuals.'

20. The child must give explicit, informed consent for the transfer of information. Any disclosure absent this may be unlawful, as the guidance states. It may, as the guidance states jeopardise the safety of the claimant or members of the family. These matters are not less true just because the instruction is no longer on the website.
21. Mr Jeremy Oppenheim, the then UK Border Agency's 'Children's Champion' said at the UK Border Agency Corporate Stakeholder meeting on 16 May 2008 'We have to remove these children'. Not so. The UK Border Agency *wishes* to remove children whose claims for asylum have failed, but its *obligations* are to respect UK law and policy, on children and child protection and on immigration and to respect the UK's international obligations, towards those seeking international protection and towards children.

¹⁷ See

www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/disclosureandconfidentiality.pdf?view=Binary

22. We recall the answer given by the Parliamentary Under Secretary of State Lord West of Spithead of 14 November 2007¹⁸

'An unaccompanied child under the age of 18 would not be considered for removal from the UK unless it's been established that the country to which the child is to be removed that adequate reception arrangements are in place. The Home Office must liaise with social services and/or the nominated guardian with responsibility for the care of the child in the UK to ensure the removal is effected in the most sensitive manner possible.'

23. Put simply, the question of whether a child should be given international protection from persecution or breach of human rights on return is a matter for the UK Border Agency. The question of whether forced return will put the child at risk of harm or not be in the child's best interests engages the wider child protection framework, laws and guidance. No matter what procedures the UK Border Agency puts in place it cannot displace that wider framework of obligations.

24. It is difficult to overstate the shortcomings of the UK Border Agency's current approach to forced returns of unaccompanied children but an immigration judge's determination of May 2008 provides a glimpse of these¹⁹. The Home Office did not appeal the decision and recognised the child appellant as a refugee following the determination. In short form the child gave a telephone number stated by the child to be that of the parents in the home country. Local consular staff, at the behest of UK Border Agency officials, tried the number without her informed consent. The person who answered at first confirmed that the speaker was the parent, spoke of being frightened, and hung up. That was the only 'contact' with the supposed adequate reception arrangements. The immigration judge states:

'...it was [] clear that the Respondents were aware of some of the circumstances which [the social worker] was able to describe today but had not seen fit to appraise their Presenting Officer of the situation or to include it in the reasons for refusal letter or appraise the Tribunal.

...

I find it somewhat unfortunate that the different agencies involved do not appear to have had a full and frank exchange of information particularly as this may have led to this young and vulnerable child being returned to a potentially very dangerous situation.

...

I should first consider the claim made by the Respondents that adequate reception arrangements be made in...

...

The whole basis of the Respondents' conclusions in this matter are set out in an email from the British Consulate [...cited in full in the determination]

...

I do not find that this even begins to approach to any reasonable standard to say that adequate reception arrangements have been made for the Appellant. ...

These emails of course need to be read in their entirety so that the true meaning is not distorted. However, heaving read these emails in their entirety it would appear that the

¹⁸ Hansard HL 14 November 2007 Col WA18

¹⁹ Cited with permission.

emphasis is on the need to remove the Appellant rather than assessment of either her condition or the conditions to which she would be removed.

...

the Appellant does not have a nominated guardian.

...

Of even more concern to me is that the fact that the Respondents are very much aware that the Appellant may have been trafficked...[the social worker] was able to tell me that following her full asylum interview the Appellant had been interviewed further by officers on behalf of the Respondent from a specialist unit...there had been liaison between the Home Office, social, services and the police in respect of this aspect of the Appellant's circumstances. What concerns me is that the Respondents have not referred to any of this in the reasons for refusal letter and it would also appear that the officers dealing with unaccompanied minor [gender] have also not been kept abreast of these developments.'

...[the social worker] went on to say that the keenness and persistence of the people trying to get hold of [the Appellant's] address led her to believe that the Appellant had been trafficked. That information was passed to the port authorities and to the Home Office crime agency and to the airport security...The Respondents have not provided any information about this.'

25. In the recent Court of Appeal case, *CL(Vietnam)* [2008] EWCA Civ 1551, Lord Justice Keene describes what the Home Office did in practice to establish that the country was safe for the child.

6. There is a Home Office document headed "consideration" and dated 22 July 2002 which concludes by stating:

"Despite the fact that Applicant is a minor it is considered that he can be returned to Vietnam as it has been established that there are adequate care provisions for children returned to Vietnam. See attached letter from the British Embassy in Hanoi."

....

8. The British Embassy letter was one dated 4 July 2001. It stated:

"The Law on Care, Protection and Education of Children of Vietnam states that all children, including orphans, shall be given appropriate care and education by the state. All children homes are run by the Ministry of Labour, Invalids and Social Affairs. Some receive additional financial assistance from foreign NGOs.

In principle, childcare ceases at the age of 18 but, in practice, continues until individuals have found a job. Vietnam is a secular society with no restriction on religious practices."

26. Lord Justice Sedley, giving the concurring judgment, stated:

31. *...the Home Office policy...of course designed in large part...to give effect to the United Kingdom's international obligations, here in particular the European Convention on Human Rights and the International Convention on the Rights of the Child*

32. *...I find it disturbing that a document as bland and jejune as the letter which Keene LJ has quoted was relied on by the Home Office when deciding something as important as the safe return of a child to another country. The letter is plainly a recital of a formal answer obtained from the Vietnamese authorities. The Immigration Judge recorded evidence from the Home Office's own in-country information which shows that the reality for tens of thousands of Vietnamese children was very different.*

27. There could be no better illustration of the UN Committee on the Rights of the Child's comment, at paragraph 70 of its Conclusions:
- c) there is no independent oversight mechanism, such a guardianship system, for an assessment of reception conditions for unaccompanied children who have to be returned;*
28. ILPA members have experience of cases in which UK Border Agency officials have got in touch with adults in the child's country of origin without the informed consent of the child and also without a proper assessment of the child's protection claim, which may involve the implicit involvement of the family in case of a trafficked child and/or failure to assess possible ill-treatment a child's ill-treatment at the hands of family members. As the examples above illustrate, there continues to be reliance upon unsubstantiated evidence to justify forced returns. A lack of full and frank disclosure of sources when considering adequate reception arrangements and treatment on return may be explained by the paucity of that information when, as in the cases above, it is brought to light by the determined efforts of representatives. The decision to share, or not to share, information about a child should always be based on professional child welfare judgement, supported by the cross-Government *Information Sharing: Practitioners' Guide* published by the DfES in 2006 and the DfES additional guidance *Information sharing: Further guidance on legal issues*.²⁰
29. The Government continues to focus its work on forcibly returning unaccompanied asylum seeking children to their country of origin. It was suggested in the consultation paper *Planning Better Outcomes and support for unaccompanied asylum-seeking children*²¹, as opposed to focusing its efforts on fairly assessing the protection claims of children. It has not been easy to obtain information about what is happening but it is ILPA's understanding that the Home Office is looking at the possibility of returning children other than to members of their family/primary caregivers, i.e. returning them to orphanages, whatever names these are given, in the country of origin. On 9 October 2008 ILPA succeeded in obtaining the following comment from Mr Oppenheim, the then UK Border Agency 'Children's Champion'
- 'We have been looking at returning unaccompanied young people to a number of countries and, as part of this, officials have recently visited Pakistan, Afghanistan and Bangladesh. We are now considering the issues arising from these visits.'*

²⁰ See www.everychildmatters.gov.uk/resources-and-practice/IG00065

²¹ www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/uasc/

30. Information since then has been scant, but we understand that the UK Border Agency is now working with the Foreign and Commonwealth Office and the Department for International Development. **This is a matter on which the Committee could usefully seek further information.**
31. Unaccompanied children are not the only subjects of concern. Members have encountered cases whereby children are being forcibly removed from the UK with parent(s) who may pose a risk to their welfare/safety without a proper assessment of risk on return. Failure to make provision for guardians in proceedings before the UK Border Agency and the Asylum and Immigration Tribunal puts these children at risk. Returns of children should only ever take place where this is shown to be in accordance with Article 3 of the UNCRC.

C.5 Third Country Cases and discrimination against children in challenging removals

32. In some cases in which ILPA members have been involved, the Government has sought to rely upon a presumption (and indeed in some cases little more) that a third country will afford a child protection. One area in which this arises is when it is held that a child should have claimed asylum in a safe third country, so that considerations of both child protection and international protection from persecution apply. In such cases the only challenge is likely to be by way of judicial review. But here children have a particular problem, because they face discrimination because of their status as a child in judicial review challenges to their removal. The UK Border Agency Enforcement Instructions and Guidance state at Chapter 60.4 (we have expanded the acronyms that pepper the Guidance):
- 'We need to ensure that persons subject to enforced removals have sufficient time between the notification of R[emoval] D[irections]s and the date/time of removal to seek legal advice and/or apply for J[udicial] R[eview].'*
33. They set out a procedure whereby there must be a minimum of 72 hours (including two working days) between notification of removal and the removal. But at Chapter 60.6 they set out an exception to this procedure:
- 'An exception to the minimum 72 hour notification period (60.4 and 60.5) may be made where prompt removal is in the best interests of the person concerned due to:*
- *Medically documented cases of either potential suicide or risk of self-harm,*
 - *In T[hird] C[ountry] U[nit] cases, removal of unaccompanied children in liaison with Social Services and the receiving country.'*
34. The rhetoric of 'best interests' is used to seek to justify a lesser protection for children. For in these cases not only is the child not notified, the legal representative is not notified either. ILPA members have first hand evidence that these provisions do not act to protect the best interests of the child. In one case a child, accepted by the UK as a child, was returned to a third country to claim asylum there. That country had not, when the child had been there, accepted the child as a child. The Third Country Unit of the UK Border Agency obtained no assurances

that he would be so treated on his return. And the child was not, but was instead left to fend for their self in dire need until back in touch with the UK representative who managed to secure a court order that the child be returned to the UK. Which was done.

C.6 Children and special immigration status

35. Provision was made in the Criminal Justice and Immigration Act 2008 for a new 'special immigration status' for those who cannot be deported because of risks or torture or other grave violations of their human rights on return but who otherwise would face deportation either because of behaviour that excluded the person from the 1951 UN Convention Relating to the Status of Refugees by reason of Article 1F therein or because of a criminal conviction. The new status is indefinite yet denies individuals and families, to whom it is given, any opportunity to work or access mainstream support, restricting them to a level of support possibly similar to that provided to asylum seekers but delivered by means of vouchers and allows for the imposition of stringent conditions relating to residence and reporting, including electronic tagging. Under the Act, family members, including family members, including children may be subject to this status and these conditions not for any action of their own but for that of a family member. This cannot be reconciled with Article 3 of the UNCRC and the need to make the best interests of the child a primary consideration.

C.7 Division of responsibility between government agencies

36. The UNCRC requires that all children be treated equally without discrimination on account of their race, nationality or any other status. The best interests of children should be a primary consideration. There is a need to ensure that children under immigration control are dealt with as far as possible by the Department for Children, Schools and Families and that there is not the assumption that the UK Border Agency take the lead on decisions on so many aspects of their lives. The DCSF play a crucial role in policy development relating to children and the UK Border Agency cannot be expected to achieve equivalent expertise and cannot be relied upon to place the needs of children highly enough among its many competing priorities. Examples of concerns include leaving the support of children in families who have claimed asylum to the UK Border Agency.

D. CHILDREN SEEKING ASYLUM

37. The current Asylum Process Guidance on children makes no reference to the UNCRC, unlike older versions of Asylum Policy Instructions²². ILPA has provided detailed comments on drafts of an Asylum Policy Instruction on children but it has yet to see the light of day. The latest version seen by ILPA did not make reference

²² Section 4: General Principles – UN Convention on the Rights of the Child. This drew special attention to the core principles of best interests, right to participation and non-discrimination

to the UNCRC. **The Committee should ask to see the latest version of the Instruction the timetable for its implementation and publication.** The treatment of children seeking asylum is one area where guidance and practice are required.

D.1 Guardianship

38. One area where the UK is falling far short of its international obligations is on the question of guardianship for unaccompanied children seeking asylum, a matter specifically highlighted by the UN Committee on the Rights of the Child²³. The United Nations High Commissioner for Refugees (UNHCR) *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1992)* addresses the need to appoint a guardian at paragraph 214. Both the UN Committee on the Rights of the Child and UNHCR recommend that a guardian or adviser should be appointed as soon as an unaccompanied child is identified and that the guardian or adviser should be maintained until the child has either reached the age of majority or has permanently left the UK.

39. In debates on the Children and Young Persons Bill in 2008 the Lord Adonis stated:
*‘...mention has been made of the difficulty that children have in giving clear instructions to solicitors. Obtaining relevant information from children can, of course, present difficulties, but it is the responsibility of solicitors who have a recognised specialism in asylum and immigration practice to ensure that relevant information is obtained to represent their client effectively.’*²⁴

40. UK Border Agency officials have made similar statements. Legal representatives are not substitutes for guardians; the roles are different. ILPA wrote to the Lord Adonis on 2 April 2008²⁵ to point out that a legal representative is not free to act on an appreciation of the child’s best interests irrespective of the particular instructions the child may have given. The legal representative is in difficulty when the child is not competent to give instructions. ILPA members have represented children under 10 when the matter at issue was whether the adult with whom the child was living was a carer or a trafficker. The child’s instructions were that the adult was a carer. Whereas the Official Solicitor can intervene in cases before the higher courts there is no provision for the appointment of a guardian in cases being dealt with by the UK Border Agency or before the Asylum and Immigration Tribunal. UK Border Agency

41. The European Union (EU) Reception Directive²⁶ states:

“Article 19

Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or

²³ Conclusions, op cit, para 71 (c).

²⁴ Hansard HL Report 17 March 2008 Col 38 et seq.

²⁵ Letter available at www.ilpa.org.uk/submissions/menu.html

²⁶ 2003/9/EC

by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.”

42. The EU Qualification Directive²⁷ states:

“Article 17

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

(a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (1);

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor:

(a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or

(b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfill the tasks assigned above to the representative; or

(c) is married or has been married....

43. Under Article 10 of the Council of Europe Convention on Action Against Trafficking in Human Beings,²⁸ when a child who is unaccompanied has been trafficked, States are obliged to appoint a legal guardian who will act in the best interests of that child, take steps to ascertain his or her identity and nationality, and locate his or her family.

44. The UK has failed to implement provisions in Article 19 of the Reception Directive (2003/9/EC) which states:

‘Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities’

D.2 Discrimination contrary to Article 2 UNCRC

²⁷ 2004/83/EC

²⁸ CETS No. 197, opened for signature 16 May 2005, into force 1 February 2008.

45. The Final Act of the Conference that adopted the UN Convention Relating to the Status of Refugees 1951 recommended that States take the measures for ensuring family reunion for refugees²⁹. The UK recognises the entitlement of adults who are recognised as refugees to be reunited with their minor children, but does not recognise the entitlement of minor children recognised as refugees to be reunited with their parents. This treatment is discriminatory, contrary to Article 2 of the UNCRC. Recognition as a refugee is recognition that the child stands in need of international protection and cannot enjoy family life in the country of origin. The UK's approach appears to confuse the recognition of a child as a refugee with the granting of other leave to a child in recognition of their status as an unaccompanied child.

D.3 Other shortcomings in guidance and practice

46. The UN Committee on the Rights of the Child said in its Conclusions
'70. The Committee welcomes the State party's commitment to withdraw the reservation on article 22 as well as the introduction of a new asylum procedure in March 2007 whereby all asylum applications from children are considered by specially trained "Case Owners", who are especially trained to interview children.'

47. However, when one considers the procedures those caseworkers are trained to implement, there are reasons to conclude that children's rights are not respected in the asylum determination procedure. Applications from children must be lodged in the same way as those from adults. Children of five continue to be fingerprinted, children under five are also photographed and children of 12 or over are required to report to UK Border Agency officials. In the specific context of interviews, children are asked to approve interview records, by signature, without having the records read back to them for accuracy. ILPA's Chair, Sophie Barrett-Brown, wrote to Matthew Coats, an Executive Director of the UK Border Agency, on 5 March 2008:

"I write now to raise with you ILPA's concerns regarding the introduction into the asylum interview of a question asking a child/young person to "approve the content of the interview". Our members report that this question is being put to their young clients at the end of the interview without the client being given an opportunity either to have the interview read back to them in their own language or to have had an opportunity to read through the interviewer's notes taken during the interview."

48. Mr Coats indicated that the suggestion would be considered but there has been no change, and no further response. Without clear and appropriate guidance and instructions, training will not lead to respect for children's rights.

D.4 Legal Representation

49. The asylum determination procedure is complex and the rights of children cannot be protected adequately unless the child has competent legal representation. In our January 2008 response to The Legal Services Consultation on its proposed bid

²⁹ See UNHCR *Handbook*, op. cit. paras 181 to 188.

round for contracts for legal aid from 2010 ILPA expressed concern that the legal services was predicating its plans upon those of the UK Border Agency for Specialist Local Authorities to work with unaccompanied children. ILPA observed:

'Even when the designated SLAs are set up, they will not take in all child clients. They will not take in (at least at the outset) age disputed cases. Nor will they take in age disputed young people in detention, children reunited with family members or children in families who make an asylum claim in their own right... The proposals do not take in children who have immigration as opposed to asylum cases.'

50. The UK Border Agency ploughed ahead with processing children's claims in March 2007 under the New Asylum Model without there being any special arrangements in place between the Legal Services Commission and their suppliers to provide legal advice and representation specifically to children. Children continue to enter the New Asylum Model process unrepresented or to lose representation during the process. The Legal Services Commission proposals increase the risk that legal representatives specialist in representing children, particularly those in smaller firms, will not be able to have contracts in 2010. The work of the Legal Services Commission deserves as much scrutiny as that of the UK Border Agency in seeking to establish the risks to children's rights in the asylum system. Specialist provision for children will be of little avail if generalist measures have driven the representatives specialised in representing children out of legal aid work. If competent expert representatives are unable to continue to provide representation under legal aid, this will put children in the asylum system at risk.
51. ILPA is a member of the Refugee Children's Consortium and warmly commends to the Committee the Consortium's submission to this enquiry on the question of children seeking asylum.

E. CRIMINALISATION OF CHILDREN

52. ILPA members continue to see cases where children are prosecuted for arriving without immigration documents or for illegal entry³⁰ without any evidence that consideration has been given to the age of the child or the actions taken by adults who have taken responsibility for these children.
53. Despite Crown Prosecution Service guidance³¹, ILPA members continue to see children who have been trafficked continue to face prosecution, for example when found in cannabis factories.
54. The government's consultation paper *The Path To citizenship* proposed that citizenship would be denied those with convictions for certain criminal offences,

³⁰ For an example of this in the reported cases see *R v Bei Bei Wang* [2005] EWCA Crim 293

³¹ Prosecution Of Young Defendants Charged With Offences Who Might Be Trafficked Victims, 1 October 2008, see [/www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#_Prosecution_Young](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#_Prosecution_Young)

who would face expulsion from the UK and the route to citizenship lengthened for those with other convictions. It was proposed in *The Path to Citizenship* that parents could face expulsion or a longer route to citizenship for the activities of their children. The document *Making Change Stick* that accompanied the Draft (partial) Immigration and Citizenship Bill proposed that while on the proposed new 'probationary citizenship' status people would be denied access to services (unspecified but at an educated guess including welfare benefits, access to education and health care). Neither provision has been included in the Borders, Citizenship and Immigration Bill but as we understand it they remain the long-term policy intention and the Bill constitutes the first steps in implementing that policy. We consider that these proposals contravene Articles 3 and 40 of the UNCRC and risk, in the cases of some of the children affected, contravening the obligation in Article 39 of the UNCRC to promote the recovery and reintegration of a child who has suffered any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts.

55. There are similar concerns that the automatic deportation provisions contained in the UK Borders Act 2007 may be used against those who were children at the date of their conviction. This appears contrary to the decision of the European Court of Human Rights in *Maslov v Austria*³² a case concerning a ten-year exclusion order issued against Mr Maslov when he was 16 years old, and becoming final when he reached the age of majority (18). The Court held that the 10-year exclusion order had not been necessary in a democratic society. A decisive feature of the case was Mr Maslov's age when he had committed the offences. The European Court of Human Rights noted the obligation to take into account the best interests of the child and held that these included obligations to facilitate the reintegration of the child.

F. TRAFFICKED CHILDREN

56. Many of our comments above, on the Code of Practice, on the new clause 51 duty and its limitation to UK, on forced returns and on criminalisation of children are applicable to trafficked children.
57. During debates on the definition of trafficking under Section 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, the Refugee Children's Consortium raised concerns that the proposed definition of trafficking, now found in section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was inadequate to ensure prosecution of those who trafficked babies and young children. So it has proved, as set out in the evidence submitted by the Refugee Children's Consortium to the Joint Committee on Human Rights Enquiry into the Policing and Crime Bill 2009. ILPA and fellow members of the Refugee Children's

³² *Maslov v Austria* (application no. 1638/03), 26th June 2008 – Grand Chamber - violation of Article 8 (right to respect for private and family life)

Consortium have urged the government to make amendment of the legislation a matter of priority. This is necessary to comply with the UK's obligations under Article 35 of the UNCRC, under the Palermo Protocol³³ and under the Council of Europe Convention on Action Against Trafficking in Human Beings.

58. Traffickers often facilitate the entry of children into the UK through visa applications in a false identity, using false names. ILPA members have represented children in cases where the UK Border Agency has forced children to adopt the false names given to them by alleged traffickers and given the children documents such as Asylum Registration Cards in the name the child says is not their own and that might identify to them to the alleged traffickers, thus jeopardising the safety and welfare of the child as well as causing tremendous distress. It has taken strenuous efforts on the parts of representatives, including preparedness to litigate, to get the cards in the false name withdrawn. It is contrary to Articles 8 and 39 of the UNCRC.

G. AGE ASSESSMENTS

59. Current age assessment processes of the Government are wholly inadequate as detailed in ILPA's Report *When is A Child Not a Child?*³⁴ and acknowledged by the UN Committee in its Conclusions³⁵. If a child is not recognised as a child will not be recognised as a person entitled to the protection of the UNCRC or the provisions of national law.
60. Age assessment is not an exact science. ILPA members continue to see cases where all the evidence is compatible with a child's being a child, as they say that they are but evidence other than the testimony of the child is also compatible with their being over 18. These are treated as age disputes. They should not be. The process of dispute and its contentious resolution is harmful to children. The first and most essential step is confine age disputes to a minimum of cases, not have it as the first thing on the agenda when a child presents to immigration control. All too often the dispute appears to arise as a result of UK Border Agency officials mere assessment of a child's physical appearance. These officials are not qualified to arrive at such decisions. There is also grave concern at local authority practice in this area.
61. The Government's age assessment working group met for the last time in August 2008. family and immigration context. To date we are aware neither of the outcome of the Working Group nor the Government's plans in this area. One subject deliberated by the working group was the question of X-rays as a tool for assessing age. ILPA considers that the use of X-rays for non-therapeutic purposes is unlawful

³³ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children", done in November 2000 in Palermo, a protocol to the UN Convention Against Transnational Organised Crime.

³⁴ May 2007.

³⁵ *Op. cit.* paragraph 71(1)(c).

and direct the Committee to the Opinion of then Nicholas Blake QC (now Blake J) and Charlotte Kilroy that:

“No individual, and in particular no child, can lawfully be ‘subjected’ to a medical examination. This would be an assault.”³⁶

H. CHILDREN IN DETENTION

62. The detention of children is contrary to Article 37 of the UNCRC and the UN Committee voiced its grave concerns about the practice in its Conclusions³⁷, yet members routinely encounter instances of children being detained with adults either alone (in cases of age dispute) or within a family unit, often for lengthy periods with no judicial oversight.
63. As noted by the UN Committee³⁸ data on children is inadequate. There are no published statistics to show how many children are detained with their families, where or for how long. No information is recorded about age disputed children in detention.³⁹
64. The UK Border Agency’s increasing use of detention to separate a child from their parents/primary caregiver should also be scrutinised. This has been put forward as a preferred approach⁴⁰ to avoid the detention of children. This is clearly not in accordance with Article 9 of the UNCRC, disrupts family unity and may expose a child to harm. Detention is never the best environment for children and can badly affect their physical, and emotional, health and wellbeing⁴¹.
65. The UK Border Agency and Social Services have failed to disclose evidence to support assertions that appropriate child protection assessments are being made in detention centres. Members have encountered cases whereby children have been placed into detention with parent(s) who have been investigated for child cruelty. Reports from HM Inspector of Prisons about Tinsley House and Dungavel stress that no progress had been made in relation to independent assessment of the

³⁶ 7 November 2007

³⁷ Paragraph 71(a)

³⁸ *Conclusions, op.cit.* paragraph 70(b)

³⁹The HM Chief Inspector of Prisons for England and Wales reports: “*Other centres, including Yarl’s Wood, had no accurate record of length of detention: indeed, we were initially told that some children had spent 275 days in detention, only to be informed later that this was a recording error and the figure should have been 14 and 17 days.*” (HM Chief Inspector of Prisons for England and Wales Annual Report 2007-08)

⁴⁰ Border and Immigration Agency Code of Practice for Keeping Children Safe from Harm Consultation – Pro Forma for Responses, 25 April 2008.

⁴¹See for example, Save the Children Fund UK (2005) *NO Place for a Child: Children in UK immigration detention: Impacts, alternatives and safeguards.*

welfare and developmental needs of children, and that even the internal procedures laid down for detaining children were not being followed.⁴²

66. The only solution that seems to be working is to seek damages for detention. We draw to the attention of the Committee the press release issued by Bhatt Murphy solicitors on 9 February 2008⁴³

'In a settlement approved by the High Court on 9 February 2009 the Home Office accepted that a family from the Republic of Congo were unlawfully arrested and unlawfully detained at Yarl's Wood Detention Centre .

The family - who included a one year old baby and a child of eight - were asylum seekers at the time and they have now been given leave to stay in the country. Their claim related to their arrest and detention between the 6 June 2006 and 3 August 2006 (57 days) and 29 September 2006 and 2 October 2006 (3 days). On both occasions they were detained at Yarl's Wood Detention Centre.

In the face of court proceedings brought by the family, the Home Office has accepted that their arrests and subsequent detentions was unlawful as they could not have been lawfully removed from the country.

Both detentions followed much criticised "dawn raids" with large numbers of uniformed officers arriving to arrest the family at their then homes in the West Midlands, as well as the controversial practice of detaining children under the Immigration Act.

These events caused both children to suffer psychiatric damage, the younger child suffering from an adjustment disorder and the older child also suffering post traumatic stress disorder. The children remained in detention despite the fact that Bedfordshire Social Services and a psychologist raised with the Home Office their concerns about the impact of the detention on them.'

I. EDUCATION

67. Not only the UNCRC but also, in the case of refugee children, Article 22 of the 1951 Convention Relating to the Status of Refugees, make provision for access to education without discrimination. Members continue to see cases where children do not access appropriate education because of their immigration status. Restrictions on financial support based on immigration status and/or length of residence prevent many children from having any opportunity to achieve their Article 29 rights under the UNCRC. For example, some young people who arrive in the UK at the ages of 14 or 15 are placed into pupil referral units or sixth form colleges rather than mainstream school. Others who arrive after the beginning of

⁴² Inspections took place on: Dungavel (14-16 December 2004 and 7-10 October 2002) Scotland, Tinsley House (1-5 November 2004 and 18-20 February 2002) Gatwick Harmondsworth (16- 18 September 2002) Nr Heathrow, Oakington (4-6 March 2002) Cambridgeshire

⁴³ Available at <http://www.medicaljustice.org.uk/content/view/596/67/>

the academic year may take very long periods to access education if indeed, in the case of those nearing 16, they manage to do so at all.

J. ERADICATING CHILD POVERTY

68. The poverty of certain children under immigration control is not being eradicated, it is being written out of the picture: the Government's target measure does not include the children of asylum seekers.⁴⁴
69. Destitution is used as an enforcement measure for families at the end of the asylum process who can be denied all support under s 9 of the Asylum & Immigration (Treatment of Claimants etc...) Act 2004). Although the government took powers to repeal s 9 and related provisions in s 44 of the Immigration, Asylum and Nationality Act 2006, it has never exercised those powers of repeal and indeed the current intention is not to do so.
70. Members see increasing numbers of destitute children within families, age disputed young people and unaccompanied minors who become 18.⁴⁵
71. The government has discussed changing the system of asylum support. We urge the Committee to seek assurances that this will not further put children at risk, will respect the principle of family unity and will not under any circumstances remove support from families nor remove support from unaccompanied children as they approach 18. Such measures are contrary to Articles 2 and 3 of the UNCRC.
72. We are concerned at leaving care provisions for children under immigration control. Children who have previously been looked after by Local Authorities (LA's) under the Children Act 1989 are consistently failing to access protective benefits and services which they are entitled to under the Children (Leaving Care) Act 2000.
73. Members continue to see a significant number of cases in which children are being supported by their Local Authority under s17 of the Children Act 1989 rather than support under s20 of the same Act. This affects the child/young person's access to Full leaving care support
- A personal advisor, a needs assessment and a pathway plan
 - Maintenance and accommodation
 - Assistance with education, training and employment
 - Vacation accommodation if they are in higher education Other support and assistance

Sophie Barrett-Brown, Chair, ILPA

⁴⁴ HM Treasury (2007) PSA Delivery Agreement 9: Halve the number of children by 2010-11, on the way to eradicating it by 2020 states that the 'Delivery Agreement ... does not specifically cover the children of asylum seekers'

⁴⁵ See for example, *Living on the Edge of Despair*, The Children's Society 2008.

*For further information please get in touch with **Alison Harvey, General Secretary** or **Baljeet Sandhu, co-convener of ILPA's Children's sub-committee**, via **info@ilpa.org.uk** , **0207 251 8383***