

ILPA response to

**A draft working document for statutory guidance under
clause.57 of BIC Bill¹ (now s.55 of the Borders, Citizenship
and Immigration Act 2009)² for comment 11 June 2009 Version
1.6 entitled “*Arrangements to safeguard and promote the
welfare of children for those exercising UK
Border Agency functions and Director of Border
Revenue functions*”**

Introduction

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. ILPA has undertaken extensive research into children under immigration control, published as *Working with children and young people subject to immigration control : Guidelines for best practice*, November 2004; *Child first, migrant second: Ensuring that every child matters*, February 2006; *When is a child not a child? Asylum, age disputes and the process of age assessment*, May 2007³

ILPA provided responses to many UK Border Agency consultations on children, including, in April 2008, comments on the draft of the Code that this statutory guidance will replace to which we invite reference to be made in considering this response. ILPA has recently submitted evidence on the rights of children subject to immigration control to the Joint Committee on Human Rights enquiry on the rights of the child, on which we draw in these comments⁴. ILPA provided to the UK Border Agency comments on the draft Asylum Policy Instruction on children⁵

ILPA has long urged that the duties on all those carrying out the functions of the UK Border Agency and Director of Border Revenue to safeguard children should be no less than those duties applied to other statutory authorities under s.11 Children Act

1 As at Bill stage 86 08-09 see

<http://www.publications.parliament.uk/pa/cm200809/cmbills/086/09086.i-ii.html>

2 See http://www.opsi.gov.uk/acts/acts2009/pdf/ukpga_20090011_en.pdf

3 See www.ilpa.org.uk, Publications. Also includes *Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child* 1989, ILPA, July 2009

4 See www.ilpa.org.uk, Publications, February 2009.

5 Unpublished. Enquiries on the ILPA comments should be made to info@ilpa.org.uk

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2004 irrespective of a child's immigration status. It has also been ILPA's position that the Department for Children, Schools and Families (DCSF) is the appropriate government department to take responsibility for safeguarding all children including those who come within the functions of the UK Border Agency.

ILPA regrets that the opportunity was not taken by government to act on the House of Commons Children Schools and Families Committee recommendation in its 2009 report on Looked After Children, that there should be joint responsibility between DCSF and the Home Office for unaccompanied children seeking asylum⁶. ILPA considers that such joint responsibility should encompass all children under immigration control. ILPA also observes that the Code will be applicable to the way in which children not subject to immigration control are treated by the UK Border Agency, for example in the exercise of customs functions or in a workplace raid.

ILPA recalls the removal in November 2008 of the UK reservation to the UN Convention on the Rights of the Child in respect of children under immigration control⁷ and underlines that the Convention must be applied to all children, irrespective of their status. ILPA highlights the principles of non-discrimination, best interests, child development and effective participation set out in the Convention's Articles 2, 3, 6 and 12.

In this context ILPA makes the following general observations:

ILPA recalls statements made during the passage of the Borders, Citizenship and Immigration Act 2009 about the duty and the guidance which is the subject:

"...guidance, which is a crucial element in the implementation of the new duty in making it clear to the UK Border Agency, our customers and other bodies with whom we work what the duty means in practice."

"It is already our intention that the guidance to support Clause XX will be developed and issued jointly with the Department for Children, Schools and Families...and will reflect closely the existing Section 11 guidance"

"Let me now return to...the relationship between our guidance and the existing Section 11 guidance. ...existing statutory guidance on making arrangements to safeguard and promote the welfare of children under Section 11 is divided into two parts. Part 1 sets out the general arrangements to safeguard and promote welfare, which all bodies subject to the duty must have in place. It includes strategic and organisational arrangements such as senior management commitment to children; a clear statement of the agency's responsibilities towards children that is available for all staff; staff training; effective inter-agency working; and so on. Part 1 also highlights some of the ways in which the duty affects direct work with children and families; for example, in the need to ensure that children are listened to and taken seriously; to be clear when to refer children in need to other agencies; to keep good records; and so on. Part 1 is drafted in such a way as to be relevant to all the different bodies that are subject to the duty and to enable them to apply it in ways appropriate to their own functions. "

6 See paragraph 62 page 11 of Volume I of the CSF Committee 3rd Report of 2008/9 *Looked After Children* at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmchilsch/111/111i.pdf> and Volume II <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmchilsch/111/111ii.pdf> together with Government response to this report on 29 June 2009

7 <http://www2.ohchr.org/emglish/bodies/ratification/docs/UK2008-Eng.pdf>

“We think that Part 1 as drafted is equally relevant to the UKBA and should apply in the same way.”

“The amendments make a specific point about taking account of the Section 11 guidance when the guidance on this clause is reviewed. In view of the very close relationship between the two...it will be obvious that neither could be reviewed without reference to the other and that this aspect of the amendments is also unnecessary.”⁸

“...the intention...is to mirror as closely as possible the effect of Section 11 of the Children Act 2004. We want the border force to be on the same footing as other public bodies which have significant dealings with children so that we can improve interagency working and be more effective in the way in which we jointly safeguard and promote the welfare of children...”

“DCSF’s statutory guidance on Section 11, the guidance on which we intend to draw heavily”⁹

“We are attempting to ensure that UKBA has a duty that is the same as that found in section 11 of the Children Act 2004, thereby bringing the agency in line with a number of other public bodies in the UK”¹⁰

This has not been done. To give effect to Ministerial assurances; to reflect properly the guidance under section 11 of the Children Act 2004; to ensure that it is as accessible to all those who use it as is that guidance, and to ensure that it can develop as that guidance develops and that the guidance for the UK Border Agency reflects properly the s.11 duty guidance, Part One of the revised Statutory Guidance on making arrangements under s.11 Children Act 2004¹¹ should be incorporated in to this Guidance in its entirety, with only such minimal necessary technical amendments as are necessary to reflect its different statutory basis.

As the text stands, whilst the Draft Guidance adopts extracts from the s.11 of the Children Act 2004 Statutory Guidance it omits much more that is of use and importance without any explanation as to why it has not been considered relevant to children within UK Border Agency functions¹². The draft Guidance makes almost no cross-references to DCSF Every Child Matters publications¹³ about safeguarding children other than a footnote to the s.11 of the Children Act 2004 statutory guidance¹⁴.

Ministers also stated during debates on the Borders, Citizenship and Immigration Bill:

“In Part 2 of the guidance, there are individual chapters devoted to each individual organisation to which the duty applies. This is because the duty applies differently to each and every body or organisation to which it relates because it always applies within the context of the specific organisation’s exercise of its specific functions. We will produce something along similar

⁸ All by the Lord West of Spithead, *Hansard*, HL 4 March 2009 Cols 832-4 (HL Committee stage of the Borders Citizenship and Immigration Bill)

⁹ The above two quotes taken from The Lord West of Spithead, *Hansard*, HL 1 April 2009 Cols 11142-3 (HL Report stage of the Borders Citizenship and Immigration Bill)

¹⁰ Phil Woolas, MP Minister of State for Borders and Immigration *Hansard* HC Report of the Public Bill Committee, Sixth Sitting, 16 June 2009, col 192.

¹¹ See

<http://publications.everychildmatters.gov.uk/default.aspxPageFunction=productdetails&PageMode=publications&ProductId=DFES-0036-2007>

¹² For example paragraphs 2.3,2.8, 2.9, 2.10, 2.11 and 2.13 of the S.11 guidance

¹³ See <http://www.dcsf.gov.uk/everychildmatters/safeguardingandsocialcare/safeguardingchildren/safeguarding/>

¹⁴ See footnote 3 at para 10 of the draft s57 guidance document.

lines for the UKBA. It will set out the UKBA's primary functions, including those of the director of border revenue, and the main areas where it has a contribution to make to safeguarding and promoting the welfare of children in the exercise of those functions."¹⁵

Again, this has not been done. If one considers, for example, the guidance issued under Part 2 section 6 of the Section 11 guidance in respect of police functions, one finds a much simpler, clearer format containing guidance drafted in a way which gives much more positive advice and instructions about the applicability of children's rights and on actually promoting children's well-being as an integral part the police primary function than does the proposed guidance for the UK Border Agency. There is no reason why the UK Border Agency cannot mirror the same positive and clear approach taken by the police in this regard.

Ministers also stated during the debates:

*"...The noble Lord, Lord Ramsbotham, also asked about the relationship between the border force and LSCBs. The Clause 51 duty will ensure that the border force fits within the inter-agency arrangements set out in Section 11 of the Children Act. That includes liaison with the local safeguarding children boards. He also asked whether we can confirm that the full implications of looking after children that are contained in Section 11 of the Children Act are being looked into. We are exploring with the Department for Children, Schools and Families how the Section 11 duty will apply in strategic arrangements and in the framework for co-ordinating with other agencies. That will be set out in detail in the guidance accompanying the new duty. The noble Earl, Lord Listowel, asked about guidance on this liaison. I assure him that we have had a close partnership in formulating that guidance."*¹⁶

Contrary to this Ministerial assurance, there is no practical advice and guidance on the role of Local Safeguarding Boards and the relationship between the UK Border Agency and those Boards and other agencies. This must be rectified. Although the draft guidance in some respects takes forward the work begun in the Code of Practice, for example in the recognition of the need to strengthen measures to identify children at risk in private fostering, visa entry and trafficking situations, it also omits much of the positive guidance in the Code without explanation.¹⁷ As a result it seems to be a much more limited and restrictive document in its layout, its language and its scope with little ambition to implement the major changes needed to put in place appropriate child welfare practices and policies across the UK Border Agency, many of which have been discussed by ILPA with the Office of the Children's Champion since that office's inception.

The emphasis in this guidance is on maintaining and justifying existing policies and practices with some added considerations about children in that continuing practice. It does not place children at the centre. It is of concern that the Guidance is generally couched in negative terms, about what is permissible rather than what is best practice and reads more about preserving the primacy of immigration functions rather than promoting the welfare of all children, especially in the sections concerned with detention and removal and about asylum processes.¹⁸ Detention is antithetical to

¹⁵ Quote taken from The Lord West of Spithead, *Handard*, HL Report 4 March 2009 Cols 832-4 (HL Committee stage of the Borders Citizenship and Immigration Bill)

¹⁶ The Lord West of Spithead, *Handard*, HL Report 4 March 2009 Cols 832-4 (HL Committee stage of the Borders Citizenship and Immigration Bill).

¹⁷ For example paragraphs 1.5, 1.6, 1.7 of the Code of Practice

¹⁸ For example paragraph 11 of the draft guidance contains nothing which explicitly describes its functions in relation to children's international protection from harm, or in respect of its housing, support and welfare responsibilities

child safeguarding and to their welfare. The Guidance remains silent on the role of the UK Border Agency and the Secretary of State for the Home Department in the manner in which proceedings involving children are conducted before the appellate tribunal and courts. It remains of great concern that the duty and the guidance is limited by statute to responsibilities for children within the UK jurisdiction even though the guidance document now contains limited and non-binding advice to overseas staff. The functions of the UK Border Agency and Border Revenue affect large numbers of children who are outside the UK even though decisions may be made about them within the jurisdiction. Work by officials and unregulated private contractors in consular posts overseas at juxtaposed controls may present a serious risk to children overseas.

What is needed, as described above, is to adopt Part 1 of the section 11 guidance and then to draft positive, clear, accessible safeguarding guidance, such as exists for all other agencies, in Part 2. The text presented, apart from all its shortcomings in terms of content, is inaccessible and difficult to use and is confused as to whether it is statutory guidance about safeguarding or a quasi-asylum policy instruction or operational procedures document

Statutory safeguarding guidance should be a stable document, to be revised only as and when safeguarding principles are revised and further articulated. To mix policy and operational details in this document risks it becoming outdated and misleading both legally and in policy terms very quickly and hence would soon inevitably become unusable.

Even if the guidance is redrafted in the manner we suggest it will not and cannot be the last word on safeguarding but only the starting point. It is also necessary to institute a root and branch review of all existing policy and practice together with all operational instructions and guidance document that accompany them. For example the failure to make provision for a guardian for children who are unaccompanied is as incompatible with the duties in the Act as it is with the international obligations toward specific groups of that children set out *inter alia* in Council Directive 2003/9/EC of 27 January 2003 and in the Council of Europe Convention Against Trafficking in Human Beings.

The draft guidance, as with its predecessor the Code of Practice under s21 of the Borders Act 2007, sits in its own vacuum. It contains only limited reference to the general framework of child protection legislation and the statutory roles of different agencies in child protection. Although there is some basic referral information in Part 7 this is insufficient without further development of operational instructions to meet safeguarding duties and cross reference to detailed child protection procedures and guidance.

Many of the existing operational instructions are not compatible with a duty to safeguard and promote the welfare of children in the light of the new obligation placed on the agency. It is also necessary to clearly cross-reference all such revised policy and operational instructions with this statutory guidance and vice versa. Whilst ILPA takes the view that this document needs wholesale revision in content and structure to reflect the same standards and content as the s.11 guidance we provide a commentary on the text and set out additional concerns in the Annex set out below which are designed to be used by those reviewing and redrafting existing guidance, policy and other instructions. We do not suggest that these paragraphs properly have their place within the statutory guidance but should be reflected in all UK Border Agency documentation and practical arrangements.

Annexe to ILPA's response to draft section 55 statutory safeguarding guidance

Commentary on draft text

Where there is no comment on a particular clause or provision this does not imply support or approval by ILPA.

Paragraph by paragraph comments (headings and numbering of paragraphs are as in the draft circulated for consultation):

The role of the UK Border Agency in relation to safeguarding and promoting the welfare of children

1 As described above, the imposition of the new duty entails a need to review current policy and operations, and the guidance that accompanies them. The approach taken in the draft presented is not only unhelpful but also unworkable, as it risks rapidly becoming out of date, and indeed unlawful.

The guidance should not attempt to reiterate, summarise or extract operational guidance elsewhere because in doing so there is a risk that as that other guidance is updated the children's duty guidance lags behind. There is a good example of this arising from the Code of Practice introduced on 6th January 2009, to which reference is made in the minutes of the UK Border Agency Detention Users Group of 27 April 2009 which state:-

“Steve Symonds¹⁹ raised the subject of a case where the High Court ruled against UKBA before the Code of Practice was published but Simon Barrett²⁰ clarified that the Code of Practice was laid before Parliament before judgement and that when mistakes happen they are rectified as soon as possible.”

Steve Symonds, ILPA's Legal Officer, who represented ILPA at the meeting, was referring to the case of *R (Abdi) et ors v SSHD*²¹. The Code was presented to Parliament immediately prior to the *Abdi* judgment. The Code included a reiteration of the unlawful presumption of detention policy ruled against in *Abdi*. Thus when the Code came into force it contained a statement of policy that had recently been ruled unlawful. Moreover, the Code has not been revised and hence continues to contain a statement of unlawful policy²²

2 Reference to the UK Border Agency functions (currently in draft paragraph 11) should be brought into this paragraph for the reasons given in the comments on paragraph 4 set out below. Reference should be made to the functions as set out in the 2009 Act not a separate list of functions. While it may be convenient to gloss the

19 ILPA Legal Officer

20 UK Border Agency Assistant Director - Detention Services Policy Unit

21 [2008] EWHC 3166, 19 December 2008.

22 See footnote 4 on page 10 of the Code, which is at the following link:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/keepingchildrensafe/codeofpracticechildren?view=Binary>

statutory definition of functions, the way in which this is done in the draft is inaccurate and unhelpful, see below (comments on paragraph 11)

4 Omit the word “*simply*”. This qualification serves only to reduce the importance of safeguarding and welfare within the functions of the UK Border Agency and Border Revenue. The s. 11 guidance on this point (para 2.4) uses the word “*however*” which stresses the importance of the duty. There appears to be an elision in this paragraph and what follows between ‘functions’ as set out in the Act and in paragraph 11 and the notion of functions as activities, such as those described in the policy and operational instructions referenced in paragraph one. While the duty does not create new functions in the sense in which this is meant in paragraph 11, it does change the activities of the UK Border Agency as set out in its policy and operational instructions, all of which need to be reviewed in the light of the new duty and this guidance.

5. It should be made explicit that in effect this means all staff of the Agency.

6 “*It is issued in conjunction with the Department for Children, Schools and Families*”. The DCSF should be involved in the dissemination, training and implementation of this guidance and monitoring its effect. ILPA requests information on how this is to be done.

The relationship with section 11 of the Children Act 2004

9 “*This guidance is informed by the guidance issued under section 11 Children Act 2004. That guidance defines safeguarding children and promoting their welfare*”. The wording of the Children Act 2004 Guidance is more precisely “ *to safeguard and promote the welfare of children*”. It is important that there is consistency of language across these duties.

10 Whilst this paragraph contains some of the guidance contained in Part 1 of the s.11 guidance, other advice which would be equally important in the fulfilment of UK Border Agency functions contained elsewhere in part 1 is not. The whole of Part 1 should be included verbatim in this guidance. For example, the guidance in paragraphs 2.15 to 2.20 of the s.11 guidance is of particular importance in establishing an appropriate management culture and framework for understanding the basic safeguarding needs of all children and for inter-agency working.

11 Contrast this with the guidance regarding police safeguarding duties at Part 6 (para 6.3) of the s.11 guidance. The police have law enforcement, public order and safety functions which are not that dissimilar to the UK Border Agency in terms of their primary purpose. Nevertheless, the police have identified many positive contributions they can make towards the safeguarding of children within those functions. The lack of any child specific functions in the UK Border Agency draft guidance list at paragraph 11, notably its prime responsibility for the international protection of children at risk of harm and its shared responsibility for the welfare safety and well-being of all children whilst in the UK as an essential part of that primary function are serious omissions and missed opportunities. As noted, this paragraph also creates confusion because it does not correspond with the statutory list of ‘functions’ as defined in the Act. If included, amended as proposed, it should be included as an elucidation of the definition of ‘functions’ in the Act not as a re-definition.

12 ILPA does not consider that this paragraph adds anything to the guidance. ‘Handling’ sounds as though the Agency is dealing with dogs not children and

nothing in paragraph adds anything to the notion of 'safeguarding and protecting the welfare of children'. The paragraph should be omitted.

14 *"will introduce arrangements in accordance with those set out in Part 1 of the Statutory guidance..."* Whilst there are paragraphs that follow this statement which do deal with structural arrangements those paragraphs should set out how the UK Border Agency's arrangements are actually in accordance with the s.11 guidance. Provision should be made for the updating of the Code as section 11 guidance is updated.

Day to day contact with children

The heading is unhelpful. The application of this section should not be limited to *"... its day to day contact with children"* but to all policies and operational guidance and procedures and other indirect actions which have an impact upon the safety and welfare of a child. In particular, the duty extends to decision-making processes and to the substance of decisions themselves. This is one of the most important parts of the guidance. It is buried under the heading and by its position in the text and we suggest moving comments of this nature to the beginning of the guidance.

15 The application of the "principle" of best interests is set out in this paragraph in such a way as to suggest that it can be balanced against any other considerations as a matter of general practice. This is wrong in international law. The UN Committee on the Rights of the Child's General Comments are considered to be authoritative interpretation of the rights contained in the Convention on the Rights of the Child and state that:²³ .

"Exceptionally, a return to the home country may be arranged, after careful balancing of

the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations"²⁴.

The description of the non-discrimination principle is incomplete. The final discrimination prohibition set out in the text of Article 2 UNCRC is on the grounds of *"other status"*. This has been omitted from paragraph 15. A child cannot be discriminated against because of their immigration or any other status and there are no exceptions to this provision.

In both these principles, the full wording of the UN Convention on the Rights of the Child should be set out to avoid misinterpretation

UNICEF states:

*"The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. Every right spelled out in the Convention is inherent to the human dignity and harmonious development of every child."*²⁵

Best interests, non-discrimination and the rights of the child to be heard and have their views, wishes and feelings taken into account and to effective participation in all

23 See the Committee on the Rights of the Child General Comment # 6 Treatment of Unaccompanied and Separated Children Outside their Country of Origin UN Doc CRC/GC/2005/6 at para 86.

24 Underlining added by ILPA

25 www.unicef.org/crc/

decisions concerning them have been identified in the draft guidance²⁶. However the guidance is silent on the other “core” principle of the Convention, *the right to life and the duty of the state to ensure to the maximum extent possible the survival and development of the child*²⁷ (Article 6)

Two statements of principle previously set out in the Code of Practice at paragraph 1.6 are not in this draft guidance:

“Every child does matter, as much if they are subject to immigration control as if they are British citizens;”

and

“...the UK Border Agency is determined to exemplify good practice in the way that members of staff deal with children.”

These two principles, previously considered appropriate in the Code of Practice should be included in the guidance.

Paragraph 1.5 of the Code of Practice contained an acknowledgment of key international instruments and standards relevant to the rights of children (amongst others) and a requirement to act in accordance with these standards. Paragraphs 1.7 to 1.9 of the Code of Practice also contained positive commitments and a generally positive orientation of the UK Border Agency functions towards children but these have been omitted from this draft guidance. These should all be included as UKBA and Border Revenue guiding principles. If they are not to be included ILPA requests an explanation as to why these aspects of existing guidance have been withdrawn?

Cross reference may usefully be made at this point to the UNICEF Implementation Handbook (and checklists) for the Convention on the Rights of the Child which gives helpful guidance on practical measures that States Parties should take to give effect to Convention rights²⁸

ILPA set out in its April 2008 response to the UK Border Agency’s draft Code of Practice

“Examples of general principles to set out within the Code:

- *The duty to safeguard and promote the welfare of children.*
- *Where consent of a child is required it is essential that such consent is informed.*
- *The independent role and responsibilities of others working with children must be respected, as must the importance of the relationship between a child and such other persons or agencies.*
- *Physical environments in which children are placed must be appropriate for the child and shall be welcoming and conducive to any participation which may be expected of the child.*
- *Every child does matter – as much if they are subject to immigration control as if they are British citizens.*

...

26 Pages 5 and 6 at para 15

27 Underlining added by ILPA

28 For the fully revised Third Edition – see www.unicef.org/publications/index_43110.html

Immigration procedures and situations must be responsive to the needs of children. Time must be made available for appropriate communication with children and families.

- ...
- *This Code applies equally to operational staff and those staff responsible for policy; and policy must be made with regard to this Code so that operational staff can be reasonably expected to implement such policy with regard to this Code.*

16 This is not guidance. On the one hand it tells staff to be as responsive 'as possible' to the needs of children. It then repeats the 'as possible' in different words 'without overriding the purpose of their work'. The final phrase should be omitted, it is repetitious of much that has gone before and provides no guidance that is of assistance to staff.

Line Management Arrangements

Given the frequency with which UK Border Agency arrangements change, this section is a hostage to fortune. Save for the last sentence of the third paragraph, it contains nothing that could be read as 'guidance' and indeed does not explain how these bodies sit within the line management above an individual casework. The information would be better contained in a separate annexe.

Reporting issues of concern outside the management line

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6 *"Complaints can be lodged by adults on behalf of children if they have a formal role in that child's life and have witnessed an event about which they wish to complain"*

This is inconsistent with the right of the child to be heard as set out in Article 12 of the UN Convention on the Rights of the Child and risks entailing practices contrary to the best interests of the child. It describes bad child protection/welfare practice as it prevents a child from choosing a person they trust to put forward their views in the complaints process and limits the range of permissible complainants to those who have actually seen or heard the event complained about, including treatment that should be reported in accordance with child protection legislation. If children who disclose behaviour which may amount to abuse or indeed other concerns to an adult it is unlikely that that adult will have actually witnessed those events but they must be able to take such a concern to the appropriate UK Border Agency complaints mechanism.

There is confusion in this section – the previous paragraph referred to concerns of members of UK Border Agency staff, while paragraph six contemplates complaints by third parties. Perhaps it would be more helpful if the guidance instructed UK Border Agency staff, to whom it is addressed, on how to handle such complaints. Complaints might come from the child, directly or with the assistance of an adult, or they might be made by a person who has witnessed something about which they wish to complain. ILPA's understanding of the UK Border Agency's complaints procedure²⁹ is that a complaint can be made by any person and would be considered in accordance with that procedure.

29 <http://ukba.homeoffice.gov.uk/contact/makingacomplaint>

The draft safeguarding complaints provision may serve to restrict children's access to complaints procedures not to enhance them and may also cause child protection concerns to go unreported.

All complaints processes must also contain a link to guidance on child protection referral procedures to ensure that such concerns are not simply fed into a complaints process and, *vice versa*, that complaints can also be escalated to child protection referrals.

Children on arrival in the UK

The statement that *Paragraphs 1-4 refer to children whose applications are being dealt with in managed migration* is potentially unhelpful in that it implies a limitation upon comments that are of general application, including to children not subject to immigration control with whom the Agency may come into contact in the exercise of its customs functions, or children who do not have any documents. Where the comments are limited to children travelling on a visa, this is clear from the text.

1. It would not, in all cases, be the UK Border Agency that should investigate further and investigations may, depending on the circumstances, have to be carried out by the police or social services. The comment 'as a minimum' provides no guidance as to when staff can be satisfied with the minimum.

Visa requirements

2 Much of this does no more than repeat immigration rules and guidance pertaining to them. The text is uneven with statements such as '*This creates a record that can be used to tackle some of the problems associated with unaccompanied children arriving in the United Kingdom*' appearing to seek to provide context, where elsewhere in the draft guidance this is not done. The first two paragraphs appear to be focused on immigration control and gives no guidance as to safeguarding and promotion of welfare.

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3 "*When staff encounter a child who does not appear to have a parent or legal guardian to care for them, they must refer the child to the Local Authority*"

including

a child being the principal applicant in any application made to the UK Border Agency;

a child who has arrived with an adult in the UK, but has since submitted an application in their own right;

A child may be the principal claimant of a family unit for sound legal reasons and equally may have good reason to submit an application or claim in their own right in due course acting on legal advice. These are not necessarily indicators of a child being at risk and care should be taken not to confuse normal legal processes with child protection risks without proper consideration. It may indeed be one of a number of indicators which gives cause for concern but such guidance needs to be much clearer about the circumstances when it would be appropriate to make a referral to a local authority. The addition of the line "*without there being a reasonable explanation for this*" would help to resolve this.

4 *In such circumstances, but only when it is clear that the child is not seeking asylum, staff must notify the Embassy or High Commission in the UK of the country from which the child comes. This is so that these authorities can set in train the actions needed in that country to trace the parents or adult carers. This is not a substitute for the case-worker's own actions in this regard.*

This is badly drafted. "Not seeking asylum" must not be treated as meaning simply a formal request for asylum but any form of words used or evidence that a child may face serious harm in their country of origin which is capable of amounting to a need for international protection, whether from the state or from the family or others.

In any event, the reference to tracing is premature. If, for example, a child has been trafficked, there may be risks in tracing enquiries being made, and to suggest that there should be communication with a national Embassy or High Commission asking them to undertake tracing before it is possible to highlight those risks to them fails to recognise these risks.

ILPA has expressed its concerns at the enquiries being made by the UK Border Agency or other Agencies and in particular in connection with tracing. These we reiterate here:

The EU Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers³⁰ 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...*

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...'. .

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 2005³¹, 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*

30 OJ L31/18 6.2.2003

31 SI 2005/7

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.

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

The Asylum Policy Instruction on Disclosure and Confidentiality has been under review since at least June 2008³². 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.*

We also recall the Home Secretary's evidence to the Home Affairs Committee on 13 November 2008³³:

"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."

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.

³² See

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

³³ Oral evidence of the Secretary of State for the Home Department to HC HAC on "The Work of the Home Office" <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/1191/08111305.htm>

These matters are not less true just because the instruction is no longer on the website.

We recall the criticisms that have been made of the UK Border Agency's 'tracing'. For example, those set out in an "unreported" immigration judge's determination of May 2008³⁴. 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 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.'*

34 Cited with permission.

...[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.'

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.

It would be helpful to reference 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.³⁵

Unaccompanied children seeking asylum

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Much of the information in this section is applicable to all children with whom the UK Border Agency comes into contact, not only those who are unaccompanied and not only those seeking asylum. The heading is misleading and unhelpful. It is necessary to identify under the heading 'Unaccompanied children seeking asylum' matters specific to such children, whereas generic matters should be dealt with elsewhere.

5 This paragraph is a non-sequitur. It fails to explain why and in what circumstances it will be appropriate to obtain this information through an interview rather than the use of interrogatories etc. The UK Border Agency is now under a duty to promote the welfare of children and the way in which information is gathered must be accordance with this duty.

6 This paragraph is applicable to all children, not just to unaccompanied children, nor just to children seeking asylum. That parents are with a child does not arrogate the UK Border Agency's duties to keep them safe and to promote their welfare. The wording has significantly changed from paragraph. 2.7 of the Code of Conduct and there is now less guidance about creating a child-friendly environment beyond the very basic pastoral needs. There needs to be more elaboration for example of how UK Border Agency will ensure that children are kept safe in and around entrance and waiting areas and properly supervised by a member of staff especially when children are entering, exiting or waiting at UK Border Agency offices, including at screening units³⁶, to ensure that they are with their carer or a responsible adult at all times and that they are not kept waiting for lengthy periods.

7. Parts of this paragraph are applicable to children other than unaccompanied children seeking asylum. As to unaccompanied children seeking asylum, ILPA emphasises the importance of the role played by the Refugee Council Children's Panel and expresses its profound concerns at cuts in funding to the panel and enforced changes to its remit regarding age disputed children.³⁷

³⁵ See www.everychildmatters.gov.uk/resources-and-practice/IG00065

³⁶ See *Claiming Asylum at a screening Unit as an unaccompanied child*, 11 Million, Office of the Children's Commissioner for England and Wales, March 2008.

³⁷ See *Hansard* HL 4 March 2009 cols 830ff

This paragraph also throws into stark relief the pressing need for guardians for unaccompanied children if effect is to be given to the duties to safeguard and promote the welfare of children. This was a matter specifically highlighted by the UN Committee on the Rights of the Child in its observations on the UK's report in October 2008³⁸. 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.

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."*³⁹

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 2008⁴⁰ 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.

The European Union (EU) Reception Directive⁴¹ 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 by any other appropriate representation. Regular assessments shall be made by the appropriate authorities."

The EU Qualification Directive⁴² 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:

38 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

39 *Hansard* HL Report 17 March 2008 Col 38 et seq.

40 Letter available at www.ilpa.org.uk/submissions.html

41 2003/9/EC

42 2004/83/EC

(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....

Under Article 10 of the Council of Europe Convention on Action Against Trafficking in Human Beings,⁴³ 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.

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'

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9 *In making decisions, there should also be a recognition that children continue to develop...*

The Code of Practice (para 2.10) was not limited to "making decisions" and nor is the statutory duty in the Borders, Citizenship and Immigration Act 2009. This guidance should emphasise that it is applicable to all actions of the UK Border Agency concerning children

Children being looked after in a private fostering arrangement

10. The definition of private fostering gives rise to as many questions as it answers, as the question may often be whether the person has parental responsibility for a child, or is indeed a relative and therefore it is likely that it will be necessary to make referrals to local authorities where this is unclear.

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

12. This paragraph is accurate, but it may be that the very matters that will determine whether a relationship is one of private fostering will also, in certain cases, have implications for whether a visa has been issued in accordance with the immigration rules. Local authority involvement will also be important in such cases, where the case is, or may be, one of private fostering.

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We suggest that

13 “*If it becomes obvious...*” should be replaced with “where there is reason to believe”

“If the child still qualifies for entry as a visitor or as a dependant and there are no indicators of harm that would justify immediate attention from the Local Authority, then the child need not be kept there [i.e. at the port of entry] until the Local Authority has responded.”

Unless there is specific evidence/intelligence available at the port of entry it is unlikely that there will be any indicators of harm in the majority of cases. The UK Border Agency needs to provide guidance on what those “indicators of harm” may be. The UK Border Agency should only allow the child to leave the port without Local Authority intervention if the adult into whose care they have been placed attends to collect the child and has proof of identity and place of residence. This amongst other things will assist in determining the identity of the local authority with statutory responsibility under Children Act 1989

Children’s issues when applications to stay are refused

This paragraph is correct as far as it goes, but provides no guidance as to what this means in practice.

ILPA recalls in particular our comments in April 2008 on the draft of the UK Border Agency Code of Practice:

“Whether a child’s return is voluntary will depend on whether they are able to give informed consent to the return. This is no straightforward matter... Children need independent guardians before the notion of voluntary departure can be applied in their cases.

It is not enough for a child to be willing to leave, if child protection concerns have not been met and child protection procedures (those that apply by law) have not been satisfied. Voluntary departure does not override this: children should have more limited freedom than adults to decide to do things that will harm them. This is a matter of UK law and it is the child protection system that can determine the safety of return,...”

4. Children detained or escorted under immigration act powers

This section is incomplete, as its heading indicates. While it covers detention and escort it says nothing about ‘dawn raids’ on accommodation, or workplace raids, or enforced removals in situations where people are put on aeroplanes or ships or other situations in which enforcement activity takes place, including with the use of force,

and children, whether under immigration control or not, are present and/or involved. The risks of harm, both physical and psychological to children in such circumstances. See, for example, the settlement approved by the High Court on 9 February 2009 where the Home Office accepted that a family from the Republic of Congo were unlawfully arrested and unlawfully detained at Yarl's Wood Detention Centre. Evidence of the harm done to the children was provided in that case and compensation was awarded for this. See also the European Court of Human Rights judgment in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*: (Application no. 13178/03)^{44 45} which held that there had been violations of both Article 3 and Article 8 of the European Convention on Human Rights by the member State on account of a lack of welfare considerations for the child and her mother in both its detention and removal practices.

Page 14 Section 4

2 “If a decision is made to detain the adults, then the children will normally be taken into detention with their parents or other adult carers since not to do so would involve the more serious course of separating them from their parents.”

There is an in-built presumption of detention of children with their parents/carers in this statement and no reflection of the need to consider the best interests of every child on an individual basis. It is necessary to consider the best interests of the child at the time of making a decision on whether the parents or carers should be detained, not as an afterthought. Where a parent or carer faces detention, it may be that in some cases a child's best interests are met by remaining with their parents but this cannot be a presumption in statutory guidance and all family cases should be assessed against the best interests provisions of the UN Convention on the Rights of the Child and all relevant child welfare factors.

The detention of children is contrary to Article 37 of the UN Convention on the Rights of the Child and the UN Committee voiced its grave concerns about the UK practice in its Conclusions⁴⁶, 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. As noted by the UN Committee⁴⁷ data on the detention of children is inadequate.

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 welfare and developmental needs of children, and that even the internal procedures laid down for detaining children were not being followed.⁴⁸

There is no guidance as to the harm detention may cause, and which at the very minimum ought to be fully and carefully considered before any decision to detain and

44 <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=809283&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

45 For a compilation of ECtHR judgements see ILPA's *Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child 1989* at <http://www.ilpa.org.uk/>

46 Paragraph 71(a)

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

48 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

throughout any period of detention. In our view children subjected to detention would in all cases be harmed as defined.

3 The guidance in paragraph 2 should simply be omitted and paragraph 3 revised to include provisions detailing the importance of considering the best interests of the child at the time of making a decision on whether the parents or carers should be detained, and that where (if at all), this consideration results in a decision that there are no suitable alternatives to detention of the adult family members, further consideration of the best interests of the child should be given to whether or not they should be placed in detention with their parents, including fully taking into consideration the wishes and feelings of the children and available alternatives to detention or the children.

5 & 6 These criteria are not child safeguarding guidelines but adult detention criteria. On the basis that the detention of a child should only ever be used as an exceptional measure (*“of last resort”* as paragraph 7 advises), the only relevant factors to take into account should be based on child welfare and best interests considerations. ILPA recalls paragraph 53.5.3 of the UK Border Agency guidance and instructions:

“Unaccompanied young persons, under 18, whilst alternative care arrangements are made (including age dispute cases where the person concerned is being treated as a child): initially, an Inspector/SEO but as soon as possible by an Assistant Director. Detention should in any case be reviewed by an Assistant Director if it goes beyond 24 hours. Such persons may only be detained overnight and in a place of safety as defined in the Children and Young Persons Act 1933 (for England and Wales), or the Children (Scotland) Act 1995 (for Scotland). For Northern Ireland, “place of safety” is defined as: a home provided under Part VII of the Children (Northern Ireland) Order 1995; any police station; any hospital or surgery; or any other suitable place, the occupier of which is willing temporarily to receive a person under the age of 18. - see 55.9.3. In non-CCD cases, detention must not be authorised in any other circumstances, including for the purpose of a pending removal, subject to the following exception: unaccompanied children who are to be returned to an EU Member State under the Dublin Regulation or, in the case of both asylum and non-asylum applicants, to their home country may be detained in order to support their removal with appropriate escorts. Such detention will occur only on the day of the planned removal to enable the child to be properly and safely escorted to their flight and/or to their destination. Detention in such cases must be authorised by an Assistant Director. In CCD cases, detention of an FNP under the age of 18 may be authorised by a Deputy Director in exceptional circumstances where it can be shown that they pose a serious risk to the public;

Paragraph 55.9.3 states:

“Unaccompanied children (i.e. persons under the age of 18) must only ever be detained in the most exceptional circumstances and then only normally overnight, with appropriate care, whilst alternative arrangements for their care and safety are made. This exceptional measure is intended to deal with unexpected situations where it is necessary to detain unaccompanied children very briefly for their care and safety. In circumstances where responsible family or friends in the community cannot care for children they should be placed in the care of the local authority as soon as practicable. In CCD cases, detention of an FNP under 18 may be authorised in exceptional circumstances where it can be shown that they pose a serious risk to the

public and a decision to deport or remove has been taken. In non CCD cases, detention of persons under 18 must not be authorised in any other circumstances, including for the purpose of a pending removal (subject to the exception in the following paragraph). This includes age dispute cases where we are treating the person concerned as a child.

ILPA is concerned that the statement ‘then only normally overnight’ is not compatible with the duty to safeguard and promote the welfare of children. We are familiar with, but unimpressed by, the suggestion that the UK Border Agency requires the power to detain separated children for their own protection if they arrive unaccompanied late at night, for example. An emergency social services response is the correct response, not the placing of a child in immigration detention.

In circumstances where the child is at risk and is reluctant to stay, emergency protection measures under Part V Children Act 1989 provide all the necessary powers to ensure the child’s safety. If UK BA staff are not trained in how to activate these interventions by those who can protect children, that training need should be addressed as a matter of urgency. Orders under s. 44 Children Act 1989 or police powers under s. 46 of that Act provide the necessary powers to protect children from harm.

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8 *“This will include knowing the importance of how to make a timely referral to the right agency. In the majority of cases this referral will be to Children’s Services professionals”.*

All staff should be provided with clear and accessible instructions on how and when and where to make such a referral as well as just being expected to understand the importance of doing so. All child welfare and protection referral procedures should be kept up to date and all decisions to refer and also not to refer a child should be recorded and monitored. An essential part of ensuring that the UK Border Agency fulfils its responsibilities to safeguard and promote the welfare of children is that staff have a clear understanding of the wider child protection framework, the roles and responsibilities of the actors within it and how to get in touch with them. Part seven of the guidance addresses the latter point, but in isolation, All the Department for Children, Schools and Families *Working Together to Safeguard Children* documents are important resources in this respect.

This paragraph should be clearly cross referenced to section 7 below “ *When and how to refer to other agencies*”

9 *“...the UK Border Agency will endeavour to ensure a continuation of the pattern of care that exists between the parents and their children.”*

Any significant departure from that pattern of care must be recorded and full reasons given.

12 This paragraph contains important guidance, but it is also necessary to address the consequences of allowing children to be close to their parents. Seeing their parents powerless or humiliated, including where the child has experienced this in the past, will affect the child and the way in which parents are dealt with in the presence of their children requires careful consideration.

Page 16

13 *“Children must be allowed to maintain voluntary personal links with their school or education provider if they wish.”*

Children must be made fully aware of this possibility from the outset.

“The UK Border Agency must take reasonable steps to ensure that their education record and their medical record are available in any place where they are detained.”

The UK Border Agency must take all reasonable steps and the word ‘all’ should be inserted. In particular, the Agency should put in place a system with other statutory agencies (ordinarily with the consent of the parents) to ensure that medical records are available. Failure to obtain medical records may endanger the child.

15&16 Undue pressure should never be put on a parent who is reluctant to give information to their child which the parent considers will upset or distress the child. The UK Border Agency should work with the parents to explore the best way to inform the child of decisions and actions that are being taken about the family.

17 The current Code of Practice paragraph 3.14. states that *“Although the primary carers for a child at this point are the parents, this should not rule out an ongoing concern for a child by those in charge of the detention facility.”* This should be included in guidance.

18 A health assessment should be carried out *before* the decision to detain and *again* no later than 3 days after decision and at periodic intervals thereafter. Local authority children’s services should be requested to carry out a Children Act 1989 assessment of all children in detention no later than 3 days after their detention in that particular immigration removal centre or holding facility and at periodic intervals thereafter.

19 *“Reviews of the detention of a child must, as at present, include views that are independent of the caseworking function.”*

This is a new provision compared to the Code of Practice but should go further and include a requirement to taken into account the expert views of health and child care agencies who have assessed the child and any independent expert reports and materials that the child and their parents wish to put forward. A further consideration of the best interests of the child should be part of any such review and recorded.

Escorted travel from one venue to another

The heading correctly refers to any time at which a child and/or family are under escort. The text does not, but refers to escort between one detention centre and another. The text should be amended.

20 & 21 *“The safety and comfort of everyone involved in such a journey must be paramount...”*

ILPA considers that the ‘presumption’ that caged vehicles will not be used for family transport should be changed to a prohibition on such vehicles being used. We can envisage no circumstances in which the transport of a child in a cage could be compatible with the UK Border Agency’s duty to safeguard and promote the welfare of children. The comfort of the child must also include provision of on-board refreshments appropriate to the length of the journey and weather conditions. Time

must be included in the planning of journeys to allow for “comfort” breaks at regular intervals to allow children not just to use toilet facilities but other facilities such as a relaxation or play area. Unscheduled stops should also be permitted where a child or parent needs an unexpected break in the journey. A full written instruction setting out such details should be made part of all contracts for the movement of children and their families on behalf of the UK Border Agency.

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22 The guidance should also make reference to the circumstances in which the child’s being in the care of the local authority will mean that the consent of the courts is required before they can be removed from the jurisdiction.

25 There must be a mechanism for review in circumstances where the detention is not expected to last more than two or three days and then, before the end of the third day at the latest, it becomes clear that it is likely to do so.

Exceptional cases of unaccompanied or separated children

26 *“When unaccompanied or separated children are being escorted from their normal place of residence to a port where removal will take place, then they must be served with the formal notice of detention form IS 91 so that they are subject to detention procedures whilst the supervised escort is taking place. The introduction of formal detention arrangements at this point means that the UK Border Agency is fully responsible for the child during that period”*

The Code, para. 3.23, also continues *“as well as proper provision for the child’s welfare”*, which is omitted from the draft guidance without explanation and should be reintroduced

As with the Code (para 3.23) it is a paradox of UK Border Agency functions that it distinguishes itself as *“fully responsible “* for an unaccompanied child’s welfare in these circumstances only where the child is formally detained. The UK Border Agency is ‘fully responsible’ for its own conduct toward such children at all times, but the police and local authorities retain their statutory obligations to protect children at all times. It is stated earlier in the guidance that it is the government’s desire wherever possible to achieve voluntary returns. Is it the case that even where the return of an unaccompanied child is on a voluntary basis that they will be technically detained? If so this would appear to maintain an additional category of detention for children for no other reason than to establish a legal mechanism for the duty to look after a child’s welfare. This seems not only perverse but redundant in light of this new statutory duty. Furthermore, in the case of removal of unaccompanied children, the statutory duty to look after the child always rests with the relevant local authority under Children Act 1989 provisions at least until the child is outside the jurisdiction. In cases involving removal there should be no welfare reason whatsoever to detain as the local authority should be present and providing welfare support and accommodation right until the point of departure and possibly beyond in supervised returns⁴⁹.

27 *“Overnight detention for unaccompanied children is only permitted so that alternative arrangements for a safe place to stay can be made. This is a safeguarding measure not an immigration measure”*

49 See the *Mayeke* case above at footnote 44 above for the comments of the European Court of Human Rights on detention of children and on traveling alone on repatriation flights

See comments above in this section. As with paragraph 27, it is oxymoronic and indeed offends to against the principle of child welfare to speak of detention as a safeguarding measure and as such it speaks volumes about the UK Border Agency's continued misunderstanding of its own and other's lawful functions and the acquittal of its welfare duties. If this is *not an immigration measure* pursuant to the Immigration Act 1971 and subsequent acts, what lawful basis is there for the detention of a child in these circumstances, however exceptional. A local authority will always be responsible, (especially on an emergency basis) for accommodating a child in need in its area under Children Act 1989. Detention is not an acceptable measure 'even' in such exceptional circumstances.

The UK Border Agency must not detain an unaccompanied child for any other reason, including for the purpose of a pending removal.

This directly contradicts the guidance set out in paragraph 26 which requires detention for transportation to port of a removal

ILPA Comments on Draft Guidance Part 2 – sections 5 to 12

Section 5 *Human trafficking and trafficking of children*

Page 20

4 & 5 The insertion of new guidance on duties towards children who have been trafficked, paragraphs 4 and 5 and indeed section 5 as a whole, do not provide sufficient guidance to ensure that these children at risk are identified nor adequately address the particular safeguarding needs of children once they have been considered to have been trafficked

In paragraph 4, concerning support and non-removal during the “reflection period” no reference is made to other statutory support available to children, nor to unaccompanied child asylum policies on non-removal and the use of discretionary leave to remain. No relationship is made between trafficking and a child's potential claim for asylum and refugee protection where trafficking may also amount to persecution.

In paragraph 5 the statement “*Where a child is identified as vulnerable as a result of a suspicion of trafficking, frontline staff should complete a new ‘Referral to Child Welfare Services’ form*” is on its own wholly inadequate. Local authorities have responsibilities toward children at risk of harm, including in circumstances where the Local authority, in the exercise of its statutory duties identifies a risk, although the UK Border Agency does not. Local authorities are not, and cannot, be bound by the decisions under the National Referral Mechanism if these do not accord with its own assessment. In any event, just because a child does not fall within the technical definition of trafficking does not mean that the child is not at risk of exploitation and other harm, in which circumstances a referral to the local authority and where appropriate to the police, must be made. A cross-reference to the useful referral information in part seven of the guidance should be made here.

Beyond completing a referral form to social services there is no guidance about the kind of immediate safeguarding and welfare measures that should be taken to keep the child safe. No guidance is given on how the UKBA should work with police anti-trafficking units, local authorities and other agencies in child trafficking cases, for example on the provision of safe accommodation, on confidential information sharing and in care planning.

Unlike other sections of this guidance that provide examples of suspicious circumstances (e.g regarding private foster care arrangements) there is no practical guidance or reference to the essential document *Working together to safeguard children who have been trafficked*⁵⁰, other practical guidance such as the Home Office's own trafficking identification "toolkit"⁵¹ and the London Child Safeguarding Board revised London Trafficked Child Toolkit, which contains more detailed guidance about the UKBA role than this statutory guidance⁵²

We refer you to ILPA's responses to parliamentary enquiries and UK Border Agency consultations on trafficking⁵³ which set out more fully our concerns about how UK Border Agency and Border Revenue staff are equipped to identify and safeguard children who have been trafficked and about the "specially trained competent authority staff"?

Section 6 ***Vigilance on behalf of children by UK Border Agency staff***

This section contains sensible and practical guidance but is a mixture of principles, which would be much clearer if given greater general prominence in the guidance and practical guidance. Within the section, text should be split into shorter paragraphs.

1. The statement in bold **Where children appear to be at risk, the staff of the UK Border Agency will refer to outside statutory and professional agencies where appropriate** should be amended to say 'as' appropriate. It will always be appropriate to involve local authority child protection professionals where a child is at risk of harm. The statement deserves much greater prominence earlier in the guidance and a cross-reference to part seven on the clear information on making a referral, which needs to be supplemented with signposting to information about the broader statutory framework, and the roles of different agencies .

2 This should be split into shorter paragraphs, for example making the statement of principle that "*The UK Border Agency will take such actions as are necessary to keep children safe but without unwarranted intrusion or intervention in families' lives*" a paragraph on its own and then splitting into two paragraphs between "...if their children are present" and "*Such arrangements might be provision of child-care and supervision...*"

As per our comments above, it is not only in giving accounts of past ill-treatment that parents risk being humiliated before their children. UK Border Agency staff must at all times be vigilant to the potential psychological harm to the child of seeing their parent in a situation of powerlessness and vulnerability.

All references to Criminal Records Bureau checks should refer to the need for enhanced checks and also to the new Independent Safeguarding Authority registration duties⁵⁴

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50 December 2007, Home Office and Department for Children, Schools and families, <http://police.homeoffice.gov.uk/publications/operational-policing/safeguard-children-trafficking>

51 See <http://www.crimereduction.homeoffice.gov.uk/toolkits/tp00.htm>

52 See

http://www.londonscb.gov.uk/files/resources/trafficking/london_safeguarding_trafficked_children_toolkit_july_2009.pdf See especially the section on the UK Border Agency from page 50 onwards

53 See www.ilpa.org.uk , Submissions.

54 Details of the ISA scheme can be found at <http://www.isa-gov.org.uk/>

7. When and how to refer to other agencies

3 In the Code of Practice paragraph 4.4 after this wording, states that:- *“The UK Border Agency will apply the wider aims and arrangements for safeguarding children as expressed in “Every Child Matters: Change for Children” A programme for change” published in 2004.”*

This should be retained in the draft Guidance

Referral arrangements for each of the four UK administrations

This highlights the need to cross-reference to the relevant child protection procedures and legislation in each administration throughout the guidance.

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Working with others

11 *However, there is no absolute bar on removal if arrangements in the country of destination do not mirror the arrangements that would have been provided in the UK.*

Whilst this may be true in most circumstances, but not all (for example where the consent of a court is required before the child is removed from the jurisdiction), it is hard to understand why this is relevant to safeguarding guidance. Each child's case is unique and as such the emphasis should be on ensuring that where a decision to return a child to their country of origin or elsewhere is considered, this is based on child focused objective evidence of country information⁵⁵ the relevant facts of the individual case and prevailing case-law and consideration of the best interests of that child. We recall the judgment of Court of Appeal in *CL(Vietnam)* [2008] EWCA Civ 1551, where Lord Justice Keene describes as follows 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.

55 A report by Dr Ravi Kohli and Fiona Mitchell for the Advisory Panel on Country Information on the coverage of issues related to children in country of origin information reports in 2008, presented to the APCI at its 10th meeting – was welcomed by the UKBA-see minutes of meeting at http://www.apci.org.uk/PDF/tenth_meeting/APCI%2010%20M%20%20minutes.pdf unfortunately the excellent full report is no longer available on the APCI website and should be made available to all UKBA staff dealing with children. See also UNHCR QI 6th report findings on UKBA misapplication of country information and other evidence in child cases (footnote 58)

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."

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.

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;

Those providing Country of Origin information, and those using it, are as bound by the duties to safeguard and promote the welfare of children as any other staff member.

Local Safeguarding Children Boards or Area Child Protection Committees

See comments above.

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This list is intended to be indicative and is not exhaustive – exercise of individual judgment by UK Border Agency staff in the particular circumstances of each case is encouraged and must be supported by line managers as this will be key to successful intervention."

This is a new provision compared to the Code of Practice. Whilst it may be appropriate for staff who are best placed to recognise possible harm to a child to be encouraged to form their own individual judgement of what amounts to harm, this must only be done in the context of appropriate child protection training, supervision and clearly established child protection procedures for reporting and escalation.

All staff must have access to a named, designated child protection officer in the UK Border Agency or Border Revenue to raise and discuss concerns with, not just line management support. All contractors working with children must also show that they have similar provisions in place within their own workplace. For an authoritative and comprehensive child protection manual see The London Child Safeguarding Board website⁵⁶

56 3rd edition of the London Child Protection Procedures , <http://www.londonscb.gov.uk/>

Section 8 ***Training for UK Border Agency staff who deal with children***

The reference to ‘who deal with children’ is unhelpful. Staff who do not have direct contact with children may nonetheless be involved in setting up or implementing policy and practice that may affect children. While training may differ depending on roles, all need training.

1 The final sentence of this paragraph, as used in para 6.1 of the Code of Practice “*and have the means of expressing sensitive concerns outside their management line.*” has been removed.

This important provision, which is addressed earlier in the guidance, should be repeated and a cross-reference inserted.

3 Add reference to the Independent Safeguarding Authority registration process⁵⁷

Staff training

4 Staff Training – All staff working with children directly should also have “live” rather than just *elearning* training about safeguarding and children’s welfare and protection and should be required to maintain these skills through annual continuing professional development and be required to demonstrate their competence through supervision and appraisal processes including analysis of their case files and decisions.

Regarding interviewing and decision making in children’s cases ILPA draws attention to the UNHCR Quality Initiative 6th report findings especially:-

“...UNHCR’s assessment of 21 interviews found some erroneous practices that go against the child’s best interests, deny the child the opportunity to freely express their reasons for claiming asylum, or fail to ensure that any vulnerabilities or special needs of the child are taken into consideration.”⁵⁸

“UNHCR recommends that UKBA institute a systematic and ongoing procedure to assess and consider the best interests of each asylum-seeking child at all stages of the decision-making process where an action taken by UKBA affects the child.”⁵⁹

“UNHCR also recommends UKBA develop child-specific quality assurance tools and marking standards.”⁶⁰

- *All staff conducting assessments of children’s interviews and decisions should be adequately trained in how to assess a child’s claim.*

57 <http://www.isa-gov.org.uk/>

58 <http://www.unhcr.org/what-we-do/SixthReportKeyObservationsandRecommendations.pdf.pdf> at page 6

59 *Ibid* page 7

60 *Ibid* page 1

- *The Quality Assurance Team should assess a representative number of children's interviews (live) and decisions as part of their auditing activities and work with other UKBA staff to ensure remedial action on findings.*

It is essential that all training materials and learning processes address the welfare of all children irrespective of the nature of the interview or decision.

5 As per comments above and add to the minimum set of elements:-

“child protection procedures and recognition of harm”

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Section 9 ***Children's applications and UK Border Agency staff overseas***

1 & 2 The statutory duty in clause 57 of the Borders, Citizenship and Immigration Bill does not apply when UK Border Agency staff are carrying out immigration functions in relation to children who are outside the UK and thus the responsibility of another state.

ILPA considers that this guidance should apply to all functions of the UK Border Agency in and outside the UK. Simply because welfare duties towards a child may rest with the host state, this does not exonerate the UK Border Agency from its own legal responsibilities towards children with whom its staff have contact on or off UK authority premises and about whom decisions are made. It is to reflect this position perhaps that the guidance requests overseas UK Border Agency staff to adhere to “*the spirit*” of the guidance. Whilst this is a step in the right direction it does not go far enough and a failure to follow this guidance where relevant to those overseas functions ought to be considered as a breach of policy, practice and individual working duties. There is reference to honouring existing local arrangements, but there should be a positive duty to seek to negotiate such arrangements so that children can be safeguarded and their welfare promoted.

We have described above how overseas staff have made enquiries in relation to a forced return that have then been used by their colleagues within the UK in a way held to put the child at risk. It must be made explicit in the guidance that staff bound by the duties to safeguard and promote the welfare of children are thus responsible under the statutory duty for any instructions given to staff overseas or any reliance that they place on information obtained from staff overseas or use that they make of it. This will also be the case in Dublin Convention transfers. The law does not permit the duty to be circumvented.

In addition, the guidance in this section must be extended to all local private contractor arrangements for the processing of entry applications and a requirement incorporated into such contracts to demonstrate effective child safeguarding procedures and staff training are in place and that these should be the subject of regular monitoring by the UK Border Agency's contract compliance monitors overseas.

This should apply also in all countries and zones where juxtaposed controls are being operated and a “memorandum of understanding” drawn up to ensure that there is clear understanding of how to escalate child safeguarding procedures and upon whom the legal duty falls in those control areas in the event of a child welfare incident. This should also include all arrangements made by the UK Border Agency under third country transfer provisions.

We recall Ministerial assurances given during debates on the bill that became the Immigration, Asylum Nationality Act 2006 as to the treatment of children at juxtaposed controls, especially their treatment by private contractors working there by which the UK Border Agency is bound.

“All contractors will be required to submit to the Secretary of State detailed procedures for handling vulnerable groups, including unaccompanied minors. Authorisation will be granted to individuals and will be suspended or revoked if there are any concerns. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232

The training that must be included involves, among other things, managing detention anxiety and stress, including the detention of vulnerable trainees [sic]; health and safety; suicide and self-harm prevention; and race relations, cultural awareness, and human rights issues. The safety and security of those who will be in the care of the authorised person is of the utmost importance—I want that to be on the record—and must not be jeopardised. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC231

...we will ensure that there is a period of training before authorisation that will include the care of vulnerable persons, including children. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232

*We have to make a differentiation here. On training in relation to children, we want to make sure that those who will deal with such children or people in a vulnerable situation are properly trained in issues like human rights, racial awareness, dealing with vulnerable people in traumatic circumstances, and of course all the issues around children. That is quite different from the kind of skills needed by immigration service officers as a part of their professional training. While they will have the skills I have outlined, they will have other skills as well.*The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC235

One issue to address is to ensure that staff are properly trained to hold a child. The noble Earl knows well from our discussions on children with special needs and behavioural issues that this is an important point. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC237

I understand noble Lords' need to ensure that the contractors are properly trained. They will have to provide the Immigration Service and the appointed monitors with access to the course material and the opportunity to attend the training they provide to ensure that there is high quality. I am happy to [make] that training document available to noble Lords, if they would find it of value. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, cols. 576-577

Authorisation will be granted only following stringent checks against a number of criminal record databases in the UK and in France, because people operating in France may be French. That will include the Sex Offenders' Register, as the Committee would expect. They will mirror existing procedures that apply to current contractors who already hold detention and

escort contracts. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232

Of course the checks will be as rigorous as those made in the public sector; that is the whole point. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC234

We do not want anyone to be given access to children who should not have it. I am absolutely determined on that point and I speak on behalf of Home Office Ministers in saying it. The checks must be rigorous and done properly because we have to protect children in all circumstances. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC234

Children taking part in sponsored visits

This section provides no information on safeguarding by the UK Border Agency, for example on entry.

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6 It is our understanding that the Independent Safeguarding Authority scheme will run alongside the CRB check scheme, and not replace it.

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Adoption and Surrogacy arrangements

Unlike the paragraphs on adoption, those on surrogacy provide no information on safeguarding.

Section 10 Contractors and others providing services to the UK Border Agency

As a general comment, this guidance is written in a way which predominantly speaks from the point of view of internal UK Border Agency functions and does not reflect the way in which contractors will need to adapt their own practices to meet their duties to safeguard children. There is nothing within the guidance which requires UK Border Agency to monitor contractors procedures, practice and staff training to demonstrate compliance with these standards. This needs to be added, not least to give effect to Ministerial assurances given to parliament set out at the beginning of these comments and under our comments on juxtaposed controls above

1 Add to these examples, accommodation and support providers, detention health care agencies, re-settlement agencies, special advisers, experts and consultants.

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Section 11 The functions of the Director of Border Revenue and general customs functions

3 Please provide details of the current Border Revenue Guidance on children as it is not possible to comment on whether or not and to what extent this guidance affects existing Border Revenue practices

Any other comments?

The guidance gives the appearance of different sections having been drafted by different people and then pulled together. The order and the headings under which matters are dealt with are not, we suggest, easy for UK Border Agency staff to navigate. A comprehensive index is required but the order should also be reviewed. General principles, applying to all, should come first and thence sections should move from the general to the particular. We have given examples in the text above.

Omissions

Legal representation

ILPA highlights that the right to be heard under Article 12 ECHR entails the child having access to legal representation and also to an independent guardian, as described above.

Within the draft guidance there is no recognition of a child's right to legal advice and representation, or recommendation to ensure provision for this. This is another principle that the guidance ought expressly to recognise:

Children must be ensured appropriate and timely access to free legal advice and representation.

If the UK Border Agency is committed to safeguarding children and promoting their welfare, it must acknowledge the child's right to good quality, independent, confidential legal advice. This includes so that the child has independent legal assistance in ensuring that the protection of his or her needs, which ought to be provided by the guidance, is indeed provided.

ILPA wrote to Matthew Coats, Director and Board member of the UK BA with responsibility for immigration and asylum, on 5 March 2008 to express concern that separated children were being asked to approve the content of their asylum interviews without having these read back to them, a proceeding discontinued even for adults some years ago. The response to the letter, dated 28 March 2008, stated:

"Having the interview record read back to the child or young person is an option but this would lengthen the interview and may cause additional stress. I appreciate the reasons for your request however, and will consider it."

This is an example of arguments ostensibly based on the welfare of children being misused to deny children important rights. In the circumstances described ILPA's advice to its members would be to advise their clients not to approve the interview record. ILPA does not accept that the time spent on reading through is more stressful than a wrongful refusal and, in the worst case scenario, *refoulement* as a consequence.

Chapter 60 of the UK BA's current Enforcement Instructions and Guidance expressly exempts the UK BA from any obligation to give notice to a separated child or his or her legal representative of the child's removal under third country removal arrangements controlled by the UK BA's Third Country Unit⁶¹. This is inconsistent

61 See section 60.6 of the policy instruction at:

with proper regard to the child's safety and the stated purpose of the draft Code. Chapter 60 of the Enforcement Instructions and Guidance is in urgent need of revision.

Immigration Asylum and Nationality Appeals and other legal proceedings.

The guidance is silent on the duties of staff who provide representation functions on behalf of the UKBA and the Secretary of State for the Home Department at the Asylum and Immigration Tribunal and in courts of record, where children's appeals and other children's cases are heard.

The guidance should include a section on duties to take a child-sensitive approach to comply with procedural directions and all relevant Practice Directions and Statements⁶² made by the courts and/or reasonable requests by children's representatives concerning the welfare and best interests of a child appellant or witness, to enable children to have their cases heard in a manner which is most conducive to their effective participation and determination. Representatives of the UK Border Agency should be given training in how to cross-examine sensitive witnesses appropriately and to work constructively with the court and parties to ensure that a child's case proceeds without delay and avoiding harm to the child.

Guidance is particularly necessary for, but not limited to, how representatives of the UK Border Agency will conduct appeal hearings including any cross-examination of children but also wider considerations of how to respond to circumstances where adjournments may be needed and the presentation of evidence, including child specialist and other experts' opinion evidence, in these appeals.

Appeals proceedings are adversarial. By that very reason, it is especially important that the draft Code ought to expressly draw attention to the role of the UK Border Agency in these proceedings. This is because their adversarial nature may risk causing harm to a child; and because of the risk that a representative of the UK Border Agency may lose sight of his or her responsibilities towards a child because of the adversarial nature of the process in which he or she is engaged.

The guidance ought explicitly to recognise that the principles and duties envisaged under the Code do not end when the primary responsibility or control of processes to which the child may be subjected pass from the UK BA to other agencies, such as the Asylum and Immigration Tribunal. Accordingly, we would suggest adopting the following principles:

Responsibility towards children extends to all processes in which UKBA may have a role but which are formally controlled by external persons or agencies, including court proceedings.

The UK Border Agency should cooperate and communicate with other parties and the courts in civil or criminal proceedings involving children subject to immigration control, where requested to do so, and take such proceedings properly into account in discharging its own duties towards children.

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter60.pdf?view=Binary>

62 For example Asylum and Immigration Tribunal Guidance Notes – see children's guidance at <http://www.ait.gov.uk/Documents/CaseLaw/PracticeDirections/GuideNoteNo8.pdf> and Tribunals Judiciary President's Practice Directions e.g <http://www.tribunals.gov.uk/Tribunals/Documents/Rules/Childvulnerableadultandsensitivewitnesses.pdf>

In a recent High Court judgment⁶³ concerning two cases where immigration issues impacting on concurrent private law children proceedings had been mishandled Mr Justice Munby commented:

"...those acting for a parent in family proceedings who is also party to concurrent asylum or immigration disputes with the Home Office (and the same too often applies also in cases, for example, where there are parallel criminal proceedings) are quite unable to answer with any precision even the simplest and most obvious questions from the bench about what has been going on and what the 'current state of play' is in the other matter."

It is incumbent not only upon legal representatives to make all necessary enquiries about related immigration matters but for the UKBA to ensure that it has procedures in place to ensure that it responds appropriately and cooperates fully to assist the courts in such cases.

Age Disputes

There is no guidance in this document on safeguarding children whose age has been disputed by the UK Border Agency and ILPA, in the light of its research referenced above and subsequent experience is concerned that a large number of children may be excluded from the considerations and arrangements in this guidance where UK Border Agency takes the view that they are not children.

Specific guidance is needed to ensure that the child is afforded all safeguarding and welfare measures during an age dispute and assessment process and for so long as a child remains in dispute with the UK Border Agency and other agencies about their age, this guidance must apply to that person until it is lawfully concluded otherwise. This needs to be stated on the face of the guidance.

ILPA's research *When is a child not a child: Asylum age disputes and the process of age assessment* (2007) found that age was disputed in 2005 and 2006 in nearly half of the applications made by people who identified themselves as under 18. Given a lack of official statistics we examined the Refugee Council's Children's Panel statistics. In a sample of 164 cases from March 2005 to 2006, 49% of age-disputed cases went on to be assessed by local authorities as children and supported by them.

The attitude toward safeguarding and promoting the welfare of children has perhaps been exemplified by the UK Border Agency's continued interest in the use of ionising radiation (x-rays) to determine age despite their lack of probative value and the consensus among professional bodies that the use of ionising radiation for non-therapeutic purposes is unethical. In his preface to *When is a child not a child?* the Children's Commissioner described one of the arguments deployed by the UK Border Agency in their consultation document *Planning Better outcomes for asylum-seeking children*, concerning the use of X-rays to date children's birth as "deceitful and duplicitous".

A legal opinion by the then Nicholas Blake QC and Charlotte Kilroy of Matrix Chambers⁶⁴ concluded that to 'subject' a child to a medical examination would be an assault. It concluded that consent to a medical examination given by a child in circumstances where s/he is told that a refusal to give her/his consent will adversely

⁶³ *M & N (Children)* [2008] EWHC 2281 (Fam)

⁶⁴ *In The Matter Of A Proposed Amendment To The Immigration Rules* 7 November 2007

affect a decision on her/his age or asylum application cannot be described as freely given and identified the risk of unlawful action where valid consent was not obtained.

Proposed changes to the immigration rules on this issue did not appear in the rules as enacted. ILPA was not alone in being surprised that x-rays were on the agenda for the Ministerial Working Group on age assessment. Nor in being surprised that in the January 2008 UK Border Agency paper *Better Outcomes: the way forward: improving the care of unaccompanied asylum seeking children* it was stated that:

*“There is presently a lack of consensus among stakeholders about the merits of x-rays as a means of accurately assessing age.”*⁶⁵

We have yet to identify any respondents who were in favour of x-rays to assess age. Opponents include the Children’s Commissioner, all the children’s and refugee organisations of which we are aware, the medical professional bodies and the legal profession. The failure of the Ministerial Working Group to report has only added to the confusion.

Recognition of a child as a child is the gateway to the safeguarding and promotion of the welfare of that child. It cannot be ignored in this guidance without putting children at risk.

Prosecutions

The Crown Prosecution Service Guidance on prosecution standards and practice should be followed and advice sought where appropriate. The current Protocols between CPS and UKBA should now be fully revised to take into account this new statutory duty.⁶⁶

This statutory guidance does not address prosecutions of children or their parents for immigration offences – e.g. under s. 2 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 if they fail to produce an immigration document. Any decision to prosecute a child or his or her parent has potential to cause serious harm to the child.

It is wrong to penalise – especially by way of criminal prosecution and deportation measures – children for breaches of immigration law over which they may have little or no understanding or in which they may have little or no choice. This applies to both criminal measures (such as s. 2 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) and administrative measures (such as paragraph 320(7B) Immigration Rules).⁶⁷

In any event, all criminal deportation decisions which affect children and their families must comply with established case law of the European Court of Human Rights and criteria to consider the best interests of the child in such situations⁶⁸

65 Paragraph 5.3

66 For the Protocols between UKBA and CPS on immigration offences – see <http://www.cps.gov.uk/publications/agencies/immservepro.html>

67 This measure introduces mandatory bans upon returning to the UK which last for varying periods of time, up to 10 years from the time a person leaves the UK, if they have committed certain breaches of immigration laws. Concerns regarding the effect of this measure upon children were expressly raised with the Minister by the Joint Committee on Human Rights when the Minister gave evidence to them: see Uncorrected Oral Evidence given by Liam Byrne MP, Minister of State, Home Office and Lin Homer, Chief Executive, Border and Immigration Agency, 19 February 2008 to the Joint Committee on Human Rights available at:

<http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/uc357-i/uc35702.htm>

68 See *Under v Netherlands*; Court (Second Section); 05/07/2005 AND Court (Grand Chamber);

Timely decision making

There is no guidance on the principle of “no delay” which informs all decisions made under the Children Act 1989. It should be stated in this guidance that decisions about and affecting children should be made in a timely manner without either undue haste or delay both of which are likely to have a negative effect on their welfare and development. It should be clearly stated that no case should ever be put on hold which would serve to deny a child the opportunity to have their case and circumstances considered as a child.

Devolved UK jurisdictions and the UKBA duties

ILPA has yet to see how these statutory duties will be expressed specifically in relation to UK devolved jurisdictions so is unable to comment on this area of the UK Border Agency's functions.

A written understanding must be developed in agreement with devolved authorities and set out in guidance to all UK Border Agency staff for children's cases within the UK where children are moved or supported under UK Border Agency functions between England and devolved jurisdictions, so that inter-agency responsibilities are always clear at any stage of the process, for example when children and their families are moved between England Scotland Northern Ireland and Wales for support purposes, or during detention or transport movements or any other reason, the responsibility and inter-operability of the different statutory safeguarding duties and systems must be clearly set out.

Alasdair Mackenzie
Acting Chair
ILPA
31 July 2009