IMMIGRATION LAW PRACTITIONERS' ASSOCIATION BRIEFING FOR HOUSE OF LORDS DEBATE 12 JANUARY 2010 ON THE UK OPT-IN TO THE DRAFT EU ASYLUM PROCEDURES AND QUALIFICATIONS DIRECTIVES

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 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, research and analysis. ILPA is represented on numerous government and other stakeholder and advisory groups. ILPA gave evidence to the House of Lords Committee on the European Union on the original versions of the Procedures and Qualifications Directives as well as hosting a seminar on these with the International Association of Refugee Law Judges in which the UK Border Agency, members of the judiciary and the UNHCR participated, and providing evidence to the European Commission.

In preparing this briefing we have drawn on the joint 8 December ILPA and the AIRE Centre comments to the UK Border Agency on the draft recast directives which can be found at http://www.ilpa.org.uk/submissions/menu.html . This provides further detail on the matters covered in this briefing. We acknowledge the contribution of the work of the AIRE Centre and also of Asylum Aid in commenting on the draft recast directives.

The UK is a party to the current EU Directives on qualification for asylum and on asylum procedures and must decide whether to 'opt-in' to replacements of these Directives, which have been drafted by the European Commission and are now to be considered and amended in the European system. The 4 December 2009 report of the House of Lords European Union Committee *Asylum directive scrutiny of the opt-in decisions*[1], the subject of this debate, recommends that the UK opt-in to both Directives. The UK has produced Explanatory Memoranda on the new drafts[2] setting out reasons for and against opting-in. We agree with the House of Lords Committee on the European Union and the Commission's analysis that the UK will continue to be bound by the existing instruments if it does not opt in to the new ones.[3] We concur with the analysis of the House of Lords Committee on the

[1] HL Paper 6, European Union Committee 1st Report of session 2009-10 which includes as Appendix 3 *Reply from the European Commission to the Report of the House of Lords "The United Kingdom opt-in: problems with amendment and* codification, Margo Wallström, Vice President of the European Commission, 28 October 2009. See also the Committee's report *The United Kingdom opt-in: problems with amendment and codification* HL Paper 55, European Union Committee, 7th Report of session 2008-09

[2] Documents 14863/09 and 14959/09, both Meg Hillier Parliamentary Under-Secretary of State, Home Office, published as Appendices Four and Five to HL Paper 6 of session 2009-10, *op. cit.*

[3] HL Paper 6 of session 2009-10 and Appendix Three thereto, *op. cit.*

European Union that in the light of this *"it is not so much desirable as essential that the Government should opt in."*[4]

The Qualification Directive

We consider that the standards contained in the proposed amended Directive reflect those already incorporated into domestic UK immigration law and the UK's international obligations. Accordingly the proposals represent a codification of current obligations rather than a change in applicable standards. The UK could opt in to the recast Directive without a significant effect on domestic law and practice and should opt-in to strengthen the homogeneity and consistency of the determination of clams for international protection across the European Union.

Since 2006, UK immigration and asylum law has been the subject primary legislation, changes in guidance and procedures and has been affected by case law in the UK courts, the European Court of Justice and the European Court of Human Rights. In these circumstances, that the re-cast Directive might give rise to further changes in UK law and practice is not a reason to reject it.

We agree with the statement in the Home Office's Explanatory Memorandum[5] that the proposal to introduce a new concept of beneficiaries of international protection to include both refugees and beneficiaries of subsidiary protection would cause no change to UK law or practice as the UK already operates a single procedure for both types of claim.

We address below the particular concerns highlighted by the UK Government. We agree with the analysis of the House of Lords Committee on the European Union that

> *"…none of these difficulties seem to us to be so significant that the Government should decline to opt-in."*[6]

In our view the Explanatory Memorandum[7] on this re-cast Directive overstates some of the concerns, in some cases perhaps because of a mis-reading of the text of the re-cast Directive.

Family members Article 2(j) of the re-cast Directive

The proposed more detailed specification of qualifying family members in Article 2 and particularly the carers of qualifying children similarly reflects the UK's existing law and international obligations under both Article 8 of the European Convention on Human Rights and the UN Convention on the Rights of the Child. The Explanatory Memorandum indicates concerns[8] about the new definition of a family member (para14). Indeed, the Home Secretary before the European Council stated:

> *"The proposal to allow UAMs to be joined by their parents if their claims succeed would be even more disastrous. In the UK 12% of our claims come from minors we spend about □160 million a year dealing with this problem. A decision allowing*

[4] HL Paper 6 of session 2009-, *op. cit,* para 18.
[5] Document 14863/09
[6] HL Paper 6 of session 2009-10, *op. cit.* para 17.
[7] Document 14863/09, o*p. cit.*
[8] *Op. cit.,* para 14.

children to be joined by their parents will simply encourage more to come, undermine our efforts to reduce trafficking of children, and would be the opposite of what is needed. I would strongly encourage the commission to think again."[9]

With respect to the Home Secretary we consider that these comments are based upon misapprehensions and confusion. First, the provisions of the recast Directive are not concerned with joining a child. They are concerned with those family members who are *"present in the same Member State"* and moreover present *"in relation to the application for international protection"* (draft Article 2(j)). Such family members, and the children with whom they wish to stay are likely to have strong claims under Article 8 of the European Convention on Human Rights in any event.

The UK's current definition of dependents in paragraph 349 of the immigration rules read with the last published version of the Asylum Policy Instruction on Dependants makes provision for a broader definition of family members than that set out in the current Qualification Directive.

In all the cases where more extensive provision is made for minor children (including children born out of wedlock, adopted children and minor unmarried siblings this is made subject to a best interests test which has the potential considerably to constrain its application.

We take issue with the Home Secretary's comments in any event, but for reasons that will not be touched by the definition of family members in the re-cast Directive in its current form. If a child claims asylum in the United Kingdom the United Kingdom does not currently recognise any right of that child to be reunited with his/her parents when the child has been recognised as a refugee or accorded humanitarian protection whereas the right of an adult recognised as a refugee or granted humanitarian protection to be reunited with his/her minor children is recognised. This appears to be discrimination is contrary to the UK's obligations under the UN Convention on the Rights of the Child and in particular Article 2 (prohibition on discrimination) and Articles 8 (right to preserve family relations) and 9 (right not to be separated from parents against the will of the child) but most of all Article 10 which states

> "10(1)…applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, expeditious and humane manner"

Article 7 (actors of protection)

The proposed new Article 7 reflects the evolving jurisprudence of both the former European Court of Justice (now the Court of Justice of the European Union) and the European Court of Human Rights in this field, where a *prima facie* risk of persecution or serious harm has been shown to exist particularly in relation to those who would be required to rely on armed militias to protect them. It is thus similarly a codifying measure.

[9] Transcript of 30 November 2009 Justice and Home Affairs Committee 2979th meeting, which is available to view at http://video.consilium.europa.eu/index.php?pl=2&sessionno=2612&lang=EN

The Explanatory Memorandum misstates the proposal in the re-cast Directive and, we suggest, tilts at windmills. It is not the case that the proposed amendment imposes a

> *"requirement to provide international protection for people who can obtain protection in their home countries, simply because those providing the protection do not operate a formal legal system."*[10]

The provisions of the proposed Directive require that an applicant for international protection must establish, *inter alia*, that either they are at risk of an act of persecution (Article 9) or serious harm (Article 15). If an applicant cannot establish this, the question of whether or not the country operates a legal system does not arise. UK caselaw is line with that interpretation.[11]

We have had sight of the email from David Saville of the UK Border Agency EU Asylum Policy Team re the figures cited by the Home Secretary at the 2979th Justice and Home Affairs Committee meeting explaining that the figure of 1700 cases that would be affected by Articles 7 and 8 of the recast Directive was based upon an assessment from operational colleagues that the new definition (as (mis)-understood by the authors of the Explanatory Memorandum) would turn 10% of current refusals of asylum into grants and that the UK Border Agency currently refuses some 17,000 asylum cases per annum. Mr Saville notes that this was based on a reading of the proposals as more radical we believe them to be.

Article 8

The proposed new Article 8 similarly reflects existing caselaw. the approach taken by the European Court of Human Rights decision in[12] and a number of other applications to the ECthR which have resulted in friendly settlements.[13]

Article 11 and Article 16

The new Article 11 simply rectifies the omission of the relevant provisions of Article 1 of the 1951 UN Convention Relating to the Status of Refugees which were not included in the current directive, but have been part of refugee law for more than fifty years.

The new Article 16 similarly reflects – in the words "compelling reasons" - the range of circumstances currently covered by Articles 2,3,4 and 8 of the European Court of Human Rights which may preclude the return of an individual to his/her country of origin.

These deal with cessation and for the most part reiterate the text of the 1951 UN Convention Relating to the Status of Refugees. The UK's concern appears to be that they transpose the humanitarian proviso set out in Article 1C(6) of the 1951 Convention Relating to the Status of Refugees (proposed Articles 11(3) and 16(3)

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[10] Document 14863/09, o*p. cit* paras 15 and 16.
[11] *Hovarth v SSHD* [2000] 3 WLR 379 and for Article 3 ECHR *R (Bagdanivicius) v SSHD* [2005] 2 WLR 1359
[12] *Salah Sheek v Netherlands* (Application no 1948/04), *NA v UK* , Application no. 25904/07, judgment 17 July 2008.
[13] Such *as Chahal v UK* (1996) 23 EHRR 413, *Hilal v UK* (2001) 33 EHRR 2

and make of it an obligation. The proviso relates to circumstances in which a person who has suffered persecution should not be forced to return to their country of origin although they are no longer at risk there.

We recall the debates on this matter during the passage of the Bill that became the Nationality, Immigration and Asylum Act 2002 when the Lord Filkin, speaking for the Government *stated:*

> *"Where a person has suffered badly in a particular country, that would not of itself mean that he continues to be a refugee, but it would be a factor that would be taken into account when deciding whether it would be appropriate to grant further leave to remain.*[14]

The proviso is limited in its application.[15] The reasons for not forcing the person to return must be 'compelling' and must have a nexus with the persecution from which that person fled. It is difficult to think of circumstances in which the proviso would be engaged that would not engage the UK's obligations under Article 3 of the European Convention on Human Rights (re inhumane treatment), or else Article 8 of that Convention, dealing with private life in the sense of physical and moral integrity, by which the UK is also bound.

A decision to apply the cessation clauses in the Refugee Convention is the subject of a right of appeal under UK law, and arguments under the European Convention on Human Rights are likely to form part of such appeals. We therefore suggest that the concerns expressed in the Explanatory Memorandum are unfounded and that drafts Articles 11(3) and 16(3) are unlikely to make a difference to current UK practice.

Article 20

Article 20 presents a non-exhaustive list of 'vulnerable persons' whose specific situation is to be taken into account in implementing Chapter VII of the recast Directive which is concerned with the content of internal protection. This is acknowledged in the Explanatory Memorandum, which identifies them as "examples". The concern expressed in the Explanatory Memorandum that applicants might 'fall through the gap'[16] thus appears to relate to matters of style rather than substance.

Article 31

The Explanatory Memorandum appears to suggest that the provisions relating to family tracing in the recast Article 31(5) 'enhance' the tracing provisions in the original Directive. The European Commission in introducing the proposals drew attention only to the desire to be consistent with the recast qualification directive.[17] Nor did the Commission suggest in introducing that Directive that it 'enhanced' standards of tracing.[18] It is unclear to us what the UK considers to be the enhancement. The current Qualification Directive places Member States under an

[14] *Hansard* HL 17 October 2009 vol 639 col 1050.
[15] See *In re B, R (Hoxha) v Special Adjudicator [2005] UKHL 19*
[16] Document 14863/09, o*p. cit* para 23.
[17] COM (2009) 551 b, Explanatory Memorandum, para 1.1
[18] COM(2008) 815 final/2 Proposal for a Directive of the European Parliament and the Council laying down minimum standards for the reception of asylum seekers

obligation to 'endeavour' to trace family members, the recast Qualification Directive to 'establish procedures for tracing'. The change appears formal and procedural rather than substantive. We are pleased to see the change given that some of the *ad hoc* measures of tracing used by the UK Border Agency have given rise to grave concerns.[19]

The recent (20th Nov 2009) Resolution of the Parliamentary Assembly of the Council of Europe (PACE) on Improving the Quality and Consistency of Asylum Decisions in the Council of Europe Member States which starkly states that it is *"an affront to the rule of law and inherently unfair "* that similar claims are treated so differently across Europe with, for example, the acceptance rate for those from one national group ranging from 0% in one state to 81% in another. The Parliamentary Assembly expressly invited the European Union to *"prioritise in its revisions of the Procedures and Qualifications Directives the removal of provisions which are* in tension with the European Convention on Human Rights and other international instruments"

The amendments to the Directive which the Commission proposes were prompted by the problems encountered by many member States who have a less rich and developed national jurisprudence in this field. It is important that the UK should opt in.

Procedures Directive

We share the view of the House of Lords Committee on the European Union that cross references between different EU asylum instruments instruments are likely to be the source of particular difficulties for the UK if it does not opt in.[20] We concur with the opinion of the European Commission[21] that the UK will be bound by all the provisions of the amended version of the Dublin Regulation on which European country is responsible for an asylum application and how this should be dealt with, regardless of whether it elects to opt-in to any other instruments[22]

In a number of areas the UK Government's Explanatory Memorandum on the draft recast Procedures Directive appears to overcomplicate matters and in some places to be based on misreadings and misunderstandings of the draft Procedures Directive that lead to an overstatement of the difficulties opting-in might pose to the UK. The desire to see find difficulties in opting-in may stem from what we understand to be the UK's main concerns about the draft Directive: its effect on accelerated asylum procedures such as the detained fast-track (Article 27) and cases in which there is no right of appeal against refusal of protection prior to removal from the UK (Articles 27 and 41).

Accelerated procedures (Article 27)

[19] See ILPA's February 2009 submission to the Joint Committee on Human Rights Inquiry into Children's Rights, published as part of the written evidence to that report, Joint Committee on Human Rights, Twenty-Seventh Report of session 2008-09 HL 57/HC 318
[20] HL Paper 6 of session 2009-10, *op. cit.* para 23.
[21] Op cit. Appendix 3 to HL paper 6 of session 2009-2010/
[22] Appendix 3 to HL Paper 6 of session 2009-10, *op.cit.*

The recast Directive does not outlaw accelerated procedures and we consider that it disappoints in this regard. Article 27 permits accelerated procedures in cases

- about safe country of origin;
- which, taken at their highest, do not engage the obligations to provide protection in accordance with the Directive;
- where the applicant has presented false information;
- where it is "likely that" that the applicant has destroyed a passport or travel document in bad faith ;
- where a child makes an application following the rejection of applications by his/her parents, without raising relevant new matters; and
- where an application is made to frustrate a new or imminent decision that would affect removal.

The UK detained fast-track procedure rushes a person through the decision-making process without time to gather the necessary evidence, then sees that person make a fresh claim shortly after the process has ended because the evidence is now available and calls into doubt the original decision[23]. This is not a fair process and is not an efficient one. UK Border Agency officials have indicated in discussions with ILPA representatives that while they wish to continue to run a detained-fast track procedure, they recognise the need to examine how the procedure works.

The UK Explanatory Memorandum asserts of the detained fast-track:

> *"We know that the decisions are fair because 97% of them are upheld on appeal…'*[24]

This presupposes that the appeal gives rise to a fair, sustainable decision. If the necessary information is not there to put before the decision-maker on appeal, or if the person has not disclosed all pertinent information at the time of the appeal, then the success of the appeal can be no measure of the fairness and sustainability of the decision. Even more so where these difficulties have led to or are compounded by the absence of legal representation at the appeal.

We recall the criticisms of the UK detained fast-track made by the Council of Europe Commissioner for Human Rights Mr Thomas Hammarberg in the Memorandum he produced shortly after his visit to the UK,[25] stating that

> *"[30] Administrative celerity aimed at efficiency should not act to the detriment of the effective observance of the European human rights standards and the principles of international refugee law."*

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[23] See *The Detained Fast-Track Process: a best practice guide, ILPA 2008;* See e.g. ILPA's 28 February 2005 response to the Department of Constitutional Affairs consultation *Asylum and Immigration Tribunal* Fast Track procedure rules; ILPA's submission to the Joint Committee on Human Rights Inquiry into the Treatment of Asylum Seekers, October 2006 and ILPA's further submission to the Committee following the publication of its report, in the form of a memorandum dated September 2007. See also ILPA's February 2008 and March 2009 submissions to the Home Affairs Committee Inquiry into Human Trafficking and ILPA's submissions to the The Tribunal Procedure (Upper Tribunal) Rules 2008 – consultation on rule amendments for Asylum and Immigration Upper Tribunal Chamber, 29 September 2009, all available on www.ilpa.org.uk at the Submissions page.

[24] Document 14959/09, *op. cit.*, para 20.

[25] CommDH(2008)23 Strasbourg, 18 September 2008

The UK has wavered between characterisation of the detained fast-track as suitable for cases that can be *decided* quickly[26] and as suitable for cases that are clearly unfounded, i.e. cases that can be *refused* quickly. The approach outlined in the draft Directive is that accelerated procedures may only be applied to cases likely to be susceptible of a quick refusal. Both approaches are problematic, as is evidenced by the UK example. Screening for inclusion in the UK detained-fast procedure cannot pick up those characteristics (such as being a survivor of torture or of trafficking) that make a person unsuitable for the procedure.[27] Because its screening criteria do not work, the sample of cases entering the detained fast-track is essentially a random one. One should therefore expect to see results comparable with the success rates in other appellate procedures. This, as described above, is not the case.

Our concern must be contrasted with that expressed by the UK Government. We fear that the Commission's proposals will allow the UK to replicate far too much of its detained fast-track procedure and that the recast Directive will permit complex cases to go through accelerated procedures that are inimical to the fair determination of those cases. Would that the recast Directive spelt the end of the detained fast-track; in its current form it does not.

The reference in the UK's Explanatory Memorandum

> *"We believe that Member States should be encouraged to give asylum applicants fast and fair decisions rather than have restrictions placed on their ability to do so"*[28]

fails to make any mention of the provisions of Article 27 relating to a six-month longstop for an initial decision on an application for asylum in the proposed recast Directive,[29] and permitting the giving of priority to particular cases.[30] Both meet the UK's concerns. **We urge the House to probe the Government on its views on the six-month long stop.**

Articles 27 and 41 'Clearly unfounded cases'.

The UK Explanatory Memorandum indicates that not to be able to certify cases on a case-by-case basis would affect some 120 cases a year.[31] This small number of cases, some of which would, under the proposals set out in the Directive, be cases that could be subject to accelerated procedures, appears to amount to an insufficient reason to found rejection of the Directive as a whole.

The comments in the Explanatory Memorandum objecting to the definition of 'manifestly unfounded'[32] in the recast Directive are at odds with statements made by Ministers during the passage of the Nationality, Immigration and Asylum Act 2002. The Lord Faulkner of Thoroton stated

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[26] See for example the Enforcement Guidance and Instructions Chapter 55.4
[27] See ILPA's February 2009 response to the consultation on the Detained Fast Track & Detained Non-Suspensive Appeals - Intake Selection (AIU Instruction) and ILPA's further comments of September 2008 published after the publication of the revised intake selection.
[28] Document 14959/09, *op. cit.*, para 19.
[29] Article 27(3).
[30] Article 27(5).
[31] Document 14959/09, *op. cit.*, para 22.
[32] Document 14959/09, *op. cit.*, para 22.

> *"In some cases – considering the facts, such as the nature of the country referred to or the basis of the claim being made – one can almost immediately say, 'that is not likely to succeed. Even if all the facts were made out, it would not remotely constitute the relevant risk required to satisfy the basis of an application'.* The *noble Earl, Lord Russell, is of course right that some cases which look weak initially look stronger when one examines them more closely. However, there is a category of cases that readily suits the description of unfounded."*[33]
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> *"…the process is about identifying those cases which are clearly unfounded, not where there is an argument both ways and one has to weigh up which way the answer probably falls."*[34]

Ministers were at pains to emphasise, repeatedly, that 'clearly unfounded' meant the same as 'manifestly unfounded'.[35] Far from having misled parliament Ministers were voicing an understanding of what is meant by clearly unfounded that reflects the position under UK law. A 'manifestly' or 'clearly' unfounded case is one which, taken at its highest, does not engage protection obligations; it is one where a prima facie examination indicates that the case cannot possibly succeed.[36]

The approach taken in the Explanatory Memorandum nonetheless shows a cavalier disregard for the public purse in that where there is no appeal a challenge is by way of judicial review which is likely to be much more costly than an appeal.

The UK Explanatory Memorandum asserts

> '…*our N*[-on]*S*[-uspensive]*A*[-ppeals] *process is effective and fair'*.[37]

We do not agree. A process that returns a person to a place where they allege that they face persecution or prohibited violations of their human rights and only allows them to challenge that removal subsequent to return, is not a fair process.

Other objections set out in the UK Explanatory Memorandum

Article 21 Guarantees for Unaccompanied minors

Contrary to what is suggested in the UK's Explanatory Memorandum there is nothing in the proposed recast Directive that would prevent the UK from giving priority to children's cases in the event of a queue or backlog. The Explanatory Memorandum appears to confound determining a child's case rapidly and subjecting the child to accelerated procedures as defined in the proposed re-cast Directive.[38] Provision is made for the former, including giving priority to the case of, for example, a child, because of their special needs.[39]. What is prohibited is subjecting the child to

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[33] *Hansard* HL 23 June 2002, col 352
[34] *Hansard* HL 24 October 2002, col 1507
[35] See, for example the House of Commons Committee report 21 May 2002c cols 427-429, HL 23 July 2002 col 343.
[36] *R (ZT (Kosovo) v SSHD*) [2009] UKHL 6, per the Lord Philips, paras 21 to 23: "The test of whether a claim is 'clearly unfounded' is a black and white test. the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer."
[37] Document 14959/09, o*p. cit.*, para 23.
[38] Document 14959/09, o*p. cit.*, para 18.
[39] Article 27(5)

accelerated procedures and the 'safe third country' concept. No reason is given in the Explanatory Memorandum for the UK's opposition to the exemption of minors from the 'safe third country concept' and the UK has opted into the proposal amending the Dublin Regulation.[40] As discussed it will be bound by this[41] and thus objections to the recast Procedures Directive on this point would appear to be academic

Grave concerns surround the treatment of persons, including separated children, returned under third country procedures to Greece. The UNHCR's criticisms are set out in the *UNHCR Position on the Return of Asylum-seekers to Greece under the 'Dublin' Regulation."*[42] It is this type of very grave concern that has prompted the desire to place extra protections in place for unaccompanied children. This is a reminder of the extent to which the European instruments on asylum represent a common project to raise standards throughout the Union.

The UK's own procedures with respect to the return of separated children to third countries have given rise to concerns as detailed in ILPA's submission to the Joint Committee on Human Rights Inquiry into the Rights of the Child.[43] Chapter 60 of the UK Border Agency's current Enforcement Instructions and Guidance expressly exempts the Agency 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 Border Agency's Third Country Unit. [44] This is inconsistent with the duty now imposed upon the UK Border Agency thanks to efforts of the House of Lords over many years, to safeguard and promote the welfare of the child. These provisions do not protect the best interests of the child. In one case a child, accepted by the UK as a child, was returned to a third country to claim asylum there. That country had not, when the child had been there, accepted the child as a child. The Third Country Unit of the UK Border Agency obtained no assurances that he would be so treated on his return. And the child was not, but was instead left to fend for himself in dire need until back in touch with the UK representative who managed to secure a court order that the child be returned to the UK. Which was done. This illustrates the risks in subjecting to a child to third country procedures.

The UK's Explanatory Memorandum also expresses concern that the provision on unaccompanied minors may 'lead to more applicants claiming to be minors'.[45] Many of those who claim to be children, are children. As documented in ILPA's *When is a child not a child* (to which reference was made in the Supreme Court judgment in the case of *R(A) v Croydon, R(C) v Lambeth* [2009] UKSC 8, handed down on 26 November 2008) the available evidence indicated that a large proportion of age disputes are resolved in favour of the child. Statistics available showed age disputes in almost 45% of cases of separated children. Statistics on the percentage of those resolved in the child's favour were not available but statistics collected for the research showed age disputes resolved in favour of the child running at between 49%

[40] As notified to the European Commission on 6 March 2009.
[41] Appendix 3 to HL Paper 6 of session 2009-10, *op.cit.*
[42] 15 April 2008.
[43] February 2009,, published as part of the written evidence to that report, Joint Committee on Human Rights, Twenty-Seventh Report of session 2008-09 HL 57/HC 318
[44] Enforcement Instructions and Guidance s 60(6).
[45] Document 14959/09, o*p. cit.*, para 18.

and 80% of all disputed cases. Although official statistics have never been made available, we understand that the proportion of age disputes resolved in the child's favour continues to be high.

In its Explanatory Memorandum the UK Border Agency once again makes reference to 'the risks of placing adults into Member States' child care systems without any reference to the risk of placing children in adult asylum determination systems, including the risk of wrongful detention of the children. We recall that these respective risks are not equivalent, since the child in an adult system is thereby excluded from those systems of care and supervision which seek to protect against abuse. Statistics presented to the UK Border Agency's Detention User Group on the numbers of people who claimed to be children after being detained indicates that of 45 decisions reached during the second quarter of 2009, nine concluded that the child was a child. The statistics do not indicate how many of the remaining 36 cases were the subject of further challenges ultimately resolved in favour of the child and comparable statistics have not been produced on those claiming to be children at other stages in the process. As to the placing of children in Member States' child care systems, a process that assesses the risks a person presents solely on the basis of their chronological age is not a safe process, and the UK Border Agency has been subject to criticism for this line of reasoning many times already.

Article 7 Information at the border or in detention facilities.

The UK Explanatory Memorandum expresses concern "that the proposals might require the permanent presence of such organisations at all such facilities or ports of entry".[46] The requirement set out in the proposed Article is that those who provide advice and counselling to people applying for asylum ('such organisations') have 'access'[47] to border crossing points, transit zones and detention facilities. The suggestion in the Explanatory Memorandum that anything requires the State to ensure that such organisations have a permanent presence at any, let alone all, ports of entry, appears to be based on a misunderstanding of the text.

Training (Article 4)

The draft recast Directive sets out minimum requirements for training. These are broad and general and it is difficult to envisage training other than the most cursory that did not address these points. The UK's Explanatory Memorandum suggests that the new EU Asylum Support Office is better placed to deal with training.[48] There is a grave danger of this Office becoming all things to all people and being too stretched to work effectively. UK Border Agency officials have indicated at National Asylum Stakeholder Forum EU subcommittee meetings that they should wish to see the efforts of the Asylum Support Office concentrated on places, and situations, where member States stand most in need of support. It cannot be assumed at this stage that devising a training curriculum will be among the priorities for the limited resources of the Asylum Support Office throughout its existence.

Article 3 Territorial Waters

[46] Document 14959/09, *op. cit.*, para 16.
[47] Article 7(3)
[48] Document 14959/09, *op. cit.*, para 15.

The UK's Explanatory Memorandum expresses concerns at obligations to those seeking asylum found in territorial waters because of 'the extent of our territorial waters.'[49] Particular reference is made to Gibraltar. Under the Territorial Sea Act 1987 the UK's territorial waters extend to 12 nautical miles, which is in conformity with most other countries and in accordance with the standards set by 1982 Convention on the Law of Sea. Gibraltar's territorial waters currently extend to three nautical miles. They are the subject of a dispute between Spain and the UK[50],

On 7 August 2009 the UK Government requested permission from the Court of First Instance to intervene in support of the Government of Gibraltar against the European Commission seeking annulment of Commission Decision 2009/95/EC in so far as it includes a Site of Community Interest proposed by Spain with what the UK contend to be British Gibraltar Territorial Waters (case T-176/09).[51] If the UK wishes to assert its interest in these territorial waters, then it would be wise to opt-in to the re-cast Procedures Directive to have an opportunity to do so in this context.

Alasdair Mackenzie
ILPA
11 January 2010

[49] Document 14959/09, o*p. cit.*, para 13.
[50] As evidenced by Spain's Declaration under Article 310 of the 1982 UN Convention on the Law of the Sea upon ratification of the 1982 Convention and the UK's rejection of that Declaration as unfounded in its Statement under Article 310 made at the time of its ratification of the Convention.

[51] See *Hansard* HC 12 October 2009 col 41W