ILPA to the UK Border Agency - Refugee Family Reunion

We write further to the meeting hosted by the UK Border Agency on 17th January, at which ILPA was represented by Charlene Stakemire.

At the meeting, it was indicated that the UK Border Agency is giving consideration to changing the relevant Rules, policy and practice regarding refugee family reunion. In particular, three matters were identified as under consideration:

(i) the status that is given to successful applicants for refugee family reunion;
(ii) the family members to whom refugee family reunion is available; and
(iii) the particular situation of post-flight family members in view of the determination of the Upper Tribunal in *FH (Iran)* [2010] UKUT 275 (IAC).

We deal with each of these matters in turn under discrete headings below, after making some general observations.

ILPA members have provided cases studies, and a few of these are used to illustrate some of the concerns addressed here.

General observations

The subject of refugee family reunion raises several fundamental issues of human rights and international and domestic legal obligations.

The right to respect for family life, while qualified, is a fundamental human right guaranteed by the 1950 European Convention on Human Rights. The proportionality of interference with that right for immigration policy aims has come before the UK's domestic courts on many occasions; and most recently in *Diego Andres Aguila Quila & Ors v Secretary of State for the Home Department* [2010] EWCA Civ 1482. In that case, the Court of Appeal placed considerable weight upon the absolute right of British citizens to be in the UK. Whereas refugees do not have the right of abode, they have an entitlement to be here and, moreover, unlike the usual case for a British citizen, they cannot relocate to the country of origin of their family member (where this is their own country of origin, as will generally be the case) by reason of the persecution or other serious harm which they face there. Any interference with family life in the circumstances of a refugee is very likely to be complete in the sense that the refugee may have no alternative means to give real effect to it. In the realm of family life, in particular the right to marry, the House of Lords has held in *R (Baiai & Ors) v Secretary of State for Home Department* [2008] UKHL 53 that requirements, such as a fee, which act as an effective bar to the right may be unlawful.

Where children are concerned, the UK is also bound by Article 3 of the 1989 UN Convention on the Rights of the Child to make the best interests of those children a primary consideration. In relation to children in the UK, this obligation is supplemented by the statutory duty regarding the safety and welfare of children provided by section 55 of the Borders, Citizenship and Immigration Act 2009; and the statutory guidance in relation to that makes clear that, so far as children outside the UK, the UK Border Agency is expected to nonetheless act in accordance with this welfare duty in those of its functions that concern such children. It will ordinarily be difficult to see how the best interests of a child or the child's welfare will not demand family unity; and in the context of a refugee who *ipso facto* cannot safely return to his or her home country, family reunion in the UK will ordinarily be

the only option. The relevance of Article 3 and section 55 to UK immigration law, policy and practice has been increasingly the subject of litigation and judicial comment over the course of last year, e.g. in such cases as *R (TS) v Secretary of State for the Home Department & Northamptonshire County Council* [2010] EWHC 2614 (Admin), *R (Suppiah & Ors) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin) and *LD (Zimbabwe)* [2010] UKUT 278 (IAC).

These international and domestic obligations provide a broader context for the principle of family unity, as discussed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, and Recommendation B from the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (Article IV) adopting the 1951 UN Convention on the Status relating to Refugees:

> *THE CONFERENCE,*
> *Considering that the unity of the family, the natural and fundamental group of society, is an essential right of the refugee, and that such unity is constantly threatened, and*
> *Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems the rights granted to a refugee are extended to members of his family,*
> *Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:*
>
> > *(1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country,*
> > *(2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.*

The importance of refugee family reunion arises from a number of factors including the circumstances which have led to the family's separation, and the peculiar difficulties in the way of family reunion outside of the UK (the risk of persecution in the country of origin; if the family members have fled to a third country, the often absence of any practical or lawful means for the sponsor to relocate to that country) and the often dangerous and desperate circumstances in which family members may find themselves (whether in their country of origin or in a third country). Additionally, there are the significant hurdles many refugees face seeking to establish themselves in the UK. Refugees often spend long periods (sometimes many years) excluded from work and more generally marginalised by reason of their situation as asylum-seekers before recognition as a refugee. Some refugees suffer from serious mental health difficulties, including trauma arising from past experiences of persecution and distress and depression at being isolated from family members. The longer such marginalisation or isolation continues, the longer it is likely to take, or harder it will be, for these to be significantly or fully overcome.

There are profound reasons therefore which differentiate the position of refugees from, for example, British citizens in relation to applications for leave to enter for the purpose of family unity. While the Supreme Court in *ZN (Afghanistan) & Ors v Entry Clearance Officer (Karachi)* [2010] UKSC 21 did not attempt to review these matters in full, the judgment clearly recognised these distinctions where at paragraph 35 of the Court's judgment Lord Clarke said:

> "*...there are coherent policy reasons for applying the same principles to applications to join or remain with a spouse or parent who has been granted asylum both before and after such a sponsor has become a British citizen. An important factor in this regard is that referred to in para 25 above, namely that one of the purposes of the Refugee Convention is to protect and preserve the family unit of a refugee. The need for protection for a member of such a family unit is likely to be the same whether the sponsor obtains British citizenship*

or not. Moreover, the risk of persecution may be such that the need for protection for family members is particularly stark."

Status to be given to successful applicants

The current position is that successful applicants are given leave to enter in line with the sponsor. Thus, those joining a refugee receive refugee leave, and those joining someone with humanitarian protection receive humanitarian protection. Our understanding is that what is being considered is whether the leave in line given to family members joining the sponsor should be differentiated in some way from the sponsor's leave for the purposes of policy and practice on refugee family reunion, having regard to the matters addressed in *MS (Somalia) & Ors v Secretary of State for the Home Department* [2010] EWCA Civ 1236. However, the position adopted by the Court of Appeal may in certain cases introduce an effective bar to the sponsor being reunited with his or her family, since family members may be faced with an invidious choice of deciding with which of their family to remain. Given the circumstances in which many of these family members may find themselves, by reason of what has led to the family becoming disunited, there will often be compelling humanitarian reasons why such a choice should not be demanded.

Moreover, it is necessary to consider the persecution or other serious harm to which the family is at risk by reason of the risk to the sponsor – whether by way of persecution or harms that may be directed at the other family members by reason of their relationship to the sponsor or the persecution or harm caused to those family members by the loss or harm that may be caused to their family member (i.e. the sponsor). The position adopted by the Court of Appeal, which the UK Border Agency is not obliged to follow, may produce additional administrative burdens to the UK Border Agency. Family members whose family unity is at risk may make their own asylum claims. Given the accepted risk to the sponsor, there would ordinarily be a strong *prima facie* claim for asylum. Nonetheless, receipt of such claims would add to the number of claims and add to the administrative cost of dealing with such claims, with the risk that the capacity of the UK Border Agency to consider and decide asylum claims is generally reduced leading to delays and backlogs. If in any particular case asylum were to be refused, this would likely only lead to additional pressure on the appeals process causing further risk of delays and backlogs at both the Tribunal and the UK Border Agency. Alternatively, if family reunion policy does not provide for such family members, this will simply leave individual cases to be advanced on Article 8 grounds. For reasons explained below, this is highly problematic given the poor quality of entry clearance decision-making in such cases.

In the circumstances, ILPA suggests that provision is expressly made, whether in the Rules or other policy for family reunion for these family members.

Family members to whom refugee family reunion is available

The current policy position is that, as regards an adult sponsor, the Immigration Rules provide for his or her pre-flight partner and/or children. The Secretary of State has maintained a policy, albeit for some time not publicly available on the UK Border Agency website, whereby other dependant family members may be permitted outside of the Rules to join the sponsor in the UK if there are compelling, compassionate circumstances. The Secretary of State has also maintained a discretionary approach to refugee family reunion in the case of separated child refugees.

It is our understanding that the UK Border Agency is considering whether to maintain the policy in respect of other dependant family members, and if not whether to simply discontinue the current policy or to introduce into the Rules provision for such family members. As regards the latter option, consideration is being given to paragraph 317 of the

current Rules. For this to operate, it will be necessary to address the difficulty highlighted in relation to post-flight family members which results from the current policy position whereby refugees (and those granted humanitarian protection) initially receive limited leave for a period of five years only (see below). We note that there would be two alternatives for addressing that difficulty – making provision in the Rules for refugee sponsors with limited leave or returning to the position whereby refugees are granted indefinite leave on recognition. This latter would be in line with the current approach to resettled refugees under the Gateway programme, would promote the interests of refugee integration by offering an immediate settled status on recognition and would constitute a significant administrative saving to the UK Border Agency by avoiding the, recently begun, task of dealing with settlement (protection) applications after the five years' period.

An additional matter that the UK Border Agency needs to give attention to is highlighted by the case of *R (Elmi) v Secretary of State for the Home Department* [2010] EWHC 2775 (Admin) concerning the waiving of an application fee.

Whichever option is adopted will not remove the need for the UK Border Agency to deal with such applications. As identified in the general observations (above), relevant cases concern fundamental human rights and international and domestic legal obligations. Whether the Secretary of State chooses to simply leave such matters to her general discretion or to maintain a policy (which should be in the public domain – whether in the Immigration Rules or otherwise available on the UK Border Agency website), entry clearance officers will surely receive such applications. Given the paucity of guidance available to entry clearance officers, and decision-making, in relation to Article 8, it is ILPA's firm position that the Secretary of State should maintain a policy concerning such matters. Given her current policy relates to circumstances described as compelling and compassionate, and (as highlighted above) relates to sponsors who cannot safely return to their countries of origin and who are therefore likely unable to maintain an effective family life elsewhere but in the UK, it is difficult to see how that could be effectively and unlawfully made any more limited; and ILPA would certainly oppose any attempt to limit it further.

As regards the situation of separated child refugees, the Secretary of State's position is currently unlawful and discriminatory for the reasons explained in ILPA's letter to Lin Homer of 24 February 2010 (to which we received a response dated 12 March 2010). We urge that this position should be remedied by making express provision in the Rules and policy for children to be able to benefit from refugee family reunion in like manner to adults.

FH (Iran) & post-flight family members

It is our understanding that the UK Border Agency is considering amendment to the Immigration Rules to address the effective lacuna identified in the case of *FH (Iran)* [2010] UKUT 275 (IAC). That case specifically concerned post-flight spouses, but we consider that there is equal reason to address the circumstances of those other partners and children, who also would currently be covered by the Rules but for the relationship being post-flight.

We note that it would be possible to address this in broadly two ways. Either, the Rules could expressly provide for the situation of post-flight family members – e.g. by amending the paragraphs identified by the Upper Tribunal (paragraphs 194 and 281 – though these paragraphs would be insufficient to address the circumstances of other partners or children), amending the current paragraphs relating to refugee family reunion (paragraphs 352A *et seq*, which currently are restricted to pre-flight relationships) or introducing new paragraphs into the Rules (e.g. to sit alongside paragraphs 352A *et seq*). Alternatively, the Secretary of State could revert to the position whereby, on recognition, refugees are granted indefinite leave. This latter option would require some policy position to cater for those refugees (and those granted humanitarian protection) currently with only five years' leave. Granting indefinite

leave would be in line with the current approach to resettled refugees under the Gateway programme, would promote the interests of refugee integration by offering an immediate settled status on recognition and would constitute a significant administrative saving to the UK Border Agency by avoiding the, recently begun, task of dealing with settlement (protection) applications after the five years' period. This would not necessitate any requirement to change the triggers for reconsideration of refugee leave, so the position would largely remain unchanged as concerns the UK Border Agency save for the avoidance of the current need for a formal application and decision process after a five years' fixed term.

The observation above relating to *R (Elmi) v Secretary of State for the Home Department* is equally relevant in relation to the circumstances of post-flight family members.

Concluding observations

We have highlighted above the general paucity of guidance and decision-making in relation to Article 8 of the 1950 European Convention on Human Rights. The Entry Clearance Guidance and Instructions, at least that which is publicly available via the UK Border Agency website, is limited to:

> ***ECB2.1 Human Rights***
>
> *The Human Rights Act came into effect on 2 October 2000. It made it a legal duty for public authorities to act compatibly with the European Convention on Human Rights.*
>
> *An ECO must take Human Rights' considerations into account when reaching a decision.*
>
> *UK Ministers believe that the Immigration Rules are compatible with the Human Rights Act. Any proper decision to refuse entry clearance should not be in breach of an individual's rights.*
>
> *Details of how to proceed if allegations are made of a breach of human rights are contained in Appeals (APL4.2).*

Not only does this fail to address Article 8 specifically, it directs entry clearance officers to understand that, while they are obliged to act in accordance with the Convention, they will do so merely by applying the Immigration Rules. This is correct as to their obligations but wrong as to the effect of simply applying the Rules. Since refugee family reunion cases are concerned with family life, this has an inevitable effect on the quality of decision-making in these cases. We note that UK Border Agency management information, which you have helpfully shared, indicates particularly high success rates on appeal in these cases (66% in 2008; 61% in 2009).

Case Study A

The following case study gives example of entry clearance officer's unwillingness or inability to apply human rights provisions, and indicates the importance of, so far as is possible, bringing the situation of refugee family reunion within the scope of the Rules or other policy:

Mrs U is an elderly refugee from a war-torn country in Africa. She lives with her three teenage and adult grandsons, all of them recognised as refugees. Her daughter, the mother of her grandchildren, her son-in-law and their two remaining children applied in a third country in 2007 for visas to come to the UK, under refugee family reunion provisions. They were refused, the visa officer recognising that there were strong compassionate circumstances, but not referring the case to the UK Border Agency as they should have

done and not considering the case properly on human rights grounds. This matter was not resolved until, with legal representation, an appeal was pursued before what was then the Asylum and Immigration Tribunal. Ultimately, the UK Border Agency conceded that family reunion should be granted.

We draw two broad conclusions from this. Firstly, there is an urgent need for better guidance to entry clearance officers. Secondly, having regard to our experience of entry clearance decision-making, the UK Border Agency would do well not to simply leave matters such as refugee family reunion in respect of other dependant relatives to consideration of Article 8. If that is done, it is likely to lead to increased litigation (at cost to the UK Border Agency, but also e.g. to the Ministry of Justice and in terms of court time). We note that our experience of entry clearance decision-making is generally in line with the experience of the Chief Inspector of the UK Border Agency, whose introduction to his most recent inspection report in respect of an entry clearance post (Guangzhou) with the following observation:

> "*I remain concerned about the damage that the focus on productivity is continuing to have on decision making quality. In all categories of applications sampled at this visa section, I discovered errors which showed carelessness and a lack of attention to detail. The UK Border Agency needs to ensure staff have the training and the time to make better quality decisions.*"

Case Study B

The following case study gives example of unnecessary litigation caused by poor entry clearance officer's decision-making, a problem which ILPA considers would likely be greatly exacerbated if such cases placed outside the scope of the Rules or other policy and left to the general consideration of the Secretary of State's discretion and Article 8:

T is refugee. Her legal representatives made a straightforward application for Entry Clearance under the Family Reunion provisions for her two minor children. The applications were refused on the basis that there was no evidence that the family had resided together as a unit prior to T's flight. T appealed the decision. Due to the distress the continued separation from her children was having on T, a request was made to the First-tier Tribunal to expedite T's appeal hearing. This was done and the appeal allowed on the day of the hearing.

Case Study C

The following case study gives another example of the extent of litigation caused in some of these cases, here where refugee family reunion was sought for a relative other than the partner or child of the refugee sponsor:

H is the elderly dependant mother of a refugee sponsor in the UK. H lived unlawfully in Addis Ababa, Ethiopia. H and the sponsor had been separated due to the displacement caused by the civil war in Somalia. They had lived together as part of the same family unit before they were forced to flee due to persecution. The sponsor was raped and beaten by clan militia on Mogadishu so had no option but to leave. The sponsor managed to flee to the UK and was recognised as a refugee. M remained in Addis Ababa. M submitted her own application without legal assistance in 2006 and the application was refused. The sponsor sought legal aid solicitors' assistance with the appeal and the appeal was in the Tribunal between 2007 and 2009. The matter was remitted back to the Entry Clearance Officer by the Tribunal on more than one occasion and entry clearance was eventually granted in summer 2010 following lengthy litigation and threat of judicial review.

Having regard to the fundamental matters of human rights and international and domestic obligations highlighted in our general observations (above), there are strong reasons to avoid such an increase in litigation by providing, whether in the Rules or other policy, for the circumstances of other dependant family members of refugee sponsors, family members of separated refugee children and post-flight family members.

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Chair
ILPA 31 January 2010