Submission from ILPA to the Joint Committee on Human Rights

Review of the Government's response to judgments identifying breaches of human rights in the UK

Summary

In this submission we have drawn particular attention to the Joint Committee's concern, and encouragement to the Government, that the Government needs to make much greater effort to ensure compliance with human rights obligations by ensuring full implementation of court judgments. The Joint Committee has identified rightly that such an approach demands more than giving speedy and full effect to a judgment in any particular case, but to ensuring that its effect is fully implemented to the benefit of others and that wider lessons are learned from judgments so that both identical and similar (or otherwise predictable) violations of human rights do not occur in later cases.

With that in mind, we have highlighted a number of judgments and areas of concern where the wider implications of the judgments in *R (Baiai & Ors)*, one of the cases that the Joint Committee has given particular attention to, have not been appreciated or addressed. Most of these matters concern Article 8 (the right to respect for private and family life).

The other area to which we give particular attention in this submission concerns the exercise of powers of immigration detention, particularly in connection with foreign nationals who have served prison sentences in the UK and with those who continue to suffer immigration detention for periods of many months, or in some cases years.

We have returned to some of the matters which we have raised with the Joint Committee previously – in particular, the UK Border Agency's use, sharing and retention of personal data. We have also drawn to the Joint Committee's attention the need for close attention to be paid to the question of accessibility of Legal Aid provision of sufficiently high quality so as to ensure that human rights, which are the preserve of all but often in practice the protection of the most vulnerable, are truly available to all.

Introduction

ILPA is a professional association with some 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 and providing evidence-based research and opinion. ILPA is represented on numerous government

and other stakeholder and advisory groups and has given both written and oral evidence to many parliamentary committees, including the Joint Committee on Human Rights.

This Submission is provided in response to the Joint Committee's invitation of 10 September 2010 and addresses the Government's response to the Joint Committee's Fifteenth Report of 2009-10 (Cm 7892) of July 2010 before providing some additional observations on particular human rights judgments, some identified by the Joint Committee and some not, and closing with some general observations.

The Government's response to the Joint Committee's Fifteenth Report of 2009-10 (Cm 7892)

The Government's response generally focuses narrowly on instances of rulings by the European Court of Human Rights of violations by the UK and of declarations in domestic courts of incompatibility, and the UK's record in implementing such rulings. No doubt, those discrete matters are of great significance. As the response notes "[a] *common feature of these judgments is that their implementation usually requires changes to legislation, policy or practice, or a combination thereof*". However, there are numerous other examples that may be cited of decisions of domestic courts and tribunals, which require changes to policy or practice and, sometimes, legislation; and the Government's record in relation to human rights compliance cannot simply be measured by reference to its response to judgments of the European Court and domestic declarations of incompatibility.

In its Fifteenth Report of 2009-10, *Enhancing Parliament's role in relation to human rights judgments* (HL 85/HC 455) of March 2010, the Joint Committee expressed particular concern at the Government's "*current approach of 'minimal compliance' with specific judgments*". At that time, the Joint Committee published, as an annex to its report, *Guidance for Departments on Responding to Court Judgments on Human Rights*, in which it expanded this concern:

> ***Full implementation***
>
> *27. When deciding what remedial action is required the Committee expects the Government to demonstrate a commitment to full implementation rather than minimal compliance with court judgments. The Committee therefore expects the remedial action proposed by the Government not only to prevent a repeat of identical violations in the future but also to prevent future violations which are predictable as a result of the judgment in question.*

ILPA strongly supports the position of the Joint Committee. Our experience of the UK Border Agency and Home Office was explained in our submission to the Joint Committee in September 2009, which is included among the written evidence published within the Fifteenth Report of 2009-10:

> "*...in many instances, the UK Border Agency has:*
>
> - *failed to give effect to judgments of the courts in a timely manner, or in some cases, at all*

- *failed to ensure consistency of approach – conceding one case on a particular point, only to decide and/or fight another on the same point*
- *used secret and unpublished instructions, including unlawful instructions.*
- *failed to respect principles of fairness and as to the conduct of legal proceedings.*"

More generally, we observed at that time:

> "*Human rights cannot in and of itself bear the full weight of what the Committee described in its Annual Report 2008 as '...the rule of law, or the democratic settlement within a State.*"'

At the time, ILPA complained (and gave examples to support that complaint) that the approach of the UK Border Agency and Home Office was often one of minimal, delayed and/or no compliance with court judgments. Over the last 12 months, regrettably, our experience is that little has changed. One possible change is suggested by the approach in recent months to the judgments in *Pankina & Ors v Secretary of State for the Home Department*[1], *R (ZO(Somalia) & Anor) v Secretary of State for the Home Department*[2] and *ZN (Afghanistan) & Ors v Entry Clearance Officer*[3] (which are each addressed below). However, this change is not all to the good, for while it gives some indication of a greater willingness, perhaps particularly at Ministerial level, to respond rather than to delay in the face of court judgments, the responses have generally been strikingly minimalistic in terms of compliance, and indeed have in some cases been simply to act to reverse the effect of the decision of the court with little or no concern or appreciation of the human rights implications of so doing.

Accordingly, ILPA encourages the Joint Committee to pursue the Government in relation to the guidance annexed to its Fifteenth Report of 2009-10; and particularly that part of the guidance concerned with 'full implementation' with a view to encouraging the Government to give effect to a changed approach whereby Government takes early action to give full effect to court judgments and to understand the wider implications of those judgments by avoiding repeated identical violations of human rights and preventing future predictable, while not identical, violations.

With this in mind, we have considered the Government's response to the Joint Committee[4]:

> "*...the Ministry of Justice is also considering the need for further guidance for Government departments regarding the implementation of adverse judgments. Should a decision to develop such guidance be taken, the guidance offered by the Joint Committee as part of their report will be taken into account during the drafting process.*"

---

[1] [2010] EWCA Civ 719
[2] [2010] UKSC 36; [2009] EWCA Civ 442
[3] [2010] UKSC 21
[4] p33 of the Government's response – *Responding to human rights judgments: Government Response to the Joint Committee on Human Rights 2009-10*, Ministry of Justice (Cm 7892), July 2010

That is a disappointingly lukewarm response. Considered in the context of the Government's proposal to produce an annual report, which in principal we would support, our concern is that the Government continues to show little appetite for addressing the substance of the Joint Committee's recommendation, which is that there be a fundamental change in approach to human rights on the part of Government such that compliance is not seen simply and somewhat grudgingly as the duty to implement the judgment of the European Court or remedy declarations of incompatibility by domestic courts; but that it be seen as a fundamentally proactive duty, informed by decisions of courts, European and domestic, with the positive effect of both reducing instances of human rights violation and the burden of litigation on the courts, litigants and, indeed, the taxpayer.

Additional observations regarding recent judgments concerning human rights

Under discrete subheadings below, we consider specific cases, some specifically identified by the Joint Committee and some not. We consider many of these cases for the purposes of identifying their potential wider application, having regard to the Joint Committee's position, with which we agree, that the Government should be acting so as to remedy any immediate violation, prevent repeat violations and prevent future violations of a different nature but which may be predictable having regard to the court's ruling.

Case of *A & Ors v UK*[5]

The Grand Chamber considered a number of matters relating to Articles 3, 5 and 6. We, however, wish to highlight two matters. Firstly, at paragraph 130, the Grand Chamber explained, in assessing the Article 3 claims before it:

> "*The Court considers that the uncertainty regarding their position and the fear of indefinite detention must, undoubtedly, have caused the applicants great anxiety and distress, as it would virtually any detainee in their position. Furthermore, it is probable that the stress was sufficiently serious and enduring to affect the mental health of certain of the applicants...*"

Ultimately, the Grand Chamber did not find there to have been any violation of the applicants' Article 3 rights. Nonetheless, the Grand Chamber's observations are salient in relation to the use by the UK Border Agency of immigration detention powers in recent years, during which the numbers of detainees held for periods of years under these powers and the length of such detention has significantly increased. In January 2009, the London Detainee Support Group (LDSG) published a report on the use of such 'indefinite' detention[6]. The report records that[7]:

> "*London Detainee Support Group has over the last 20 months supported 188 people who have been detained for more than a year. Only 18% have been deported.*"

---

[5] Application 3455/05, Grand Chamber, 19 February 2009
[6] *Detained Lives* – the report is available at: http://www.detainedlives.org/
[7] p5, Executive Summary of *Detained Lives op cit*

In September 2010, LDSG published a further report[8]. In this report, LDSG followed-up on what had happened to the 188 people they had originally reported upon. The report records[9]:

> "*Twenty months on, the evidence confirms what was suspected at the time: indefinite detention usually does not lead to deportation. If deportation has not been possible after a year, it is unlikely to become possible later. A full 57% of the indefinite detainees surveyed in the report have been released. They have lost years of their lives in detention to no purpose. Only a third of the detainees were deported. The detainees have been held for a total of 399 years, at a cost to the taxpayer of over £27 million.*"

Returning to the Grand Chamber's judgment, the second matter we wish to highlight was explained at paragraph 167 of the judgment, in assessing part of the Article 5 claims before the court:

> "*There was no evidence that during the period of the applicants' detention there was, except in respect of the second and fourth applicants, any realistic prospect of their being expelled without this giving rise to a real risk of ill-treatment contrary to Article 3. Indeed, the first applicant is stateless and the Government have not produced any evidence to suggest that there was another State willing to accept him... In these circumstances, the Court does not consider that the respondent Government's policy of keeping the possibility of deporting the applicants 'under active review' was sufficiently certain or determinative to amount to 'action... being taken with a view to deportation'.*"

The Grand Chamber did find a violation of Article 5.1 in that the applicants had been deprived of their liberty for no reason within the permitted reasons. In this regard, the Grand Chamber observed at paragraph 171:

> "*The Court does not accept the Government's argument that Article 5.1 permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from a terrorist threat.*"

We note that many of those who have been held in immigration detention for periods of one or more years, over recent years, have been persons who have served a criminal sentence in the UK. The UK Border Agency may have given notice of an intention to deport them; and some of them will be subject to the 'automatic deportation' regime introduced in August 2008 on the commencement of provisions of the UK Borders Act 2007. Nonetheless, Article 5.1 provides no greater scope for any balance to be struck between the individual's right to liberty and what the Secretary of State may argue to be the State's interest in protecting its population against non-terrorist, criminal threats.

These cases have led to considerable litigation before the Administrative Court and Court of Appeal, some of which is reviewed in the LDSG reports. Rather than

---

[8] *No Return, No Release, No Reason* – the report is available at: http://www.detainedlives.org/

[9] p3, Executive Summary of *No Return, No Release, No Reason op cit*

seeking to review all of this litigation ourselves, we shall content ourselves with recalling the following from our September 2009 submission to the Joint Committee:

> "*ILPA draws attention to violations of the right to liberty resulting from detention under immigration powers and the way in which individuals are having to litigate to assert these rights rather than the UK Border Agency learning the lessons of precedent.*"

Just over a year on, our concern and the reasons for it are not diminished. However, we close these observations with reference to the Court of Appeal's judgment in *Muuse v Secretary of State for the Home Department*[10]. In this case a Dutch national, of Somali origin, was unlawfully detained for more than four months for the purpose of a deportation, in respect of which no notice papers had been served and, in any event, would have been unlawful; and despite the Home Office having proof of Mr Muuse's Dutch nationality while delaying and demanding he supply such proof. The Court of Appeal concluded that his detention "*was not merely unconstitutional but an arbitrary exercise of executive power which was outrageous*" and, dismissing the Secretary of State's appeal against the trial judge's award of exemplary damages, held that:

> "*Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages.*"

In responding to concerns raised by ILPA in the wake of this judgment, the UK Border Agency explained to us[11]:

> "*It is recognised that there were significant failings in the management of this Claimant's detention in 2006 which must be considered in the context of the heightened public interest in the deportation of foreign national prisoners at that time. The Agency was still in the early stages of responding to this public and political interest which began early that year and it is accepted that mistakes were made during that period...*"

While we have no grounds for disputing the accuracy of this analysis of the causes of what the Court of Appeal described as "*outrageous*" behaviour on the part of what is now the UK Border Agency, it raises a profound concern. Government must surely recognise the need for particular care in respect of human rights when responding to public and political events of the like described. Indeed, the Grand Chamber held as much in *Case of A* in the arguably much more serious circumstances it was contemplating where it said at paragraph 126:

> "*The Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress*

[10] [2010] EWCA Civ 453
[11] Letter from Lin Homer to ILPA of 21 May 2010

that Article 3 enshrines one of the most fundamental values of democratic societies."

Case of Gillan & Quinton v UK[12]

We draw attention to *Case of Gillan & Quinton* as we consider that the Joint Committee may be interested to enquire of the Government how this judgment, which concerns stop and search powers introduced by the Terrorism Act 2000, and which the European Court found to be arbitrary and not in accordance with law for the purposes of Article 8, has informed training, guidance and practice of immigration officers in the exercise of powers in the UK in seeking to identify illegal entrants and overstayers.

R (Baiai & Ors) v Secretary of State for the Home Department[13]

ILPA responded on 6 October 2010 to the Joint Committee's call for evidence in relation to the Remedial Order repealing the Certificate of Approval Scheme. As indicated there, we welcome the Remedial Order and are satisfied that the Order will remove the human rights incompatibility the scheme had introduced. We asked "*that the quickest possible process be used now in order to remove the discriminatory scheme*" because the scheme had already been in place for more than five years, with judgments from the Court of Appeal in 2007 and the House of Lords in 2008 highlighting the incompatibility of the scheme.

Moreover, we explained that we considered the introduction of the scheme was "*indicative of the tendency of the Secretary of State for the Home Department to make immigration law without adequate regard to compatibility with the Convention*" since "[w]*hen the scheme was first proposed, it was clear to those who had experience of immigration law and the European Convention of Human Rights that the scheme was discriminatory*".

We also gave some short explanation of the impact of the longstanding failure to implement the courts' judgments and effectively remedy the ongoing human rights violation:

> "*Following the decision of the House of Lords (and the Court of Appeal before that), it has been possible for an individual to obtain a Certificate of Approval whatever their immigration status in the United Kingdom so long as the Secretary of State was satisfied that the relationship is genuine. However, from our members, we are aware that this position was not widely understood by the migrant population and that some of the deterrent effect of the Certificate of Approval scheme remained.*
>
> "*Individuals with sound legal advice would know that they could make a Certificate of Approval application and be successful but for many others the belief remained that they would be denied permission to marry...*
>
> "*ILPA members also found that applications for Certificates of Approval made by their clients without immigration status took a very long time to consider, adding to*

[12] Application No. 4158/05, 12 May 2009
[13] [2008] UKHL 53; [2007] EWCA Civ 478

the deterrent effect. Delays increased after April 2009, when the UKBA stopped charging fees."

Immigration fees and immigration requirements and human rights (in particular, the right to respect for private and family life)

Lord Bingham of Cornhill, in his opinion in *R (Baiai & Ors)*, made the following observation:

> "*It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry which is in issue. A fee of £295 (£590 for a couple both subject to immigration control) could be expected to have that effect.*"

Baroness Hale of Richmond also drew attention to this concern. The other members of the House of Lords merely expressed agreement with the opinions of Lord Bingham and Baroness Hale, and hence offered no particular observations in relation to fees.

Of course, the substance of the observation about fees is not restricted to fees. It is a general point that any requirement may restrict or preclude a particular applicant's enjoyment of a particular right. In *R (Baiai & Ors)*, the right in question was the right to marry, but the point is not restricted to that right. In relation to many immigration applications, the right to respect for private and family life may be in issue, and ILPA highlighted concerns regarding this in our response to the Joint Committee's call for evidence in relation to the Remedial Order:

> "*From 29 November 2010, the Secretary of State will introduce compulsory English language requirements for individuals applying for visas to the United Kingdom to be with their settled partners. There are clear implications for human rights and race relations. Clearly, English language tests will have far greater impact on spouses from non-English speaking countries than those from the majority-English speaking countries which are exempted from this requirement...*
>
> "*All bodies, including this Committee, should urge the Secretary of State to postpone such tests until further consideration has been given. It is far better to deal with such issues upfront than wait for a declaration of incompatibility from the Courts.*
>
> "*The Secretary of State has also published proposals to increase the fees charged for many immigration applications, raising the fees for marriage applications in the UK to £500 and to £750 for those applying for entry clearance abroad, and to £900 for settlement applications after the two year probationary period. These fees are excessive and will place a further barrier on family reunion.*"

As regards the introduction of pre-entry English language testing, the equalities impact assessment[14] recalls concerns expressed by respondents to the July 2008 consultation *Marriage Visas: the Way forward*[15] that such testing would discriminate

[14] This is available at: http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ia/english-for-partners/

[15] This is available at: http://webarchive.nationalarchives.gov.uk/20100422120657/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/preentryenglishrequirement/

against certain nationalities. However, the impact assessment does not address, still less answer, these concerns. The impact assessment repeatedly makes claims that the introduction of pre-entry English language testing will benefit applicants by broadening opportunities for them and their families, particularly children, and assisting their integration. Of course, none of these benefits can be achieved if the introduction of such testing simply precludes an individual from joining his or her partner/family in the UK because he or she cannot satisfy the new requirement. It is said in the impact assessment, in the short section considering human rights:

> "*The rules change could have an impact on Article 8 – right to respect for private and family life – of the European Convention on Human Rights (ECHR) if families are separated because a spouse is unable to meet the English requirement.*
>
> "*Any impact here is mitigated by the fact that UKBA caseworkers are required to take Article 8 into account in making decisions...*"

We find that last observation difficult to credit, since our experience is that decision-making in relation to Article 8 claims is especially poor[16]. This is perhaps unsurprising given the paucity of guidance that has been available to decision-makers at the UK Border Agency. The Immigration Directorate Instructions, Chapter 1, Section 10 (Human Rights), December 2006 is plainly inadequate to assist with such a decision. The area of the website where this instruction is contained[17] provides a link to a more detailed instruction regarding Article 8, but this is an Asylum Instruction and is, therefore, expressly concerned with questions of the lawfulness of removal from the UK. The Entry Clearance Guidance (i.e. the guidance that decision-makers dealing with applications where the pre-entry English language test will be relevant) is even poorer[18]. This barely acknowledges the significance of human rights considerations. The most detailed consideration, among what is publicly available, 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.*

---

[16] Over the summer 2009 ILPA, with others, gave consideration to proposals of the UK Border Agency to introduce a pro-forma for the making of fresh asylum and human rights claims. In the course of that the UK Border Agency produced a dummy case scenario to indicate how the proposed form might be completed and how this might assist decision-makers. A dummy decision letter was produced also. ILPA views on both the proposed form and dummy case were provided by way of correspondence September 2009 (which is available in the Submissions section of our website at www.ilpa.org.uk). The dummy decision in relation to Article 8 was poor, and had it been a real case in our view plainly open to judicial review. However, decisions on entry clearance applications, which we have seen, are of a considerably poorer standard, often giving no more than a standard line response that the decision-maker has concluded that the decision does not interfere with the claimant's human rights/Article 8 rights without any attempt to analysis the facts of the claim by reference to the claimant's private and family life or even mentioning proportionality, still less attempting to apply it.

[17] See http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter1/

[18] Entry Clearance Guidance is available at: http://www.ukvisas.gov.uk/en/ecg/

> *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).*

Thus, consistent with the impact assessment, the guidance confirms that decision-makers are required to take human rights, including Article 8, into account. However, no guidance is given on how to do this save that it is stated very clearly that Ministers believe the Rules are compatible with human rights obligations. The natural, perhaps only reasonable, understanding of that available to a decision-maker would be to think that whatever is in the Rules adequately deals with any human rights considerations that may arise or be advanced. Thus, the guidance ensures that the requirement that Article 8 is taken into account provides no mitigation whatsoever of the potential incompatibility identified by the impact assessment.

The impact assessment was published on 1 October 2010. As regards its consideration of human rights, having regard to the guidance given to entry clearance officers, it is difficult to consider it to be anything but glib. Certainly, it indicates no improvement in, or cause for optimism about, the consideration of human rights by the UK Border Agency. This despite the fact that that agency ought to be familiar with human rights considerations, including Article 8, in view of the obvious relation of human rights to many of the decisions it makes and the frequent consideration of human rights in the appeals to which it is a party; and indeed the high proportion of judgments of the European Court and declarations of incompatibility by domestic courts which relate to its work and that of its parent department, the Home Office.

As regards fees, the refusal to waive an entry clearance application fee in respect of a seventeen years old Somali girl, and orphan, living in Ethiopia and seeking to join her uncle in the UK came before the Administrative Court in *R (QB by her litigation friend MB) v Secretary of State for the Home Department*[19]. The discretion to waive entry clearance fees had been, and remains, removed from entry clearance officers. While the discretion may be exercised by the Secretary of State, for this to be exercised an entry clearance officer would have to refer the matter to a decision-maker in the UK. It is understood that, in order for consideration even to be given to waiving of the fee, judicial review proceedings were necessary, which resulted in the quashing of the original decision. It is noteworthy that this matter came before the Administrative Court a year after the recognition in *R (Baiai & Ors)* of the potential for a fee to be incompatible with human rights obligations, yet the case appears to reveal an absence of any effective means for such circumstances to be considered in entry clearance applications.

ZN (Afghanistan) & Ors v Entry Clearance Officer

[19] [2010] EWHC 483 (Admin)

The Supreme Court handed down judgment in this matter, ruling that a refugee who had naturalised as a British citizen, still fell within the ambit of the Rules by which his or her partner or children might apply for family reunion without any maintenance and accommodation requirement being met, on 12 May 2010. The judgment plainly relates to Article 8 (right to respect for family life). While the judgment required a change in practice and guidance, it did not require any change in the Rules. Nonetheless, on 1 October 2010 the Secretary of State laid before Parliament Statement of Changes in Immigration Rules (Cm 7944) to reverse the effect of the Supreme Court judgment from 22 October 2010. While, therefore, this constitutes a different approach to court judgments to the tendency to ignore and delay shown in the past, it is not a welcome change. The Explanatory Memorandum to the Statement of Changes explained that no consultation or impact assessment had been undertaken because:

> "*...consultation... would be disproportionate given the minor nature of the changes and the fact that they reinforce rather than change existing policy...* [and] *there are no financial implications involved.*"

The explanation is misconceived. The changes may affect a relatively small number of people – e.g. refugees who are either so traumatised that for several years they are unable to face making efforts to trace family or take steps for family reunion, or those for whom family remain missing for several years (possibly feared dead) but are ultimately located – but the impact may affect them very severely if they are unable to meet requirements that they maintain and accommodate their partner and/or children without recourse to public funds by effectively precluding family reunion (a plain interference with the right to respect for family life). The changes are not, therefore, minor. Moreover, the changes do not merely reinforce existing policy. They change it. Existing policy is that set out in the Rules, as now explained by the Supreme Court (and long litigated).

R (ZO (Somalia) & Anor) v Secretary of State for the Home Department

In our submission to the Joint Committee in September 2009, we briefly highlighted this case, which concerns permission to work for asylum-seekers, who have been waiting for 12 months or longer for a decision by the UK Border Agency on their original or fresh asylum claims (a matter within the ambit of Article 8 and the right to respect for private life). In May 2009, the Court of Appeal found in favour of the claimants. The Secretary of State acted on that decision in giving permission to work to the claimants, but refused to apply the judgment to others – necessitating a number of judicial review applications – pending an appeal to the House of Lords. Judgment was ultimately given by the Supreme Court, upholding the decision of the Court of Appeal, on 28 July 2010. On 19 August 2010, the Secretary of State laid before Parliament Statement of Changes in Immigration Rules (Cm 7929) to restrict this provision from 9 September 2010 such that permission to work would only be granted for jobs on the UK Border Agency's highly restrictive shortage occupation list. The equalities impact assessment, itself dated 9 September 2010 (i.e. after the Statement of Changes was laid), simply states, in relation to human rights: "*We are confident that the policy complies with the ECHR.*" This is despite the fact, which ILPA has raised with the UK Border Agency, that the effect of the restriction is highly likely to effectively preclude any asylum-seeker, who has been waiting for more than 12 months for a decision, of the benefit that he or she is intended to be given (in

European Union law[20]) of permission to work because the shortage occupation list is so restrictive.

Essentially, while the Government acted fast in response to the Supreme Court judgment, its response has been to rob the judgment of its effect. Moreover, the Statement of Changes included transitional provisions, from which asylum-seekers waiting for 12 months or longer for a decision on a fresh claim (the class in respect of whom the case was brought) were expressly excluded; and while waiting for the changes to take effect the UK Border Agency stated explicitly that it would not consider applications for permission to work from such persons. Effectively, therefore, the UK Border Agency refused to implement the judgment for the class of persons it benefited – even while the legal position remained unchanged by the provisions of the Statement of Changes.

Pankina & Ors v Secretary of State for the Home Department

In *Pankina*, the Court of Appeal considered the legal status of the Immigration Rules and the legality of the Secretary of State introducing additional requirements to those set out in the Rules in guidance issued by the UK Border Agency. In short, the Court of Appeal ruled that the practice of introducing additional requirements outside of the Rules was unlawful because this was contrary to the requirement for Parliamentary scrutiny by way of Statements of Changes in Immigration Rules being laid before Parliament, and which either House could disapprove by way of negative resolution, as provided for by section 3(2) of the Immigration Act 1971.

However, the Court of Appeal also considered the relationship between Article 8 and the Rules in the context of a failure to meet a requirement of the Rules, which might have the effect of interfering with a claimant's private or family life in circumstances where he or she may be required to leave the UK, despite having been effectively settled in the UK for several years. The Court of Appeal considered that the nature and significance of the particular requirement would have to be considered, but cautioned that:

> "*The Home Office has to exercise some common sense about this if it is not to make decisions which disproportionately deny respect to the private and family lives of graduates who by definition have been settled here for some years and are otherwise eligible for Tier 1 entry.*"

There is no reason to consider that caution to relate solely to graduates or applications under Tier 1 of the Points-Based System, as opposed to any other aspect of the Immigration Rules. The Court of Appeal's judgment was given on 23 June 2010. On 22 July 2010, Statement of Changes in Immigration Rules (HC 382) was laid before Parliament making changes to bring the requirements that had been set out in guidance into the Rules in accordance with the Court of Appeal's judgment. However, this has done nothing to address the Court of Appeal's concern regarding the need for common sense in decision-making where this has potential to interfere with respect for private and family life. As noted above, the

[20] Article 11 of Council Directive of 27 January 2003 (2003/9/EC) (Reception of Asylum Seekers)

guidance available to UK Border Agency decision-makers is poor, and decisions in relation to Article 8 have often been especially poor.

HJ (Iran) & HT (Cameroon) v Secretary of State for the Home Department[21]

In July 2010, the Supreme Court gave judgment in this case overturning previous UK jurisprudence that had supported the position that gay and lesbian asylum-seekers could be required to exercise discretion in order to avoid persecution on return to their countries of origin. That position has been one long advanced by the UK Border Agency, with the support of the immigration tribunals, and been the reason for many refusals of asylum and dismissals of asylum appeals in the past.

The judgment shows, therefore, that incorrect reasons have been given for refusing some asylum claims; and that, in some cases, decisions have been reached that are incompatible with the 1951 UN Convention relating to the Status of Refugees and similarly with Article 3 (right to be free from torture etc.). ILPA has pressed the UK Border Agency concerning the continued absence of guidance, or development of any mechanism, for ensuring that wrongly made decisions in respect of persons who are still in the UK are not enforced by removing persons to countries in which the judgment now shows them to be at risk of persecution/Article 3 mistreatment or shows that that on the strength of previous decisions it cannot safely be concluded that the person is not at such risk. To date, the UK Border Agency has not addressed this, though we understand that the agency is currently considering our recent correspondence on this matter[22]. While we look forward to a response to our correspondence, it is nonetheless symptomatic of the concern that the Joint Committee has expressed of a minimalist, or worse, approach to giving effect to human rights and human rights judgments that the UK Border Agency did not immediately foresee (or act upon any such foresight) the need to put guidance and mechanisms in place to ensure persons, who had been refused asylum for reasons now shown to be incorrect, were not subject to enforcement action, including detention and removal.

Case of S & Marper v UK[23]

In our September 2009 submission to the Joint Committee, we drew attention to this case. We noted:

> "*It is important that the Government make efforts to identify the wider implications of human rights judgments, so that those within their wider ambit do not have to bring separate cases to the European Court of Human Rights. ILPA urges the Committee to press the government on the implications of the* Marper *case for persons whose data is obtained under immigration act powers...*"

ILPA continues to be concerned about the UK Border Agency's use, sharing, storage and retention of personal data. For example, in June 2010, we wrote to the UK

---

[21] [2010] UKSC 31

[22] ILPA wrote to the UK Border Agency on 15 October 2010. Prior to this, ILPA has raised the same concerns with the UK Border Agency at formal stakeholder meetings in July and September.

[23] Application Nos. 30562/04, 4 December 2008

Border Agency concerning the agency's proposal to become members of CIFAS, which describes itself in the following terms[24]:

> *CIFAS is a not for profit Membership association representing the private and public sectors and operating in the public interest. CIFAS is dedicated to the identification of financial crime and the prevention of fraud and staff fraud.*
>
> *CIFAS provides a range of fraud prevention services to its Members, including a fraud avoidance system used by more than 260 UK organisations across a number of business sectors, as well as by public sector bodies.*

In July 2010, we received a response from Damian Green MP, Minister for Immigration, in which he explained that the "*UK Border Agency CIFAS membership project is presently under review*". We understand the matter to be still under review. However, the prospect of personal data held by the UK Border Agency being shared with a wide CIFAS membership[25] provides another example of the type of concerns we raised in connection with *Case of Marper* in our September 2009 submission.

Other matters

ILPA raised concerns last year, and our concerns continue, at the substantial delays in issuing residence documents to non-EEA national family members, contrary to Article 8(2) of EU Directive 2004/38[26] which has been transposed into UK law through the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Article 8(2) of the Directive provides that for EU nationals exercising free movement rights in the UK, three months after arrival, they are entitled to a registration certificate which "shall be issued *immediately*" (emphasis added). For third country national family members of an EU national Article 10 applies, which states that these persons shall be issued a residence card "*no later than six months after the date on which they submit the application.*" Further the article states "*A certificate of application for a residence card shall be issued immediately.*"

---

[24] See http://www.cifas.org.uk/default.asp?edit_id=564-28

[25] See http://www.cifas.org.uk/default.asp?edit_id=721-28

[26] Article 8(2) of the Directive provides that for EU nationals exercising free movement rights in the UK, three months after arrival, they are entitled to a registration certificate which "shall be issued *immediately*" (emphasis added). For third country national family members of an EU national Article 10 applies, which states that these persons shall be issued a Residence card "no later than six months after the date on which they submit the application". Further the article states "A certificate of application for a residence card shall be issued immediately." As the Directive consolidates the previously applying EU law, it builds on the rights which its beneficiaries already had acquired under the previous law, see C-127/08 *Metock* para 59. "The same interpretation must be adopted *a fortiori* with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to 'strengthen the right of free movement and residence of all Union citizens', so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals." Under the previous Directive (64/221) article 5(1) stated, "A decision to grant or to refuse a first residence permit shall be taken as soon as possible and in any event not later than six months from the date of application for the permit." Thus the six month long stop in Article 10(1) Directive 2004/38 must be read as exactly that: a long stop where issues of public policy or security arise, not as a norm.

Finally, we must draw to the attention of the Joint Committee our concerns regarding Legal Aid. The capacity for individuals to bring their complaints of human rights violations before the courts, domestic and the European Court, is heavily dependent on the availability of Legal Aid and the quality of legal advice and representation which that supports. Many human rights matters relating to the conduct or decision-making of the UK Border Agency could not be brought without Legal Aid. The Joint Committee will be aware that Refugee and Migrant Justice, formerly the Refugee Legal Centre, went into administration earlier this year. The announcement of the results of this year's tenders for immigration and asylum Legal Aid contracts was subject to protracted delays, and the start date for contracts due to have commenced this month has been put back. The results of the tender process, that have been announced, have caused both concern and confusion. It is our understanding that these results would not provide national coverage for immigration and asylum Legal Aid. Several of those tendering for contracts have either been awarded no contract or very much smaller contracts than for they bid, raising questions as to the viability of their ultimately accepting such contracts. We also understand there to be ongoing challenges to the tender process. ILPA has long held and voiced concerns as to the inadequacy of access to Legal Aid provision of a good standard. The current situation merely compounds those concerns.

We highlight this here, without setting out the detail of our concerns (though we should be very pleased to do so)[27], simply to emphasis the precarious, current position. We consider this to be a matter for concern for the Joint Committee, since if Legal Aid provision is not accessible and or sufficient quality, many, particularly the most vulnerable, will be likely unable to seek judicial redress for any human rights violations they may suffer; and without the prospect of that judicial oversight, there may be a greater prospect that the executive is tempted to greater excesses at the expense of human rights in the interests of other policy objectives.

We also wish to draw to the Joint Committee's attention the impact that Government has on Legal Aid spend in that the greater the carelessness for human rights and other legal obligations, the greater the need for litigation, some of which necessarily supported by Legal Aid. In this regard, we highlight out longstanding dissatisfaction at the failure by the UK Border Agency to adopt a culture of undertaking Legal Aid (and wider court) impact assessments in relation to changes of policy and law, a matter we have repeatedly raised with the agency over several years but to little effect.

Concluding observations

[27] ILPA formal submissions/consultation responses over the last 12 months, which are each available on our website at www.ilpa.org.uk, include *Access to Justice Review*, 30 June 2010; *Legal Services Commission Management Awareness Process*, 14 June 2010; *Immigration Coding and Guidance*, 14 June 2010; *Legal Aid: Refocusing on Priority Cases*, 19 February 2010; *MoJ consultation – Funding Reform*, 6 November 2009; *MoJ consultation – Legal Aid: Refocusing on Priority Cases*, 8 October 2009. ILPA has also given extensive written evidence in the judicial review proceedings (*CMX & Ors v Legal Services Commission & Ors*, CO/6888/2010) concerning the administration of Refugee and Migrant Justice and the consequences of this for its then clients.

ILPA considers that it is fundamental to respect for the rule of law that the Government act as rapidly to give effect to the judgment of the courts as to give effect to the legislation that it has brought into force. It is open to the Government of the day to appeal a case in which it loses. It is open to the Government of the day to go to Parliament to seek to change the law to reverse a decision of the courts that it does not like. All too often a point of principle is decided against the UK Border Agency but each affected individual must litigate to obtain the application of that principle to his or her case. Many cannot and many, as a result, suffer or continue to suffer violations of their human rights. Where the UK Border Agency acknowledges that changes must be made it is unreasonably slow to make such changes and individuals suffer violations of their human rights in the interim. The result is lack of respect for the rule of law and irremediable, or ongoing, breaches of human rights.

Where, however, the Government does choose to go to Parliament to seek to change the law to reverse a decision of the courts, it is vital that the Government does not do so without proper regard to the human rights implications of so doing. As we have highlighted in this submission, while there have been some examples in recent months of the Government acting more quickly in response to certain judgments of the courts, where this has been done the human rights implications have either not been considered or given only cursory attention. This is no less a failure of implementation in the sense identified by the Joint Committee, discussed in this submission, as "*full implementation*".

Sophie Barrett-Brown
ILPA, Chair

22 October 2010