ILPA Submission to the UK Border Agency Review into ending the detention of children for immigration purposes:

Introduction

1. ILPA is a professional association with around 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 groups including the National Asylum Stakeholder Forum and its children subgroup.

2. ILPA has produced best practice guidance and undertaken research in connection with children and immigration, including *When is a child not a child? Asylum, age disputes and the process of age assessment* (May 2007), *Child first, migrant second: Ensuring that* every *child matters* (February 2006) and *Working with children and young people subject to immigration control: Guidelines for best practice* (November 2004). ILPA currently operates a refugee children's project, to provide training, guidance and other support to legal and other practitioners working with asylum-seeking children.

3. For ease of reference, 'the UK Border Agency' is used in this response to refer to the UK Border Agency and its predecessors (the Border and Immigration Agency and the Immigration and Nationality Directorate).

4. We are grateful for the opportunity given on 30 June 2010 to meet the Minister and officials to discuss the Review[1]. We have sought to reflect some of the discussions at that meeting in this response, though inevitably lack of time has restricted the degree to which we have been able to do so.

Overview of context and legal standards

5. On 12 May 2010, the Government published its initial coalition agreement. That agreement included the following commitment:

> "*We will end the detention of children for immigration purposes.*"

6. That commitment was restated when, on 20 May, the Government published the full agreement. Shortly thereafter, on 25 May, in the address on the Queen's Speech, the Prime Minister emphasised that commitment when he said:

> "*…after the Labour Government failed to act for so many years, we will end the incarceration of children for immigration purposes once and for all.*" (*Hansard*, HC 25 May 2010 : Column 49)

[1] Steve Symonds, ILPA Legal Officer represented ILPA at the meeting at 1530 hours with the Minister and David Wood, UK Border Agency Strategic Director for Criminality and Detention and Kristian Armstrong, UK Border Agency Children's Champion.

7. The Government is right to have made this commitment, and right to highlight the failure by the previous Government over so many years to end the practice of detaining children for immigration purposes. Detention is harmful, and there is now a significant body of expert evidence attesting to the particular harms it causes to children. Harmful effects are both immediate and long-term. These include harm to children, parents and families. The Royal College of General Practitioners, Royal College of Paediatrics and Child Health, the Royal College of Psychiatrists and the UK Faculty of Public Health describe both the generally harmful effect of detention upon children and particular harms arising from inadequate health and welfare provision in UK immigration removal centres:

> "*Almost all detained children suffer injury to their mental and physical health as a result of their detention, sometimes seriously. Many children experience the actual process of being detained as a new traumatising experience. Psychiatrists, paediatricians and GPs, as well as social workers and psychologists, frequently find evidence of harm, especially to psychological wellbeing as a result of the processes and conditions of detention. Reported child mental health difficulties include emotional and psychological regression, post traumatic stress disorder (PTSD), clinical depression and suicidal behaviour. Specific physical consequences include weight loss and inadequate pain relief for children with sickle cell disease. Children in detention are also placed at risk of harm due to poor access to specialist care, poor recording and availability of patient information, a failure to deliver routine childhood immunisation, and a failure to provide prophylaxis against malaria for children being returned to areas where malaria is endemic.*"[2]

8. The Children's Commissioner has also recently stated[3]:

> "*There is a growing body of evidence, not least from the medical Royal Colleges, that documents that detention has a profound and negative impact on children and young people.*"

9. In 2007, the Joint Committee on Human Rights recorded concerns of Her Majesty's Inspectorate of Prisons and Her Majesty's Chief Inspector of Prisons that "*detention itself compromises the welfare and development of children*" yet the inspectorate "*do not routinely find any evidence that the interests of the child are considered at all in making [the] initial detention decision*"[4]. The Committee concluded:

> "*258. We are concerned that the current process of detention does not consider the welfare of the child…*
> "*259. The detention of children for the purposes of immigration control is incompatible with children's right to liberty and is in breach of UK's international human right's* (sic) *obligations…*"[5]

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[2] Intercollegiate Briefing Paper: Significant Harm – the effects of administrative detention on the health of children, young people and their families, December 2009. The paper is available at: http://www.bbc.co.uk/blogs/thereporters/markeaston/images/intercollegiate_statement_dec09.pdf

[3] Executive Summary to the Children's Commissioner for England's 17 February 2010 follow up report to *The Arrest and Detention of Children Subject to Immigration Removal*, see: http://www.childrenscommissioner.gov.uk/content/publications/content_394

[4] Joint Committee on Human Rights Tenth Report of Session 2006-07, *The Treatment of Asylum Seekers*, 30 March 2007 HL 81-I/HC 60-I (paragraphs 239 and 243)

[5] *ibid*

10. The UK's immigration reservation to the 1989 UN Convention on the Rights of the Child ("the 1989 Convention") was withdrawn in November 2008. At the time, the UK Border Agency undertook no systematic review of its practices and policies so as to ensure compliance with the UK's obligations; and the previous Minister for Immigration stated that, apart from the code of practice on safeguarding children[6], which had been introduced around that time, "*no additional changes to legislation, guidance or practice are currently envisaged*"[7]. That constituted a profound lack of understanding of the obligations under the Convention. The current Review provides some opportunity to reverse that. In relation to the detention of children, the following obligations are key:

    - Article 3.1 requires that the "*best interests of the child shall be a primary consideration*" in all actions concerning children. It must be recalled that this sets a general standard stretching across all areas. It does not, as has sometimes been suggested by the UK Border Agency, set the limit of the UK's obligations. It is not sufficient, as has been done in the past, to rest engagement with the Convention standards upon the indefinite article to suggest that immigration control is, or is always, another primary consideration to be given equal weight in the UK Border Agency's actions.

    - Article 9.1 requires that "*a child shall not be separated from his or her parents against their will, except where competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child*". This entails a particularly strong example of where an approach that merely seeks to balance the UK Border Agency's interest in immigration control with the best interests of the child is not permissible. Separation of children can only be permitted where to do so is necessary, and that necessity must be for the singular purpose of achieving the best interests of the child.

    - Article 2.2 requires that "*the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members*". Use of detention as a means of deterrence or coercion is impermissible insofar as this constitutes punishment of or discrimination against the child. Similarly, reducing or excluding the child's rights, including such rights as access to legal representation and access to the courts by such practices as reducing the notice to be given of a family's removal, is impermissible insofar as this is used as a form of deterrence or coercion.

    - Article 12.2 requires that "*the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body*". Excluding, whether by policy or practice, a child's opportunity to be heard in connection with his or her removal, or that of his or her parents, is impermissible.

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[6] This has now been withdrawn with the coming into force of section 55 of the Borders, Citizenship and Immigration Act, but had been introduced under section 21 (now repealed) of the UK Borders Act 2007.

[7] *Hansard*, HC 24 November 2008 : Column 825W (*per* Phil Woolas MP)

- Article 37 prohibits unlawful or arbitrary detention of children. It further sets standards such that any detention of a child is only permissible "*as a measure of last resort*", must be "*for the shortest possible time*", is only permissible if the child is "*treated with humanity and… dignity…, and in a manner which takes into account the needs of persons of his or her age*" and must ensure "*prompt access to legal and other appropriate assistance*" including access to the court.

11. Since the withdrawal of the reservation to the 1989 Convention, the UK Border Agency has been made subject, by section 55 of the Borders, Citizenship and Immigration Act 2009, to the requirement "*to have regard to the need to safeguard and promote the welfare of children*" ("the section 55 duty"). ILPA commented upon a draft of the UK Border Agency guidance produced in support of the section 55 duty[8]:

    "*The emphasis in this guidance is on maintaining and justifying existing policies and practices with some added considerations about children in that continuing practice. It does not place children at the centre. It is of concern that the Guidance is generally couched in negative terms, about what is permissible rather than what is best practice and reads more about preserving the primacy of immigration functions rather than promoting the welfare of all children, especially in the sections concerned with detention and removal and about asylum processes. Detention is antithetical to child safeguarding and their welfare. The Guidance remains silent on the role of the UK Border Agency and the Secretary of State for the Home Department in the manner in which proceedings involving children are conducted before the appellate tribunal and courts.*"

12. Improvements were made to the guidance before it was brought into force. Nonetheless, the general concern remains that the UK Border Agency has responded to the section 55 duty by adopting a manner that is essentially defensive of prior policy and practice of the UK Border Agency rather than instructive of new obligations to safeguard and promote the welfare of children[9]. We note that the Chief Executive of the UK Border Agency, and other senior officials, have publicly stated their recognition that what is needed is 'a change of culture'[10]. Regrettably, the UK Border Agency has not, to date, taken the opportunity to fully embrace that need, as is evidenced by the tone and substance of much of the guidance. The UK Border Agency's

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[8] ILPA's response to draft statutory guidance on section 55, Borders, Citzenship and Immigration Act 2009 (children's welfare) of August 2009 is available in the 'Submissions' section of the ILPA website at www.ilpa.org.uk

[9] A very recent and stark example of this is demonstrated by the following, apparently standard, paragraph appearing in a reasons for refusal (or asylum) letter: '*Consideration has been given to the needs and welfare of your child as required under Section 55 of the Borders, Citizenship and Immigration Act 2009. It is not considered that removing you and your child from the UK would amount to a breach of Section 55.*' The paragraph tells the recipient nothing as to what was considered in relation to the child's safety and welfare, nor anything as to the reasons why the writer concluded that removal entailed no breach of the section 55 duty. Presumably, however, the writer considered there to be some importance in the inclusion of this paragraph; and the inference we would draw is that the writer (and/or whoever has produced this standard paragraph) considered it prudent to protect the decision to refuse asylum and give notice that the recipient and child are to be removed without any consideration as to whether or how the section 55 duty applied in the instant or any instant case.

[10] The Chief Executive, Lin Homer, emphasised this point at a roundtable discussion organised by the UK Border Agency on the afternoon of 11 April 2008, at which ILPA was represented by Steve Symonds, ILPA Legal Officer. That roundtable was to consider the code of practice requirement under section 21 of the UK Borders Act 2007 (*op cit*).

response to the Government's commitment to end the detention of children provides another opportunity to address this need. For reasons discussed in this response, current signs, including the terms of reference for this Review are not encouraging.

Timeframe

13. Having regard to the compelling and uncontested[11] evidence as to the harm being caused to children in detention and the domestic and international legal standards by which the UK Border Agency is now bound, it is a matter of profound concern and regret that the Government has to date failed to give effect to its stated aim. The Minister for Immigration, Damian Green MP, recently stated in debate in Westminster Hall on 'Alternatives to Child Detention':

> "*I should emphasise that the UK Border Agency is fully determined to replace the current system with something more humane, without compromising on the removal of people who have no right to remain in the UK. We are talking about alternatives to detention and not about ending removals. Until the review is completed, current policies will remain in place, with one exception. …the detention of children overnight at Dungavel immigration removal centre in Scotland has been ended as a precursor to such practice ending across the UK*." (*Hansard*, HC 17 June 2010 : Columns 211-212WH)

14. Our understanding from the plain words of the Government's coalition agreement is that this Government is firmly decided that the detention of children must end. Our understanding, moreover, is that the Minister is personally determined that this must be so. Indeed, we acknowledge that, at the meeting of 30 June 2010, the Minister demonstrated that determination by both his willingness to listen and his contribution to the discussion. We welcome that determination as it is in accordance with both the compelling and uncontested evidence of the serious harm that detention does to children and the domestic and international legal obligations upon the UK. Why then is the UK Border Agency continuing to detain children?

15. The terms of reference for the UK Border Agency review state:

> "*The Review's aim is to consider how the detention of children for immigration purposes will be ended. It will make recommendations on its findings… The Review will take account of… the need for an implementation timetable*."

16. The impression given by the terms of reference is that the ending of detention of children is contingent on the UK Border Agency finding alternative options for returns. If this impression is correct it is to be deplored. Even if the commitment to end the detention of children remains absolute, as it is plainly stated to be in the coalition agreement, it is nonetheless to be deplored that the realisation of that commitment continues to be delayed, and it appears to

[11] We recall that when the previous Minister was asked as to the Home Office's assessment on the health and emotional wellbeing of children relating to immigration detention, he listed various matters that he said went to the issue of children's health and wellbeing but was unable to provide any assessment of these children's health and wellbeing because he said '*It is not possible to provide the information requested withot examination of individual records at disproportionate cost.*' (*Hansard*, HC 22 March 2010 : Columns 60-61W)

be envisaged will be delayed further after the review for the purpose of developing "*a new approach to family removals*" [12] and pursuing "*an implementation timetable*". The terms of reference make no express reference to any disaster that would befall the UK Border Agency or the UK if the detention of children were to end now, nor make any express suggestion that any review of asylum and immigration processes, including as concerns returns, cannot be satisfactorily conducted while not detaining children.

17. At the 30 June 2010 meeting, it was suggested that an immediate end to the detention of children risked that later criticisms of the UK Border Agency regarding returns and removals of families may lead to pressure for the detention of children to be reintroduced. As expressed at the meeting, we hope that the Minister and the UK Border Agency are sufficiently committed to end the detention of children because in all likelihood there will be public criticisms from some quarters. In this regard, we urge that an immediate end would more strongly signal such commitment and, in the longer run, assist the UK Border Agency and the Minister to deal with any such criticism. It was also suggested that ending the detention of children risked encouraging more trafficking of children. However, deterring trafficking is best achieved by measures to identify and prosecute traffickers. Moreover, the detention of a child for the purpose of deterring others is not only potentially seriously harmful to that child but also unlawful for reasons addressed elsewhere in this response.

18. In evidence to the Home Affairs Committee in September 2009, David Wood, who is the UK Border Agency Strategic Director for Criminality and Detention Group and the person leading the current review, stated:

> "*The families we detain are those who refuse to leave the United Kingdom, those who have not left voluntarily and that is why we detain them. I do feel that our immigration policy would be in difficulty if we did not have that ability to detain them because it would act as a significant magnet and pull to families from abroad to come to the United Kingdom because, in effect, once they got here they could just say, 'I am not going.' Whilst issues are raised about absconding, that is not our biggest issue. It does happen but it is not terribly easy for a family unit to abscond.*"[13]

19. There is no justification in any of this for delaying the ending of the detention of children. It is simply unlawful for the UK Border Agency to be using the detention of children and families as a deterrent to others not to come to the UK. This is contrary to the UK Border Agency's statutory duties to safeguard and promote the welfare of the individual child in respect of whom it is acting and contrary to the obligations of the UK under the 1989 Convention, as briefly discussed in the preceding section. In particular, it is to disregard the direct nature of the UK Border Agency's obligations under the 1989 Convention and section 55 to the individual child's best interests, safety and welfare; and, in so doing, fails to respect the dignity of the child. On its face, it also suggests penalty or punishment of the child by reason of his or her parent's status or actions.

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[12] *Hansard*, HC 17 June 2010 : Column 212WH (*per* Damian Green MP)

[13] Oral Evidence given by Dave Wood, Strategic Director, Criminality and Detention, UKBA to the Home Affairs Committee, The Detention of Children in the Immigration Service, on 16 September 2009, HC 970-i (Question 25)

20. However, it is surely correct that absconding by families "*is not terribly easy*"[14], and to the extent that this may be influencing the UK Border Agency to delay the ending of the detention of children it is irrational. We would be grateful for an opportunity to consider any evidence the UK Border Agency may have – none was presented to the Home Affairs Committee – as to its assertion that this may, in some cases, be a risk. It is, in any event, necessary to recall that the relevant question is whether whatever risk is considered in any such cases would necessarily be made real simply by ending the detention of children now while giving whatever further thought to asylum and immigration processes as may be needed. Having regard to that question, ILPA does not consider there to be any credible need for the ongoing delay.

21. In short, the detention of children should be ended immediately. As the Prime Minister recognised in addressing the House on the Queen's Speech, the harming of children in the UK's immigration detention estate has gone on for far too long. Moreover, that the UK Border Agency continues to be afforded the convenience of resorting to harming children in this way can do nothing to infuse any urgency in its wider consideration of asylum and immigration processes. It is more likely to encourage the view that delay in such consideration will be tolerated, in turn continuing the delay in ending the detention of children. Meantime, children continue to suffer potentially serious and long-lasting harm.

Further thoughts on the terms of reference for the Review

22. The terms of reference for the Review set out seven numbered matters which the Review will consider and a further seven matters of which it will take account. Some observations on these are given below under discrete subheadings.

The UK Border Agency's current approach to dealing with asylum applications from families, including contact arrangements with those families and the families' access to legal representation

23. The primary concern of the UK Border Agency ought to be to ensure that those who are entitled to be granted leave to remain in the UK, whether because they are refugees or for other reasons, are granted such leave. Currently, the UK Border Agency is extraordinarily inefficient and ineffective at identifying those – whether separated children, families or single adults – who are entitled to asylum. It has displayed similar inefficiency and ineffectiveness at recognising others, in respect of whom enforced removal or deportation is unlawful. The same can be said of the UK Border Agency's failure to

[14] We also have concerns that where the UK Border Agency refers to 'absconding' it is not clear that this necessarily means anything more than missing of a reporting event. There is a very great difference between a person or family not attending a reporting event, not attending a port for the purpose of a return and vacating their last known address and going to ground. Criticisms made of the Millbank pilot and the UK Border Agency's evaluation of that pilot were set out in an independent evaluation produced by The Children's Society and Bail for Immigration Detainees. These included that '*Statistics about the number of families who refused to go to the pilot, or who left Millbank, have not been released. However, it is clear that some UKBA case owners recorded people as absconders when they had in fact notified UKBA about where they were. For example, two families we interviewed had left Millbank in order to return to their asylum accommodation and had immediately notofied the school and the local authority. In one case the 'absconding' family had also notified UKBA.*'. A copy of that evaluation is available at :
http://www.childrenssociety.org.uk/resources/documents/media/17148_full.pdf

acknowledge and rationally address the circumstances of those whom it cannot remove. The result has been a great deal of UK Border Agency activity aimed at the removal of persons who it would be unlawful to remove or who it is not reasonably practicable to remove and who should not be subjected to attempts at removal[15].

24. In relation to this, it is necessary to highlight and comment upon somewhat tired refrains that have emanated from the UK Border Agency over recent years. One such refrain was echoed by the then Minister for Immigration, Phil Woolas MP, in his statement reported by *The Times* on 24 March 2010[16]:

> "*The sad fact is that some illegal immigrants refuse to comply with the decision of the independent courts and return home voluntarily*."

At heart, this is the same position that in 2007 was put by the Government to the Joint Committee on Human Rights in response to the Committee's recommendation regarding support for refused asylum-seekers[17]. ILPA gave a detailed response to the position put by the Government highlighting *inter alia* several factors why it is unsafe to conclude that because someone has been through the appeals process, and their appeal dismissed, it is necessarily appropriate or lawful to expect them to return to their home country. Those factors included inadequacy in the provision of legal aid, failures by the UK Border Agency in its decision-making and later changes in the decisions of the courts as to the law and country situations. The ILPA response remains publicly available on our website[18]. However, we note here that the quality of decisions of the courts is, in significant part, determined by the quality of preparation in the cases which appear before them and the quality of submissions presented to them. If the UK Border Agency fails to focus appropriately on the real issues in the case (as contrasted to a scatter-gun approach in refusal letters, cross-examination and submissions) and fails to put all and only relevant matters before the court, or if legal representatives fail or are unable to take full instructions from appellants or fail or are unable to provide the court with the relevant evidence and legal material in a sufficiently structured and focused manner, the fact of a previous independent decision from the court may prove of neither comfort nor value to an appellant whose appeal is dismissed despite his or her having well-founded fears of persecution or other human rights violation if returned or some other good claim to remain in the UK.

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[15] Some cases have come before the courts. Among the more recent and egregious examples to have done so are *N v Secretary of State for the Home Department* [2009] EWHC 873 (Admin) and *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453. In the former case a gay asylum-seeker was removed to Uganda without forewarning and without his legal representatives' knowledge. Subsequent to the ruling that the Home Office had acted unlawfully, he was returned to the UK on the order of the High Court. He was then found to be a refugee by the Asylum and Immigration Tribunal. In the latter case, a Dutch national of Somalian origin was unlawfully detained for more than four months by reason of the UK Border Agency's determination to deport to Somalia a man who insisted he was a Dutch national and whose Dutch driving licence, identity document and passport were each available to the UK Border Agency.

[16] *Baby held at Yarl's Wood for 100 days, says chief prison inspector*, see http://www.timesonline.co.uk/tol/news/uk/article7073354.ece

[17] Joint Committee on Human Rights Seventeenth Report of Session 2006-07, *Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers*, 5 July 2007 HL 134/HC 790, see the response to the Committee's recommendation no. 10

[18] ILPA's Memorandum to the Joint Committee on Human Rights following the publication of the Government's response to the Committee's Tenth Report of Session 2006-07, *The Treatment of Asylum Seekers* is available in the 'Submissions' section of the ILPA website at www.ilpa.org.uk (see paragraphs 5 to 5(i))

25. Another such refrain was repeated by David Wood in his evidence to the Home Affairs Committee in September 2009[19]:

> "*The reasons that some* [families] *end up there* [in detention] *longer is they create new judicial reviews and other legal processes, a lot of which are spurious, the NAO found earlier this year, which would accord with our own view. Over 90% of judicial reviews do not even get leave for hearing.*"

26. We regret that, to a degree, these reflections were repeated at the meeting of 30 June 2010. We provided some answer at the meeting, and now provide a little more. There are various reasons why a judicial review application may not proceed to an oral hearing or a grant of permission. These include that the application may be withdrawn. Many applications are withdrawn, and one reason for this is that the UK Border Agency has conceded that its decision, against which the judicial review is brought, cannot stand. In other cases, applications are withdrawn on agreement with the UK Border Agency or Treasury Solicitors that time will be given for the person to submit further representations through newly acquired legal representation, or on a similar basis even without such agreement. ILPA has long sought from the UK Border Agency data giving some breakdown of the applications which do not proceed to oral hearing or a grant of permission. The most that has been forthcoming has been data for 2006 and 2007, indicating that a large proportion of judicial review applications are withdrawn[20]. It is clear that the UK Border Agency's repeated and unqualified reference to this 90% figure (and similar figures) misrepresents the true picture.

27. Whether in relation to children, families or single adults, these statements are reflective of the continued 'culture' at the UK Border Agency[21]. That culture is likely causative of, and in turn further embedded by, such factors as the UK Border Agency's enthralment with targets for removals and deportations and its equal fascination with 'pull factors' and deterrence. While the willingness or ability of the UK Border Agency to respond rationally and reasonably to the situation of individual cases continues to be so heavily skewed by these and other factors, it seems likely that it will continue to waste considerable time, money and credibility in pursuing removals of children, families and others

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[19] Oral Evidence given by Dave Wood, Strategic Director, Criminality and Detention, UKBA to the Home Affairs Committee, The Detention of Children in the Immigration Service, on 16 September 2009, HC 970-i (Question 25)

[20] There are no satisfactory figures available. However, the National Audit Office report *Management of Asylum Applications by the UK Border Agency*, 23 January 2009 (to which David Wood referred in his evidence to the Home Affairs Committee – see previous footnote) reported that over a four months period from January 2008 to April 2008 approximately 225 judicial reviews were brought on average per month. In response to a freedom of information request by ILPA, the UK Border Agency disclosed by letter of 5 June 2009 that it had no figures available to address the detail that ILPA had requested (in an attempt to properly address what was happening with judicial review applications) but supplied figures for 2006 and 2007 showing that 831 and 997 applications respectively relating to asylum had been withdrawn in those years and a further 353 and 535 respectively relating to non-asylum immigration had been withdrawn in those years.

[21] The most recent and high profile spotlight upon this was provided on 2 March 2010 by the oral evidence of Louise Perrett, a former UK Border Agency caseowner, to the Home Affairs Committee. A transcript of her oral evidence is available as Ev 1 to the Committee's Twelfth Report of Session 2009-10, *UK Border Agency: Follow-up on Asylum Cases and E-Borders Programme*, 7 April 2010 HC 406. The Committee recorded in its report (paragraph 7) the UK Border Agency's commitment to investigate the allegations made by Ms Perrett. We are not aware of any conclusion or report of those investigations.

where such pursuit is impractical or unlawful. If the focus of this Review is, as appears to be the case from its terms of reference viewed as a whole, on returns and removals rather than the entirety of asylum and immigration processes, it seems all the more likely that the situation described here will remain.

The current circumstances in which children are detained

28. In addition to the preceding paragraphs, we highlight three matters in relation to this matter.

29. Firstly, it is necessary for the UK Border Agency to reflect further on its immigration practices and policies more generally than mere consideration of the asylum process as indicated by the previous ("*The UK Border Agency's current approach to dealing with asylum applications…*"). The matters outlined under the preceding subheading apply in other immigration processes, such as deportation processes and processes dealing with overstayers or curtailing leave.

30. Secondly, it is necessary for the UK Border Agency to address the ongoing situation of separated children (often referred to as unaccompanied children), who are subjected to detention, either because insufficient opportunity has been given for them to state or confirm their age prior to a decision to detain them or because of inadequate or erroneous age assessments. While unaccompanied children continue to be detained the aim of the Government to end the detention of children will not be realised. The current situation has been very recently described by the Harmondsworth Independent Monitoring Board[22]:

> "*…UKBA's attitude to age disputes is not primarily defined by a desire to protect children, and there is a culture of disbelief when a detainee claims to be under 18, which compounds the distress of genuine children. The agency has been slow to engage with Hillingdon Council at an appropriate level to speed up age assessments and is disinclined to take responsibility for the fact that it may be detaining children.*"

This is yet further evidence of the failure of the UK Border Agency to effectively embrace (or properly acknowledge) its section 55 duty. It is of particular concern given that the management information that has been shared over recent months by the UK Border Agency with the Detention Users Group has consistently shown that a significant number of separated children are detained, and that such detentions are not unique to any one immigration removal centre or any particular set of circumstances[23].

31. We were pleased that the issue of age disputes was expressly raised at the 30 June 2010 meeting. We do not here repeat the findings of ILPA's May 2007 report on this subject[24]. We highlight, however, as was said at the meeting that the proper application of the benefit of the doubt by the UK

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[22] Harmondsworth Independent Monitoring Board, Annual Report for 2009, May 2010

[23] It had initially been suggested that such cases may be peculiar to Oakington immigration removal centre and a result of a practice whereby 'lorry-drop' cases were generally screened at that centre. The management information, however, indicates that this was not correct.

[24] *When is a child not a child? Asylum, age disputes and the process of age assessment* remains available in the 'Publications' section of the ILPA website.

Border Agency ought to be the primary means by which the detention of children, whose age is disputed, is avoided. It was again raised by the UK Border Agency that there were child protection issues raised by the risk of allowing an adult, claiming to be a child, into a child setting. However, as was said in response, there are very immediate risks to a child's welfare of wrongly detaining him or her as an adult in an immigration removal centre with other adults. Moreover, in the former situation, the setting is one immediately within the purview of children's social services, where there is expertise on children's welfare and direct attention to the children in that setting. The same cannot be said for the reverse situation where a separated child is detained.

32. Thirdly, the UK Border Agency must ensure that detention is ended – not merely at Immigration Removal Centres – but also at other places of detention whether within the UK Border Agency detention estate (e.g. short-term holding facilities) or outwith that estate (e.g. police stations).

All relevant baseline data and statistics

33. ILPA would be grateful if such baseline data and statistics are made publicly available generally or to ILPA. ILPA has, with others, long sought an improvement to the baseline data and statistics that are made available[25]. A key reason for that is to ensure that dialogue between the UK Border Agency and ILPA is better informed on both accounts and may accordingly be more effective. It is also so that ILPA can more effectively play its part in holding the UK Border Agency to account by e.g. identifying earlier any trends that may need investigation.[26] We recall that Liam Byrne MP, then Minister for Immigration, when introducing the UK Borders Bill to Parliament at Second Reading emphasised:

> "*If the IND* [now UK Border Agency] *is to become a stronger agency, it must be more open and accountable not only to this place but to the public.*" (*Hansard*, HC 5 February 2007 : Column 591)

Damian Green MP, now Minister for Immigration, endorsed that approach in Committee:

> "*I was interested in and, in part, gratified by the Minister's response. He recognises the need for better oversight than exists at present or will be available through this Bill.*" (*Hansard*, HC UK Borders Bill Public Bill Committee, Fifth Sitting 6 March 2007 : Column 144)

34. As regards the currently available data, we concur with the Minister's view that the data amply demonstrates that, judged by its own terms and aims, the current policy on detaining children has failed:

> "*Detention under the system that we are getting rid of was not necessarily effective. Of the 1,068 children who departed from detention in 2008-09, only 539 were removed and 629 were released back*" (*Hansard*, HC 17 June 2010 : Column 231WH)

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[25] ILPA has, *inter alia*, raised these matters at the National Asylum Stakeholder Forum and Detention Users Group. ILPA also participated in a workshop hosted by the UK Border Agency with members of Home Office Migration Statistics in November 2008.

[26] This, in particular, has been raised by ILPA in relation to the detention of age-disputed children at the Detention Users Group.

On the face of these figures, the disruption, distress and harm caused to some 60% of these children was ineffective and wholly unnecessary however the decision to detain them is judged. This is not the reason why we advocate for the immediate cessation of detention, but it provides clear support for our position. We note that the figures, of themselves, give no support for the contrary position. In particular, the figures say nothing about the relative efficacy of detention of the remaining 40% of these children.

The UK Border Agency's initiatives on implementing alternatives to the detention of children, including the Glasgow pilot

35. ILPA considers that these initiatives suffer from the fundamental flaw that they have been established in isolation from consideration of the asylum process[27] as a whole and, accordingly, have operated in circumstances where the problems identified above (viz. "*UK Border Agency's current approach to dealing with asylum applications…*") remain endemic. We recall the Minister's observations upon the predecessor to the Glasgow pilot at Millbank, Ashford:

> "*I rise as a constituency Member, because the alternative-to-detention project that the Government started took place in my constituency and was pursued, at best, halfheartedly. It did not clearly engage any particularly serious part of the Government's thinking—if, indeed, it was a serious alternative to detention. I suspect that Members from all parts of the House want desirable alternatives to detention, but they have never been properly set out or tried. The experiment in my constituency was nothing like long enough, well resourced enough or serious enough to answer the question about whether we can have a proper alternative.*" (*Hansard*, HC Borders Citizenship and Immigration Bill, Second Reading 2 Jun 2009 : Column 217)

We suggest that, at least in significant part, the inadequacies to which he there pointed were a result of the misguided focus at the heart of both pilots on returns and removals rather than considering the entirety of the asylum process in which both were engaged.

Models of good practice from other jurisdictions and relevant current research

36. ILPA is aware of, but not familiar with, models operating in Australia, Belgium and Sweden. However, ILPA is of the view that if the fundamental flaw highlighted under the preceding subheading remains not addressed it is unlikely that initiatives, whether inspired by models from other jurisdictions or not, will prove effective. We note the following taken from an International Detention Coalition briefing paper summarising key elements of the Swedish model[28]:

> "*The Swedish case management role introduced in both community and detention contexts was premised on a rights and welfare-based framework. The caseworker is responsible for informing detainees of*

[27] The pilots of which we are aware, formerly in Millbank, Ashford and currently in Glasgow, each relate specifically to refused asylum-seekers.

[28] International Detention Coalition, *Case Management as an alternative to immigration detention*, June 2005 (page 5). The paper is available at: http://idcoalition.org/wp-content/uploads/2009/06/casemanagementinaustralia.pdf

their legal rights and ensuring these rights are upheld, including access to legal counsel and the right to seek asylum."

37. We are not in a position to comment on the success or otherwise of the Swedish model. However, we note that, insofar as the International Detention Coalition briefing paper accurately summarises the model, it records explicit recognition in the Swedish model that it is key that legal rights are upheld and the means to upholding such rights are available. It must be noted that the degree to which models, whether in Sweden or elsewhere, are transferable may be dependent upon the degree of proximity or difference between the settings in which such models operate and the UK's asylum and immigration processes, including the UK's legal aid, tribunal and court systems. Nonetheless, the acceptance that accessibility and recognition of legal rights is key is, on its face, supportive of the observations made in preceding paragraphs.

How the current voluntary return process may be improved to increase the take-up from families who have no legal right to remain in the UK

38. ILPA has nothing to add to the foregoing paragraphs, which are relevant to this matter. However, we stress that focus upon returns rather than on asylum and immigration processes as a whole is likely to prove ineffective. It is to repeat past mistakes.

How a new family removals model can be established which protects the welfare of children and ensures the return of those who have no right to be in the UK, outlining the key process changes, rules or legislative changes that would be required to implement the new model

39. ILPA has nothing to add to the foregoing paragraphs, which are relevant to this matter. However, we stress that focus upon removals rather than on asylum and immigration processes as a whole is likely to prove ineffective. It is to repeat past mistakes.

Existing international EU and Human rights obligations

40. We shall not recapitulate the various international standards by which the UK is bound in relation to asylum-seekers, migrants and children. However, we recall that we have earlier in this response provided the UK Border Agency with a summary of certain of the relevant Articles of the 1989 Convention. We note, too, that the European Court on Human Rights has frequently given attention to the 1989 Convention when addressing cases before it involving children. A particular example is given by the *Case of Maslov v Austria* where the Court considered the State's obligations under Article 40 of the 1989 Convention to be of particular relevance in consideration of the Article 8 claim brought before the Court in connection with deportation proceedings against Maslov[29].

[29] '*The Court considers that, where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration. In this connection the Court notes that Article 40 of the Convention on the Rights of the Child makes reintegration an aim to be pursued by the juvenile justice system (see paragraphs 36-38 above). In this court's view this aim will not be achieved by severing family or social ties though expulsion…*' Grand Chamber 23 June 2008, Application No. 1638/03 (paragraph 83)

The UK Border Agency's statutory duty to make arrangements to take account of the need to safeguard and promote the welfare of children as it carries out its functions (section 55, BCI Act)

41. As we have indicated above, quite apart from this Review, the UK Border Agency urgently needs to reconsider this duty and its response to this duty. The UK Border Agency needs to stop portraying or understanding this duty as a threat to its purposes in respect of immigration control, rather than a useful guide, in particular, to the extent of its jurisdiction and powers in the exercise of immigration control where child safeguarding and welfare duties of other statutory agencies are in play[30].

Equality obligations

42. The primary consideration as regards this matter must be Article 2.1 of the 1989 Convention:

> "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*"

43. Having withdrawn its immigration reservation to the 1989 Convention it must now be clear that a child's immigration status, or that of his or her parent, does not permit of any divergence from a full and equal application of the Convention rights in respect of that child[31]. Recognition of this ought to underpin acceptance that the section 55 duty sets the same standards for the UK Border Agency as are established by section 11 of the Children Act 2004 for other public authorities.

Current financial constraints

44. ILPA's primary concerns are with the safety and welfare of children in immigration processes, with the legality and fairness of such processes and

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[30] A recent example of the failure, in practice, of the introduction of the section 55 duty to bring the UK Border Agency into the family of public authorties bound by the twin duty under section 11 of the Children Act 2004 is given by the UK Border Agency's introduction in September 2009 of its asylum process guidance on Family Relationship Testing (DNA). This actively encourages the bizarre and improper situation whereby an official of the UK Border Agency, suspecting an adult and child at the Croydon Asylum Screening Unit not to be related as claimed, to seek the adult's consent to the taking of a DNA swab of the child. This has been explained as a response to fears regarding the safety and welfare (potentially trafficking-related) of the child. How the UK Border Agency considers that an adult who is not the true parent or legal guardian of the child is competent to give consent on behalf of the child remains unexplained. Why the UK Border Agency does not simply make an immediate referral to social services, or if there are more pressing fears to the police, is equally inexplicable.

[31] This was the position prior to the formal withdrawal since the reservation was itself unlawful as contrary to the object and purpose of the Convention: see CRC/C/15/Add.34 15 February 1995 *Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland* and CRC/C/15/Add.188 9 October 2002 *Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland,* Joint Committee on Human Rights Seventeenth Report of Session 2004-2005, *Review of international human rights instruments,* 23 March 2005 HL 99/HC 264 (paragraph 46 *et seq*). See also the Committee's Tenth Report of Session 2002-03, *The UN Convention on the Rights of the Child*, 24 June 2003 HL Paper 117, HC 81 (paragraph 81 *et seq*) and Seventeenth Report of Session 2001-02, *Nationality, Immigration and Asylum Bill*, 21 June 2002 HL 132, HC 961 (paragraph 16 *et seq*).

with the availability of appropriately competent and expert legal advice and representation throughout such processes.

45. Nonetheless, we note that financial constraints strongly favour the position outlined in this response that detention of children should end immediately. As the Minister has observed:

> "*…nothing is as expensive as detention.*" (*Hansard*, HC 17 June 2010 : Column 234WH)

This is not the reason why we advocate for its immediate cessation, but it is clear that doing so would save money.

46. Finally, it is impossible in the current climate to ignore the fact that financial constraints can only be addressed by ensuring an holistic consideration of asylum and immigration processes. As we have reminded the UK Border Agency on several occasions[32], its practices and policies can and do have immediate impacts upon legal aid costs and the costs of tribunal and court proceedings. We recall the following statement of the Minister, when in opposition:

> "*I seek to minimise the effect on the public purse, as would the Minister, and to maximise the speed at which people go through the system, because delay promotes both injustice and expense. As I was saying, experiments in this country, and many experiments overseas, have revealed that if someone receives decent legal advice at the start of the process, their case will not only be concluded more quickly but will be much less likely to go to appeal. If they then end up being removed from the country, they are more likely to accept the situation.*" (*Hansard*, HC Borders Citizenship and Immigration Bill Committee, Sixth Sitting 16 Jun 2009 : Column 189)

We concur with the Minister's view that measures that give effect to appropriately competent and expert legal advice and representation at the earliest possible stage of these processes are most likely to contribute to better quality decision-making on the part of the UK Border Agency, and that better quality decision-making, which includes focussed (rather than scatter-gun) decision-making and reasons, would contribute to reduced costs – whether because an appeal is unnecessary or is more focused. However, we recall that circumstances (including law, policy, country situations, court and UK Border Agency appreciation of country situations and available evidence) change and the availability of appropriately competent and expert legal advice and representation is not limited to early stages. Practices based upon such misapprehensions can and do compound the cost of later processes by creating situations where the opportunity for fair and just consideration of changed circumstances is left to last-minute recourse to judicial review.

The requirement for robust statistical data

47. ILPA observes that, for reasons addressed above, any statistical data available to the UK Border Agency should be shared. Statistical data can certainly be of value, but such data is of value only to the extent that it is

[32] e.g. at meetings of the National Asylum Stakeholder Forum. In September 2008, ILPA presented a written briefing to NASF on 'Challenges facing [legal] practitioners', which outlined several matters among which the need to address impact on legal aid was a recurring theme.

correctly interpreted and the risks of incorrect interpretation of such data are seriously compounded where the data is not shared and any interpretation can only be derived from one or limited perspectives.

48. In the same way that there is no need for a timetable to end the detention of children (see below), there is no need for the collection of robust statistical or any other data in order to do so.

The need for a risk assessed approach in dealing with individual families

49. It is unclear what is meant by this. ILPA generally has no objection to the assessment of risks, provided such assessment is based upon proper evaluation of evidence, having regard to the views of children and families offered in proceedings that provide independent legal advice and representation so that such views can properly be considered to be informed. As regards risks to be assessed, critical risks include the risk of persecution or other human rights violation on return, and the risk to the safety and well-being of the child. Risks that have no place in these considerations include speculative and non-evidenced risks or assertions of risk, and risks associated with the impact of treatment of an individual child on the behaviour of others.

The need for an implementation timetable

50. ILPA has nothing to add. We refer to the preceding section entitled 'Timeframe' and stress that, for reasons there given, there is no reason why the detention of children, and the harm that it causes, should be continuing. There is no need for a timetable for the ending of the detention of children. It can and should end now.

Further observations

51. In this section we will address matters arising directly or indirectly from statements made by the Minister during the course of the Westminster Hall debate on 17 June 2010, and which we have not addressed or addressed fully in preceding sections of this response. In that debate the Minister gave some indication of matters actively under consideration by the UK Border Agency at this time. Firstly, however, we note that, if the detention of children were to be ended now, as we advocate here, there would be no difficulty in the UK Border Agency conducting a formal consultation on specific proposals or options so that ILPA and others can provide responses directly addressing such matters as may be under consideration. That would be far preferable to the current Review, of which the terms of reference, while made public, fail to set out with any clarity just what it is that the UK Border Agency is considering.

52. The Minister has said that:

> "*Clearly there is a need to achieve faster and better decision-making on family asylum cases.*" (*Hansard*, HC 17 June 2010 : Column 212WH)

Later in the debate the Minister referred to the pressing need to resolve the legacy backlog[33]. We agree with the Minister as to that. However, the

[33] *Hansard*, HC 17 June 2010 : Column 232WH

Minister should be aware that backlogs are now growing in the New Asylum Model[34]. Generally, we do not demur from the Minister's intention that decision-making in family cases should be faster and better provided those aims are pursued together; and where in an individual case faster does not permit of a better decision then slower decision-making will be necessary. There is nothing to be gained by rushing to unsafe decisions, in which nobody can have any confidence and which may lead in the long term to delay and litigation that might have been avoided.

53. The Minister noted his ongoing interest in "*the provision of early legal advice*" as piloted in 2007-2008[35]. We wish to make two observations. Firstly, we must caution that "*collaboration*" with the UK Border Agency can never properly be the role of a legal representative in our adversarial legal system. However we certainly acknowledge that there is much to be gained from UK Border Agency decision-makers identifying what are truly issues of contention in relation to a claim and giving time to legal representatives to address those issues before making decisions on the asylum claim. Secondly, while we support the provision of early legal advice and representation, the fundamental need is that those passing through asylum and immigration processes have access to appropriately competent and expert legal advice at all stages. As we have indicated above, circumstances do change and whatever improvements may be made to initial decision-making it cannot be ruled out that further submissions may need to be made in an individual case. We recall that at the 30 June 2010 meeting there was a general consensus among participants as to the importance of the availability of legal advice and representation and the need for this to be provided as early as possible, to be of appropriate competence and expertise and for the provision of this to be sustained through asylum and immigration processes.

54. The Minister referred to:

> "*…the need for better contact management and more active discussion of a family's options if their claim is rejected and their right to appeal a decision has been exhausted. Discussions with a family member might need to be backed up by improved support from NGOs, partners and other workers.*" (*Hansard*, HC 17 June 2010 : Column 213WH)

We do not demur from the general thrust of these observations, though would caution against oppressive contact management which may foster both distrust and distress. We recall, prior to the Millbank and Glasgow pilots referred to elsewhere in this response, the UK Border Agency conducted a pilot named 'Clannebor' which, from our recollection of concerns raised by other stakeholders e.g. at meetings of the National Asylum Stakeholder Forum Case Resolution subgroup[36], caused immense and unnecessary

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[34] We have written to Hugh Ind, UK Border Agency National Lead for Protection on 11 June 2010 in connection with this.

[35] *Hansard*, HC 17 June 2010 : Column 213WH

[36] It was discussed at the October 2007 meeting of the Case Resolution subgroup. The minutes of the next meeting record some concern that the minutes of the October 2007 had not adequately recorded the concerns that had been expressed. The October 2007 minutes record: '*There was widespread concern about children being asked to attend case conferences, which could be seen as an intimidating environment especially where children are unaware of their immigration status. Other issues raised included legal representatives and voluntary sector caseworkers not having a full understanding of the initiative. Also, families have been reported to be feeling singled-out because they had received a pink*

distress to a number of families subjected to it. We note the Minister's express reference to discussions after decisions and appeals. We agree that caution must be exercised as regards the timing of such discussions. General information may be unsuitable or inappropriate prior to decision on an asylum claim, as it may suggest a particular bias towards a negative outcome. While information may be appropriate after an asylum decision, it may be inappropriate to seek discussions at this stage as an asylum-seeker bringing an appeal is entitled to consider that he or she may reasonably direct himself or herself to that appeal. As regards information that may be provided, we would urge that this is initially provided via any legal representative. It would be appropriate for a legal representative to have advance notice of any intended discussions. This has several advantages. It may assist any discussion, since the legal representative may be able to explain any options prior to discussions. It may also reduce the risk of distrust and distress that is often caused when individuals or families are invited to attend meetings or discussions with the UK Border Agency, of which they have little or no information that they understand and about which their legal representative is able to provide no assistance or comfort since, if contacted, he or she often knows less that the individual and can only guess at the range of events or risks facing the individual at the upcoming meeting.

55. As regards discussions of families' (and others') options, we note that legal representatives can and should, though their ability to do so effectively is now severely compromised by what has happened to the legal aid regime, advise on such options. This is not to suggest that there is no role for others to play. However, it is necessary that independent third parties seeking to play a role recognise their own limitations. It is one thing to advise a family as to what are the standard options available to persons in the family's situation. It is quite another to provide advice or encouragement as to the taking of any particular option. To do the latter, any adviser needs to be fully conversant with the family's asylum or immigration case and the relevant law and policy standards applicable to that case[37]. Otherwise, any such advice they may give is improper and may be harmful since, without this knowledge, they cannot know whether any particular option is truly advisable. Moreover, it is not sufficient that such third parties may possess knowledge of the family's case and relevant legal and policy standards. Advising in such circumstances, if there is a legal representative, is to act in a way that fundamentally compromises the relationship between the client and his or her legal representative; and, ultimately, may lead to a situation, which deprives the client of such representation.

56. The Minister referred to the option that:

> "*The UK Border Agency would therefore set removal directions while the family is in the community, giving the family time to submit further representations and to apply for a judicial review if they wish to do so, as well as giving them time to make plans for their return.*" (*Hansard*, HC 17 June 2010 : Column 213WH)

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questionnaire. There was a suggestion that the initial letters should also be worded differently. Other communications issues were again raised.'

[37] If the advice is to touch on such matters as a person's or family's asylum claim, unlawful entry, any claim to be granted leave, removal or deportation, the adviser will need to be a qualified person for the purposes of provision of immigration advice or services under section 84 of the Immigration and Asylum Act 1999. Otherwise they may be comitting a criminal offence.

ILPA would welcome such an approach. Such an approach would accord with the need for the UK Border Agency to ensure that a family facing removal has proper access to legal representation and the family's right of access to the court[38]. This approach will work best where a family has ongoing legal representation at the time such notice is given. It will be least likely to be successful where the family has no immediate legal representation, faces difficulties finding a legal representative with capacity to provide advice and has been without legal representation for several months or years such that there are difficulties finding or retrieving relevant casepapers even if a new legal representative is secured. As we have indicated elsewhere, these considerations show the pressing need for some closer working between Ministers and officials across the Home Office and Ministry of Justice because of the close relationship between asylum and immigration processes and legal aid in terms of justice, effectiveness and cost. As indicated previously, it is necessary that legal advice and representation is both available and of sufficient competence and expertise.

57. Finally, we note that the Minister indicated that consideration is also being given to options such as the separation of families and detention of families "*for a short period*".[39] We have grave concerns at these indications. We recall that it has always been said by the UK Border Agency that detention is for the shortest possible time. The current policy on detention, whether of families or single adults, is explicit:

> "*Detention must be used sparingly, and for the shortest possible period necessary.*"[40]

In his evidence to the Home Affairs Committee, David Wood stated:

> "*…when we detain the children it is going to be for a short period of time…*"

Though he did continue:

> "*…but some end up staying there longer…*"[41]

We do not understand how the clear and absolute commitment given in the coalition agreement can be met if there is to continue to be detention of some children. Moreover, if the policy position is to be no detention of children save as for a short period where the UK Border Agency consider that to be necessary, we do not understand how this position differs from the current position. Having regard to any or all of several factors – e.g. the harm caused to children, the ineffectiveness of detention in these cases and the considerable costs involved – we urge that the Government make good on its commitment and end this abhorrent practice.

58. We note the observation by the Baroness Neville-Jones, Home Office Minister of State:

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[38] The right of access to the court in connection with removal processes is currently being litigated. ILPA has supported the claimant in that case with a witness statement which chronicals the history of this issue over recent years.

[39] *Hansard*, HC 17 June 2010 : Columns 213-214WH

[40] UK Border Agency enforcement instructions and guidance, chaper 55, section 55.1.3

[41] Oral Evidence *op cit* (Question 57)

"*We certainly aim not to separate families from children or children from families.*" (*Hansard*, HL 2 June 2010 : Column 252)

Not only is that a worthy aim, it is a legal obligation – as described above in the summary of relevant Articles of the 1989 Convention. The Minister in the Westminster Hall debate rightly drew attention to the best interests of the child "*as the paramount concern*"[42] in this regard. It is difficult to conceive of circumstances in which the interests of immigration control alone could provide circumstances where separation is in the best interests of a child. We note that at the meeting of 30 June 2010 others made clear their view that, if pursued, separating families would not prove to be an acceptable or effective response by the UK Border Agency to the ending of the detention of children.

59. We briefly draw attention to the urgent need for the UK Border Agency to address the circumstances of families split by imprisonment under the criminal justice system. Where sentence is completed, whether deportation is under consideration or being pursued, current practice habitually fails to have regard to the welfare of the child under the section 55 duty or address the best interests of the child under the 1989 Convention while maintaining the separation.

Conclusion and general principles

60. The following principles, agreed by the Refugee Children's Consortium of which we are a member, may comfortably be drawn from the foregoing and hence we provide them by way of conclusion:

- Detention of children must end now, as it is clear that detention harms children; children and their families should be released immediately.

- Children and their families should never be separated for immigration purposes.

- Ending the detention of children is not dependent on establishing 'alternative to detention' projects or new processes for families.

- Discussions on policies and practice on returns are not needed to end the detention of children.

- Discussions that focus on finding solutions to the problems at the end of the process need to consider a family's entire experience of the asylum and immigration processes. The provision of good quality legal advice throughout these processes is crucial.

Sophie Barrett-Brown
ILPA, Chair

2 July 2010

[42] *Hansard*, HC 17 June 2010 : Column 231WH