ILPA response to the Asylum Support Consultation

ILPA is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration an 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.

This paper begins by setting out a number of overarching concerns about the consultation paper and its relationship to the Simplification Bill, before responding to the specific questions asked in the consultation document and other points raised by the consultation.

1. Overarching concerns

1.1 ILPA is fundamentally opposed to the idea that the support system can or should be used as a means of "encouraging" compliance with enforcement and increasing rates of voluntary return. Access to accommodation and essential living needs is a fundamental right. It should not be contingent on behaviour or compliance with the requirements of the State. Asylum support should not be used as a "carrot" to reward those who "play by the rules" or – more worryingly still – as a stick to beat those who don't.

1.2 The government has failed, in ILPA's view, to identify any coherent basis for linking the provision (or denial) of support with compliance with the asylum system. That link appears instead to be based on a media-fuelled paranoia about abuse of the system by asylum seekers seeking to benefit from the "luxury" of UK Border Agency support. The terminology of the consultation document, with its references to "playing by the rules", reflects this.

1.3 In its March 2007 report on "The Treatment of Asylum Seekers", the Joint Committee on Human Rights (JCHR) found:

> *"Many witnesses have told us that they are convinced that destitution is a deliberate tool in the operation of immigration policy. We have been persuaded by the evidence that the Government has indeed been practising a deliberate policy of destitution of this highly vulnerable group. We believe that the deliberate use of inhumane treatment is unacceptable. We have seen instances in all cases where the Government's treatment of asylum seekers and refused asylum seekers falls below the requirements of the common law of humanity and of international human rights law."*[1]

[1] Joint Committee on Human rights, 10th report of the Session 2006 – 2007, "The Treatment of Asylum Seekers", HL Paper 81-I, HC 60-I, published 30 March 2007, paragraph 120.

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1.4 In its response to the JCHR report, the Government "strongly refute[d] the Committee's claim of a deliberate policy of destitution towards asylum seekers".[2] However, ILPA considers that the proposals set out in the consultation paper reflect in many instances just such a policy. . The removal of entitlement to accommodation and support in an effort to "encourage" compliance with removal and "voluntary return is exactly the kind of policy of deliberate destitution so roundly condemned by the JCHR.

1.5 However, ILPA's opposition to this underlying premise of the consultation is founded not only on its basic objection to the use of destitution as a tool of immigration control, but also on a serious concern about the lack of any evidential basis for the policy. Previous attempts to "encourage" compliance with immigration control through the use of destitution or other serious restriction on human rights (such as the use of prolonged detention) have not been successful. There is no evidence that removing accommodation and support from failed asylum seekers encourages them to leave; on the contrary, the available evidence points in the opposite direction.[3] The disastrous pilot of the removal of support from families under section 9 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("AI(ToC)A") is just one such example.[4] Research carried out by the Asylum Support Partnership in October 2008 showed that nearly half of the destitute people encountered had been destitute for over six months.[5]

1.6 Removal of support may very well make it more likely that individuals and families will abscond. In the section 9 pilot, nearly twice as many families (39% of those required to report) absconded from the cohort group as those in the control group (21% of those required to report).[6] In an earlier consultation, UK Border Agency staff expressed concern that the removal of UK Border Agency support from asylum seekers would make it harder for them to maintain contact.[7]

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[2] Government response, published as Annex to JCHR, 17th report o the Session 2006 – 2007, "Government response to the 10th report of this session: the Treatment of Asylum Seekers", HL Paper 134, HC 790, 5 July 2007.

[3] See, for example, Refugee Action, *The Destitution Trap*, 2006, available at: http://www.refugee-action.org.uk/campaigns/destitution/intro.aspx#download; Asylum Support Appeals Project, *Unreasonably Destitute*, June 2008, available at: http://www.asaproject.org/web/images/PDFs/news/unreasonably_destitute.pdf ; Joseph Rowntree Charitable Trust, Still destitute: A worsening problem for refused asylum seekers, 2009, available at: http://www.jrct.org.uk/text.asp?section=0001000200030006

[4] The government's evaluation of the pilot, *Family Asylum Policy: The Section 9 Implementation Project*, is available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf

[5] *The Second Destitution Tally: an indication of the extent of destitution amongst asylum seekers, refused asylum-seekers and refugees in the UK*, Kate Smart, Asylum Support Partnership, May 2009.

[6] See paragraphs 14 -15 of the Evaluation document

[7] "Asylum - Comments indicate that the Agency should look to simplify the different types of asylum support, review section 55 (restricted access to asylum support), and not ask applicants to leave their accommodation after they are refused until they are actually removed from the UK (as this would make it easier to maintain contact with the applicant)." Summary of issues raised by [UK Border Agency] staff in workshops/presentations) p19, Simplifying Immigration Law: consultation responses report, December 2007, see

1.7 This concern links to ILPA's second overarching concern, namely the lack of any real evidence base for the proposals in the consultation paper. In its response to the 2007 JCHR report on *The Treatment of Asylum Seekers*,[8] the Government accepted the Committee's recommendation that asylum policy should be formulated on the basis of evidence. Yet the present consultation paper shows little evidence of this.

1.8 At a consultation meeting with stakeholders held on 15 December 2009, UK Border Agency officials were repeatedly pressed as to the evidential basis for a number of proposals in the consultation document, and specifically were asked whether Ministers understood the lack of any evidence that measures such as s. 55[9] actually worked. Officials simply reiterated that these proposals were an important part of the government's policy on support, and that Ministers understood how the proposals fitted in. **ILPA urges the UK Border Agency to ensure that decisions on asylum support policy are based on the available evidence as to the impact of existing policies and to commission additional research or evaluation where the evidence does not already exist before proceeding with the proposals in the consultation.**

1.9 ILPA's third overarching concern is that the proposals do not achieve the aim of "simplification" and reducing administration and bureaucracy. ILPA agrees that the existing asylum support system is complex and bureaucratic but by retaining two (or more) different systems for support (reflected in clauses 206 and 210 of the Bill) depending on the stage of an individual's case, and different mechanisms for supporting individuals or families, as well as introducing three new "cases" for clause 210 (old section 4) support, ILPA considers that the Bill does not achieve the aim of simplification.

1.10 It is disappointing that the government has not used the opportunity of the simplification project fundamentally to re-think its approach to asylum support. The current system is ineffective and inefficient and has resulted in an increasing number of vulnerable people being left destitute. The level of support is unacceptably low, leaving people struggling to survive on as little as £5 a day. The proposals in the consultation paper do not begin to engage with the failings of the current system, which requires wholesale reform. Provision of support and accommodation to vulnerable people is part of the government's obligations to respect fundamental human rights. It should not be connected to immigration control and management of asylum support should be removed from the UKBA in order to remove the perception that the two are somehow linked.

1.11 Moreover, by requiring asylum seekers, particularly asylum seeking families, to reapply for support at different stages of their case, the proposals in the consultation appear in fact to increase bureaucracy and, consequently, are likely to increase administration costs. Thus the laudable aim set out at page 8 of the consultation paper

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http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/consultationresponses.pdf?view=Binary

[8] Op. cit.

[9] Section 55 of the Nationality, Immigration and Asylum Act 2002, which the consultation proposes will be re-enacted.

of achieving a system which is “simple and cost effective to deliver, avoiding unnecessary administrative processes and allowing us to provide support in ways which make the best use of tax payers money” is undermined by the different systems of support and the levels of bureaucracy involved.

1.12 ILPA’s fourth overarching concern is in the extent to which the Bill proposes to transfer power to the Secretary of State, in particular by making only broad general provisions within the Bill itself and leaving far more to secondary legislation than was previously the case. This is described in the consultation document as the use of “high level powers” to provide flexibility, but ILPA is concerned that the degree to which delegated legislation will control the availability of and nature of asylum support removes a crucial degree of democratic control and parliamentary scrutiny. What is of further concern is that as yet there are no draft regulations and in a number of respects the consultation document does not address those matters, which are to be left to regulation. It is very difficult to respond effectively to a consultation of this nature without knowing the detail of the proposals.

1.13 For example, the proposals on appeal rights in the draft Bill appear to remove a right of appeal from a very large category of people who the UK Border Agency believes have ceased to qualify for support (clause 222(3)(h)) but UK Border Agency officials have confirmed in a paper circulated after a consultation meeting held with stakeholders on 15 December 2009 that it is only intended to apply this provision to cases where support is provided because a person is taking reasonable steps to leave the UK and the individual has been supported for the proposed maximum three month period. There is no good reason for not making this more restricted limitation of appeal rights express in the Bill. The provision in clause 222(3)(h) at present is alarmingly wide and gives the government an almost unrestricted power to remove appeal rights with minimal parliamentary scrutiny.

1.14 In addition to these concerns about the reduction in accountability, it is also concerning that at the meeting held with stakeholders on 15 December 2009, UK Border Agency officials were unable to give any indication of when the draft Regulations would be published, or whether and if so to what extent these would be preceded by consultation.

2. **Q1: Some asylum seekers frustrate the system by not making their claim at the earliest possible stage. Should we reserve the right not to support them in some circumstances?**

2.1 No. The power currently contained in s. 55 of the Nationality, Immigration and Asylum Act 2002 (NIAA) should be repealed and not be re-enacted.

2.2 There is no evidence that the existence and use of this power actually has any impact on the point at which asylum seekers make their claim. This proposal is the clearest example of where the UK Border Agency has failed to adopt an evidence-based

approach to policy making. In fact the evidence is that since the s. 55 power was introduced, the proportion of port applications for asylum has reduced.[10]

2.3 In a presentation given at the meeting with stakeholders on 15 December 2009, the UK Border Agency stated that "*The asylum support system must ensure that genuine asylum seekers are not left destitute...*" ILPA agrees with this proposition, but contends that the continued existence and use of the section 55 power undermines that statement of principle. The fact that an asylum claim is made late does not necessarily mean that it is not a genuine claim. ILPA's members are aware of countless examples of persons recognised as refugees despite claiming asylum months or even years after arriving in the UK.

2.4 It is ILPA's experience that a myriad of factors other than the availability of support or an intention to "frustrate the system" influence the point at which asylum seekers make their claims, including but not limited to where in the UK they arrive, what they are told by their agents, their health, being traumatised or frightened of officials, wishing to wait and see whether the situation in their country of origin might improve, the level of information or advice available to them about the asylum process, what other options are available to them (for example, if they have extant leave as a student or for employment and hope that by the time this expires, they will no longer be at risk).

2.5 If the UK Border Agency wishes to encourage claims to be made as soon as possible, ILPA considers that there are other, practical steps which can be taken, such as enabling in-country asylum claims to be made at more than one location. In its 2007 report,[11] the JCHR was critical of the practical difficulties created by the fact that, at that time, it was only possible to claim asylum at Croydon or Liverpool, and recommended that the UK Border Agency "provide locations for claiming asylum and support throughout the UK".[12] The Government rejected that recommendation and in October 2009 announced that new in-country applications could only be made in Croydon.

2.6 The UK Border Agency currently has a network of regional reporting centres with counter services where asylum seekers could make their claims. The current system means that if a person presents at one of these reporting centres to seek asylum, they have to be referred to Croydon. This in itself can often result in delay, particularly if the person is destitute and unable to afford to travel to Croydon. Accepting asylum claims at reporting centres, particularly where there are New Asylum Model caseworkers available, would be consistent with the regionalisation of asylum decision-making and enable the immediate allocation of claims to New Asylum Model teams.

2.7 Alternatively, the UK Border Agency could return to a system where asylum claims could be made by post. Once a postal claim for asylum was received, arrangements could be made for the asylum seeker to attend a screening interview at one of the UK Border

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[10] Home Office Asylum statistics show that the percentage of applications for asylum made at port has steadily decreased from an average of around 33% in the years immediately preceding the introduction of s. 55 to around 15% in 2006 and 2007 and 10% in 2008. Statistics taken from http://www.homeoffice.gov.uk/rds/immigration-asylum-publications.html

[11] Op. cit.

[12] Paragraph 81

Agency's regional offices in order to undergo screening, be issued with an Asylum Registration Card and apply for support if necessary. If appropriate, the UK Border Agency could provide a form to be submitted with a postal asylum claim to ensure that essential basic details such as name, date of birth, nationality, and contact details are provided to facilitate the arrangements for screening.

2.8 Since the ruling in *R (Limbuela & Others) v SSHD* [2005] UKHL 66, UKBA has only used the section 55 power in subsistence-only cases, and there have been relatively few cases in which it has actually been deployed to refuse support.[13] Yet the administrative costs and delays caused by the need to carry out section 55 interviews appear to be disproportionate to the benefit – if any – in terms of cost savings and encouraging early applications. Members of the Asylum Support Partnership report delays of at least six weeks in some regions.[14]

2.9 In its report on the Management of Asylum Applications by the UK Border Agency, the National Audit Office found that it cost significantly more to accommodate asylum seekers in initial accommodation under s. 98 of the Immigration & Asylum Act 1999 ("IAA") than it did after dispersal, and recommended that the UK Border Agency should reduce the time that asylum seekers spend in initial accommodation.[15] The process of undertaking s. 55 interviews before deciding whether to grant s. 95 support delays the taking of the s. 95 decision, in many cases for a substantial period of time, and consequently increases the costs of initial accommodation under s. 98 of the Immigration and Asylum Act 1999.

2.10 Even if the power is only used in cases where accommodation is available, it can still lead to breaches of individuals' right not to be subject to inhuman and degrading treatment if they are unable to meet their needs for food, washing facilities and other essential living needs. Thus while it is right that, as currently enacted and as envisaged in the bill, the power to refuse support in these circumstances is subject to a safeguard to protect human rights, there will undoubtedly be cases of asylum seekers who are denied support under s. 55 and who consequently face deprivation which breaches their human rights. It was for this reason that the JCHR recommended in its 2007 report that the power be repealed:[16] ILPA urges the government to take the opportunity to follow that recommendation.

3. **Q. 2: Do you agree with our proposals to repeal those parts of legislation which we do not intend to use and which:**

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[13] The Home Office's Quarterly Asylum Statistics for the period from the second quarter of 2007 to the first quarter of 2008 showed that of 17645 applications for asylum support received in that quarter, only 845 were refused under s. 55 – less than 5%. After the first quarter of 2008, Home Office published asylum statistics do not include details of s. 55 refusals.

[14] Refugee Action state that clients who apply for subsistence-only support have reported delays of six weeks and more waiting for a s. 55 interview.

[15] National Audit Office, The Home Office: Management of Asylum Applications by the UK Border Agency, Report by the Comptroller and Auditor General, HC124, Session 2008-2009, 23 January 2009, paragraph 10(v).

[16] Paragraph 92

a) **Relate to the withdrawal of support for families where they fail to cooperate with removal processes** *[Section 9, Asylum and Immigration (Treatment of Claimants, etc) Act 2004];*

b) **Require failed asylum seekers to participate in Community Activities as a condition of support** *[Section 10, Asylum and Immigration (Treatment of Claimants, etc) Act 2004]*.

3.1 Yes. ILPA agrees with both these proposals both because they would remove provisions that are incompatible with the other provisions of the law and with the UK's international obligations and also because they reflect the type of evidence-based policy making which ILPA strongly urges the government to adopt more widely. In particular, as noted above, the evidence from the pilot of section 9 showed that it failed to achieve its objectives and indeed was counterproductive, leading to higher rates of absconding.

3.2 The government already has the power to repeal section 9.[17] ILPA urges the government to use that power to do so immediately.

3.3 However, ILPA is disappointed that at the same time, the UK Border Agency is seeking to introduce procedures for moving families into full board accommodation as a means of enforcement. This proposal is discussed in more detail in the answer to Q. 7 below.

4. **Q.3 Should we support any failed asylum seekers who have been found to have no protection need by the independent appeal system?**

If yes, under what circumstances should we support failed asylum seekers?

4.1 Yes. Asylum seekers should be provided with accommodation and support from the point of application (or before, if there is a delay or difficulty in presenting themselves to make the application) until the point of departure, whether voluntary or through enforced removal. All asylum seekers have a fundamental right to accommodation and to have their essential living needs met, whether or not they have reached the end of the process. Continued provision of accommodation and support will in fact decrease the likelihood of asylum seekers absconding.

4.2 As has been noted elsewhere, there is no evidential basis for suggesting that removing support from refused asylum seekers encourages them to leave the United Kingdom or assists in enforcing removal. On the contrary, as noted above, the section 9 pilot showed that removing support from families had no tangible impact on the uptake of voluntary return and led to a higher rate of absconding, making it harder to enforce removal.

4.3 However, recognising that the UK Border Agency is unlikely to agree with ILPA in this respect, we make the following comments about the proposed circumstances in which support will be provided.

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[17] Section 44 of the Immigration, Asylum and Nationality Act 2006.

4.4 Refused asylum seekers should be provided with support in all of the circumstances set out in the consultation document, but in others as well. ILPA believes that if support is to be limited to specific sets of circumstances, those criteria should be included in the primary legislation and not left to Regulations. If, contrary to ILPA's submissions herein, some people whose applications for asylum have failed are to be excluded from access to support, ILPA believes that there should be Parliamentary scrutiny of the circumstances in which such people will and will not be supported.

4.5 In addition to supporting asylum seekers where the Secretary of State believes that there is no viable route of return, provision should also be made for supporting asylum seekers where the UK Border Agency has suspended enforced returns. In circumstances where the UK Border Agency does not consider it safe to return people forcibly, it will often unreasonable to expect them to take steps to do so voluntarily. However, where there is no reasonable prospect of a removal, individuals should not simply be left in limbo – whether with or without asylum support – but a grant of leave to remain should be made.

4.6 In *R (NS) v First Tier Tribunal (Social Entitlement Chamber) & SSHD* (6 November 2009, unreported) the Administrative Court (Stadlen J) held that where a person had made an application for judicial review of an asylum-related decision s/he may be entitled to support under section 4 on the grounds that refusal of support would breach his/her human rights, even before s/he had been granted permission. In ILPA's view this is correct, as it would be unreasonable to expect a person claiming judicial review of a decision connected with an asylum claim to leave the country before a decision is made on his application for permission. In the circumstances, the requirement in category 2(c) (on page 12 of the consultation document) for permission to have been granted should simply be removed. At the stakeholder meeting on 15 December 2009, UK Border Agency representatives indicated that the consultation document having been drafted before the judgment in *NS*, consideration had not yet been given to the implications of this judgment. The UK Border Agency should now give effect to the consequences of the judgment for the interpretation of the law.

4.7 Further, if the UK Border Agency intends to retain a limited set of categories of persons whose applications for asylum have failed who would be entitled to receive support, further clarification should be provided to UK Border Agency caseowners as to the types of situation in which a refusal of support might breach an applicant's human rights. It is inappropriate to formulate policy and legislation which is likely to give rise to a breach of people's human rights with simply a "backstop" provision to safeguard rights in extreme cases. Rather, the legislation should be formulated so that cases where the refusal of support would be likely to result in a breach of an individual's human rights are expressly included within the categories of entitlement to support.

4.8 This could best be achieved by the inclusion of further categories of entitlement for obvious cases where the refusal of support might breach an applicant's rights. For example, the fact of having submitted further representations might be identified as a separate category for support. Other potential categories should include:

- Being a party to ongoing court or family proceedings, where the applicant's effective participation would be impeded if he or she were to leave the jurisdiction;

- Where an applicant does not qualify for support as a dependent but nonetheless has a family life with a person whom it would not be reasonable to expect to leave the UK, for example because that person has an outstanding asylum or human rights claim, or is a British citizen.

4.9 If this suggestion is adopted, it would bring a benefit of greater clarity for both applicants and caseworkers and would reduce the number of erroneous decisions. However, in these circumstances it remains important for a human rights safeguarding provision, such as that contained in category 2(d) on page 12 of the consultation document, to be retained.

4.10 In the light of the evidence that significant numbers of refused asylum seekers with children are destitute,[18] ILPA supports the inclusion of families with children born after the main applicant is appeal rights exhausted in those entitled to support, but is disappointed that the UK Border Agency proposes to move all families with children onto the equivalent of s. 4 support after they exhaust their appeal rights. This proposal is discussed further below.

4.11 The meaning of the last clause of category 2(e) on page 12 of the consultation document ("who may otherwise fall to be supported by local authorities") is unclear. ILPA assumes that this is simply intended to explain the rationale behind including this group of people in those who would be entitled to support after their appeals have been finally determined, rather than in any way limiting the scope of category 2(e). If, on the contrary, it is proposed that families would only be supported if otherwise local authorities would be obliged to support them, ILPA would oppose that limitation. As the section 9 pilot has shown, withdrawing support from families with children does not increase the uptake of voluntary returns and leads to an increase in the number of families absconding, which is not in the best interest of children. ILPA strongly believes that families in particular should be supported throughout their time in the United Kingdom.

4.12 It would be preferable for families with children to be supported by local authority children's services departments who have the specialist knowledge necessary to provide appropriate support to vulnerable children. As proposed above, the UK Border Agency should take the opportunity for radical overhaul of the system of support for people seeking asylum. Part of this overhaul should include consideration of abolishing the provisions that prevent asylum seeking families with children from accessing mainstream local authority support.

5. **Q. 4: Do you agree that we should be able to set a fixed time limit for support for those supported on the basis that they are taking steps to leave, with no right of appeal?**

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[18] *The Second Destitution Tally* (above) found that 13% of destitute people who visited in the course of its research in October 2008 had dependent children.

5.1 No. ILPA opposes this proposal.

5.2 First, we do not consider that it is appropriate to set a fixed time limit for support. There are frequently barriers to departure even where a person is making every effort toward a voluntary return. As the UK Border Agency is aware, it is extremely difficult to obtain travel documentation for returns to certain countries and can take a very long time.[19] Indeed, in the consultation document it is acknowledged that individuals may experience difficulties in leaving the UK and suggests that such persons might reapply for support. The Asylum Support Appeals Project's report *Unreasonably Destitute* gives clear examples of cases where people making serious efforts to leave the UK have been unable to do so for far longer than three months, because they are stateless or unable to demonstrate their nationality to the satisfaction of their Embassy.[20]

5.3 The introduction of a fixed time limit with the possibility of reapplying for support for a further period introduces unnecessary bureaucracy, cost and delay into the system. It therefore defeats one of the objects of the reform, namely to create a system which is simple, cost-effective and avoids unnecessary administrative processes.[21] It increases the likelihood of applicants falling through the gaps and being left destitute for prolonged periods if they do not realise that they need to reapply for support before the three-month period ends. If, as under the policy in operation since June 2009, applicants are only able to apply twice (i.e. for two three-month periods) there risk being large numbers of people, seeking to leave the UK, who are unable to be supported because it has taken more than six months to secure travel documentation. Furthermore, such a limitation would penalise those who, while not initially able to be fully co-operative with the process, perhaps because of illness, subsequently co-operate fully. Such people might start to co-operate three or four months into the process, but would still only be entitled to support for that limited period.

5.4 It would be more effective both in terms of costs and of achieving the UK Border Agency's aims of encouraging voluntary departure, to continue support until individuals are either granted leave to remain or leave the UK, whether voluntarily or through an enforced departure. The continued provision of accommodation and support will facilitate those who do wish to leave in accessing advice and support on doing so, obtaining necessary travel documentation, making arrangements for the return of personal belongings, and making contact with family and friends in the country of origin. This would increase the likelihood of voluntary departures. Continued support will also make it more likely that the UK Border Agency will be able to retain contact with individuals.

5.5 Generally, regard should be had to the UK Border Agency's commitment that asylum cases be resolved within 6 months of the claim. If that goal, introduced with the New Asylum Model and being steadily rolled out up to end 2011, is to be met, the past

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[19] An example is Vietnam, where there have historically been very long delays and it is understood that the situation has become so dire that recently the Vietnamese government has sent a task team to try to speed up the process of checking identity and issuing travel documentation.

[20] *Unreasonably Destitute?* – Asylum Support Appeals Project, June 2008.

[21] Page 8 of the consultation document

concerns of the UK Border Agency regarding expenditure on what is now section 4 support should be substantially addressed. If the Secretary of State were to grant leave to remain in the circumstances to which we refer at paragraph 4.4 (above), this would further significantly reduce expenditure on asylum support.

5.6 If, contrary to ILPA's submissions, the UK Border Agency decides to introduce a time limit in these cases, the right of appeal should not be removed. Under the current system, where the UK Border Agency proposes to terminate support on the grounds that the individual no longer qualifies under the criterion under which they were originally granted support, they are given the opportunity to show, both to the UK Border Agency by way of written representations and on appeal, that in fact they now meet another of the criteria. Support continues while their representations and any appeal are considered. ILPA believes that this process is far preferable to requiring individuals to make a fresh application for support, and more consistent with the UK Border Agency's aims of achieving a simplified, cost-effective system and minimising administrative processes. The retention of a right of appeal would have the added benefit of ensuring that individuals did not fall into a gap between periods of support because they did not appreciate the need to re-apply for support within the original three- month period.

6. **Q. 5: Do you agree that the way in which support is provided to asylum seekers should be different than the way support is provided to those who have been found to have no protection need?**

6.1 No. Maintaining two (at least – the draft bill appears to suggest in fact more than two different forms of support) different systems of support undermines the stated aim of simplification through the provision of a single, coherent system of support. Requiring asylum seekers to re-apply for support is an unnecessary bureaucratic step and undermines the UK Border Agency's stated aim of creating a system that is simple, cost-effective and avoids unnecessary administrative procedures.

6.2 As the JCHR observed in its 2007 report:

> *"All asylum seekers – including those whose claims have been refused and the Home Office intends to remove from the UK – are still 'within the jurisdiction' and therefore beneficiaries of the rights set out in the panoply of international human rights treaties that the UK has adopted. They have simply asserted a fundamental right in seeking asylum. Regardless of their reasons for coming to the UK, asylum seekers must be treated with humanity before and after their applications have been decided. All are owed the human rights obligations successive Governments have assumed."*[22]

6.3 ILPA is particularly opposed to the proposals in the consultation document which suggest that changes in the type of support provided could be used to reward individuals for co-operating or "playing by the rules" and penalise them for failing to do so. As set out above (in the section on "overarching concerns"), support should not be used as a

[22] Paragraph 11

tool of enforcement, in principle, because of attendant breaches of the law and the UK's international obligations and because there is no evidence that it works.

6.4 There are significant delays in processing applications for section 4 support at present. There is also considerable cost to the UK Border Agency and wider public purse arising from the administration that is required to process these applications and the legal challenges that arise in relation to the severe delays. All of this could be reduced if those already in receipt of what is now s. 95 support did not have to reapply for support. As stated above, it would serve the UK Border Agency's wider aims if asylum seekers continued to be supported until they left the UK, whether willingly or through enforced removal. Accordingly, ILPA sees no need to change the way in which support is provided once an asylum seeker's appeals have been finally determined.

6.5 While welcoming the fact that the provision of support to asylum seekers in clause 206 of the new Bill is now a duty, ILPA does not understand why clause 210 only provides for a power to provide support in the prescribed circumstances to those who are not eligible for clause 206 support. The change from a duty to a power to support is of particular concern in the case of families with children. During the meeting with stakeholders on 15 December 2009, UKBA was pressed to explain this. The UK Border Agency indicated that it was not intended to refuse support to anybody who met the prescribed criteria under clause 210. In the circumstances, it appears that the distinction between the duty in clause 206 and the power in clause 210 is more apparent than real. The drafting should be changed so that there is a duty in both cases.

6.6 ILPA does not understand why it is proposed to allow families whose appeal rights have been exhausted to continue to receive subsistence-only support but not individuals. It costs the UK Border Agency more to provide an individual with accommodation and support than with subsistence-only support. It would be more cost effective and a better use of tax-payers money to allow individuals to live with family or friends, but to provide subsistence-only support where those family members or friends are unable to meet the individual's other essential living needs.

6.7 ILPA believes that this would also be more consistent with the UK's human rights obligations, particularly the obligation to promote respect for family life under Article 8 of the European Convention on Human Rights. At present, mixed households, for example those where one member of the family is a British citizen or entitled to s. 95 support but others are eligible only for section 4 support, are unable to live together. This is an unjustifiable interference with these families' Article 8 rights. If support continued to be available on a subsistence-only basis, this would enable such families to live together. In addition, ILPA considers that this is required by the UK Border Agency's duty to promote and protect the welfare of children: in general, it is in children's best interests to live with their family including both their parents. Article 9 of the UN Convention on the Rights of the Child 1989 provides that children should not be separated from their parents unless it is in their best interests and then only where this is determined by a court. This is reflected in domestic law by the provisions of the Children Act 1989 which provide for children to be brought up by their parents so far as is consistent with their safety and welfare.

7. **Q. 6: Do you think that closer working with both the voluntary sector and local authorities will:**

   a) **Help applicants to understand the options available to them at each stage of the process?**

   b) **Encourage those who are found to have no protection need to accept their position and return voluntarily?**

7.1 The best way to ensure that asylum seekers understand the process of their application for asylum and the options available to them is through the availability of good quality legal advice at all stages. ILPA also considers that access to legal advice is crucial in ensuring that asylum applicants are able to properly present their case for asylum and assists the UK Border Agency in getting their decisions right first time. ILPA therefore welcomes the proposals in the consultation document for expanding the early access to legal advice pilot and hopes that the UK Border Agency has taken on board the need for Legal Services Commission support for these proposals.

7.2 Asylum-seekers' understanding and confidence in the process is also likely to be influenced by what they see of consistency or inconsistency in the process. There are many aspects to this, but critical factors that establish or constitute inconsistency that are the direct responsibility of the UK Border Agency include poor decision-making, failures to implement policy consistently and different decision-making and appeal tracks such as those used in fast track processes.

7.3 It is important to remember that advising clients as to their prospects of success, and as to the procedures involved in the asylum system involves the provision of specialist *legal advice*. Not only are voluntary sector partners of the UK Border Agency not necessarily qualified to give such advice, it would be a criminal offence under the Immigration and Asylum Act 1999 for them to do so if they are not qualified. Although advice on asylum support is specifically excluded from the provisions of Part V of the Immigration and Asylum Act 1999, advice on procedures and prospects of success will frequently involve advising on immigration matters.

7.4 However, ILPA recognises that there is a distinction between the provision of legal advice on an individual case, and general guidance about the asylum process. At the stakeholder meeting on 15 December 2009, the UK Border Agency indicated that what was intended was that voluntary sector agencies would (a) ensure that clients understood their options as they went through the process, and those options narrowed, and (b) had understood any legal advice they had received. It is very unclear what the distinction is between "understanding options" and being given legal advice, and it is difficult to see how voluntary sector representatives can ensure that legal advice has been understood without giving legal advice themselves.

7.5 ILPA is concerned at the suggestion in the consultation paper that the UK Border Agency will "get tough" on legal representatives who put forward unmeritorious claims on their clients' behalf. ILPA considers that this suggests a lack of understanding on the part of

the UK Border Agency of lawyers' obligation to act on instructions, save where this would be a breach of their professional ethics, which means they cannot refuse to put forward a case on behalf of their clients. Legal representatives have professional conduct obligations which are a matter for their professional regulatory bodies (the Solicitors Regulation Authority, Bar Standards Board and Office of the Immigration Services Commissioner). In Legal Services Commission-funded cases there is a merits test and it may be legitimate to raise concerns with the Legal Services Commission if legal representatives appear to be misapplying the merits test. However, in the case of a privately paying client, a legal representative is normally professionally obliged to advance a claim if instructed to do so by his/her client, even if it is unlikely to succeed.

7.6 At the stakeholder meeting on 15 December 2009, the UK Border Agency clarified that by "getting tough" on legal representatives, it simply meant that it intended to adopt a more co-ordinated approach to making formal complaints about unethical legal advisors, through the normal complaints channels (i.e. the Solicitors Regulation Authority, Bar Standards Board or Office of the Immigration Services Commissioner). It was also understood that it was intended that such complaints would need to go through more senior officers at the UK Border Agency than rank-and-file casework staff in order to ensure that vexatious complaints were not being made. This is the appropriate way for the UK Border Agency to take action in respect of unethical or improper behaviour on the part of legal representatives.

8. **Q. 7 – Do you agree that case owners should be able to tailor accommodation provisions for those who have been found to have no protection need and bring families who purposefully frustrate the system into full board accommodation (where this could assist with removal or return)?**

8.1 No. For the reasons set out above, ILPA does not consider that the type of support or accommodation provided should either depend on the stage which an asylum seeker has reached in the process, or be used as a tool for enforcement.

8.2 In the case of families with children in particular, the UK Border Agency is obliged to have regard to the need to safeguard and promote the welfare of children. The "section 9" pilot showed that removing support from families with children as a means of "encouraging" returns did not work: it did not increase the uptake of voluntary returns, did not increase the number of removals, and led to a higher rate of absconding.

8.3 Moving families out of the accommodation in which they have lived while their claims are being processed and away from their schools, friends and communities is unlikely to be in the best interests of children. Moving families into full board accommodation away from the communities in which they have been living is likely to have a similar impact on children's well-being. It would not be consistent with the UK Border Agency's duty to safeguard and promote the welfare of children.

Q8 – Do you agree that the offences to tackle support fraud should apply to all types of support?

8.4 ILPA does not object to this proposal although notes the lack of evidence to demonstrate the need for further offences to be created. In particular, there is no explanation of why it is disadvantageous for UK Border Agency fraud investigators to have to use the general criminal law which makes ample provision for fraud charges.

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Chair
ILPA
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