ILPA and the AIRE Centre comments to the UK Border Agency on the re-cast Procedures and Qualifications Directives.

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information, research and analysis. ILPA is represented on numerous government and other stakeholder and advisory groups. ILPA gave evidence to the House of Lords Committee on the European Union on the original versions of the Procedures and Qualifications Directives as well as hosting a seminar on these with the International Association of Refugee Law Judges in which the UK Border Agency, members of the judiciary and the UNHCR participated, and providing evidence to the European Commission.

The AIRE Centre, Advice on Individual Rights in Europe, is a registered charity, which provides information and advice throughout Europe on international human rights law, including the rights of individuals under the provisions of European Community Law; direct legal advice and assistance on a case by case basis to legal practitioners or advisers; expert resource persons and teaching materials to organisers of workshops and conferences and general advice on international human rights law to public authorities. The Centre's advice, information and representation service covers all aspects of the rights of individuals in Europe under international law.

In short time available, we are unable to provide a comprehensive analysis of both instruments. We have focused these comments upon the concerns highlighted by the UK Border Agency.

The UK should be an active participant in raising standards of protection throughout the European Union and in ensuring that all Member States uphold these standards. We have considered the 4 December 2009 report of the House of Lords European Union Committee *Asylum directive scrutiny of the opt-in decisions*[1], that Committee's report *The United Kingdom opt-in: problems with amendment and codification*[2] and the European Commission's response to the latter report,[3] which forms Appendix Three to the former report.

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

We have considered the Explanatory Memoranda produced by the United Kingdom[4] and also the UK's reasons for hesitation as expressed at the UK Border Agency National Asylum Stakeholder Forum EU Subcommittee meeting on 18 November 2009 and discussed there.

We have also had sight of the comments of Asylum Aid on the question of opting-in to the re-cast Qualification Directive submitted following the 18 November 2009 meeting and acknowledge our debt to them in the comments that follow.

In the light of all these documents we consider that the reasons for the UK's hesitation are not well-founded. More detail is provided below.

We agree with the House of Lords Committee on the European Union and the Commission's analysis that the UK will continue to be bound by the existing instruments if it does not opt in to the new ones.[5] We concur with the analysis of the House of Lords Committee on the European Union that in the light of this *"it is not so much desirable as essential that the Government should opt in."*[6] We recommend that the United Kingdom opt-in to both directives.

The Qualification Directive

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

The primary, authoritative texts are the 1951 Convention Relating to the Status of refugees and its Optional Protocol of 1967 by which the UK is bound in any event. In *R (Adan and others) v Secretary of State for the Home Department* [2001] 2 AC 477, 516 the House of Lords held that Article 1A(2) of the 1951 Convention relating to the Status of Refugees has an autonomous meaning.[7]

The primacy of the 1951 Convention was a point made with force in the judgment of the House of Lords in *Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department* [2006] UKHL 46, handed down before the UK's implementing legislation on the current Qualification Directive had come into force. Lord Bingham, giving the leading judgment held that if a particular interpretation were given to the current Qualification Directive's definition of a social group *"..it propounds a test more stringent than is warranted by international authority."* Lord Brown agreed saying *"The…Directive…will…have to be interpreted consistently with [*Lord Bingham's*] definition."*

[4] Documents 14863/09 and 14959/09, both Meg Hillier Parliamentary Under-Secretary of State, Home Office, published as Appendices Four and Five to HL Paper 6 of session 2009-10, *op. cit.*
[5] HL Paper 6 of session 2009-10 and Appendix Three thereto, *op. cit.*
[6] HL Paper 6 of session 2009-, *op. cit,* para 18.
[7] Para 516 of the judgment.

In *EN (Serbia) v Secretary of State for the Home Department , KC (South Africa) v Secretary of State for the Home Department* [2009] EWCA Civ 630., the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004[8] (SI 2004/1910) was found to be *ultra vires* the power to make secondary legislation contained in s 72(4)(a) of the Nationality, Immigration and Asylum Act 2002. In that judgment the Court of Appeal examined the relationship between the 1951 UN Convention Relating to the Status of Refugees, the current Qualification Directive[9] and UK domestic legislation, as well as the respective jurisdictions and competence of the domestic courts and the European Court of Justice in examining these questions. While holding that, in accordance with established principles of international treaty law, ambiguous legislation must be interpreted in accordance with the UK's international obligations, the Court of Appeal held that it was for the European Court of Justice, not a domestic court, to determine whether the Qualification Directive was *ultra vires* the powers to adopt legislation on asylum under Article 63 of the Treaty on European Union[10] which permits the adoption of

> *"63(1) .. measures on asylum in accordance with the Geneva Convention …."*

Nothing suggests that this analysis would be altered by the change of legal base to Article 78(2) of the Treaty on the Functioning of the European Union.[11]

We recall that when taking its decision to opt into the current Qualification Directive the Home Office held a public consultation open for nine weeks (with apologies for the truncated period).[12] The consultation was issued with detailed supporting documents, including draft immigration rules and regulations. The Qualification Directive was also the subject of an ILPA/International Association of Refugee Law Judges seminar in which the UK Border Agency participated.

At this stage we have a very short period of time in which to comment on whether the UK should opt in to the re-cast Qualification Directive. We trust that if the decision is taken to opt in, a full consultation will be held on implementing provisions, as was done in 2006.

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

The Home Office's Explanatory Memorandum[13] states that the proposal to introduce a new concept of beneficiaries of international protection to include both refugees

---

[8] SI 2004/1910.

[9] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted Official Journal L 304, 30/09/2004 P. 0012 – 0023

[10] OJ C 191, 29 July 1992

[11] OJ C 115/47, 9 April 2008

[12] *Implementation of Council Directive 2004/83/EC of 29 April 2004 in Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as persons who otherwise need international protection and the content of the protection granted.* Home Office, 23 June 2006.

[13] Document 14863/09

and beneficiaries of subsidiary protection would cause no change to UK law or practice as the UK already operates a single procedure for both types of claim. The AIRE Centre and ILPA agree. This amendment is in line with the principles in new recital 11 (ex recital 6) and reflects at EU level the UK's existing practice and existing international obligations . We note that, despite recital 11 (ex 6), the Commission has made no proposal to extend the benefits of the Directive to those who are prohibited from being expelled under the European Convention on Human Rights (or the UN Convention against Torture) who continue to be excluded from the protection of the Directive as a result of Articles 12 , 17 or 21.

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

> *"…none of these difficulties seem to us to be so significant that the Government should decline to opt-in."*[14]

In our view the Explanatory Memorandum[15] on this re-cast Directive overstates some of the concerns, in some cases perhaps because of a mis-reading of the text of the re-cast Directive.

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

The proposed more detailed specification of qualifying family members in Article 2 and particularly the carers of qualifying children similarly reflects the UK's existing law and international obligations under both Article 8 of the European Convention on Human Rights and the UN Convention on the Rights of the Child. ILPA and the AIRE Centre recall in this context that they warmly welcomed the Government's decision in 2008 to withdraw the immigration reservation to the latter Convention. The new proposed provisions reflect existing international obligations and are predicated on the requirement that the best interest of the child require their inclusion.

The Explanatory Memorandum indicates concerns[16] about the new definition of a family member (para14). Indeed, the Home Secretary before the European Council stated:

> *"The proposal to allow UAMs to be joined by their parents if their claims succeed would be even more disastrous. In the UK 12% of our claims come from minors we spend about □160 million a year dealing with this problem. A decision allowing children to be joined by there parents will simply encourage more to come, undermine our efforts to reduce trafficking of children, and would be the opposite of what is needed. I would strongly encourage the commission to think again."*[17]

With respect to the Home Secretary we consider that these comments are based upon misapprehensions and confusion. First, the provisions of the recast Directive are not concerned with joining a child. They are concerned with those family members who are *"present in the same Member State"* and moreover present *"in*

[14] HL Paper 6 of session 2009-10, *op. cit.* para 17.
[15] Document 14863/09, o*p. cit.*
[16] *Op. cit.,* para 14.
[17] Transcript of 30 November 2009 Justice and Home Affairs Committee 2979th meeting, which is available to view at http://video.consilium.europa.eu/index.php?pl=2&sessionno=2612&lang=EN

relation to the application for international protection" (draft Article 2(j)). As set out in the submission of Asylum Aid[18], such family members, and the children with whom they wish to stay are likely to have strong claims under Article 8 of the European Convention on Human Rights in any event.

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

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

We take issue with the Home Secretary's comments in any event, but for reasons that will not be touched by the definition of family members in the re-cast Directive in its current form.

If a child claims asylum in the United Kingdom the United Kingdom does not currently recognise any right of that child to be reunited with his/her parents when the child has been recognised as a refugee or accorded humanitarian protection. When the child's claim is determined, the child will either be recognised as refugee, accorded humanitarian protection, returned if return can be affected in a manner that protects the safety and welfare of the child, or given limited leave to remain in the UK to age 17½ because no such safe return can be effected. The child given limited leave to remain for reasons of his/her safety and welfare, and thus having due regard to his/her unaccompanied status, has no entitlement to family reunion.

The adults who have a right to family reunion with their children under UK procedures are those who cannot return to their home country to live with their parents there, because they will face persecution under the 1951 UN Convention Relating to the Status of Refugees or serious harm prohibited under the European Convention on Human Rights, upon such return. It is an anomaly in UK law that a child who would face such serious harm or persecution upon return is not allowed to be reunited with his /her parents. Adult or child, a person is accepted to be a refugee and thus to be unable to live with family members in the country of origin or former habitual residence. There appears to be in the current UK law discrimination against children recognised as refugees because of their status as minors. Such discrimination is contrary to the UK's obligations under the UN Convention on the Rights of the Child and in particular Article 2 (prohibition on discrimination) and Articles 8 (right to preserve family relations) and 9 (right not to be separated from parents against the will of the child) but most of all Article 10 which states

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

We also draw attention to Articles 22 and 39 of the UN Convention on the Rights of the Child.

---

[18] *Op cit.*

The UK Children Act 1989 already imposes a duty upon local authorities to promote the upbringing of children in need within their families save where this is incompatible with safeguarding and promoting the welfare of the child in question.[19] Current UK practice needs in any event to be reviewed in the light of the UK Border Agency's duty to safe and promote the welfare of children under section 55 of the Borders, Citizenship and Immigration Act 2009.

Current statistics indicate that a child is less likely to be recognised as a refugee than an adult. The Home Office statistics for 2008[20] indicate that in only 8% of the claims from children under 17 (the age used in the statistics) decided in 2008 was the child recognised as a refugee For adults the percentage recognised as refugees (19%) was more than twice that for children. Any suggestion in the Home Secretary's comments that a child is likely to be sent as a bridgehead for a family seeking protection does not accord with the evidence.

Article 7 (actors of protection)

The proposed new Article 7 reflects the evolving jurisprudence of both the former European Court of Justice (now the Court of Justice of the European Union) and the European Court of Human Rights in this field, where a *prima facie* risk of persecution or serious harm has been shown to exist particularly in relation to those who would be required to rely in armed militias to protect them. The constant jurisprudence of the European Court of Human Rights looks at the practical and effective nature of the protection, rather than the theoretical legal protection available. The protection available must not come from sources which are acting outside the law of the land or, more importantly, from armed militias operating in violation of international law. It is thus similarly a codifying measure.

The Explanatory Memorandum misstates the proposal in the re-cast Directive and, we suggest, tilts at windmills. It is not the case that the proposed amendment imposes a *"requirement to provide international protection for people who can obtain protection in their home countries, simply because those providing the protection do not operate a formal legal system."*[21]. We concur with Asylum Aid; the provisions of the proposed Directive require that an applicant for international protection must establish, *inter alia*, that either they are at risk of an act of persecution (Article 9) or serious harm (Article 15). If an applicant cannot establish this, the question of whether or not the country operates a legal system does not arise. The cases cited by Asylum Aid[22] as evidence that current UK law is in line with that interpretation are indeed authority for this proposition and are already binding on the United Kingdom. We have had sight of the email from David Saville of the UK Border Agency EU Asylum Policy Team re the figures cited by the Home Secretary at the 2979th Justice and Home Affairs Committee meeting explaining that the figure of 1700 cases that would be affected by Articles 7 and 8 of the recast Directive was based upon an assessment from operational colleagues that the new definition (as

---

[19] Section 17.

[20] Home Office Statistical Bulletin Control of Immigration: Statistics 2008 (published August 2009) see http://www.homeoffice.gov.uk/rds/pdfs09/hosb1409.pdf

[21] Document 14863/09, *op. cit* paras 15 and 16.

[22] *Hovarth v SSHD* [2000] 3 WLR 379 and for Article 3 ECHR *R (Bagdanivicius) v SSHD* [2005] 2 WLR 1359

(mis)-understood by the authors of the Explanatory Memorandum) would turn 10% of current refusals of asylum into grants and that the UK Border Agency currently refuses some 17,000 asylum cases per annum. Mr Saville notes that this was based on a reading of the proposals as more radical than Asylum Aid, which takes the same view as ILPA and the AIRE Centre, believe them to be.

Article 8

The proposed new Article 8 similarly reflects the approach taken by the the European Court of Human Rights decision in *Salah Sheek v Netherlands* (Application no 1948/04), *NA v UK*[23] and a number of other applications to the ECthR which have resulted in friendly settlements in relation to the internal flight alternative as a continuum of earlier caselaw.[24]

The UK is already bound by the European Court of Human Rights decision in *Salah Sheek v Netherlands* (Application no 1948/04), which, as acknowledged in the Explanatory Memorandum is the basis for this draft article in the recast Directive. As held by the European Court of Justice in *Elgafaji*[25] the European Convention on Human Rights is part of the *acquis communautaire* and thus binding upon the UK as a matter of European Union law.[26] UK caselaw already requires that the UK respect the standards set out in this Article.[27] We concur with the submissions made by Asylum Aid on this Article.

Article 11 and Article 16

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

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

These deal with cessation and for the most part reiterate the text of the 1951 UN Convention Relating to the Status of Refugees. The UK's concern appears to be that they transpose the humanitarian proviso set out in Article 1C(6) of the 1951 Convention Relating to the Status of Refugees (proposed Articles 11(3) and 16(3) and make of it an obligation. The proviso was considered by the UK Courts in *In re B, R (Hoxha) v Special Adjudicator [2005] UKHL 19.* The interpretation for which the recast Directive contends accords with the views of the UNHCR.

---

[23] Application no. 25904/07, judgment 17 July 2008.
[24] Such *as Chahal v UK* (1996) 23 EHRR 413, *Hilal v UK* (2001) 33 EHRR 2
[25] *Elgafagi v Staatssecretarias van Justitie* C-465-07, European Court of Justice judgment of 17 February 2009
[26] *Elgafagi, op.cit.* para 28
[27] *R v SSHD ex p Robinson* [1998] QB 929, *Januz v SSHD* UKHL 5

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

> *"Where a person has suffered badly in a particular country, that would not of itself mean that he continues to be a refugee, but it would be a factor that would be taken into account when deciding whether it would be appropriate to grant further leave to remain.*[28]

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

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

UNHCR pointed out at the meeting of the National Asylum Seeker Forum EU subcommittee that Article 14 (4) of the current Qualification Directive dos not deal with the withdrawal of refugee status but rather with the withdrawal of immigration status without affecting the refugee status of the person concerned and expressed concerns that this provision has been incorporated into rule 339 A (ix) and (x) of the Immigration Rules (HC 395) as grounds for revocation of refugee status. We concur with the UNHCR analysis.

Article 20

Article 20 presents a non-exhaustive list of 'vulnerable persons' whose specific situation is to be taken into account in implementing Chapter VII of the recast Directive which is concerned with the content of internal protection. This is acknowledged in the Explanatory Memorandum, which identifies them as "examples". The concern that applicants might 'fall through the gap'[29] thus appears to relate to matters of style rather than substance. Chapter VII is concerned with the rights protected under Articles 2 to 34 of the 1951 UN Convention. Various of those articles make reference to treatment no less favourable than that accorded to nationals or 'nationals of a foreign country in the same circumstances', depending upon the Article. The treatment under question is a matter of developed national and European law in the member States of the European Union, covering a wide body of special needs. We suggest therefore that this developed body of law, read with the obligations under the 1951 UN Convention, provides the means to plug the potential gaps about which the UK is concerned.

---

[28] *Hansard* HL 17 October 2009 vol 639 col 1050.

[29] Document 14863/09, o*p. cit* para 23.

The deletion of Articles 20(6) and 20(7) is raised as a concern on behalf of other member States; the UK does not rely upon them. We recall the Commission's explanation of the change in the Explanatory Memorandum that accompanies the proposal for the recast Directive:

> *"These possibilities are not conducive to integration and raise concerns from the perspective of the principle of non-discrimination. Furthermore, their limited use in practice points to their limited added value. It is thus proposed to delete these possibilities."* [30]

We also recall the description in that Explanatory Memorandum[31] of the detailed research undertaken by the Commission in preparing the recast Directive and the overarching aims of raising standards of protection and of simplification.[32] These suggest that the benefits of the deletions outweigh any benefits of retention, which would appear to be minor in any event.

Article 31

The Explanatory Memorandum appears to suggest that the provisions relating to tracing in the recast Article 31(5) 'enhance' the tracing provisions in the original Directive. The European Commission in introducing the proposals drew attention only to the desire to be consistent with the recast qualification directive.[33] Nor did the Commission suggest in introducing that Directive that it 'enhanced' standards of tracing.[34] It is unclear to us what the UK considers to be the enhancement. The current Qualification Directive places Member States under an obligation to 'endeavour' to trace family members, the recast Qualification Directive to 'establish procedures for tracing'. The change appears formal and procedural rather than substantive. We are pleased to see the change given that some of the *ad hoc* measures of tracing used by the UK Border Agency have given rise to grave concerns.[35]

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

[30] COM(2009) 551 b, Explanatory Memorandum para 7(e)
[31] COM(2009) 551 b, Explanatory Memorandum paras 1 & 2
[32] COM (2009) 551 b, Explanatory Memorandum, para 1.1
[33] COM (2009) 551 b, Explanatory Memorandum, para 1.1
[34] COM(2008) 815 final/2 Proposal for a Directive of the European Parliament and the Council laying down minimum standards for the reception of asylum seekers
[35] See ILPA's February 2009 submission to the Joint Committee on Human Rights Inquiry into Children's Rights, published as part of the written evidence to that report, Joint Committee on Human Rights, Twenty-Seventh Report of session 2008-09 HL 57/HC 318

The amendments to the Directive which the Commission proposes were prompted by the problems encountered by many member States who have a less rich and developed national jurisprudence in this field. It is important that the UK should opt in to the recast Directive which is the keystone of the European asylum system and is essential for the reduction of secondary movements.

Since it is our view that these amendments do no more than incorporate the international standards already applicable under the 1951 UN Convention Relating to the Status of Refugees, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention Against Torture and other relevant international instruments to which the UK is already a party the failure to opt in would suggest to the rest of Europe (and to the European Court of Human Rights in the event of any case going before it) that the UK had taken a decision not to articulate those obligations.

Procedures Directive

We share the view of the House of Lords Committee on the European Union that the UK should opt-in to this Directive.[36] We share the view of the Committee that cross references between different instruments are likely to be the source of particular difficulties for the UK if it does not opt in.[37] We note and concur with the opinion of the European Commission that the UK will be bound by all the provisions of the amended version of the Dublin Regulation, including those imported by means of cross-reference, regardless of whether it elects to opt-in to any other instruments[38]

Articles 2 & 20 Applicants with Special Needs

The UK Explanatory Memorandum on this recast Directive instrument appears to overcomplicate matters with respect to mental health problems. According to the definition, and as the UK observes in the Explanatory Memorandum,[39] the mental health problem in question must give rise to a "need of special guarantees in order to benefit from the rights and comply with the obligations in accordance with this Directive".[40] It is insofar as the mental health problem has implications for asylum procedures that it is of relevance; this is no more than a statement of good practice.

Article 3 Territorial Waters

The UK's Explanatory Memorandum makes reference to 'the extent of our territorial waters.'[41] Territorial waters is a matter with which we are familiar because of its relevance in nationality law. Under the Territorial Waters Jurisdiction Act 1878, 'adjacent territorial waters' were coastal waters to a distance of three miles. The Territorial Sea Act 1987 extended the distance to 12 miles, which is in conformity with most other countries and in accordance with the standards set by

---

[36] HL Paper 6 of session 2009-10, *op. cit.* para 22.
[37] HL Paper 6 of session 2009-10, *op. cit.* para 23.
[38] Appendix 3 to HL Paper 6 of session 2009-10, *op.cit.*
[39] Document 14959/09, *op. cit.*, para 13.
[40] Article 2(d)
[41] Document 14959/09, *op. cit.*, para 13.

1982 Convention on the Law of Sea. Gibraltar's territorial waters currently extend to three nautical miles. They are the subject of a dispute between Spain and the UK, as evidenced by Spain's Declaration under Article 310 of the 1982 UN Convention on the Law of the Sea upon ratification of the 1982 Convention and the UK's rejection of that Declaration as unfounded in its Statement under Article 310 made at the time of its ratification of the Convention.

On 7 August 2009 the UK Government requested permission from the Court of First Instance to intervene in support of the Government of Gibraltar against the European Commission seeking annulment of Commission Decision 2009/95/EC in so far as it includes a Site of Community Interest proposed by Spain with what the UK contend to be British Gibraltar Territorial Waters (case T-176/09).[42] If the UK wishes to assert its interest in these territorial waters, then it would be wise to opt-in to the re-cast Procedures Directive to have an opportunity to do so in this context.

Articles 4 and 6 Training

The requirements for training set down in the revised Procedures Directive are broad and general and it is difficult to envisage training other than the most cursory training of staff that did not address these points.

We note the reference in the UK's Explanatory Memorandum to the Asylum Support Office.[43] There is a grave danger of this Office becoming all things to all people and being too stretched to work effectively. UK Border Agency officials have indicated at National Asylum Stakeholder Forum EU subcommittee meetings that they should wish to see the efforts of the Asylum Support Office concentrated on places, and situations, where member States stand most in need of support. It cannot be assumed at this stage that devising a training curriculum will be among the priorities for the limited resources of the Asylum Support Office throughout its existence.

The proposed Article 6 of the recast Directive makes no express reference to training. We can only assume that reference is made to Article 6 because of the use of the words 'competent authorities' in that Article. As ILPA has set out *ad nauseam* to the UK Border Agency in discussions on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, the reference to 'competent authorities' in international and domestic law refers to authorities having legal competence rather than being competent in the sense of good at what they do. Article 17(5) would appear to be the other article with implications for training, not Article 6.

At the National Asylum Stakeholder Forum EU Subcommittee meeting on 18 November 2009 ILPA was asked whether the proposals would have financial implications for the training of legal representatives. Article 4 does not address the training of legal representatives and does not appear to place any requirements upon States in this regard. We recall that in the UK solicitors are required by their Code of Conduct only to act where they are competent to do, and to complete Continued

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

[43] Document 14959/09, *op. cit.*, para 15.

Professional Development on an annual basis. Those who give advice on legal aid (and the majority of persons seeking asylum qualify for legal aid) must be accredited to do so, and reaccredited, under the Law Society's scheme. Those not for profit organisations regulated by the Office of the Immigration Services Commissioner who give advice on legal aid must also pass the Law Society accreditation. The Office of the Immigration Services Commissioner requires examinations at different levels as a condition of being registered to give advice and also imposes Continuing Professional Development requirements. Again, advisors must not act where they are not competent to do so. We should not consider a person who had not had training on the matters listed in Article 4 competent to give advice on asylum.

Article 7 Information at the border or in detention facilities.

The UK Explanatory Memorandum expresses concern "that the proposals might require the permanent presence of such organisations at all such facilities or ports of entry".[44] The requirement set out in the proposed Article is that those who provide advice and counselling to people applying for asylum have 'access'[45] to border crossing points, transit zones and detention facilities. The suggestion in the Explanatory Memorandum that anything requires the State to ensure that such organisations have a permanent presence at any, let alone all, ports of entry, appears to be based on a misunderstanding of the text.

At the National Asylum Stakeholder Forum EU Subcommittee meeting on 18 November 2009 ILPA was asked about the implications of these proposals for legal representatives. As set out above, we do not consider that the Article requires legal representatives to maintain a permanent presence at ports of entry. Instead, it requires States to ensure that they have access to these areas.

We further note that representatives are able to accompany applicants to screening interviews in certain circumstances (for example the Legal Services Commission will fund this in the case of an unaccompanied child, and in other cases on an exceptional basis. It is thus not the case that screening units are wholly 'off-limits' to legal representatives under existing arrangements.

Article 17 Medico-legal reports

Special attention is drawn in the UK Explanatory Memorandum to the term 'medio-legal reports'[46] but this term is used only in the title of the Article which in its text refers only to 'a medical certificate'[47] and 'the results of medical examinations'.[48] We note that in a number of areas of law the term 'medico-legal report' appears currently to be preferred to the term 'forensic medical report' without any discernable change in meaning.

[44] Document 14959/09, *op. cit.*, para 16.
[45] Article 7(3)
[46] Document 14863/09, *op. cit.*, para 17.
[47] Article 17(1).
[48] Article 17(6).

The text of Article 17(1) says that a State 'shall' grant applicants a period to submit a medical certificate, but this follows a sentence that makes clear that the obligation is to allow applicants to have an examination 'to support' statements. It will be encumbent upon a legal representative who is asking for an adjournment of a court or tribunal hearing or a delay on the part of the UK Border Agency to indicate the purpose for which the medical report is sought and to persuade the court, tribunal or UK Border Agency that is appropriate to wait for the report because of the likelihood that it will provide evidence relevant to a fair determination of the application. This is the case now.[49] Where no reason can be shown, it is unlikely, under Article 17 as now, that an adjournment or stay of UK Border Agency procedures will be granted, therefore it is unclear why this provision should cause difficulties to the Agency.

Article 21 Guarantees for Unaccompanied minors

The UK's Explanatory Memorandum appears to confound determining a child's case rapidly and subjecting the child to accelerated procedures as defined in the proposed re-cast Directive.[50] Provision is made for the former, including giving priority to the case of, for example, a child, because of their special needs in Article 27(5). What is prohibited is subjecting the child to accelerated procedures under Article 27(6) and 7). Thus the concern expressed in the Explanatory Memorandum appears to be unfounded. There is nothing in the proposed recast Directive that would prevent the UK from giving priority to children's cases in the event of a queue or backlog.

No reason is given for the UK's opposition to the exemption of minors from the safe third country concept, described in the UK Explanatory Memorandum. We recall that the UK has opted into the proposal amending the Dublin Regulation[51] and reiterate our agreement with the view of the European Commission. We note and concur with the opinion of the European Commission that the UK will be bound by all the provisions of the amended version of the Dublin Regulation, including those imported by means of cross-reference, regardless of whether it elects to opt-in to any other instruments.[52] The objections on this point would thus appear to be likely to be academic as the UK looks set to be bound by European Union standards in any event. Moreover, it is difficult to imagine one State of the European Union operating safe third country rules in isolation.

The UK is aware of the grave concerns that surround the treatment of persons, including separated children, returned under third country procedures to Greece and of the UNHCR's criticisms as set out in the *UNHCR Position on the Return of Asylum-seekers to Greece under the 'Dublin' Regulation'*[53] in April 2008 in that regard. It is this type of very grave concern that has prompted the desire to place extra

[49] See The Asylum and Immigration Tribunal Procedure Rules 2005, SI 2005/230 (L 1), r 21 and the Asylum and Immigration (Fast Track Procedure) Procedure Rules 2005 SI 2005/560 (L 12), r 28. See also The Tribunal Procedure (Upper Tribunal) Rules 2008 – consultation on rule amendments for Asylum and Immigration Upper Tribunal Chamber. See also the UK Border Agency Asylum Process Instruction on the Medical Foundation. While we are that the latter is under discussion we are not aware of any elements of that discussion that would invalidate the comments made herein.
[50] Document 14959/09, *op. cit.*, para 18.
[51] As notified to the European Commission on 6 March 2009.
[52] Appendix 3 to HL Paper 6 of session 2009-10, *op.cit.*
[53] 15 April 2008.

protections in place for unaccompanied children. This is a reminder of the extent to which the European instruments on asylum represent a common project to raise standards throughout the Union.

The UK's own procedures with respect to the return of separated children to third countries have given rise to concerns as detailed in ILPA's submission to the Joint Committee on Human Rights Inquiry into the Rights of the Child.[54]

Chapter 60 of the UK Border Agency's current Enforcement Instructions and Guidance expressly exempts the Agency from any obligation to give notice to a separated child or his or her legal representative of the child's removal under third country removal arrangements controlled by the UK Border Agency's Third Country Unit. [55] This is inconsistent with the duty now imposed upon the UK Border Agency to safeguard and promote the welfare of the child. In these cases not only is the child not notified, the legal representative is not notified either. ILPA members have first hand evidence that these provisions do not act to protect the best interests of the child. In one case a child, accepted by the UK as a child, was returned to a third country to claim asylum there. That country had not, when the child had been there, accepted the child as a child. The Third Country Unit of the UK Border Agency obtained no assurances that he would be so treated on his return. And the child was not, but was instead left to fend for their self in dire need until back in touch with the UK representative who managed to secure a court order that the child be returned to the UK. Which was done. This illustrates the risks in subjecting to a child to third country procedures.

The UK's Explanatory Memorandum also expresses concern that the provision on unaccompanied minors may 'lead to more applicants claiming to be minors'.[56] We remind the UK that many of those who claim to be children, are children. As documented in ILPA's *When is a child not a child* (to which reference was made in the Supreme Court judgment in the case of *R(A) v Croydon, R(C) v Lambeth* [2009] UKSC 8, handed down on 26 November 2008) the available evidence indicated that a large proportion of age disputes are resolved in favour of the child. Statistics available showed age disputes in almost 45% of cases of separated children. Statistics on the percentage of those resolved in the child's favour were not available but statistics collected for the research showed age disputes resolved in favour of the child running at between 49% and 80% of all disputed cases. Although statistics have never been made available, we understand that the proportion of age disputes resolved in the child's favour continues to be high.

In its Explanatory Memorandum the UK Border Agency once again makes reference to 'the risks of placing adults into Member States' child care systems without any reference to the risk of placing children in adult asylum determination systems, including the risk of wrongful detention of the children. We recall that these respective risks are not equivalent, since the child in an adult system is thereby excluded from those systems of care and supervision which seek to protect against abuse. Statistics presented to the UK Border Agency's Detention User Group on

[54] February 2009,, published as part of the written evidence to that report, Joint Committee on Human Rights, Twenty-Seventh Report of session 2008-09 HL 57/HC 318
[55] Enforcement Instructions and Guidance s 60(6).
[56] Document 14959/09, *op. cit.*, para 18.

the numbers of people who claimed to be children after being detained indicates that of 45 decisions reached during the second quarter of 2009, nine concluded that the child was a child. The statistics do not indicate how many of the remaining 36 cases were the subject of further challenges ultimately resolved in favour of the child and comparable statistics have not been produced on those claiming to be children at other stages in the process. As to the placing of children in Member States' child care systems, a process that assesses the risks a person presents solely on the basis of their chronological age is not a safe process, and the UK Border Agency has been subject to criticism for this line of reasoning enough times, including by ILPA, that it is most disappointing to hear it repeated here.

Article 27

We understand from the meeting of the National Asylum-Seeker Stakeholder Forum EU Subcommittee and from the UK's Explanatory Memorandum that this provision is one of the ones causing most concerns to member States.

The reference in the UK's Explanatory Memorandum

> *"We believe that Member States should be encouraged to give asylum applicants fast and fair decisions rather than have restrictions placed on their ability to do so"*[57]

fails to make any mention of the provisions of Article 27 relating to a six-month longstop for an initial decision in the proposed recast Directive,[58] and permitting the giving of priority to particular cases.[59] Both meet the UK's concerns. We should have been most interested in the UK's comments on the six month long-stop.

The recast Directive does not outlaw accelerated procedures and we consider that it disappoints in this regard. Article 27 permits accelerated procedures in cases about safe country of origin; which, taken at their highest, do not engage the obligations to provide protection in accordance with the Directive; where the applicant has presented false information; where it is "likely that" that the applicant has destroyed a passport or travel document in bad faith and where a child makes an application following the rejection of applications by his/her parents, without raising relevant new matters; and where an application is made to frustrate a new or imminent decision that would affect removal.

ILPA has made its position on the detained fast track procedure very plain.[60] A procedure that rushes a person through the decision-making process without time to gather the necessary evidence, then sees that person make a fresh claim shortly

---

[57] Document 14959/09, *op. cit.*, para 19.

[58] Article 27(3).

[59] Article 27(5).

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

after the process has ended because the evidence is now available and calls into doubt the original decision, is not a fair process and is not an efficient one.

UK Border Agency officials have indicated in discussions with ILPA representatives that while they wish to continue to run a detained-fast track procedure, they recognise the need to examine how the procedure works.

The UK Explanatory Memorandum asserts

> *"We know that the decisions are fair because 97% of them are upheld on appeal…"*[61]

This is a false syllogism. It presupposes that the appeal gives rise to a fair decision. If the necessary information is not there to put before the decision-maker on appeal, or if the person has not disclosed all pertinent information at the time of the appeal, then the success of the appeal can be no measure of the fairness of the decision. Even more so where these difficulties have led to or are compounded by the absence of legal representation at the appeal. We recall that in its immigration tenders published on 30 November 2009 the Legal Services Commission has specifically excluded success rates in detained fast-track cases from the calculation of whether representatives are meeting a Key Performance Indicator of a 40% success rate.

We recall the criticisms of the UK detained fast-track made by the Council of Europe Commissioner for Human Rights Mr Thomas Hammarberg in the Memorandum he produced shortly after his visit to the UK,[62] stating that

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

The UK has waivered between characterisation of the detained fast-track as suitable for cases that can be *decided* quickly[63] and as suitable for cases that are clearly unfounded, i.e. cases that can be *refused* quickly. The approach outlined in the draft Directive is that accelerated procedures may only be applied to cases likely to be susceptible of a quick refusal. Both approaches are problematic, as is evidenced by the UK example. ILPA has expressed particular concern that screening for inclusion in the detained-fast procedure cannot pick up those characteristics (such as being a survivor of torture or of trafficking) that make a person unsuitable for the procedure.[64] Because its screening criteria do not work, the sample of cases entering the detained fast-track is essentially a random one. One should therefore expect to see results comparable with the success rates in other appellate procedures. This, as described above, is not the case.

Our concern must be contrasted with that expressed by the UK in the Explanatory Memorandum. We fear that the Commission's proposals will allow the UK to

---

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

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

[63] See for example the Enforcement Guidance and Instructions Chapter 55.4

[64] See ILPA's February 2009 response to the consultation on the Detained Fast Track & Detained Non-Suspensive Appeals - Intake Selection (AIU Instruction) and ILPA's further comments of September 2008 published after the publication of the revised intake selection.

replicate far too much of its detained fast-track procedure and that the recast Directive will permit complex cases to go through accelerated procedures that are inimical to the fair determination of those cases. Would that the recast Directive spelt the end of the detained fast-track; in its current form it does not.

Articles 27 and 41 'Clearly unfounded cases'.

The UK Explanatory Memorandum asserts

> '…our NSA process is effective and fair'.[65]

We do not agree with this characterisation. A process that returns a person to a place where they allege that they face persecution or prohibited violations of their human rights and only allows them to challenge that removal subsequent to return, is not a fair process. The UK Explanatory Memorandum indicates that not to be able to certify cases on a case-by-case basis would affect some 120 cases a year.[66] This small number of cases, some of which would, under the proposals set out in the Directive, be cases that could be subject to accelerated procedures, appears to amount to an insufficient reason to found rejection of the Directive as a whole.

The comments in the Explanatory Memorandum objecting to the definition of 'manifestly unfounded'[67] in the recast Directive are at odds with statements made by Ministers during the passage of the Nationality, Immigration and Asylum Act 2002. The then Home Secretary, the Rt Hon David Blunkett MP described a case that is clearly unfounded as one

> *"…where people produce no evidence of having been at risk or that the country from which they came was unsafe for them"* [68]

The Lord Faulkner of Thoroton stated

> *"In some cases – considering the facts, such as the nature of the country referred to or the basis of the claim being made – one can almost immediately say, 'that is not likely to succeed. Even if all the facts were made out, it would not remotely constitute the relevant risk required to satisfy the basis of an application'.* The *noble Earl, Lord Russell, is of course right that some cases which look weak initially look stronger when one examines them more closely. However, there is a category of cases that readily suits the description of unfounded."*[69]

> *"…the process is about identifying those cases which are clearly unfounded, not where there is an argument both ways and one has to weigh up which way the answer probably falls."*[70]

Ministers were at pains to emphasise, repeatedly, that 'clearly unfounded' meant

[65] Document 14959/09, *op. cit.*, para 23.
[66] Document 14959/09, *op. cit.*, para 22.
[67] Document 14959/09, *op. cit.*, para 22.

[68] *Hansard,* HC 11 June 2002, col 798

[69] *Hansard* HL 23 June 2002, col 352
[70] *Hansard* HL 24 October 2002, col 1507

the same as 'manifestly unfounded'.[71] Far from having misled parliament Ministers were voicing an understanding of what is meant by clearly unfounded that reflects the position under UK law. A 'manifestly' or 'clearly' unfounded case is one which, taken at its highest, does not engage protection obligations; it is one where a prima facie examination indicates that the case cannot possibly succeed. The Lord Philips, giving judgment in the House of Lords in *R (ZT (Kosovo) v SSHD*) [2009] UKHL 6 stated

> "22. The test of whether a claim is 'clearly unfounded' is a black and white test. The result cannot, for instance, depend upon whether the burden of proof is on the claimant or the Secretary of State, albeit that section 94 makes express provision in relation to the burden of proof - in *R(L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 WLR 1230, paragraphs 56 to 59 I put the matter as follows.
>
> > "56 Section 115(1) empowers—but does not require—the Home Secretary to certify any claim 'which is clearly unfounded'. The test is an objective one; it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.
> >
> > 57 How, if at all, does the test in section 115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states 'unless satisfied that the claim is not clearly unfounded'. It is useful to start with the ordinary process, such as section 115(1) calls for. Here the decision-maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.
> >
> > 58 Assuming that decision-makers—who are ordinarily at the level of executive officers—are sensible individuals but not trained logicians, there is no intelligible way of applying section 115(6) except by a similar process of inquiry and reasoning to that described above. In order to decide whether they are satisfied that the claim is not clearly unfounded, they will need to consider the same questions. If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded. If that point is reached, the decision-maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded. Miss Carss-Frisk for the Home Secretary has properly accepted that this is the correct approach."
>
> 23. Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered.

---

[71] See, for example the House of Commons Committee report 21 May 2002c cols 427-429, HL 23 July 2002 col 343.

> If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

The majority of the House of Lords in *ZT(Kosovo)* concurred with this view.

Applications that are 'inconsistent, contradictory, improbable' or 'unconvincing' do not fit this definition.

The contention in the Explanatory Memorandum that judicial review is an effective remedy raises the interesting question, canvassed in *ZT (Kosovo)* in the context of applications under rule 353 of the immigration rules of the extent to which a judicial review of a matter such as a case being 'clearly unfounded' (or, in the case of rule 353 having no realistic prospect of success), would resemble an appeal, as per the passage from the judgment of the Lord Philips, cited above. As per the Lord Bingham in *R (Razgar) v SSHD* [2004] UKHL 27, [2004] 2 AC 368

> *'In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal'* (para 17 of the judgment).

The approach taken in the Explanatory Memorandum nonetheless shows a cavalier disregard for the public purse in that a judicial review application is likely to be much more costly than an appeal.

Alasdair Mackenzie
Acting Chair
ILPA

Nuala Mole
Director
The Aire Centre

8 December 2009