CONSULTATION ON
DRAFT PRACTICE STATEMENTS AND PRACTICE DIRECTIONS OF THE ASYLUM AND IMMIGRATION CHAMBERS OF THE FIRST-TIER TRIBUAL AND THE UPPER TRIBUNAL

RESPONSE OF THE IMMIGRATION LAW PRACTITIONERS' ASSOCIATION (ILPA)

1. ILPA is a professional association with between 900 and 1000 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 teaching, provision of resources and information. ILPA is represented on a wide range of government and other public body stakeholder and advisory groups including the Asylum and Immigration Tribunal Stakeholder Group and the Administrative Court Users Group.

2. ILPA welcomes this consultation. When the incorporation of asylum and immigration appeals into the new tribunal structure was first mooted, ILPA identified the main potential benefit as being the application of norms of fairness from other jurisdictions to immigration and asylum appeals whereas previously, procedures favoured the Home Office over the opposing party. It follows that ILPA considers that as a matter of fairness and equal treatment, procedures that apply across other chambers should also apply to the Immigration and Asylum Chamber in the absence of exceptional reasons.

<u>Reporting determinations</u>

3. ILPA has repeatedly expressed concern about the way in which certain decisions are selected for 'reporting' whereas representatives are prevented

from citing other decisions. In its submissions on a consultation on the Asylum and Immigration Tribunal's Practice Directions in 2006, ILPA stated that:

> We strongly submit that the criteria by which it is determined whether a determination is reported and the procedure by which this is done should be formalised in the Practice Directions. The only previous guidance offered is that many determinations are only of interest to the parties. ILPA agrees. However, ILPA has also seen many determinations which assess issues which are of relevance to other cases which are unreported; whereas determinations of no more apparent relevance *are* reported. ILPA understands that previously, it was a matter for the individual discretion of panel chairs whether the determination was reported but that there is now a system in place for determining this. Given the legal significance in terms of citation of determinations, ILPA submits that the criteria and process must be transparent. [1]

4. Only in response to a Freedom of Information Act (FOIA) request in December 2007[2] was the existence of a Reporting Committee formally disclosed and that:

> The Reporting Committee (under the general guidance of the President, and chaired by a Deputy President) decides whether a determination (whether country guidance or not) is to be reported.

5. Nothing is known about the criteria that the Reporting Committee of the Asylum and Immigration Tribunal has applied, including how it deals with conflicting determinations. Other tribunals that had a system for reporting determinations had published criteria and there was no rule restricting the citation of unreported determinations. The Guidelines for Reporting published on the website of the Administrative Appeals Chamber of the Upper Tribunal provide for reporting a decision if it is of value as a precedent which requires that the decision commands the broad assent of a majority of the relevant judiciary.

6. The notes to the original version of the Practice Direction (IAT PD No. 10) stated that

> 3 By restricting the number of determinations capable of being cited at either level,

[1] See www.ilpa.org.uk, submissions page.
[2] Ministry of Justice to Mr R Low-Beer 21 December 2007.

> the Tribunal intends both to promote consistency of decision-making and to give a reliable indicator of the current judicial thinking on frequently (and less-frequently) occurring issues. Determinations will not, however, be reported if in the Tribunal's view they contain no new principle of law or matter of real and generally-applicable guidance to parties, Adjudicators or the Tribunal, and no assessment of facts of such generality that others ought to have regard to it.
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> 4 It should be emphasised that both Adjudicators and the Tribunal remain open to arguments that the reported decision or decisions should not be applied or followed. The effect of the Practice Direction is that such arguments will need to be supported by sound reasons, rather than by some previous decision.

7. ILPA understands that there is no procedure comparable to that which was operated by the Social Security Commissioners whereby decisions which it is proposed to report are circulated amongst the Commissioners to determine whether 'the decision commands the broad assent of the majority of the Commissioners' (and which it is assumed is now operated by the Administrative Appeals Chamber). While it is obvious why cases are not reported if they reach no conclusion on issues of any interest beyond the parties to the appeal, ILPA has repeatedly expressed concern that many determinations of wider interest have not been reported for no obvious reason. ILPA members have also expressed concern that a small number of Senior immigration judges are disproportionately represented in the reported cases. The absence of transparency in the criteria for reporting determinations has contributed to a perception that they may not be fully representative of the Tribunal's caselaw.

8. The rules for citing an unreported determination include that the party should provide a 'summary analysis of all other decisions of the Tribunal and all available decisions of higher authority, relating to the same issue' for the last six months. The Practice Direction states that 'This analysis is intended to show the trend of Tribunal decisions on the issue.' The response to the FOIA request referred to above stated that

> Unreported determinations following hearings in which a Senior Immigration Judge sat are put on the 'unreported cases' part of the AIT website principally for purposes of comparison.

9. Whereas reported determinations are searchable on the Tribunal's website,[3] the Asylum and Immigration Tribunal has so far failed to make unreported determinations available in a searchable form. As long as this remains the position, the Tribunal cannot reasonably expect the analysis required by the Practice Direction to encompass other unreported determinations. If such a requirement is to remain, then at a minimum, the Tribunal Service must enable these determinations to be searched in the same way as reported determinations. It is unreasonable and unworkable to require parties to search for additional decisions in a database which they are prevented from searching electronically.

10. Procedures for highlighting particular decisions may be reasonable so long as the process of selection is fair and transparent. However, ILPA considers that it is especially inappropriate for a court of record to implement a system whereby the majority of its decisions cannot be cited and there is no transparency (or even published criteria) about the selection of those that can be cited.

References to the European Court of Justice

11. ILPA is concerned that it is not compatible with the discretion under Article 234 of Consolidated Treaty given to 'any court or Tribunal' of a member State to make a reference to the European Court of Justice to ask for a preliminary ruling to permit only some immigration judges to make such a reference.

12. It considers that the reference to 'any court or tribunal' is not a reference to for example 'the Asylum or Immigration Tribunal' as a body (or, e.g, to 'the Court of Appeal' as a body) but to a court or tribunal constituted to hear a particular case. We do not consider that draft practice direction 2.1(8) is compatible with this. It could give rise to a situation where the tribunal hearing the case is of the view that it should make a reference but the Senior President or Chamber President disagreed. ILPA considers that it would be unlawful to prevent the tribunal making the reference in those circumstances.

[3] www.ait.gov.uk

Evidence in the Upper Tribunal

13. ILPA has submitted in its response to the Procedure Rules Committee consultation on rules for the Asylum and Immigration Chamber in the Upper Tier Tribunal that rule 15(2A) is unnecessary. There is no indication in its consultation document why the Upper Tribunal's existing powers to deal with evidence are not considered sufficient. Similarly, the draft Practice Directions state that:

> 4.1 UT rule 15(2A) imposes important procedural requirements where the Upper Tribunal is asked to consider evidence that was not before the First-tier Tribunal. UT rule 15(2A) must be complied with in every case where permission to appeal is granted and a party wishes the Upper Tribunal to consider such evidence. Notice under rule 15(2A)(a), indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal, must be filed with the Upper Tribunal and served on the other party as soon as practicable after permission to appeal has been granted. [Emphasis added]

14. While a similar provision exists in the Asylum and Immigration Tribunal's Practice Direction in relation to Evidence on reconsideration,[4] it is not consistently applied. Evidence is not usually excluded especially from second stage reconsiderations so long as it is served in compliance with standard directions.

15. Clearly, fresh evidence will be relevant to an appeal on a point of law in limited circumstances. Where an error of law is established but further findings are required, up to date evidence will often be relevant. That should be served in good time and in accordance with directions. But a provision that requires each individual piece of evidence (e.g. country reports) to be served individually as soon as it becomes available is wasteful and impractical and serves no obvious purpose.

Fast track provisions

[4] Asylum and Immigration Tribunal, Practice Directions (Consolidated version as at 30 April 2007), 14A Evidence on Reconsideration

16. ILPA's general concerns about the fast track have been set out in various documents: see ILPA's *The Detained Fast-Track Process: a best practice guide*[5] and ILPA responses and submissions. [6]

17. ILPA has asked the Procedure Rules Committee to consult on the Fast Track procedure rules as soon as possible, when ILPA will set out its wider concerns in detail. The provisions in the Practice Direction for the Fast Track should also be reviewed.

18. ILPA has however strongly submits that the Committee should not insert new provisions into the Upper Tribunal rules without concluding that they are fair. The time limits are manifestly unfair. It is obvious that it is unreasonable to provide only one working days notice of the hearing (r.36(2)(aa)). The fact that the appellant is detained cannot justify preventing him/her having a fair opportunity to prepare and present his case (see consultation paper, para 10.2). If it is suggested that the time limit is in the interest of the detained person, ILPA would be pleased to explain to the Committee in detail why this is not the case.

Proposals for additional provisions

19. ILPA would propose the following additions.

<u>CMRHs and provision for requiring the respondent to clarify its case</u>

20. Many Appellants are publicly funded. All Appellants deserve to know the case against them. It is frequently the case that at Case Management Review Hearings and other preliminary hearings, Presenting Officers representing the original decision maker will state that they cannot give any indication of the

[5] ILPA, 2008, available online at www.ilpa.org.uk/pub.html
[6] 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. All these are available on www.ilpa.org.uk/submissions/menu.html

approach to be taken by the Presenting Officer who will appear at the full hearing. An Appellant faced with a change of approach by the Presenting Officer at the hearing may be seriously disadvantaged if an adjournment is not granted in the face of a change of approach: publicly funded Appellants cannot justify to the Legal Services Commission the preparation of points other than those in the decision appealed against.

21. In the circumstances, ILPA has submitted to the Procedure Rules Committee that the imposition of a Rule requiring variation of the reasons in relation to the decision against which the appeal is brought would provide discipline upon the Respondent to appeals, and save judicial time. This would add force to the provision at part 7 of the Practice Directions in relation to the case management review whereby both appellant and decision maker are required to provide details of the case they intend to present at hearing and the decision maker must provide details of any amendment to his refusal letter. At present, the decision maker may fail to do so yet seek to amend his case at the hearing.

22. The provisions in the Asylum and Immigration Tribunal's Practice Directions for a Case Management Review Hearing (CMRH) are omitted from the draft Practice Directions. No explanation has been given for this. There has been no consultation on abandoning Case Management Review Hearings and it is assumed that the omission does not therefore indicate such an intention. While Case Management Review Hearings could operate better than they currently do, ILPA considers that they provide a valuable, indeed often the only opportunity to define and confine the issues prior to the full hearing of the appeal.

23. The current Practice Directions state that at the Case Management Review Hearings, the Home Office must produce 'any amendment that has been made or that is proposed to be made to the notice of decision to which the appeal relates *or to any other document served on the appellant giving reasons for that decision*' (emphasis added). That indicates that an appellant is entitled to notice of any reasons for refusal not contained in the refusal letter upon which the Home Office will rely at the hearing. The Tribunal Guidance Note on Case Management Review Hearings states that:

"23. For the respondent, the presenting officer should have the power to concede particular points where appropriate, such as age, nationality, or ethnicity. The presenting officer ought to be able to indicate that particular paragraphs in the reasons for refusal letter will not be relied upon or are no longer material. The presenting officer ought to indicate any material issues arising in relation to section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 in respect of behaviour by the appellant to be taken into account as damaging to credibility. "

24. Appellants (and the AIT) have long faced endemic and systemic obstacles in persuading the Home Office to disclose its case on the relevant issues with sufficient clarity sufficiently in advance. Fairness entitles the appellant in cases of such gravity to know the case against him. ILPA hopes that the procedures in the new tribunals will enhance fairness in this respect and is therefore concerned that the draft practice directions do not currently include even the provisions in the Asylum and Immigration Tribunals' practice directions.

25. ILPA's concern is increased by recent exchanges with the Home Office as to the role of Presenting Officers. ILPA was provided in with a copy of training materials for Presenting Officers which said, in terms, that the Reasons for Refusal Letter acts as the Presenting Officers skeleton argument and instructions. When ILPA pointed that this was evidently honoured in the breach and not the observance, the Home Office changed the training materials so that they no longer say this. It appears from the training materials provided to ILPA in October 2008 that Presenting Officers are now told that they may change the basis of the Secretary of State for the Home Department's decision, including raising new matters, without reference to the original decision-maker, as long as notice is given. References in previous materials to 'instructions' have been removed.

26. The period of notice proposed by the Home Office is that the Presenting Officer will alert the appellant and Tribunal 48 hours before a hearing, of any

proposed amendments to the reasons for refusal letter and that, 'for operational reasons' even this may not be possible in many cases. That is an entirely inadequate timescale.

27. The Home Office has thus confirmed that, as a matter of policy, the reasons for refusal letter will not necessarily identify all matters that the Secretary of State for the Home Department proposes to raise at the hearing, and that new issues may well be raised much less than 48 hours before the hearing, including at the hearing itself.

Bail

28. The Asylum and Immigration Tribunal's Practice Direction[7] directs that immigration judges should have regard to guidance notes including the Bail Guidance Notes for Adjudicators (May 2003). Although aspects of this are out of date, ILPA considers that the procedural guidance therein is valuable and should be reissued in a new practice direction.

Children and vulnerable adult witnesses and the question of litigation friends

29. ILPA supports the good practice directed by the existing Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses.[8] ILPA has invited the Asylum and Immigration Tribunal to apply it.[9] However, the proposed practice directions and statements do not include the provisions in the Chief Adjudicator's Guidance Note 8 on Unaccompanied Children[10] (which was applied to the Asylum and Immigration Tribunal by its Practice Direction).

30. Children involved in asylum appeals are likely to have experienced serious physical and psychological harm and ILPA considers that their treatment should be addressed by a further practice statement in the immigration and asylum chamber of both tribunals.

[7] Asylum and Immigration Tribunal, Practice Directions (Consolidated version as at 30 April 2007).
[8] Tribunals Judiciary, First Tier and Upper Tier, undated.
[9] ILPA to the President of the Asylum and Immigration Tribunal, 6 January 2009.
[10] April 2004.

31. As a ratifying state to the United Nations Convention on the Rights of the Child, (UNCRC) as a member state of the European Union and Council of Europe and as a matter of domestic and European jurisprudence and laws relating to the welfare and safeguarding of children, the United Kingdom and its public institutions, in all decisions affecting a child must treat the best interests of the child as a primary consideration (Article 3 UNCRC), must act without discrimination on the grounds of a child's status (Article 2 UNCRC) and must enable a child's wishes and feelings to be taken into account and to be enabled to participate effectively in all decisions affecting that child (Article 12 UNCRC). States must also put into effect measures to implement fully all the rights of children established under the Convention on the Rights of the Child and report these measure periodically the UN Committee on the Rights of the Child. The most recent UK report[11] and corresponding UN Committee on the Rights of the Child's Concluding Observations in 2009[12] raised concerns about the UK's practices on the detention of children subject to immigration control[13] and the lack of guardianship provisions for this group of children. [14]

32. In all decisions affecting children, whether directly or indirectly, the Tribunal must ensure that its procedures satisfy the highest standards in relation to children's rights. This should apply both to practical measures to ensure that court precincts and the judicial arena are appropriate to meet the needs of children as appellants and witnesses and for the parents, carers and representatives of children accompanying them in court.

33. This should also apply to all judicial administrative procedures and judgecraft in court, for example in listing and marshalling cases involving children pastoral considerations, the rules governing the conduct of appeals by Immigration and Senior Immigration Judges and representatives and the consideration of evidence of the child in person and through child expert

[11] Consolidated third and fourth periodic report to the UN Convention on the Rights of the Child, 15 July 2007 CRC/C/GBR/4
[12] *Consideration of reports submitted by States parties under Article 44 of the Convention: United Kingdom of Great Britain and Northern Ireland,* 20 October 2008 CRC/C/GBR/CO/4.
[13] CRC/GBR/CO/4 *op. cit.* paras 70(a) and 71(a).
[14] CRC/GBR/CO/4 *op. cit.* paras 70(c) and 71(c).

witnesses and guardianship arrangements.

34. All new procedure rules should be written, interpreted and applied in such a manner as to be sufficiently flexible to give positive effect to the rights of children in terms of their immediate and longer term best interests, principles of non-discrimination and effective participation rights.

35. Practice Directions, Statements and Guidance where given should be practical and clear as to the needs of children as particularly vulnerable appellants, taking into account the varying age, maturity and experiences of children, including those whose age is not established or is disputed.

36. This guidance should be consistent with other domestic and international guidance on the rights and needs of children involved in court proceedings. The authoritative UN Committee on the Rights of the Child has so far issued 12 General Comments on the interpretation and application of the UNCRC including General Comment Number 6 on the Treatment of Unaccompanied Children and General Comment Number 12 on the Rights of the Child to Be Heard. [15] The Family Division of the High Court and the Criminal Courts have issued useful practice directions to facilitate the rights of children within those jurisdictions and should also be considered when drafting guidance to support the new procedure rules. [16]

37. ILPA considers that provision should be made in the rules or practice directions for the appointment of a litigation friend in cases of appellants who lack capacity (in particular children and mentally ill adults). We are aware of cases where a litigation friend was appointed by the then Immigration Appellate Authority (predecessor to the Asylum and Immigration Tribunal) or the Court of Protection but at the moment there appears to be no express power to make such an appointment. ILPA is concerned that this is a significant lacuna, because there are inevitably many cases in this jurisdiction

[15] CRC/C/GC/12 20 July 2009.
[16] See e.g. The Principal Registry of the Family Division, Representation of Children in family proceedings President's Direction Pursuant to rule 9.5 of the Family Proceedings Rules, 22 April 2004; Crown Court Practice Direction Trial of Children and Young Persons in the Crown Court, 16 February 2000.

involving people with mental health problems, as well as a significant number of cases of children.

38. ILPA would be happy to provide more detailed proposals when consideration is given to further rules or practice directions direction dealing with children, vulnerable adults and the appointment of litigation friends.

Gender guidance

39. The predecessor to the Asylum and Immigration Tribunal, the Immigration Appellate Authority, also published Gender Guidance[17] which provided valuable guidance on dealing with gender specific issues and with vulnerable witnesses generally including children. ILPA proposes that the procedural guidance from the Immigration Appellate Authority's Gender Guidance be included in a further practice statement. Many issues relating to children's cases also contain gender specific considerations.

Alasdair Mackenzie
Acting Chair, ILPA
23 November 2009

[17] *Immigration Appellate Authority Asylum Gender Guidelines*, Crown Copyright November 2000, previously available on the website of the Immigration Appellate Authority.