Submission from ILPA to the Joint Committee on Human Rights

Implementation of Strasbourg Judgments and Declarations of Incompatibility

Summary

ILPA draws attention to the continued failure to give effect to the decision of the House of Lords in the case of *Baiai*[1] and to the ways in which its own attempts to press the Government on this matter have been no more successful than those of the Joint Committee.

ILPA draws attention to the judicial review challenge to fees for Certificates of Approval and the Government's *Observations* and *Further Observations* in the case of *O'Donoghue*[2] before the European Court of Human Rights on Certificates of Approval and recommends that the Committee consider earlier and ongoing delays in the light of these developments. ILPA considers that these provide evidence that the Government's approach to date has been to do as little as possible, as late as possible, to implement the judgment and of its failure to appreciate the gravity of the past and ongoing breach of human rights in this case.

ILPA invites the Committee to press the government on the implications of the judgment in *S & Marper v UK*[3] for data retained under Immigration Act powers.

ILPA invites the Committee to press the government on cases in which the European Court of Human Rights has repeatedly issued letters under Rule 39 of its Rules of Court to urge the UK government not to remove Tamils to Sri Lanka and draws parallels with this and the government's conduct of the litigation relating to gender discrimination and widow's benefits as detailed in the Committee's *Monitoring the implementation of human rights judgments Annual Report 2008*[4] (hereinafter Annual Report 2008) and relates this to wider areas of concern about the UK Border Agency's lack of respect for the rule of law.

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

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[1] *R ((1) Mahmoud Baiai (2) Izabela Trzcinska (3) Leonard Bigoku (4) Agolli Melek Tilki)) v Secretary of State for the Home Department & (1) Joint Council for the Welfare of Immigrants (2) AIRE Centre (Interveners)* [2008] UKHL 53.

[2] *O'Donoghue v United Kingdom*, ECtHR(App No 34848/07),

[3] Case of *S & Marper v UK* (ECtHR, Application Nos. 30562/04 and 30566/040

[4] Thirty-first report of session 2007-2008, HL Paper 173, HC 1078.

ILPA draws attention to the UK Border Agency's failure to give effect to the judgment of the Court of Appeal in *ZO(Somalia)* [2009] EWCA Civ 442 and thus to deny certain persons seeking asylum the right to work (an interference with their Article 8 right to private life) and that this is not 'in accordance with the law' being contrary to European Union law.

ILPA observes that human rights cannot be expected to bear the full weight of the constitutional settlement and that a precondition for the respect of human rights is respect for the rule of law. ILPA sets out its evidence for its view that the UK Border Agency has failed to respect the rule of law. In this regard ILPA draws attention to the decisions in the cases *of RN (Zimbabwe) CG* [2008] UKAIT 83; *Metock v Ireland, C-127/08* and *R (HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin) and *R (HSMP Forum (UK) Ltd) v SSHD* [2009] EWHC (Admin) and the risks of violations of human rights resulting from removal without notice including in the case of *X v SSHD* CO/9617/2008.

Introduction

ILPA is a professional association with some 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 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, including the Joint Committee on Human Rights.

This Memorandum is provided in response to the Committee's Call for Evidence of 30 July 2009 and deals with the response of the UK Border Agency to judgments concerning human rights.

ILPA notes the Committee's general comments[5] in its *Monitoring the implementation of human rights judgments Annual Report 2008*[6] and agrees that it would be helpful if responses to human rights judgments were monitored across government and reports made to the Committee in a systematic manner. ILPA shares the Committee's concerns about delay.

The right to marry

In its Annual Report 2008[7] the Committee drew attention to comments in paragraph 135-127 of its second Annual Report[8] (2007), following the judgment of the Court of Appeal in *Baiai*[9]. The Committee questioned whether administrative convenience

[5] Annual Report 2008. Conclusions and Recommendations, p43, conclusions 1-6
[6] *Op.cit.*
[7] Annual Report 2008, Paragraph 96ff
[8] Sixteenth report of session 2006-2007, Monitoring the Government's response to Court judgments finding breaches of human rights, HL paper 128, HC 728.
[9] *Op.cit.*

and public costs were sufficient justification for delay in removing the discriminatory elements of the scheme[10] and concluded:

> *"101 The continued application of a provision of domestic legislation that the UK courts have decided is incompatible with the Convention is inconsistent with our commitments to give full effect to the protection of the Convention to all people in the UK. It leads not only to the continued likelihood that people in the UK may be treated in a way which breaches their fundamental rights but also that they will only be able to secure a remedy in Strasbourg. We repeat our previous calls to Government to provide coherent guidance to Government on responding to declarations of incompatibility. This guidance should cover not only the obligations of the HRA 1998 but also the responsibilities of the UK under its international obligations."*

The Committee went on to observe that:

> *"103. We note the Government's reference to its interim guidance on Certificates of Approval, which was designed to reduce the impact of the Certificate of Approval scheme, pending the decision of the House of Lords. However, we consider that it has no real implications for the ongoing discrimination identified by the Court of Appeal, which continues to mean those who wish to marry in a Church of England service are treated more favourably than others."*

ILPA agrees with this analysis.

The delay in implementation to which the Committee drew attention must be viewed in the light of the Government response, or, more accurately, the lack of response, following the judgment of the House of Lords in *Baiai.*[11]

The House of Lords handed down judgment on 30 July 2008. By this time the Government had had ample time to ponder the possible outcomes of the appeal to the House of Lords, having before it the judgments in the High Court of 10 April 2006[12] and Court of Appeal on 23 May 2007,[13] and to make provision for every eventuality. Yet the response to the decision of the House of Lords was yet more delay.

Following the judgment of the House of Lords ILPA repeatedly requested from the UK Border Agency information about how the UK Border Agency would respond to the judgment in *Baiai*. We grouped this request with requests to be provided with information on other judgments, for example the judgment of the European Court of Justice in *Metock*.[14] ILPA sits on the UK Border Agency's Corporate Stakeholder Group and sought repeatedly to raise the question of the UK Border Agency's respect for the rule of law at meetings of that group.

It was with great surprise that ILPA read the Government's observations in the case of *O'Donoghue v United Kingdom* before the European Court of Human Rights (App No 34848/07), in which the Government contended that the delay in implementation of the *Baiai* judgment was due to the need to consult with stakeholders. This echoes

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[10] Annual Report 2008, para 99
[11] *Op. cit.*
[12] *R (Baiai) v Secretary of State for the Home Department and Another* [2006] EWHC 823
[13] *Secretary of State for the Home Department v R(Baiai) et ors* [2007]EWCA Civ 478
[14] *Op.cit.*

the government's response to the Committee's Annual Report 2008,[15] where it stated:

> *"The UK Border Agency is liaising with relevant stakeholders and is considering the most appropriate way to remedy the incompatibility."*

ILPA, a member of the UK Border Agency's Corporate Stakeholder group, which has pressed repeatedly for a response to the House judgments in *Baiai*, is at a loss to know who these relevant stakeholders are. ILPA was not consulted, despite having repeatedly attempted to press the Government on what it would do, and when, to implement the judgment. To ILPA's knowledge, the AIRE Centre and the Joint Council for the Welfare of Immigrants were not consulted either despite having been intervenors in the *Baiai* case and having brought a subsequent challenge to seek to force to the government to give effect to the judgment.[16] The Government's *Observations* in *O'Donoghue* fail to make clear that the Committee has long been pressing the Government on the question of Certificates of Approval. ILPA questions whether the Government *Observations* (and *Further Observations*) give the European Court of Human Rights a clear picture of the way in which the *Baiai* judgment has been approached in the UK.

The House of Lords in *Baiai* held, *inter alia,* that it was an interference with the right to marry that people subject to immigration control who wished to marry in any rites other than those of the Anglican church needed a Certificate of Approval for which they had to pay a fixed fee of £295.

The House of Lords held:

> *"It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry which is in issue… A fee of £295 (£590 for a couple both subject to immigration control) could be expected to have that effect."* (para. 30 per Lord Bingham)

Yet nothing was done. The AIRE Centre and the Joint Council for the Welfare of Immigrants brought a challenge by way of judicial review (CO/2346/2009).

Silber J's consent order in CO/2346/2009 is dated 7 April 2009. It states

> *"..the parties agreeing that, in the light of the decision of the House of Lords in Baiai v Secretary of State for the Home Department [2008] 3 WLR 549, to charge a fee of £295 to applicants for permission to marry in the United Kingdom (under section 19(3)(b) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 is* ultra vires *insofar as it infringes the rights under ECHR Article 12 of a needy applicant."*

And on 9 April 2009 fees were suspended. That should and could have been done on 30 July 2008. That the case was settled by consent and the rapidity of the response themselves call into question the reasons for the earlier delay.

Only in August 2009 did the UK Border Agency publish a scheme by which some applicants could reclaim the fee unlawfully charged between 2005 and 2009. The

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[15] *Op. cit.*
[16] See below.

scheme is restrictive[17] and is unlikely to assist all those who suffered breaches of their human rights as a result of the fee. Fixed levels of savings and income are made the test of whether a person could afford the fee. Thus only a household with a total joint net income of under £236 a week for six months prior to making an application in 2009 could qualify for a refund of the fee, despite the level of the fee being considerably more than that weekly income. Those whose immigration status requires that they have no recourse to public funds will only obtain a refund in exceptional circumstances, even if they fall below the £236 joint income level.

The blanket prohibition on the right to marry without such a certificate and the exception for the Anglican church remain. The House of Lords held

> *"…subject to the discretionary compassionate exception, the scheme imposes a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience or whether they are not. This is a disproportionate interference with exercise of the right to marry".* (para 31 per Lord Bingham)

The UK Border Agency website, at www.ukba.homeoffice.gov.uk/visitingtheuk/gettingmarried/certificateofapproval/ still refers only to the judgment of the Court of Appeal and not to the wider finding of the House of Lords. It retains the exception for the Anglican church some three and a half years after the High Court had pointed out why this constituted unlawful discrimination.

The Committee stated in its 2008 Annual Report

> *"The Government has not explained how any proposals to create a separate scheme for the Church of England would be justifiable and compatible with Article 14 ECHR. In the light of the outcome of the Government's appeal to the House of Lords, and the continued operation of the Certificate of Approval Scheme, we expect the Government's proposals for the removal of the discriminatory exemption for Church of England marriages, together with a full explanation of their compatibility with the Convention, to be published without delay. We call on the Government to send us its proposals as soon as they are available."*[18]

ILPA notes that this has not been done.

The Committee drew attention in its 12 May 2009 letter[19] to Phil Woolas MP, Minister of State for Borders and Immigration, to the *O'Donoghue* case[20] and asked for an update on the implementation of the judgment in *Baiai.* The Committee stated

> *"The Government told us three years ago that it intended to remove the discrimination identified in the declaration of incompatibility. If there is any reason for any delay in extending the Certificate of Approval scheme to the Church of England, I would be grateful for an explanation of that reason and the Government's timetable for action."*

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[17] See the guidance at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/partners-other-family/coa-refund-form

[18] Annual Report 2008, para 106

[19] Available on the Committee's website

[20] *Op. cit.*

ILPA understands that no response has been received to the letter, by the requested response date of 4 June 2009, or at all.

Since the judgment of the House of Lords in *Baiai*, new immigration legislation, the Borders, Citizenship and Immigration Act 2009, has completed its passage though parliament. Thus there has been an opportunity to address the shortcomings of the Certificate of Approval scheme in primary legislation and to revisit s.19 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. This opportunity has not been taken.

Other cases

Tamil Rule 39 applications

In its Annual Report 2008 the Committee stated:

> *111. The President of the ECtHR, its most senior Registrar, the Group of Wise Persons appointed to consider the future of the Court, and other commentators have all recognized that an inordinate amount of the Court's time is taken up by repeat or clone cases which arise from failures to remedy a particular breach of the Convention. ..States are encouraged to meet problems locally once a problem has been identified, in order to avoid unnecessarily diverting the resources of the ECtHR. …Recently, we have been concerned by three sets of cases where we are aware that a number of clone cases are pending for hearing before the Court. We discuss two of these issues below. A third issue concerns a significant number of Rule 39 applications made in respect of cases pending against the United Kingdom. Rule 39 allows the Court to order interim measures in respect of a case. We understand that around 200-250 new Rule 39 applications per month are made against the UK before the ECtHR. Between January 2008 and June 2008, there were, in total, 1415 new Rule 39 applications against the UK. Although a significant number of these applications are refused, they may present a heavy burden on the resources of the ECtHR.*
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> *112. A significant number of these cases have been brought by Tamil asylum seekers seeking to prevent their deportation and return to Sri Lanka from the UK. This issue was recently considered in a lead case by the ECtHR and we intend to return to this issue in correspondence with the relevant Ministers.* [footnotes omitted].

Rule 39(1) of the Rules of Court of the European Court of Human rights states

> "*The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.*"

In the Tamil cases highlighted by the Committee, the rule has been invoked in cases involving the removal of persons to countries where, it is alleged, they will face breaches of their human rights, when the removal is being challenged before the European Court of Human Rights. People from other countries who are in similar positions, for example Somalis, have also relied upon Rule 39 letters. Even where a person does not have a Rule 39 letter from the European Court of Human Rights, it

would still be possible to apply for an injunction from a High Court judge if one had notice of a threatened removal.

The difficulty is that too often one does not have such an opportunity and in such circumstances a Rule 39 letter is likely to look like a better bet than an injunction.

It had been UK Border Agency policy to give a minimum period of notice to people detained that they were facing imminent removal and to tell them the flight details. *The I[*mmigration*] and N[*ationality*] D[*irectorate*] Statement of Policy: Judicial review challenges following notification of removal directions* stated:

> ***Notice of removal***
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> *1. From 12 March 2007 IND will give at least 72 hours notice of removal, including two full working days. The last 24 hours of the 72 hours will include a working day (to allow proceedings to be filed during this period).*
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> *2. When notifying an individual of directions for removal, IND will indicate to the individual:*
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> - *that the case is one to which paragraph 18 of the Practice Direction supplementing Part 54 of the Civil Procedure Rules applies, and*
> - *the address to which any claim must be copied to IND in accordance with paragraph 18.2(2) of the Practice Direction.*
>
> *3. IND will aim to provide a short, factual summary of the case with the notice of removal including a brief immigration history and other relevant information (including the name of a responsible officer to contact in the event of an injunction).*
>
> *4. At the time of being notified of the removal, the individual will be advised by IND to seek legal advice and, if detained, provided with the means to contact a legal adviser or representative.*

In March 2007, the predecessor of the UK Border Agency (the Immigration and Nationality Directorate) adopted a new policy on removals and judicial review in which it set out the minimum notice that would be given of a removal. The new policy, however, included that it would not necessarily provide any notification of removal to certain groups. These included some particularly vulnerable people, notably those at risk of self-harm and unaccompanied children facing removal to a third country. ILPA has consistently raised concerns regarding this. On 23 April 2009 ILPA wrote to the UK Border Agency expressing a range of concerns over judicial review of removal, viz:

- Objection to the published exceptions, whereby notice of removal is given to neither the applicant nor their legal representative.
- Objection to the unpublished, secret exception – DSO 07/2008 which came to light in the case of *X v SSHD* CO/9617/2008. The judge held the Detention Service Order to be unpublished and that this rendered the removal unlawful. He held that, even had the Order been published, X fell outwith its scope and its application to his case was therefore unlawful. He held that he held that the failure to give notice had been part of a deliberate attempt to mislead so that X would not have access to his lawyers at Refugee

and Migrant Justice. He held that it could not be said that X did not have a claim worth pursuing. X has now been recognised as a refugee.

ILPA has yet to receive a substantive response to these concerns although it continues to press the UK Border Agency for one as a matter of urgency. The UK Border Agency has not changed its policy.

We draw attention to the Order in an application for interim relief in case CO/10522/2009 in which the judge invited the Secretary of State to consider whether removals on this basis (to Afghanistan) pending guidance on the application of Article 15 of the European Qualification Directive[21] to removals to that country until the point, pending before the higher courts, has been decided. ILPA has seen no information from the UK Border Agency that such consideration has taken place despite a significant number of injunctions having been granted on this basis.

ILPA has seen cases where it is has taken 17 months for a person to be returned to the UK following a finding that the removal was unlawful. In other cases, the person is never found, and one can only speculate on the numbers of such people who had no opportunity to challenge their removal and have never even been sought.

We recall the comments made by the Committee in its 2008 Annual Report on the Government's approach to cases involving gender discrimination and widow's benefits. The Committee stated:

> *"119. However, we recommend that the Government's approach to clone cases should be more proactive. Government policy on settlement appears to be based upon the existence of an admissible application to Strasbourg. This places the onus on the individual who has been affected by a breach which has already been identified by the ECtHR to come forward and to invest time and money in the preparation of a claim. As legal proceedings develop and costs accumulate, settlement negotiations may become more difficult.*
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> *120. We consider that in any similar cases in future, the Government should encourage the European Court of Human Rights to identify a batch of cases to treat as lead cases, or as pilot judgments (a development which we consider below). Where a systemic problem or a breach which may lead to a significant number of well founded applications by individuals is identified, the Government is already obliged to consider what steps are necessary to remove the breach, prevent future breaches and compensate those affected by the breach. This obligation should be approached imaginatively and include consideration of whether more innovative steps can be taken at a domestic level in order to provide a speedy remedy for those affected by the breach, if possible, in a way which avoids unnecessary public expenditure. These steps could include, for example, the creation of a well-publicised Government sponsored compensation scheme, avoiding the need for individual applicants or Government departments to incur significant legal expenses. While, after exhausting these domestic remedies, an individual must be free to take a claim to Strasbourg, these steps could help reach equitable solutions without adding unnecessarily to the list of cases pending against the UK."*

[21] Directive 2004/83/EC

These comments have a particular resonance in the Tamil Rule 39 cases but they are applicable to a much wider range of cases in which the UK Border Agency is involved.

ILPA sees a large number of cases in which the Home Office settle a judicial review while maintaining the position challenged in the case settled in other pending cases. One result of a failure to follow precedent and to manage cases is that those people not able to bring a challenge suffer violations of their human rights that are not remedied at all. Those able to bring a challenge may suffer violations of their human rights that continue for longer than they would have done had the Home Office followed precedent. As the legal aid budget comes under increasing scrutiny, at the risk that criteria for eligibility will be more tightly drawn so that fewer people will benefit,[22] it is important to scrutinise how much money is being spent fighting points in one case that have already been won in another case. It not only the Home Office's expenditure in legal fees but that of the Legal Services Commission and individuals paying in their own cases, that should be cause for concern.

Case of *S & Marper v UK* (ECtHR, Application Nos. 30562/04 and 30566/040 and wider questions of data protection

It is important that the Government make efforts to identify the wider implications of human rights judgments, so that those within their wider ambit do not have to bring separate cases to the European Court of Human Rights. ILPA urges the Committee to press the government on the implications of the *Marper* case for persons whose data is obtained under immigration act powers. In the Borders, Citizenship and Immigration Act 2009, provision is made to extend the fingerprinting powers contained in the Immigration and Asylum Act 1999 to include those made subject to a mandatory ("automatic") deportation order under the UK Borders Act 2007. During the passage of the 2009 Act ILPA raised the question of the implications of the *Marper* judgment for the extensive powers of the Agency to take and retain the date of migrants. The Lord Avebury laid amendment 111 and the question was debated.[23] The Minister, the Lord West of Spithead, indicated that a forensics White Paper would be published later in the year and provided no assurances.[24]

The UK Border Agency's Asylum Process Instruction on Fingerprinting (dated Nov 2006 but marked 're-branded December 2008') states:

> *"Dependants of claimants may also be fingerprinted. Children under sixteen years of age may be fingerprinted, but only in the presence of a responsible adult, who cannot be a member of UK Border Agency staff or a person authorised to take fingerprints. The policy on fingerprinting children under five years of age is currently under review. A pilot involving the taking of fingerprints of claimants and dependants aged under five began in February 2006. This pilot is taking place for claims made at the ASUs in Croydon and Liverpool only."*

It is unclear what the present situation is with regards to any such pilot.

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[22] See *Legal Aid: Refocusing on Priority Cases* Legal Services Commission consultation opened 16 July 2009, closes 8 October 2009

[23] *Hansard* HL Report 4 March 2009: Col 782ff.

[24] *Op cit,* Col 786

In September 2009 the UK Border Agency announced a new pilot project called the 'Human Provenance Pilot'.[25] It is stated to be the Agency's intention to use isotope analysis and DNA testing on adults claiming to be Somali whom the Agency does not consider vulnerable. No information is provided in the Asylum Process Instruction[26] about storage and retention of this data. There is information about asking for consent, but no information about informed consent and provision is made for a refusal to consent. Standard paragraphs for insertion into a 'reasons for refusal' letter in the Instruction rely on a refusal to consent:

> "When you attended the Asylum Screening Unit, you were asked to provide isotope and DNA samples to ascertain your country/area/clan of origin. It is noted that you refused to provide samples. *Case Owners should insert reason(s) why the applicant did not provide samples by referring to the Screening Officer's comments on the consent form which should be attached to the HO file (if not, also check CID 'Notes').*
>
> *Use where a reasonable explanation has been given*
>
> It is considered that you gave a reasonable explanation for failing to provide samples.
>
> *Use where no reason has been given or a reasonable explanation has not been given for refusing to provide samples (do not use this standardised wording in isolation – refer to 7.2.2 Addressing Refusal to Provide Samples, within the Refusal Letter)*
>
> You did not give a reasonable explanation for failing to provide samples. It is considered that a person in genuine need of international protection would assist the authorities of a safe country in establishing the validity of his/ his/her application for asylum. Your failure to do so undermines your claim to be a refugee." [emphasis in original]

Wider questions of data protection and confidentiality give rise to concerns about the UK Border Agency's respect for the rule of law, discussed below. UK Border Agency press releases frequently make reference to 'identifiable' individuals. Press releases on illegal working frequently point to a named workplace or one that that is identifiable, especially when picked up by the local press, and say the employer may be liable to a civil penalty if shown not to have checked documents. ILPA members have seen cases in which such releases have been issued even in circumstances where UK Border Agency officials have indicated to employers that they will not face a civil penalty because they had conducted checks properly.

The right to liberty: unlawful detention under immigration act powers

There have been several recent High Court cases in which the courts have found instances of unlawful detention under Immigration Act powers.[27]

ILPA wishes to draw the Committee's particular attention to the decision of the High Court in December 2008 in the case of *R (Abdi & Ors) v SSHD* [2008] EWHC

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[25] See the Asylum Process Instruction *Nationality Swapping: Isotope Analysis and DNA testing,* 27 August 2009.
[26] *Op. cit.*
[27] See e.g. R (on the application of FR (Iran)) v Secretary of State for the Home Department [2009] EWHC 2094 (QB). See Also (CO/11526/2008) – Determination Awaited.

3166 (Admin). In this case the Court ruled on the legality of Home Office policy on detention of foreign national prisoners after their sentences were over. The policy had been kept secret from detainees, their lawyers and the courts for over two years even though Home Office lawyers repeatedly advised there to be serious questions as to the legality of both keeping the policy secret and the substance of the policy.

The judge began his judgment by describing the Home Office's conduct as "*unedifying*" and "*disquieting.*" He found that it was unlawful to have kept the policy secret; and that the substance of the policy was unlawful. It was finally published on 9 September 2008, but had been in operation, secretly and in contradiction to published policy, since at least May 2006.

Right to private life: *ZO (Somalia)* [2009] EWCA Civ 442

In *ZO (Somalia)* it was held that denying those who had made a 'fresh' asylum claim[28] the right to work when the fresh claim remained undecided after 12 months breached rights under the EU Reception directive. Although ZO and the other applicants in the particular case have been given permission to work, the Government has indicated that it will not apply the judgment to other people in the same position pending the appeal to the House of Lords.

Implementation of Human Rights judgments and the broader question of respect for the rule of law

The cases above provide an example of ILPA's concerns at the way in which the UK Border Agency and Home Office react to human right judgments. The Government response to the Committee of Ministers' recommendation, endorsed by the Joint Committee on Human Rights, on a coordinating role across Government to ensure implementation of human rights obligations is therefore not encouraging.[29]

In April 2009 in a response to a request for agenda items for the UK Border Agency's Corporate Stakeholder group, ILPA asked that the question of the UK Border Agency's respect for the rule of law be an agenda item for that group and raised the following questions:

- Does the Agency perceive a difference between statute law and the judgments of the courts in terms of whether they must be followed?
- What is the Agency's understanding of precedent - e.g. if the Agency concedes a case/pays damages on the basis that it should not have done what it did to the individual in the particular case does this affect the Agency's view of whether it can do the same thing to someone else?
- When a court judgment says that the Agency is doing something unlawful, what delay does the Agency consider acceptable in complying with the judgment?

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[28] See Immigration Rules, HC 395, paragraphs 360 and 360A.

[29] *Government Response to the Joint Committee on Human Rights' Thirty-first Report* 2007-08 Cm 7524, paras 31-32.

- When the Agency loses a court case, for how long does it consider it is reasonable for it to continue doing what it has always done while its lawyers consider the judgment?
- How can the Agency state it is considering a judgment when its Presenting Officers are going into court and putting forward an interpretation (or different interpretations) of that judgment or case owners making a decision (or different decisions) on the basis of that judgment?

The matter was briefly discussed at the meeting and ILPA was told that a representative of ILPA would be invited to the UK Border Agency's Litigation Strategy Board to discuss the matters in more depth. ILPA pressed subsequently for the invitation but it has yet to materialise although on 30 September we were invited to meet with the Agency to discuss how the Agency deal with litigation. Subsequent presentations, most notably that of the UK Border Agency's Chief Executive at the Immigration Advisory Service Annual Conference on 21 July 2009, have led ILPA to be concerned that the creation of a Guidance, Litigation and Appeals Directorate within the Agency, far from providing a way in which to respond rapidly to judgments, creates a bureaucracy that will delay such responses.

ILPA's questions to the Agency were born of ILPA's concerns that in many instances, the UK Border Agency has:

- failed to give effect to the judgments of the courts in a timely manner or, in some cases, at all
- failed to ensure consistency of approach – conceding one case on a particular point, only to decide and/or fight another on the same point
- used secret and unpublished instructions, including unlawful instructions.
- failed to respect principles of fairness and as to the conduct of legal proceedings.

Human rights law cannot in and of itself bear the full weight of what the Committee described in its Annual Report 2008 as "…the rule of law, or the democratic settlement within a State."[30] The Committee's Annual Reports provide an opportunity to scrutinise how respect for the rule of law is underpinning respect for human rights.

Most immigration cases have human rights implications. Risks include violations of, *inter alia,* Articles 2, 3 4, 5 and 8. ILPA sets the comments above in context by raising some of the other cases and matters that have given rise to the concerns enumerated above.

***R (HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin) and *R (HSMP Forum (UK) Ltd) v SSHD* [2009] EWHC (Admin)**

These judgments of April 2008 and March 2009 respectively address matters that the Committee had already held[31] gave rise to breaches of Article 8 ECHR, saying in its

[30] Annual Report 2008, Paragraph 58
[31] http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/173/173.pdf

August 2007 Report, *Highly Skilled Migrants Programme: changes to the immigration rules.*[32]

> *"The changes to the Rules are so clearly incompatible with Article 8, and so contrary to basic notions of fairness, that the case for immediately revisiting the changes to the Rules in Parliament is in our view overwhelming"*

Yet it took litigation (two rounds) and the provision by the courts of a deadline for implementation, before the UK Border Agency would address all matters identified in the Committee's report.

Right to life, right to be free from torture, inhuman and degrading treatment, RN (Zimbabwe)

On 19 November 2008, the Asylum and Immigration Tribunal handed down judgment in *RN (Zimbabwe)*[33] holding that those who could not demonstrate loyalty to the regime would face persecution on return to Zimbabwe.

In a letter to ILPA dated 3 January 2009 the then Home Secretary confirmed that asylum cases would be reviewed in the light of the decision of the Asylum and Immigration Tribunal in *RN (Zimbabwe)*. In February and March 2009 the Secretary of State represented that she accepted the decision in *RN*, including before the Court of Appeal where this was the basis for persuading the Court to reject a challenge to previous country guidance in the case of *HS (Zimbabwe) v. Secretary of State for the Home Department*, [2009] EWCA Civ 308. Instead a consent order dated 11 March 2009 was issued, stating that the case would be reconsidered in the light of the new country guidance. The Secretary of State took the same position in the many cases pending behind *HS*. Yet, less than two weeks later, on 24 March 2009, the Chief Executive of the UK Border Agency wrote to ILPA and others, enclosing a new Operational Guidance Note on Zimbabwe and indicating that the UK Border Agency would no longer comply with the judgment in *RN*. It was the Agency's contention that RN related only to post election violence, yet in *RN* itself a special further hearing had been convened on 30 October 2008 prior to judgment being handed down to address precisely this point. Moreover, the position taken by the Agency was that it considered the situation to have effectively reverted to that expressed in the previous country guidance (i.e. the very matter that had been before the Court of Appeal). The UK Border Agency has not, to the best of ILPA's knowledge, ever provided any evidence to suggest that the situation changed between 11 March 2009 and 24 March 2009.

Metock v Ireland, C-127/08 ECJ and the issue of residence documents

Failures to comply with legal obligations can result in the need to turn to human rights as a backstop. This is the case for EEA nationals and their family members whose Article 8 rights are breached by failure to implement, and delays in implementing, EEA law. It is instructive to consider these cases alongside human

[32] Twentieth report of session 2006-7, HL Paper 173, HC 993
[33] *Op .cit.*

rights cases to understand the wider problem of the implementation of judgments and respect for the rule of law.

This judgment of the European Court of Justice was handed down at about the same time as the judgment of the House of Lords in *Baiai,* on 25 July 2008. This dealt with applications by non-EEA national family members for EEA family permits and held that such applications could be made at any issuing post and the immigration status of the family member in that country should not be a bar to applying. Ireland issued a press release promising compliance the following day and produced new statutory instrument on 31 July 2008.[34] The UK Border Agency took no action until December 2008, when it amended instructions on its internal website with no publicity.[35]

Between July and December 2008 affected cases were being decided and were being argued by Presenting Officers before the courts and the Tribunal. There was no published guidance and different Presenting Officers, in different courts, took different approaches. This meant that the UK Border Agency was continuing to act contrary to the law.

Meanwhile ILPA continues to voice its concerns at the huge delays in issuing residence documents to non-EEA national family members, contrary to Article 8(2) of EU Directive 2004/38[36] which has been transposed into UK law through the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).

Article 8(2) of the Directive provides that for EU nationals exercising free movement rights in the UK, three months after arrival, they are entitled to a registration certificate which "shall be issued *immediately*" (emphasis added). For third country national family members of an EU national Article 10 applies, which states that these persons shall be issued a residence card "no later than six months after the date on which they submit the application." Further the article states "A certificate of

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[34] The European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (Statutory Instrument No.310 of 2008)

[35] ILPA was told on 17 December 2008: "Amendments have been made to European Casework Instructions chapters 1, 2 and 5 as these were, in small part, affected in small sections by the judgment *http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/*. Chapter 3 of the ECIs and the relevant Entry Clearance Guidance on the UKVisas website will be updated shortly to reflect these amendments."

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

application for a residence card shall be issued immediately." Yet delays of 12 to 18 months are common. The reason given to applicants who complain about delays is that staff were transferred to deal with foreign national prisoners. When applicants' representatives complain about delay and begin legal action, the UK Border Agency normally issues the document and pays the costs of the action, and damages. Those who do not have such representatives continue to wait. This delay is illegal and goes towards breaches of Article 8.

Conclusion

We recall the Committee's comments in paragraph 104 of its Annual Report 2008:

> 104. …where the Government accepts part of a statutory scheme is incompatible with the Convention, but proposes to appeal against a wider declaration of incompatibility, a choice must be made about the timing of any reform. This choice must clearly strike a balance between the cost, administrative inconvenience and parliamentary time involved in removing the incompatibility and the detriment suffered by those who are affected by the ongoing application of the incompatible provisions. In our view this balance can only be struck on a case-by-case basis. In some circumstances, a breach could have so significant an effect that no degree of administrative inconvenience might justify the failure to bring forward a remedy without delay. We consider that the following factors will be relevant to the assessment of the weight to be given to the need for a speedy remedy:
>
> - the right being infringed, the nature of the breach identified and the impact on individuals affected;
> - whether the individuals affected or likely to be affected are vulnerable;
> - whether the provision affects a significant number of people;
> - whether delay will undermine the value of a remedy for a significant number of people;
> - whether an interim administrative response is in place which removes or reduces the impact of the breach identified by the Court;
> - the likely time until the final appeal is heard in the case.

ILPA is concerned that the reference to striking a balance between cost and administrative convenience and the detriment suffered by those whose human rights have been breached may give comfort where none is intended. The cases above are examples of breaches of human rights where the Government has determined that there is not only 'no rush' but no need to do anything until forced to act as a result of subsequent litigation. ILPA considers that in all cases a remedy should be brought forward '*without delay*' and that delay, rather than the time taken to implement the judgment, is what has been experienced in the cases described.

ILPA considers that it is fundamental to respect for the rule of law that the Government act as rapidly to give effect to the judgment of the courts as to give effect to the legislation that it has brought into force. It is open to the Government of the day to appeal a case in which it loses. It is open to the Government of the day to go to Parliament to seek to change the law to reverse a decision of the courts that it does not like. All too often a point of principle is decided against the Agency but each affected individual must litigate to obtain the application of that principle to

his or her case. Many cannot and many, as a result, suffer or continue to suffer violations of their human rights. Where the Agency acknowledges that changes must be made it is unreasonably slow to make such changes and individuals suffer violations of their human rights in the interim. The result is lack of respect for the rule of law and irremediable, or ongoing, breaches of human rights.

Alasdair Mackenzie
Acting Chair
ILPA
30 September 2009