ILPA response to the consultation on the draft illustrative Immigration Rules on Protection

1. ILPA is a professional association with some 1000 members (individuals and organisations), who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-government organisations working in this field are also members. ILPA aims to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on numerous government, court and tribunal stakeholder and advisory groups.

Introduction:

2. ILPA welcomes this opportunity to comment upon the draft illustrative Immigration Rules on Protection ("the draft Protection Rules"), which were published last summer alongside the draft (partial) Immigration and Citizenship Bill ("the draft Bill"). We understand that a further draft will be made available for comment before the end of the 2008-09 parliamentary session. In light of that, our comments here are for the most part of a general nature. Whereas, we make some points on discrete aspects of the draft Protection Rules, these are not intended to be exhaustive (as we anticipate there may be changes before the next draft) and in several of these are illustrative of wider concerns.

3. ILPA provided some limited observations upon the draft Protection Rules in our October 2008 Memorandum of Evidence to the Joint Committee on Human Rights as part of our response to the Committee's Call for Evidence in respect of the draft Bill[1]. We there highlighted concerns in relation to the provisions for exclusion from, and cancellation of, a protection status contained in the draft Protection Rules. Further reference is made to our observations to the Joint Committee in the body of this response, but those observations are not repeated here.

4. This consultation response is divided into discrete sections under distinct headings. Each section addresses a general area of concern, except the final section where some further points are made on discrete paragraphs of the draft Protection Rules.

Current international obligations:

5. In inviting comments upon the draft Protection Rules, the UK Border Agency states the decision to develop the Immigration Rules in this way:

[1] A copy of our Memorandum is available in the Submissions section at www.ilpa.org.uk

> "*…will not affect the UK's international obligations but reflects simplification principles in making our legislation easier to use and understand.*"[2]

6. This observation must be considered in context. The UK's international obligations include obligations under the 1951 UN Convention relating to the Status of Refugees ("the Refugee Convention"[3]), the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Human Rights Convention"), several European Council Directives adopted for the purposes of working towards the establishment of a Common European Asylum System and the 1989 UN Convention on the Rights of the Child ("the Convention on the Rights of the Child").

7. In respect of European Council Directives, the UK Border Agency has notified stakeholders, including ILPA, that the Government's current intention is that the UK will not opt-in to the revised Reception Directive[4]; and it considers that on the adoption of the revised Reception Directive the UK will no longer be bound by the current Directive[5]. We do not understand, and it has not been suggested, that the policy position of either the Government or the UK Border Agency is to adopt standards below the minimum standards to which the UK is currently obligated under this (or indeed any other) Directive[6]. However, if the UK Border Agency is correct in its analysis of the effect of adoption by the European Council of a revised Reception Directive (and we do not concede that the analysis is correct), there is a danger that the UK's international obligations will be altered; and accordingly the Protection Rules ought to ensure that any reduction in the UK's international obligations is mitigated by ensuring that the Protection Rules do not allow for the adoption of standards below the current minimum.

Respecting international obligations:

8. The assertion (highlighted above) that the draft Protection Rules would not affect the UK's international obligations, when considered in the context of the draft Protection Rules, is of little value or relevance. It is trite that the UK cannot change its international obligations by the making or changing of Immigration Rules. However, such Rules are capable of affecting whether, in practice, the UK respects and complies with its international obligations. In this regard, the draft Protection Rules give considerable cause for concern.

9. The draft Protection Rules seek to provide detailed interpretation of the UK's international obligations. Whereas it is understandable that guidance

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[2] See the letter (undated) circulated to various stakeholders by email on 1 April 2009 from Amelia Wright, Head of Asylum Policy

[3] References here to the Refugee Convention are to be understood as also referring to the 1967 UN Protocol relating to the Status of Refugees

[4] See letter of 6 March 2009 from Lin Homer to Jacqueline Parlevliet, UNHCR

[5] This was explained to stakeholders, at a meeting on 17 April 2009 at 2 Marsham Street, at which ILPA was represented by Steve Symonds, ILPA Legal Officer

[6] Indeed, the letter from Lin Homer (*op cit*) expressly states that the UK Border Agency remains "*fully committed to the standards laid down in the existing Directive*"

made under the Rules may be used to provide such interpretation, in order to seek consistency and accuracy in decision-making, it is not acceptable that Rules or legislation should seek to provide such interpretations. It is fundamentally inconsistent with the UK's international obligations for the UK to seek to legislate for its own interpretation of those obligations. Those obligations are as set out in relevant international instruments, as interpreted by relevant international bodies, and cannot lawfully be defined or constrained unilaterally by the UK adopting particular definitions and interpretations in its domestic legislation. Moreover, they cannot lawfully be set in stone by the UK adopting definitions and interpretations, which may be current at any particular time, since international instruments such as the Refugee Convention, Human Rights Convention and Convention on the Rights of the Child are living instruments[7].

10. Whereas the European Council Directives seek to provide interpretation of the Refugee Convention, these expressly recognise the supremacy of that Convention – both in the agreement under which these Directives are adopted[8] and within the recitals to each Directive. The draft Protection Rules, by contrast, do not expressly recognise the supremacy of the Refugee Convention or other international obligations to which they relate; and clause 21 of the draft Bill, under which it is proposed the draft Protection Rules shall be made, similarly fails to provide any recognition of the supremacy of those obligations. Having regard to the ease and frequency with which changes may be made to the Rules, mere recognition within the Protection Rules would be inadequate.

11. As regards the UK's obligations under European Council Directives, some protection is provided by their direct effect in domestic law; and by the judicial supremacy of the European Court of Justice. As regards the UK's obligations under the Human Rights Convention, the Human Rights Act 1998 provides some protection (unless any incompatibility is required by primary legislation). However, even in these cases, erroneous interpretations in the Rules would be likely to contribute to practice and decision-making which are not compatible with international obligations; and to the need for litigation to address any incompatibility.

12. Absent primary legislation, similar to the Human Rights Act 1998 (in relation to the Human Rights Convention), giving direct effect to the UK's international obligations (e.g. under the Refugee Convention and the Convention on the Rights of the Child), clause 21 of the draft Bill (or any later incarnation) needs to be amended so as to recognise the supremacy of the relevant international instruments in the interpretation of the Rules so as

[7] See, e.g. in respect of the Refugee Convention, *Sepet & Anor v SSHD* [2003] UKHL 15 (para. 6) *per* Lord Bingham (citing with approval dicta of Sedley J in *R (Shah) v IAT* [1997] Imm AR 145 and Laws LJ in *R (Adan) v SSHD* [2001] 2 AC 477); *R v Asfaw* [2008] UKHL 31 (para. 55) *per* Lord Hope of Craighead and *R (European Roma Rights Centre and Ors) v Immigration Officer at Prague Airport and Anor* [2004] UKHL 55 (para. 43) *per* Lord Steyn

[8] Agreement reached by the European Council at its special meeting in Tampere on 15 and 16 October 1999 to work towards establishing a Common European Asylum System based upon full and inclusive application of the Refugee Convention

to avoid the risk that the UK fails to meet its international obligations by reason of erroneous interpretations within the Rules.

13. Failure to recognise the supremacy of such international instruments will not merely risk failure to meet international obligations, but will increase the likelihood of extensive litigation over the interpretation and application of the Protection Rules; and contribute to inconsistency and lack of confidence in decision-making and the decision-making process in relation to asylum claims. At worst, such Rules (if they are to be followed) could require UK Border Agency officials to act and make decisions that conflict with international obligations resulting in significant additional legal and legal aid costs and making the courts the first point of legitimate decision-making in respect of such matters as deciding upon refugee status.

14. There are various provisions within the draft Protection Rules which give rise to these concerns. The meanings of "*refugee*", "*serious harm*" and "*terrorism*" in the interpretation section do so:

    a. The Refugee Convention gives the definition of a 'refugee'[9], including criteria as to the degree and type of harms that are relevant to refugee status. Several paragraphs in the draft Protection Rules seek to give a UK definition or interpretation of the Convention definition and criteria. Some of these paragraphs relate directly to the relevant European Council Directive[10]. Some of these use language taken directly from the Convention or the Directive. However, the approach is not satisfactory even where the language is taken directly. Unlike the Refugee Convention, UK legislation and the Rules made under it are not 'living instruments'. Unlike the Directive, the draft Protection Rules do not purport to set out minimum standards by way of guidance for decision-making[11], do not confirm the Refugee Convention (and Protocol) as providing the cornerstone for the regime of refugee protection[12] and would not, as drafted, be founded upon a "*full and inclusive application of the* [Refugee Convention]"[13]. Without direct adoption of the supremacy of the Refugee Convention, the Rules are incapable of reflecting that understanding and application of the Convention may change over time with judicial interpretation and changing contexts. As drafted, the draft Protection Rules fundamentally misunderstand or fail to reflect the differing qualities of UK legislation and international human rights instruments or European Council Directives. Some examples of this inadequacy within the draft Protection Rules are given in our earlier evidence to the Joint Committee on Human Rights (referred to above). The examples, which relate to exclusion and cessation, are not exhaustive

[9] Article 1
[10] 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 ("the Qualification Directive")
[11] Recital (16) to the Qualification Directive
[12] Recital (3) to the Qualification Directive
[13] See recital (2) to the Qualification Directive

and similar points may be made, e.g., in respect of the paragraphs in the draft Protection Rules which relate to Article 1(A)(2) of the Refugee Convention.

b. As regards the meaning given to 'terrorism' and its application in the draft protection Rules, please see our earlier evidence to the Joint Committee on Human Rights (*op cit*).

Decision-making:

15. Certain paragraphs of the draft Protection Rules seek to legislate upon the evaluation of evidence, including the assessment of credibility, and the method for so doing. Again, whereas guidance on such matters may be necessary to maintain standards and ensure consistency in decision-making, Rules and legislation are inappropriate and have the potential to remove the essential quality that decisions are made on the basis of the individual circumstances of the particular case; and (as regards protection claims) ultimately founded upon a composite or global evaluation of all the evidence before the decision-maker. Seeking to legislate as to what must be taken into account, in what way and with what weight is to promote or, worse, require an approach that is both impracticable and unlawful[14].

16. Paragraph 7 of the draft Protection Rules largely adopts the language of section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Section 8 has been the subject of judicial comment, and has led to significant confusion and error on the part of decision-makers, including at first instance. The Asylum and Immigration Tribunal considered that the section "*has the incidental effect of interfering with the well-established rule that the finder of fact… should look at the evidence as a whole*", which effect the Tribunal described as "*unfortunate*", potentially "*difficult to manage*" and a "*distortion*"[15]. The determination, and the grounds submitted and advanced on behalf of the Secretary of State, in that case reveal how her officials' understanding of decision-making has been distorted by section 8.

17. The judgment of the Court of Appeal, in a more recent case[16], reveals how section 8 has distorted decision-making by members of the immigration judiciary. In that judgment, the court expressly referred to the Tribunal's determination[17], and considered section 8 to be dangerous if "*read as a direction as to how fact-finding should be conducted*" and "*in distorting the fact-finding exercise by an undue concentration on minutiae which may arise under the section at the expense of, and as a distraction from, an overall assessment*"[18]. The

[14] The fundamental flaw in seeking to reduce an evaluation of risk to scientific precision or a formulaic methodology was explained, by reference to several other authorities, in the judgment of Sedley LJ in *Karanakaran v SSHD* [2000] EWCA Civ 11, with which Brooke and Robert Walker LLJ agreed; subsequently approved by Lord Steyn, Lord Hutton and Lord Bingham of Cornhill in *R (Sivakumar) v SSHD* [2003] UKHL 14

[15] *SM (Section 8: Judge's process) Iran* [2005] UKAIT 00116 (paras. 7 & 9) *per* Mr CMG Ockelton, Deputy President

[16] *JT (Cameroon) v SSHD* [2008] EWCA Civ 878

[17] *SM (Section 8: Judge's process) Iran op cit*

[18] (para. 19) *per* Pill LJ, *JT (Cameroon) op cit*

court was also driven to reading words into the section[19] so as to give effect to "*Parliament's assumed regard for the principle of legality*"[20].

18. A further example of the potential for distortion can be seen by a consideration of paragraph 7(b) of the draft Protection Rules. Paragraph 7(b) lists certain types of behaviour which "*will be treated as designed or likely to conceal information or to mislead*" and to which, therefore, regard will be had as a matter that may damage an asylum-seeker's credibility. Five types of behaviour are set out at paragraph 7(b), all bar one of which include reference to "*without reasonable excuse*". The implication, therefore, arises that the behaviour described at paragraph 7(b)(ii) ("*production of a document which is not a valid passport as if it were*") is something for which there necessarily cannot be a reasonable excuse. Without seeking to provide an exhaustive response to that implication, it seems obvious to us that a child, trafficking victim or person of diminished responsibility by virtue of their mental capacity may be someone who could be acting reasonably in following the instructions of a trafficker or smuggler in presenting a document in such circumstances.

19. The example given and those given in the caselaw to which reference is made here are illustrative only.

20. The draft Protection Rules include various other paragraphs which may distort the decision-making process, including paragraphs 6 ("*Submission of material factors as soon as possible*"), 12 ("*Individual and objective basis for assessment*") and 14 ("*Circumstances in which a person's statements do not need confirmation*"). That much of the language in these paragraphs is taken from European Council Directives[21] does not answer our concerns for the following reasons. While the language is largely consistent, the draft Procedure Rules diverge from the language in discrete respects[22]. More significantly, the draft Procedure Rules neither adopt the Directives as their context nor provide a context similar to that within which the Directives are situated (by virtue of the Tampere agreement[23] and the recitals to each Directive). The relevant elements of the Directives provide for guidance towards achieving common minimum standards. By contrast, if implemented, the draft Protection Rules would direct, or give the appearance of directing, UK Border Agency decision-makers on how to evaluate asylum claims – precisely that which the Court of Appeal has ruled to be contrary to basic principles of legality[24].

Children:

[19] The word "*potentially*" was read into the section – see (para. 20) *per* Pill LJ, (para. 24) *per* Laws LJ, *JT Cameroon op cit*
[20] (para. 20) *per* Pill LJ, *JT Cameroon op cit*
[21] Paragraphs 6, 12 and 14 of the draft Protection Rules in significant part adopt the language of Article 4, paragraphs 1, 2, 3 & 5 of the Qualification Directive
[22] By way of example, "*reasonable excuse*" is substituted for "*good reason*" in paragraph 14(e)
[23] See fn. 8
[24] See fn. 23

21. We have here given explanation as to why the mere adoption of discrete language or paragraphs from European Council Directives within the Rules is flawed. A further example, by way of omission, is the absence of recognition within the draft Protection Rules of the general need for primary consideration of the best interests of the child[25].

22. The inadequacy of the draft Protection Rules in this regard is significantly extended by the reference to "*an unaccompanied child's best interests*", at paragraph 28(a), which erroneously assumes that tracing of, and by implication reunion with, the child's family can be equated with 'best interests'. While this may be so in some cases, it will not be so in all cases – e.g. where the child is fleeing from abuse by that family or is the victim of trafficking facilitated by that family. We note that the assumption results from words at the beginning of the paragraph ("*So as to*…"), which are taken from the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7[26]. Those Regulations were made for the implementation of the relevant European Council Directive[27]. However, the language adopted in the Regulations and transposed to the draft Protection Rules differs from that in the Directive, which does not directly link tracing and family reunion with 'best interests'[28]. This is an area of considerable concern for reasons that are explained in ILPA's comments, which remain outstanding, to the UK Border Agency upon a draft Asylum Policy Instruction on Children[29]; and in our evidence to the Joint Committee on Human Rights in relation to the Committee's inquiry on children's rights[30].

23. Further consideration needs to be given to children as regards the entirety of the draft Protection Rules. It is apparent on the face of the draft Protection Rules that such an approach has not informed the current draft. For example, consideration of the best interests of children, in the context of considering protection applications, is restricted to applications under paragraph 5(e) of the Annex ("*Right of dependent to apply for temporary protection*")[31]. Also, the limited protections provided by paragraph 21 ("*Interview of children who have made an application for protection*") are simply ignored in respect of the possibility of interview of a dependant child under paragraph 3(b) ("*Dependants of applicants*").

Further observations on discrete paragraphs of the draft Protection Rules:

[25] cf. recital (12) to the Qualification Directive
[26] Regulation 6(1)
[27] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ("the Reception Directive")
[28] cf. Article 19.3 of the Reception Directive
[29] ILPA letter of 16 June 2008 to Justin Russell, then Director of Performance, and letter of 3 October 2008 to Steph Hutchison-Hudson, then Head of Operational Policy and Improvement
[30] ILPA submissions of February 2009 are available in the Submissions section at www.ilpa.org.uk
[31] Moreover, this paragraph significantly understates the UK's international obligations which are not merely to have regard to the best interests of the child but to give primary consideration to those interests – see Article 3.1 of the Convention on the Rights of the Child

24. Some further observations about discrete paragraphs within the draft Protection Rules are set out under subheadings (which refer to the particular paragraph by number) below. These are not intended as exhaustive observations, whether upon the particular paragraph or upon the draft Protection Rules more generally.

Paragraph 1

25. We consider there is good sense in ensuring that any asylum claim, whether made by reference to the Refugee Convention or otherwise, is considered by reference to that Convention. However, similarly, any claim made by reference to that Convention should also be considered in relation to criteria for humanitarian protection (certainly if refugee status is not granted). Paragraph 1 should be amended accordingly.

Paragraph 3

26. On its face, paragraph 3 restricts the option of including a person as a dependant to those who are present and accompanying the principal claimant at the time the asylum claim is made. This is unduly restrictive.

Paragraph 4

27. Paragraph 4 restricts the circumstances in which an asylum claim will be recorded to where the claim is made in person. However, there may be circumstances where it is not possible for someone to claim in person (e.g. for health or disability reasons). The paragraph needs to be revised in order to allow for a claim made by such a person to be recorded despite the claim not being made in person. Moreover, for many years it has proved convenient to the UK Border Agency (and its predecessors), legal representatives and asylum-seekers for fresh claims to be made in writing. The interpretation section indicates that paragraph 4 would apply to fresh claims, in which case the paragraph needs further revision so that fresh claims will be recorded when made in writing.

Paragraph 5

28. This paragraph is not appropriate. Firstly, the UK has no standing to make a Rule as to what another State will or will not do. Secondly, there may be exceptional cases where it is not appropriate for a particular asylum claim to be dealt with in another member State. This could arise, for example, because the claimant is a child who ought to be reunited with family already settled or in the asylum system in the UK; or because the claimant is someone who is particularly vulnerable to harm in the member State in which he or she now is (e.g. where the person is at risk from traffickers).

Paragraph 8

29. The paragraph should make clear that where the Secretary of State is providing or has arranged for the person's new accommodation, he or she is not required to notify the Secretary of State of that which she already knows.

Paragraph 9

30. We do not consider that the policy position underlying this paragraph is appropriate. In the absence of a general policy position permitting asylum-seekers and refused asylum-seekers to work, we consider there is force in the position of the Joint Committee on Human Rights[32] that consideration of permission to work should not simply focus on the length of time between the making of an asylum claim and an initial decision, but should also consider the lengthy periods for which some people may remain in the UK, where a claim is refused, before there is any realistic possibility of return. Moreover, we consider the focus on 12 months to bear no sensible relation to the longstanding targets in relation to the New Asylum Model (NAM) of resolving cases within 6 months (where resolution is not achieved by an initial decision, but by a grant of status or departure from the UK). We do not accept, and have seen no evidence demonstrating, that granting permission to work to asylum-seekers or refused asylum-seekers must act as a pull-factor; and we note that there could be no realistic prospect of such if the UK Border Agency meets its stated targets even were the relevant time period for an application for permission to work significantly reduced and the focus changed to include consideration of the total period of time the individual was likely to remain in the UK.

31. We question why paragraph 9 should exclude the option of removing any condition prohibiting self-employment; and would be grateful to receive an explanation of the policy position under which asylum-seekers and refused asylum-seekers may be excluded from self-employment.

Paragraph 16

32. Insofar as this paragraph asserts the rights that a legal representative can expect to be respected, as opposed to duties to take measures to secure legal representation, the rights set out ought not to be confined to representatives of unaccompanied children but should be afforded to representatives of all asylum-seekers.

Paragraph 18

33. This paragraph, and in particular the factors set out at subparagraph (b), risk that asylum claims may be determined before there has been full disclosure by the claimant, including in circumstances where there has been inadequate opportunity for the claimant to develop sufficient trust and confidence in his or her representatives and/or the asylum process so as to disclose such matters as a history of rape or trafficking, or a fear of domestic, sexual or other violence that arises out of such histories. The provision at subparagraph (d) to allow for "*a reasonable opportunity to submit further information*" is inadequate insofar as the opportunity is predicated on the

[32] See the Committee's Tenth Report for the Session 2006-07 *The Treatment of Asylum Seekers*, paras. 120-122

omission of the interview, whereas such information may reveal a need for an interview.

Paragraph 20

34. The reference to "*written report*" rather than "*written record*", while adopting the language of the relevant European Council Directive[33] appears to reduce standards currently applicable in the UK to the minimum standards required by the Directive[34]. As such, paragraph 20 should be amended to refer to the written record; and should be improved by also reflecting the standards adopted in the UK, following a judgment of the Court of Appeal, in providing a copy of any taped recording of the interview[35].

Paragraphs 23

35. Where there is a legal representative on record, notice ought to be given to the legal representative (whether or not it is also given to the individual).

Paragraph 24

36. Where information is given to an individual in person, whether in writing or orally, there ought to be a duty to check that the information has been understood.

Paragraph 30

37. As regards withdrawal of a claim, where a legal representative remains on record, such withdrawal ought not to be accepted from an asylum-seeker unless and until he or she has withdrawn instructions from his or her representative. Given the potential consequences of withdrawal, where a legal representative is on record, no decision to treat an asylum claim as implicitly withdrawn should be taken prior to notifying the legal representative of an intention to take such a decision. Where there is a legal representative on record, any decision to discontinue consideration of an asylum claim ought to be notified and explained to the legal representative.

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[33] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive")
[34] Article 14 of the Procedures Directive
[35] *R (Dirshe) v SSHD* [2005] EWCA Civ 421