ILPA RESPONSE TO THE BORDER AND IMMIGRATION AGENCY CONSULATION ON THE TRANSPOSITION OF THE EU ASYLUM PROCEDURES DIRECTIVE 2005/85/EC INTO NATIONAL LAW

The Immigration Law Practitioners' Association (ILPA) is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

Consultation question

Whether there are any areas not covered in the Consultation document

We take the third question posed in the Consultation document first. The Consultation document fails adequately to deal with the question of minimum standards, and of the higher standards required under international law. Article 5 of Directive 2005/85/EC (hereafter 'the Procedures Directive'), and the third preamble thereto set out that the Directive sets minimum standards and that (text from Article 5)

> *'Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, insofar as those standards are compatible with this Directive'*

As to the latter part of that text, if the Directive goes beyond setting minimum standards it exceeds the competences of the EC under Title IV EC and to that extent we cannot agree with the analysis set out in paragraph 28 of the Consultation document that the UK must give effect to mandatory provisions 'where or not those provisions are seen to benefit an individual applicant'.

ILPA provided an analysis of the Procedures Directive in its July 2004 paper *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, parts of which we have used in this response. Given that it is some 50 pages long, we do not propose to take up all the points herein. Therein, we highlighted a number of areas where we consider that the Procedures Directive fails to respect international standards as set out in the 1951 Convention Relating to the Status of Refugees, the European Convention on Human Rights and other international instruments. Our concerns were shared by, amongst others, UNHCR. The then UN High Commissioner for Refugees, Ruud Lubbers, expressed concerns about the Directive,

'warning that several provisions …would fall short of accepted international legal standards…[and]…could lead to an erosion of the global asylum system, jeopardizing the lives of future refugees'[1]

In implementing the Directive, the UK, like other Member States, is bound by European Community law on fundamental rights[2], which in many instances will preclude it from following the letter of the Directive, which fails to elaborate standards sufficiently protective of fundamental rights. We consider that the UK should ensure that it adopts higher standards where these would reflect the UK's international obligations in a way that the Procedures Directive does not.

The Consultation document is long and detailed and we have, of necessity, had to be selective in those matters touched on in this response, both in terms of the Articles we have addressed and the matters addressed under particular Articles. That we have not touched on all matters raised is a reflection of our capacity, and should not be taken as indicating that matters not touched upon are dealt with to our satisfaction. In the case of unaccompanied minors, we would suggest that a meeting is required to address the many difficulties with the proposals set out in the Consultation document.

Rather than rehearse arguments on the shortcomings of the Procedures Directive and the case for higher standards, we have drawn attention to them in responding to the question on whether the proposed changes to the immigration rules, and the draft regulations, satisfactorily implement the Procedures Directive. We have at the same time drawn attention to areas where we consider that UK practice does not reflect the current requirements of the Directive at the end of our response.

Consultation questions:

Whether the proposed changes to the immigration rules and contents of the draft regulations satisfactorily implement the Directive

Areas where you feel UK practice does not reflect the current requirements of the Directive

Chapter 1

Article 2

We agree that paragraph 327 of the Rules should be amended to make it clear that a person need not specifically request to be recognised as a refugee to make an asylum claim. However the wording should be more explicit to ensure that any

[1] UNCHR Press Release *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004) and see UNCHR Press Release *UNHCR regrets missed opportunity to adopt high EU asylum standards (*30 April 2004).

[2] See joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers*, Opinion of Advocate General Mischo, 20 September 2001, Judgment 10 July 2003 [2003] ECR I-7411

request not to be returned or removed for fear of serious harm, a term borrowed from the Refugee Qualification Directive (2004/83/EC), shall be presumed to be an application for asylum within the meaning of the rules.

Suggested amendment:

Paragraph 327 - After the words 'international protection' insert 'including any request not to be returned or removed for fear of serious harm on arrival at destination'

Article 3

We consider that the decision that procedural guarantees should apply equally to all claims for international protection whether they are made under the Refugee Convention or the European Convention on Human Rights is a sensible one. The amendment to the Immigration Rules however is proposing to exclude Article 3 ECHR claims for protection outside the ambit of Humanitarian Protection from these procedural protections. We would oppose any situation where such Article 3 ECHR claims had lesser procedural protections.

Suggested amendments

Paragraph 327B

After 'consideration of' insert 'applications for'

At end insert 'and of all applications based on Article 3 of the European Convention on Human Rights'

Article 4

We note from the Consultation document that the Border and Immigration Agency will decide all asylum applications made within the jurisdiction of the UK. A more felicitous description of the second part of Article 4(1), rather than that it 'excludes juxtaposed controls' as per the wording of the consultation document might be that, taken with Regulation (EC) No 343/2003, it requires applications at the juxtaposed controls to be passed to the states in whose territory the juxtaposed control is found. If there were any question in the case of a particular juxtaposed control as to the territorial status of the area in which UK immigration control was operating, then, were it determined to be UK territory, it would fall to the UK to determine the claim[3].

We understand from the consultation paper that the Border and Immigration Agency does not intend to delegate any of its decision-making.

[3] For a detailed discussion see ILPA's July 2006 response to the consultation on private freight searching and fingerprinting at juxtaposed controls.

Given that a number of the procedural guarantees in the Directive apply to the appellate level, it is necessary to make clear that the Asylum and Immigration Tribunal and the Special Immigration Appeals Commission will be bound by the procedural safeguards also

Article 5

ILPA is an association dedicated to the promotion of the highest standards of advice and representation of all asylum applicants and to the highest standards of decision-making on their claims. As per our introduction to this response, we consider that it behoves the UK to apply higher standards than those for which provision is made in the Procedures Directive where this is necessary to give full effect to its international obligations.

Chapter 2

Article 6

The suggested amendment to Rule 349 that 'Every adult with legal capacity has the right to make an application for asylum on his own behalf' may cause confusion in the case of, for example, an unaccompanied minor child or an adult incapacitated by mental illness.

The UK has failed to implement provisions in Article 19 of the Reception Directive (2003/9/EC) which states

> *'Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities'*

The text of the proposed amendment to the Immigration Rules may be said to leave unclear how an unaccompanied child with no legal guardian in the UK is to make a claim for asylum, although that it should be possible to make such a claim is clearly envisaged by the proposed paragraph 350, discussed under Article 17 below. The existing reference in the rules to a minor child 'also' making a claim for asylum does not necessarily cure this defect, because it might be read as applying to children of a parent who has already made such a claim. Under the 1951 Convention Relating to the Status of Refugees, the UK is obliged to consider all applications for asylum, whether made by adults or children, and similarly under the ECHR. If it is being suggested that a child cannot make such a claim unassisted, then provision must be put in place for the child to be so assisted. The Directive (at Article 6 (a) (b) and (c) invites Member States to deal with these matters in national legislation.

We read paragraph 349 of the Immigration Rules (as it is proposed to amend it) as providing that that the implementation of this Article will not prevent those claiming asylum in their own right also being able to apply as the dependants of their partners

and parents. Two simultaneous applications are possible: one as an applicant and one as a dependant. Paragraph 349 should make explicit that where the principal applicant is granted asylum a person who has applied both as a dependant of that applicant and in his/her own right will be granted leave in line with the principal applicant, in addition to the provision for the dependant's claim in his/her own right to be considered separately. We understand this to be the import of the rule, but it should be made more explicit.

As to proposed paragraph 327A, see our comments on Article 2 above. We consider also that, given the use of private contractors by the Border and Immigration Agency, it would be helpful to make express reference to such contractors in this paragraph.

The implementation of the provision in Article 6(5) could usefully give examples of the authorities such as Social Services and the Police who are likely to be asked about such matters.

Suggested amendments

Paragraph 349

First sentence after 'Every adult with legal capacity has a right to make a claim for asylum on his own behalf.' insert 'No person shall be denied the right to claim asylum where he is not an adult with legal capacity to do so, but shall instead be given the necessary assistance to establish whether he wishes to make a claim and to assist him in making such a claim.'

After 'The case of any dependant who claims asylum in his own right will' insert 'also'

Paragraph 327A

After 'authorities' insert 'and those contracted to perform functions on their behalf'

After 'someone who wishes to make an application for asylum' insert 'including, but not limited to, the Police, Local Authority Social Services Departments, the Serious and Organised Crime Agency, the Prison Service, officers of Her Majesty's Revenue and Customs,'

Article 7

It is accepted that the current UK law on the right to remain in the Member State pending examination of the application is compatible with the Directive.
We consider that to give effect to this right it is vital that the safeguard of not requiring an applicant to attend interviews with Embassy officials is upheld. We draw to your attention a recent Ministerial statement on this matter.

> *'Rt Hon John Reid MP: The Home Office would not ask an asylum seeker to meet officials from the embassy of their country of origin until and unless a negative decision was taken in respect of his claim for protection in the United Kingdom.'* (Hansard HC Report 21 June 2007 Col 2073)

We recall the judgment of the High Court in *Nadarajah* [2003] EWHC 1107 Admin:

> *Further, it was accepted at the oral hearing before me that once an appeal had been lodged, it is inappropriate to require a person to give an interview to the authorities of the state to which he will be removed in order to facilitate the obtaining of a travel document. This is no doubt for the sound reason that such an interview might lead to information being provided which might put the claimant or his family, who in the present case are still in Sri Lanka' (paragraph 39)*

ILPA's opposition to non-suspensive appeals procedures is a matter of record and we note in passing that UNHCR expressed concern at the approach of the Procedures Directive to non-suspensive appeals, noting that

> *' ..in several European countries 30-60% of initial negative decisions are subsequently overturned on appeal'* [4].

Article 8

The Consultation document identifies a risk of confusion as to whether the UK complies with its obligations under Article 8(1) caused by section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. We suggest that the proper way to deal with the risks of confusion as to the transposition of Article 8(1) is to repeal subsections 8(4)-(6) of section 8 of that Act. As ILPA has previously argued, the matters in section 8 are not determinative of the strength or weakness of an asylum claim and repeal of section 8 would strengthen the integrity of the UK's framework for deciding applications for asylum[5].

We note the addition of new paragraph 339HA. **Consideration should also be given to making equivalent provision for the Asylum and Immigration Tribunal and the Special Immigration Appeals Commission, neither of whom make decisions on behalf of the Secretary of State.** We are aware that the Immigration Rules cannot be used to place obligations on those authorities, but are concerned that equivalent provision has not been made .

We note the proposed additions to paragraph 339J but suggest that to give effect to Article 8(2)(a) it is also necessary that the Race Relations Act 1976 section 19D be amended so that functions in connection with the determination of applications from asylum are removed from its ambit, just as 'nationality functions' were removed in 2004[6].

We note the proposed paragraph 339JA but suggest that for the avoidance of doubt it must be made clear that an appellant and his/her representatives, if any, have access to the information.

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[4] UNHCR Press Release29 March 2004, *op cit.*

[5] See *Jabari v Turkey* ECHR Application No 40035/98 (11 July 2000), and the UN Committee Against Torture Communication No 15/1994 *Tahir Houssain Khan v Canada* (18 November 1994) para 12.3

[6] See Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 section 14 and SI 2204/2999, with effect from 1 December 2004.

Article 8(4) permits the UK to provide for rules concerning the translation of documents relevant for the examination of applications. ILPA considers that it should be the responsibility of the Border and Immigration Agency to translate documents relevant to applications submitted to them where this has not been done by the applicant due to lack of representation or funding for the representative to provide translations. Therefore, it is proposed that a provision in the Rules should provide that the Secretary of State will translate any relevant documents submitted to her in support of an asylum application if this has not been done by another competent authority.

Suggested amendments

Repeal of subsections 8(4)-(6) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Amendment of section 19D of the Race Relations Act 1976 to remove functions in connection with the determination of claims for asylum from its ambit.
Insert a new paragraph 339HB 'The Secretary of State shall ensure that the personnel examining applications for asylum and taking decisions on his behalf are able to consider all relevant documents submitted in support of an application for asylum. This shall include making available to them, to the applicants and to any court or tribunal considering the application on appeal or review, translations of those documents where these would not otherwise be available'.

In proposed paragraph 339JA before 'and' the Special Immigration Appeals Commission' insert ', an appellant, his representative (if any)'

Article 9

We note the decision to give written reasons for the refusal of refugee status in all cases, and to provide information in a language the applicant can reasonably be expected to understand as to the decision and how to challenge the decision to those who are not represented. As it would seem likely that the information on further challenges to negative decision will be provided in the form of a leaflet in a relevant language, would it not be possible to provide this with all refusals? The wording of proposed paragraph 333 is awkward – if the appellant has no legal representative s/he needs the information whether or not free legal representation is 'available', a matter that may be difficult to ascertain. ILPA is aware that applicants may be represented by less than competent representatives and this information would go some way to ensure that all people seeking asylum know their rights at little extra cost or inconvenience. The new paragraph 333 of the Immigration Rules should be amended to reflect this. The Consultation document refers to cases in which leave is granted for up to a year and to the lack of any statutory right of appeal against such a decision (a provision which, as you will be aware from discussions on *inter alia* the UK Borders Bill, ILPA opposes). Those refused in such cases should receive an explanation of their position, including of the stage at which appeal rights become available. They should not be left simply with silence about appeal rights.

Suggested amendment

Proposed paragraph 333

At the beginning of the third sentence insert 'In all cases where the application is rejected and in all other cases'

Article 10

ILPA considers that the Immigration Rules should contain reference to a person's entitlement to get in touch with the United Nations High Commissioner for Refugees, and that applicants should be provided with information about this right so that all decision-makers and applicants are aware of this.

ILPA considers that rule 339I should be amended to add 'where the applicant requests an interpreter'. See also our comments on Article 13, below.

We are aware that the Ministry of Justice is consulting on changes to the relevant Procedure Rules and will deal with the proposed amendments in our response to that consultation.

Suggested amendments

Proposed amendment to paragraph 339I after '…communication between the applicant and the Secretary of State' insert 'or where the applicant requests an interpreter'

Proposed paragraph 357A, after 'obligations during the procedure insert 'including their right to contact the United Nations High Commissioner for Refugees (UNHCR)'

Article 11

It is accepted that Article 11 is permissive. ILPA reiterates that the power to impose obligations on applicants does not obviate the need to respect the prohibition on *refoulement*. If a person has asked for asylum and the Secretary of State considers that a person will face persecution or a breach of their human rights that would violate the prohibition on refoulement on return, then international protection must be extended to that person. Whatever the sanctions for non-compliance, these cannot extend to a breach of the *non-refoulement* obligation.

Article 12

The provision of the Immigration Rules that it is proposed will deal with personal interviews states that the representative shall be legally competent to conduct the interview. It is ILPA's view that they should also have a sufficient level of knowledge

about the country of origin material relevant to the application. Further, they should take into account the personal *and* general circumstances surrounding the application, including the applicant's cultural, ethnic and religious origins, their gender and any vulnerabilities. It is not possible to fail to take such matters into account and still to make a fair decision so the final clause 'insofar as it is possible to do so' should be deleted.

That the absence of a personal interview should not prevent a decision being taken on an application, applies in cases where the absence of such an interview is 'in accordance with this article' (Article 12(3) of the Procedures Directive. This should be accurately reflected in the transposition, as set out in the box below.

Failure to afford an opportunity for a personal interview risks putting the UK in breach of international standards such as UNHCR EX Com Conclusions No.s 8 and 30, and case law under the European Convention on Human Rights, and decisions of the UN Human Rights Committee and of the UN Committee Against Torture[7].

Suggested amendments

Proposed paragraph 3339NA

In subparagraph (i) omit 'insofar as it is possible to do so'

In subparagraph (iv) place the second sentence in a new sub-paragraph (vi) and amend as follows:

(vi) The omission of a personal interview, in accordance with the provisions of this paragraph, shall not prevent the Secretary of State from taking a decision on the application.

Article 13

The provision at Article 13(3) (b) seems to have been omitted from the proposed amendments to the Immigration Rules. It is ILPA's view that the Immigration Rules should state that at all asylum interviews where the applicant is not happy to be interviewed in English the Secretary of State will provide an interpreter in a language that the applicant speaks fluently. There is a difference between being able to make oneself understood in a language and the ability to give a complex account, including of difficult and painful events, in that language.

The Case Resolution subgroup of the National Asylum Stakeholder Forum, which ILPA attends, has discussed cases where children are asked to attend with their parents for interviews (as for example in the Clannebohr programme in Leeds). There have been cases where families have felt compelled to take all their children, including very young children, to report for interviews, although Border and Immigration Agency caseworkers have subsequently indicated that the intention was

[7] See also Council Resolution on Minimum Guarantees for Asylum Procedures 20 June 1995 [1996] OJ C274/3 para 14. For a detailed exposition, see the Annexe to ILPA's *Analysis of the Procedures Directive*, op. cit.

to issue an invitation rather than an instruction to bring all family members. It would be helpful if the Secretary of State were to make explicit in letters calling people to interview whether she considers it necessary, as per draft rule 339NB(i) to have other family members present, or whether there is simply an invitation to other family members to attend if they wish to do so.

Suggested amendment

New rule 339NB (iii) The Secretary of State shall select for the interview an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.

Article 14

Although the provision at Article 14(1) of the Procedures Directive only requires a written report containing at least the essential information regarding the asylum application this is inadequate to comply with international standards[8]. The Secretary of State currently provides applicants currently with a copy of the complete asylum interview record and we recall the comment at paragraph 28 of the Consultation document that it is proposed to implement permissive provisions where these closely reflect existing UK policy and practice. We recall also the 'minimum standards' approach set out in Article 5, on which paragraph 28 is a gloss. Article 14(1) is permissive as to the record that shall be provided, as it says 'at least', thus reiterating the principle of minimum standards for this express purpose. Current practice should be reflected in the proposed changes to the Rules. This must be the most efficient and least time-consuming way of fulfilling the obligation in any case. The current proposed amendment to the Rules would provide for a lower standard of practice than that already in place.

Suggested amendments

Proposed rule 339NC Delete 'report' and insert 'record' throughout.

In 339NC(i) delete the words 'containing at least the essential information'

Article 15

ILPA notes the amendment to the Rules to ensure that asylum applicants are entitled to an effective opportunity to consult an accredited adviser at their own expense. ILPA considers that it should be made explicit that applicants who enjoy rights under national law to consult an advisor at public expense are also given an effective opportunity to do so.

[8] See *Chahal v UK* (1997)0 23 EHRR 413

Suggested amendment

Proposed paragraph 333A after expense insert 'or at public expense in accordance with provision made for this by the Legal Services Commission or otherwise'

Article 16

ILPA considers that it would be appropriate to reflect Article 16(2) of the Directive by placing a paragraph in the Rules confirming the right of access by legal representatives to detained asylum seekers, including those held in prison service establishments, so that officials and applicants are aware of the approach recorded in paragraph 59 of the consultation paper. The difficulties of a person who is detained finding a legal representative are well documented, including in reports from Her Majesty's Inspector of Prisons[9].

Suggested amendment

Proposed rule 333AB

Persons advising or representing an applicant who are authorized under Part V of the Immigration and Asylum Act 1999 to give immigration advice shall have effective access to closed areas such as detention facilities, prisons and transit zones for the purpose of consulting an applicant. No limitations shall be placed on this right of access save where these are objectively necessary for the security, public order or administrative management of the area and where such limitations would not severely limit or render impossible access by the adviser.

Article 17

The Border and Immigration Agency is in receipt of ILPA's response to the Consultation Document *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children* and ILPA's 2007 report *'When is a child not a child'* and we refer you to those for more detailed comments on this provision. Given the comments in, for example, paragraph 28 of the consultation paper, it comes as a matter of considerable surprise to ILPA that the Secretary of State has not incorporated Article 17(6) into the Immigration Rules. When we turn to paragraph 79, we find that the government has prayed in aid of its not doing so, the UK's notorious and unlawful[10] reservation to the UN Convention on the Rights of the Child. This is

[9] See, for example Her Majesty's Chief Inspector of Prisons, Introduction to Foreign National Prisoners: a thematic report (July 2006, published 3 November 2006)

[10] The reservation, being contrary to the objects and purpose of the UN Convention on the Rights of the Child, is unlawful, see Article 51(2) therein, and see *CRC/C/15/Add.188 9 October 2002 Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland.* See also the Vienna Convention on the Law of Treaties 1969, Art 19 and see Joint Committee on Human Rights 17th report of session 2004-2005 23 March 2005 *Review of international human rights instruments,* HL 99/HC 264. See also

contrary to the approach the government has previously taken, which is to claim that Convention rights are respected in practice. As the Joint Committee on Human Rights summarised the government's evidence:

> *"The Government justifies this reservation as necessary in the interests of effective immigration control, but states that the reservation does not prevent the UK from having regard to the Convention in its care and treatment of children. It states that, in practice "the interests of asylum seeking children and young people are fully respected" in particular under the Human Rights Act 1998 and that "notwithstanding the Reservation, there are sufficient social and legal mechanisms in place to ensure that children receive a generous level of protection and care whilst they are in the UK".* (notes omitted)[11]

The Asylum Policy Instruction on Children summarises the position thus:

> *"It is, however, IND's policy to seek to adhere to the principles contained in the Convention where possible, subject to the need to maintain an effective immigration control. In particular caseworkers should bear in mind the core principles of best interests, the right to participation and non-discrimination"[12].*

Even if the UK reservation were lawful as a matter of international law, it would still be a reservation to the UN Convention on the Rights of the Child. It could in no way reduce the UK's obligations under European Union law. Article 17(6) is a mandatory provision. There must be a paragraph of the Immigration Rules clearly stating that the best interests of the child must be a primary consideration in the provision of procedural guarantees to unaccompanied children seeking asylum.

There is much of concern in paragraphs 60 to 79 of the Consultation document. We have sought to concentrate here on the proposed amendments to the Immigration Rules and would refer you to ILPA's response to *Planning Better Outcomes* (*op. cit.*) to understand why we take issue with so much of this part of the Consultation document.

The government has proposed, as part of debates on the UK Borders Bill, that the Border and Immigration Agency be made subject to a Code of Practice on children, in an attempt to fight off pressure to make the Agency subject to section 11 of the Children Act 2004 – a duty to have regard to safeguarding and promoting the welfare of children. We note that while the 14th preamble to the directive speaks of the vulnerability of children, the consultation document makes reference to their 'potential vulnerability'. Thereafter many parts of the proposed changes to the Immigration Rules appear grudging and far from many of fulsome but vague statements of intent that have been made by the government and officials to date.

Where there is a dispute about the age of a child, this must be resolved before a child is denied the procedural guarantees set out in Article 17 and this should be reflected in the rules.

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the Committee's Tenth Report of 2002-03, HL Paper 117, HC 81, para. 49. See and Seventeenth Report of Session 2001-02, *Nationality, Immigration and Asylum Bill*, HL Paper 132, HC 961.

[11] HL 99/HC 265, o*p. cit.* note 4 *supra*. at paragraph 47.

[12] APIs see www.ind.homeoffice.gov.uk

We do not understand Article 17 to mean that all unaccompanied minors must be interviewed, as is suggested in paragraph 63 of the consultation document. Article 17(1) (b) (read with Article 12, which is phrased in terms of affording an opportunity for a personal interview) envisages some interviews being attended by the representative alone. Article 17(4) (a), for example, uses the language 'if an unaccompanied minor has a personal interview' and makes express reference to Article 12. ILPA considers that an unaccompanied child should be offered a personal interview (in accordance with the child's right to be heard as set out in Article 12 of the UN Convention on the Rights of the Child) but that no child should be prejudiced for declining a personal interview. There will be limitations on this, as per Article 12 of the Procedures Directive, where the child is unfit to be interviewed, or where an interview would be unsafe (as per Article 12.3) for example because of their very young age. In such cases the representative could attend alone. ILPA considers that the approach outlined here would accurately reflect the Procedures Directive. The mandatory part of Article 17, where interviews are concerned, are that: if a child is to attend an interview, a representative must be given an opportunity to inform the child about the meaning and possible consequences of the interview and how to prepare for it.

We consider that the proposed wording on who should be the adult present at the interview is not adequate. It should be made explicit that the person accompanying the child should be independent of the Secretary of State and not merely not one of his officers. The suggestion that the representative is a person who 'for the time being' takes responsibility for the child is unhappily vague.

ILPA notes the amendments to the Rules to ensure that unaccompanied children seeking asylum are entitled to representatives, that they are entitled to consult these representatives promptly, and that these representatives are entitled to engage with the interviewing process. We further note the amendments to ensure case owners dealing with these matters are appropriately trained.

ILPA has already pointed out the UK's failure to give effect to Article 19 of Directive 2003/9/EC, to which reference is made in Article 17(1) (a). We regret that the Consultation document makes no reference to this failure or to any steps being taken to address it, for it is against a background of having implemented this requirement that Article 17 of the Procedures Directive is to be understood. A legal representative acts upon instructions. Where the client is not able or is not competent in law, because of age or for another reason, to give such instructions, then it is necessary to identify an independent person to assist the child. This person should be wholly independent of the Secretary of State. This is not adequately reflected in paragraph 352 as drafted.

A clarification – the Panel of Advisors at the Refugee Council do not provide legal representation as paragraph 66 suggests. They do work to help a child to find a legal advisor, although you will be aware that demand for their services far outstrips supply. The statement in paragraph 70 of the Consultation document that 'A legal representative will have been arranged for the child by the Children's Panel of the Refugee Council' Paper is also inaccurate. In many cases, children find it very difficult to access a competent and skilled advisor. Those who are assisted by the Children's Panel have an advantage, but the Panel members may have to devote

considerable time to finding a representative for a child and may have difficulties in doing so.

It is not the case that the representative needs merely have the opportunity to speak to the child, as suggested by paragraph 68 of the consultation paper. The process of informing the child as per Article 17(1) (b) demands that sufficient time be allowed for this process; the time needed will depend upon the age and maturity of the child.

We note that paragraph 72 of the Consultation document and agree with the UK's decision not to make use of the exemptions set out in Article 17(2) of the Directive. Paragraph 73 of the Consultation paper is equivocal as to the UK position on 1 December 2005. UK law as of 1 December 2005 did not permit a child to be refused legal representation on the basis of a merits test and it would have been helpful to have made this explicit in the consultation document.

For the reasons set out in detail in its 2007 report '*When is a child not a child?'* ILPA is extremely concerned at the extent to which children's ages are disputed in UK procedures. As set out in that report, in 2005 and 2006 in nearly half of the applications made by people who identified themselves as under 18, age was disputed.

In his preface to *When is a child not a child,* the Children's Commissioner for England and Wales describes arguments deployed by the Border and Immigration Agency in their consultation document *Planning Better outcomes for asylum-seeking children*, concerning the use of X-rays to estimate the age of children as 'deceitful' and 'duplicitous'. Invasive medical examinations performed upon children for no therapeutic reason are contrary to professional medical ethics and to the principle of giving primacy to the best interests of the child. While the drafting of the proposed paragraph of the Immigration Rules appears to entertain the possibility that a child might refuse to consent to a medical examination, much of the drafting presents medical examination as though it were a mandatory procedure and fails to highlight the principle of informed consent. A child who is claiming asylum, for example at the asylum screening unit, has quite enough to consider without trying to deal with the question of consent to medical examination; and it is extremely unlikely that informed consent could be obtained at this stage.

The drafting of the first bullet point in proposed paragraph 352 suggests that medical examination can determine age. It cannot. Medical examination produces an estimate of age, with a wide margin of error, and, even then only where there is cohort data relevant to the person being examined.

We are aware that the third bullet point in proposed paragraph 352 is taken from the Procedures Directive, but refusal to undergo a medical examination can in no way lessen the obligation upon a state to prevent *refoulement* in accordance with the principles of international law and, in accordance with the minimum standards approach discussed above, this wording should not appear in the UK rules.

Suggested amendments

Paragraph 350

At end insert 'The best interests of the child shall be a primary consideration in all aspect of the handling of every case of an unaccompanied child. '

At end insert 'Until a dispute on age is resolved, a person claiming to be under 18 shall be given the protection to be afforded to a child.'

Paragraph 352

Omit the words 'will be interviewed about the substance to rule 339A' and replace with 'will be offered the opportunity of a personal interview unless the child is unfit or unable to be interviewed. No adverse inference shall be drawn from the child's declining to be interviewed.'

Omit the words 'who for the time being…Secretary' and replace with ', wholly independent of the Secretary of State who has responsibility for the child'

Omit the words 'he may be subjected to a medical examination' and replace with 'he may be offered a medical examination'

First bullet point - Omit the words 'his age may be determined by medical examination' and insert 'he may be asked to give informed consent to a medical examination as part of the process of age assessment'

Second bullet point – after 'informed of' insert 'his right to refuse the medical examination, and to discuss the question of whether to consent to the medical examination with a responsible adult who is wholly independent of the Secretary of State. He should be informed of'

Leave out 'refusal to undergo' and replace with 'decision not to undergo'

Leave out 'at the point he claims asylum' and replace with 'prior to the examination of his claim for asylum'

Third bullet point 'the sole' and replace with 'a'

Article 18

Article 18(1) should be transposed into the Immigration Rules. This would mirror the approach taken to other articles, such as Article 21.

It is contrary to Article 18(1) to permits people seeking asylum to be detained for the purposes of administrative convenience in processing their claim, as in fast-track procedures. Article 18(1) cannot be read as a mere statement that Member States must not detain all asylum seekers, as is suggested in paragraph 80 of the Consultation document. Judgment of the Grand Chamber of the European Court of Human Rights in the case of *Saadi v UK,* (Application No. 13229/03) is also awaited.

Article 18 requires the Secretary of State to make any successor to fast-track procedures operate with open door facilities, and not to use detention.

Further, it is not accepted that our current bail provisions suffice to meet the requirements of Article 18 that there must be the possibility of 'speedy judicial review'. In the context of the UK being required to provide a "speedy" challenge to detention a period of 2 days is considered an appropriate period so that practical arrangements can be put in place for a hearing to be organized. We recall that provision was made for automatic bail hearings in Part III of the Immigration and Asylum Act 1999, to give effect to the UK's obligations under the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998, but that these provisions were repealed without ever having been brought into force[13] To ensure compliance with Article 18(2) of the Procedures Directive, paragraph 22 of Schedule 2 to 1971 Act should be amended to allow port asylum seekers to apply for bail immediately. In addition to the right to apply for bail, provision should be made for the introduction of automatic bail hearings after seven days as recommended by the Joint Committee on Human Rights in their report *The Treatment of Asylum-Seekers.*[14] .

Suggested amendments

New paragraph of the rules 'No one shall be held in detention for the sole reason that he is an applicant for asylum'

To paragraph 22 of Schedule 2 to the Immigration Act 1971 to allow port applicants for asylum to apply for bail immediately.

To primary legislation (for example using the UK Borders Bill or the Criminal Justice and Immigration Bill currently before parliament) to make provision for automatic review of detention.

Article 19

We consider that the proposed amendment to the Immigration Rules should read that the "Secretary of State shall take a decision to discontinue consideration of the application". This wording reflects the application having explicitly been withdrawn by the applicant.

Suggested amendment

Proposed paragraph 333B delete 'reject' and with replace with 'take' before 'a decision to discontinue consideration of'

[13] Repeal as of 10 February 2003. Effected by s 68 of the Nationality, Immigration and Asylum Act 2002 (see SI 2003/1).
[14] Tenth Report of session 2006-2007.

Article 20

We note that the word 'may' is used in proposed rule 339M, although paragraph 84 of the Consultation document used the expression 'we will reject the claim'. We suggest that the use of the word 'thereby' in the proposed rule 339M is unclear and that it would be clearer simply to use the word 'may'.

We recall that Article 20(2) requires that Members States shall ensure that a person is not removed contrary to the principle of *non-refoulement* and consider that express reference should be made to this in the proposed paragraph 353A. That paragraph should also make reference not only to considering the submissions but to making a decision on them.

Suggested amendment

Proposed paragraph 339M

Delete 'thereby' and with replace with 'may'

Proposed paragraph 353A

After 'Rules' and to the principle of *non-refoulement*

After '353' insert 'and issued a decision on those submissions'

Article 21

ILPA welcomes the proposed amendments to the Rules concerning UNHCR.

Article 22

Whilst the proposed amendments to the Immigration Rules reflect the wording of the Procedures Directive ILPA would urge the Secretary of State to go further and to omit the word "directly" from the proposed paragraph 339IA. Any other approach could result in the alleged actors of persecution being informed of an asylum application and put the physical integrity, liberty and security of the applicant and his family at risk. See also our comments on Article 7 above.

Suggested amendment

Proposed paragraph 3391A omit 'directly'

Chapter 3

Article 23

As described above, the detained fast-track does not comply with Article 18(1). It thus falls foul of the requirement that procedures under Article 23 comply with all the guarantees set out in Chapter II.

ILPA notes that the proposed amendments reflect the wording in the Procedures Directive. However neither they nor the Procedures Directive permit the Secretary of State to deal with "case resolution" or "legacy" cases differently from other cases for the purposes of notification, as the Consultation document seems to suggest. In all cases, if the applicant does not make enquiries and if no decision is reached within six months then, under Article 23(2), an applicant must be informed of the delay, and if alternatively s/he requests information s/he shall be given an estimate of the time frame within which the decision on his/her case is to be expected.

Article 24

See discussion of Articles 25 to 27 below.

Articles 25, 26 and 27

Article 25(1) provides that Dublin transfer cases can be treated as inadmissible. This fails to comply with international standards. It runs counter to jurisprudence of the European Court of Human Rights in *TI*[15] and, given that the Procedures Directive sets only minimum standards and that it cannot be used as a pretext for States to resile upon their international obligations, it is necessary to make provision for the examination of the individual case before transfer is possible. See also the decision of the High Court in *Nasseri v SSHD* [2007] EWHC 1548 (Admin).

We disagree with the suggestion in the Consultation document (paragraphs 93 to 94) that the Procedures Directive allows Member States to designate a third country as safe as is done in UK law, by means of an irrebuttable presumption. The procedures as set out in Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 do not comply with Article 27 of the Directive in that they include irrebuttable presumptions of safety that do not reflect reality. These irrebuttable presumptions provide no opportunity for the competent authorities to be satisfied that the principle of *non-refoulement,* in accordance with the Geneva Convention, and the prohibition on removal in violation of the right to freedom from torture and cruel, inhuman and degrading treatment as laid down in international law, as is required by Article 27(1)(b) and (c). Nor do they ensure a case-by-case consideration of the safety of the country and an individual consideration of whether it is safe for a particular applicant as is required by Articles 27(2)(b) and (c)

Paragraph 345(2) of the Immigration Rules, to which reference is made in paragraph 95 of the Consultation paper, does not, in our view, satisfy the requirements of the Directive because it does not require 'a connection between the person seeking

[15] Application No 43844/98 *TI v UK* (7 March 2000).

asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country. We do not accept that what is described in paragraph 95 of the Consultation document, viz. the notion that a person will be admitted, constitutes a connection between the person seeking asylum and the third country, let alone that it addresses the question of reasonableness.

People seeking asylum should not be put into orbit. If the UK removes a person to a third country and that person is not admitted, the person should be admitted to the procedures in the UK, not shuttled back and forth.

Suggested amendments

To Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to remove the irrebuttable presumptions of safety therein and to include the guarantees set out in Articles 25 and 27 and in particular to make provision for a case by case examination of the safety of the country.

Paragraph 345

To paragraph 345 of the Immigration Rules to introduce a requirement that there be a connection between the person seeking asylum and the third country concern on the basis of which it would be reasonable for that person to go to that country.

To the proposed paragraph under the heading paragraph 345(2) (b) in the consultation document to omit sub-paragraph (c)

To the proposed paragraph under the heading paragraph 345(2) in the consultation document to omit paragraph beginning 'Provided that he is satisfied…'.

To the second proposed paragraph under this heading to omit the words 'subject to determining and resolving the reasons for non-admission.

Articles 30 and 31

ILPA is on record as opposing both the designation of countries as 'safe' (see also the discussion of Articles 25 to 27 above) and non-suspensive appeals. ILPA does not consider that a non-suspensive appeal provides an effective remedy. We agree that amendments would be needed to the test for designation of countries/ parts of countries on the non-suspensive appeals list in section 94(5) of the Nationality, Immigration and Asylum Act 2002 to take into account of Articles 30(4) and (5). These amendments have not been drafted so cannot be commented upon. ILPA is particularly concerned that while Country of Origin information is the subject of comment by the Advisory Panel on Country Information, the more widely used Operational Guidance Notes (OGNs) are not. This concern is exacerbated when reference is made to the Advisory Panel on Country Information in ways that imply that it comments, for example on the designation of a country as safe, when in

practice it does not do so. ILPA considers that, while there is an Advisory Panel on Country Information, it should look at OGNs and well as at other Country of Origin information and at designation of states. It should always be made explicit on the face of a specific country report or OGN or other country information whether or not that report or OGN has been considered by the Advisory Panel on Country Information, and when. While the Advisory Panel on Country Information operates as it does it at the moment, then, when countries are designated, the Explanatory Note accompanying the statutory instrument that sets out the designation, should state explicitly that the Advisory Panel on Country Information does not comment on the designation of a particular country as safe, nor in any way approve that designation.

Article 31 raises important questions of competence as the European Union is only entitled to establish minimum standards in this area whereas Article 31 would make the common list of safe countries of origin mandatory.

Article 32

In ILPA's view, the terms 'further representations' and 'subsequent application' are not used interchangeably in this article. Applications are defined in the Directive (Article 2) and mean 'applications for international protection'.

Article 35

For ILPA's position on juxtaposed controls, see ILPA's July 2006 response to the consultation on private freight searching and fingerprinting at juxtaposed controls.

Article 36

The UK's third country legislation, with its irrebuttable presumptions that do not reflect reality, is not compatible with the European Convention on Human Rights. This is not only the view of ILPA but also the High Court, see *N v SSHD* [2007] EWHC 1548 (Admin). The UK's legislation must be amended to ensure that the risk to an individual of *refoulement* can be evaluated in each case, with an effective right of review or appeal if the applicant is not satisfied by a decision that s/he would be safe in the third country.

The Directive requires the UK to lay down national provisions that comply with the principle of *non-refoulement* at Article 36(4). The UK is not currently complying with this duty, as is exemplified in the declaration in *Nasseri v SSHD* [2007] EWHC 1548 (Admin).

Chapter 4

Article 38

We agree that further amendments to the Immigration Rules will be needed to ensure that up to date country information from a variety of sources will be used when considering withdrawal and that this will not be collected from the actor of

persecution in a way which will later alert them to the status' being reviewed or place the applicant/his/ his family in danger. We also agree that the Notices Regulations should be amended to ensure that reasons are given for any withdrawal of refugee status.

Chapter 5

Article 39

ILPA's position is that there should always be an in-country right of appeal where asylum is refused or refugee status revoked and that a non-suspensive appeal is not an effective remedy. Provisions for the adjournment of fast track appeals or for lifting cases out of the fast-track procedure must be used to ensure that the appeal hearing does not take place before a person has had chance to collect sufficient evidence to make an effective appeal. **ILPA considers that the current fast-track timetable is too fast to ensure an effective remedy and that it should no longer be used.**

The case of *Nasseri v SSHD* [2007] EWHC 1548 (Admin) provides important guidance on the question of an effective remedy.

A person who is refused asylum should have the opportunity to appeal this. ILPA considers that section 83 of the Nationality, Immigration and Asylum Act 2002, prohibiting an appeal where a person is given leave of less than one year, should be amended. All those refused asylum should have access to a court to appeal a decision.

Suggested amendments

Amend the Nationality Immigration and Asylum Act 2002 to ensure that all those refused asylum have an in-country appeal against that decision.

Amend section 83 of the Nationality Immigration and Asylum Act 2002 to remove the words 'for a period exceeding one year (or for periods exceeding one year in aggregate).

Article 41

ILPA does not share the understanding of Article 41 set out in paragraph 136 of the Consultation document. ILPA's understanding of this provision is that the asylum determining authorities are bound by a duty of confidentiality with regards the information they obtain in the course of processing asylum applications unless confidentiality is waived by the applicant. This should be explicitly acknowledged in the Immigration Rules dealing with consideration of applications and **should also cover appeals** unless confidentiality is waived.

Suggested amendment

Proposed new Rule All those involved in the determination of an asylum application are bound by a duty of confidentiality toward the applicant, and shall not disclose information they obtain in the course of work other than to the applicant and his representative, save in the circumstances where the applicant expressly and in writing waives confidentiality.

ILPA

19 October 2007