ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Submission to the Home Affairs Committee Inquiry Into Immigration Control

Summary

1. ILPA is a professional association with some 1200 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law.

2. Members have relevant experience of all the areas to be covered by the Inquiry. Our submission therefore addresses all, endeavouring to provide concrete examples and recommendations both for investigation and for change. The requirement of brevity means that these are but examples.

Institutional Structures and Coordination

3. It continues to be ILPA's experience that institutional coordination is not robust. For example:
   - As users we find a lack of clarity concerning the division of responsibility between Croydon, Sheffield and Liverpool in variation cases.
   - Policy proposals, including on managed migration strategies appear to be developed in relative isolation from those who operate the current system. This leads to a lack of clarity and fragmentation on policy change.[1]
   - There is no publicly accessible, and perhaps no, archive of Immigration Directorate Instructions (IDIs) and Asylum Policy Instructions (APIs). It is difficult to obtain records of the date and nature of changes, and of past policies. An on-line resource to address this is apparently being developed and should be encouraged
   - Assessments in Country Information reports are not always reflected in Operational Guidance notes (OGNs) and are not applied in decision-making.

4. Coordination across government is also weak. For example:
   - DWP offices have been treating people who cannot provide up to date IND acknowledgment of their application for leave to remain as overstayers and thus wrongly refusing them benefits[2].

   - Section 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 is wholly at variance with the Children Acts. Home Office levels of funding for unaccompanied children supported by local authorities do not meet costs. It is timely and appropriate for the efficacy of the protocol arrangements between Local Authorities, the Family Division and the Home Office to be examined.

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[1] : E.g. specialised lead within Asylum Policy for children does not have lead on detention policy for children. Detailed knowledge of particular areas are often not widely shared, raising concerns about degrees of oversight and accountability See ILPA policy paper 'Child First Migrant Second, Ensuring that every Child Matters Heaven Crawley ILPA November 2005'

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[2] The length of time the Home Office takes to determine these applications appears to be one source of the confusion as is their consequent failure to acknowledge the application and estimate a realistic date of determination.

Quality of Initial Decisions.

5. Members' experience accords with that of the Independent Monitor for Entry Clearance cases[3], and of the NAO[4], who have found considerable variation in the substance and quality of decision-making between different posts abroad. ECOs continue to refuse visas on the grounds that they doubt a person's intention without ever interviewing, or putting their doubts to that person, in contravention of internal procedures.

6. FYS policy is to address quality administratively and in a managerial fashion, while removing appeal rights[5].

7. ILPA members frequently see poor quality decisions by immigration officers. There are often obvious errors of law[6], errors arising from failures to consider documents provided. Consideration should be given to efficiency savings which could be achieved by the introduction of a "minded to refuse" procedure which allows clarification of disputed issues.

8. ILPA sees no prospect of internal review mechanisms proving robust if there is no later appeal to concentrate the decision-maker's mind on getting it right first time.

9. Scrutiny by the Advisory Panel on Country Information[7] is hampered by its current limitation to the Country Information Reports, and the exclusion of the Operational Guidance Notes (OGNs)[8] and standard refusal paragraphs from their remit. Yet the OGNs are the documents actually utilised by decision-makers.

10. The audit of asylum decisions by UNHCR staff under the Quality Initiative (QI) Project and internal examinations on quality are welcome developments. There is still much room for improvement. Accreditation schemes are up and running for legal representatives practising in immigration, and consideration should now be given to the accreditation of IND staff under these schemes.

11. Effective representation could increase quality. However, in the fast track schemes in Harmondsworth and Yarlswood representatives have, at best, only 24 hours notice that they will be representing a client at an asylum interview.

12. Limitations on appeal rights and constraints on representation adversely affect decision-making by reducing accountability and independent scrutiny[9].

Proposed points based scheme

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[3] E.g. Report by the Independent Monitor (Immigration and Asylum Act 1999) Fiona Lindsley February 2005.
[4] NAO Visa Entry to the United Kingdom, The Entry Clearance Operation, HC 367 of 2003 to 2004.
[5] As well as debates on the Immigration, Asylum and Nationality Bill 2005 see the Annexe to the letter of the Minister of State Tony McNulty MP to Dr Evan Harris 18 October 2005, copy in House libraries Contrary to the impression given by some statements during debates on the Immigration, Asylum and Nationality Bill (E.g. Minister of State, Tony McNulty MP, Standing Committee E, 19 10 05, at Column 63) the NAO emphasised that "The refusal decision is reviewed again by an entry clearance manager when the appeal is received", thus while new evidence might explain an initial refusal, it cannot explain why internal review mechanisms did not operate to avoid an appeal.
[6] E.g. misinterpretation of an immigration rule.
[7] To which ILPA is an observer.
[8] Often the only country information documents read by decision-makers
[9] See *Appeals* below for detail.

13. Little detail is yet available on the points system, but what is known is not reassuring.[10] Particular concern centres on the desire to disband specialist teams and push decision-making out to ECOs. This removes complex decision-making from specialists to generalists. There is proven concern about quality in posts[11], about the level and scope of their experience and their capacity to handle the volume of work. We are not reassured that problems will be solved by an all-encompassing IT system. We fear that the complexity of assessing individual applications under a points system has been underestimated.

Appeals and judicial review

14. Where appeal rights exist, there are real difficulties securing competent representation and funding for a challenge.

15. Funding arrangements provide a disincentive to solicitors undertaking legal aid work. If, on an audit of a yearly random sample of files it is found that more than10% of work done on a case cannot in the LSC's view be justified, the LSC claws back that percentage of <u>all</u> its payments, including sums spent on counsel's fees and disbursements (subject only to a lengthy appeal process). Firms have ceased legal aid practices because they are unable to operate under conditions of such financial exposure and uncertainty. The LSC has also indicated its intention to amend the contract[12] to introduce a performance standard requiring a 40% success rate at appeal, with failure to achieve this being treated as a fundamental breach. This is a crude and unrealistic measure and will further deplete legal aid ranks.

15. There are now only 1,100 representatives accredited under the Law Society's scheme at Level 2, and 455 at Level 1. Legal aid rates have not increased for five years. Level 2 accreditation does not lead to any increase in hourly rates. Level 3[13] attracts a 5% increment. In all other areas of law the increment is 15%.

16. The fast track appeal system is too fast for justice to be done. Appeals are heard a few days after the decision to refuse asylum: there is insufficient time to marshal evidence or adequately to instruct representatives. Over 50% of appellants in these appeals are unrepresented. All cases that are in the fast track appeals system should automatically qualify for legal aid if the interests of appellants are to be properly protected.

17. Removal of appeal rights continues apace with proposals to remove rights of appeal against decisions to vary leave, and most rights of appeal against refusal of entry clearance and refusals of entry[14].

18. It remains the responsibility of the Home Office or Entry Clearance Officers in particular cases to submit papers to the court[15]. ILPA members' regular experience is that documents sent to Home Office Presenting Officer Units more than 7 days in advance of a hearing, in accordance with directions, do not get linked to the Home Office file. Many

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[10] See ILPA's response to the consultation *Selective Admission: Making Migration Work for Britain* , appended hereto.
[11] See *Quality* above.
[12] From April 2006
[13] Administered by the Law Society, and still not up and running.
[14] See *Quality* above. Proposals are contained in the Immigration Asylum and Nationality Bill which has highlighted the extent to which the DCA abdicates policy in this area to the Home Office. The government's intention is that powers to restore, and to take away, appeals, should be exercised by the Secretary of State to the Home Office, a party to those same appeals.
[15] Entry Clearance Officers have a particularly long time in which to do so: 11 weeks in non-settlement cases, 19 in settlement cases.

adjournments of appeal hearings are attributable to Home Office failures or errors. The Committee should seek data and information on the Home Office as a litigant in appeals.

19. New practice directions are supposed to allow Immigration Judges to take on robust case management. Their task is hampered by directions powers which focus only on applicant errors and omissions and do not provide any sanction for Home Office oversights or failures. In this as with other procedural provisions, there is no equality of arms in the immigration appeal process.

20. ILPA recommends that the Committee consider the intersection of immigration and related decision-making and appeals, including on welfare benefits, housing and in family and care proceedings. There are new complexities in these overlapping jurisdictions which it is timely to address.

E-borders, including biometrics

21. The NAO's recent report *Consular Services to British Nationals*[16], provides useful insight into the infrastructure in posts abroad. It has significant implications for implementation of E-borders and the increased use of biometrics. ILPA will provide a summary on this in evidence to the Committee.

22. The *Information* provisions of the Immigration, Nationality and Asylum Bill make little reference to safeguards to sharing and retention of personal data. This is symptomatic of a wider failure adequately to address such concerns.

Reporting, investigating and punishing immigration offenders

23. From September 2004 to July 2005 there were 372 prosecutions under s.2 of the Nationality, Immigration and Asylum Act , and 281 convictions. During this period there had also been an increase in prosecutions under other immigration legislation[17]. We have asked for updated figures but these have yet to be provided: we have no statistics for the last six months.

24. Those with no documents are receiving sentences of between 2 to 4 months and those with false documents of up to 12 months. Section 2 allows children to be prosecuted. Prosecutions have been brought in cases where the age of the defendant is disputed, ILPA members have experience of cases in which age disputes resolved in favour of the child have proceeded to prosecution and custodial sentences have been given to the child[18].

25. Immigration offenders identified are usually taken to police stations, interviewed very briefly by Immigration Officers and served with removal directions. The speed of this process has the effect that the case often proceeds as a human rights application when it should have been dealt with within the Immigration Rules. There is insufficient consideration to whether

[16] HC 594 of Session 2005 to 2006

[17] , Such as for deception under s24A Immigration Act 1971 or possession of a false passport under Part I of the Forgery and Counterfeiting Act 1981.

[18] Including cases where the accused was held in a young offender institution /referred to a youth offending team. Among those convicted were 11 children, 10 of whom were age-disputed by IND.

the accused is a victim of trafficking, perhaps a minor, and intimidated by a trafficker or under duress.

26. Immigration offenders held in police stations should be provided with access to accredited immigration lawyers attending in person to take instructions and represent the client before the Immigration Service before any decision is taken on removal. This requires proper funding by the LSC who at present are only willing to provide a limited telephone advice service.

27. Those leaving the UK voluntarily by air, having overstayed their leave to enter by only a few days, are increasingly having their passports stamped and are being served with notices, and recorded in the statistics, as immigration offenders. We question whether this practice is directed to improving removal statistics.[19] The person shown as removed may have difficulties obtaining a visa in future. It is not a necessary or proportionate response to a person voluntarily leaving the UK. Clause 11 of the Nationality, Immigration and Asylum Bill will exacerbate this problem.

Detention Policy and conditions

28. ILPA is concerned that the lack of automatic judicial oversight is resulting in prolonged arbitrary detention practices. We draw to the Committee's attention the comments of Mr Alvaro Gil-Robles, Commissioner for Human Rights, Council of Europe"[20].

29. Over 13% of the total detention beds are now dedicated to families. Unaccompanied minors are detained, including in fast track cases, because of decisions taken by CIOs that the minor is over 18 without any age assessment having been undertaken by Social Services. It often seems that people are detained and placed in the fast track because there is a bed available. Although the Court of Appeal held that the fast track scheme in Oakington complied with Article 5 of the ECHR, the European Court of Human Rights has declared the case admissible and will examine whether it is lawful to detain people for administrative convenience.

30. The HMIP inspection regime is doing excellent and extensive work in reporting on conditions of detention. ILPA is pleased that the role of HMIP is being formally extended to include short term holding facilities and escort arrangements[21]. We draw to the attention of the Committee failure to implement a number of key HMIP recommendations[22] and urge the Committee to audit implementation of HMIP recommendations.

31. There are particular concerns with the conduct of private contractors conducting detention and escort facilities.

Race Equality

32. ILPA recommends that the Committee audit implementation of the recommendations of the Independent Race Monitor, who addresses the effect of Ministerial authorisations under

[19] See *Statistics* below.
[20] Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4th - 12th November 2004, Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005, para. 49
[21] By the Immigration, Asylum and Nationality Bill.
[22] Including those on children, legal representation and statistics. See also *Statistics* below.

s.19E of the Race Relations Amendment Act. We also seek disclosure of the text of authorisations so that decision-making is transparent

33. Passing the burden and cost of policing immigration control to employers[23] risks increasing discrimination without catching those who exploit migrant workers. Proposals for a new civil penalty regime for employers[24] will increase these risks, for people subject to immigration control, and others. Better protection for migrant workers is a cornerstone of effective protection against discrimination, as well as against exploitation[25].

34. The extent to which different treatment by different posts abroad constitutes race discrimination is worthy of further examination[26]. ILPA notes the discrepancy between the waiting times for the consideration and issue of settlement visas as between posts.

35. ILPA is also concerned at decisions taken without consultation, to remove entire national groups from eligibility to apply for certain categories of the Immigration Rules[27].

Customer Satisfaction

36. In ILPA's experience, levels of satisfaction with Work Permits UK are higher than for other parts of IND, yet the work of WPUK is to be moved abroad to posts, where concerns about quality dominate[28].

37. Access is one reason why ILPA members are more satisfied with WPUK than other parts of IND. The Unit is accessible to applicants and representatives. Other parts of the department are inaccessible. It is necessary to go via the Telephone Enquiry Bureau rather than direct to caseworkers. Responses to enquiries from posts abroad can take many months[29].

38. Fees are a cause of significant dissatisfaction. The basic fee to be paid by those applying to stay with their families, or to work, has more than doubled to £355[30]. There is a fee of £160 to transfer an endorsement of indefinite leave to remain to a new passport, a simple administrative task. This is beyond the means of many. There are inadequate fee waiver provisions.

39. That some applicants are prepared to pay the £500 premium fee to have their application processed in one day is a sign that they find this a useful service. ILPA believes that consideration should be given to reducing that fee. However, we also consider that the premium day service should be extended to applications by EEA nationals and their families

[23] Under both the Bill and the Managed Migration proposals.
[24] In the Immigration, Asylum and Nationality Bill
[25] See Report of the House of Lords Select Committee on the European Union, Economic Migration to the EU HL Paper 58, 14th Report of Session 2005-2006, especially Chapter 5
[26] See *Working Holidays for all?* Mick Chatwin, Mahmud Quayam Legal Action , August 2002 and Verity Gelsthorpe, Robert Thomas and Heaven Crawley *Family Visitor appeals: an evaluation of the decision to appeal and disparities in success rates by appeal type* Home Office Online Report 26/03.
[27] For example, without consultation, severe restrictions were placed on applications for visas by young Nigerian men. prevented from applying for visas to the UK.
[28] See *Quality* above.
[29] For example, one ILPA member represented a refugee whose wife was waiting over a year in a third country for a visa because IND had failed to confirm his status as a refugee.
[30] As a result of the Immigration (Application fees) Order 2005

who are outside the current scheme and consideration given to ways to provide expedited services more broadly.

40. Rules preventing people from switching immigration status from within the UK create complexity, for applicants and for IND. There should be greater flexibility in designating alternative application posts to process or issue visas to applicants unable to return to their homes or from distant countries such as Australia, South Africa or South America

41. Applications for entry clearance can now be made on line at many posts abroad. A facility for on-line applications should be extended to in-country applications as well.

42. Complaints procedures are inadequate and are not dealt with in any meaningful way. Complaints are dealt with by officers within the department and only monitored by individuals from outside[31]. These procedures, designed for individuals concerned about the handling of an application, are not suited to complaints about the exercise of powers of search and detention[32]. Unlike the police, Immigration Officers are not publicly accountable to an independent complaints authority. Moreover, a great many of the immigration control functions are privatised. The activities and practices of private firms engaged in the transport or detention or search of immigration detainees are governed solely by contracts kept secret for reasons of commercial confidentiality The criminal law provides the only oversight and accountability. This is inadequate and inappropriate.

Immigration statistics

43. Statistical information remains inadequate and fails to elucidate management practices and outcomes[33]. Statistics on detention are poor, as HMIP has observed repeatedly. Little information is collated on representation. There is a need to collect statistics on the numbers of applicants unrepresented at appeals.

44. Some recorded information is likely to be misunderstood. For example:

- Success rates on appeal and in particular judicial review fail to identify those cases in which the Home Office conceded a case, often at the door of the court, giving the impression of lower success rates than is the case.

- The new removals project exercise appears to count as "removed" people who are voluntarily leaving the UK, but whose leave has expired.

Coordination with European Immigration policies

45. We refer you to our evidence to the European Union Committee of the House of Lords[34], highlighting problems of selectivity. In summary, British policy since 1999 has been to decline to opt-in to immigration measures that would require the UK it to grant a right of admission to certain categories of person. The difficulties of the UK's position are highlighted by the other Member States' rejection of the UK´s requests to participate in the

[31] Complaints Audit Committee : Appointed by, and reporting to, the Secretary of State for the Home Department.
[32] Where they are the only option aside a civil action for assault or false imprisonment.
[33] See ILPA's submission on Immigration statistics, appended hereto.
[34] In particular for their Inquiry into *Economic Migration to the UK, Op cit*. See Annexe.

EU Border Agency and the EU measure on passports[35]. During its Presidency of the EU, the UK has sought to advance matters from which it is excluded because of its sovereign borders policy, for example work on the Visa Information System.

46. The UK has also influenced European decision-making in a negative way; for example it pressed for an equivalent to s.55 of the Nationality, Immigration and Asylum Act 2002 in the Reception Directive, and now s.55 has been roundly criticised by the House of Lords in *R v SSHD ex p Limbuela and ors.*

47. See also ILPA's *Response to the Home Office consultation on* Implementation of Council Directive 2003/9/EC of 27 January[36], which examines a specific instance of compatibility in detail.

List of Annexes

- ILPA Response to Selective Admission: Making Migration Work for Britain, November 2005

- ILPA submission on Immigration Statistics June 2005

- ILPA's Evidence to House of Lords European Union Committee Inquiry: Extract from
- Economic Migration to the EU, 14th Report of Session 2005-06 HL Paper 58, Evidence response to Q41, page 13 of the Report.

- ILPA 's response to Implementation of Council Directive 2003/9/EC of 27 January laying down minimum standards for the reception of asylum seekers

  ILPA policy paper. Child First Migrant Second, Ensuring that every Child Matters Heaven Crawley ILPA November 2005

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[35] The UK has brought actions before the European Court of Justice to challenge these decisions.
[36] See Annexe.