

Implementation of Council Directive 2003/9/EC of 27 January laying down minimum standards for the reception of asylum seekers

Response to Home Office Consultation

1. This is the response of the Immigration Law Practitioners' Association ('ILPA') to the consultation document issued by the Home Office on 10 September 2004. ILPA includes within its ranks a large number of lawyers and advisers experience in dealing with practical and legal issue of support for asylum seekers.
2. This response follows the structure of the consultation. The following references are used in this response:
 - paragraphs in bold are references to paragraphs of the consultation
 - 'ASR' means Asylum Support Regulations 2000
 - 'Directive' means Council Directive 2003/9/EC
 - 'ECHR' means European Convention on Human Rights
 - '1999 Act' means Immigration & Asylum Act 1999
 - '2002 Act' means Nationality, Immigration & Asylum Act 2002.

Article 13 – Requirement to provide support

3. **4.2-4.3.** ILPA agrees that the Directive requires the imposition on the Secretary of State of a legal duty to provide support in the circumstances set out in the Directive. ILPA considers that the 1999 Act should be amended so as to make clear that sections 95 and 98 impose a duty to provide asylum support in accordance with ASR.

Article 14 - Accommodation

4. **4.7.** Article 14.4 imposes a prohibition on unnecessary moves. In the experience of ILPA members there have been occasional apparently arbitrary enforced moves of applicants. ILPA proposes that the Secretary of State should publish guidance to his staff instructing them that, save where a supported person requests, they should not move supported persons from accommodation unless the accommodation is no longer available for NASS purposes.
5. **4.8.** ILPA welcomes the Home Office's commitment to ensuring that accommodation centres will comply with the Directive. However, there is no indication of the concrete steps which will be taken in that regard. In particular, there is no indication as to how the Home Office will ensure the protection of family life in accommodation centres and the possibility of adequate facilities

for communication with relatives. ILPA urges that the Home Office quickly provide full details of how the Directive will be given effect in accommodation centres so that this can be the subject of proper consultation.

6. ILPA considers that the power in 2002 Act s29(1) to make provision ought to be replaced by a *duty* to secure adequate provision^[1]. The power to make regulations governing some aspects of accommodation centres^[2] made under sections 29 and/or 30 should be extended to make regulations to give effect to the Directive in relation to those centres. That will ensure that the rules giving effect to the Directive are on a clear legal footing.

Article 5 - Information

7. **4.10.-4.12.** The experiences of ILPA members is that IND often provides important written information only in English to non-English-speaking immigrants. Article 5(1) imposes a duty to ensure the provision of the required information where possible in a language that the applicants may reasonably be supposed to understand. ILPA considers that:
 - a. it is possible to provide almost every applicant with an information sheet containing the required information in his or her mother tongue. This is preferable since the applicant can retain the sheet, the information is unlikely to contain translation errors that bedevil face-to-face translation and there are costs savings;
 - b. in the case of rare languages and illiterate applicants it will be necessary to provide the information orally. The existence of services such as 'LanguageLine' mean that this will always be possible.
8. Therefore ILPA urges IND to amend its procedures to ensure that it knows, not only which language an applicant wishes to be interviewed in, but whether s/he can read in that language. This will enable IND staff to provide applicants with information in the correct language.
9. ILPA agrees that these new requirements should be incorporated into the Immigration Rules. Those Rules should state the duty to provide the information in a language which the applicant can properly read and/or understand when spoken.

Article 6 - Documentation

10. **4.16.** ILPA agrees that these new requirements should be incorporated into the immigration rules.

Article 8 - Families

11. **4.22.** ILPA agrees that the Order should impose a duty to accommodate together the members of a family (as defined in the Directive). The legislation should address certain special categories:
 - a. *asylum-seeker whose partner is settled here or has leave to remain, where that partner has their own accommodation.* Where that

accommodation is inadequate for the asylum-seeker to be accommodated with the resident spouse (or to do so would breach a term of the resident's occupation) the Order should impose on NASS a legal obligation to offer to arrange joint accommodation at a location which avoids disruption of the partner's existing community ties.

b. *asylum-seeker whose partner is in residential accommodation under the National Assistance Act 1948 or other accommodation arranged by the local authority.* There should be a legal obligation on NASS to liaise with the local authority to ensure that the asylum-seeker can be accommodated with the partner at a location which permits provision of the special services required and avoids disruption of the partner's existing community ties.

12. ILPA also considers that NASS should be under an obligation to accommodate with the family other dependants (as defined in ASR) *where practicable*. This will ensure that the existing good practice is not lost as a side-wind of the imposition of the duty by Article 5.

Article 11 - Employment

13. **4.30.** ILPA has long held the view that is desirable that asylum-seekers who wish to do so are granted permission to work. There is no reliable evidence that such a policy 'pulls' people to the United Kingdom. There is however good evidence that it enables asylum-seekers to maintain their dignity and to contribute to the country in which they are seeking asylum. It assists employers to fill vacancies in sectors where recruitment and retention is difficult and reduces the burden of providing support. (The general permission to students to work also helps to achieve this and shows how such policies need not be problematic.) Having now established a generally speedy system of asylum determination, there is here an opportunity for the UK to return to a humane and socially beneficial policy of granting permission to work. ILPA urges the Home Office to adopt a policy of generally granting permission to work to asylum-seekers.
14. Even if such an approach is not to be taken, ILPA urges the Home Office to adopt a shorter period than the minimum one year. The speed with which asylum claims are now determined means that only a few additional cases would be affected were the period of time to be reduced to six months. That small minority should be permitted to avoid enforced dependence on a community at a time when they very much wish to contribute.
15. The consultation does not state the circumstances under which applicants will be permitted to work. It is now the case that more than one year's delay for a first instance decision is rare. ILPA considers that the rule should be that permission to work should be granted on application if a first instance decision on an asylum claim was not made within a year of that claim, save where the period is only that long because of inordinate delay on the part of the applicant. There is no rationale for limiting permission to those who apply before the

asylum claim is determined.

16. **4.31.** ILPA considers that the rules proposed here should be incorporated into the Immigration Rules. These should also give effect to Article 11(3) and prohibit withdrawal of permission to work while an appeal or further appeal is pending.
17. **4.32.** This part of the consultation is unclear. The rationale behind Article 11 (2) is that it is an interference with a person's dignity to be denied the possibility of supporting oneself and that one year is the absolute maximum period of that interference. Against that background, no rational distinction can be drawn between working for an employer and working for oneself. The rule should reflect this and provide that permission to work will include permission to establish oneself in business.

Article 16 – Reduction or withdrawal of support

18. ILPA strongly urges the Home Office not to extend powers to withdraw support. In the litigation concerning section 55 of the 2002 Act, the Court of Appeal held that withdrawal or reduction of support can breach ECHR Articles 3 and 8 and that ECHR Article 6 requires a thoroughly careful procedure to protect the important rights at stake. See *R(Q) v Secretary of State for the Home Department* [2004] QB 36 and *Secretary of State for the Home Department v Limbuela* [2004] EWCA Civ 540.
19. The criminal law contains ample sanction for serious breaches, such as dishonesty or violence. Less serious breaches of rules do not justify enforced destitution. Denial or withdrawal of support from destitute asylum-seekers with pending claims or appeals is likely to breach their human rights and to lead to litigation. It serves no real public purpose and should be avoided.

Abandonment

20. **5.6-7.** ILPA agrees that ASR regulation 20 should be amended to be consistent with Article 16(1) in the respects proposed.

Failure to attend interview/ provide information

21. **5.10.** The Home Office proposes to allow asylum support to be withdrawn for failure to provide information or attend interviews in relation to the asylum claim. This would be an important amendment of ASR. It would reverse long-standing UK practice of keeping asylum support provision separate from any question of the merits of behaviour in respect of the asylum claim. ILPA strongly opposes such a change for the following reasons
 - a. Directive Article 16(1)(a) second indent permits, *but does not require*, such a change. The existence of this provision is not a good enough reason for using it: the consultation does not identify any benefit from such a change;
 - b. the appropriate scope of the UK scheme for withdrawing support on

account of failure to co-operate was considered by Parliament during the passage of the 2002 Act. By section 57 of that Act, Parliament permitted regulations to be made allowing support to be refused for failure to provide complete information *in the asylum support claim*. Parliament could have, but did not, extend that to failure to provide complete information *in the asylum claim*;

- c. in many cases, withdrawal or reduction of support will breach ECHR Articles 3 and 8 ECHR, for the reasons given by the Court of Appeal in the section 55 cases (see above);
- d. failure to provide information and failure to attend interviews are issues likely often to involve difficult factual disputes. What excuse is offered for a failure to attend? Is it to be accepted? What explanation is there for an alleged failure to provide information? Did the asylum-seeker understand the request at issue? Does the asylum-seeker have the information? Unless decisions under this provision are confined to the clearest cases, its use is likely to generate a large number of wrong decisions and litigation (as in the case of section 55). A mistaken decision will deprive an asylum-seeker of his or her home and income, thus making it very difficult for them to continue with their asylum claim or secure a proper remedy in respect of the decision;
- e. such a measure will push what is properly an aspect of the asylum procedure into an asylum support system which is not equipped to deal with it. NASS cannot be expected to consider whether an asylum-seeker has failed to provide information or attend interviews about the asylum claim. Similarly, asylum support adjudicators are not the appropriate body to decide questions such as whether the asylum-seeker ought to know the information sought about the asylum claim;
- f. the Home Office has ample remedies for failure to co-operate with asylum determination. It often refuses asylum claims on such grounds. That is an appropriate way to deal with such allegations, allowing the adjudicator to determine the appeal, taking into account the allegations.

- 22. **5.12.** ILPA agrees with the proposal to amend ASR regulation 20(1)(b).
- 23. ILPA opposes the proposal to amend the ASR to discontinue support in the case of a person found to have unduly benefited in the past. In many cases, withdrawal or reduction of support will breach ECHR Articles 3 and 8 ECHR. Where a person presently has insufficient resources to repay, it is inhumane to punish them by withdrawing support. Instead, the Home Office should consider prosecution and/or deferring recovery until the applicant has recoverable assets.

Accommodation centres

- 24. **5.15.** ILPA considers that the proposed approach misinterprets the term 'accommodation centre'. Such a term, even as defined, is inappropriate to describe all accommodation where residents share facilities. The terms

‘accommodation centre’ and ‘collective’ should be understood as referring to large-scale accommodation, of the type which have rules. They do not refer to every kind of shared house. The simplest, and most appropriate, approach is to use the UK definition of accommodation centre.

Failure to take up dispersal accommodation

25. **5.18.** ILPA welcomes the proposal to keep open offers of accommodation for all those who fail to take up dispersal accommodation.
26. ILPA is however concerned that the practical effect of this is to deprive those persons of a right of appeal about the withdrawal of their existing accommodation. ILPA strongly urges the Home Office to allow appeals to asylum support adjudicators from dispersal decisions.[\[3\]](#)

Intentionally destitute

27. **5.19.** ILPA welcomes the proposal to revoke ASR regulation 20(1)(c) and agrees with the reasons for doing so.

Special needs

28. **6.1-6.4.** ILPA welcomes the proposal to make overarching provision for persons with special needs. However, ILPA regrets the lack of any specific proposals, which makes any response very difficult. In this aspect the consultation significantly fails to meet the second consultation criterion (see **10**).
29. ILPA therefore requests that the Home Office consult further once it has developed these proposals, allowing sufficient time before they are finalized for a proper discussion about their content.

Unaccompanied minors

30. **6.7-8.** The consultation lacks proposals to give effect to Article 19(2). Some local authorities have practices of placing unaccompanied minors in accommodation unsuited to their age. Such practices will be rendered unlawful by Article 19(3). It is therefore essential that the ECA Order imposes on local authorities the Article 19(3) duties. ILPA urges the Home Office to include such provision in the order and to consult on it before it is finalized.
31. Some local authorities use staff who lack training in the needs of young people to make decisions about and provide social services to unaccompanied minors aged over 16. Such practices will be rendered unlawful by Article 19(4). It is therefore essential that the ECA Order imposes on local authorities the Article 19(4) duties and ILPA urges that this is done.

Appeals

32. **7.1-7.3.** Article 21(1) first sentence imposes a duty to provide a right of *appeal*.

A right of *review* (such as judicial review) does not meet the requirements of Article 21 (1) first sentence – even if it is to a judicial body. Second sentence requires that in the last instance each person has access to a judicial body (on review or appeal). Judicial review meets this requirement.

33. It follows that Article 21(1) first sentence requires the Home Office to extend appeal rights in respect of negative decisions concerning benefits under the Directive. ILPA urges that the ECA Order provide for a right of appeal to an asylum support adjudicator from any decision withdrawing or reducing asylum support, regardless of the grounds for doing so. This right must extend to section 98 decisions and to decisions of local authorities.
34. This is also practical: asylum support adjudicators presently have far fewer appeals than was envisaged and the High Court is overworked.
35. Asylum support adjudicators hear appeals very quickly but lack a clear mechanism for ensuring the continuation of support pending the appeal. (This has led to judicial review being used instead or as well as an appeal.) The ECA Order must enable interim provision to be made. ILPA proposes that the most effective way of achieving this is for appeals to have suspensive effect (as asylum appeals do).
36. Article 21(2) requires domestic law to make provision for access to legal assistance. There is very limited, voluntary, assistance available at asylum support adjudicator hearings. ILPA urges the Home Office, in consultation with the Legal Services Commission, to examine how a proper system of legal assistance before the adjudicator can be secured.
37. In short, ILPA urges that the ECA Order should amend the existing law to give a right of appeal to the asylum support adjudicator:
 - a. from any Home Office decision denying, withdrawing or reducing asylum support (including section 98 support);
 - b. from any decision of a local authority denying, withdrawing or reducing asylum support;
 and to provide that:
 - c. appealable decisions not to take effect until the time for appealing has expired and, if an appeal is brought, until the asylum support adjudicator has given decision on the appeal;
 - d. public funding for representation be available.

Definitions

38. **8.2.** See paragraph 24 above and paragraph 39 below for proposals on these definitions.

Scope

39. **8.3.** The existing domestic legal regime for asylum support equates applicants under ECHR Article 3 with those applying under the Refugee Convention: see

s94 1999 Act, definition of claim for asylum. ILPA is therefore very surprised that the Home Office proposes to limit the changes to persons claiming asylum. Such a course is most unwelcome. It will introduce considerable complexity to an already very complex area, requiring applicants, decision-makers and advisers to distinguish between three classes:

- a. those claiming (or appealing) under the Refugee Convention (asylum-seeker under domestic and EU law);
- b. those claiming (or appealing) under ECHR Article 3 but not the Refugee Convention (asylum-seeker under domestic law only) and
- c. those claiming (or appealing) under the ECHR other than Article 3 and not under the Refugee Convention (protection seeker, but not asylum-seeker under domestic or EU law).

The proposal is a recipe for confusion and administrative and legal expense. ILPA strongly urges that those seeking protection under ECHR Article 3 are treated as asylum-seekers for reception purposes.

40. ILPA strongly urges the Home Office to make the same reception rule for ECHR Article 3 applicants as is made for those claiming under the Geneva Convention.

Reporting

41. **Article 25.** The UK already has valuable experience of a rule of the kind permitted by Article 16(2), i.e. refusal of reception conditions where the asylum seeker failed to demonstrate that his or her asylum claim was made as soon as reasonably practicable after arrival. Section 55 of the 2002 Act came into force in January 2003 and made such provision. It led to an unprecedented number of applications to the High Court in which asylum-seekers argued that their rights under ECHR Articles 3 and 8 had been violated. In ILPA's view violations had occurred in many of those cases. The litigation about section 55 and the related effect on human rights was extensive, involving a large number of cases raising different issues of law, and including two lengthy and important Court of Appeal hearings. The consequences were that the Home Office was repeatedly required to amend its administrative practices and the legal tests it applied. One set of proceedings is pending before the House of Lords. Eventually, the Home Office adopted a practice of allowing three days to make an asylum claim, with the result that few cases are presently under section 55. ILPA urges the Home Office to advise the European Commission of the UK's experience in this respect. That will enable the Commission to warn other Member States about the difficulties of establishing a scheme under Article 16(2) and have this information when preparing the Commission's report to Parliament and the Council.

Asylum Support (Interim Provision) Regulations 1999.

42. These govern the provision of asylum support by local authorities to

transitional cases. The effect of the Directive is to require that the changes to be made to the principal legal and administrative regimes must also be made to these Regulations and the scheme operated under them. ILPA strongly urges that all changes to the asylum support scheme have mirror amendments to the interim scheme.

Consultation Process

43. ILPA welcomes the consultation paper and, in particular, the lengthy period allowed. However, ILPA regrets that in several important respects the proposals do not comply with the second criterion: “Be clear about what your proposals are [and] who may be affected”. Paragraph 4.8 contains a vague promise of action: this should have been a specific proposal. The proposals at paragraphs 6.4, 6.9 are far too vague.
44. It is therefore essential that new detailed proposals on these points are made and are the subject of consultation giving as much time as is possible. If there is inadequate time for that further consultation, the Home Office must be willing to review and revise the legislation after it has come into force.

ILPA, 3 December 2004

[1] analogously to the proposed changes to s95 and 98 1999 Act

[2] see eg 2002 Act s29(2) and s30(2)

[3] The Home Office has express power to do this by regulations: 1999 Act s103(7), or s103A once 2002 Act s 53 is in force.