RESPONSE FROM THE IMMIGRATION LAW PRACTITIONERS' ASSOCIATION TO UK BORDER AGENCY CONSULTATION ON THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: REVIEW OF IMMIGRATION RESERVATION

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-governmental organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, UK Border Agency and other advisory and consultative groups and has responded to numerous UK Border Agency consultations.

ILPA welcomes the Government's review of the immigration reservation to this Convention and urges that the reservation be quickly withdrawn. The reservation is an unlawful reservation in that it is so broad as not to be compatible with the object and purpose of the Convention. This view has been expressed by, *inter alia*, the Joint Committee on Human Rights[1] and the Equality and Human Rights Commission.[2]

About the reservation

The reservation is in the same terms as reservations, now withdrawn, to the UN Convention on the Elimination of all forms of Discrimination Against Women and the UN Convention on the Rights of the Child.

As to the Convention on the Elimination of all forms of Discrimination Against Women, on 24 July 2007, the Government of the United Kingdom notified the UN Secretary-General that it had decided to withdraw the following reservation made upon ratification to the Convention:

> *"(d) The United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the United Kingdom as it may deem necessary from time to time and, accordingly, its acceptance of Article 15 (4) and of the other provisions of the Convention is subject to the provisions of*

[1] JCHR, Twelfth Report of Session 2008-09, *UN Convention on the Rights of Persons with Disabilities: Reservations and Interpretative Declarations*, HL 70/HC 397, 17 April 2009, paras 58-71, at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/70/70.pdf (accessed 31 May 2011).
[2] Position statement on UK ratification of the Convention, undated, available at http://www.equalityhumanrights.com/human-rights/international-framework/human-rights-submissions/rights-of-disabled-people/position-statement-on-uk-ratification-of-the-convention/ (accessed 31 May 2011),

any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom."[3]

This followed the statement in the May 2007 UK report to the UN Committee on the Elimination of all forms of Discrimination Against Women that the reservation had been withdrawn.[4]

As to the UN Convention on the Rights of the Child, on ratification the UK entered a reservation in the following terms:

> "*(c) The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time"*

The UN Committee on the Rights of the Child indicated that it considered the reservation to be a

> ..."*wide-ranging reservation … against the object and purpose of the Convention."*[5]

The words *"against the object and purpose of the Convention"* are drawn from Article 51(2): they are the description of a reservation that is not permitted. This is the formulation of a principle more generally accepted in international law. The UN Vienna Convention on the Law of Treaties 1969,[6] which sets out general principles for reservations, states:

> *"Article 19 Formulation of reservations*
> *A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*
> *(a) the reservation is prohibited by the treaty;*
> *(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
> *(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty."*

The UK Parliament's Joint Committee on Human Rights shared the view of the UN Committee on the Rights of the Child that the reservation was an illegal one.[7]

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[3] See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

[4] UN Convention on the Elimination of All Forms of Discrimination Against Women, Sixth Periodic Report of the United Kingdom of Great Britain Northern Ireland, CEDAW/C/UK/6, May 2007.

[5] *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 CRC/C/15/Add.34 15 February 1995 *Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland.*

[6] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

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

The UK submitted its third periodic report to the Committee on the Rights of the Child in 2007.[8] The UK was examined upon it in September 2008.[9] The UK Government took the opportunity of the oral evidence to announce that it would withdraw the reservation.[10] It did so by a communication dated 18 November 2008, received by the Secretary General on 20 November 2008.[11]

The Joint Committee on Human Rights commented, before implementation of the Convention on the Rights of Persons with Disabilities, that the UK immigration reservation thereto was very similar to that to the UN Convention on the Rights of the Child, which had recently been withdrawn, and on its disappointment that the Home Office had made so broad a proposal with so vague a justification, and stated:

> *"69. Read literally, this reservation could disapply the Convention in its entirety in so far as its protection might relate to people subject to immigration control. In our view, this is incompatible with the object and purpose of the Convention and does not constitute a valid reservation.*
>
> *"70. We recommend that the Government abandon this reservation. We consider that it is both unnecessary and inconsistent with the object and purpose of the Convention."*

The Equality and Human Rights Commission states in its guidance on the Convention's provisions:[12]

> *"When it ratified the Convention the UK Government made a statement (a 'reservation') about immigration matters which limits the impact of this Article and indeed the whole Convention, with respect to immigration, in the UK. It means that the UK Government will continue to apply whatever immigration rules it thinks are necessary (regardless of whether they would conflict with the Convention). The Equality and Human Rights Commission believes that this reservation is incompatible with the object and purpose of the Convention and should not be permitted under Article 46 of the Convention.*
>
> *The UK made a similar reservation on immigration and citizenship to the UN Convention on the Rights of the Child. However, in 2008 the reservation was eventually withdrawn. This followed strong criticism in two reports by the United Nations Committee on the Rights of the Child, combined with campaigning by children's rights organisations. Withdrawing the reservation gave vulnerable children seeking asylum, those trafficked into the UK and others subject to immigration control, the same rights to education, health and support services as British children."*

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[8] *The Consolidated 3rd and 4th periodic report to the UN Committee on the Rights of the Child* See http://www.everychildmatters.gov.uk/resources-and-practice/IG00249/

[9] http://www2.ohchr.org/english/bodies/crc/crcs49.htm

[10] See the press release *UK lifts reservation on the UN Convention on the Rights of the Child,* Department for Children, Schools and Families press release of 22 September 2008 at *www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2008_0209*

[11] See http://www.ilpa.org.uk/08%2012%2002%20UN.pdf

[12] Equality and Human Rights Commission, *The United Nations Convention on the rights of people with disabilities: what does it mean to you?,* p. 25, summer 2010, at http://www.equalityhumanrights.com/uploaded_files/publications/uncrpdguide.pdf

ILPA regrets that the recommendation made by the Joint Committee on Human Rights was not followed at the time. The Committee and the Commission's views that the reservation is 'inconsistent with the object and purpose of the Convention' is one which ILPA shares. As explained above, this is a statement that the reservation is unlawful.

The UK has, on a number of occasions, lodged objections to other States Parties' reservations to international conventions on the grounds that the reservations are unlawful.[13] The UK's authority in so doing and the power of its objections to influence other States are undermined if is perceived by other States, the UN and its domestic authorities to have lodged unlawful reservations itself.

It is set out in the consultation paper that

> *"The previous Government had concluded that such a reservation was necessary to retain the right to apply immigration rules, and to retain the right to introduce wider health screening for applicants entering or seeking to remain in the UK. It agreed to review the reservation 12 months after ratification to assess whether there was a continued need for it in practice."*

We recall that the previous Government took the same view, for many years, of the ending of the UK's reservations to the UN Convention on the Rights of the Child and the UN Convention on the Elimination of all forms of Discrimination against Women.[14] Removing those reservations has had positive effects on the UK Border Agency's dealing with children and women respectively. We have heard no suggestions subsequent to withdrawal of the reservations that they have made the UK Border Agency's work of immigration control impossible.

The withdrawal of the reservations must also be considered against the backdrop of rising standards under domestic law as a result of statute (for example section 55 of the 2009 Borders, Citizenship and Immigration Act) and decisions of the courts (for example, in the case of children, *ZH (Tanzania)* [2011] UKSC 4 and the decision of the Court of Justice of the European Communities in *Ruiz Zambrano* (Case C34/9)). When obligations have already been adopted as a matter of domestic law, accepting them as obligations flowing from international treaties may simply be a matter of catching up.

Given that other reservations in similar terms have been removed, the Government should be wary of treating persons with disabilities differently. No Government could or should want to send a message to those implementing immigration controls, or to those affected by them, whether directly as migrants or indirectly as British citizens, that it is acceptable to implement such controls in a way that discriminates against people with disabilities.

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[13] See, for example, the UK's objections to reservations made by Saudi Arabia, Mauritania the Democratic Republic of Korea, Syrian Arab Republic , United Arab Emirates and the Federated States of Micronesia to the UN Convention on the Elimination of All Forms of Discrimination Against Women, available at http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm

[14] See, for example, *The Consolidated 3rd and 4th periodic report to the UN Committee on the Rights of the Child, at* http://www.everychildmatters.gov.uk/resources-and-practice/IG00249/

The consultation paper states:

> *"The Convention should not affect the Government's ability to apply immigration rules controlling entry to the UK.'*

But that is precisely what the Convention, and domestic law, should do. It should ensure that in applying immigration rules and related legislation the Government gives due consideration to the effect on persons with disabilities and acts in a sensitive and appropriate manner. The same can be said of the conventions where reservations in the same terms have already been withdrawn. To 'affect' is not to destroy and to confuse the two is unhelpful. Having said this, disability is not a reason in any part of the immigration law and rules for an immigration refusal or for treating a person less favourably than another, so any refusal based merely on a person's disability is arbitrary and unlawful *per se*. This will not be changed by withdrawal of the reservation.

Migration and the UN Convention on the Rights of Persons with Disabilities

The intention of the UN Convention on the Rights of Persons with Disabilities is to

> *"...promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."* (Article 1)

The UK immigration laws and rules make no specific direct references to people with disabilities. However, where there is indirect discrimination, as there is in many aspects of life, removal of the reservation could help to achieve justice and fair treatment for people with disabilities. This submission focuses on areas where there may be indirect discrimination at present and urges change to avoid such discrimination.

The Article of this Convention which is most directly relevant to migration is Article 18. It states:

> *"Article 18 - Liberty of movement and nationality*
>
> *"1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:*
>
> a. *Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;*
> b. *Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;*
> c. *Are free to leave any country, including their own;*

d. *Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.*

"2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents."

This has parallels with Articles in the UN Convention on the Rights of the Child (Article 9) and the UN Convention on the Elimination of all forms of Discrimination Against Women (Articles 9 and 15). What is expressed, as is the case with the UN Convention on the Elimination of All Forms of Discrimination Against Women, is a parity principle, that those with disabilities should have these rights 'on an equal basis with others.' That would seem to encapsulate the UK's current obligations toward persons with disabilities.

The Equality and Human Rights Commission explains its view that this means[15]

"...that disabled people should not be restricted to go to another country or to come back to their country of permanent residence. It could mean that the government needs to take steps so that airport security measures or passport requirements do not discriminate against disabled persons.

One of the fundamental principles of European Community law is free movement of persons. If a disabled British citizen moves to another country in the European Community they should still be able to claim certain disability benefits."

ILPA agrees with these points, but would go further, as indeed does existing UK law and practice. For example, under s.44A of the British Nationality Act 1981, as inserted
by s.49 of the Immigration, Asylum and Nationality Act 2006, the Secretary of State has discretion to waive the requirement to be of full capacity "if he thinks it is in the applicant's
best interests [to do so]." This is described in the Nationality Instructions, Part 1, Chapter 18, Annex A where it is made clear that the section is particularly designed to promote the interests of the 'mentally handicapped' (those with learning disabilities). Here consideration has been given to the adverse effects that the requirement might have on persons with a disability and reasonable adjustments made to mitigate that adverse affect. Exemptions are made in Schedule 1 to that Act to the requirement to pass the Knowledge of Language and Life in the UK test, but only where the disability would prevent the person from taking the test. Annexes E and Ei to Chapter 18 of the Nationality Instructions state:

"1.4.7 Discretion should normally be exercised where the applicant is:

i. suffering from a long term illness or disability which severely restricts the ability to attend ESOL classes or to prepare for the Life in the UK test;

ii. deaf, mute or suffers from any speech impediment which limits their ability to converse in the relevant language;

iii. has a mental impairment and may be capable of physically meeting the requirement but is not able to speak or learn the relevant language.

[15] Equality and Human Rights Commission, *op.cit.*, p. 24

1.4.8 Requests for exemption on this basis should be supported by original and current evidence from a medical practitioner. This must state the condition and explain why it is unreasonable to expect the applicant to take the Life in the UK test or attend an ESOL course.

1.4.9 Each application must be considered on its own merits and you must consider how the impairment would stop the applicant from taking the Life in the UK test or attending an ESOL course. Life in the UK test centres and many ESOL colleges can cater for a variety of disabilities, such as blindness. An applicant may be able to do the test, therefore, even if they produce evidence of a disability."

These are practical examples of the Agency making 'reasonable adjustments' seeking to ensure that the law is applied in a way which does not disadvantage disabled persons, without in any way abandoning the framework of immigration control or nationality law that it has put in place.

In the information on its website about the "IRIS" system that allows people to use automatic gates at ports, the Agency states

"Travellers with a disability

We are committed to taking into account the terms of the Disability Discrimination Act by ensuring that our services comply with the provisions stipulated in that Act. In this regard, wheelchair access is available at the IRIS booths in selected UK airports.

When considering an application from a traveller with a disability who wants to register for IRIS, our staff will be able to offer advice about the processes that the traveller will encounter when using an IRIS booth at the UK border. Travellers should be aware that normally there are no staff available to assist travellers once they are inside the IRIS booth.

If the automated IRIS system is not deemed to be a suitable way for a traveller with particular needs to enter the UK, there are alternatives such as dedicated desks at ports of entry. These are staffed by our officers, who will be able to provide assistance clearing UK passport control."

Having paid attention to the issue, it is to be hoped that the Agency will do more to make IRIS accessible to persons with a disability.

The Agency's leaflet on Biometric Enrolment Services says

"If you and/or any dependants who are applying with you have a medical or physical condition which may require special arrangements to be made in order for your biometric features to be recorded, you must obtain a letter or other document giving the details of any such condition and enclose it with your application.

Appropriate documentary evidence would be a letter from a treating clinician, such as a practising doctor registered with the General Medical Council, giving details of the condition and/or special needs and explaining any arrangements that may be necessary.

What if the migrant has no fingers or hands?

> *If you are physically unable to provide fingerprints we will take a photograph of the facial image and record on the database the fact that you on the database the fact that you are physically unable to provide fingerprints."*

In practice the Agency also uses its mobile biometric unit (also used for super-premium applicants) for those who need this.

There is scope for the Agency to do more to promote the rights and interests of persons with disabilities. The UK Border Agency Business Plan for April 2011-March 2015 states

> *"We remain committed to equality, diversity and inclusion for our staff. We will continue to support flexible working in line with business needs so that people can balance their work and home lives. We will implement the public-sector equality duties required under the 2010 Equality Act."*

It says nothing further about disability and this is a pity. For example, it is not clear what instructions the UK Border Agency's commercial partners abroad have for dealing with applicants with disabilities to ensure that there is no discrimination in their access to the visa application process; this should be an open part of the contract and be monitored. If, for example, a person is unable to provide biometric fingerprints, this should not lead to delays and complications in the visa application process, nor in the immigration process on arrival at a port of entry in the UK.

The UK Border Agency consultation note states:

> *"The Convention should not remove the scope for the introduction of a wider policy of health screening for those seeking leave to enter or remain in the UK, if the Government were to decide that should be necessary at some future point, including for the protection of public health."*

and

> *The Government is to conduct a further review of arrangements for access by foreign nationals to NHS services in England (see pp 24-25 of the Department of Health document 'Access to the NHS by foreign nationals – Government response to the consultation', at http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_125271). The Government wishes to ensure that it retains the scope to introduce such measures as may be appropriate in the light of that review.*

The former unhelpfully confuses disease with disability. Health screening, for recognised public health and public policy purposes, is not incompatible with domestic law and would not be incompatible with withdrawing the reservation, provided that the screening is done on an open and non-discriminatory basis. As the example of biometric enrolment cited above illustrates, what is needed is to think about how screening is carried out where a person has a disability. The UK Border Agency and the Department of Health are currently considering changes in the arrangements for access of persons from abroad to the National Health Service; ILPA will comment on those when they are published.

As to the latter, Appendix 4 to the original consultation states:

> "Those seeking registration with a primary medical care contractor do so by applying directly to the contractor (normally by attending the practice premises). Primary medical care contractors (GPs) are self-employed and have contracts with the local Primary Care Trust (PCT) to provide services for the National Health Service. Under the terms of those contracts, GPs have a measure of discretion in accepting applications to join their patient lists. However, they cannot turn down an applicant on the grounds of race, gender, social class, age, religion, sexual orientation, appearance, disability or medical condition. [16]

The initial Impact Assessment on exemption for failed asylum seekers[17] stated:

> *50. There is no foreseeable differential impact on disability, gender, sexual orientation, or religion or belief. This policy increases equality by bringing more of the FAS population into line with the general population in terms of eligibility for free NHS hospital treatment, which in turn is likely to lead to them accessing secondary care more.*

This is repeated in the updated impact assessment on this topic, published on 18 March 2011.[18]

There is no mention of disability in the Government response to the consultation itself. Thus, throughout the Government has highlighted existing duties not to discriminate on the grounds of disability and assessed its proposals as not affecting those with a disability. The policy intention evidenced by the documents is not to place persons with a disability under any additional disadvantage. Thus, ILPA does not identify any way in which removal of the reservation could constrain the Government in doing that which it wishes to do, which is to be the subject of the new consultation.

The UK Border Agency should work together with the Department for Work and Pensions to ensure that Department of Work and Pensions staff are fully aware of the benefits to which other European Union nationals are entitled in the UK following the decision of the European Court of Justice in *Jauch v Pensionsversicherungsanstalt der Arbeiter* (case C-215/99).[19] UK Border Agency staff should have further guidance in European law to know that claiming benefits after having been economically active does not affect EU nationals' claim to permanent residence.

Family members

[16] *Review of access to the NHS by foreign nationals: Consultation on proposals* February 2010

[17] 10 December 2009

[18] The December 2009 and March 2011 Impact Assessments for extending the 'period of absence' for UK residents are expressed in similar terms.

[19] See the Academic Network of European Disability experts (ANED)'s information on '*Free movement of disability benefits?*' at http://www.disability-europe.net/theme/disability-benefits/free-movement-disability-benefits

Article 23, on respect for home and family, provides:

> *"1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:*
>
> *a. The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;"*

The immigration rules do not directly discriminate against people with disabilities in relation to family and marriage but people with disabilities are more likely than the majority able-bodied population to be out of employment and dependent on public funds. The Office of National Statistics' statistics show that at the end of 2010 41% of people with disabilities were in employment, compared to 71% of those without.[20] The immigration rules require those wishing to be joined by family members from abroad to show that the family member(s) can be maintained and accommodated without recourse to public funds. While instructions to immigration officials make it clear that this is to be interpreted as showing that no *additional* public funds must be required for a family member to join a sponsor in the UK, this is not widely known in the communities most affected. When, for example, a wife applies to come to join her husband in the UK, and the husband is disabled, the wife can meet the requirements of the immigration rules by showing that she has an offer of work, or skills and qualifications which make it likely that she would be able to find work, as well as showing that other family members or friends are able and willing to support her initially. The public information which the UK Border Agency gives about immigration applications should make this clearer to comply with the duty to ensure that it promotes the full enjoyment of the right to marry and to found a family to people with disabilities.

Right of individual petition

The consultation paper states:

> *The Optional Protocol to the Convention, which creates a right of individual petition to the UN Committee set up to monitor States' adherence to the Convention, should not create a further avenue of challenge to immigration decisions, including those relating to removal or deportation from the UK.*

The UK ratified the Optional Protocol on 7 August 2009. The Rules of Procedure of the UN Committee on Disabilities state

> ***"Rule 64***
> *1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State party concerned, for its urgent consideration, a request that it take such*

[20] See ONS Labour Force Survey, at http://www.statistics.gov.uk/downloads/theme_labour/LFSHQS/2010/2010_LFS_HQS_CQ.pdf

interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee or the Special Rapporteur on Communications under the Optional Protocol, acting on behalf of the Committee, requests interim measures under this Rule, the request shall state that it does not imply a determination on the merits of the communication.

3. The State party may present arguments on why the request for interim measures should be lifted.

4. On the basis of the explanations or statements submitted by the State party the Committee or the Special Rapporteur on Communications under the Optional Protocol, acting on behalf of the Committee, may withdraw the request for interim measures. "

This is very similar to rights of individual petition under a number of other human rights instruments.

Article 26 of the Vienna Convention on the Law of Treaties[21] sets out the *pacta sunt servanda* principle. Article 27 provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The UK is a party to the Convention and to its Optional Protocol and must perform its obligations faithfully.

Persons with a disability already have entitlements, subject to complying with provisions on the exhaustion of domestic remedies and other formal requirements, to take their cases to the European Court of Human Rights in Strasbourg and to the Committee on the Elimination of All Forms of Discrimination Against Women. Both the Court and Committee may make requests similar to those made under Rule 44 of the Rules of Procedure of the UN Committee on the Rights of Persons with Disabilities, and the European Convention on Human Rights and the Convention the Elimination of All Forms of Discrimination Against Women instruments contain similar provisions as to the exhaustion of domestic remedies and admissibility. We see no basis for a conclusion that the right to petition the UN Committee on Disabilities would result in additional delays in immigration cases, including cases of deportation and removal. They might result in an applicant choosing an alternative route, but this should not be confused with a 'further' avenue of challenge. All three treaties contain provisions about not examining matters that are being or have been examined by other international bodies. In the Convention on the Rights of Persons with Disabilities this is expressed in Article 2(c) of the Optional Protocol as:

"(2) *The Committee shall consider a communication inadmissible when:*

...

(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;"

[21] Treaty Series No. 058 (1980): Cmnd 7964

Indeed, given the delays that currently beset the European Court,[22] which is likely to be able to examine, under Article 8 of the European Convention on Human Rights read with Article 14, matters in immigration cases which could be examined by the Committee on the Rights of Persons with Disabilities, it may be that the UK, keen to progress an immigration case, would see advantages in the person turning to the Committee on the Rights of Persons with Disabilities.

Statistics

Article 31 of the Convention on the Rights of Persons with Disabilities provides for States Parties to "collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention." At present, the UK Border Agency does not keep statistics of people with disabilities who are affected by immigration control, either as sponsors or as applicants. The UK Border Agency should consider, in collaboration with other Government departments, what statistical monitoring it might most usefully undertake. ILPA is particularly concerned that the UK Border Agency should undertake monitoring that is adequate to allow it to prepare impact assessments on the impact of new laws, policies and procedures on persons with disabilities and would particularly highlight the need to keep detailed statistics on persons with disabilities who are subject to immigration detention.

Equality Act 2010 disability exceptions

These are found in paragraph 16 of Schedule Three to the Act, which state:

> ***Immigration Disability***
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> *"16(1) This paragraph applies in relation to disability discrimination.*
> *(2) Section 29 does not apply to—*
> *(a)a decision within sub-paragraph (3);*
> *(b)anything done for the purposes of or in pursuance of a decision within that sub-paragraph.*
> *(3) A decision is within this sub-paragraph if it is a decision (whether or not taken in accordance with immigration rules) to do any of the following on the ground that doing so is necessary for the public good—*
> *(a)to refuse entry clearance;*
> *(b)to refuse leave to enter or remain in the United Kingdom;*
> *(c)to cancel leave to enter or remain in the United Kingdom;*
> *(d)to vary leave to enter or remain in the United Kingdom;*
> *(e)to refuse an application to vary leave to enter or remain in the United Kingdom.*
> *(4) Section 29 does not apply to—*
> *(a)a decision taken, or guidance given, by the Secretary of State in connection with a decision within sub-paragraph (3);*
> *(b)a decision taken in accordance with guidance given by the Secretary of State in connection with a decision within that sub-paragraph.*

[22] See Proceedings, High Level Conference on the Future of the European Court of Human Rights Interlaken, 18-19 February 2010 and Protocol 14 to the European Convention on Human Rights, which entered into force on 1 June 2010.

Section 29 deals with provision of services. It deals with the withholding of a service and the terms on which the service is provided as well as with victimisation and harassment. There is no need for this exception. Disability is not a reason for refusal in any part of immigration law and rules for an immigration refusal, so any refusal based merely on a person's disability would be unlawful *per se* and any refusal based on something arising as the consequence of a person's disability, for example extreme behaviour, would also be unlawful unless it could be justified as a proportionate means of achieving a legitimate aim.

The explanation given for the immigration exception in paragraph 706 of the Explanatory Notes to the Equality Act is:

> *"This is a new exception. An express exception was not previously needed since the Disability Discrimination Act 1995 did not prohibit direct disability discrimination in the provision of services or exercise of a public function and because disability-related discrimination, which did apply to the provision of services or exercise of a public function, could be justified if it was necessary for a number of reasons, including not to endanger the health or safety of any person."*

Rule 320(6) of the immigration rules provides for refusal where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good. Instructions and guidance to officials exists in order to ensure that they make decisions and carry out their duties in accordance with the law; if a refusal were based on disability without whatever protection the courts held to be afforded to it by the Secretary of State's authorisation under this paragraph, it would be unlawful. If the Secretary of State made a decision based on disability, without any further reason why this was contrary to public policy or public health, or might in some way be conducive to the public good, it would arguably be unreasonable and therefore challengeable. There are separate provisions for refusal of entry or entry clearance on the grounds of public health, for example when a person is suffering from active tuberculosis. The Equality Act 2010 would not outlaw such a refusal.

The Joint Committee on Human Rights in its Legislative Scrutiny – Equality Bill report[23] also found that this exception, along with the reservation to the Convention, was unjustifiable:

> *"147. .... We consider that the immigration exception as set out in Schedule 3(16) is also inconsistent with the object and purpose of the UN Convention. This exception could permit treatment of disabled persons which could violate their right to equal treatment, as well as potentially threatening other rights such as the right to life protected under Article 2 ECHR and the Article 3 ECHR right to freedom from inhuman and degrading treatment if disabled persons with serious illnesses are denied entry to or leave to remain in the UK and deported back to countries where they may be subject to life-threatening conditions in the absence of a reason to do so under immigration law.*

[23] Joint Committee on Human Rights, 26th report, 27 October 2009, at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/169/16907.htm

148. Further, the scope of this exception is excessively wide, in particular in how it exempts all acts done "if necessary for the public good". There is no explicit requirement that any discriminatory acts must be done for a legitimate aim and be objectively justified. The Government's suggestion that a proportionality requirement will be automatically applied by courts in assessing the legality of acts done under the exception appears to be very optimistic: Schedule 3(16) does not make provision for such a test and not every case involving this exception will result in the application of the proportionality requirements applied under the HRA. We accept that the immigration authorities may legitimately wish to exclude people from entering or remaining in the UK in certain specific and limited circumstances, for example if they have certain highly contagious diseases. However, any such decisions must be necessary to protect public health or public safety, must achieve a legitimate aim and be objectively justified in line with the standard proportionality analysis. Consistent with the Solicitor-General's indication in the PBC, we recommend that the Government amend the Bill to make this explicit."

Removal of the exception, and of the reservation, would not fetter the UK Border Agency in making decisions based on objective public health reasons. It would also remove the unhelpful confusion between disability and illness. Neither this not the previous government have so far given any objective or valid justification for this reservation. Its withdrawal would be evidence of a commitment towards the rights and welfare of people with disabilities. ILPA urges that it should be withdrawn now.

Sophie Barrett-Brown
Chair
ILPA
13 June 2011