ILPA Comments on the Draft Asylum Instruction on Family Reunion

While ILPA is always grateful for an opportunity to comment on draft instructions, the timeframe given on this occasion[1] is far too short for us to provide a fully considered response. That said, we were grateful for the earlier opportunity to give our views on refugee family reunion policy, which we did by our submission of 31 January 2011. We do not repeat that submission here, but merely confirm that we continue to hold the views expressed.

We make the following observations under discrete headings identifying the part of the draft instruction to which the observations relate.

Section 2.1.4 – Ineligible sponsors

This includes the following statement:

> *The Immigration Rules and the UK Border Agency's policy do not allow the following persons to be sponsors for family reunion purposes:*
>
> ...
>
> - *A minor with leave otherwise qualifying him/her as a sponsor (even to sponsor parents)*

We must assume that this is a mistake. While the Rules do not permit a minor to sponsor a refugee family reunion application, UK Border Agency policy as explained by the then Chief Executive, in her letter of 12 March 2010 to ILPA, does permit this. We would refer you to the following statements in her letter:

> *None of this* [assertions concerning the UK's stance in respect of the recasting of the EU Qualification Directive] *should be taken to mean that there will not be cases where it is appropriate to allow child refugees to be joined by their parents.*
>
> *We maintain a discretionary stance to refugee family reunion for unaccompanied minors is the most suitable way to ensure that we protect the best interests of children.*
>
> *With respect to our Asylum Policy Instruction on Family Reunion, this is still currently under revision and we will endeavour to address the circumstances in which family reunion might be made available to unaccompanied minors at their request but only where this does not put the child at risk*

If what currently appears in the draft instruction is not a mistake, this would constitute a withdrawal of the policy position under which discretion was maintained to grant family reunion applications by the parent or parents of a separated child

[1] The draft instruction was made available for comment immediately before the bank holiday weekend on Friday, 27th May with responses requested by Monday, 6th June.

refugee (or child granted humanitarian protection) where this "*was appropriate*" and "*does not put the child at risk*". Moreover, the draft instruction does the precise opposite of what was indicated to ILPA (see the last of the three extracts from the then Chief Executive's letter) since it does not address the circumstances in which family reunion would be available for separated child refugees but rather introduces a blanket refusal to permit this.

Our objections to the current and longstanding discrimination against separated child refugees remain as set out in our correspondence of 24 February 2010 to the then Chief Executive and our 31 January 2011 submission to which we have referred above. The draft instruction, if adopted as drafted, would compound those objections and indeed the injustice, discrimination and illegality of the UK Border Agency stance toward this group of children – all the more ironic given the standard recitation of the Agency's statutory duty toward children in the UK which appears at section 1.1 of the draft instruction – by changing the degree of less favourable treatment of these children from being a discretion outside the Rules (as compared to provision in the Rules for adults) to a blanket denial of family reunion.

Section 2.3 – Family reunion costs and charges

If, as we assume must be the case, the reference to 'settlement' in the second sentence is to applications for settlement made by those who have been granted leave to enter/remain on the grounds of family reunion, this ought to be made more clear.

Section 2.4 – Refugees *sur place*

The inclusion of a distinct section on refugees *sur place* is appropriate, but this section fails to address the key distinction for the purposes of family reunion. The Rules relate directly to refugees (other than *sur place*) in that these require the relationship between refugee and family member to pre-date the refugee's flight from his or her country of origin. Refugees *sur place*, by contrast, have not fled. A refugee *sur place* will have arrived in the UK for reasons unrelated to the Refugee Convention and without fear of persecution. He or she may, since that arrival, have formed a family relationship in the expectation of continuing that relationship in his or her home country at the end of his or her expected stay in the UK. If a change of circumstances now occurs putting him or her at risk of persecution, it would be unjust to insist upon the requirement that the relationship be formed before the refugee *sur place* left his or her country of origin at a time when there was no real or perceived risk of persecution.

Accordingly, this section should be revised to make clear that the policy position will permit family reunion in circumstances where a refugee *sur place* has formed the relevant relationship prior to the making of his or her asylum claim.

Section 3.2 – In country applications for family reunion

We note the comment included with the draft instruction suggesting that consideration is being given to whether a form, such as FLR(O), might be used for these applications. We do not know that there is anything to be gained from this; and it may prove unhelpful. The form FLR(O) is currently used for applications that

are charged, which may cause confusion for applicants who are not required to pay any fee or for UK Border Agency officials receiving an application without a fee.

Section 3.6.1 – Rights of appeal

This is liable to confuse because while "*whether the applicant had leave at the time of the application*" is an example of a factor that will or may be relevant to whether there is a right of appeal, the presence or absence of an "*immigration decision*" (as defined by section 82 of the Nationality, Immigration and Asylum Act 2002) will be determinative of the question.

Section 4.1 – Cases where a dependant's age is disputed

This section needs revision. There is no asylum instruction on Age Disputes. There is an asylum process guidance on Assessing Age.

It is generally inappropriate to commence this section with a presumption that age is to be disputed. Moreover, the test set out here is wholly unsuitable. The dangers of seeking to make an assessment of age on nothing more than a visual assessment of physical appearance or demeanour are profound, and have been the subject of criticism of conduct in the UK asylum system for years. ILPA has researched and reported on this in detail – see *When is a child not a child?* (published in 2007) – which is familiar to the Agency. Prior to publication, the findings and recommendations were the subject of a roundtable discussion including members of the then Immigration and Nationality Directorate. At that time, the Home Office expressly acknowledged that: "*There is no doubt that assessing age solely on physical appearance is unsatisfactory*"[2]. The ILPA research found:

> *...there is evidence that much of what currently passes for 'age assessment', particularly at screening units and ports but also among some social workers, legal representatives, immigration judges and other practitioners, is essentially a rapid visual assessment which concludes that an individual doesn't look like a child. This conclusion is inevitably based on a socially constructed understanding of what a child should look like.*[3]

The ILPA report recorded that the Refugee Council had found that in 2005 decisions to detain at Oakington (where at the time the Refugee Council had a permanent presence) on the basis a person's appearance strongly suggested he or she was over 18 years of age (the test used in the draft instruction) had led in substantial numbers of cases to the detention of children:

> *In 2005 over 60% of those detained at Oakington who were assessed by the local authority were found to be children following a formal age assessment. For three months of that year this rose to more than 80% of cases.*[4]

[2] See *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children*, Home Office, February 2007
[3] See *When is a child not a child?*, ILPA, May 2007 (page 49). For a fuller discussion of the problems with mere visual assessment, see pages 8, 48-58 of the report.
[4] *op cit* (pages 2-3)

Since that time, the UK Border Agency has adopted a test that seeks to be more restrictive of age disputes than that set out in the draft instruction. Even so, as was recognised by the Home Office in 2007, assessing age on the basis of physical appearance is not satisfactory and the current test (see the asylum process guidance on Assessing Age) has not proved satisfactory. The Children's Commissioner, the Refugee Council, the Children's Society and ILPA have raised this with, and discussed this with, the Agency on several occasions[5]. Indeed, we are currently awaiting the Agency's response to concerns on the Assessing Age asylum process guidance. The Agency has never in those discussions sought to retract the 2007 acknowledgment that appearance is not a satisfactory means to assess age. The Independent Monitoring Board for Harmondsworth has reported in 2009[6] on its concerns regarding the detention of children, who have been treated as adults because of the current, more recent test; and we are aware that its concerns remain. The UN Committee on the Rights of the Child, in its 2008 and most recent report on the UK, having considered the policies and practices of the UK at that time, was moved to recommend that the UK apply the benefit of doubt in age disputed cases in the asylum system[7]; and in 2009 the Joint Committee on Human Rights repeated its concerns on the same subject with some degree of exasperation[8]:

> *In our Report on the Treatment of Asylum Seekers, we expressed concern at the treatment of children whose ages were disputed by the authorities.*
> *...**We are disappointed that, more than two years after our Report on the Treatment of Asylum Seekers, age-disputed children continue to be poorly treated and to experience the problems we previously identified.***

As long ago as 1999, the Royal College of Paediatrics and Child Health issued guidelines relating to age assessment indicating that "*no single approach can be relied upon*" and highlighting how age assessment techniques still led to *"difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18*". The idea that on mere visual observation an assessment could satisfactorily be undertaken by someone with child health or childcare expertise is belied by that guidance, the available evidence in this area and generally the observations of acknowledged experts and the Home Office's own position[9].

These appearance/demeanour tests have been demonstrated to be immensely damaging to the physical, mental and emotional wellbeing of children in the asylum process in the UK, including where application of the test has not led to a decision to detain[10]. For all the harm that has been caused to children in the UK, and for all that the tests have proved highly unsatisfactory, there are additional factors that make application of either test in the context of the draft instruction even more

[5] Most recently, the Chair of the Refugee Children's Consortium and representatives from ILPA and the Refugee Council met with Lynne Spiers, Laura Pearson and Ben Nicholson to discuss the Assessing Age asylum process guidance, at which these tests were discussed on 20 October 2010.
[6] See the 2009 Annual Report of the Independent Monitoring Board for Harmondsworth Immigration Removal Centre (section 5.8)
[7] See UN Committee on the Rights of the Child: Forty-ninth session *Consideration of Reports submitted by States Parties under Article 44 of the Convention, Concluding observations: United Kingdom of Great Britain and Northern Ireland*, paragraph 71(e)
[8] See Joint Committee on Human Rights: Twenty-Fifth Report for Session 2008-09 *Children's Rights*, 20 November 2009 HL 157/HC 318 (paragraphs 123-124)
[9] See fn. 3 (and e.g. those bodies and references cited in this letter)
[10] See fn. 3

inappropriate. Children subject to such a test by an official overseas are unlikely to have any recourse to a social services assessment or assessment by other experts as may be experienced by a child in the UK asylum system; and scrutiny and supervision of such decisions by officials overseas are even less likely to be practicable or effective.

As ILPA has long argued, the benefit of the doubt must be the starting point. If there are no other reasons to doubt a person's age, other than that an official believes or even strongly believes that a person's appearance or demeanour indicates that he or she is over 18 years of age that ought not to be sufficient to displace the benefit – still less should it require that age is disputed. That is all the more so in the context of refugee family reunion where the application of a test purely founded on appearance/demeanour is undertaken by an official in an overseas post.

Section 4.3 – Children conceived before the refugee fled to seek asylum in the UK

This section, as currently drafted, would require a birth certificate to be provided for family reunion to be granted. However, birth certificates will not be available in all cases. In some countries, such documents will not be created or available. For example, an approach to the authorities to obtain such a document may be precluded by reason of the persecution of which the refugee (and possibly his or her family members) is at risk, poor or corrupt bureaucracy may impede birth registration or there may be discriminatory practice against certain minorities. As such, the section must be revised to deal with situations where a birth certificate could not be provided. The current drafting is not consistent with what is said at section 3.4, which states: "*Requests for documents should be sensible and realistic*".

Section 4.4 – UK born children

This refers to the asylum instruction on Dependants. The asylum policy instruction on Dependants has, like that on Family Reunion, been 'under revision' for several years. If there is now an instruction available, we should be grateful for this to be made available to us immediately and placed on the UK Border Agency website.

There can be serious problems for people granted refugee status who subsequently have children born in the UK and do not know that they must take action to 'regularise' the child's status before any travel document can be issued. Although we understand that it is policy that such immigration applications are not chargeable, this is not always reflected in practice; and applications for children to be granted leave in line with their parent(s) may be substantially delayed.

ILPA
6 June 2011