IMMIGRATION LAW PRACTITONERS' ASSOCIATION RESPONSE TO THE DISCUSSION PAPER *DO WE NEED A UK BILL OF RIGHTS* FROM THE COMMISSION ON A BILL OF RIGHTS

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, non-governmental organisations and individuals with a substantial interest in the law are also members. Founded in 1984 by leading practitioners in the field, 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 research and opinion that draw on the experiences of members. ILPA is represented on numerous Government, official and non-Governmental advisory groups and regularly provides evidence to parliamentary and official enquiries and responses to consultations.

Question 1: Do you think we need a UK Bill of Rights?

In ILPA's view the UK already has such a Bill. The Human Rights Act 1998 has already incorporated many of the rights set out in the European Convention on Human Rights into UK law in a way which means that these rights can be more easily enforced in UK courts without people having to take cases to the European Court of Human Rights.

The Coalition Programme for Government, on page 11, stated:[1]

> *"We will establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these obligations and liberties. "*

If such a Bill of Rights were to retain all the rights protected by the European Convention on Human Rights and its protocols, ILPA sees no reason to reinvent the wheel. But if it did not, this process could result in the erosion of existing levels of domestic human rights protection for all those within the jurisdiction and force more people to turn to Strasbourg to enforce their rights.

The European Convention on Human Rights is of vital importance to migrants and refugees, in that its supervisory mechanisms help to ensure that international human rights standards are upheld. Some fundamental rights, such as the right to life, the prohibition of torture or inhuman or degrading treatment and the right to respect for family and private life, may be more frequently under threat for refugees and

[1] The Programme for Government, accessed 11 November 2011, http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf

migrants. In other areas of the law, refugees and migrants may enjoy a lesser degree of protection than that accorded to citizens and/or the settled. We refer you to ILPA's compendium of recent human rights cases engaging Article 8 of the European Convention on Human Rights which have been relevant to migrants.[2]

Question 2: What do you think a UK Bill of Rights should contain?

The European Convention on Human Rights. The UK should incorporate Articles 1 and 13 of the European Convention on Human Rights into the Human Rights Act 1998 so that all relevant matters can be adjudicated upon within the domestic courts. The UK should also take steps to put itself in a position to ratify Protocol Four to the European Convention on Human Rights, by addressing the position of those British nationals with no right to enter or remain in the country of their nationality.

Consideration should be given to the incorporation of the UK's obligations under other international human rights instruments ratified by the UK. The UK should incorporate Article 14 of the Universal Declaration of Human Rights and provide that everyone has the right to seek and to enjoy asylum from persecution. Successive Governments have reiterated the UK's commitment to giving sanctuary to the persecuted.

Section 7(3) of the Human Rights Act 1998, providing that only a victim may bring proceedings should be re-examined and attempts made to identify the scope for public interest litigation.

A UK Bill of Rights should contain provisions to ensure equality of arms, including that where a person is unable to assert and defend their rights without assistance, and is not able to pay for such assistance, they should have access to legal aid.

Question 3: How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

Immigration is not a devolved matter, although the court systems enforcing the law are different in the different countries and immigration status affects entitlements in many devolved areas, such as social entitlements. Any Bill of Rights should ensure all people in the UK, regardless of their citizenship or immigration status, have equal access to processes to protect and enforce their rights.

Question 4: Are there any other views which you would like to put forward at this stage?

Rights do not exist in a vacuum. The State may fail to give effect to them, or may breach them. If rights are to be protected, individuals need to be able to assert and to enforce their rights.

[2] See ILPA's Annex to its response to the Ministry of Justice Consultation on legal aid, at http://www.ilpa.org.uk/data/resources/4124/11.02.505.pdf

Monitoring and oversight of the implementation of human rights judgments is a problem throughout the Council of Europe.[3] ILPA has submitted evidence to the Joint Committee on Human Rights of the failure or delay in implementing judgments in human rights cases and asks that this evidence be taken into consideration as part of this submission.[4] ILPA urges the Commission to consider how human rights judgments are implemented and to identify procedures to ensure that the Government acts promptly to do so.

Asserting and enforcing rights often requires legal knowledge and, to ensure equality of arms, legal aid must remain available for cases involving human rights and any British Bill of Rights. Cases such as *Baiai [2009] 1 A.C. 287 (HL),* which held that the UK Border Agency's imposition of Certificates of Approval for marriage, requiring people not settled in the UK who wished to marry in a ceremony other than in the Anglican church to gain the Home Secretary's approval first, was not compatible with the European Convention on Human Rights were brought by persons in receipt of legal aid. The UK Border Agency lost the case at every stage but a remedial order to amend the offending legislation was only passed on 4 April 2011.[5]

We consider that ILPA's compendium of judgments of the higher courts in human rights cases engaging Article 8[6] calls into question the statement in the Ministry of Justice Green Paper *Proposals for the Reform of Legal Aid in England and Wales*[7]

> *"4.203 On balance, the Government does not consider that immigration issues are of sufficiently high importance in general to justify continued legal aid funding. We recognise that there will be cases in which important issues arise, such as the right to a family life. However, individuals will generally be able to represent themselves (with the assistance of an interpreter where necessary) in tribunals that are designed to be simple to navigate."*

ILPA members have experience of representing persons who have faced the most egregious violations of their human rights: torture and the threat of death. Very often people have been prepared to risk these terrible threats for their family, for it is rights to family life that very many people prize most dearly.

Under the Legal Aid, Sentencing and Punishment of Offenders Bill not even children will quality for legal aid in excluded areas of law, such as immigration. This will be the case even if, the child having won an appeal at first instance, it is the State that appeals onward all the way to the Supreme Court.

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[3] See e.g. AS/Jur (2009) 36 31 August 2009 ajdoc36 2009 Parliamentary Assembly of the Council of Europe, *Committee on Legal Affairs and Human Rights Implementation of judgments of the European Court of Human Rights Progress report*, rapporteur: Mr Christos Pourgourides, Cyprus, EPP/CD.

[4] See ILPA submissions to Joint Committee on Human Rights various, at http://www.ilpa.org.uk/pages/parliamentary-briefings-other-than-bills.html and most recently ILPA's 22 October 2010 Submission to the Review of the Government's response to judgments identifying breaches
of human rights in the UK, at http://www.ilpa.org.uk/data/resources/13011/10.10.679.pdf

[5] The Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (Remedial)) 0rder 2011, SI 2011/1158.

[6] *Op. cit.* See ILPA's Annex to its response to the Ministry of Justice Consultation on legal aid, at http://www.ilpa.org.uk/data/resources/4124/11.02.505.pdf

[7] November 2010

It is by a "polluter pays" approach whereby Government departments who fail to respect human rights pay the costs when they are found to have failed to do so, that legal aid can be preserved to protect individuals and Government departments can be encouraged better to respect human rights.

ILPA emphasises the importance of accurate information about human rights. For example, critics of the Human Rights Act 1998 often claim that it allows foreign national ex-offenders and terrorist suspects to remain in the UK rather than be deported. This places too much emphasis on a very small number of cases and is often inaccurate. It is usually the rights of family members, often children, including British citizen children, that are protected when a person is prevented from being deported on human rights grounds.

Many of the rights protected in the Human Rights Act 1998 and the European Convention Human Rights are qualified rights, and the rights of the individual are balanced against the rights of others. ILPA responded in detail to the UK Border Agency's recent consultation on family migration. The treatment of Article eight therein which was an example of misinformation.[8] We append the most relevant part of our response to this submission and ask that it be considered as part of this submission.

There is evidence from opinion polls suggesting that there is support for enforceable human rights; that 96% of the public agree it is important that there is a law that protects rights and freedoms in Britain.[9] Yet, in the same poll, fewer than one in ten people could remember ever receiving or seeing any information from the Government explaining the Human Rights Act 1998.[10] If rights and the Human Rights Act 1998 are properly explained people may better understand the benefits, and the debate on any need to (re)create a UK Bill of Rights will be better informed.

The Human Rights Act 1998 works well at present but lacks public support. The key challenge therefore is to promote greater understanding of human rights and of the European Convention on Human Rights. Work to do so has the potential to improve understanding of, and respect for, migrants and refugees if the concept of universal human rights is properly explained. ILPA concurs with the view of the Commission's Chair, Sir Leigh Lewis, given in evidence to the Political and Constitutional Reform Committee, that 'we may be able to give people more widely a better understanding of the facts, the position and the issues so that any future and further debate ... might be better informed.[11]

Sophie Barrett-Brown
Chair, ILPA
11 November 2011

[8] The full response is at http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf .
[9] Human Rights Survey conducted by ComRes for Liberty, September 2010, at http://www.comres.co.uk/poll/35/liberty-human-rights-act-poll-october-2010.htm
[10] *ibid.*
[11] House of Commons Political and Constitutional Reform Committee, 9 June 2011, HC 1049-i, Q27, at http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpolcon/1049/1049contents.htm

APPENDIX A

UK Border Agency: Family Migration, a consultation

Response from Immigration Law Practitioners Association (ILPA) 13 October 2011

(EXTRACT ONLY)

ECHR ARTICLE 8

Chapter 8: Article 8

Before answering the questions posed in this section of the consultation, ILPA wishes to comment on the way in which the present state of the law on Article 8 is presented. As the consultation paper does not set out the position in the United Kingdom with regard to Article 8, we do so here.

R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27, [2004] 2 AC 368, para 17*,* sets out the process to follow in assessing whether a person's exclusion or expulsion from the UK will give rise to a breach of Article 8. It states:

> *In a case where removal is resisted in reliance on article 8, these questions are likely to be:*
> *(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
> *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?*
> *(3) If so, is such interference in accordance with the law?*
> *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
> *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?*

In cases of the types discussed in the consultation paper, it is usually the question of proportionality which is in dispute. The question is whether expulsion or exclusion will amount to a disproportionate interference with a person's right to respect for family and private life (and the rights of any other family members upon whom the decision would impact).

In *Huang and Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11, [2007], the House of Lords, reviewed all of the relevant authorities from the UK and from Strasbourg. It set out, on the one hand, factors which would weigh in favour of exclusion or removal:

> *[16] The [Tribunal] will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the*

> *general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on.*

It then set out, again on the basis of a reading of UK and Strasbourg authority, the factors which weigh against removal:

> *[18] Human beings are social animals. They depend on others.* ***Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives.*** *Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.*

The House of Lords went on to reject the suggestion that a person who claimed a right to remain in the United Kingdom because of his/her private or family life would have to pass an 'exceptionality' test. Instead, it was essential to conduct a proper factual analysis:

> *[20] In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality.*

Reflecting on paragraph 20 of *Huang*, the House of Lords in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41stated at paragraph 12:

> *[12] Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that* ***it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case.*** *The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.* [Emphasis added].

We should have expected passages such as these, which represent the thinking of the highest courts about the nature of the right to family and private life, to be cited or at least summarised in a consultation paper which intends to elicit and informed response from members of the public who may not be familiar with the details of the law. It is extremely disappointing that the consultation paper makes no attempt to provide such information.

Specific errors in Chapter 8

'insurmountable obstacles'

At paragraph 8.5 of the consultation, the authors assert that

> "*the European Court of Human Rights at Strasbourg has said that there is no interference with the right to respect for private and family life if there are no 'insurmountable obstacles' in the way of the family living in another country*".

The reference given in footnote 116 is *Abdulaziz v UK* (1985) 7 EHRR 471.

In *Abdulaziz*, however, the European Court of Human Rights 'says' no such thing. What the court finds in that case (para. 68) is that there were no '*obstacles*' at all to the families concerned living in another country. Nothing in *Abdulaziz* suggests that a person must show 'insurmountable' obstacles before an interference is shown and therefore before Article 8 is engaged. [12]

There is no extant legal authority in support of the extreme position which is advanced as a norm, or as a starting point, by the authors of the consultation document at paragraph 8.5. This is a fundamental legal error; it gives false legitimacy to a point which has been never been upheld in the international or national courts, and it is bound to mislead anyone who is not familiar with the original case reports and who goes on to read the remainder of section 8 of the consultation.

That error is compounded by paragraph 8.6 of the consultation document, which appears to suggest that the judgment of the Court of Appeal in *R (Mahmood) v SSHD* [2001] 1 WLR 840 is consistent with the spin the consultation has already attempted to place upon the European Court of Human Rights' judgment in *Abdulaziz*.

As is clear even from a reading of the passage quoted in footnote 117 to the consultation, the Court in *Mahmood* said no such thing. The authors of the consultation then move on (still at para. 8.6) to suggest that the judgments of the House of Lords in *EB (Kosovo) v SSHD* [2008] UKHL 41 and of the Court of Appeal in *VW (Uganda) v SSHD* [2009] EWCA Civ 5 were, somehow, reversing the decisions in these earlier cases. This is another mistake. The courts in these later decisions were building precisely upon the earlier ones. As the authors of this consultation paper are, or should be, aware, the reliance upon an '*insurmountable obstacles*' test as a necessary precondition for an Article 8 breach has been authoritatively described as a '*misreading*' of *Mahmood* (see *VW (Uganda)* at 28; and see *JO (Uganda) and JT (Ivory Coast) v SSHD* [2010] EWCA Civ 10).

Paragraph 8.7, which backs off from this extreme and incorrect position, is in itself unobjectionable, but to any reader who is unfamiliar with the cases, and who simply trusts that the Secretary of State will have accurately summarised them in a consultation paper, the damage is already done. The authors of the report have sought to portray a conflict between different authorities, or between Strasbourg and the UK courts, and given the reader the

[12] See also the comments on *Abdulaziz* in *Quila, op. cit.* paragraphs 43 and 72 per Lord Wilson and Lady Hale.

impression that there is a choice to be made between them. That conflict does not exist, and the Secretary of State is, or should be, aware of this.

Automatic deportation

Paragraph 8.11 is, again, misleading. It refers to the automatic deportation provisions as follows: "*Parliament has imposed a duty on the Secretary of State to make a deportation order*" and then suggests, that, where such duty applies, it will be "*only in exceptional circumstances*" that Article 8 will be breached by removal of an applicant from the UK. It then goes on to suggest that the Court of Appeal in *AP (Trinidad and Tobago)* [2011] EWCA Civ 551 "*indicated that this is the right approach*". This is not only wrong (there is no such reference to 'exceptional circumstances' in the Court's Judgment). It is also misleading in a more fundamental way. In *AP (Trinidad and Tobago)*, the Secretary of State expressly declined to advance this argument, with the result that the court did not hear argument on it, and did not reach any settled conclusion on it at all. The Secretary of State may now wish to change her mind, but it is misleading to suggest that this argument was advanced before the Court.

Precariousness

At paragraph 8.14, the authors of the consultation paper introduce the next error of law. The question here is the weight to be attached to private or family life which is established while a person is unlawfully present in the UK. The authors suggest that "*judgments from the Strasbourg Court make [it] clear*" that such person "*should [not] benefit from their lack of status*". The authors cite the Strasbourg case of *Rodrigues da Silva v Netherlands* (2007) 44 EHRR 729 in support of that proposition. Any reader of the consultation document who is unfamiliar with that case, or who trusts the Secretary of State to present it accurately, would reach the conclusion that the Strasbourg Court had dismissed a claim on the basis that a person was unlawfully present. In fact, as the authors of the report must be aware, the applicants in *da Silva* were successful, despite Mrs da Silva's having remained unlawfully in the UK and established her private life and family life as an unlawful migrant.

As the authors of the consultation document are, or should be, further aware, the Supreme Court recently expressed its own views about *da Silva*, describing it (in *ZH (Tanzania)* [2011] UKSC 4 at 20) as

> "*.. a relatively recent case in which the reiteration of the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making*".

The authors of this consultation document overlook this recent and authoritative commentary on *da Silva*.

General Comments on Chapter 8

In addition to these specific and fundamental errors, there are three overriding problems with Chapter 8 of the consultation paper.

First, we have set out above the courts' observations about the fundamental importance of the rights to family and private life. It is extremely disappointing that, in a document which is presumably intended to trigger an informed discussion, there is no attempt at all to explain why Article 8 rights are important. The UK government has, as described elsewhere in response, claimed to be committed to the preservation of family life, and the provision of a stable environment for family members. It is astonishing that there is no reference to the link between this aim and the rights protected by Article 8; it is very disappointing indeed that

the Courts' descriptions of the importance of Article 8 rights are entirely omitted from this consultation paper.

Secondly, the consultation paper simply fails to recognise that the Article 8 exercise, both the fact-finding element and the final assessment of the proportionality or otherwise of a decision to exclude or expel, is clearly established to be a matter (i) for the Secretary of State (or ECO) at the initial stage; and then (ii) for the Tribunal and/or courts on appeal or review.

There is a clear and principled division between the legislature, which has decided that Article 8 is directly enforceable in the UK; the executive, which are required to apply Article 8 when taking decisions; and the judiciary, which is required to interpret the requirements of Article 8 and apply them in the context of individual decision.

The consultation document appears to suggest that the role of the judiciary in interpreting and applying Article 8 can be ousted or its judgment fettered by the Immigration Rules. It therefore appears to invite respondents to give opinions which would be contrary to the Article 8 jurisprudence as it presently stands. This is both a misleading and pointless exercise. It is misleading, because it gives the impression that the Government has the power to do something which it cannot do (amend the meaning of Article 8 by Immigration Rules or published policies). It is pointless, because it gives respondents to this consultation document the impression that their views are capable of changing the nature of Article 8 by way of changes in policy or rules.

The underlying proposals advanced in this chapter of the consultation exercise seek, in our view, to amend the nature and application of Article 8 itself. Such amendments do not fall within the proper scope of this consultation exercise; they require to be addressed to the Council of Europe and to the European Union. To give respondents to the consultation the impression that the United Kingdom's international obligations can be short-circuited in this way is to set up a futile and illegitimate set of expectations.

Finally, it seems that the whole basis of the consultation exercise is an attempt to introduce criteria of exceptionality: if a person has established his or her private/family life while overstaying; or is subject to 'automatic' deportation; or faces no insurmountable obstacles in relocating, he/she should only exceptionally be entitled to succeed on Article 8 grounds. Against that background, it is astonishing that the authors have not chosen to refer at all to the seminal judgment of the House of Lords in *Huang*, where any recourse to 'exceptionality' tests was firmly rejected.

To put it another way, the consultation exercise seeks to draw "*hard-edged or bright line rule[s]*", to determine who should and who should not succeed on Article 8 grounds (see e.g. paras 8.11; 8.13; 8.14; 8.16; 8.19; 8.20). Such rules are, however, expressly rejected by the House of Lords in *EB (Kosovo)*[13] at para. 12:

> "*The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires*".

Again, this passage, which is recent and binding, is ignored by the authors of the consultation paper. Any rules which seek to impose a "*hard-edged or bright-line rule*" are and will remain incompatible with Article 8 for as long as *EB (Kosovo)* remains binding law in the UK. It is, therefore, unclear why the consultation exercise purports to give respondents a choice which can have no legal purchase whatsoever. It is further unclear why a consultation exercise which does footnote a number of legal authorities and hold itself out as legally

[13] *Op. cit.*

informed should simply fail to refer to the passages most relevant to the propositions it seeks to advance.

The government has a duty, when presenting a consultation document, to take reasonable care that it gives an accurate portrayal of the law. Selected chunks of favourite bits of jurisprudence, cited out of context and (in the case of *Abdulaziz*[14]) entirely incorrectly, do not satisfy that duty. Most regrettably, this section of the consultation exercise falls far enough short of presenting an accurate or competent picture of the law as it presently stands that little if any weight can be attached to any answers to it.

Response to the specific questions

Despite our objections to the way in which this whole section of the Consultation Paper, we seek to answer the questions put.

Question 34: Should the requirements we put in place for family migrants reflect a balance between Article 8 rights and the wider public interest in controlling immigration?

That balance is already enshrined in the decision making of the UK Border Agency and in the reviewing powers of the courts. It is clearly set out in the text of Article 8 itself and in its interpretation by the UK Courts, the European Court of Human Rights, and the European Court of Justice. The question must be answered 'yes'. No other answer would be lawful, and to give the impression that there is a choice to be made is simply misleading.

Question 35: If a foreign national with family here has shown a serious disregard for UK laws, should we able to remove them from the UK?

Again, the courts have clearly established that the UK has the power to remove such people, subject always to a fact-sensitive analysis of their and their families' individual circumstances and histories including such factors as length of residence, nationality of the affected parties, best interests of the children, seriousness of the breach of the UK laws, risk of reoffending, difficulties which will face the affected parties upon expulsion, and so on.

The only lawful answer to this question is 'yes'.

Insofar as the consultation exercise suggests that the fact-sensitive analysis can be restricted by hard-edged or bright-line rules, that suggestion is unlawful and we should reject it. Any attempt to introduce 'exceptionality' criteria will only lead to costly litigation in the higher courts and delays in decision-making, as happened in the last decade, and must be avoided.

Question 36: If a foreign national has established a family life in the UK without an entitlement to be here, it is appropriate to expect them to choose between separation from their UK-based spouse or partner or continuing their family life together overseas?

This is, again, to seek to introduce a hard-edged or bright-line rule. It is unlawful and we should reject it.

The courts have clearly established that the fact that family life has been established during a period of unlawful residence is a relevant factor in the Article 8 balancing exercise, no more and no less.

[14] *Op. cit.*

The weight to be attached to such precariousness will be affected by other factors such as length of *de facto* residence, the culpability of the parties and their knowledge of precariousness, the best interests of any children involved, the nationality of the parties, the nature of the obstacles to relocation elsewhere, and the conduct of the Secretary of State, including any delay in resolving immigration issues. We should reject any attempt to short-circuit this fact-finding exercise. The courts have clearly shown that they are able to conduct the exercise (see for example the figures cited at footnote 121 of the consultation paper). Any attempt to limit the fact-finding of the courts, or to restrict their exercise of judgment, will be unlawful and will lead to unnecessary and costly litigation.

Our overriding response to the consultation questions on Article 8 is that the courts have shown themselves fully able to regulate the operation of Article 8 in an immigration context. While this will inevitably lead to some decisions with which the Secretary of State disagrees and also to decisions with which migrants and their representatives disagree such is the nature of judicial overview of the decision-making system.

IN GENERAL

Question 37: What more can be done to prevent and tackle abuse of the family route, particularly sham marriage and forced marriage?

See detailed ILPA responses above especially in light of the Chief Inspector's recommendations for better implementation of the current immigration rules and guidance which already address the stated aims of the consultation paper. *[Full response available at http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf]*

Question 38: What more can be done to promote the integration of family migrants?

See detailed ILPA responses above especially in light of the Chief Inspector's recommendations for better implementation of the current immigration rules and guidance which already address the stated aims of the consultation paper. *[Full response available at http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf]*

Question 39: What more can be done to reduce burdens on the taxpayer from family migration?

See detailed ILPA responses above especially in light of the Chief Inspector's recommendations for better implementation of the current immigration rules and guidance which already address the stated aims of the consultation paper. *[Full response available at http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf]*

Question 40: How should we strike a balance between the individual's right under ECHR Article 8 to respect for private and family life and the wider public interest in protecting the public and controlling immigration?

See detailed ILPA responses above especially in light of the settled and established human rights case law. *[Full response available at http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf]*