ILPA response to the UK Border Agency letter of 13 March 2012 re waiver of 72 hours' notice of removal in cases where a person consents to the waiver of notice.

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 950 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law 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, official and other consultative and advisory groups. The question of notice of removal is one that has engaged ILPA for many years and ILPA provided evidence in the *R(Medical Justice) v SSHD* case, both in the High Court (*R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 Admin) and in the Court of Appeal. ([2011] EWCA Civ 269).

ILPA is in receipt of Mr Walsh's letter of 13 March 2012 which sets out proposals for the waiver of 72 hours' notice of removal.

ILPA does not agree that the safeguards proposed are sufficient to ensure that the only persons removed with less than 72 hours' notice are persons who give informed consent to such removal. Hence we do not agree with the proposals in Mr Walsh's letter.

We consider that the proposals in Mr Walsh's letter provide insufficient safeguards against:

a) Inappropriate pressure being placed on detainees to 'consent' to removal and to maintain such consent; and
b) Removals that are unlawful.

Mr Walsh's letter sets out some safeguards but not the obvious one: that consent to removal, and any waiver of notice, come via a person's legal representative. This is, in ILPA's view, the only safeguard which could meet the exigencies of the situation.

ILPA has long protested that 72 hours' notice of removal is insufficient in many cases.

We concur with Lord Justice Sullivan in the *Medical Justice* case that consent does not justify departure from the normal notice period:

> *"The consent exception is based upon the same premise as the other exceptions, that is to say that giving less than 72 hours' notice and in some cases virtually no notice at all, does not give rise to a very high risk that the right of access to justice is being and will be infringed. That premise is a false premise, for the reasons given by the judge."* (Paragraph 38).

The judge in question was Mr Justice Silber, in the *Medical Justice* case in the High Court, and the reasons he gave were:

> *"90. … if the 2010 exceptions are invoked when the removal directions are made, there are formidable (if not invariably insurmountable) obstacles to be overcome because of the difficulties of first contacting an immigration lawyer; second the immigration lawyer might be unable to take on the case at such short notice; third the likely unavailability of crucial documents; fourth the problem of obtaining financial assistance and fifth the difficulties of the legal advisor being able to advise and obtain an injunction in the limited time available.*
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> *91. This conclusion is significant because it means that the obligation in safeguard (i) (which I have set out in paragraph 27 above) to inform a legal representative of the removal directions does not in itself facilitate access to the court. …"*

ILPA shares Lord Justice Sullivan's view that the risks are very high and does not consider that the UK Border Agency's proposals as set out in Mr Walsh's letter mitigate that risk. Under the proposals, the witness to any failure to observe the procedures described in the letter is the individual concerned, who is likely to have been removed far from the jurisdiction. ILPA members are aware how difficult it can be to stay or get it touch with individuals following removal. Their complaints may never be known.

The Agency is not independent; it has an interest in waiver being made. As acknowledged in Mr Walsh's letter, it stands to save money thereby. It also stands to effect a removal, something it is under considerable pressure, not least from the Home Affairs Committee, to do. The filename for Mr Walsh's letter as sent to ILPA and the subject line of the email under cover of which it was sent, was "Illegal migrants who wish to leave the UK, waiving their legal rights beforehand." This provides evidence that the UK Border Agency has, at some level, prejudged the question of whether those consenting to removal have, or are aware that they have, a lawful basis for stay in the UK.

In these circumstances the utmost good faith is not only required of the Agency, but required to be demonstrated by the Agency. That the Agency has in the past denied any interest in consents to removal[1] can only add to the pressure upon it to demonstrate such utmost good faith.

That the proposal set out in Mr Walsh's letter does not even canvas the possibility of consent coming via a legal representative, despite this possibility have been put in terms to the Agency by ILPA, *inter alia*, leads ILPA to consider that insufficient work has been done on the proposal and insufficient study made of the Agency's records on this matter and of the judgments of the courts.

[1] Statement of Andrew Elliott in the *Medical Justice* case in the Court of Appeal: in: *"There is no specific advantage either to UKBA or any UKBA employee if the consent exception is applied"*.

We therefore append to this response:

- ILPA's note of our meeting with Dee Bourke, then Director of Central Operations and Performance at the UK Border Agency, and Andrew Eliot of the Agency, on 7 January 2010;
- The witness statement of ILPA's Legal Officer, Steve Symonds, on the specific issue of consent, which was before the Court of Appeal in the *Medical Justice* case.
- ILPA's letter of 11 February 2010 to Lin Homer, then Chief Executive of the UK Border Agency re communication via legal representatives and the reply of Dee Bourke UK Border Agency, of 20 April 2010.[2]

We also set out in some detail the reasons for our conclusion that only by consent's coming via a legal representative will adequate safeguards against removal without informed consent freely given be provided. This will also, we trust, demonstrate that when we express scepticism as to some of the more sanguine assumptions associated with the proposal, we do so with good reason in the light of long experience. We acknowledge a degree of cynicism. But we consider that we have ample reason for this.

There will be persons who wish to depart immediately who would be unable to do so if consent has to come via a legal representative because they do not have a legal representative via whom consent can be given. Seventy-two hours is often insufficient time to instruct a legal representative. However, the difficulties caused to those individuals by delays of 48 hours (72 hours minus the 24 hours for which the UK Border Agency would propose to delay removal even in no-notice cases) or until the next available flight, (whichever is the longer) are, in our view, outweighed by the need to preserve the (albeit, in ILPA's view, inadequate) safeguards that exist against unlawful removal. We are surprised that the Agency does not consider that they are outweighed by the effort the Agency would have to put into implementing, maintaining, policing and monitoring the proper implementation of the proposals and can only conclude that the Agency has underestimated the challenge.

Removal without informed consent freely given

The history of removal in general and of removal without notice in particular is fraught with examples of incomplete and inadequate information and of the failure of such safeguards as are envisaged in policy to translate into practice and/or there to do the job intended of them. We trust that we have set out enough below to explain why we consider that we have good reason to approach the proposals in Mr Walsh's letter with the highest degree of scepticism. However good the intentions may be, we are far from sanguine as to what would happen in practice.

The questions highlighted in the *Medical Justice* case are nothing new. The case that led to the provision in the Asylum Appeals Act 1993 for rights of appeal to a 'special adjudicator' against refusal of asylum was one in which judicial reviews had failed and the persons who had claimed asylum were returned to Sri Lanka where they were

[2] This discussion is on-going; the latest is that Sonia Dower of the Agency is currently in the process of convening a meeting between ILPA, The Law Society and the UK Border Agency to discuss.

tortured. [3] The history of debates on the question of notice question of the notice of removal was traced back to 2005 in ILPA's *Response to the Consultation on the Draft Practice Direction on applications for permission to apply for judicial review in immigration and asylum cases*.[4] As set out therein, the evidence in support of the Home Office's arguments for reducing notice of removal was incomplete and the weight the Home Office sought to place on it unjustified.

At the 7 January 2010 meeting with Dee Bourke and Andrew Elliot of the Agency ILPA set out in detail why we did not consider that the Agency was in any position lawfully to treat consent as reason to waive the 72 hours' notice of removal.[5] ILPA's reflections on that meeting can be found in ILPA's witness statement for the *Medical Justice* case in the Court of Appeal, appended hereto. While Mr Walsh's letter suggests that the exception to the period of notice of removal is for the convenience of those consenting, Ms Bourke suggested at that meeting that it was there to protect the Agency against the use of consent to removal to frustrate removal. ILPA remains confused as to the mechanism envisaged by Ms Bourke, but clear that different persons have at different times advanced different reasons for the proposals without the reasons for the change in reasoning having been explained.

ILPA members have been involved and continue to be involved in cases where persons were removed unlawfully and where it took some considerable time (in one case some 18 months) to achieve their return from places where they were in danger.

In the meeting with Ms Bourke and Mr Elliot ILPA gave the example of a case before the European Court of Human Rights where the Court issued a 'rule 39 letter' requesting and requiring the UK not to remove the applicant. The UK Government's case was that the applicant told the escort that he did not mind being removed and was removed. There was no paperwork re the claimed agreement to the claimed voluntary removal notwithstanding the European Court of Human Rights Rule 39 having been invoked in the case and thus the interest of that Court. The Government's case was that the paperwork had been lost or destroyed.

This concern has not gone away. In recent months ILPA has been in communication with Jill Beckingham, Director of the Agency Records Management and Modernisation Programme at the UK Border Agency about, *inter alia*, our concerns at the information received in response to subject access requests where this information is held by private contractors in detention centres or handling escorts.[6] We have no confidence that adequate records are kept, let alone in a form that ensures that records can be retrieved and we are not confident that what is kept and could be retrieved is in practice retrieved.

In 2009 ILPA provided a witness statement and evidence in the *Nyombi* case (*R(N) v Secretary of State for the Home Department* [2009] EWHC 873 (Admin)). Mr Nyombi

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[3] *SSHD v IAT & an adjudicator in the matter of the appeals of Vaithialingam Skandarajah and Nadarajah Vikvarajah* [1990] Imm AR 492.

[4] Much of the early part of this history is set out in ILPA's 24 November 2006 letter at http://www.ilpa.org.uk/data/resources/13131/06.11.624.pdf

[5] See the note of the meeting appended hereto: **iii) Written consent from the person.**

[6] ILPA to the UK Border Agency 12 July 2011 and Jill Beckingham UK Border Agency to ILPA of 1 September 2011. There has been subsequent correspondence, and a meeting.

was unlawfully removed to Uganda while he had an application for judicial review outstanding. There he was detained and ill-treated. The Home Office was ordered by the courts to return him to the UK. He was subsequently recognised as a refugee, because it was recognised that he was at risk of persecution in Uganda. In that case Sir George Newman held that the Home Office was guilty of "a grave and serious breach" of the law. It was found as a fact that Mr Nyombi had been "deliberately misled" on the day of his removal and had been given no opportunity to get in touch with a lawyer or make a telephone call. The UK Border Agency admitted liability and Mr Nyombi was awarded £100,000 in damages.

ILPA's evidence in the case went to Detention Service Order 07/2008, which was about circumstances in which notice of removal would not be given and went beyond the published policy, not being known and not having been disclosed to ILPA or others to whom other Detention Service Orders had been disclosed and who had been promised that Detention Service Orders would be published on the UK Border Agency website.

The *Medical Justice* case was preceded by the cases of *T et ors v SSHD* [2010] EWHC 3572 (Admin).[7] The child T had been removed to Italy, a country where she had been in street prostitution. T was brought back to the UK. The UK Border Agency did not publish its decision to suspend removals of unaccompanied children without notice following the case of *T et ors*. Instead this only came to light in the *Medical Justice* case.

A considerable amount of evidence was put before the courts in the *Medical Justice* case, including by ILPA, with Steve Symonds, ILPA's legal officer providing witness statements in both the High Court and the Court of Appeal. The latter, appended hereto, addresses consent. Mr Symonds concludes by stating:

> `*…it is ILPA's position that*
>
> *1) Any consent to reduced notice of removal must be a)fully informed and b) freely given*
>
> *2) It cannot be both, unless the person giving the consent is able to access prior legal advice on the implications of giving such consent, which is not what happens in practice; and*
>
> *3) There is real danger that, if the Court permits an exception to the reduced notice policy where a person so consents without that consent being sought via the person's legal representative, the result will be to deny that person access to justice.'*

THE PROPOSED SAFEGUARDS

(1) Clearer instructions

(1) Individuals must approach the Agency specifically asking for a quick removal rather than this being canvassed by the Agency (or its sub-contractors)

[7] Appealed to the Court of Appeal *sub nome MA, BT & DA v SSHD* **[2011] EWCA Civ 1446**

The 19 September 2011 witness statement of Andrew Elliott of the UK Border Agency in the *Medical Justice* litigation indicates that this safeguard is not new as a matter of policy. Concerns centre on what happens in practice. We do not consider that the records kept by the Agency or its subcontractors are adequate to evidence that this has been done or to allow for monitoring of adherence to this instruction. In addition to our correspondence with Ms Beckingham, we draw attention to the 14 November 2011 statement of Ravi Low-Beer in the Medical Justice litigation which sets out the record-keeping in a sample of cases.[8]

We do not consider that this adequately distinguishes between expressions of distress and despair at being detained, and an informed decision to waive notice. In common parlance many people would regard removal after 72 hours (three days) as 'quick' and requests for a quick removal are not necessarily requests to leave within 72 hours. As we explained at the meeting with Ms Bourke and Mr Elliot, the Agency is at risk of allegations of putting persons under duress, including by use of force or threats, and we are surprised that it is not more anxious to mitigate this risk by requiring that consent to removal/return, with or without any waiver of 72 hours' notice, come via a legal representative.

(2) Individuals must provide an express waiver of their right to 72 hours' notice of removal

See comments on 1) above. Neither 1) nor 2) make provision for a person's waiving their right to 72 hours' notice of removal and then changing their mind.

(3) The material facts of the case must have been established before written consent to removal without 72 hours' notice will be canvassed

We see no means by which the Agency can be confident that it has all the material facts in period of less than 72 hours. It is proposed in Mr Walsh's letter that waiver should not be accepted from an unaccompanied child, from a trafficked person or from a person who is otherwise 'vulnerable.' This would involve the identification of the person as not being within one of those categories within 72 hours. ILPA's comments on the shortcomings of the screening process, which, with less immediate consequences, aims to make such rapid identifications, are pertinent here.[9]

(4) Written consent cannot be given at the premises in which the person is encountered.

This does not appear to us to add anything to (3) above. That it is suggested that the Agency could be satisfied in the time officers are at the premises that it had all material facts and that the person was in possession of all the information necessary to take an informed view on waiver of 72 hours' notice of removal, had taken such a view, and was freely waiving such notice, leads us to question whether the Agency has understood what informed waiver freely given entails.

[8] At paragraph 9.

[9] See for example ILPA's letter of September 2008 to Ms S Hutchinson Hudson of the Agency on the Asylum Intake Unit instruction pertaining to the he Detained Fast Track http://www.ilpa.org.uk/data/resources/13084/08.09.577.pdf

(5) Written consent must be given within normal office hours

This is only meaningful as an adjunct to ensuring that the person is able to take advice. But the person may not have a legal representative, or may be unable to reach the legal representative at once. That is why the only safeguard that ensures that the person has taken such advice as will ensure that the waiver is informed and freely given is that the waiver come via the legal representative. It may be relevant to ensuring that the UK Border Agency staff member dealing with the person is adequately supervised, but it does not guarantee this.

Nothing in the above explains how the instructions will be 'clearer,' but more importantly nothing in the above explains how adherence to the instructions could or would be monitored and/or enforced.

(2) More [*better*] informed consent

(0) As now, the requirement to sign a consent form

See comments under *(1) Clearer Instructions* above. The language of 'consent' is awkward in circumstances in which the Agency will require that it is the individual facing removal who raises the possibility of a rapid removal.

(I) Clear explanations from UK Border Agency staff, through an interpreter if necessary and forms in plain English

See comments under *(1) Clearer Instructions* above. In addition, clear explanations in a language a person understands, both in terms of the language used and the complexity of that language, are requirements if current explanations are to be lawful. They do not appear to add anything to the safeguards currently required and nor do they address the shortcomings of the current procedure: that UK Border Agency staff are not independent persons providing the explanation.

(II) Clear explanations of how to withdraw consent

See comments under *(1) Clearer Instructions* above and under (I) above.

(III) No removal within 24 hours of written consent being given.

Thus the whole process cuts notice of removal from 72 to 24 hours, a saving of 48 hours. This strengthens our view that the benefits to individuals are heavily outweighed by the risks.

This is inadequate as a safeguard in the absence of satisfactory safeguards around the initial waiver. It is further inadequate because of the lack of any means of guaranteeing that a change of mind will be recorded and acted upon.

(IV) **Post hoc *notification of the legal representative***

Where a person has a legal representative on the record, communication should go through their legal representative, as set out in ILPA's letter to Lin Homer of 11 February 2011. We see no justification whatsoever for considering *post hoc* notification of the legal representative to waiver coming via the legal representative.

That the proposal contains express consideration of the role of the legal representative makes it all the more incomprehensible that it does not address consent to removal/return, with or without any waiver of 72 hours' notice, being given via the legal representative. A legal representative notified post consent/ waiver being given will have less than 24 hours, even if the notification is given at once, as the proposal intends, to get in touch with their client and be satisfied that the client has given informed consent, and freely.

(3) Exceptionally vulnerable cases

The heading refers to those who are "exceptionally vulnerable, "suggesting that mere "vulnerability" is insufficient. But vulnerability to any pressure may call into question a person's ability to act freely and to be informed as to the consequences of waiver. A detainee is vulnerable to being persuaded to leave against their better judgment because of the experience of being apprehended and taken into detention and the distress of detention itself.

All those whom the Agency proposes to exclude from being removed with less than 72 hours' notice are indeed persons who may not be in a position to make an informed waiver, and whom the UK Border Agency could not be in a position to be satisfied were in a position freely to make an informed waiver. However, in addition to the more general concern that vulnerability to making a waiver that is not informed and is not freely given extends to all detainees, the exclusions are not well-drawn.

There is a real risk that persons who are children, or who are victims of human trafficking or are mentally or physically ill will not be placed within the excluded categories because they will not have been identified. Those who are trafficked or held in bonded labour in the UK may well be issued with false documents identifying them as adults. Trafficked persons may, including through fear, fail to identify themselves and UK Border Agency staff will not necessarily identify them as set out in the 11 November 2011 statement of Abigail Stepnitz in the *Medical Justice* case before the Court of Appeal. Similarly distress at being apprehended and/or detained may mask underlying physical or mental health problems, or learning disabilities. In *R (S) v SSHD* [2011] EWHC 2120 (Admin), R(*BA) v SSHD* [2011] EWHC 2748 (Admin) (26 October 2011) and *R(HA (Nigeria)) v SSHD* [2012] EWHC 979 the treatment of men with mental health problems in detention was found to breach Article 3 of the European Convention on Human Rights. In BA"s case the judge speaks of the "*callous indifference*" to his suffering. Rather than one case being a wake-up call and leading to changes in the treatment of mentally ill detainees, these cases form a pattern. They cannot inspire confidence as to how the proposed procedure will be operated.

We also recall the case of *Abdillaahi Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453. The Court of Appeal concluded that the conduct of what was then the Immigration and Nationality Directorate and HM Prison Service in the unlawful imprisonment of Mr Muuse "*was not merely unconstitutional but an arbitrary exercise of executive power which was outrageous*". It is clear that each of the Lord Justices considered that the then Home Secretary was fortunate to avoid a finding of reckless indifference to legality, which would have established misfeasance in public office. At paragraphs 73 and 74 of the judgment, Thomas LJ lists the key actions or omissions on the part of the officials and of the

department which the Court found to exhibit the outrageous nature of the conduct of the officials and the department in this case. The Court's conclusion, justifying the grant of exemplary damages in the case, was that:

> "*Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in the future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages.*"

Safeguards must be robust enough to stand up to conduct akin to that which the Court of Appeal finds as a fact to have occurred in the Muuse case. We consider that persons in detention and facing removal within 72 hours are vulnerable to the sorts of treatment that Mr Muuse received. Mr Muuse was rendered extremely vulnerable not because of his own history, physical or mental condition, but, quite simply, because of the way he was treated.

We do not suggest that these matters will always be detected within 72 hours. We do not claim that it is easy for a legal representative, particularly one newly instructed, to make these identifications in a short space of time either. But if a legal representative cannot be satisfied that they have an informed waiver freely given then they will not be in a position to transmit this to the Agency. This provides a safeguard.

Given the family removals process now operated we can envisage no circumstances in which a family would, were procedures followed properly, have less than 72 hours' notice of removal. Nor ought there to be such circumstances. Therefore the suggestion that there would be no exclusion for children or children/young persons the subject of an age dispute where they are part of a family unit appears to us wholly inappropriate.

We recommend that if the Agency wishes to pursue proposals for a waiver of 72 hours' notice it must turn its attention to developing a procedure whereby the notification comes via the legal representative on the record.

A removal on the basis of a waiver that is not informed and not given freely is unlawful. The proposal as drafted envisages unlawful removals.

ILPA
13 May 2012