House of Commons
4 July 2012

Debate:
The Work of the UK Border Agency

The Immigration Law Practitioners' Association (ILPA) is a professional association, the majority of whose members are barristers, solicitors and advocates practising in immigration, asylum and nationality law. Academics and non-Government organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law and to work for a just and equitable immigration, asylum and nationality law practice.

General

ILPA's recommendation to MPs is to dust off their old copies of *Hansard* from 1999 and to use what was said about the then Immigration and Nationality Directorate to act as an early warning system. The sense of an Agency losing its way that was present then is being remembered by many legal representatives and perhaps by MPs and staff in constituency offices. Take for example some comments of then Mr Peter Brooke, in the comments debate of 26 October 1999:

> *"A second index of a shambles is that, six months after the Home Secretary's very welcome letter telling colleagues that the very worst was over in the immigration service, lawyers daily release cases into my lap because they cannot get answers, in writing or by telephone, from the Home Office.*
>
> …
>
> *However, what I ask for most of all is a clear statement of the detail of the backlog facing the immigration service. I can see that the service might be crying out for a period of peace and quiet in which staff can get on with sorting out that backlog. It would be much easier for some of us to afford the service that relief and respite if we had a much clearer idea of the present policies, procedures and situation that we could advance to our desperate and bewildered constituents. Home Office officials are personally very courteous to me. I should like to respond to them in kind, if they would give me the tools to do so."*[1]

On 11 April 2012, the Home Affairs Committee published its Twenty-first Report of Session 2010-12 on *Work of the UK Border Agency (August-December 2011)*,[2] in the conclusions of which the Committee stated:

> "*2. The Committee has long suggested that the terminology and figures used by the UK Border "Agency" can be, at best, described as confusing and at worst, misleading. It would seem that, on this occasion, even their Chief Executive had difficulty in following the data provided to the Committee. The work of the "Agency" and any discussion on immigration will necessarily involve the use of statistics. It is vital that, when providing, figures, especially to a Committee of the House, that the information is consistent, clear and accurate. The Committee expects this to be the case in the future. It is difficult to*

[1] See also *HL Deb 29 March 1999 vol 599 cc4-7, HL Deb 25 March 1999 vol 598 cc1417-22.*
[2] HC 1722.

see how senior management and ministers can be confident that they know what is going on if the "Agency" cannot be precise in the information it provides to this committee..."

The Committee's doubts as to the capacity of the UK Border Agency to know what is going on because it does not have a proper grip on data and other information are consistent with findings of the Chief Inspector of Borders and Immigration. For example:

- In May 2012, the Chief Inspector reported on inspections of Gatwick North[3] and Heathrow Terminal 3[4] that had taken place during 2011, when the Border Force was still part of the UK Border Agency. He found that "*the Agency was not systematically recording or analysing data on ethnicity*" and had "*a poor understanding of appropriate selection indicators and risk profiles*". At Heathrow in two thirds of searches of persons, "*the search was neither justified nor proportionate*"; and at Gatwick this was the case in 71% of cases.

- In June 2012, the Chief Inspector reported on an inspection of visa sections in Africa.[5] His inspection was hampered by the "*lack of an audit trail...*" "[A] *robust quality assurance mechanism*" was also lacking. There was "*still a significant proportion of cases where applicants are refused entry clearance for failing to provide information, the need for which they would not have been aware of*", a problem he had reported in his global report on entry clearance the previous year.[6]

- In February 2012, the Chief Inspector reported on the Detained Fast Track. He found: "*The Agency did not record why* [substantial] *delays were occurring and was unable to demonstrate whether they were primarily to assist the applicant or due to resource or capacity constraints.*", and expressed concern that "*the Agency has not conducted and published any analysis of* [the] *operation* [of this process]."[7]

The only other report the Chief Inspector has published this year is that of his investigation into security at the border.[8] Among his findings were:

> "*Records showing the number of times border security checks were suspended and reasons for these were maintained at all ports. However, the level of detail recorded differed, and there were significant discrepancies between the records maintained at individual ports and records maintained centrally by the Agency... There was limited staff understanding at ports as to why accurate and detailed records needed to be maintained and how and whether the information would be used by the Agency to maintain management oversight, develop policy or change operational practice.*

[3] See http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Inspection-of-Gatwick-Airport-North-Terminal.pdf
[4] See http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Inspection-of-Border-Control-Operations-at-Terminal-3-Heathrow-Airport1.pdf
[5] See http://icinspector.independent.gov.uk/wp-content/uploads/2012/06/EMBARGOED-A-comparative-inspection-of-the-UK-Border-Agency-visa-sections-in-Africa.pdf
[6] See http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Entry-Clearance-Decision-Making_A-Global-Review.pdf
[7] See http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf
[8] See http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/2012-02-20-Report-of-the-UKBA-ICI-Report3.pdf

> "*Despite regular visits by senior managers, there were insufficient enquiries undertaken to find out precisely what was happening at ports. No process was put in place to analyse the number of occasions and reasons why checks were suspended...*"

Findings such as these are not new. They are consistent with findings the Chief Inspector has made in previous years. Inaccurate or incomplete record-keeping, inadequate understanding of the purpose of record-keeping or the utility of information, and arbitrary, inconsistent and disproportionate responses to persons subject to immigration control or subject to immigration powers are symptoms and causes of problems ranging far more widely than the subject matters of these reports. Some of the more pressing areas of concern are addressed under discrete subheading in the remainder of this briefing.

Backlogs

In the Government's response[9] to the Home Affairs Committee's Ninth Report of Session 2010-12, *The work of the UK Border Agency (November 2010-March 2011)*,[10] the Government states:

> "*On 31 March 2011 the UK Border Agency had reviewed all cases in the asylum backlog, ahead of schedule.*"

This is incorrect. There are thousands of cases still in the asylum legacy backlog. As ILPA has explained to the UK Border Agency, most recently at a meeting with Ms Jo Liddy[11] on 2 May 2012, ILPA members have large numbers of these cases. They include cases where individuals have remained in touch with the UK Border Agency through reporting and where ILPA members have remained on record as representing individuals for many years. They include cases where the individual or the legal representative has, in response to a request from the then Case Resolution Directorate, submitted passport-sized photographs in 2008, 2009, 2010 or 2011. Although it is not possible to calculate the number of such cases, it is clear to ILPA that there are large numbers of such cases – not tens, certainly hundreds, possibly more.

No action was taken following 31 March 2011 on large numbers of these cases. Neither individuals nor legal representatives were informed of the outcome of any review or that any review had taken place. In so many of these cases, passport-sized photographs were submitted to the UK Border Agency on its request prior to 31 March 2011. Had any meaningful review taken place by this date then how could they remain unresolved even now?

Parliament, the courts, the public, individuals in the backlog, their legal representatives and other agencies working with or supporting these individuals, had all be assured that cases in the asylum legacy would be resolved, not simply reviewed, by July 2011.[12] ILPA was asked to, and did, pass on the message that the resolution of cases in the legacy

[9] Published by the Home Affairs Committee on 28 May 2012 as its First Special Report of Session 2012-13, HC 142.
[10] HC 929.
[11] Regional Director for UK Border Agency North West and responsible for the Case Assurance and Audit Unit, which has responsibility for the remaining legacy cases.
[12] See e.g. *Hansard* HC, 19 July 2006: Columns 324 & 328; 25 July 2006: Column 736; *R (FH & Ors) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin) & *R (HG & Ors) v Secretary of State for the Home Department* [2008] EWHC 2685 (Admin).

would be completed by this date and that individuals should wait to hear from the Agency; because of the size of the backlog they would have to wait their turn. The UK Border Agency had been clear that 'resolved, ' save where it was able to confirm that the case was no longer 'live' e.g. because the person had already left the UK, meant either removal of the individual and any dependants or a grant of settlement (indefinite leave to remain).[13]

These assurances have not been met. In large numbers of cases no reason has been given as to why not. Instead, the UK Border Agency has sought to imply that it has met its commitment by statements that it has reviewed all cases. The UK Border Agency has complained to ILPAs that it is now overworked with letters threatening legal action, with judicial review applications and MP's correspondence.[14] But this is only to be expected. People have done all that was asked of them, have now waited more than six years for their cases to be resolved (some have waited decades) and have seen similar cases resolved while theirs remain pending. Their anxiety is increased by the Agency's statements suggesting that it has completed its legacy work.[15]

The unfairness and inconsistency has been compounded, particularly since July 2011, by person's receiving grants of discretionary leave for three years in circumstances where equivalent cases dealt with earlier in the backlog clearance received indefinite leave to remain.[16] A grant of discretionary leave does not resolve a case. What was promised was removal or settlement: a final resolution to the case. Those granted discretionary leave to remain must reapply to extend their leave in three years' time and then again after a further three years. By that time, many of these people will have been in the UK for decades.

Students

Last week, Damian Green MP, Minister for Immigration, was reported as saying that: "*The UK has been forced to launch a global charm offensive to convince foreign students it is not against immigration*".[17] In the same article, Nicola Dandridge, Chief Executive of Universities UK, is reported as saying that the aggregate of changes to the immigration rules and requirements affecting overseas students,[18] and the way these have been implemented, "*was in danger of putting Britain at a disadvantage to its major higher education competitors such as the US, Canada, Australia and New Zealand.*" The Minister said:

---

[13] This was made explicit in a secretarial note to the minutes of the September 2008 meeting of the Case Resolution Directorate, at which ILPA was represented.
[14] This was said to us at the 2 May 2012 meeting.
[15] See e.g. oral evidence of Jonathan Sedgwick to the Home Affairs Select Committee on 13 September 2011, Q17 *et seq*; see Ev1 at http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/1497/1497ii.pdf
[16] Figures provided in June 2012 to Asylum Aid following a freedom of information request (FOI 21018) show that in June/July 2011 the ratio of grants of discretionary leave to indefinite leave to remain per month in legacy cases was essentially reversed from approximately 1 in 10 grants being for discretionary leave to 9 in 10 grants being for such leave. The aggregate numbers of grants did not go down, but significantly rose from around 350-400 per more to around 600-700 per month.
[17] *Damian Green tells foreign students: Please come to UK*, BBC, 26 June 2012.
[18] Changes have included restrictions on whether and, if so, for how many hours per week a student may work; the removal of the post-study work category in Tier 1 (replaced by a more restrictive post-study work entry to Tier 2); restrictions on dependents coming to the UK and whether they may work; and raising of English language requirements.

> "*I think the sensible thing to do is to let the system bed down while we relentlessly go round the world saying the brightest students and the best are as welcome as ever to Britain.*"

Leaving aside the question as to why the UK should be concerned that only the 'brightest and best' students, whatever that may mean, should be studying at UK institutions, the trouble with the Minister's statement is that many overseas students' current experience does not accord with it. In May 2012, *The Guardian* newspaper reported three examples of cases where students who had come to the UK from South Africa, India and Bangladesh to study for a business degree, an MBA and an accountancy qualification respectively were left high and dry, having spent several thousands of pounds on course fees at colleges on the UK Border Agency approved list, when the UK Border Agency removed the licences of those colleges causing the colleges to close.[19]

In these circumstances, students should be given 60 days to find a new course provider, (approved by the UK Border Agency) whose fees they will have to pay, and apply with a fee for a new visa. The distress and expense caused, even if the student is able to find a new course provider, are exacerbated by rule changes that mean that new conditions apply to students just because, through no fault of their own, they have had to get a new visa. The three students are quoted in *The Guardian* as saying:

> "*Many of the* [other] *students* [affected] *ended up going home incredibly despondent and with a very poor perception of the UK... They didn't have the means to resubmit their visas and pay out again.*"

> "*The first thing I would tell someone in India who wants to study in the UK is not to do it.*"

> "*I thought coming to the UK would bring me a bright future. My teachers told me how good an education system the UK had. I would never recommend studying in the UK now. I feel robbed.*"

These are not isolated incidents. Nor is the poor treatment of overseas students by the UK Border Agency restricted to such situations. In January 2012, the Upper Tribunal (Immigration and Asylum Chamber) allowed the appeal of a student, who applied to extend his leave in the UK to continue further studies.[20] His application was refused because in checking whether he had completed his first course successfully, the UK Border Agency received information from the first college that he had not. That information was incorrect, but the UK Border Agency took no steps to check with the applicant as to this apparent discrepancy on his application. It simply refused his visa, taking his fee, without notice. The Upper Tribunal also referred to other appeals it had recently decided where applicants for student visas had their applications refused by the UK Border Agency because, unbeknownst to them and after their applications were made, the UK Border Agency revoked the licenses permitting the relevant colleges to enrol overseas students (from outside the European Union).[21] The applications were refused without warning or opportunity to find an alternative course, and the visa fees taken.

---

[19] *Stranded: the students and staff hit by the crackdown on 'bogus' colleges*, 14 May 2012.
[20] *Naved* (Pakistan) [2012] UKUT 00014 (IAC).
[21] *Patel* (India) [2011] UKUT 00211 (IAC); *Thakur* (Bangladesh) [2011] UKUT 00151 (IAC).

It cannot be assumed that the reputational damage to the UK caused by the UK Border Agency mistreatment of these students is limited to the UK's capacity to attract overseas students.

Detention

ILPA has twice this year requested a meeting with the Chief Executive of the UK Border Agency in view of growing concerns about the use of detention. To date, the Chief Executive has not been able to meet with us and our last request of 14 May 2012 remains unanswered. In that letter, we drew attention to findings by the High Court, in three cases of mentally ill men held for extended periods in immigration detention, that the circumstances of their detention were not only unlawful, but so improper and damaging as to constitute a violation of their right not to be subject to torture, inhuman or degrading treatment (Article 3, 1950 European Convention on Human Rights).[22] In one of those cases, the judge speaks of the "*callous indifference*" to the man's suffering.[23]

Since our writing in May, there have been three further cases of the High Court finding detention of mentally ill men to be unlawful.[24] Whereas these more recent cases were not brought on Article 3 grounds, all these cases together form a pattern and are indicative of grave shortcomings in the UK Border Agency's treatment of immigration detainees.

In October 2010, the UK Border Agency changed its policy on 'suitability' for detention. The changes significantly extended the circumstances in which the elderly, mentally ill and those with serious medical conditions could be detained to, on the face of the policy, circumstances in which a person's health, care or supervision needs cannot be met in detention.[25] This was a dangerous extension of the policy, and may provide part of the explanation for the pattern that is now emerging of mentally ill persons being unlawfully held in detention, often over several months, causing grave damage to their health.

ILPA objected to the changes at the time, and warned the UK Border Agency as to their possible effect at the then quarterly Detention Users Group.[26] The UK Border Agency abandoned the group in 2011, and replaced it with a meeting that it said would deal only with operational matters, not policy, and whose proceedings would remain

[22] *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin), *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) and *R (HA(Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin).
[23] See paragraph 237 of *R (BA) op cit.*
[24] *R (C) v Secretary of State for the Home Department* [2012] EWHC 1543 (Admin), *R (Aziz Lamari) v Secretary of State for the Home Department* [2012] EWHC 1630 (Admin) and *R (Rahul Anam) v Secretary of State for the Home Department* [2012] EWHC 1770 (Admin).
[25] Previously, the policy stated that "*those suffering from serious medical conditions or the mentally ill*" were "*normally considered suitable for detention in only very exceptional circumstances*". Since that date, the policy has stated that "*those suffering serious mental illness which cannot be satisfactorily managed within detention*" are "*normally considered suitable for detention in only very exceptional circumstances*".
[26] ILPA both wrote to the UK Border Agency about the matter in October 2010 and raised concerns at the final meeting of the Detention Users Group in that same month.

confidential. ILPA declined to join the group on these terms and ours is not the only expertise that has been lost.[27]

Conclusions

The Home Affairs Committee began its most recent report on the work of the UK Border Agency[28] with the statement that:

> "*Since 2006, the Home Affairs Committee has undertaken to examine the UK Border "Agency" on a much more frequent basis than would usually be the case because of the deep concerns about the performance of this organisation...*"

The specific areas of concern referred to in this briefing are not intended as exhaustive of ILPA's concerns. Rather they stand as examples of the UK Border Agency's ongoing failures to treat people and their applications, appeals and circumstances consistently, fairly and lawfully.

It has long been popular for the UK Border Agency to suggest that its difficulties are related to external factors – such as the non-cooperation of individuals, the bringing of legal challenges against the UK Border Agency and its decisions, and the decisions by the courts and tribunals including on what is said to be new evidence. Consistently over many years, Governments and Parliament have responded by conferring new powers on the UK Border Agency and introducing ever greater constraints on the access to the tribunals and courts of those subjected to the its powers and decisions. At this point in time, provisions of the Crime and Courts Bill,[29] and the Immigration Appeals (Family Visitor) Regulations 2012, SI 2012/1532, continue this trend, including in relation to the removal of appeal rights in family visit cases in a way to which the Home Affairs Committee had signalled its objection in its Ninth Report of Session 2010-12 on *Work of the UK Border Agency (November 2010-March 2011)*.[30]

However, ILPA's experience, consistent with findings of the Home Affairs Committee and the Chief Inspector, is that the UK Border Agency has not improved its practices as a result of being granted more powers and of receiving less independent judicial scrutiny. What is needed is a reversal of this trend, with the Agency held to account more, not less.

The recent Home Office statement[31] on the human rights compatibility of the most recent changes to the Immigration Rules[32] asserts that the approach of the UK courts and tribunals in applying Article 8 of the 1950 European Convention on Human Rights in individual cases:[33]

> "*...has led to unpredictability and inconsistency which are anathema to good administration.*"

---

[27] Bail for Immigration Detainees, the Refugee Council and Freedom from Torture (formerly known as the Medical Foundation) are among former members of the Detention Users Group.
[28] See fn 1.
[29] See ILPA's HL Second Reading briefing at http://www.ilpa.org.uk/data/resources/14767/12.05.24-ILPA-Second-Reading-Briefing.pdf
[30] HC 929, paragraph 31, page 15.
[31] See http://www.ukba.homeoffice.gov.uk/sitecontent/documents/news/echr-fam-mig.pdf
[32] Statement of Changes in Immigration Rules (HC 194).
[33] See paragraph 11 of the compatibility statement *op cit*.

This is to confuse cause and effect. Inconsistent and unpredictable decision-making by the UK Border Agency has demanded the intervention of the courts and tribunals. Delays and the build up of backlogs by the UK Border Agency, coupled with failures to follow its own policies, have compounded this; as has arbitrary and unfair decision-making which fails to have regard to the evidence and relevant facts, or refuses any opportunity for individuals to provide evidence or answer any concerns on the basis of which the UK Border Agency acts.

Among the many inadequacies of the most recent Statement of Changes in Immigration Rules on family migration,[34] the newly extended routes to settlement requiring multiple applications by individuals and family members over periods of five or ten years. A minimum of three or five applications will be required under these routes respectively. Not only are these antithetical to integration, family stability and the welfare of children, by reason of the extended period of uncertainty as to individual family members' futures in the UK; but these establish routes to settlement in which the UK Border Agency must successfully manage many more applications over an extended period of time. It has not proved itself up to such a task, and these Immigration Rules' changes risk the build up of new backlogs among those on the family migration route.[35]

For further information please get in touch with Alison Harvey, General Secretary ILPA on 0207 251 8383, alison.harvey@ilpa.org.uk

[34] *Op. cit.*

[35] More on the new Immigration Rules is available from the relevant section in ILPA's recent written submission to the Joint Committee on Human Rights at http://www.ilpa.org.uk/data/resources/14951/12.06.29-JCHR-submission-legis-scrutiny-2012-13.pdf