

ILPA Submission to the Home Affairs Committee Enquiry into Trafficking

A. Introduction

1. ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder groups including the NGO/Stakeholder Consultative Group on Human Trafficking and the Child Trafficking Advisory Group and has provided evidence to many parliamentary committees and in the course of debates on legislation on the subject of trafficking.
2. This response is of necessity brief; for a membership organisation such as ILPA the short timescale of this consultation presents a challenge. We have therefore focused on a few areas that may receive less attention from other participants. A selection of ILPA's broader work on this topic will be found in the previously submitted material annexed to this report. ILPA is happy for this submission to be made public.

B. Executive Summary

3. In this response we concentrate on the following terms of reference:
 - The difficulty of finding those who have been trafficked when they are normally too frightened to complain to the authorities; and the role of NGOs in helping to identify and assist victims;
 - Effectiveness of the co-ordination between public authorities in the UK (Home Office, FCO, police forces, Serious Organised Crime Agency, Border and Immigration Agency, social services).
4. We deal with these in four specific contexts:
 - Access to legal advice and representation
 - People who have been trafficked in the detained asylum fast track
 - Age disputes
 - Interface between the immigration and criminal justice systems.
 - New penalties for working illegally
5. We have dealt with a number of matters raised by other terms of reference in previously published submissions (annexed hereto) and the final part of the text explains where to find this information in the Annexes and highlights subsequent developments.

C. ILPA submissions

I. Identification

Terms of reference of the Enquiry: The difficulty of finding those who have been trafficked when they are normally too frightened to complain to the authorities; and the role of NGOs in helping to identify and assist victims;

I.A Access to legal advice and representation

6. While the terms of reference refer to the role of NGOs in helping to assist and identify victims, ILPA wishes to emphasise that legal representatives can play a very important role in ensuring that a person who has been trafficked is identified. Although not every trafficked person has an irregular immigration status (as for example when a person from a member State of the European Union is trafficked), many will have. At the time when they go and see a lawyer, it may be that no one is aware that they have been trafficked. The skills of the legal representative in identifying that the person has been trafficked will then play an important part in identification.
7. Many trafficked people do not come to attention of people working in NGOs or support groups. Most come through other routes such as via police, prisons or social services first. Legal representatives, whether immigration or criminal practitioners, have access to people in prisons and police stations.
8. Skill alone is not enough: the context in which skills are deployed is important. These cases may involve related criminal proceedings, and/or intelligence gathering to gain information about the traffickers. This should increase if government proposals to take action against trafficking in human beings, including ratifying the Council of Europe Convention are implemented¹. Clients may need to be accommodated in safe houses or shelters and in some cases open visits to representatives will not be possible. Clients may be suffering physical injuries and are likely to be extremely distressed. Cases will often involve obtaining medical or psychological evidence. People may need time to think about past traumatic events, and to establish a sufficient level of trust and confidence to reveal the painful and humiliating details of their experiences².
9. These cases are both evidentially and legally complex. If a person may become a witness in the criminal trial of a trafficker, then it is important that all evidence gathering, including by the Border and Immigration Agency and legal representatives, meets standards that do not call into question whether

¹ See Tackling Human Trafficking – Consultation on proposals for a UK Action Plan, Home Office and Scottish Executive, January 2006 and ongoing work including the Home Secretary's announcement on 14 January 2008 that the UK would ratify the Council of Europe Convention on combating trafficking in human beings before the end of 2008.

² See 'Impact of sexual violence on disclosure during Home Office interviews', Diana Bögner, Jane Herlihy, Chris R. Brewin, *The British Journal of Psychiatry* (2007) 191: 75-81.

the evidence is sufficiently robust to be relied upon in a criminal trial. It takes time to build a solid relationship of trust and confidence.

10. The Legal Aid fixed fee regime allowing a fee of £450 for an asylum case and only £240 for an immigration case (and calculated based on hourly rates that have not been adjusted to take account of inflation since April 2001) does not provide the time necessary to deal with these cases.
11. The fixed fee is lifted, and the lawyer paid an hourly rate, if the hours worked exceed three times those allowed for under the fixed fee regime (the 'exceptional cases' threshold). However, a complex trafficking case does not always exceed this. ILPA has argued that the level of exceptionality is set too low. This can be demonstrated by looking at some cases that predate the fixed fee regime. For example, one very complex trafficking case, which went to a panel hearing at the Asylum and Immigration Tribunal with some three pre-hearing reviews, would not have reached the exceptional cases threshold under the fixed fee system. Because the calculation is based on the profit costs of the solicitor and the costs of representation at court are deducted from the total costs, although the case was a very expensive case in the end, it only reached the level of approximately 2.7 times the fixed fee. Had fixed fees been in force at the time the lawyer would have got only the fixed fee. In another case different representatives acted at the Legal Help and Controlled Legal Representation stages, necessitating a certain amount of extra work. There were two clients, an appeal before a panel of the Asylum and Immigration Tribunal, an adjournment for the Home Office to reconsider, which they did only when faced with evidence from the police on risk. Yet the case did not quite reach what is now the exceptional cases threshold. This was a case where related criminal proceedings resulted in the trafficker being jailed for 21 years.
12. The changes to the legal aid regime affect not only the time that is to be spent on a case but also the availability of lawyers doing this work. As a result of the legal aid changes in 2004 a significant number of immigration lawyers ceased to do immigration work, or reduced the proportion of their immigration work done on legal aid as opposed to privately. The new contracts in October 2007 are having the same effect, the full extent of which is unlikely to become apparent for many months. It can take a considerable time to find a legal representative with the capacity and skills to take on a legal aid trafficking case, and a person under surveillance by his/her traffickers may have limited time to make contact.
13. Traffickers may make use of clandestine routes of entry and of false documents, whether to traffic people to the UK or to attempt to traffic them onwards to another country. If apprehended, the trafficked person themselves may face criminal prosecution, as discussed below. The person may be detained under immigration act powers. A three-hour cap on travel is now imposed on lawyers wishing to visit detained clients. Thus, if a lawyer travels more than three hours to a prison or detention centre, they can still only claim three hours travel time. There may be no legal aid representatives within three hours travel with the capacity to take on new detained cases, let

alone the specialist experience. Then, unless lawyers are prepared to subsidise the payment of travel, no representative will be found.

14. The speed of procedures to decide a case also make up part of the context in which the lawyer's skills are deployed. At the moment the situation can be summarised as cases, in particular asylum or human rights cases, going through the system too fast or too slowly. Cases of those who claimed asylum or protection from violations of their human rights before approximately March 2007 and remain in the UK without leave, are dealt with by the Border and Immigration Agency's Case Resolution Directorate, which aims to resolve the cases by July 2011. New cases involving asylum or human rights processed through the New Asylum Model where the target is that the whole case is resolved by a grant of leave or removal within six months. While this may not sound unreasonable as an end-to-end procedure the stages are unevenly divided so that initial interviews can happen very rapidly, with little time for a lawyer to take instructions, and it is members' experience that it is extremely difficult to obtain adjournments in these cases for the collection of medical or further other evidence.

1.B Cases of trafficking in the Detained Fast Track

15. Not all those who have been trafficked will claim asylum or claim that return will breach their human rights. Such claims must be founded on risk on return; past suffering and persecution may be part of the evidence of a risk on return but are not in themselves sufficient to found a claim. However, in many cases the circumstances that led the person to be vulnerable to trafficking in the first place, or a risk of being trafficked in the future, will mean that a person who has been trafficked claims that return would result in his/her persecution and/or a breach of human rights.
16. The detained fast track process is an accelerated procedure for dealing with asylum cases. People are detained for administrative convenience in processing their cases. On 29 January 2008, the Grand Chamber of the European Court of Human Rights issued a judgment in *Saadi v UK* (Application no. 13229/03) on accepting that detention as part of accelerated procedures can be lawful where it is part of a process to determine whether a person should be given leave to enter the UK, is not arbitrary and is proportionate. In January 2007, ILPA published *The Detained Fast Track Process: a best practice guide*, which will be launched in parliament on 25 February 2007.
17. The Border and Immigration Agency policy, set out in its 'Suitability List' is that claims
*'Where there is independent evidence from a recognised organisation, e.g. the Poppy Project, that that the claimant has been has been a victim of trafficking are unlikely to be accepted into the detained fast track process'*³.

³ Border and Immigration Agency *Asylum Process Instruction Suitability for Detained Fast Track and Oakington processes* 28 July 2007

18. ILPA's view is that cases of trafficking will never be suitable for detained fast track procedures.
19. The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking⁴ recommend ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.
20. Cases are selected for inclusion in the detained fast track process at a very early 'screening' stage. At this stage there is likely to be little or no information about the substance of the claim. Thus the 'suitability list' functions as a tool for lawyers of those applicants who are legally represented to argue that the case should be lifted out of the detained fast track rather than a means to determine whether or not such cases end up in the detained fast track. While the Asylum Policy Instruction on Gender Issues (October 2006) states that

'further guidance on handling claims where the applicant has or is believed to have been trafficked into the UK for sexual exploitation will soon be available in an Asylum Process Notice'

No such notice has been issued. This is particularly unsatisfactory when Article 10 of the Convention requires the adoption of such measures as may be necessary to identify victims. This requires an active approach to identification.
21. ILPA recommends that the Border and Immigration Agency change its 'Suitability' policy to provide that where there is evidence to suggest, or where circumstances lead the interviewing officer to identify that a person *may* be a victim of trafficking then the case should not be included in the fast track. The Border and Immigration Agency should also change its instructions to staff on detention⁵ to provide that where there is evidence to suggest, or where circumstances lead the interviewing officer to identify that a person *may* be a victim of trafficking that person should not be detained.
22. Once a case is in the fast track it is ILPA member's experience that the case will normally will remain in the fast track unless the person has been accepted for assessment at the Poppy Project, the Helen Bamber Foundation, or the Medical Foundation. The Poppy Project deals only with adult women who have been victims of trafficking for sexual exploitation. There is a real risk that people who have been trafficked will not be lifted out of fast track procedures.
23. In *The Detained Fast Track process: a best practice guide* there is an example of a case that predated the change in the 'Suitability List' that now makes express reference to the Poppy Project. The screening interview referred to the female client having been involved in opposition politics in Guinea, having been brought to the UK by an agent and having then been kept for some

⁴ The official Explanatory Report to the Convention states that this chapter of the Convention "is centred on protecting the rights of trafficking victims, taking the same stance as set out in the United Nations *Recommended Principles and Guidelines on Human Rights and Trafficking in human beings*".

⁵ Operational Enforcement Manual Chapter 38

time in the house of the agent and not allowed to leave. An experienced and skilled representative was able to discern from this brief sketch that there was a possibility of trafficking. The right questions were asked and the client disclosed having been trafficked for prostitution. The case was immediately referred to the Poppy Project. The fast track asylum interview did not await the outcome of the refusal and the immigration service also refused to delay taking a decision on the case for the Poppy Project to make an assessment and for expert evidence to be obtained. The Poppy Project did indeed accept the referral, recorded physical and mental health problems arising and asked that the case be taken out of the fast track as a matter of urgency. This did not happen. The appeal was listed for four days time. The representative requested of the Asylum and Immigration Tribunal that the case be removed from the fast track and the appeal adjourned to give time to obtain expert evidence. The day before the appeal hearing the Asylum and Immigration Tribunal phoned the representative with the news that an immigration judge had decided that the case should be taken out of the fast track. This was done and the client was immediately transferred into the care of the Poppy Project. A successful outcome, but one that took considerable time to achieve.

24. Even under the amended procedures, the process is not delayed until such time it is unclear that the process would have been delayed until such time as the Poppy Project had made an assessment. On 3 October 2007, the Strategic Director for Asylum in the Border and Immigration Agency, wrote to Asylum Aid and the Anti-Trafficking Legal Project (AtLeP), who had requested that referrals to the Poppy Project be treated in the same way as referrals to the Medical Foundation for the Care of Victims of Torture, saying

'In relation to your recommendation that upon receipt of a letter from the Poppy Project stating that they wish to assess a woman in the detained fast track, the case should be taken out of the fast track. I understand your concerns but I am afraid that it is not possible to release these individuals from the detained fast track until they have been interviewed/assessed. We will do all we can to work with the UKHTC [UK Human Trafficking Centre] and Poppy to try and ensure that the assessment is done within a reasonable time frame. If, following an interview/assessment, a representative from the Poppy Project or the UKHTC has reasonable grounds to believe that an individual has been trafficked, we already try to release them as quickly as possible, usually within 24 hours.'

I.C Age Disputes

25. Special attempts to protect trafficked children will only benefit those children if they are recognised as children. Disputes over age are a huge barrier to such recognition. The ILPA Report *When is a child not a child? Age disputes and the process of age assessment* examined the question of disputes over age in great deal. The primary recommendation of the report is that the Home Office should follow its own policy and that age dispute procedures should only embarked upon when there is a real reason to do this, not simply because the young person could be a bit older than they say they are. The report provided a plethora of evidence that this is not what was happening in

practice. Statistics available showed age disputes in almost 45% of cases. Statistics on the percentage of those resolved in the child's favour were not available but statistics collected for the research showed age disputes resolved in favour of the child running at between 49% and 80% of all disputed cases. On 31 January 2007 the Border and Immigration Agency published *Better Outcomes: the way forward, improving the care of unaccompanied asylum seeking children* in which it announced that one Key Reform would be 'Putting in place better procedures to assess age in order to ensure children and adults are not accommodated together.'

26. The welcome given to this was muted not only because of the long delay (the consultation closed on 31 May 2007) but also because the Home Office indicated that it would continue to investigate the use of ionising radiation (x-rays) to determine age, despite responses to the consultation from the Royal College of Radiologists, the British Dental Association, the Royal College of Paediatrics and Child Health, the Children's Commissioner for England and Wales and numerous others, voicing their opposition to the use of a non-therapeutic procedure that will not in any event determine age, as well as a learned legal opinion which described in detail the risks that such procedures would be unlawful. In his preface to the ILPA Report *When is a child not a child* the Children's Commissioner for England and Wales had described some of the arguments deployed by the Border and Immigration Agency on the use of X-rays in their original consultation document⁶ as IA in their consultation document as 'deceitful and duplicitous'.

2. Effective coordination

Term of reference of the enquiry: Effectiveness of the co-ordination between public authorities in the UK (Home Office, FCO, police forces, Serious Organised Crime Agency, Border and Immigration Agency, social services).

2.A People who have been trafficked – interface between the immigration and criminal justice systems

27. ILPA members practice in immigration law, but some also practice criminal law and in addition immigration lawyers representing people who have been trafficked see some of their clients caught up in the criminal justice system. Article 16 of the European Convention on Combating Trafficking in Human Beings imposes an obligation upon states to make provision for people who have been trafficked and have been compelled to be involved in unlawful activities not to be penalised for so doing.
28. The Crown Prosecution service has issued, and revised, guidance on 'Prosecution Of Defendants Charged With Immigration Offences Who Might Be Trafficked Victims'⁷. This guidance draws particular attention to cases where people who have been trafficked may face charges of

⁶ *Planning better outcomes and support for asylum-seeking children: a consultation document*, 2007

⁷ December 2007

- *using a false instrument under section 3 of the Forgery and Counterfeiting Act 1981;*
 - *possession of a forged passport or documents under section 5 of the Forgery and Counterfeiting Act 1981;*
 - *possession of a false identity document under section 25 Identity Cards Act 2006;*
 - *failure to have a travel document at a leave or asylum interview under section 2 Asylum and Immigration (Treatment of Claimants) Act 2004.*
29. It enjoins upon prosecutors to consider whether the public interest is best served in continuing the prosecution in cases where the person is considered to be a 'credible' trafficking victim on the basis of 'information or evidence that has been obtained and submitted by a police officer or immigration officer for the immigration matter'. Information from other sources is to be submitted to the investigating officer.
30. The guidance also identifies that recent cases have highlighted the following offences as likely to be committed by child trafficked victims:
- *theft (in organised "pickpocketing" gangs), under section 1 Theft Act 1968;*
 - *cultivation of cannabis plants, under section 6 Misuse of Drugs Act 1971*
31. Children are also being prosecuted for false document offences as illustrated by cases such as *R v Wang* [2005] 2 Cr App R (S) 492 , *R v J* (Court of Appeal 20 July 2007 brought by the Howard League).
32. Despite this guidance, and the strong support for the principles it contains voiced by the Director of Prosecutions when he addressed the All Party Parliamentary Group on Trafficking in 2007, prosecutions of people who have been trafficked continue. Are prosecutors sufficiently trained to be able to spot where there are indications that a person has been trafficked? Are they taking a sufficiently proactive role in implementing the guidance and requiring cooperation of investigating officers? Are investigating officers doing enough to examine trafficking, whether in the first instance or when asked to do so by a prosecutor? These are matters that the Committee could usefully explore in the course of this Enquiry because the Crown Prosecution Service guidance will have no practical effect until investigating officers are given appropriate training and encouraged to take a pro-active role in investigating the possibility that a defendant may have been a victim of trafficking. Victims of trafficking should be recognised as such because they should be protected, but also because it is in the wider interests of the justice system; they are potential witnesses to serious organised crime. Unless they are identified as victims of trafficking it is unlikely that more widespread prosecutions of traffickers will be possible.
33. In July 2007 the first ever award of compensation was made by the Criminal Injuries Compensation Authority (CIJA) to EM, a victim of trafficking in the UK. MM was a young adult trafficked for sexual exploitation. MM gave evidence in the criminal prosecution of her trafficker. She was granted humanitarian protection in the UK. MM was awarded £66,000 for sexual abuse (£22,000 in accordance with the CIJA tariff) and £40,000 for loss of

earnings. Her younger sister, EM, a minor when trafficked was awarded £36,500, £20,00 of that being for loss of opportunity.

2.B Employer sanctions

34. The Immigration (Restrictions on Employment) Order 2007 (SI 2007/3290) will come into force on 29 February 2008. This will see the coming into force of the new regime for a combination of prosecutions and civil penalties for employers who employ people who do not have permission to work in the UK for which provision was made in the Immigration, Asylum and Nationality Act 2006. Not everyone trafficked to the UK will not have permission to work, but this will be the case for many. The March 2007 Border and Immigration Agency Enforcement Strategy which includes a statement that the Agency will

‘develop regional partnerships with workplace enforcement teams from HM Revenue and Customs (HMRC), Department for Work and Pensions (DWP) and Department of Trade and Industry, to track down and punish unscrupulous bosses who exploit the system;’

35. Paragraph 7.5 of the Strategy says that the Agency will

‘...create a network of Border and Immigration Agency compliance teams by April 2008, to help licensed employers and academic institutions operating under the Points-Based System comply with the requirements of the new system, whilst also capturing knowledge about abuse in their sector and feeding the information back into the system. An increased number of compliance officers will check on prospective sponsors’

36. The Home Office’s Illegal Working Taskforce Regulatory Impact Assessment for the Immigration, Asylum and Nationality Bill 2006, published 25 June 2005, records that since 1989 a total of 17 employers have successfully been prosecuted under the UK’s existing provision for employer sanctions, s.8 of the Asylum and Immigration Act 1998. In the two years for which figures were then available (2004 and 2005), a total of 5111 ‘illegal workers’ had been detected. The Home Office’s stated intention⁸ is to operate the current law more effectively,
37. Will new attempts to enforce employer sanctions result in more removals of trafficked people before there has been an opportunity for voice their fears of risks on return, or will it interrupt the activities of more traffickers?
38. On 20 June 2007 the UK published an Explanatory Memorandum⁹ on the European Commission’s 16 May 2007 proposal for a directive¹⁰ on illegal

⁸ Hansard, HL, 15 May 2007, Col WS8.

⁹ Submitted by the Home Office on 20 June 2007.

¹⁰ Proposal for a Directive of the European Parliament and of the Council providing sanctions against employers of illegally staying third country nationals Council document 9871/07, Com (2007) 249 final, SEC (2007) 604.

working¹¹. The UK Memorandum evinces little enthusiasm for measures that would enhance the protection of migrant workers. The UK will have the option of opting into the proposed Directive if it becomes law. The proposed Directive would allow foreign nationals to register complaints and have protection against exploitative working conditions¹². In its Explanatory Memorandum, the UK does not express a view on this proposal beyond references to the Gangmasters Licensing Act 2004 and to 'existing UN and EU Conventions' on trafficking.

39. Article 15 of the proposed Directive would require member States to inspect staff records at a minimum of 10% of companies in the country. Companies would be selected on the basis of a risk assessment. As to the matters on which the risk assessment will be based, breaches of health and safety law, breaches of tax or customs regulations, benefit fraud and general criminality are the examples given in the Home Office's Explanatory Memorandum on the proposal, which observes that the UK has no central department responsible for workplace assessments¹³.
40. The Committee could usefully devote resources in its enquiry to establishing the extent to which employer sanctions in the UK will be set within a wider framework of workplace inspections, with a view to protecting all workers from exploitation and abuse. Such an approach, carried through in careful joint working, could mean that enforcement work around employer sanctions had the potential to provide protection to people who have been trafficked, rather than increasing risk to them through a hasty removal.

3. Other matters.

3.A Implementation of the Council of Europe Convention on Combating Human Trafficking and the Treatment of those with no legal right to remain.

Term of reference of the Enquiry: The treatment of those who have been trafficked but have no legal right to remain in the UK, including the requirements imposed by the Council of Europe Convention on Combating Human trafficking;

41. We refer you to our submission at Annexes one and two, which treat of this topic in detail. The question of residence permits is of particular importance. The European Union Council Directive of 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities" provides at 8(3) for a residence permit for a *minimum* period of six months.

¹¹ For a detailed discussion of the proposals, see Guild, E. & S. Carrera, An EU Framework on Sanctions against Employers of Irregular Immigrants Some Reflections on the Scope, Features & Added Value, CEAPS Policy Brief, No. 140, 2007 available at www.libertysecurity.org/IMG

¹² Article 14.

¹³ *Op Cit.* para 37.

3.B Cooperation within the European Union

Terms of reference: Co-operation within the EU (including Europol); and control of the EU's external frontiers;

42. We refer you in particular to our submission at Annexe three, although the submissions at Annexes one and two also treat of this topic. On 5 December 2007 ILPA gave evidence to the House of Lords European Union Committee (Sub-Committee F – Home Affairs) Enquiry into FRONTEX¹⁴, the latest in a number of presentations to the European Union Committee on matters of EU coordination.

3.C Coordination in the UK

Terms of reference Effectiveness of the co-ordination between public authorities in the UK (Home Office, FCO, police forces, Serious Organised Crime Agency, Border and Immigration Agency, social services).

43. In addition to the comments made above we refer to the documents at Annexes one and two.

4. Material relevant to other terms of reference in previously published work

44. ILPA would like to take this opportunity to bring to the attention of the Committee our existing responses to consultations on trafficking, which are annexed hereto.
1. ILPA Submission to the Joint Committee on Human Rights Enquiry into Human Trafficking together with the Annexe, as submitted to the Committee, extract from ILPA's *Child first, migrant second: Ensuring that Every child matters* - Chapter 6, Trafficked children and young people. (ILPA's oral evidence to the Joint Committee is published as part of the Committee's Report ¹⁵ see <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrightts/245/6060501.htm>
 2. ILPA April 2006 response to *Tackling Human Trafficking – Consultation on proposals for a UK Action Plan*, Home Office and Scottish Executive, January 2006 the Home Office consultation
 3. ILPA January 2007 response to the European Commission Communication: Fighting trafficking in human beings - an integrated approach and proposals for an action plan COM(2005) 514 final

We should be pleased to make any of the ILPA reports and responses to which reference is made in this submission available to the Committee.

¹⁴ See <http://www.publications.parliament.uk/pa/ld200708/ldselect/lddeucom/999/euf051207evl0.pdf> for the corrected oral evidence.

¹⁵ HL 245/HC 1127-I, Twenty Sixth Report of Session 2006-2007

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