Joint Committee on Human Rights inquiry into the human rights of unaccompanied migrant children and young people in the UK

Submission by the Immigration Law Practitioners' Association (ILPA)

1. ABOUT ILPA

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.

ILPA is a member of the Refugee Children's Consortium and endorses the submission of the Consortium to this consultation. ILPA is currently running a Refugee Children's Project, funded by the Diana, Princess of Wales Memorial Fund, which provides training and best practice publications on working with refugee children. ILPA's remit is broader than refugee children only and covers all children under immigration control.

Materials appended to this submission are listed in the Appendix, together with a list of relevant materials available on ILPA's public website.

ILPA consents to the publication of this submission.

2. IS THE TREATMENT OF UNACCOMPANIED MIGRANT CHILDREN AND YOUNG PEOPLE IN THE UK CONSISTENT WITH THE UK'S OBLIGATIONS UNDER THE UN CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)?

No.

This has been highlighted by the UN Committee on the Rights of the Child. In its fourth report[1] the Committee on the Rights of the Child drew particular attention in the introductory "Main concerns" section[2] to its regret that the UK had not implemented recommendations in its previous report[3] on non-discrimination in general and on refugee children and those seeking asylum[4] in particular.

The Committee on the Rights of the Child went on to make specific mention of immigration and asylum in many of its recommendations including on training[5] and on discrimination:

> *25.* ***The Committee recommends that the State party ensure full protection against discrimination on any grounds, including by:***
> …
> *(b)* ***Strengthening its awareness-raising and other preventive activities against discrimination and, if necessary, taking affirmative actions for the benefit of vulnerable groups of children, such as … migrant, asylum-seeking and refugee children; …and of children belonging to minority groups;***
> *(c)* ***Taking all necessary measures to ensure that cases of discrimination against children in all sectors of society are addressed effectively, including with disciplinary, administrative or – if necessary – penal sanctions.***

As detailed below, migrant and refugee children continue to face discrimination. The latter do so in the case of family reunion not only when compared with other children in the UK, but when compared with adult refugees.

Until protest was made, by the UK's four Children's Commissioners, the Refugee Children's Consortium, ILPA and others, including peers and MPs, the UK Border Agency was set to expose children to ionising radiation in the form of dental x-rays for the non-therapeutic purpose of age assessment despite this being of the most questionable legality.[6] We find it difficult, if not impossible, to envisage circumstances in which this would be thought to be acceptable treatment of a British citizen child.

The Committee on the Rights of the Child made recommendations on the best interests of the child recognising that the principle had not been "adequately integrated" into legislation affecting refugee children and on the best interests of the child:

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[1] CRC/C/GBR/CO/4 *op. cit.*
[2] CRC/C/GBR/CO/4, paragraph 6(a) and recommendation 7. See also paragraph 15.
[3] CRC/C/15/Add.188 9 October 2002 Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland.
[4] CRC/C/15/Add.188 , non-discrimination (paras. 22-23); asylum-seekers and refugee children (paras. 49-50)
[5] CRC/C/GBR/CO/4, paragraph 17, discussed below.
[6] See below and see the *Opinion on proposed amendment to the Immigration Rules in respect of medical examination of age disputed asylum applicants*, Nicholas Blake QC and Charlotte Kilroy for the Children's Commissioner for England of 7 November 2007 on use of dental x-rays in age assessment of 7 November 2007. For further ILPA resources on this topic, see http://www.ilpa.org.uk/resources.php/14476/letter-from-zilla-bowell-uk-border-agency-on-plans-to-reintroduce-use-of-x-rays-for-age-assessment

27. The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of …immigration.

This continues to be the case and new measures that fail to recognise the best interests of children have been enacted, in particular, as detailed below, the Statement of Changes in Immigration Rules HC 194, despite its express reference to these interests.

The Committee drew specific attention to separated children affected by conflict:

57. The Committee recommends that additional resources and improved capacities be employed to meet the needs of children with mental health problems throughout the country, with particular attention to those at greater risk, including children deprived of parental care, children affected by conflict, those living in poverty and those in conflict with the law.

Separated children are deprived of parental care and many will have been affected by conflict and be living in poverty. In addition to the question of specialised mental health facilities, there is the question of the attention paid to ensuring that protective factors are in place. The Committee on the Rights of the Child recommended that they receive additional help; instead there are too many instances of separated children waiting a considerable period for a school place, of those aged 16 to 17 being housed in adult bed and breakfast accommodation and of no one legally having parental responsibility for these children, unlike children cared for under section 31 of the Children Act 1989.

We deal below with specific recommendations toward migrant and refugee children and those seeking asylum in paragraph 71 of the report:

71. The Committee recommends that the State party:

(a) Intensify its efforts to ensure that detention of asylum-seeking and migrant children is always used as a measure of last resort and for the shortest appropriate period of time, in compliance with article 37 (b) of the Convention;

The focus of work around recommendation 71(a) since the report was written has been on children in families, who continue to be detained, but so do separated children whose age is disputed. It is extremely difficult, as the Committee on the Rights of the Child set out in recommendation 71(d), to obtain reliable statistics or even "management information" on the number of those subsequently found to be or to have been children who were detained under immigration act powers in the UK. We urge the Joint Committee to ask for these and not to be content with a "snapshot" but to require "longitudinal" information.

(b) Ensure that the United Kingdom Border Agency (UKBA) appoints specially-trained staff to conduct screening interviews of children;

The treatment of persons at the Asylum Screening Unit has been a matter of such grave concern to ILPA that we alerted the European Commission to our concerns. The European Commission is now in communication with the Government on this matter. Both ILPA and the Law Society have expressed in the strongest terms concern about the way in which

people are treated at the asylum screening unit.[7] While the children in the (anonymised) example below were not unaccompanied we consider their treatment not atypical of what happens in screening:

> *In August 2011 three minor female clients wished to lodge asylum claims in their own right. They were not unaccompanied minors. They lived in ***. The representative requested that they be allowed to lodge their claims at Dallas Court or with the Liverpool Asylum Team, so that they would not face the disruption and expense of a trip to the Croydon Asylum Screening Unit. The representative attempted to follow up the request a few times but no response was received from the UK Border Agency.*
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> *Eventually the representative managed to get through by telephone and was told that the clients had to travel to Croydon to lodge their asylum claims and be screened.*
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> *The representative telephoned the Asylum Screening Unit appointment line with the girls present, and was again told that they would not be given appointments in Croydon Asylum Screening Unit, but that they should just attend there without appointments any day and they could lodge their claims and have screening interviews.*
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> *On 11 November 2011 the girls travelled to Croydon with the assistance of a community organisation in ***. They were accompanied by their mother and by a member of the community organisation. The representative had sent a letter to Croydon Asylum Screening Unit a week beforehand to advise the UK Border Agency that the girls would be there that day, and that the UK Border Agency should get in touch with the representative with any questions.*
>
> *On 12 November 2011 the girls attended the representative's office without Screening Interview records. They only had blank Statement of Evidence Forms. No caseowner was indicated on the forms. The representative posted the forms to the Liverpool Asylum Team with a covering letter.*
>
> *About a week later one of the girls came to the representative confused because she'd received a letter from Dallas Court asking that she come in for a screening interview. She had received the letter directly, no copy had been sent to the legal representative. The legal representative telephoned Dallas Court to say that the girls had already been to Croydon.*
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> *The legal representative was told that they had been refused screening interviews at Croydon "because they arrived without an appointment" and "they arrived around lunch time and it was a very busy day." When the legal representative asked why no one from the UK Border Agency had telephoned the representative that day or afterwards the person on the telephone from the UK Border Agency had no answer.*[8]

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[7] See, for example, *Asylum seekers 'prevented from lodging cases*, The Guardian, 29 September 2011, quoting from The Law Society's letter to the head of the Asylum Screening Unit: "*Our members' experience and others' reports … have highlighted the negative and sometimes quite degrading treatment of people on their arrival at the ASU and the appalling nature of the physical environment which they expected to be in for often prolonged and indeterminate periods of time.*"

[8] Extract (anonymised) from a 10 August 2012 letter from ILPA to Sonia Dower, Head of the Operational Policy and Rules Unit at the UK Border Agency. The Law Society also sent Ms Dower a letter in support of

At the UK Border Agency National Asylum Stakeholder Forum on 8 October 2012, at which ILPA was represented it was stated that the average time children spent at the Asylum Screening Unit was four hours 49 minutes, which is an extremely long time for a child to have to wait. This was said to represent a reduction in waiting times.

(c) Consider the appointment of guardians for unaccompanied asylum seekers and migrant children;

See the response to question 10 below.

(d) Provide disaggregated statistical data in its next report on the number of children seeking asylum, including those whose age is disputed;

The statistics on age disputes remain woefully inadequate. See our suggestions below as to the data we recommend the Committee ask be collected.

(e) Give the benefit of the doubt in age-disputed cases of unaccompanied minors seeking asylum, and seek experts' guidance on how to determine age;

See our comments below. The benefit of the doubt is not being given to children. This is the primary question; how age is assessed is the secondary question.

(f) Ensure that when the return of children occurs, this happens with adequate safeguards, including an independent assessment of the conditions upon return, including family environment;

Recommendation 71(f) is of enormous concern at the moment. The UK is proposing forcibly to forcibly return children to Afghanistan, if not to their families then to institutional accommodation, which could take the form of orphanages. This work is being taken forward under the umbrella of the European Return Platform for Unaccompanied Minors – ERPUM.[9] The UK Border Agency confirmed at the National Asylum Stakeholders' Forum Child Subcommittee meeting on 8 October 2012 that outside the framework of joint European action it continues to pursue its own plans to return children to other countries. Parliamentary questions have indicated that the question of returns to Vietnam is also being examined.[10]

At the heart of our concerns is that the UK will assert that it can return children saying that it has made arrangements for their safety and welfare on return in specialised accommodation, but then, if the arrangement breaks down and the child is unsafe, the UK

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the ILPA letter. The focus of the correspondence which was the Agency getting in touch with clients directly and not with the legal representative on the record.

[9] For further information see the website of the Swedish Migration Board at http://www.migrationsverket.se/info/4597_en.html

[10] Hansard HC report 3 Sep 2012 : Col 207W http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120903/text/120903w0008.htm#12090429000917

will simply say that the child is outside the jurisdiction and no longer its responsibility. The likelihood that a child will not be safe must be very high, given the situation in Afghanistan. See *KA (Afghanistan) v SSHD* [2012] EWCA Civ 1014.[11] We urge the Committee to press the Government on the circumstances under which the children it proposes to send back to Afghanistan would be brought back to the UK and what responsibilities and liability the UK would have if they went missing or suffered death or injury on return.

> ***(g) Consider amending section 2 of the 2004 Asylum and Immigration (Treatment of Claimants etc.) Act to allow for a guaranteed defence for unaccompanied children who enter the United Kingdom without valid immigration documents.***

Recommendation 71(g) has not been implemented and we urge the Committee to call for its implementation.

3. TO WHAT EXTENT IS THE STATUTORY DUTY IN SECTION 55 OF THE BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009, AND ITS ACCOMPANYING GUIDANCE, PROVING EFFECTIVE IN ENSURING THAT IN PRACTICE PUBLIC BODIES HAVE REGARD TO THE NEED TO SAFEGUARD AND PROMOTE THE WELFARE OF CHILDREN?

The statutory duty can be pleaded by legal representatives endeavouring to ensure that their child clients are safeguarded and their welfare promoted and reference can be made to it in meetings and negotiations with the Agency. This is now being used more widely by legal representatives and other advocates when representing children, with some positive outcomes, however this has not yet led to a significant or systematic change in approach by the UK Border Agency. Attention has been drawn to the duty in many cases including *ZH (Tanzania) v SSHD* [2011] UKSC 4, and *KA (Afghanistan) v SSHD* [2012] EWCA Civ 1014 (in which earlier instances of judicial consideration of the duty are reviewed).

As to the 'promotional' value of the duty, this is more difficult to determine. While much of the UK Border Agency's guidance to staff now makes reference to the duty, all too often it does so only in standard introductory paragraphs and the main text of the guidance is unaltered and misses opportunities to highlight the implications of the duty. Many pieces of guidance bear the legend, in the grid provided at the end for the purposes of version control, "Children's duty paragraph added," suggesting that this is seen as the extent of the exercise. The Asylum Process Guidance on accessing country of origin information has not been updated since the duty came into force and does not mention children at all.[12]

There are instances where a different approach has been taken. For example the Asylum Process Guidance on *Criminality, Adverse Immigration History and Other Information –Migration Casework Actions*[13] was updated with "Children's duty paragraph added" but a month later

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[11] See also *AA (unattended children) Afghanistan CG* [2012] UKUT 00016 (IAC).

[12] Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/accessingcountryoriginginfo.pdf?view=Binary

[13] Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/criminalityadverseimmigration?view=Binary

was further updated in respect of the children's duty. The Committee should encourage the Agency to continue to integrate consideration of children's rights into all instructions to staff, not only those to do with asylum, and to ensure that the consideration runs the length of the instruction. The instruction must then be applied by the UK Border Agency in accordance with the developing case-law.

It is helpful that the Agency is now held to the same safeguarding standards as other public bodies working with children as this provides a common framework and has the potential to allow the standards now required of the Agency to develop in line with developments in other agencies. This is discussed further below.

One of the shortcomings of the section 55 duty is that it applies only to children "in the UK." The reasons for this pleaded during the passage of the Borders, Immigration and Citizenship Act 2009 were wholly unconvincing:

> *'…the duty is based on the systems in place in the UK and that it cannot be transplanted to other countries, which may have entirely different arrangements. Moreover, it is likely that other countries would consider it interference in their jurisdiction if UKBA were to seek to assume the level of responsibility for local children as it would for children in the UK.'*[14]

There is no question that an extension of the duty would result in the UK becoming a general children's rights monitor in any country in which it operates. What it would mean was that when entry clearance officers in posts abroad were faced with a situation where there were indicators that a child was being trafficked or otherwise exploited, they would have a duty to act, if only to notify local police. Similarly when working on matters related to immigration, such as an involvement in family tracing. It has repeatedly been stated that the Agency abides by the same standards overseas:

> *'…the statutory guidance that accompanies the duty sets out the expectation that UKBA staff overseas will make referrals to overseas authorities where local or other international agreements permit or require. In addition, our staff going to work overseas receive training in children's issues as part of their induction.'*[15]

If this is the case then it has nothing to fear from the extension of the duty. In ILPA's experience, as highlighted in our briefings on the "in the UK" aspect of the section 55 duty[16] it is not the case and the involvement of posts overseas in matters such as family tracing or checking the safety of return continues to raise the concerns that we highlighted to the Committee in our submission to its inquiry into children's rights.[17]

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[14] Phil Woolas MP, Minister of State for Borders and Immigration *Hansard*, HC Committee, Sixth Sitting 16 Jun 2009 : Column 192. See ILPA's March 2009 briefing on this omission Clause 51 Duty regarding the welfare of children Amendments 112 and 114 'in the UK' Amendment 124 commencement of s 51 at http://www.ilpa.org.uk/data/resources/12898/09.03.245.pdf

[15] Phil Woolas MP, Minister of State for Borders and Immigration *Hansard*, HC Committee, Sixth Sitting 16 Jun 2009 : Column 193

[16] *Clause 51 Duty regarding the welfare of children Amendments 112 and 114 'in the UK' Amendment 124 commencement of s 51*, *op cit.*

[17] ILPA's February 2009 submission to the enquiry can be found at http://www.ilpa.org.uk/data/resources/13073/09.02.566.pdf

ILPA urges the Joint Committee on Human Rights to call for the deletion of the words "in the UK" from section 55.

The **Joint Committee on Human Rights should ask the UK Border Agency to carry out a systematic review and update of all its guidance so that the guidance accurately reflects the duty under section 55.**

We consider that the importance of the judgment of the Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC 4 for protecting the rights of migrant and refugee children and in fostering respect for article 12 of the UN Convention on the Rights of the Child more generally,[18] cannot be underestimated.[19]

4. SHOULD ONE DEPARTMENT IN GOVERNMENT HAVE OVERALL RESPONSIBILITY FOR UNACCOMPANIED MIGRANT CHILDREN AND YOUNG PEOPLE IN ORDER TO ENSURE THAT THEIR RIGHTS ARE BEST PROMOTED AND PROTECTED? IF SO, WHICH ONE?

No. There is not one department in Government that has overall responsibility for children and migrant children are children first, migrants second[20] and this is in line with the injunction in Article 2 of the UN Convention on the Rights of the Child to respect the rights of children without discrimination. The lead department on any particular issue should be the department that has the lead on this issue for all children.

All too often other departments have deferred to the Home Office and not assumed their own responsibilities for these children, or that the Home Office has not thought to consult them.

The approach to guidance on the section 55 duty is instructive:

> *'It is already our intention that the guidance to support [section 55] will be developed and issued jointly with the Department for Children, Schools and Families…and will reflect closely the existing Section 11 guidance.*'[21]

The Home Office has devised systems with insufficient reference to the role of other departments of both central and local Government. The clearest example is the use of the

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[18] See e.g. *Collins v Secretary of State for Communities and Local Government and Flyde Borough Council* [2012] EWHC 2835 (Admin)

[19] See CRC/C/GBR/CO/4 paragraph 33. *The Committee recommends that the State party, in accordance with article 12 of the Convention, and taking into account the recommendations adopted by the Committee after the day of general discussion on the right of the child to be heard in 2006: (a) Promote, facilitate and implement, in legislation as well as in practice, within the family, schools, and the community as well as in institutions and in administrative and judicial proceedings, the principle of respect for the views of the child.*

[20] See *Child first, migrant second: Ensuring that every child matters*, ILPA/Heaven Crawley, February 2006.

[21] Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office *Hansard*, HL Committee 4 Mar 2009 : Column 832.

National Referral Mechanism for children who may have been trafficked when local authorities are already making decisions on safeguarding these children. ILPA expressed its concerns about the duplication of work and about responsibility for making the decision passing from the more competent to the less competent, in its second response to the Home Affairs Committee's inquiry into human trafficking (a joint response with the Anti-Trafficking Legal Project), in the following terms:

> *"…Trafficking of children is one form of abuse of children. Child protection teams should be skilled to identify and respond to cases of trafficking – this is a specialist area but sits firmly within the framework of their responsibilities toward children at risk of harm. Under UK child protection law these teams have responsibilities to identify and to protect children at risk of trafficking. But under the proposed model for implementation of the Convention these teams will be obliged to refer the case to the UK Border Agency or the UK Human Trafficking Centre to determine whether there are reasonable grounds for believing the child to have been trafficked. Those with most information about the case, and most expertise in general child protection, will be referring the case to those with less. Whatever the decision of the UK Border Agency or the UK Human Trafficking Centre, the child protection teams will, under UK law, retain all their own responsibilities toward these children. If they think the child has been trafficked, they must act accordingly – a negative decision from the UK Border Agency or the UK Human Trafficking Centre cannot release them from their obligations under UK child protection law. So what purpose is the second decision serving at all?*
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> *…The police are not going to cease their efforts to prosecute a trafficker just because the 'competent authority' says that the person has been trafficked – or vice versa.*

In respect of trafficked children, we recall the debate House of Commons debate in Westminster Hall on human trafficking where the point was made that international good practice envisages that there is not one single lead authority:

> *… article 10 [of the Council of Europe Convention] deals with the identification of victims. [It…] suggests that international good practice is that there is no lead department—a single competent authority—and that decision making should be devolved across a range of authorities at a regional and local level, so that it is closest to the location of the victim…Support services could then be agreed, co-ordinated and provided quickly. For children, that would be through local authority children's services.*
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> *….all local authorities, the police, the UK Border Agency and the UK Human Trafficking Centre should all be competent authorities. …If the UK Human Trafficking Centre is the sole competent authority, there will also be operational problems….*[22]

5. ARE GOVERNMENT DEPARTMENTS AND THEIR AGENCIES SATISFACTORILY 'JOINED-UP' IN HOW THEY PROTECT AND

[22] Anthony Steen MP, then Chair of the All-Party Parliamentary Group on Trafficking in Women and Children Hansard HC Report 3 February 2009, cols 158-159.

SUPPORT UNACCOMPANIED MIGRANT CHILDREN AND YOUNG PEOPLE?

See response to question four above. In ILPA's view the starting point must be that these are children first and migrants second and each department with responsibility for an aspect of their protection or welfare should consider how it will discharge its general obligations and what special protection it must provide. It is part of each department's responsibilities toward all children that it work well with other departments involved in their welfare and care and migrant children should sit within this mainstream joint working. Current joint working should be audited against the aspirations voiced when section 55 was being passed:

> *…the intention of [section 55] is to mirror as closely as possible the effect of Section11 of the Children Act 2004. We want the border force to be on the same footing as other public bodies which have significant dealings with children so that we can improve interagency working and be more effective in the way in which we jointly safeguard and promote the welfare of children...*[23]
>
> *We are exploring with the Department for Children, Schools and Families how the Section 11 duty will apply in strategic arrangements and in the framework for co-ordinating with other agencies.*[24]

The most striking example of a failure to be "joined up" has come with the Legal Aid, Sentencing and Punishment of Offenders Act 2012. See the response to question 11 below. See also the response of the four children's commissioners to statement of changes in immigration rules HC 194[25] and in particular the failure of those drafting these changes to consider others with responsibility for assessing best interests and the role of the family courts.

Another example of failure to join up came in the February 2011 Education (Student Fees, Awards and Support) (Amendment) Regulations 2011 (SI 2011/87) which mean that young people with Discretionary Leave to Remain in the UK, included separated young people must now pay international student fees and will not be able to access student loans for a higher education course in England. The young people still in the UK with discretionary leave at the time of going to university are likely to be those given further leave after they turned 18 and on a six year route to settlement, those whose future is considered to lie in the UK. This comes at the same time as care leavers are given priority for access to learning grants.[26] It was established at the National Asylum Stakeholders Forum Children's subgroup of 8 October 2012 that the Department for Education and the Home Office had not been in consultation about this matter.

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[23] Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office *Hansard*, HL Report 1 Apr 2009 : Column 1143.
[24] Lord West of Spithead, *Hansard*, HL Committee 4 Mar 2009 : Column 834.
[25] Children and the new immigration rules, the four Children's Commissioners to Damian Green MP, 1 August 2012.
[26] https://www.gov.uk/access-to-learning-fund/eligibility

The Joint Committee should call for those with discretionary leave to have access to home student fees and student loans to ensure that separated children can access education without discrimination.

One way of departments joining up is to share information but we are concerned that too often information is shared without the informed consent of the child. Without a guardian, there will be many migrant children who are not in a position to give such informed consent. The UK Border Agency uses general blanket waivers on, for example, children's Statement of Evidence forms and interview records:

> *The information you give us will be treated in confidence and the details of your claim for asylum will not be disclosed to the authorities of your own country. However, information may be disclosed to other UK government departments, agencies, local authorities, international organisations and other bodies where necessary for immigration and nationality purposes or to enable them to carry out their functions.*
>
> *Information may be disclosed in confidence to the asylum authorities of other countries which may have responsibility for considering your claim.* [27]

We do not consider that informed consent to sharing with any particular Government agency can be said to have been given by a child confronted with such a waiver. It is impossible to ascertain what might be shared with whom for what purposes. No child can possibly understand all the functions of all these bodies.

No discussion of joined up Government in this regard could be complete without mention of Gibraltar. There are very few States and parts of States that have not acceded to the Convention but it remains the case that the British overseas territory of Gibraltar has not. No consideration of the Convention as it pertains to the UK is complete without drawing attention to this startling gap in protection for children.[28]

6. WILL THE PROPOSED REFORMS TO THE OFFICE OF THE CHILDREN'S COMMISSIONER FOR ENGLAND BENEFIT UNACCOMPANIED MIGRANT CHILDREN AND YOUNG PEOPLE OR IS THERE MORE THAT COULD BE DONE TO ENSURE THAT THE INSTITUTIONAL MACHINERY PROTECTS THIS PARTICULAR VULNERABLE GROUP?

The proposed changes indeed stand to benefit this group of children, if properly resourced. There are greater powers to investigate, question, inspect and study materials and all these can be used to hold agencies and the private contractors to account.

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[27] Statement of Evidence form (SEF) Combined Interview and NINO application, Children, ASL.2816 SEF (Interview) – Children.

[28] CRC/C/GBR/CO/4 20 October 2008 *Concluding observations of the Committee on the Rights of the Child : United Kingdom of Great Britain and Northern Ireland*, paragraphs 8 and 9.

There is always more that can be done to refine institutional machinery better to protect these children. It is against the standard articulated by the UN Committee on the Rights of the Child in its fourth report on the UK[29] that the changes should be judged:

> *17.* ***The Committee recommends that the State party ensure that all four established Commissioners be independent, in compliance with the Paris Principles and mandated, inter alia, to receive and investigate complaints from or on behalf of children concerning violations of their rights. These bodies should be equipped with the necessary human and financial resources in order to carry out their mandate in an effective and coordinated manner so that the rights of all children in all parts of the State party are safeguarded. In this regard, the Committee draws the attention of the State party to its general comment No. 2(2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child.***

It is of enormous regret that the Commissioner for England and Wales will continue to be prohibited[30] from investigating cases of individual children. In the England we have just seen a migrant (accompanied) child starve to death.[31] That the Children's Commissioner cannot investigate an individual case even in such extreme circumstances is, as the Committee on the Rights of the Child has highlighted,[32] an unacceptable limitation on her powers.

The proposed *Provisions reforming the office of Children's Commissioner* include a recommendation that the Children's Commissioner be able to carry out impact assessments:

> 2 ***Primary function: children's rights, views and interests***
>
> …
> *(2) (3) In the discharge of the primary function the Children's Commissioner may, in particular—*
>
> > …
> > *(c) consider the potential effect on the rights of children of government policy proposals and government proposals for legislation;*
> > *(d) consider the effect on the rights of children of Acts and subordinate legislation (within the meaning of the Interpretation Act 1978) made under Acts;*[33]

ILPA endorses this recommendation. It will need to be resourced adequately.

During the consultations that led to the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ILPA and many others urged the Government to take a 'polluter

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[29] CRC/C/GBR/CO/4.
[30] *Reform of the Office of Children's Commissioner: draft legislation*, CM 8390, July 2012, paragraph 20 re section 2(4).
[31] See Westminster Safeguarding Children Board *Serious Case Review Executive Summary Child EG*, 17.12.10 updated April 25 2012, amended as directed by the High Court and to include the verdict of the inquest.
[32] CRC/C/GBR/CO/4, paragraph 17
[33] *Reform of the Office of Children's Commissioner: draft legislation Presented to Parliament* by the Secretary of State for Education by Command of Her Majesty, Cm 8390 July 2012,

pays" approach whereby the Government departments changing law or practice would meet the costs of this to the legal aid scheme.[34] Impact assessments are supposed to identify the costs of changes to the legal aid system, to the courts and to the legal system. The UK Border Agency impact assessments we have seen continue to be inadequate. See also below in response to question 10 re legal aid impact assessments.

7. IS THERE SUFFICIENT AWARENESS AND RELEVANT TRAINING ON CHILDREN'S RIGHTS AND THE UNCRC FOR THOSE IN GOVERNMENT, CENTRAL AND LOCAL, AND OTHER BODIES, PUBLIC OR OTHERWISE, WHO DEAL WITH SEPARATED MIGRANT CHILDREN AND YOUNG PEOPLE?

In ILPA's experience, awareness is not sufficiently high. Generally the best interests principle set out in Article 3 is now known, but members' experience is that the detail of other individual articles is not generally known including articles such as respect for the child's identity (Article 8) and promotion of physical and psychological recovery (Article 39) and how these relate to issues of both protection and welfare.

Initiatives such as UNHCR's Quality Initiative,[35] which has included specific focus on children, serve to raise awareness not only in general, but with reference to the detail of decision-making. Reports and statements by the Children's Commissioners have been immensely valuable in this regard.

Awareness is not enough: awareness that a child may have additional rights can make agencies such as the Home Office reluctant to accept that persons claiming asylum are children and too ready to dispute age. Or staff may be aware of the Convention rights, but fail to link these with the specific situations that they encounter, or apply them incorrectly or inadequately, as a matter of misunderstanding or as a matter of intention and policy.[36] Training and attention to the culture of the UK Border Agency and other official bodies are essential if increased awareness is not to have these negative effects.

As to training, we recall the comments of Committee on the Rights of the Child:

> *21.* ***The Committee recommends that the State party further strengthen its efforts, to ensure that all of the provisions of the Convention are widely known and understood by adults and children alike, ….***
> ***It also recommends the reinforcement of adequate and systematic training of all professional groups working for and with children, in particular law enforcement officials, immigration officials, ...social workers and personnel of child-care institutions.***[37]

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[34] See ILPA response to the Ministry of Justice consultation: *Proposals for the Reform of Legal Aid in England and Wales, 14 February 2012* at http://www.ilpa.org.uk/data/resources/4121/11.02.503.pdf

[35] See Sixth Report April 2008-March 2009, available at http://www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Sixth_Report.pdf

[36] See our comments on Statement of Changes in Immigration Rules HC 194, *passim.*

[37] CRC/C/GBR/CO/4*, op.cit.*

We have insufficient information to answer the broad question posed by the Joint Committee. ILPA has had sight of the 7 February 2011 response to the Freedom of Information request from Mahmud Quayum of Camden Community Law Centre[38] which asked for details of training on section 55 received by details of training received by the entry clearance staff and entry clearance managers in Dhaka and Abu Dhabi. The response stated:

> *All delegates are instructed to complete the mandatory e-leaming package from our in house database on arrival at post. I can only confirm that all visa staff have undertaken the mandatory e-learning at the beginning of their employment at the Visa Sections in Dhaka and Abu Dhabi. However, there is no requirement to repeat this training on an annual basis although some optional courses are available.*

We append the materials to this submission. We also attach the September 2010 powerpoint on best interests training received through the UK Border Agency's National Asylum Stakeholder Forum on 2 December 2010.

We urge the Joint Committee to endeavour to ascertain whether pressures on funding have resulted in a reduction of the amount of training delivered to staff.

We also urge the Committee to probe staff turnover in an effort to understand how long a new staff member may be in post before s/he receives training.

We have recently drawn to the attention of the Chief Inspector of the UK Border Agency the fulsome promises as to training of private contractors operating at the juxtaposed controls and urged him to audit whether that training is indeed taking place.[39] We draw these promises to the attention of the Committee as they specifically concerned children:

> *I understand noble Lords' need to ensure that the contractors are properly trained. They will have to provide the Immigration Service and the appointed monitors with access to the course material and the opportunity to attend the training they provide to ensure that there is high quality. I am happy to make that training document available to noble Lords, if they would find it of value.*[40]

The Committee should ask for sight of this document and what external staff training on safeguarding duties has been provided, with other statutory safeguarding agencies as provided for in the s.55 statutory guidance.[41]

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[38] HO Reference: GV100/158115, FOI Reference: 21049

[39] Juxtaposed controls: ILPA note for the Chief Inspector re his inspection of juxtaposed controls. 8 October 2012 available at http://www.ilpa.org.uk/resources.php/15539/juxtaposed-controls-ilpa-note-for-the-chief-inspector-re-his-inspection-of-juxtaposed-controls.-8-oc

[40] The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, cols. 576-577

[41] See *Every Child Matters: Change for Children*, section 1.9 e.

We talked in Grand Committee about the strict safeguards that will apply to the recruitment and the work of the contractors. …The training will include cultural awareness, race relations, the legal framework, interpersonal skills and care for vulnerable detainees, including—perhaps I would say especially—unaccompanied minors.[42]

The training that must be included involves, among other things, managing detention anxiety and stress, including the detention of vulnerable trainees; health and safety; suicide and self-harm prevention; and race relations, cultural awareness, and human rights issues. The safety and security of those who will be in the care of the authorised person is of the utmost importance—I want that to be on the record—and must not be jeopardised. [43]
All contractors will be required to submit to the Secretary of State detailed procedures for handling vulnerable groups, including unaccompanied minors. [44]

…we will ensure that there is a period of training before authorisation that will include the care of vulnerable persons, including children.[45]

One issue to address is to ensure that staff are properly trained to hold a child. The noble Earl knows well from our discussions on children with special needs and behavioural issues that this is an important point. [46]

The Children's Commissioner for England drew attention in her report *The Fact of Age*, to gaps in training and guidance for social workers on how to carry out age assessments.[47]

8. HOW ARE UNACCOMPANIED MIGRANT CHILDREN'S BEST INTERESTS BEING CONSIDERED AND UPHELD IN IMMIGRATION DECISIONS MADE ABOUT THE LEAVE TO REMAIN OR ENTER?

As described in response to question two above, the UN Committee on the Rights of the Child specifically highlighted immigration as an area where there was a need to make progress on the best interests' principle.[48]

There are two elements to the question. The first is the weight given to best interests in the substantive decision on whether the child should be given leave to enter or remain. The second is how best interests of the child are met within process that leads to that decision.

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[42] The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186
[43] The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC231
[44] The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232
[45] *Ibid.*
[46] The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC237
[47] Children's Commissioner for England, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment in R(A) v Croydon LBC [2009]* at http://www.childrenscommissioner.gov.uk/content/publications/content_590
[48] CRC/C/GBR/CO/4, 27

The substantive decision

Best interests are usually considered in the course of determining whether it would be a breach of the child's rights under Article 8 of the European Convention on Human Rights to be required to leave the UK, though this is not the exclusive place, legally where these interests fall to be considered. Here all articles of the UN Convention on the Rights of the Child, including Article 3 which deals with best interests, are relevant to the decision on a child's international protection, whether under the 1951 Refugee Convention or other protection mechanisms.

Refugee children

If a child asks for recognition as a refugee, they will be considered first against the criteria set out in the United Nations 1951 Convention relating to the status of refugees, then, if they are found not to fulfil these, against the criteria for humanitarian protection and then, if they are not found to meet these either, those for discretionary leave. If the child is found not to qualify for leave under any of these criteria there nonetheless remains the question of whether arrangements can be made for the safety and welfare of the child on return. The extent to which investigations of this latter have been carried out with due regard to the best interests of the child has been the subject of adverse comment by immigration and higher court judges, as ILPA has brought to the attention of the Joint Committee in the past.[49]

Children applying under the immigration rules

A separated child applying under the immigration rules will be considered against the criteria in those rules. Provision has now been made within the immigration rules to consider the child's interests, although this is not determinative of the question of whether they should be allowed to remain in the UK as consideration should be given to a grant of leave outside the rules on human rights grounds if the application within the rules does not succeed.

New criteria to be applied within the immigration rules were introduced by Statement of Changes in Immigration Rules HC 194. New Appendix FM came into force on 9 July 2012. The criteria fail to respect the best interests of the child.

They are helpful in that they reintroduce the notion, once a concession outside the rules, then abolished, that the future of a child who has lived for more than seven years in the UK will normally lie in the UK. They are unhelpful in that for other children they introduce criteria that are inimical to a decision based on best interests. In the case of a decision on whether a person with a "genuine and subsisting parental relationship" with a child in the UK should be allowed to stay then in cases where the child is not a British citizen and has not lived in the UK for seven years the test is "it would not be reasonable to expect the child to leave the UK."[50]

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[49] See ILPA's February 2009 submission to the Joint Committee on Human Rights briefing on children's rights http://www.ilpa.org.uk/data/resources/13073/09.02.566.pdf

[50] HC 194, inserting new Appendix FM into the immigration rules, including paragraph EX.1. (cc) (ii)

Where a child has lived continuously in the UK for at least seven years (or the child is a British citizen), the new rules state this may provide a basis not to deport his or her parent (where that parent has received a prison sentence of less than four years) if it would not be reasonable to expect the child to leave the UK and there is "no other family member able to care for the child" in the UK.[51]

Where a child offender has lived at least half of his or her life in the UK, the new rules state this may provide a basis not to deport him or her (where he or she has received a prison sentence of less than four years) if he or she has no ties to the country to which he or she would otherwise be deported.

These are not best interests tests. The separation, possibly permanently, of a child from his or her parent will always be a matter of fundamental importance, whether or not there is another family member able to care for the child, and whatever the length of any prison sentence handed down to the parent. That a child offender has some ties to the country to which he or she may be deported, does not mean that country is a suitable place for him or her to go. The new rules set out particular thresholds and requirements, which if met may permit a child or parent to come to or stay in the UK. However, whether or not these thresholds and requirements are met in any particular case cannot of itself determine a child's best interests.

On 19 June 2012, Damian Green MP, then Minister for Immigration, said about the new Immigration Rules:

> *...we have reinforced our approach by bringing a consideration of the welfare or the best interest of children into the new immigration rules. In assessing that best interest, the primary question in immigration cases involving removal is whether it is reasonable to expect the child to leave the UK. The best interests of the child will normally be met by their remaining with their parents... I make the point that in these rules, exceptional factors are allowed for.* (*Hansard* HC, 19 June 2012 : Col 822)

The four Children's Commissioners wrote to Mr Green on 1 August 2012 to protest the changes. They said:

> *Given that the circumstances of each child subject to an immigration decision need to be considered individually to determine the child's best interests, we do not see how the Immigration Rules can reflect how the best interests of the child may be considered in immigration proceedings. In our view the attempt to solve the inherent problem of the situation by developing and implementing a set of rules is incompatible with the approach set out, and the precedent set, by the Supreme Court in ZH (Tanzania).*
> …
> *It is in our view wrong that simply because another family member may be in a position of being able to care for a child, this necessarily addresses what is in the child's best interests if his or her parent faces deportation…The fundamental right of the child to be with their parents is recognised by Articles 7,9,10 and 22 of the UNCRC.*

[51] Rule 399a as inserted by HC 194.

We also question what if any provision has been made for the due assessment of the suitability of other family members to care for the child. Nor are we assured as to how the process will correlate with those in the family courts, given the need to make a special guardianship order in these circumstances.

…

The new rules fail to cite, or explicitly to recognise as they should, the UK's obligation under Article 40 of the UNCRC to treat child offenders in such a way as to promote and enable their reintegration into society.

The response to the Children's Commissioners came two months and 18 days later, from Mr Mark Harper MP, Mr Green's successor, to Dr Maggie Atkinson, Children's Commissioner for England and Wales, on 19 October 2012. In his reply Mr Harper stated that guidance on the exceptional factors which would make it unreasonable to expect the child to leave the UK would be kept under review.
Mr Harper also said of deportation of children

I understand that your Office has also raised a number of concerns about the process and timing for considering deportation action in these cases. I understand that officials are looking at your concerns.

The Joint Committee could usefully ask for details of work undertaken to address concerns raised about the process and timing for considering deportation action in these cases.

The new Rules also establish much longer periods of uncertainty as to the future of family life in the UK because limited leave is given 30 months at a time. If the Rules are not met but a grant of leave is made outside the rules, the period of uncertainty will be even longer still as it will be 10 years rather than five before an application can be made for settlement.[52] Extended periods of uncertainty are not in children's best interests.

There are particular problems for children under the immigration rules for refugee family reunion as described in response to question 1 below.
Article 8 outside the immigration rules

Despite attempts to codify Article 8 of the European Convention of Rights within the immigration rules, it remains possible to assert that despite not coming within the rules, one satisfies Article 8 of the European Convention on Human Rights and should be allowed to remain in the UK on that basis. The Home Secretary has indicated that, subsequent to the change to the immigration rules introduced by HC 194 she anticipates that such cases will be "exceptional":

[52] All Appendix FM

> ***Mrs May:*** *…there has to be a reference to exceptional circumstances. The way we are approaching it—setting out clearly the criteria that identify and describe the right to a private and family life—means that the exceptional circumstances will be far more limited than they have been up to now. ..I have every expectation that…there would need to be truly exceptional circumstances indeed for someone to be allowed to remain in the UK outside the criteria.* [53]

We recall the words of Lady Hale in the Supreme Court case of *HH and PH v Deputy Prosecutor of the Italian Republic, F-K v Polish Judicial Authority* [2012] UKSC 25, which concerned the interests of the child where a parent faces extradition**:** "*Exceptionality is a prediction,... and not a test.*"

If exceptionality is treated as a test, many of these applications from separated children will fall for refusal at first instance.

Children making an application on the basis of Article 8 and ties to the UK, rather than asking for international protection, will not be entitled to legal aid either at first instance or to challenge the decision. See question 10 and the recommendation as to powers under section 9(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Trafficked children

A separated child who has been trafficked might apply for recognition as a refugee, for humanitarian protection or for leave on the basis of his her human rights. S/he may seek discretionary leave or a year's renewable grant of leave as a trafficked person. See ILPA's response to question 4 above re concerns that children's cases are passed to the UK Border Agency under the National Referral Mechanism rather than being dealt with by child protection specialists with greater expertise in best interests' determination.

Best interests pro forma

UK Border Agency caseowners are instructed to encourage social workers to fill out a so-called "best interests pro forma" about the child to assist the UKBA case owner when considering return.[54] This process of requesting basic welfare information from the local authority is far from being an holistic approach that can inform the conduct of the whole decision-making process and a far cry from a properly structured and inter-agency approach to assessing the best interests of a child. In any event, it does not appear to be being completed in every case and is being used at different stages of the asylum process than contemplated in the process instructions. It is unclear how assessments around best interests are being conducted and how much weight is given to them, or to what extent the child understands how this process is conducted and information shared between these agencies..

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[53] Hansard HC report 19 Jun 2012 : Col 768

[54] UKBA guidance on 'Processing an asylum application from a child': http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary

As to the decision-making process:

The process is ill-suited to respect for the best interests of children and is set to become much less so for children under immigration control because they will no longer benefit from free legal representation unless making a claim for international protection.

A child claiming asylum may find consideration given first as to whether they can be sent to another European country, through which they have transited en route to the UK, to have the claim for asylum considered in that country, the so-called Dublin process. The case of *R (MA, BT, DA) v SSHD* [2011] EWCA Civ 1446 provides a striking example of a case in which no consideration was given to the best interests, nor indeed to the basic safety of a child being returned through the Dublin procedure.

We are particularly concerned about children who are the subject of age disputes, as described in response to question 15 below. Such disputes are all too common. Such children may face detention and the accelerated detained fast track procedure which produces a high rate of refusal of claims[55] and will face adult asylum procedures, being questioned as adults, although often with the added disadvantage that a refusal to believe them as to their age can result in treating them more broadly as liars.[56]

As per our answer to question 4 above, UK Border Agency guidance often makes use of introductory paragraphs enjoining upon staff to take account of the best interests of the child, but often without consideration of the best interests of the child being woven into the guidance.

It is a matter of profound concern that not every unaccompanied child in the United Kingdom benefits from having anyone who has parental responsibility for him/her. In the case of children who are in care under section 31 of the Children Act 1989, the local authority automatically acquires such responsibility but the vast majority of separated children are not cared for under these provisions. Instead they are accommodated and provided with services under section 20 of the Children Act 1989 and as such do not enter the formal care proceedings process. A child is, as a matter of UK law, lacking in full capacity. If there is no one with parental responsibility for him/her then there are things for which consent cannot be given, things that cannot be done. This is not in line with Article 20 of the Convention on the Rights of the Child and the child is disadvantaged.

There is a tendency, not limited to cases of unaccompanied children or children under immigration control, to treat 16-17 year olds as adults and not afford them the protection that should be afforded to them as children.

9. IS THE CURRENT DECISION-MAKING PROCESS ON CHILDREN'S ASYLUM CLAIMS SATISFACTORY AND DOES IT REPRESENT THE FINDING OF A 'DURABLE SOLUTION' FOR EACH CHILD IN THE UK, IN

[55] See ILPA's *The Detained Fast Track Process a Best Practice Guide,* January 2008.

[56] See *When is a child not a child? Asylum, age disputes and the process of age assessment,* ILPA/Heaven Crawley, May 2007

ACCORDANCE WITH THE RECOMMENDATIONS OF THE UN COMMITTEE ON THE RIGHTS OF THE CHILD?

No. the current decision-making process is not satisfactory.

Too often the whole process takes place under the shadow of a dispute about age, with the child facing the extreme stress of having their whole identity doubted and officials considering that the child is lying about their age and extrapolating from this to consider that the child is lying about many other things. See our response to question 15 below.

The quality of decision-making, both by the UK Border Agency and the tribunals is not good enough. The result is that children are wrongly, not recognised as refugees and not given humanitarian protection. See the calculations set out in the Refugee Children's consortium briefing for the Crime and Courts Bill in June 2012.[57] Using Home Office statistics for the years 2006 to 2010[58] the Consortium, of which ILPA is a member, calculated that each year only 11% of separated children are recognised as refugees and only 1% given humanitarian protection despite the nature of the countries fled. UNHCR's Quality Initiative, described in our response to question 8 above, has identified specific shortcomings in the procedure.

Durable solution

The language of "durable solution" comes originally from UNHCR where it is used of refugees. UNHCR lists the three durable solutions *for refugees*: integration, resettlement or return.

The UK is a destination country to which people are resettled. It is not a first country of asylum from which refugees are resettled, other than in cases where they are reunited with family members in a third country, for example under transfer of asylum procedures.

As to integration, it is of concern that the UK continues to grant only five years limited leave to those recognised as refugees. This creates a sense of uncertainty for separated children despite the long term futures of the vast majority of them lying in the UK.

Section 83 of the Nationality, Immigration and Asylum Act 2002 means that a child who applies for recognition as a refugee or humanitarian protection and does not succeed but is given one year's limited leave to remain or less cannot challenge the refusal of asylum. The opportunity to do so will only come once leave granted totals more than one year (i.e. following an extension of leave) or as part of a challenge to a decision that a child must leave the UK. See the response to question 12 below.

One way in which the UK refuses to provide children recognised as refugees with a durable solution is that it does not give them the same rights to family reunion as adults. An adult recognised as a refugee in the UK is entitled to be reunited with his/her minor children in

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[57] Available at http://www.refugeechildrensconsortium.org.uk/images/crime%20and%20courts%20bill%20hol%20committee%20stage_21jun12.pdf

[58] See http://www.homeoffice.gov.uk/publications/scienceresearch-statistics/research-statistics/immigration-asylum-research/immigration-brief-q2-2011/asylum

the UK. [59] Yet a child recognised as a refugee is not similarly entitled to be reunited with his/her parents in the UK. This is summarised, in guidance on the UK Border Agency website[60] as:

Non-qualifying sponsors

> *A **child** under the age of 18 years, who has been granted refugee status. There is no provision within the Rules for children recognised as refugees to sponsor family members.*

This would mean, for example, that if Malala Yousafzai, the Pakistani girl shot in the head for advocating girls' rights to education were to ask for and be granted recognition as a refugee in the UK she would not be entitled to have her parents join her but would have to make an exceptional application outside the rules, relying on human rights grounds. A child refugee is no less a refugee than an adult refugee; no more able to live with their immediate family in the country fled. This is discrimination against children, clearly violates the prohibition on discrimination under Article 2 of the UN Convention on the Rights of the Child and fails to satisfy Article 10 of the UN Convention on the Rights of Child:

> ***10(1)… applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. …***

ILPA urges the Joint Committee to ask the Government to give children recognised as refugees or granted humanitarian protection the same rights to family reunion with their parents as adult s recognised as refugees enjoy for family reunion with their minor children to end this discrimination against these children and to respect their rights to grow up in their families.

The question of a durable solution can be considered more widely that the question of what happens to children given international protection. In the UK context return is debated not in the context of refuge children but children whose claims for asylum have failed or other children given limited leave on a discretionary basis. These children do not benefit from a durable solution.

The underlying difficulty is that insofar as a grant of discretionary leave to remain considers the best interests of the child, the Home Office considers the best interests of the child during his/her childhood and not beyond. This limitation is unwarranted. When the best interests of a child are considered, consideration should be given to the child's development, up to 18, but also beyond. What is the best that can be done for the rest of that child's life?

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[59] Rule 352D

[60] Entry Clearance Guidance SET10
http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/set/set10/#header1

As Lord Justice Kay recently adjudged, "*For this purpose, it does not matter that the appellants are now over 18 because "there is no temporal bright line across which the risks to and the needs of the child suddenly disappear.*"[61]

10. ARE UNACCOMPANIED CHILDREN ABLE TO ACCESS THE LEGAL ADVICE AND REPRESENTATION NECESSARY TO ENSURE THAT THEY ARE ABLE TO HAVE THEIR VOICE HEARD IN ANY JUDICIAL AND ADMINISTRATIVE PROCEEDINGS AFFECTING THEM, AND THAT THEIR RIGHTS ARE UPHELD, IN ACCORDANCE WITH INTERNATIONAL STANDARDS? SHOULD THERE BE A SYSTEM OF GUARDIANS FOR UNACCOMPANIED AND SEPARATED MIGRANT CHILDREN TO ENSURE THAT THEIR INTERESTS ARE REPRESENTED?

Legal Advice and Representation and the ability of the child to be heard

No. In many parts of the country demand for free legal advice and representation outstrips supply. Many separated children qualify for free legal advice and representation. In all parts of the country the demand for high quality, child sensitive free legal advice and representation outstrips supply.

From April 2013, under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid will be withdrawn from immigration cases, as well as from a raft of other areas of law that may be relevant to unaccompanied children including education law.

Under the provisions of the Act, separated children given discretionary leave to 17 ½, who do not wish to advance a claim for international protection but do want to apply for further leave on the basis of their ties to the UK, for example relying on Article 8 of the European Convention on Human Rights, will not quality for legal aid. Refugee children seeking family reunion will not qualify for legal aid.

A person who receives a positive "reasonable grounds" decision under the National Referral Mechanism will receive legal aid. They will not receive legal aid until they have that decision, although the decision on any application for leave to remain will proceed apace during that period.

When it came to separated children given leave to 18, it was plain that Ministers did not understand that while they may have made asylum claims in the past, they will not necessarily qualify for legal aid when making their applications at age 17 ½. It seems to have been assumed that because they had once made an asylum claim, they would continue to qualify as persons seeking asylum. This is a failure to understand that what determines whether legal aid is available is the application presently being made, or alternatively a failure to understand that not all these children would advance human rights grounds. See ILPA's letter to the Rt Hon Lord Wallace of Tankerness QC of 15 March 2012 and his reply of 26

[61] *KA (Afghanistan et ors v SSHD* [2012] EWCA Civ 1014 at paragraph 7.

March 2012, appended hereto. the letter of Jonathan Djanogly MP to ILPA of 8 May 2012 appended hereto.

Quite simply, if no legal aid is available then the costs of legal advice and representation for these children will need to be met by local authorities supporting the children, who will be paying private rates.

Representatives of ILPA, of the Local Government Association, of the Office of the Immigration Services Commissioner and of other NGOs met Ministry of Justice and Home Office officials to discuss Mr Djanogly MP's suggestion that social workers could assist these children on 1 October 2012. All save the officials explained clearly why the proposal was unworkable. We append hereto the official Home Office note of the meeting and a letter of the OISC of 5 October 2012 circulated to all attendees subsequent to the meeting. The note records the Association of Local Government as saying:

> *… These are complex matters and involve very difficult legal concepts but they are only one component, one strand of what is going on in a child's life. This is why social workers ask experts to come in and to provide legal advice. …giving legal advice is not what social workers do. …Social workers are not qualified to complete that form. Conflicts of interest arise. …There is a question of the independence of the social worker, of the need to act in the best interests of the child. Legal advice is needed and that is not the role of the social worker, there are practice issues. There is also a risk that local authorities will face legal challenges if poor advice is given."*

The Office of the Immigration Services Commissioner said in its 15 October 2012 letter subsequent to the meeting

> *Whether the social workers become covered by the OISC regulatory scheme via Ministerial Order or direct regulation, please note that under Sch. 5 paragraph 3 (3) of the Act, they will still have to comply with the Commissioner's Code of Standards. The requirements of the Code include:*
>
> - *Professional Indemnity Insurance*
> - *Continuous Professional Development*
> - *Acting the Best Interests of the Client*
> - *Not acting where there is a potential conflict of interests*
>
> *The Commissioner will be required to take regulatory action against those social work advisers that are found to be failing. This may include seeking to have individuals excluded from continuing to give immigration advice and services.*

In short, Ministers' views on why these children could be denied legal aid were based on a misunderstanding of the nature of the claims the children were making, of the role of social workers and of the regulatory regime run by the Office of the Immigration Services Commissioner. Government must rethink this.

ILPA urges the Joint Committee to ask the Government to make use of its powers under section 9(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to bring immigration cases of separated children back into scope before the changes being made to legal aid by the Act take place in April 2013.

Asylum matters will remain within the scope of legal aid. But this is not the end of the story. The post-April 2013 contracts are out to tender. The last time legal aid contracts were let in 2010[62] it was a requirement that all firms (save in one part of the country, Devon excluding the City of Plymouth) had a mixed immigration and asylum contract. The two areas of work are thus interdependent, just as the two types of case may be intertwined in the case of an individual child. The removal of immigration from scope may have a knock-on effect as to the range of firms and organisations providing advice on asylum. Similarly some firms and organisations have a more broadly mixed legal aid practice. The loss of, for example, welfare benefits cases from scope may threaten the viability of a law centre also doing asylum cases.

We are concerned about the number of new matter starts (cases that lawyers can open) available in the current tenders, that will take effect from April 2013. For example, in Devon and Plymouth the current annual allocation of matter starts is between 350 and 400. Under the new tender it will be 100. Plymouth Council website[63] states

> *Currently there are approximately 350 asylum seekers resident in Plymouth. Nearly all are supported by the UK Border Agency (UKBA) however a small number receive assistance from Plymouth City Council (PCC). These people are mostly under the age of eighteen years who are not accompanied by an adult when they made their asylum application in the UK*

When ILPA queried the reduced allocation with the Legal Services Commission[64] it was told that the number of matter starts was based on usage. But in Plymouth, Devon Law Centre closed when the results of the last tender were announced because it had not secured a contract in social welfare law. The town was left wholly without provision for asylum and immigration legal aid for over six months. Eventually the Legal Services Commission made arrangements for a firm based in Ipswich to go to Plymouth two days a week to take cases. In those circumstances, what has usage to do with demand?

Other areas in which 'matter starts' have been dramatically reduced include Preston and Surrey and Sussex.[65] One concern is whether any legal representatives at all will take up a contract in an area where the number of matter starts on offer is so small. Another is whether those who do will have a sufficient volume of work to develop and maintain the relevant specialism. The overriding concern is that children will not benefit from representation, specialist or at all.

A separated child who concludes that s/he needs representation, who cannot obtain such representation for free, may determine to pay for it. The child may, in their efforts to earn

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[62] See http://www.legalservices.gov.uk/civil/tendering/civil_contracts_for_2010.asp

[63] See http://www.plymouth.gov.uk/asylumseekers

[64] Alison Harvey, General Secretary to Kerry Wood, Legal Services Commission, email exchange of 18 September 2012

[65] See Legal Services Commission Family, Housing & Debt and Immigration & Asylum Invitation to Tender at Annexe D, available at http://www.legalservices.gov.uk/docs/civil_contracting/Information_for_Applicants_ITT_Civil_Contracts_from_April_2013_v_2_(2).pdf.

money to pay, be put at risk of exploitation. This is the case however good the legal representation they purchase may be. There is a risk of violation of Article 32 of the UN Convention on the Rights of the Child insofar as the State leaves children to fend for themselves.

The Home Office will have new responsibilities as a result of these changes. In the case of *ZH (Tanzania) v SSHD* [2011] UKSC 4, the Supreme Court held, referring to Article 12 of the Convention on the Rights of Child, that the child must be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a representative.[66] Absent a lawyer to assist the separated child, the obligations upon the UK Border Agency will become more onerous as well as conflicted.

Guardians

Yes there should be a system of guardianship for separated and unaccompanied migrant children.

Not only is this a recommendation made by the Committee, it is, insofar as refugee children are concerned, a requirement under the binding European Union "Reception" Directive:

> *Article 19*
>
> ***Unaccompanied minors***
>
> > *1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.*[67]

Now that consideration is being given to the question[68] it is vital to ensure that this is not confined to the very narrow question of guardians for trafficked children but covers refugee and migrant children more generally. Indeed, any more limited approach would result in trafficked children going without guardians since the appointment of a guardian may be a vital factor in identifying the child as trafficked.[69]

There is currently an impossible situation where a separated child does not have the capacity to give instructions on a particular matter to their legal representative but there is no one who can give instructions on their behalf. Very often no one has parental responsibility for these children because they are not taken into care under section 31 of the Children Act 1989. The Official Solicitor only gets involved in cases before the higher

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[66] Paragraph 34 of the judgment.

[67] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

[68] Following the commitment given by the Lord Henley during the debate on the Protection of Freedoms Bill, see HL Deb 15 Feb 2012 : Column 848.

[69] For more information see ILPA's 4 February 2012 Briefing for House of Lords Report on Protection of Freedoms Bill (New Clause Amendment No. 57, Guardians for Trafficked Children)

courts after they have been through Home Office decision-making processes and through the tribunal and even then only as a last resort.[70]

The Joint Committee should give special attention to the question of why separated children are not taken into care under section 31 of the Children Act 1989 but instead more commonly accommodated under section 20. It should examine variations in practice and best practice.

The Legal Services Commission Civil Specification under the current contract sets a number of key performance indicators (KPIs) for suppliers to meet. Two of these are stated to relate to quality in immigration and asylum cases:

> *2.81 KPI 1A:*
> *You must achieve a Substantive Benefit for the Client in at least the following proportion of cases: Immigration 15%.*

For appeals the 'quality' Key Performance Indicator is:

> 2.84 KPI 1B:
> You must achieve a Substantive Benefit for the Client in at least the following proportion of cases: Immigration [and asylum] Controlled Legal Representation 40%

'Substantive benefit' has a very particular meaning (by defining which types of outcome are counted and which are not) different from the normal meaning of the words. Only detained fast track Controlled Legal Representation cases are excluded from this measure. The appeals of children are included.

ILPA has long lobbied for these indicators (particularly the appeal indicator) to be dropped or changed. There is no statistical basis for the rates set in the indicators. There is no evidence to show that a supplier diligently and conscientiously applying the merits test and preparing and presenting their appeals will achieve these results. The merits test itself introduces unpredictability as it includes cases where the merits are 'unclear'. There are also too many variables outside the control of the representatives. The concern is that the

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[70] See the Joint Memorandum of the Attorney General and the Lord Chief Justice of 19 December 2001 and see the aims, functions and business activities of the Official Solicitor as set out in *Office of the Official Solicitor and the Public Trustee Annual Report 2010 1.2 His aims are 1.2.1 to prevent injustice to the vulnerable by: • acting as last resort litigation friend, and in some cases solicitor, for … children (other than those who are the subject of child welfare proceedings) in court proceedings because they lack decision making capacity in relation to the proceedings. As litigation friend the Official Solicitor "steps into the shoes" of the client who lacks litigation capacity. His role is to carry on the litigation on behalf of the client and in his best interests. For this purpose the litigation friend must make all the decisions that the client would have made, had he been able. The litigation friend is responsible to the court for the propriety and the progress of the proceedings ...1.2.2 to assist the High Court, Court of Protection and Court of Appeal by • acting as advocate to the court1 providing advice and assistance to the court and • under Harbin v Masterman2 making enquiries and reporting to the court on any matter which the court thinks fit to direct in order to "ascertain the truth" or "find out the facts"….*

existence of these measures and that failing to meet them constitutes a breach of contract creates perverse incentives for suppliers, worried that they may fail to achieve their targets, to refuse legal aid in cases that meet the merits test, but are only borderline, to reduce the number of unsuccessful appeals that they conduct.

It is both professional misconduct and a breach of contract to take anything other than the best interests of the client into account when undertaking legal aid work. Children's cases may also be a particular factor as more of them will be upgrade appeals (appeals where a child has been granted discretionary leave to remain until the age of 17 ½ but wishes to appeal the refusal of refugee status) and may be cases where the merits are unclear or borderline

11. ARE ALL UNACCOMPANIED MIGRANT CHILDREN MADE AWARE OF THE EXISTENCE OF A SYSTEM FOR APPEALING AGAINST IMMIGRATION AND ASYLUM DECISIONS, AND IS THIS APPEAL SYSTEM SATISFACTORY?

Awareness of the existence of an appeal

No, not all unaccompanied migrant children are made aware of the existence of a system for appealing against immigration and asylum decisions.

If a person has a right of appeal only on human rights and race discrimination grounds, the refusal states

> *"Your right of appeal is limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 (www.legislation.gov.uk)"*

A separated child is unlikely without assistance to have a clue what that means. The link is to the website as a whole, not to the relevant section and lay persons, even with good English, are unaccustomed to reading statutes.

Refusal letters and appeal documents are sent in English. A child with no one to explain documents to them may not understand that they have a right of appeal.

As per the response above, not all separated children benefit from a legal representative who can explain to them at the outset of their case what appeal rights exist and who can identify opportunities to appeal as they arise. This situation is set to get worse.

Even where a legal representative is on the record, the UK Border Agency frequently writes to the separated child client. Both ILPA and The Law Society have repeatedly protested this.[71]

[71] Most recently, ILPA to Sonia Dower, UK Border Agency, Director of Operational Policy and Rules Unit, Strategy and Intelligence Directorate, UK Border Agency 10 August 2012, The Law Society to Ms Dower of 20 August 2012. A response is awaited.

As per the response to question 10, refugee children do not benefit from guardians, although some may benefit from an advisor from the Refugee Council Children's Panel or from a non-statutory guardian under the Scottish Refugee Council and Abelour pilot. Other children may benefit from schemes set up by particular voluntary or charitable organisations. But not all separated children hear about appeal rights from any of these sources. Moreover, any of these persons may make a child aware of a right of appeal, but only those who employ solicitors or barristers or who are regulated by the Office of the Immigration Services Commissioner are able to advise on whether or not to appeal and, if so, what should be pleaded.

In some cases the social worker might ensure that the child is made aware that an appeal is possible but is not competent or lawfully able to advise on whether or not to appeal and if so, what should be pleaded.

The appeal system

The system for appealing against immigration and asylum decisions is unsatisfactory. Under section 83 of the Nationality, Immigration and Asylum Act 2002, a person who is given leave to remain for one year or less is not entitled to appeal against a refusal to recognise them as a refugee. Thus a child aged 16 years and six months on arrival, not recognised as a refugee but given discretionary leave until age 17 ½, cannot challenge the refusal to recognise them as a refugee. An opportunity for such a challenge will come only when they are given further leave or refused it and face removal from the UK, over a year later and very often having reached the age of majority by that time.

During all that period they do not benefit from the rights accorded to refugees. A child given a year's leave as a trafficked person cannot challenge the refusal to recognise them as a refugee. ILPA argued when the national referral mechanism was set up that persons given leave under it should be given a year and a day (or even a year and five minutes) so that they would not be caught by section 83, but this was not accepted**.** This is not a durable solution. A child who has been subject to human trafficking should not face an enforced removal. To subject them to the uncertainty of a year's limited leave and deny them the opportunity of securing greater certainty is not in their best interests and in particular is incompatible with making best efforts toward their rehabilitation as required by Article 39 of the UN Convention on the Rights of the Child.

ILPA has proposed amendments to the Crime and Courts Bill currently before parliament to remove section 83 and would welcome the Committee's support for these in accordance with respect for Articles 3, 12 and 22 and 39 of the UN Convention on the Rights of the Child. It is not enough to give children leave to 18 rather than 17 ½ in the hope that fewer children will be caught by section 83; the section must be repealed.

There is no right of appeal against a decision under the national referral mechanism that a person has not been trafficked. The only challenge is by way of judicial review. Some aspects of the challenge may get bundled up with a challenge on a decision to refuse asylum, if the child has made an application for this.

Timetables are a matter of concern. Time limits for lodging an appeal are short, 10 days being the norm for a child in the UK,[72] yet there may then be a wait of months for an appeal to be heard. When a child succeeds on appeal, they may wait months officially to receive the grant of leave to remain. They are beset by a sense of uncertainty during this period but also by myriad practical difficulties as official bodies and third parties, including schools, colleges and prospective employers, may be reluctant to accept that they have leave.

There is concern about the way in which children and young people are dealt with before the Tribunal. ILPA is concerned that no specific rules and practice directions deal with age dispute judicial reviews which are heard before the Upper Tribunal Immigration and Asylum Chamber. We are concerned that while considerable attention has been given to the transfer of asylum judicial review cases to the Tribunal, almost none has been given to the transfer of age assessment judicial reviews to the Tribunal. Such judicial reviews have gone to the Immigration and Asylum Chamber of the Tribunal although age assessment is not a matter of immigration and asylum. We are concerned that these cases are ending up in that Chamber because age assessment cases are seen as matters of testing a person's credibility. The determinations that are coming out of the Tribunal appear to bear this out.
We draw attention to a recent tribunal determination in which an older brother gave evidence in his young brother's age dispute judicial review before the Tribunal.[73] The Tribunal found the younger brother to be 18, nearly 19 years of age. Commenting on the older brother, they said

> *"Although we have doubts as to his age, we have neither heard nor seen evidence sufficient to displace the age he has been allocated, particularly given the lack of any challenge to his age by those with care and involvement with him over a number of years."*

The older brother, by this time an adult, was not a party to the case. He had no opportunity to challenge this comment or to disapprove it but must henceforth live under this shadow of doubt.

12. IS THERE SUFFICIENT SUPPORT AND ADVICE FOR UNACCOMPANIED MIGRANT CHILDREN AS THEY APPROACH EIGHTEEN YEARS OF AGE AND BEYOND INTO ADULTHOOD?

No.

For those not recognised as refugees and not given humanitarian protection, 17 ½ is likely to be the age at which their leave to remain expires. It is wholly unsatisfactory that children are given leave to remain until 17 ½. There is no bright line at 18 years of age on one side of which a person needs support and on the other side on which they do not, as is recognised in leaving care legislation. While it is acknowledged that it is not possible to

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[72] The Asylum and Immigration (Tribunal) Procedure Rules SI 2005/230 (L.1)

[73] *R (on the application of JK) v Nottingham City Council (AAJR) [*2012] UKUT 00341(IAC)

return a child unless proper arrangements have been made for their care and welfare on return, there is not the same acknowledgement for young people who have turned 18 and who are highly vulnerable to removal, without any considerations for their welfare.. Leave to remain given to a child on the basis that they cannot safely be returned should be given until at least age 18. Consideration should be given on an individual basis to the appropriate period of leave, which will in some cases be indefinite leave.

As described above, a child whose leave will expire at 17 ½ needs legal advice but the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, lead to doubt as to whether they will get it.

If a child makes an in-time application for further leave they are unlikely to have a decision until after they have turned 18, therefore they will be beset by the difficulties attendant on a lack of documentation as described above.

13. HAS THE GOVERNMENT CONDUCTED AN ASSESSMENT OF THE NUMBER OF YOUNG VICTIMS OF TRAFFICKING IN YOUTH OR ADULT CUSTODY, AND OF THE STEPS BEING TAKEN TO SAFEGUARD THEM?

As far as ILPA is aware, no.

14. ARE LOCAL AUTHORITIES AND IMMIGRATION OFFICIALS DEALING SATISFACTORILY WITH THE ISSUE OF CHILDREN AND YOUNG PEOPLE WHOSE AGES HAVE BEEN DISPUTED, AND HAS THE GOVERNMENT CONSIDERED DEVELOPING AN INDEPENDENT MULTI-AGENCY PANEL-BASED APPROACH TO DETERMINING AGE ASSESSMENTS?

This question starts from the wrong place. The main problem is that the age of so very many children is disputed. Many children will say how old they are. This is routinely doubted. Over the last six years, an average of around 1,500 people have had their ages disputed each year.[74] There can be no resolution of the problem of age disputes until this question is resolved.[75]

How cases are dealt with

The way in which the UK Border Agency divides those whose age is disputed is unsatisfactory. It divides them into persons whose appearance "strongly suggests" that they

[74] Home Office, *Asylum data tables Immigration Statistics January - March 2012 Volume 4*, at http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-tabs-q1-2012/asylum4-q1-2012-tabs

[75] See *When is a child not a child? Asylum, age disputes and the process of age assessment,* ILPA/Heaven Crawley, May 2007

are 18 and others. It treats only the latter category as children pending resolution of the dispute. In practice, children are ending up in the category of persons whose appearance is deemed strongly to suggest that they are adults..[76]

The way in which disputes are dealt with is unsatisfactory. Although it has improved since the case of *R(A) v Croydon LBC* [2009] UKSC 8 clarified that the courts will deal with the issue, serious problems remain as highlighted in the Office of the Children's Commissioner for England and Wales' report *The fact of age: review of caselaw and local authority practice since the Supreme Court judgment in R(A) v Croydon LBC* [2009].[77]

It is not possible to establish with exactitude how old a person is if you are not prepared to rely on their testimony and if they do not have documentation of their date of birth.

In his foreword to ILPA's *When is a child not a child?*[78] Sir Al Aynsley Green, then Children's Commissioner for England, said

> *One of the striking findings is that the nub of the problem is that the official policy of giving the 'benefit of the doubt' to those claiming to be children is frequently not applied in practice by staff on the ground. There are a number of reasons for this and the research is very helpful in locating the belief systems and the underlying pressures that foster 'the culture of disbelief' that widens the gap between policy and practice.*

The body of the report contains, for example:

> *There is strong evidence from this research that the apparent increase in the number of age disputed cases largely reflects a 'culture of disbelief' which has developed towards those seeking asylum in the UK. Children and young people have not been excluded from this development. The most obvious consequence of the culture of disbelief is that separated asylum seeking children are simply not believed.*
>
> *There is often no rationale or logical explanation for why they are disbelieved; children are simply treated with disbelief from the beginning of the process and immigration officers look for information to confirm their pre-conceptions.*
>
> *The time spent observing procedures at the screening unit confirms that there is a widespread doubt and cynicism about the legitimacy or otherwise of asylum applications made by separated asylum seeking children. …There is also clear evidence of a general lack of care and empathy. Children were greeted with hostility upon their arrival … Foster carers, social workers and legal representatives were, for the most part, treated with contempt. The view that a culture of disbelief permeates the screening process was shared by many of the social workers who participated in the research.*

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[76] See UK Border Agency Asylum Process guidance, *Assessing Age,* Version 6 of 17 June 2011, available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age?view=Binary

[77] July 2012

[78] *Op. cit.*

It is also evident from discussions with some social workers that a similar culture of disbelief or cynicism about separated asylum seeking children has been allowed to develop in some SSDs. For example, social workers spoke of being put under pressure by managers to assess children as being over rather than under 16 or 18 years of age. They also described a general atmosphere in which a client's account of his or her experiences is disbelieved and credibility increasingly used as the basis for disputing a child's stated age:

> *'The whole ethos is that all clients are deceptive. If they turn up in a car the managers stand about saying 'they must be 25'. They all run up to the windows and have a look. The whole thing is that asylum seekers are liars and are really economic migrants. The workers are okay, it's management that are the problem.' Social Worker*

…

…even from a common-sense point of view the risks of wrongly treating children as adults are considerably higher than the other way around. This is because the children system has in-built support and supervision to prevent children from being harmed. No such safeguards exist in the adult system. Indeed it appears that any 'risks' associated with adults in the children system are much more related to the economic implications and a perception that immigration controls are being undermined than they are with outcomes for children.

These concerns subsist. Indeed, so concerned was ILPA about treatment in the Asylum Screening Unit that in January 2012 we and the AIRE centre relayed our concerns to the European Commission. We wrote

> *We are concerned that groups such as children, trafficked persons and older people, are not receiving a response from the Asylum Screening Unit that is appropriate to their special needs.*

We provided examples, including

> *E-mail - 23/05/2011*
>
> *"Waiting times are a concern even when an appointment has been made for a child to attend. I recently had a case where we had an appointment between 8.30 - 10.30am, and yet the client was not screened until 3pm."*
>
> *"My main problem though with the children's section at the ASU is that they refuse to allow the legal rep's interpreter to attend the screening interview. The LSC pays for a legal representative and an interpreter to attend, but the UKBA states that only one person (which will be the legal rep) can attend. Therefore there are no safeguards if an interpreting problem arises at the screening interview.*
>
> *…I made a formal complaint about this last year and also spoke to the head of the ASU, Brindha Selva, as well as the various Metropolitan police child protection officers they have there, but it got me nowhere."*
>
> *E-mail - 25/05/2011*
>
> *"I have had a recent unpleasant experience at the ASU attending in person with a minor client who is a victim of trafficking for domestic servitude. She was taken to the ASU by*

social services on 22/2/11 but was turned away as they were too busy, and given an appointment to return on 28/2/11. She duly returned with a social worker on that date.

From the general ASU she was sent to the children's ASU where she was appallingly treated by an I[mmigration] O[fficer] who accused her of lying about her age and identity because the Home Office had a copy of the documents on which she entered (or rather was trafficked!) into the UK and these made her 25 with a different name. They lodged her claim in the false identity instead of her correct identity and told her that they would contact her traffickers to check up on her. No screening interview was conducted and she was given a further appointment to return on 11/3/11. On 11/3/11 I attended the adult ASU with the client and her foster mother. The appointment was for 8.30am. I had an age assessment from social services confirming client's age as 15 which I handed in. We stayed there until 3.30pm when we were told that no screening interview would take place that day."

On 28 August the European Commission informed us that our complaint had been communicated to the UK.

The first thing that needs to happen is for greater reliance to be placed on the testimony of children and young people and this should be doubted only with very good cause. This may be the child's saying how old they are, or describing events that allow their age to be established.

The next thing is that no steps incompatible with treating a person as a child should be taken on a case of any person whose age is disputed until the dispute is resolved. The dispute should be resolved with all due diligence in cases where no documentary evidence is awaited or forthcoming.

The Home Office has often voiced concern that errors in the assessment of age might result in adults being accommodated with children, but if it is impossible in all respects to distinguish the individual in question from a child then we suggest that the risks are being exaggerated. It is the lack of adequate supervision and safeguarding provisions to manage the conduct of children and young people when placed in a residential setting that may put their peers at risk, not simply their chronological age.

The way in which disputes are dealt with could be very much more unsatisfactory than it is at the moment. In 2012 the UK again[79] proposed that persons whose age is disputed be exposed to ionising radiation in the form of x-rays despite the copious evidence[80] that this

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[79] The last examination of this issue had been in 2007 when Minister Liam Byrne set up a working group to examine questions of age assessment. The Working Group could not be persuaded to accept the use of x-rays and was mothballed.

[80] We highlight the July 2012 Australian Human Rights Commission *Inquiry into the treatment of individuals suspected of people smuggling offences who say they are children* http://www.humanrights.gov.au/ageassessment/report/index.html and in particular submission of Dr Tim Cole PhD ScD FMedSci Professor of Medical Statistics , MRC Centre of Epidemiology for Child Health, Institute of Child Health, University College London, UK available at http://www.humanrights.gov.au/ageassessment/submissions.html and the evidence of medical experts given to the Commission on 9 March 2012, transcribed at http://www.humanrights.gov.au/pdf/human_rights/20120326_medical_hearing_transcript.pdf

could not determine age and despite the UK Border Agency being unable to explain what a trial to determine the accuracy of x-rays to determine age could prove[81] when the cohort of persons to be subjected to the trial were persons whose age was not known. We could not identify that attention had been given to the best interests of the child, or indeed to the ethics and legality of the procedure. The four UK Children's Commissioners,[82] the Royal Colleges and others protested. The intervention of the Chief Medical Officer revealed that procedures for the approval of ethical research had not been respected and the trial was suspended.[83]

The Home Office has yet to submit a proposal to the National Research Ethics Committee but has confirmed, most recently at the National Asylum Stakeholder Forum Children's subgroup of 8 October 2012 at which ILPA was represented, that it remains its intention so to do.

As described above, it is unsatisfactory that there are no procedure rules or practice directions for the Upper Tribunal Immigration and Asylum Chamber dealing with age dispute judicial reviews and that children are as a result being exposed to lengthy trial-like conditions in court, standing in the witness box under cross-examination as part of a contested, adversarial and even combative judicial process.

Multi agency panels

These were mooted in ILPA's *When is a child not a child?* publication[84] in 2007 but we are not aware that these have been the subjected of sustained consideration by the Government.

The persons involved in resolving an age dispute should be independent and have no stake in the outcome of a case. Independent multi-agency panels may have a role to play in the resolution of disputes although we anticipate that very many disputes will not be resolved until there has been a court hearing. There are risks in standing panels that start to require a through-put of cases to sustain their own existence and that this would militate against the objective, described above, of reducing the number of disputes.

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[81] See ILPA note of meeting of 4 April 2012 with Zilla Bowell, Lynne Spiers and Ian Cheeseman of the UK Border Agency appended hereto .

[82] See their joint statement of 29 March 2012

[83] See letter of Zilla Bowell, Director of Asylum, UK Border Agency to members of the National Asylum Stakeholder Forum of 27 April 2012 available at http://www.ilpa.org.uk/data/resources/14631/12.04.27-Zilla-Bowell-to-NASF-Dental_x-ray_letter_270412.pdf

[84] *Op.cit.*

We suggest that, pursuant to the recommendations made by the UN committee on the Rights of the Child the Joint Committee require of the UK Border Agency statistics as to the outcomes of age disputes in cases where a person has claimed to be a child. These could include
a) Total numbers of persons claiming to be children
b) Numbers of these who were not treated as children pending resolution of the dispute.
c) Number of those persons in b) who have been detained under immigration act powers at any stage
d) Of the figure in b) how many have subsequently been accepted to be children
e) How many of those treated as children pending resolution of the dispute were ultimately found to be children.

15. WHAT ASSESSMENT HAS BEEN MADE OF THE IMPACT OF FUNDING CUTS ON CARE PROVISION FOR UNACCOMPANIED MIGRANT CHILDREN AND YOUNG PEOPLE, AND WHAT STEPS HAVE BEEN TAKEN TO ENSURE THAT SUCH INDIVIDUALS ARE PROVIDED WITH SUFFICIENT SUPPORT AND CARE?

The assessments with which ILPA is familiar are those made to do with the cuts in legal aid. These assessments, published in November 2010, were, insofar as is relevant:

Impact assessments

- Scope Changes
- Provision of telephone advice
- Financial Eligibility
- Legal Aid Remuneration - civil and family fees
- Expert Fees
- Interest on Client Accounts
- Supplementary Legal Aid Scheme
- Cumulative Legal Aid Reform Proposals [85]

Equality Impact assessments:

- Legal Aid Reform: Scope Changes
- Provision of telephone advice
- Financial Eligibility
- Civil and Family Fees

[85] http://www.justice.gov.uk/consultations/legal-aid-reform#equality

- Legal Aid Remuneration – Experts' Fees
- Alternative Sources of Funding: Sharing Responsibility
- Cumulative Impact
- Addendum to the Cumulative Equality Impact Assessment[86]

These were inadequate and are devoid of any real detail. The June 2011 Cumulative Impact Assessment stated

> *(xi) The lack of a robust evidence base means that we are unable to draw conclusions as to whether wider economic and social costs are likely to result from the programme of reform or to estimate their size.*

The assessments were most unsatisfactory. They were demonstrably wrong in a number of respects.[87] Nonetheless, the Cumulative Equality Impact Assessment set out that:

> *The proposals have the potential to disproportionately affect female clients, BAME clients, and ill or disabled people, when compared with the population as a whole. This is a result of these groups being overrepresented as users of civil legal aid services. However, it should be noted that, due to the significant proportion of clients for whom illness or disability information is not known, findings in relation to this group, and to a lesser extent the BAME group, should be treated with caution.* [88]

The Explanatory Memorandum for the Statement of Changes in Immigration rules, CM 8423 contained the statement

> *3.2 The Government regrets that for these changes it has not been possible to comply with the convention that changes should be laid before Parliament no less than 21 days before they will come into force, but invites the Committee to note that these changes have no operational impact on applicants, sponsors or caseworkers. The changes only incorporate existing requirements, currently set out in guidance or lists external to the Immigration Rules, into the Rules themselves to protect against further legal challenge.*

That for Statement of Changes HC 565 contained:

> *3.4. The Government regrets that for these changes it has not been possible to fully comply with the convention that changes should be laid before Parliament no less than 21 days before they will come into force, but invites the Committee to note that most of the changes that come into force immediately have no operational impact on applicants, sponsors or caseworkers. The changes primarily incorporate existing requirements, currently set out in guidance or lists external to the Immigration Rules, into the Rules themselves to protect against further legal challenge.*

CM 8423 came into force overnight being published on the UK Border Agency website during the evening before it came into force. It runs to 288 pages. HC 565 came into force

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[86] All available at http://www.justice.gov.uk/consultations/legal-aid-reform#equality

[87] See the Legal Action Group, The real impact of legal aid advice cuts. March 2011

[88] Legal Aid Reform: Cumulative Impact Equalities Impact Assessment (EIA). Available at http://www.justice.gov.uk/downloads/consultations/eia-cum-legal-aid-ref.pdf

overnight. It runs to 45 pages. ILPA, writing to Jeremy Oppenheim of the UK Border Agency on 7 September 2012, the day after HC 565 was laid before parliament covered some 12 pages with matters it considered to be unintentional errors in these instruments or in HC 194 and not corrected, or corrected with new errors introduced, by these instruments. These were not matters on which we identified a difference of opinion likely to result in legal challenges but rather matters that we considered to be mistakes. Replying to us on 4 October 2012, Philip Duffy of the Immigration and Border Policy Directorate in the Home Office accepted 26 of our points as matters he had either moved to correct, or accepted needed correction, or was not sure needed correction but agreed needed to be reviewed. How could documents published at such short notice, so riddled with errors, not affect applicants, sponsors or staff of the agency, not to mention legal representatives. All too often the assessment of impact is a *post hoc* has become a box ticking exercise, an opportunity to recite excuses and platitudes after the fact.

A superior system of impact assessments, perhaps with a part of Government independent of the sponsoring department having an oversight role might start to address the problems of inadequate institutional machinery in general and thus help to protect, *inter alia*, migrant children

Link this to the proposed powers of the Children's Commissioner to carry out impact assessments?

16. IS THE RELATIONSHIP BETWEEN IMMIGRATION LEGISLATION AND CHILD WELFARE LEGISLATION COMPATIBLE WITH THE UK'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS?

The relationship between immigration and child welfare legislation is that it fits with in the same hierarchy of laws, informed by obligations under EU law and the European Convention on Human Rights and by the UK's treaty obligations, including under the UN Convention on the rights of the child and by the judgments of the courts. It is not the relationship between these types of legislation that is the problem, but the content of immigration legislation insofar as it drives a coach and horses through the existing child welfare legal framework not only in England but in Scotland, Wales and Northern Ireland, because immigration is not a devolved matter although many questions that it affects are devolved. An obvious example is Schedule 3 to the Nationality, Immigration and Asylum Act 2002, withholding and withdrawing of support, with its denial of benefits, including to parents and to young people who have turned 18. Another is the provisions on automatic deportation under the UK Borders Act 2007.

A common feature of these provisions is "human rights get out clauses," for example in the Nationality, Immigration and Asylum Act 2002 Schedule 3, paragraph 3:

3 Exceptions

Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of—

a person's Convention rights, or

a person's rights under the Community Treaties.

Here, reference to human rights is serving to allow a provision of unparalleled severity to be enacted, in a way that might not have happened had no human rights get out clause been to hand. The approach is all the more fraught with danger as legal aid for advice and representation is withdrawn from those affected. Schedule 3 prevents young people who have turned 18 and whose claims have been finally determined against them from getting 'leaving care' and other types of support under the Children Acts. If a young person is found to be a person 'unlawfully in the UK', having exhausted all appeal rights, then they can have their leaving care support withdrawn, providing that to do so would not breach their human rights. Most should continue to receive support on this basis until issued with removal directions, but in practice many remain in the UK, destitute, with no support or accommodation. However, there is no statutory guidance on how to conduct human rights assessments and the quality of these, where they are undertaken, varies a great deal. Those young people who do continue to receive support under the human rights exception do not always receive a full range of leaving care services but a minimum designed to bring them above the human rights floor.

17. ADDENDUM – MORE SEPARATED CHILDREN?

The new rules on family immigration make it more difficult for family members to come to, or to remain in the UK. ILPA anticipates that the cumulative effect of the changes will be to result in more children remaining behind in the UK, for example British citizen children when their parents are forced to leave, or family structures breaking down under the pressure of the new rules, for example protracted periods of temporary and thus uncertain status under Appendix FM to the immigration rules. We anticipate that there will also be more children separated from their parents because they are left outside the UK, for example because parents are unable to satisfy the new rules in cases where they are trying to demonstrate that they have sole responsibility for the child[89] or cannot afford to bring their child because of the new financial requirements.[90]

ILPA
October 2012

[89] Appendix FM, at E-ECPT.1.1

[90] For these see Appendices FM and FM-S.

APPENDIX

List of ILPA materials and materials held at ILPA relevant to this enquiry

Appended hereto:

1. October 2012 meeting of Ministry of Justice and Home Office officials with representatives of ILPA, of the Local Government Association, of the Office of the Immigration Services Commissioner and of other NGOs re legal advice for separated children and letter of the OISC of 5 October 2012 subsequent to the meeting.

2. 8 May 2012 Letter of Jonathan Djanogly MP to ILPA re legal aid of

3. 4 April 2012 ILPA note of meeting of with Zilla Bowell, Lynne Spiers and Ian Cheeseman of the UK Border Agency

4. March 2012 ILPA's letter to the Rt Hon Lord Wallace of Tankerness QC of 15 March 2012 and his reply of 26 March 2012.

5. 7 February 2011 response to the Freedom of Information request from Mahmud Quayum of Camden Community Law Centre: details of training on section 55 received by details of training received by the entry clearance staff and entry clearance managers in Dhaka and Abu Dhabi.

6. September 2010 UK Border Agency Best interests training powerpoint of as circulated to the National Asylum Stakeholder Forum on 2 December 2010.

ILPA publications, available on http://www.ilpa.org.uk/pages/publications.html:

1. *Working with children and young people subject to immigration control: Guidelines for best practice*, ILPA/Professor Heaven Crawley, May 2012.
2. *Working With Refugee Children: Current Issues in Best Practice*, Syd Bolton, Kalvir Kaur, Shu Shin Luh, Jackie Peirce and Colin Yeo for ILPA May 2011.
3. *Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child,* 1989 ILPA, July 2009
4. *When is a child not a child? Asylum, age disputes and the process of age assessment,* ILPA/Heaven Crawley, May 2007, Executive Summary
5. *Child first, migrant second: Ensuring that every child matters*, ILPA/Heaven Crawley, February 2006.
6. *Working with children and young people subject to immigration control: Guidelines for best practice*, ILPA/Heaven Crawley, November 2004. See now 2012.

ILPA briefings and submissions – available from* http://www.ilpa.org.uk/pages/briefings.html *and subpages

1. Juxtaposed controls: ILPA note for the Chief Inspector re his inspection of juxtaposed controls, 8 October 2012
2. ILPA Response to Commission on a Bill of Rights, a second consultation, 30 September 2012
3. Submission to Joint Committee on Human Rights (Legislative Scrutiny 2012/2013) re Crime and Courts Bill, Justice and Security Bill & Statement of Changes HC 194 (new family migration rules), 29 June 2012
4. Crime and Courts Bill, Briefing for House of Lords committee on New Clause, Amendment No. 148C (Immigration appeals: asylum and humanitarian protection), 22 June 2012

5. Briefing for the debate re Statement of Changes in Immigration Rules HC 194 on the motion "This House supports the Government in recognising that the right to family or private life in Article 8 of the ECHR is a qualified right and agrees that the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be contained in the immigration rules.", 19 June 2012
6. Submission to All-Party Parliamentary Groups on Runaway and Missing Children and Adults, and for Looked After Children and Care Leavers (inquiry into children who go missing or run away from care), 23 April 2012
7. Submission to European Asylum Support Office (EASO) (age assessment practices), 20 April 2012
8. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Lords Third Reading, Briefing on Government Amendments on Victims of Trafficking, 26 March 2012
9. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Lords Third Reading, Briefing on Amendment on Children (Baroness Grey-Thompson & Ors), 6 March 2012
10. Briefing for House of Lords Report on Protection of Freedoms Bill (New Clause Amendment No. 57, Guardians for Trafficked Children), 4 February 2012
11. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Lords Committee, Briefing on Amendments Nos. 33 & 34 (children), 19 December 2011
12. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Lords Committee, 19 December 2011
13. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Lords Committee Briefing on Amendment No. 71 (victims of human trafficking etc.), 17 December 2011
14. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Lords Committee, , Briefing on Amendment No. 69 (refugee family reunion), 18 December 2011
15. Submission to Chief Inspector of the UK Border Agency (inspection programme for 2012/13), 30 November 2011
16. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Commons Report and Third Reading, Briefing on Amendment No. 145 (Refugee Family Reunion), 27 October 2011
17. Response to UK Border Agency consultation (Family Migration), 13 October 2011
18. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Commons Public Bill Committee, Amendment No. 242 (Amendment on Children), 7 September 2011
19. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Commons Public Bill Committee, Amendment Nos. 240 & 241 (Amendments on Children and Vulnerable Adults), 7 September 2011
20. Legal Aid, Sentencing and Punishment of Offenders Bill, House of Commons Public Bill Committee, Refugee Family Reunion Amendment, 2 September 2011
21. Submission to UK Border Agency (Draft Family Reunion Asylum Instruction), 6 June 2011
22. Response to Home Office consultation (Changes to Immigration-related Home Office statistical outputs), 4 May 2011
23. Response to Ministry of Justice consultation (Proposals for reform of Legal Aid in England and Wales), 14 February 2011
    Annexe 1: case studies
    Annexe 2: compendium of higher court Article 8 cases
    Annexe 3: remuneration rates
24. Submission to UK Border Agency (proposals on refugee family reunion), 31 January 2011
25. Submission to Justice Select Committee (access to justice) with Annexes (A) initial response to MoJ consultation, (B) briefing on legal aid proposed cuts, (C) initial submission to Justice Select Committee, (D) remuneration rates and (E) case studies, 20 January 2011
26. Initial Response to Ministry of Justice consultation (Proposals for reform of Legal Aid in England and Wales), 22 December 2010
27. Briefing for House of Commons debate (Legal Aid), 15 December 2010
28. Response to Crown Prosecution Service consultation (Prosecuting and Trafficking), October 2010

29. Submission to Independent Review of the Office of the Children's Commissioner, 4 October 2010
30. Submission to UK Border Agency (ending the detention of children), 2 July 2010
31. Response to UK Border Agency questionnaire (first twelve months of the National Referral Mechanism), 7 June 2010
32. Response to Home Office Statistics consultation (publication of monthly asylum application statistical data), 30 April 2010
33. Submission to UK Border Agency (Assessing Age Asylum Process Guidance version 5), 15 January 2010
34. Response to UK Border Agency consultation (draft Statutory Guidance on safeguarding and promoting the welfare of children), 31 July 2009
35. Borders, Citizenship and Immigration Bill, House of Lords Committee Briefing on Part 4 Clause 51 (Children: age disputes), March 2009
36. Borders, Citizenship and Immigration Bill, House of Lords Committee Briefing on Part 4 Clause 51 (Children: 'in the UK'), March 2009
37. Borders, Citizenship and Immigration Bill, Memorandum of Evidence for Home Affairs Committee, 6 March 2009
38. Submission to Home Affairs Select Committee (human trafficking), 5 March 2009
39. Submission to Joint Committee on Human Rights (children's rights), February 2009
40. Borders, Citizenship and Immigration Bill, House of Lords, Briefing for Second Reading (and for Policing and Crime Bill) on Baby Trafficking, January 2009
41. Submission to UK Border Agency consultation (Code of Practice for Keeping Children Safe from Harm)
    Annexe: Letter of 2 April 2008 to Lord Adonis (guardianship for unaccompanied asylum-seeking children), 25 April 2008
42. Response to Border and Immigration Agency consultation (Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children), 31 May 2007

ILPA Information Sheets

At http://www.ilpa.org.uk/pages/ilpa-information-service-further-information-sheets.html the committee will find straightforward information sheets of a maximum of two pages each, designed to be read by non-lawyers on topics in immigration law. These may be of assistance to the Joint Committee.

Other Materials held by ILPA, available on ILPA's public website

Correspondence between ILPA and Zilla Bowell, Head of Asylum, UK Border Agency on plans to reintroduce use of x-rays for age assessment, March 2012 and related materials. Available at http://www.ilpa.org.uk/resources.php/14476/letter-from-zilla-bowell-uk-border-agency-on-plans-to-reintroduce-use-of-x-rays-for-age-assessment