ILPA to the Joint Committee on Human Rights re implementation of Human Rights Judgments

Executive Summary

In this submission ILPA has commented on those judgments which fall within its expertise, and on related matters relevant to the Committee's examination, as follows:

***Abdi v UK* (Application no. 27770/08) Final 09/07/2013**
Failures to carry out review of detention
With consideration of findings against the Government in respect of immigration detention, in particular those cases where it has been found to have breached Article 3 in its treatment of men with mental illness.
Other aspects of the judgment
With consideration of length of detention and that immigration detainees are not automatically brought before a court.

C.N. v UK (Application no. 4239/08) 13 November 2012 (final 13 February 2012)
Criminalising of breaches of Article 4
With consideration of the proposed Modern Slavery Bill.
Positive obligations under Article 4
With case study and reference to the Committee's report on Human Trafficking (HL Paper 245 HC 1127).
Better protection for domestic workers
With consideration of the effects of the 2012 changes to the immigration rules and of legal aid.

***K.A. and Others v. the United Kingdom (Application no 63008/11),* of 22 January 2013-09-29**
With consideration of the implementation of the wider effects of the judgment.

***Sufi & Elmi v UK*, Applications No.s 8319/07 and 11449/07, judgment 28 June 2011**
taken with ***Ncube v United Kingdom*** [2012] ECHR 897
Return to Somalia
Leave granted
With consideration of the length of leave granted from those excluded from humanitarian protection or discretionary leave under the discretionary leave policy. Also relevant to the discussion below.

Article 8 in the immigration context
With consideration of Statement of Changes in Immigration Rules HC 194 and the Home Secretary's decision to legislate to enshrine Article 8 in primary legislation.
The Upper Tribunal
With consideration of its determinations on the subject of HC 194.
Deportation of foreign national offenders and the right to family life
With consideration of *AA v UK (Application no. 8000/08)*
Post flight spouses of refugees
With consideration of ***Hode and Abdi v UK* (application 22341/09)** 6 November 2012, 6 February 2013, the compatibility of HC 194 with that judgment and also the discrimination against children recognised as refugees in respect of refugee family reunion.

Legal Aid

***Abdi v UK* (Application no. 27770/08) Final 09/07/2013**

1. This is not the most straightforward case for the Committee to consider. First, the Committee of Ministers has yet to set out in detail the state of execution of the judgment in the case[1]. Secondly, the firm findings of the European Court are limited. We deal first with those findings and then with other implications of the judgment.

Failure to carry out reviews of detention

2. The court considered only detention from 3 December 2004 until mid-April 2007, as domestic remedies were held not to have been exhausted for the rest of the detention. It found that for that period the detention was not "lawful" under domestic law because regular reviews of detention required by the Secretary of State's published policy [2]had not been carried out[3] and, as such, was in breach of Article 5(1) of the Convention.

3. The policy requires regular reviews of detention. The problem is with the implementation of that policy. ILPA remains concerned that reviews of detention are not consistently carried out as was the case in *Abdi* and in *Kambadzi*[4] and that even where a review takes place the person conducting it too frequently fails adequately to consider all factors and evidence relevant to a decision to maintain detention. The December 2012 Joint report of Her Majesty's Inspectorate of Prisons and the Chief Inspector of the UK Border Agency *The effectiveness and impact of immigration detention casework* found that in 30% of cases studied at least one review of detention was "missed, conducted late or not on file." In 59% of cases

> *...detention was not always reviewed at the right level of authority. Many reviews did not consider all factors relevant to the case, including family ties and health problems. Factors that might support a detainee's case for release were regularly under-recorded, while detrimental information was recorded in detail…*

4. In *Kambadzi* in the High Court[5] Mr Justice Munby found that Mr Kambadzi had been sent monthly updates which said reviews had been completed when these reviews had not been done. The judge referred to the 'casual mendacity' this evidenced. Detainees do not receive copies of reviews, but only updates. **The Committee could usefully highlight the need for detainees to receive copies of all reviews.**

5. Reviews of detention have come under scrutiny by the domestic courts in the context of an examination of breaches of Article 3 of the European Convention on Human Rights resulting from the detention of men with mental illnesses under immigration act powers. While the treatment complained of took place at an earlier date the pleadings in the cases show the Secretary of State continuing to maintain that reviews that fail to give effect to the written policy are adequate.

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[1] See http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=.http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode

[2] Enforcement Instructions and Guidance, Chapter 55.

[3] See *Shepherd Masimba Kambadzi v SSHD* [2011] UKSC 23.

[4] See note three above. In *Kambadzi* some 19 reviews had been missed in a 22-month period.

[5] [2008] EWHC 98 (Admin).

6. In *R (S) v SSHD* [2011] EWHC 2120 (Admin) the judge held that "subsequent reviews failed to grapple with the need to understand and apply the policy requirement of exceptional circumstances, to recognise properly S's mental condition and to consider properly objective evidence as to the effect of detention on it." He records the Secretary of State's submission that "…the policy guidance with regard to the detention of mentally ill persons was referred to in S's detention reviews and properly applied." The judge disagreed: "…the subsequent reviews failed to grapple with the need to understand and apply the policy requirement of exceptional circumstances, to recognise properly S's mental condition and to consider properly objective evidence as to the effect of detention on it" and highlighted other "unsatisfactory" reviews. This was in the context of a case where the person was detained despite a clear (and documented) history of severe mental illness, and contrary to the clear expert advice of a number of mental health professionals; the detention was held to give rise to a breach of Article 3.

7. In *R (BA) v SSHD*[6] detention was also found to breach Article 3. The judge found "...a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare." The judge carefully enumerates the shortcomings in the reviews "In common with the other detention reviews, no detention review checklist appears to have been completed" "The reasoning in this decision does not refer to BA's mental illness at all. It …does not comply with…the policy. In addition, the decision maker appears to think, incorrectly, that BA's asylum claim had only been made recently…" "I do not consider that these factors were properly marshalled or assessed" "A crescendo of professional voices expressed the view in the course of July that he was unfit to be detained." He finds "…a deplorable failure, from the outset, by those responsible for BA's detention to recognise the nature and extent of BA's illness[7]."

8. *R (HA) v Secretary of State for the Home Department*[8] involved a schizophrenic. Again a breach of Article 3 was found. The judge considers the reviews in detail. He observes

> *There was no reference to the Claimant's medical condition or the information which had been brought to Mr Brewer's attention by this time. In his report Mr Brewer also said: 'All known facts of this case have been considered and there are no compassionate circumstances…under the heading 'Changes in Circumstances' the same words that had been used in the previous two reviews were repeated without in fact any record being given of any changes since the last review…It will be observed that there was no mention of the Claimant's mental health in the lengthy section which closed the proposal by Aina Parry.*

9. As to the Secretary of State's case:

> *The Defendant had no real answer to these submissions. In substance her response was to accept that the Claimant was in need of a transfer at about that time for assessment and, if necessary, treatment in a psychiatric setting but to deny that it was her responsibility that this did not happen as quickly as it might have done, that responsibility lying with others such as the Primary Care Trust.*

[6] [2011] EWHC 2748 (Admin) (26 October 2011).
[7] Judgment, paragraph 236.
[8] [2012] EWHC 979 (Admin) (17 April 2012).

10. *R (D) v Secretary of State for the Home Department*[9] involved another schizophrenic. Each review contains the formula "and as there are no medical or compassionate issues highlighted to date" despite the increasing evidence of mental illness. There is nothing in the voluminous contemporary documentation to suggest that anyone concerned with D's detention expressly referred to the Enforcement Instructions, much less to Chapter 55.10 [which deals with the detention of the mentally ill] The judge describes the Home Office approach as "irrational" and "laisser-faire". The Secretary of State maintained throughout that there had been no error and no breach of Article 3 or even of Article 8 even though the Official Solicitor was acting as D's litigation friend by the time of the hearing because D's mental state was such that he could not instruct his solicitors.

11. Other cases have been before the courts[10], or settled, others are ongoing. The detention of the mentally ill, especially post-conviction is often for very lengthy periods. It is not ILPA's experience that detention of the mentally ill only occurs in "very exceptional circumstances". Where a person has served time in prison, whatever their mental illness, members' experience is that, absent challenges, detention is more likely than not. Treatment of the mentally ill in immigration removal centres is inadequate and the cases cite disciplinary measures, including segregation, being used against them, but transfer to hospital under the Mental Health Act 1983 does not take place promptly.

12. One might have expected a prompt reaction to findings of breaches of Article 3, particularly when the UK's treatment of the mentally ill in detention continues to be the subject of criticism by the European Court of Human Rights[11]. Yet when Mr Rob Whiteman, then Chief Executive of the Agency, gave evidence to the Home Affairs Select Committee on 18 September 2012[12] it was far from clear that he knew what the Committee was talking about when these cases were raised". He also told the Committee that he was satisfied that the situation was "very different" from the situation when the courts had criticised the Agency. When challenged on 26 March 2013 that he had given the Committee inaccurate information about these cases he said I cannot remember those three cases[13]". This suggests a cavalier attitude to having been found, repeatedly, to have breached Article 3.

13. If breaches of Article 3 are to be averted in future the policy of not detaining the mentally ill must be adhered too and detention reviews adequately considering all circumstances and evidence must be carried out in the light of this. We suggest that in its examination of the implementation of human rights judgments it would be proper, given the gravity of the breaches, for the Committee to consider these cases in their own right and only as adjuncts to consideration of *Abdi*.

Other aspects of the Abdi judgment

14. The rest of the *Abdi* judgment takes the form of comments. These do not directly raise questions of implementation of the judgment but are nonetheless worthy of the

[9] [2012] EWHC 2501 (Admin) (20 August 2012).
[10] See for example *R (Mounir Raki) v SSHD* [2011] EWHC; *R (S) v Secretary of State for the Home Department* [2012] EWHC 1939 (Admin); *R(BE) v Secretary of State for the Home Department* [2011] EWHC 690 (Admin); *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin).
[11] *M.S. v UK* (2012) 55 EHRR 23.
[12] HC 603, questions 37-44.
[13] HC 486 26 March 2013 questions 116, 117.

Committee's consideration, particularly in the light of the comments of the former Council of Europe Commissioner for Human Rights[14]. They concern whether the detention was arbitrary given its length and that it could not be said to be detention against the possibility of deportation. The court follows the judgment of the Supreme Court in *Walumba Lumba v SSHD and Mighty v SSHD* [2011] UKSC 12 in holding that a refusal to return voluntarily cannot itself justify detention of any length. It cannot justify detention where removal is impossible in any event[15]. Because of the admissibility decision described above, the court considers only the detention from 3 December 2004 until mid-April 2007. It concludes that it "...cannot exclude the possibility that it might have found a breach of Article 5 § 1 even if the detention had been in accordance with domestic law."

15. This is tortuous but raises for the UK the question of whether detention should be subject to a maximum time limit, a matter highlighted by the third party intervenors, Bail for Immigration Detainees and also the question of whether an administrative review suffices or whether a review should be carried out by the Court. Bail for Immigration Detainees highlighted the lengths of detention including of persons where there deportation could not be effected. The UK is not a party to Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, which sets a six-month limit on detention with the possibility of further detention for limited periods to a maximum of 18 months *in toto* where, despite the State's reasonable efforts, lack of co-operation by the detainee or in obtaining documentation from third countries had caused time to be extended[16]. The UK frequently detains persons for much longer than 18 months. On 11 September 2013, in response to a parliamentary question, the Minister for Immigration stated that as of 30 June 2013, 27 people had been detained for between 18 months and 24 months, 11 for between 24 months and 36 months and one for between 36 months and 48 months[17]. In *Mathloom v Greece*[18], it was held that absent the time limits on detention, Greek legislation on detention under immigration act powers did not meet the "in accordance with the law" test laid down in Article 5 because it was not sufficiently precise or its consequences sufficiently foreseeable.

16. The UK has debated a maximum time limit on detention for many years before that Directive came into force. It is chilling to consider that when Lord Hylton moved amendments in 1999[19] on a maximum length of detention this was in the context of proposals that all detainees would be brought before a court or tribunal seven and 28 days after their detention started[20] and the number of persons detained beyond six months was 120[21]. Contrast this with the current provisions on mere administrative review[22]. The Enforcement Guidance and Instructions say

[14] Memorandum of Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom on 5-8 February and 31 March-2 April 2008, Strasbourg 18 September 2008, CommDH (2008)23.
[15] Paragraphs 73 and 74 of the judgment.
[16] See Case C-357/09, *Kadzoev* [2009] ECR I-11189, 30 November 2009.
[17] HC Deb, 11 September 2013, c 723W.
[18] Application 48883/07, judgment 24 April 2012.
[19] HL Deb 19 July 1999 vol 604 cc 693-724 .
[20] Immigration and Asylum Act 1999 s 44.
[21] HL Deb 28 July 1999 vol 604 cc1611-66, letter of Lord Williams of Mostyn to Lord Avebury, to which reference is made by Lord Avebury.
[22] Enforcement Instructions and Guidance 55.8.

Apart from the statutory requirement above, detention should also be reviewed during the initial stages, that is, the first 28 days. This does not apply in criminal casework cases where detainees come from prison, or remain there on completion of custodial sentence, and their personal circumstances have already been taken into account by the Home Office when the original decision to detain was made.

However, criminal casework cases involving the detention of children must be reviewed at days 7, 10, 14 and every seven days thereafter…in practice, this will apply only to those exceptional cases where an FNO under 18 is being detained pending deportation or removal.

17. In ILPA's experience it is now rare not to see someone held in immigration on completion of their criminal sentence and the decision to detain at this stage has all the flaws of the reviews described above.

18. The provisions on detention and bail in the Immigration and Asylum Act 1999[23] were introduced in the wake of the incorporation of the Human Rights Act 1999 into domestic law. They remain as necessary as they were then if the UK is to comply with its obligations under the Act[24] and under the Convention but were never brought into effect and were repealed in 2002[25].

C.N. v UK (Application no. 4239/08) 13 November 2012 (final 13 February 2012)

19. This case concerns a person held in domestic servitude and the ineffective investigation into her complaints, exacerbated by the lack of specific domestic legislation criminalising a violation of Article 4 at the time.

Criminalising violations of Article 4

20. Section 71 of the Coroners and Justice Act 2009, which came into force on 6 April 2010 and covers England, Wales and Northern Ireland and section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 which came into force on 28 March 201[26] made provision for an offence of holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour building on the offence of trafficking that was enacted in 2004: section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The Equalities and Human Rights Commission expressed the view in C.N. that section 71 of the Coroners and Justice Act 2009 was unlikely to result in clear deterrence or effective prosecutions, and would not improve the failures in investigation. The section does indeed have a certain circularity, defining servitude by reference to servitude:

> 71 Slavery, servitude and forced or compulsory labour
> (1)A person (D) commits an offence if—
> (a)D holds another person in slavery or servitude…

[23] Part III of the Act.
[24] See *Shamsa v. Poland,* Application No. 45355/99 and 45357/99, 27 November 2003. See also, for example, *Massoud v Malta* Application no.24340/08, 27 July 2010 and *Muminov v Russia* (2011) 52 EHRR 23.
[25] Nationality Immigration and Asylum Act 2002 s 68.
[26] SSI 2011/178.

(b) D requires another person to perform forced or compulsory labour …
(2)In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).

21. However, ILPA sounds a note of caution in that section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 proved problematic when it departed from the text of the international instrument pertinent in that case, the "Palermo Protocol"[27]. In 2009 parliament required the Government to improve the definition in Article 4 so that it covered trafficking of babies and tiny children. We recall the ringing speech of the Baroness Hanham at that time

> *The law cannot do what it says it is meant to do. Simply, for the Minister to think that I will walk away from this is probably to misunderstand me. We will not walk away from this; we will come back to it on Report. If, in the mean time, the Minister would like his officials to help us to get an amendment that will absolutely close this loophole, I will be very happy to discuss it with anyone. If we do not get that situation, we will divide the House, and I think that we will win.*[28]

22. Daunted, the Government of the day amended the clause[29], but there remain difficulties in proving the intention of the trafficker at the material time. Section 4 took a provision written to describe a victim and tried to turn it into a criminal offence. This in turn was used within the "National Referral Mechanism" for the identification of victims.

23. However, the judgment raises the wider questions of whether the Government is complying with its positive obligations under Article 4 of the Convention in general[30] and of the protection afforded domestic workers in the UK.

24. On 30 September 2013 the Home Secretary announced new legislation in her speech at the Conservative party conference:

> *…the Government will soon publish a Modern Slavery Bill. That Bill will bring into a single Act the confusing array of human trafficking offences. It will give the authorities the powers they need to investigate, prosecute and lock up the slave drivers. And it will make sure that there are proper punishments for the perpetrators of these appalling crimes.*
> *The Bill will send the clearest possible message. If you're involved in this disgusting trade in human beings, you will be arrested, you will be prosecuted – and you will be thrown behind bars.*

25. The Joint Committee could usefully ask for further information about this bill and in particular whether it will be limited to redefining offences or will deal with the UK's positive obligations. **We urge the Committee to include the Bill in its programme of legislative scrutiny.**

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[27] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, United Nations, Treaty Series, vol. 2237, p. 319; Doc. A/55/383, New York 15 November 2000 (see Article 3)to the UN Convention against Transnational Organised Crime adopted by General Assembly resolution 55/25 of 15 November 2000, and adopted by the Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series No. 197, opened for signature Warsaw 16 May 2005.
[28] Hansard HL Report 4 March 2009, col 828.
[29] Hansard HL report 1 Apr 2009 : Column 1138-9.
[30] See *Rantsev v Cyrpus and Russia* (Application no. 25965/04) 7 January 2010, *Siliadin v. France* (Application no. 73316/01), 26 October 2005 & *C.N. and V. v. France*, (Application no. 67724/09), 11 October 2012.

Positive obligations under Article 4

26. There have been initiatives to enshrine such obligations in legislation but not Government ones. In 2012 the Northern Ireland Assembly debated the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill, a private members Bill, while in Scotland Jenny Marra MSP has launched a consultation on the Human Trafficking (Scotland) Bill. It also raises wider questions of the protection afforded domestic workers in particular.

27. It is the experience of ILPA members that prosecutions of those who have held workers in servitude are rarely brought and, as set out by the Equalities and Human Rights Commission in *C.N.*, it has been necessary for victims to resort to judicial review.

> ***EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania*** **[2013] UKUT 00313 (IAC)**
> EK was trafficked to the UK from Tanzania in 2006 for domestic servitude on a six month visa as a domestic worker. Contrary to UK Border Agency guidance she was not given information on her rights upon entry to UK. When her visa expired after six months, she was not permitted to return to Tanzania by her employers. After an initial escape, she was internally re-trafficked. She developed tuberculosis but was informed she could not access medical help because of her unlawful status in the UK. In 2008 she was admitted to Accident and Emergency and treated but by then her lungs had suffered permanent damage.
> She made complaints to the police but these were inadequately investigated.
>
> In 2010 she was referred through the National Referral Mechanism as a victim of trafficking and assisted to make an asylum claim. Initially the UK Border Agency reached a negative decision as to her status as a victim of trafficking. This was overturned following a challenge by way of judicial review.
>
> EK she was refused asylum or any form of leave. Her appeal to the First-tier Tribunal failed.
> On appeal to the Upper Tribunal and provided with substantial additional evidence, including on EK's health the Upper Tribunal found that the failure to give information to EK at entry had amounted to a breach of Article 4 and that this had contributed directly to her vulnerability to trafficking, and to the damage caused to her health. It highlighted the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings, and in particular the duty to provide assistance and support to victims (Article 12), to provide a residence permit if their personal circumstances require it (Article 14) and to return victims to their country of origin with dignity (Article 16). It held that in cases where the UK has breached its obligations under Article 4, a duty of reparation is owed and that this impacts directly on any decision to remove her from the UK. Since the judgment was handed down EK has been granted discretionary leave to remain in the UK.
>
> EK also took a claim in the European Court of Human Rights for breach of positive obligations under Article 4 in relation to a police failure to investigate her complaints and the lack of penalties for servitude or forced labour. EK is to receive substantial compensation in respect of this claim.

28. Unless the police are fully trained and alert to factors that identify a person who may have been held in domestic servitude, and unless such persons are seen as victims rather than criminals, then the risk is that victims will be prosecuted rather than those who have exploited them.

29. This has been the case for those working in cannabis farms who may be victims of trafficking slavery and forced servitude, as highlighted in the recent case of *L, HVN, THN and T v R* [2013] EWCA Crim 991, where once again the Equality and Human Rights Commission intervened (with the Children's Commissioner for England). The Court of Appeal has quashed the convictions of four victims of trafficking including three young Vietnamese trafficked to work in cannabis factories and prosecuted for drug production and one young woman trafficked for sexual exploitation and prosecuted for possession of a false document. One of the four victims, THN, had disappeared by the time of the trial and was thought to have been retrafficked. Another, HVN had pleaded guilty to trafficking. He was accepted to have been a trafficked by the then UK Border Agency. Neither the prosecution nor the defence were informed of this. The Court looked to the prosecutorial discretion to proceed, the court's own powers to stay the prosecution and powers to accept a submission that the prosecution is an abuse of process.[31]

30. This case was heard in 2013. It has taken a very long time to achieve these children and young people being recognised as victims. ECPAT UK, which works with trafficked children, received its first referral of a child working in a cannabis factory in 2003 and ECPAT UK in 2010[32] and the Child Exploitation and Online Protection Centre in 2011 published substantive reports on the topic[33]. All too often such a case is seen by the police, prosecutor, defence counsel and court as an open and shut case of cultivation of cannabis. The trafficked person is all too often charged and advised to plead guilty and is sentenced to a prison sentence. ILPA representatives have sat in numerous meetings with Home Office officials and prosecutors arguing that such children and young people are victims of crime, not criminals; that we have failed them, not they us.

31. If cash seizure and forfeiture is pursued, the police should have in mind the "victim" provisions in section 301 of the Proceeds of Crime Act 2002 that allow a person who has been deprived of their cash by unlawful means to make an application for the seized money to be released to them. If the focus is only on depriving the trafficker of his/her assets, money that rightly belongs to the victim may also be subject to the irreversible order for forfeiture. It is also essential that the judge considering confiscation proceedings is also aware of any corresponding claim for compensation so that an order can be made under section 13(6) of the Proceeds of Crime Act 2002 and compensation paid out of confiscated assets.

32. The Committee's report Human Trafficking[34] remains one of the most influential parliamentary reports of recent years. **In the light of judgment in *C.N.*, ILPA considers that the Committee should audit the performance of government against the recommendations in its report, read in the light of subsequent developments.**

[31] *Safeguarding children trafficked to the UK to undertake forced labour in cannabis factories*, No.1 2010, ECPAT UK.
[32] *Ibid.*
[33] *The trafficking of women and children from Vietnam* 2011, Child Exploitation and Online Protection Centre.
[34] Twenty–sixth Report of Session 2005-2006, HL Paper 245, HC 1127.

Better protection for domestic workers

33. In the consultation paper[35] that preceded the abolition of the domestic worker visa, the Government pointed to the problems of abuse and saw these as a reason to abolish the route[36]. It asked

> *QUESTION 28 – Given the existence of the National Referral Mechanism for identifying victims of trafficking, should the unrestricted right of overseas domestic workers in private households to change employer be removed?*

34. This expressly recognises the link between the protection provided by the escape routes in the previous migrant domestic worker visa: rights to change employer and to settle[37], and the risk of forced slavery and servitude. It is easy to feel uncomfortable about the notion that people should be allowed to bring domestic workers with them to the UK, given the documented cases of abuse and exploitation, and to reach for a paternalistic response. But such a response does little or nothing to change the overall power relationships. The way to protect people against exploitation is to give them more choices, not fewer. Insofar as they are at risk from an imbalance of power and a dependency, these risks are likely to follow them around the world.

35. Abolition removed powerful protection against domestic slavery and forced servitude. Domestic workers themselves advocated that the route be kept open, with protections. Their remittances support families at home who would otherwise lack for any support; the alternatives open to domestic workers may be much worse than the jobs that bring them to the UK while the remittances they send back may keep family members from exploitation and abuse[38].

36. Since 6 April 2012, leave as a migrant domestic worker[39] limits its holder to a maximum of six months in the UK, with no extensions beyond this time, and prohibits changing employer. The domestic worker who puts up with abuse and exploitation retains his/her job, and with it attendant immigration and other benefits. The National Referral Mechanism is simply a poor substitute for the possibility of changing employer when it comes to persuading people to leave exploitative employment. The domestic worker who turns to the National Referral Mechanism has a chance of being granted a year's

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[35] *Employment related settlement, Tier 5 and overseas domestic workers: a consultation*, UK Border Agency, 9 June 2011.

[36] *Ibid*. paragraphs 6 and 7.

[37] Then HC 395, paragraphs 159A-H. See ii Draft ILO Multilateral Framework on Labour Migration *Non-binding principles and guidelines for a rights- based approach to labour migration*, Geneva, 31 Oct- 2 Nov 2005. Annex II *Examples of best practise VI Prevention of and protection against abusive migration practises*, part 82. See also Lalani, M., *Ending the abuse: policies that work to protect migrant domestic workers*, Kalayaan, May 2011, (available at http://www.kalayaan.org.uk/documents/Kalayaan%20Report%20final.pdf).

[38] The role of remittances is discussed in, e.g. World Bank: Migration and Development Brief 16, 23 May 2011 – Outlook for Remittance Flows 2011-13, page 7, page 118-122. International Development Select Committee, Fourth Report of Session 2005-06 (Private Sector Development), HC 921, paragraph 145; Treasury Committee, Thirteenth Report of Session 2005-06 ('Banking the unbanked'), HC 1717, paragraph 91; International Development Select Committee: Fourth Report of Session 2008-09 (Aid Under Pressure), HC 179, paragraph 14d); Third Report of Session 2009-10 (DfID's Programme in Bangladesh), HC 95, paragraphs 1 & 41; Fourth Report of Session 2009-10 (DfID's Performance in 2008-09), HC 48, paragraph 130; Sixth Report of Session 2009-10 (DfID's Programme in Nepal), HC 168, paragraph 67 and Eighth Report of Session 2009-10 (DfID's Assistance to Zimbabwe), HC 252, paragraph 9.

[39] See paragraphs 159A-159H of HC 395.

discretionary leave and a chance that this may be extended. As set out in all the documentation around the National Referral Mechanism, this is far from a certainty. The other possibility is that the worker faces the option of a voluntary departure, or an enforced removal.

37. There is unlikely to be a route back to the employment. Kalayaan identified 157 domestic workers as trafficked under Operation Tolerance (May-Sept 2008) and under the National Referral Mechanism (April 2009 - Dec 2010). One hundred and two of these individuals choose not to be referred to the National Referral Mechanism. Sixty-eight of those individuals did not need accommodation and support as they found new work. An additional 10 domestic workers who were referred into the National Referral Mechanism chose not to take up accommodation and support as they wanted to work[40].

38. The 2009 Home Affairs Select Committee report on trafficking stated "…to retain the migrant domestic worker visa and the protection it offers to workers is the single most important issue in preventing the forced labour and trafficking of such workers ….[41]

39. Kalayaan reports that the all those they have seen on the new tied migrant domestic worker visa are paid less than £100 a week, as opposed to 60% on the old visa. Greater numbers than before were paid no salary and did not have their own room[42]. Almost all were unable to leave the house unsupervised and the most did not have control of their passport or biometric residence permit. Kalayaan wrote

> *For migrant domestic workers who have been trafficked, a referral into the Government's National Referral Mechanism (NRM) is an option but a positive identification as trafficked does nothing to improve their personal situation, secure redress for substantial abuse and unpaid wages or provide them with any meaningful support beyond a possible 45 days reflection and recovery period.*
>
> *Reporting their treatment to the police is rarely an option either. The focus of the authorities is on immigration enforcement. Workers whose immigration status prohibits them from leaving an employer are often too scared to approach the police to report the crimes committed against them by that employer as they believe that, having broken the terms of their immigration status in escaping abuse, it is them who will be treated as the criminal*[43].

40. In May 2013, Kalayaan reported that since the introduction of the tied visa Kalayaan has seen 156 workers on the original visa and only 29 on the tied visa. But in 2012, 15,745 Overseas Domestic Worker visas were issued which is very much in line with numbers issued in previous years[44]. The reports of those who have come to Kalayaan reveal that the tied visa is no protection against abuse leading to fears that the drop in numbers is because circumstances have got worse, rather than better.

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[40] Kalayaan submission, 4 August 2011, at www.kalayaan.org.uk

[41] *The Trade in Human Beings: human trafficking in the UK*, 6th report, session 2008-9, May 2009, HC 26, para 59.

[42] *Slavery by another name: the tied migrant domestic worker visa* , Kalayaan, May 2013.

[43] *Op.cit.*

[44] In 2009, for example, 13,175 domestic worker visas were granted for six months, and 1600 for 12 months. In 2010 15,350 visas as domestic workers were issued and 1060 domestic workers were granted settlement. *Employment related settlement, Tier 5 and overseas domestic workers: a consultation*, UK Border Agency, 9 June 2011, paragraphs 7.3 and 7.13, and *Control of immigration: Quarterly statistical summary*, UK Quarter 4 2010. The number of settlement visas (a third higher than the figure for 2009) was thought to have been related to the change in the immigration rules on settlement, permitting settlement only after five years rather than four and thus putting two years of settlement applications into one.

41. Migrant domestic workers who cannot satisfy the definition of trafficking and indeed those who can until they have been formally recognised as persons whom there are reasonable grounds to believe have been trafficked, are not eligible for legal aid because immigration cases have been removed from the scope of legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. They remain eligible for legal aid for judicial review but if the Government continues along the path set out in *Transforming Legal Aid*[45] and T*ransforming Legal Aid: next steps*[46] many are likely either to fail the proposed residence test or be unable to find lawyers willing to bring a judicial review. This approach fails to respect the positive obligations under Article 4 as set out in *Rantsev v Cyrpus and Russia* (Application no. 25965/04) judgment of 7 January 2010[47].

42. Many migrant domestic workers are not well-paid and are not in a position to pay for legal advice and representation: slaves and persons in forced labour or servitude may have no money at all.

43. The Committee should use this opportunity to recommend that the migrant domestic worker visa as it was pre-6 April 2012 be restored.

***K.A. and Others v. the United Kingdom (Application no 63008/11)* of 22 January 2013**

44. The action plan in this case has yet to be agreed. The case arose out of the country guidance case of *KA and Others (domestic violence risk on return) Pakistan* CG [2010] UKUT 216 (IAC) in which the Upper Tribunal held that those who face prosecution in the Pakistan courts for adultery will in general not be at real risk of a flagrant breach of their right to a fair trial and that prison conditions in Pakistan, while extremely poor, are not in general persecutory or such as to amount to serious harm or ill-treatment contrary to Article 3. The Tribunal further held that in general the risk of honour killing is likely to be confined to tribal areas such as the North West Frontier Province and is not likely to affect married women. The tribunal looked at custody arrangements, referring to its judgments in given *in SN and HM (Divorced women – risk on return) Pakistan CG* [2004] UKIAT 00283 and *FS (Domestic violence – SN and HM – OGN) Pakistan* CG [2006] UKIAT 00023. The case turned on the possibility of internal relocation and K.A.'s claims under the Refugee Convention and Articles 3 and 8 were refused. The Court of Appeal refused an application for permission to appeal. The women in the cases, faced with return to Pakistan, complained to the European Court of Human Rights about the lack of protection afforded them and the way in which their cases had been scrutinised. It was alleged that the first applicant would face a real risk of the death penalty, honour killing and/or domestic violence if returned to Pakistan breaching of Articles 2, 3, 8 and 13.

45. The case was the subject of a friendly settlement with discretionary leave granted to the women concerned. Following this settlement we should have expected the Home Office to revisit its assessment of the situation in Pakistan for women in the situation of

[45] Ministry of Justice April 2013.
[46] Ministry of Justice September 2013.
[47] Final 10 May 2010.

the appellants. This has not happened. While the action report on the case has yet to be submitted, it is currently the case that others in a situation the same in material respects as that of the applicants risk refusal.

46. Meanwhile the country guidance case complained of has not been replaced by any subsequent determination on the website of the Upper Tribunal. The Upper Tribunal is not a party to any friendly settlement. However we should have expected the Upper Tribunal to revisit the questions raised in the case in a subsequent determination. ILPA understands that in general the Upper Tribunal prefers not to withdraw country guidance cases that have not been successfully appealed , but to update them by revisiting the points considered in the case. The Committee is referred to the judgment itself, which is still being followed in the UK.

47. A friendly settlement that assists those who have applied to the Court but does not eliminate the risk of a breach of human rights of those in a situation the same in material respects in future carries with it the risk of future breaches of human rights, in this case for women from Pakistan in the UK who are at risk of domestic and related violence on return. **The Committee could usefully draw attention to those risks in this case in its report.**

***Sufi & Elmi v UK*, Applications No.s 8319/07 and 11449/07, judgment 28 June 2011**[48]

48. This case concerned returns to Somalia. Both appellants faced deportation from the UK subsequent to criminal convictions. The court found that return of the applicants to Somalia would violate their rights under Article 3.

49. The Government has granted both men six months discretionary leave to remain, indicating that removal action will not be taken against them while the country situation in Somalia remains "largely"[49] unchanged. This is being challenged in the UK courts.

50. The case could usefully be considered with ***Ncube v United Kingdom*** [2012] ECHR 897, in which a Zimbabwean national subject to deportation was given 30 months leave to remain the course of a friendly settlement. See "Leave granted" below.

Return to Somalia

51. The UK courts had an early opportunity to consider *Sufi and Elmi* in the country guidance case of *AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia* CG [2011] UKUT 445 (IAC) promulgated the day *Sufi and Elmi* became final, 28 November 2011. *AMM* has been followed in subsequent cases (contrast the case of *K.A. v UK* discussed above). On 15 December 2011 the UK Border Agency published an Operational Guidance Note on Somalia which takes account of both cases. Our experience is that it is being followed.

[48] Final 28 November 2011, (2012) 54 E.H.R.R.
[49] See (accessed 30 September 2013) http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=&StateCode=UK.&SectionCode=

Leave granted

52. The Committee might more usefully concentrate on the six months discretionary leave given to the appellants. The policy is set out in the Home Office Asylum Policy Instruction *Discretionary Leave*. This provides that in "criminality and exclusion" cases the grant of leave will normally be for six months which can be extended. Such extensions will normally be for six months and eligibility for indefinite leave to remain in the UK will arise only when the person has had leave for ten years.

53. The questions that arise, and on which the committee could usefully press the Government are:
    - Is the UK in line with international instruments in terms of what it treats as a "serious crime" justifying a grant of a shorter period of leave?
    - The limited period of leave and longer route to settlement may be reasonable where there is a real prospect of the situation changing although this depends on the circumstances of the case and the effect on the individual, which may make a longer grant proportionate, but it is unlikely to be reasonable where it can be identified that there is no prospect of removal within a longer time frame.

54. These matters fall to be considered in the light of *R (Mayaya) v SSHD*, C4/2011/3273, on appeal from [2011] EWHC 3088 (Admin). The case settled subsequent to a grant of appeal to the Court of Appeal. The case concerned a man who established his entitlement to remain in the UK on the grounds of Article 8 of the European Convention on Human Rights but then was excluded from discretionary leave under the under the Asylum Policy Instruction *Discretionary Leave* in force before 9 July 2012 because he had committed a 'serious crime' as defined (viz. had been sentenced to 12 months or more in prison). We append the consent order and statement of reasons from the Court of Appeal, made on 19 March 2013.

55. Subsequent to this decision, the Asylum Policy Instruction *Discretionary Leave* was amended on 9 July 2012. The Asylum Process guidance *Humanitarian Protection*,[50] named for the leave given to those whose return would breach Article 3, was in same terms as the policy impugned but has also been amended, on 15 May 2013[51]. **The Committee may wish to question this delay.**

56. The revised instructions do not cover cases under Article 8 of the European Convention on Human Rights which now fall to be examined under the Immigration Rules[52]. The revised instruction on Discretionary Leave provides that the ordinary grant of leave will be 30 months, rather than three years and that all persons granted discretionary leave must wait 10 years to be eligible for settlement. These periods also apply to those granted leave under Article 8 under the immigration rules.

57. The instructions on humanitarian protection and discretionary leave operate in tandem so that individuals are first excluded from humanitarian protection then considered for

[50] Version 4.0.
[51] See the version control at the end of the document at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/huma-prot.pdf?view=Binary (accessed 1 October 2013).
[52] Appendix FM.

discretionary leave and, where they have been sentenced to 12 months or more, for the most part granted six months discretionary leave.

58. The amended guidance on humanitarian protection states:

> *A "serious crime" for the purpose of exclusion from Humanitarian Protection was previously interpreted to mean one for which a custodial sentence of at least twelve months had been imposed in the United Kingdom, but it is now accepted that a 12 month sentence (or more) should not alone determine the seriousness of the offence for exclusion purposes.*

59. However, in practice ILPA's experience is that caseworkers do exclude by reference to a twelve-month sentence or the types of crime set out in the guidance.

60. There is no mention in the documents of EU law principles of proportionality. The guidance does not deal with the effect on rights under Article 8 or, in certain cases where mental health and suicide risk are at issue, Article 3, which may be engaged by a short grant of six months leave.

61. It is not unusual for the Home Office to take more than six months to decide an application, particularly where there are considerations of criminality or exclusion. A person granted short periods of leave is thus apt to have a pending application for leave at any given time. This makes securing employment or obtaining benefits or housing to which one is entitled extremely difficult. If Government proposals on access to health care[53] and private rented accommodation[54] become law it will create difficulties on these fronts as well. These engage rights under Article 8 or, in certain cases where mental health and suicide risk are at issue, Article 3. Legal aid for assistance with such applications is severely limited following the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and will become more so if the *Transforming Legal Aid*[55] proposals become law.

62. The grant of six months leave to remain may render a decision 'not in accordance with the law' for the purpose of Article 8(2) ECHR or at all, because made in purported reliance on an unlawful policy; or alternatively, disproportionate.

63. The instruction and guidance deal in with the general circumstances in which a grant of indefinite leave to remain might be appropriate but do not deal with when a grant of leave exceeding the minimum would be appropriate in exclusion cases.

Article 8 in the immigration context

64. See also the discussion above. A number of the judgments are concerned with the UK's implementation of Article 8 of the European Convention on Human Rights. Statement of Changes in Immigration Rules HC 194, which has been the subject of amendments through subsequent statements of changes, presents a challenge to longstanding as well

[53] Department of Health *Sustaining services, ensuring fairness: A consultation on migrant access and their financial contribution to NHS provision in England*, 3 July 2013. See also *Controlling immigration: regulating migrant access to health services in the UK*, 3 July 2013.
[54] *Tackling Illegal Immigration in private rented accommodation*, a consultation, Home Office, 3 July 2013.
[55] *Transforming Legal Aid: next steps,* Ministry of Justice, 5 September 2013.

as recent jurisprudence of the European Court of Human Rights. HC 194, which took effect on 9 July 2012, made a number of changes to the immigration rules on family members but also, as accompanying guidance and parliamentary debates made clear, enshrined in the immigration rules the Government's vision of Article 8 of the European Convention on Human Rights. On 30 September 2013, in her speech to the Conservative party conference, the Home Secretary confirmed her intention to bring forward primary legislation on Article 8, saying

> *…the Immigration Bill will sort out the abuse of Article Eight – the right to a family life – once and for all. This is used by thousands of people to stay in Britain every year. The trouble is, while the European Convention makes clear that a right to a family life is not absolute, judges often treat it as an unqualified right.*
> *That's why I published new Immigration Rules stating that foreign criminals and illegal immigrants should ordinarily be deported despite their claim to a family life. Those Rules were debated in the House of Commons, and they were approved unanimously. But some judges chose to ignore Parliament and go on putting the law on the side of foreign criminals instead of the public. So I am sending a very clear message to those judges – Parliament wants the law on the people's side, the public wants the law on the people's side, and Conservatives in government will put the law on the people's side once and for all.*

65. ILPA takes issue with the characterisation of the rules as having been "approved unanimously" in the House of Commons. The debate on 19 June 2012[56] on the rules displayed nothing but confusion. Thus:

> ***Jeremy Corbyn (Islington North) (Lab):*** *As nobody has a dispute about whether article 8 is an absolute—it has always been subject to definition by national courts—why on earth are we debating this today? …*[57]
>
> ***Pete Wishart (Perth and North Perthshire) (SNP):*** *I am looking at a motion that says nothing about Parliament's view on article 8; all it seems to be is a restatement of the bleeding obvious. We all know that article 8 is a qualified right, so why are we here debating a nothing motion?*[58]*…*
>
> ***Yvette Cooper****...the process remains deeply unsatisfactory and confused. The Home Secretary has said that she wants to send clear signals to the courts, but she is not sending clear signals to the House.*[59]*…*
>
> ***John McDonnell…*** *The procedure the Government have introduced today completely undermines the credibility of the House on this matter. …No court can interpret this current process as expressing the definitive will of the House, however, because many Members will have not a clue what we are voting on as the information has been provided so late.*[60]*…*
>
> ***Mr William Cash*** *…I hope that you will forgive me, Mr Deputy Speaker, for pointing out that as we are debating this matter today, … I construe those words to mean the immigration rules as they now are, not as they are anticipated to be under the proposals printed on 13 June. On page 1 of the statement of changes, which I suspect will be debated, there is a provision titled "Implementation", which states that, with the exception of an awful lot of paragraphs, "the changes*

[56] HC Report 19 Jun 2012 : Column 760ff.
[57] Col 761.
[58] Col 762.
[59] Col 773.
[60] Col 784.

set out in this Statement shall take effect on 9 July 2012." The other paragraphs "shall take effect on 1 October 2012."… The implication of the wording in the motion might not be as clear as it should be. That leaves us with the reasonable position that the motion relates only to the immigration rules that are in force at this time. That is a technical point.[61]…

***Chris Bryant**…I want to make it absolutely clear that we are supporting the motion today on the understanding that it applies solely to the operation of article 8 in relation to the deportation of foreign criminals. In the words of the Home Secretary, the rest is a "separate issue".*[62]

66. Were this not enough, the House of Lords Secondary Legislation Scrutiny Committee devoted its Sixth report of session 2012-2013[63] to the Statement of Changes commenting:

HC194 is a partial change to the Immigration Rules yet the Commons' motion appeared to seek an endorsement of the whole…The Home Office's inconsistent use of the term "Immigration Rules" also caused considerable confusion throughout the Commons' debate. One MP, for example, asked which Rules they were being asked to endorse - the ones current on 19 June or the version amended by HC 194 which would come into effect on 9 July (HC Deb col 806)).

The normal method for seeking a debate on a negative instrument would be to lay a prayer or a "take note" motion…Such debates tend to focus on some specific aspect of the instrument that the Member proposing the motion has doubts about. Prayer motions are often withdrawn after debate, so it is uncertain whether procedurally the debate would deliver a sufficiently clear endorsement of the wider policy to assist the courts.

The quoted case law source says that the courts lack a framework because the immigration rules are "not the product of active debate in Parliament". The debate in the Commons sought explicit endorsement of what the current government has suggested, not a wide-ranging debate seeking the consensus of the House on what the Rules should be. Such a debate provides no means for the House to amend even a minor aspect of these proposals. It is therefore unclear whether the government's procedural approach would fully satisfy the court's definition of "active debate".

67. When the House of Lords came to consider the rules, which are subject to the negative resolution procedure, it was on a regret motion. The motion was not put to the vote, so the House did not get the opportunity to express a view. The Baroness Smith of Basildon, withdrawing the motion said

Obviously we understand the need to ensure that the system is not abused, but I fear that what is being done here today will not protect the taxpayer in the way that the Minister seeks, and it certainly does not protect the family. I beg to withdraw the motion[64].

68. Hardly a ringing endorsement.

The Upper Tribunal

69. The Upper Tribunal in the cases of *Izuazu [*2013] UKUT 45 (IAC), *MF (Article 8 – new rules) Nigeria* [2012] UKUT 393 (IAC), in *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC) and of *Green (Article 8 – new rules)* [2013] UKUT 254 (IAC), held that

[61] Col 805-806.
[62] Column 819,
[63] HL Paper 26, 3 July 2013.
[64] HL Report **23 O**ct 2012 : Column 200.

while the Secretary of State could set out in the immigration rules a version of the right to respect for family and private life and say that those who met these criteria could be given leave under the rules, this was not dispositive of rights under Article 8 and the tribunal had then to go on to examine whether the "real" Article 8 prohibited removal or deportation in the instant case. *MF (Nigeria)* has been appealed to the Court of Appeal and judgment is awaited.

70. That the Government's vision is out of kilter with "the real Article 8" is apparent from a first reading of the rules and guidance as well as from considering their application.

71. The rules make reference to their being "insurmountable obstacles" to family life being enjoyed in another country as the test as to whether a person would be allowed to remain in the UK to enjoy family life[65]. This is contrary to the judgment of the House of Lords in *Huang v SSHD; Kashmiri v SSHD* [2007] UKHL 11 where the House of Lords deprecated the "exceptional circumstances" test. It is settled law that it is necessary to assess the facts of the particular case; a one size fits all rule cannot be applied.

72. Paragraph 398 of the Immigration Rules provides that in cases of those who have received a sentence of between one and four years imprisonment or have received a sentence of less than twelve months imprisonment but are persistent offenders, the public interest in deportation will normally outweigh respect for family life unless paragraph 399 applies. Paragraph 399 applies where a child of the family is a British citizen, or has lived for at least seven years in the UK, where it would not be reasonable to expect the child to leave the UK and where there is "no other family member who is able to care for the child in the United Kingdom". In other words a child can be "dumped" with any available adult and indeed we have seen Home Office refusal letters that have proposed that it is reasonable to dump a child with a parent who has had nothing to do with them and has no desire to have anything to do with them. This cannot be determinative of the position under the real Article 8, where it will be rare that it is appropriate to split parent and child *EB (Kosovo) v SSHD* [2008] UKHL 41; and in *Chikwamba v SSHD* [2008] UKHL 40. Nor do the rules attempt to reflect the UN Convention on the Rights of the Child, which gives content to our understanding of children's rights under the European Convention on Human Rights, as set out by the Supreme Court in *ZH Tanzania v SSHD* [2011] UKSC 4 and the judgment in that case that the best interests of the child are a primary consideration.

73. The new rules in paragraphs 399A and 276ADE propose that a person can be returned unless they have 'no ties (social, cultural or family)' to the country of origin. Home Office reasons for refusal letters have consistently argued that persons retain some ties. The Upper Tribunal in *Green* held that "remote and abstract links" to the country of proposed deportation or removal were insufficient, pointing out that in such circumstances, nationality of the country to which it was proposed to return or deport the person could lead to a failure to meet the requirements of the rule, rendering the application of the rule "meaningless". The Home Office had argued that it was not accepted that Green, who had been brought to the UK aged seven, had "no ties" with Jamaica because he and his family came from there and would be familiar with the culture, and his estranged father lived there with whom, the Home Office contended, he could re-establish a relationship, despite very limited previous contact.

[65] HC 395, Appendix FM Section R-ILRP and the Section EX (b).

74. The Upper Tribunal in *Ogundimu* highlighted that the new rules make no attempt to reflect *Maslov v Austria* [2008] ECHR 546.

75. The judges in the cases cited above are the subjects of the direct attack in her 30 September 2013 speech. The Upper Tribunal held in *Izuazu*

> *59. Whilst it is open to Parliament to change the law by primary legislation unless and until it does so these decisions are binding on the Upper Tribunal and will be followed by it.*

76. The Home Secretary has started the clock ticking on that "unless and until".

77. If the Government enshrines its version of Article 8 in primary legislation, it will be vulnerable to declarations of incompatibility under s 4 of the Human Rights Act 1998, where it is not possible to read the legislation in a Convention compliant way under s 3(1), and where the legislation cannot be read compatibly, the Secretary of State will be immune from being found to have acted incompatibly with a Convention right where constrained by such legislation or where acting to give it effect, see s 6(2) of the 1998 Act. This suggests at the very least an intention to behave in a way that is incompatible with domestic law on the meaning of Article 8 and must raise the question of what the Government would do if faced by a declaration of incompatibility.

78. If the Government's interpretation of Article 8 is enshrined in domestic law it will be open to a person who has been unable to secure a remedy for breach of their rights under the "real" Article 8 to take their case to Strasbourg. They will no doubt draw the Court's attention to any existing declarations of incompatibility and those will be within the purview of the Committee of Ministers in its role of overseeing the execution of judgments and within the purview of reports of the Joint Committee on Human Rights in enquiries such as the present one. It would be helpful if in this report the Joint Committee could start to sketch for parliament what such a system would look like and to begin to tease out its implications. The Committee may also wish to consider whether its own remit would be restricted to the statutory article 8 or range across the whole of the real article 8.

79. The above discussion must be situated in the real world of legal aid funding. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, legal aid has been removed from most immigration, as opposed to asylum cases, with the result that those who wish to challenge the Government's version of article 8 will, unless they are persons of means, be at a substantial disadvantage. One exception is in national security cases which are not representative of the whole spectrum of cases under Article 8 and give rise to the risks of hard cases making bad law. As to taking a case to Strasbourg, legal aid may be available from the European Court of Human Rights once the case has been communicated to the Government, but no legal aid is available prior to that, requiring the poor to bring the case without assistance or to find pro bono representation.

80. It is against this background that the implementation of the judgments in the cases below must be considered.

Deportation of foreign national offenders and the right to family life

AA v UK (Application no. 8000/08)

81. The Committee of Ministers has closed this case but we suggest that it would be useful for the Joint Committee to consider it with the other Article 8 cases, especially in the light of the judgment of Court of Appeal in *SS (Nigeria) v SSHD* [2013] EWCA Civ 550.

82. AA was a young adult man from Nigeria. Aged 15, he was convicted of rape of a child of 13. Subsequent to his time in prison he had been at liberty for seven years. His appeal rights were exhausted in January 2008 but the Court found that no steps had been taken to deport him until September 2010. The court praised his efforts at rehabilitation. It found no basis for the Government's contention that he would cause disorder or to engage in criminal activities such as to render his deportation necessary in a democratic society. The Court held that the deportation to Nigeria would be disproportionate to the legitimate aim of the "prevention of disorder and crime," would therefore not be necessary in a democratic society and would breach Article 8.

83. In *SS Nigeria* the Court of Appeal considered a failed asylum seeker who had committed serious drugs offences, who had a British citizen partner and a British citizen child with her. The focus in the case is on the "marge d'appreciation" (margin of appreciation) to be given to the State in these cases. Lord Justice Laws, delivering the leading judgment suggests that the source of a power is relevant to the extent of the margin of appreciation and that in cases of criminal deportation this "means that the court's role is kept in balance with that of the elected arms of government; and this serves to quieten constitutional anxieties that the Human Rights Act draws the judges onto ground they should not occupy.".

84. Lord Justice Laws suggests that the margin of appreciation is reduced when the policy is made by parliament rather the Government, deportation provisions being enshrined in primary legislation, in the instant case s 32 of the UK Borders Act 2008, in particular:

> *…where, as here, the subject-matter of the legislature's policy lies in the field of moral and political judgment, as to which the first and natural arbiter of the extent to which it represents a "pressing social need" is what I have called the elected arm of government: and especially the primary legislature, whose Acts are the primary democratic voice.*

85. We suggest that this approach is not sanctioned by the approach of the European Court of Human Rights in *AA v UK* and the cases cited therein. We adopt the submission of Izuazu's representatives, annexed to the determination of the Upper Tribunal

> *Article 8 is a fundamental right, upon which there are authoritative statements of law which HC 194 crudely seeks to challenge. Fundamental rights and the law are not subject to the vicissitudes and political expedients of executive policy.*

86. This the Upper Tribunal endorsed, very carefully, in the following terms:

> *30. In our judgment neither of the rival submissions can be accepted in full. We accept the claimant's submission on the status of the rules, and accordingly agree that the rules cannot over-ride either the legal duty imposed by statute or the existing learning on*

that duty supplied by the higher courts, and (to the extent it is consistent with that learning) the Upper Tribunal. However, we do not accept the implicit submission that the new rules are irrelevant to the Article 8 balance required by the law to be conducted.

….

43. The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the rules will depend both on the particular facts found by the judge in the case in hand and the extent that the rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom.

87. We suggest that the Upper Tribunal's decision in Izuwazu more accurately reflects the jurisprudence of the European Court of Human rights than the judgment in SS (Nigeria). The latter is the subject of an appeal.

Post flight spouses of refugees

***Hode and Abdi v UK* (application 22341/09)** 6 November 2012, 6 February 2013.

88. Hode was a recognised refugee in the UK. Abdi was his "post-flight" spouse, married after he had been recognised as a refugee. There was at the time no provision in the immigration rules for post-flight spouses of refugees to be granted leave as spouses, the rules for spouses and partners being limited to spouses and partners of British citizens and settled persons, while the rules on refugee family reunion pertained to "pre-flight" families.

89. The case was put on the basis of treatment less favourable than that accorded to other migrants with limited leave: students and workers. The Court held that this violated Article 8 read with Article 14, endorsing the broad approach taken by the Upper Tribunal in *FH (Post-flight spouses) Iran* [2010] UKUT 275 (IAC).

90. The Immigration Rules were amended in April 2011 to make provision for post-flight spouses and partners of refugees. Such spouses and partners are subject to the same rules as British and settled persons. However, the Court gave judgment before HC 194 came in effect on 9 July 2013. Thus, since the coming into force of HC 194 on 9 July 2012 they are subject to the new financial requirements. This would appear to fail to the test of parity with students and workers applied by the Court in *Hodi and Abdi*, for the dependants of students and workers are not subject to these requirements. It also fails the test applied by the Court of parity with pre-flight spouses and families of refugees. The Court said

54. …the Court does not consider that the difference in treatment between the applicants, on the one hand, and students and workers, on the other, was objectively and reasonably justified.

…the Court sees no justification for treating refugees who married post-flight differently from those who married pre-flight. The Court accepts that in permitting refugees to be joined by pre-flight spouses, the United Kingdom was honouring its international obligations. However, where a measure results in the different treatment of persons in analogous positions, the fact that it fulfilled the State's international obligation will not it itself justify the difference in treatment.

56. The Court therefore finds that there has been a violation of Article 14 of the Convention read together with Article 8.

91. The Court's statement that "56…the situation giving rise to the breach no longer exists as the Immigration Rules have subsequently been amended" thus appears inaccurate.

92. The case is not open and shut in that the Government may argue it has treated refugees more favourably by aligning them with spouses and partners than by aligning them with the partners of migrants with limited leave. However, post the coming of into force of HC 194 this is arguably a dubious benefit. The new requirements are particularly harsh in the case of a refugee where, if the spouse or partner is from the country the refugee has fled then there is no possibility of the couple enjoying family life anywhere but in the United Kingdom. We suggest the Committee may wish to examine the case in the light of the requirements that refugee families currently have to meet and look at the question of how much more difficult it is for a refugee to enjoy family life in the UK than a student or worker.

93. We suggest that the Committee, seized of the opportunity to comment upon family reunion for refugees, comment also on the discrimination on the grounds of status that is suffered by a child refugee. While an adult recognised as a refugee is entitled under the immigration rules to be joined, inter alia, by his/her minor children[66], a minor child recognised as refugee is not so entitled and must rely upon discretionary applications outside the rules and Article 8. ILPA has long protested this inequity, most recently in its submissions to the Joint Committee for the Committee's enquiry into the human rights of unaccompanied migrant children and young people and we draw it once again to the attention of the Committee.

Legal aid

94. ILPA has made submissions to the Joint Committee on Human Rights for its inquiry into the effect upon access to justice of the Government's legal aid changes[67]. These should be read with the present submission.

95. The mentally ill prisoners described in the discussion on the *Abdi* case are unlikely to be able to complain of their treatment in prison while claims in damages such as that brought by *BA* will no longer be funded.

96. Those who have been victims of trafficking in human beings are eligible for legal aid only once there is decision that there are reasonable grounds for thinking that they have been subject to trafficking in human beings. They are able to bring limited challenges only: If the *Transforming Legal Aid* proposals are brought into effect then they will not be eligible for legal aid for judicial review if they do not have lawful residence in the UK. A domestic worker whose visa has expired does not have such residence.

97. Those affected by the Government's reading of Article 8 will not be eligible for legal aid to assist them in challenging that reading.

[66] HC 395, paragraph 352D.
[67] *Transforming legal aid: next steps, op.cit.*

98. There will be no legal aid to take cases to the European Court of Human Rights, thus for those stages of the case before legal aid is granted by the Court.

99. These represent grave threats to the genuine and effective protection of human rights, whatever the jurisprudence of the Court, however diligent the Committee of Ministers and the Joint Committee may be in scrutinising the implementation of judgments and however unremarkable the Secretary of State's transposition of Article 8 in domestic primary legislation might be.

Adrian Berry
Chair
ILPA
6 October 2013

Annex: *Mayaya* Order and Statement of Reasons