1. This is the Immigration Law Practitioners' Association's response to the consultation announced on 1st August 2002 on the draft Practice Direction on the proposed Expedited List. You have asked for responses by 15th August 2002.

2. Attached to this response are copies of Rick Scannell's letters of 1st August 2002 (Annex 1) and 9th August 2002 (Annex 2), together with the Deputy Chief Adjudicator's response of 12th August 2002.

3. As made clear in the 1st August letter, ILPA is disturbed that the announcement of the consultation by the Immigration Appellate Authority was *preceded* by two days by the Government's announcement that you had agreed that such cases will be listed 6-8 days following receipt of papers by the IAA. This raises serious questions whether the consultation can be meaningful and gives cause for concern about the IAA's independence.

4. In the 9th August letter sent in your absence to the Deputy Chief Adjudicator , it was stated that our concerns were heightened by the timetable contained in the consultation announcement which also allowed only a single working day for the IAA to consider responses. We sought information on a number of points which we indicated were essential to provide a meaningful response to your consultation.

5. On 12th August 2002, the Deputy Chief Adjudicator responded to these letters. She stated that

> *Whilst two weeks may, at first impression, seem a relatively short period for consultation, the Practice Direction, in effect, only alters the listing practice of one small category of cases, those certified as Manifestly Unfounded.*

6. We do not accept the implication that the issues raised by the Practice Direction are insufficiently serious to require a consultation period of more than two weeks. Regardless of numbers - and they are small only in relative terms - these appeals determine the fundamental rights of those involved, in some cases matters of life and death. As such, they raise matters of unique seriousness in the British legal systems. Yet the timetable proposed is to our knowledge unheard of in respect of *any* litigation in the British legal systems. We remain anxious for a full response to the issues raised in our letter of 1st August 2002.

7. The Deputy Chief Adjudicator also indicated that all comments and concerns will be reviewed with the utmost care and consideration by the Chief Adjudicator prior to implementation of the Practice Direction.

8. We would be grateful for assistance as to how it is proposed this will be done within the one working day allowed for consideration. We are aware that a number of stakeholders in the field have submitted responses. We understand that many also raise grave concerns. Indeed, we are so far unaware of any organisation (outside the government) that considers that the proposal is consistent with the fair disposal of appeals. Please could you provide an indication as to the proportion of responses which you receive to the contrary.

9. We further note that the Deputy Chief Adjudicator's letter of 12th August 2002 failed to deal with (or refer to) the points upon which we indicated we required further information in order to complete our response. In view of this, it may be necessary to make further representations to you once we have received a response.

The implications of a 6-8 day listing for a fair hearing of the appeal

10. Best practice in the preparation of an asylum and human rights appeal is likely to require, inter alia, the following:

    1. The taking of instructions on the refusal letter

    2. A witness statement taken from the appellant

    3. Any other witnesses interviewed and statements taken

    4. Investigations into what evidence may be available from the country of origin and steps taken to obtain such evidence

    5. Consideration and instruction of medical and country experts. (For example, one psychiatrist recognised as an expert by the IAA currently cannot take appointments until December.)

    6. Identification and collation of relevant country reports

    7. Preparation of a paginated bundle for the court

    8. Instruction of appropriately experienced counsel in good time to advise on evidence, arrange a conference, and then represent at the hearing. (Our members tell us that typically, four weeks notice is required to brief counsel who are experienced in the field.)

11. You will be aware that many of these tasks are also required by the IAA's standard directions.

12. ILPA's position, following the limited consultation with our members possible in this time frame, is that it is not reasonably possible for a solicitors' firm operating under a General Civil Contract with the LSC to prepare and present (or instruct counsel to properly present) appeals according to best practice within the expedited timetable you propose. The fact that a client has been detained since arrival and that advice at initial stage was limited by the draconian time limits applied by the Home Office to its Oakington procedure only exacerbates the obstacles in this respect.

13. This position is based on the feedback on the proposals from members and is the universal response of those members, who include the most experienced representatives in the field, and in particular members who act as reviewers in quality standard assessments by the Legal Services Commission, assessors for the Law

Society Immigration Panel, and examiners for the Bar Council Immigration Accreditation Board.

14. One of our members gives the following example:

> Perhaps the point we are making is best illustrated by a case in which we recently represented a client throughout the Oakington procedure and at his asylum appeal. We had to prepare four witness statements in support of the appeal as well as obtaining an expert report. Our client was not detained and yet because of our other commitments and those of the expert and other witnesses, it took in the region of about six weeks to properly prepare the appeal and involved a total of about 17 hours work on the part of the solicitor over the course of six weeks. That equates to about three working days. Obviously had our client been detained even further time would have been required. Our client won his appeal as the Home Office conceded the case. We have little doubt that had we not had time to gather and submit so much evidence in support of the case the outcome would have been different.

15. We understand that both the Refugee Legal Centre and the Immigration Advisory Service have indicated that they would be unable to represent clients in the expedited list.

16. ILPA met with the LSC on 14th August 2002 to enquire what notice they had been given of the expedited list, and what steps they had been asked to take, and had taken to investigate alternative providers of publicly funded representation who would be able to properly prepare and present an appeal in the time envisaged. We understand the following from that meeting:

    1. The LSC has had the same short notice of this proposal as other stake holders.

    2. In the time it has had available, the LSC has obtained indications from five firms near Harmondsworth that they would be interested in offering urgent appointments to such clients and representing them within the timescale. These firms have not actually agreed to take on any specific number of clients. The LSC were unable at the meeting to provide us with the names of these firms because they were writing to them today to explain what was involved and seek written confirmation of their interest. We understand that notwithstanding this, the RLC and IAS have today been provided with a list of firms who have expressed (presumably orally) an interest in doing this work. We have asked for a copy of the letter, which would have set out any requirements the LSC has imposed, sent by the LSC to these firms but have not so far been provided with it.

    3. The LSC accepts that best practice should be followed in these appeals, which should include, for example, taking instructions upon and if appropriate preparing and presenting a bail application.

    4. Had proper notice been given, the LSC would have engaged in a proper bidding process. It could then have sought particulars, as part of the bidding

process, of how the firms proposed that they could organise their resources to provide best practice according to the expedited timetable. As a result of the short notice, the LSC has been unable to do this. It has therefore not been able to seek such particulars, and the LSC has had to accept a simple indication from the firms involved.

5. The LSC were not able to confirm to us as of yesterday that they had been given *any* information by the firms it had approached as to the extent to which they would be able to provide representation according to best practice in the time available and how they would organise their resources in order to do so.

17. You will be aware that the RLC and IAS have indicated in their joint response that

> **Even if we did have such capacity [to represent clients in the expedited list], it would have been inconceivable that resources could have been re-organised and made available at such short notice.**

18. In our letter of 9th August 2002 to the Deputy Chief Adjudicator, we sought, amongst other things, information on the following in order to inform this response:

> *What consideration has the IAA given to the practicalities of preparing an asylum and human rights appeal in the timescale proposed (including for example, taking witness statements from detained clients, preparing medical and expert evidence and bundles of authorities, and booking counsel and arranging pre-hearing conferences at detention centres). Alternatively, how is it proposed to reach a conclusion on these matters in the one working day envisaged between the end of the consultation period and the introduction of the new procedures?*

19. As indicated above, the response of the Deputy Chief Adjudicator did not refer to this request.

20. You will appreciate our concern given that:

1. The RLC and IAS have indicated that they would be unable to provide representation, even had they the capacity

2. Our members, including those appointed as assessors by the LSC, Law Society, and Bar Council, have told us that proper representation in this timescale is not reasonably possible

3. The period you have allowed for consultation has permitted no time to seek proper particulars as to how the firms who have expressed an interest will be able to organise their resources in order to properly present appeals in this timescale at this notice.

21. We must reiterate our request that you tell us what information you have received that indicates that the advice we have received is incorrect and that it is reasonably possible to prepare cases of such fundamental importance according to best practice in

the timescale you envisage.

22. The IAA is well aware of the concerns about the quality of some representation, including that provided by franchised solicitors' firms and counsel briefed by them. Indeed, ILPA understands that the IAA shares these concerns. Adjudicators have rightly criticised as unacceptable many practices such as the advocate meeting the client for the first time on the day of the hearing.

23. In light of the information we have received, we could not presently advise any asylum seeker who approached us that they will be able to obtain proper representation from one of those firms who may claim (without offering particulars) to be able to provide it within the timescale. In fact, such a claim - in the absence of such particulars - would merely heighten our concerns in this respect.

24. Were any appellant subjected to the expedited procedure to be represented by one of the member firms who have advised us on best practice, it is likely that an adjournment application would be made were the appeal listed in the 6-8 days you envisage.

25. In *R v SSHD, ex parte Ghaly*, 27th June 1996, Sedley LJ said that

> **Questions for adjournment by inferior tribunals receive in many cases a closer scrutiny from this court than a Wednesbury rationality test because the question frequently throws up fundamental questions of fairness. If the maxim of both sides are to be fairly heard is to have any effect, it means that each side has to have a fair opportunity of preparing to deal with what the other side has to say.**

26. In the absence of the information requested in paragraph 22, we would seek an assurance that adjudicators will be informed of our concerns, and that they will not be advised to refuse adjournments on the basis that some firms appear to have made unsupported assertions that they could properly prepare for the expedited list.

27. In our letter of 9th August 2002, we stated that

> *The consultation document states that Appellants will require legal support and representation throughout the process including the appeal hearing. What checks are to be instigated to ensure that appellants are not subjected to the expedited list unless they have been offered proper representation, including at the hearing?*

28. We have not had a response.

29. Given that RLC and IAS are unable to provide representation, we also asked the LSC whether it had been engaged in discussions as to how the assurance given in your consultation document could nevertheless be met. However, the LSC informed us that it would apply the standard merits test which, as you will be aware, indicates that public funding must be refused unless the prospects of success exceed 50% (unless it is impossible to make the assessment). You may also be aware that the LSC has indicated that it considers that the merits test ought to be more strictly applied than at

present.

30. The LSC indicated that it had received no request from the IAA to fund representation in cases which did not satisfy its merits test. We are therefore unaware of any arrangements you have made to ensure, as you indicated, that all appellants subjected to the expedited list will be offered representation throughout, including at the hearing.

31. Please could you confirm, as must follow from the assurance given in your consultation document, that any appellant who, because of the LSC's merits test, is not offered proper representation at the hearing will be removed from the expedited list?

Criteria for the expedited list

32. Notwithstanding the above points as to why the expedited list is unacceptable for any asylum and human rights case, we have additional serious concerns over the identification of cases for the expedited list and how the IAA sees its duty of evenhandedness between the parties to the appeal before it. Your consultation document states that

> The Lord Chancellor's Department and the Home Office have together identified a group of cases where, if an appeal is dismissed, the asylum seeker can be returned with relative ease, safely and promptly to his or her country of origin.

33. Decisions as to which appeals are subject to any special listing procedure are judicial decisions. This statement appears to indicate that the categories have in fact been determined by the government.

34. Moreover, we are further unclear what role even the LCD has had in this process. The initial manifestly unfounded certificate represents merely the assertion of the putative respondent that the case against him is manifestly unfounded. The decision to detain is similarly a decision taken by the respondent.

35. In our letter of 9th August 2002 to the Deputy Chief Adjudicator we stated as follows

> *Please could you therefore indicate on what basis it is said that the LCD has identified which cases are appropriate for expedited listing. I would also appreciate information about what role the IAA will take in determining which cases are to be subject to the expedited list (and how such decisions can be taken independently of the government). It would be a matter of some concern if it transpired that the IAA has effectively delegated such decisions to one of the parties of the appeal (given that the initial decision to certify and the decision whether to detain are in the hands of the Home Office).*

36. We reiterate these questions (which were not dealt with in the response to that letter).

37. We deal below with the particular criteria suggested.

The claim by the Respondent that the Appellant's case is manifestly unfounded

38. In our letter of 9th August 2002, we asked

> *Has the IAA collected statistics about the proportion of cases certified by the Home Office as manifestly unfounded where the adjudicator does not agree with the certificate in the determination? The number of appeals which are wrongly certified by the Home Office is obviously relevant to the appropriateness of utilising the respondent's views of the strength of the case when making listing decisions. Please could ILPA be provided with such statistics as are available?*

39. No statistics have been provided in response to that request. We understand that the joint response from the IAS and the RLC indicates that

> In our experience, Adjudicators disagree with the majority of manifestly unfounded certificates. Of the sixteen cases the RLC presented last year from the Czech Republic and Poland which were certified as manifestly unfounded, the adjudicator disagreed with the certification in 63% of cases.

40. You may also be aware, for example, that the Home Office has in the past certified as manifestly unfounded numerous Zimbabwean claims. In one represented by the RLC, the Regional Adjudicator allowed Ms N's appeal and overturned the certificate commenting, "Perhaps the most curious feature of this decision is that the Secretary of State purported to certify that the claim of the appellant was manifestly unfounded". That appellant now has refugee status.

41. In the light of this, and the failure of the IAA to provide any contrary statistics, we do not understand on what basis you have made the Respondent's assertion that a case is manifestly unfounded a determining factor in imposing this draconian timescale upon an appellant. As indicated above, it is our view that Oakington cases are particularly unsatisfactory because the time allowed for initial decision making is so much shorter than usual and will have allowed no time for evidence to be obtained, or even, normally, for a statement to be prepared and approved. In addition, this procedure will, of course, require a change of representatives, given that the timetable at Oakington means that it is normally impractical for representation to be provided by anyone other than RLC and IAS.

42. We would therefore repeat our request that you give further information as to the basis for these criteria, and, as indicated in our letter of 9th August 2002, we may well wish to make representations on the information you provide.

43. Should the expedited procedure be implemented, we assume that adjudicators will follow the guidance in *SSHD v Salah Ziar* (1997) Imm AR 456. In that case, the

Immigration Appeal Tribunal considered the position where Procedure Rules required an expedited timetable for cases certified by the Home Office. It stated that

> the adjudicator will at least be under pressure to decide the case in a very much shorter period than the case of the non-certified claim and indeed is under a mandatory direction that the decision should be pronounced at the conclusion of the hearing. We appreciate that an adjudicator may adjourn hearings and extend time-limits but these powers are clearly intended to be exercised within the spirit of the "accelerated appeals procedure". The question of the claim being certified may therefore affect an adjudicator's approach to the case as a whole and encourage a speedy resolution in circumstances in which speed and detailed and thorough analysis are not always easy bedfellows.
>
> Thirdly and perhaps most importantly and equally generally there is the question of the ability of the appellant to prepare his case. [the claimant's advocate] referred us to the case of *Gashi* (13695) in which she said preparation of the case had taken some 9 months because of the need to gather evidence and there are statements by Ministers leading up to the Bill of the importance of providing an opportunity to adduce medical evidence. Whether or not certification may have affected the preparation will depend on the nature of the case and length of time between application and decision.
>
> As a general principle it seems to us that an adjudicator should consider at the earliest possible moment in any case whether or not the certificate has been established. To adopt a general practice of waiting until the end of the case before stating whether or not the certificate is agreed may well defeat the spirit not only of the asylum process but of the procedure itself. Accelerated procedure is intended to apply to claims which are certified. If, as we think, the certification may well affect the preparation of the appellant's case and the hearing before the adjudicator, to wait until the end of the proceedings and then to find either that the appeal was not properly or should not have been certified may be to defeat the dichotomy between the two categories of case. In other words the purpose of categorisation dictates that the initial decision taker consider it only after the substantive issue but an adjudicator at the earliest possible moment in the appeal.

44. The letter from the Deputy Chief Adjudicator dated 12th August 2002 states that

> *Adjudicators, as members of the independent judiciary, will decide whether or not to uphold these certificates in the same way as hitherto when hearing certified cases.*

45. Please could you indicate what procedures are being put in place to ensure that certificates are considered as a preliminary issue in accordance with the *Salah Ziar* guidance, so that cases incorrectly subjected to the expedited list are removed from it. That is, of course, essential if judicial scrutiny is to be effective and not supplanted by unscrutinised assertion by the respondent to the appeal.

<u>The decision to detain</u>

46. In our letter of 9th August 2002, we stated as follows

> *It is of course the case that detained cases are presently listed some weeks before non-detained cases (presumably to avoid them being detained for an unreasonable period). However, the normal listing period for detained cases is not comparable to that now proposed for those who have been processed in Oakington. I would have thought that detained cases were the least feasible to prepare in 6-8 days given the practical difficulties in attending the appellant to take witness statements and instructions and for pre-hearing conferences. Please could you therefore indicate why the IAA is using the Home Office decision to detain as a basis for inclusion in the expedited listing, including what the IAA's information is as to the type of cases where the Home Office will detain, and the relevance of its criteria to the suitability of the appeal for a 6-8 day listing?*

47. We required this information in order to give a meaningful response. Given that it has not been provided, we remain mystified about, and are unable to comment upon the basis upon which you may have concluded that detained appellants are those who most lend themselves to the proper preparation of their appeals in the 6-8 days proposed.

48. Best practice will obviously require a representative to make a bail application if it appears either that the detention is inconsistent with article 5 of the ECHR, or that for other reasons, including those suggested by the Home Office's own policy, the particular appellant did not represent an absconding risk and therefore should not have been detained.

49. The draconian time limits for preparation of the appeal which will flow from detention if the expedited list is implemented will only heighten the importance of a prompt bail application. In the event that the expedited listing procedure is implemented, please confirm that arrangements will be made to facilitate prompt listing of such applications and what procedures will be applied for ensuring that appellants are removed from the expedited list should bail be granted.

50. You will be aware of widespread concern that adjudicators have been requiring sureties without first reaching a decision about whether the detention is justified. Please can you confirm that you will remind adjudicators of the proper approach.

51. Please also confirm that adjudicators will be reminded that the Home Office should not be permitted to claim the existence of the expedited list as a basis for its decision to detain. That would be to create a vicious circle for such appellants (as well as highlighting the inappropriateness of the respondent's decision as a basis for a judicial listing decision).

We trust that you will give careful consideration to the foregoing and that you will deal with the specific matters which in a number of respects prevent a full response. For all the

reasons raised herein, two weeks during August was in our firm view a wholly inappropriate period within which to seek responses to the consultation. We hope that in the light of the matters raised by ILPA and other stakeholders you will not implement the proposed changes, but will instead facilitate meaningful dialogue within a realistic timetable between all stakeholders. As we have made clear, the matters raised are of profound importance and need such dialogue if a category of asylum seekers is not to be treated in a manner which will have grave consequences for their ability to obtain proper representation.

15th August 2002