

**ILPA Response to the Call for Evidence of the
Joint Committee on the Draft Modern Slavery Bill, endorsed by the
Anti-Trafficking Legal Project**

A. Introduction and overview

1. The Immigration Law Practitioners' Association (ILPA) is a charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups.
2. ILPA has provided evidence to parliament and Government on exploitation, for example to the Joint Committee on Human Rights, the Home Affairs Committee and on matters related to exploitation and trafficking in successive immigration legislation. ILPA was instrumental in work to change the law in 2009 to ensure that trafficking of babies and very small children was covered¹, having predicted the omission in 2004². During this parliament ILPA has submitted evidence to the Joint Committee on Human Rights enquiry into Legal Aid about the effect of the Government's proposals for a residence test upon trafficked persons and in our briefings on the Immigration Bill has highlighted the effects of its provisions on appeals and on access to services for those vulnerable to exploitation. Extracts from these documents pertinent to this response are annexed hereto. ILPA's interest is in the exploitation of persons under immigration control or exercising rights of free movement in the UK.
3. This submission is endorsed by the Anti-Trafficking Legal Project (ATLeP). ATLeP is an organisation whose membership comprises of legal practitioners, experts in trafficking experts and third sector agencies that represent or give expert evidence in litigation concerning victims of trafficking in UK legal proceedings and proceedings before the European Court of Human Rights. Members are engaged in dealing with trafficking victims in criminal, employment, community care and immigration proceedings. Those represented by members of ATLeP are for the most part not British citizens.

B. Would the draft Bill be effective in reducing the incidence of and preventing modern slavery?

4. There is a conflict between the Government's stated aims for the Bill – to improve the situation for victims of exploitation – and measures that will remove access to justice for victims. Efforts to tackle slavery, as outlined in the draft Bill, risk being ineffective without simultaneous protection measures for victims. The Joint Committee should take a holistic approach to scrutinising the Government's proposals for change

¹ Borders, Citizenship and Immigration Act 2009, s 54, repealing and replacing s 4(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

² See Document 7 in the Annex.

contained in the Immigration Bill³, in *Transforming Legal Aid*⁴ and in this Bill. Recent and pending changes to legal aid will mean that victims will be denied an effective right of access to the Courts, putting the UK in breach of its international obligations. The context is of key importance when considering the likely impact and efficacy of the provisions of this Bill.

5. This Bill presents an opportunity for a renewed focus on all aspects of slavery and forced labour and for changes to the legislative framework which could improve the situation for those subjected to exploitation. The conclusions and recommendations of the Joint Committee on Human Rights' inquiry and 2006 Report on Human Trafficking⁵ continue to set a standard against which such scrutiny can take place.

C. Are there other provisions which should be included in the draft Bill?

6. Yes.

(i) Criminal Offences

7. **The provisions on criminal offences should be revisited.** At the moment they simply move to a single statute a range of existing, unsatisfactory provisions.
8. We take the example of human trafficking. Article 2 of the "Palermo" protocol on human trafficking⁶ describes the purpose of that instrument as the prevention and combating of trafficking in persons, the protection and assistance of victims and the promotion of cooperation amongst States Parties to achieve those objects. Article 3 defines trafficking for those purposes. The UK offences fail to cover all that falls within the definition: the recruitment, transportation, transfer, harbouring or receipt of persons for their exploitation. Clause 3(6) of the Bill, like existing UK legislation, substitutes for the Palermo Protocol's notion of "a position of vulnerability" a limited set of characteristics: mental or physical illness, youth or a family relationship. The protocol, here and more generally, focuses on relative power⁷. Restrictions on access to legal aid, to the health services, to the courts, and the creation of a "hostile environment" decreases the relative power of persons subject to immigration control. The UK places persons subject to immigration control in positions of vulnerability. See further Documents 5 and 7 in the Annex.

9. Article 5 of the Palermo Protocol states

Article 5. Criminalization

³ HL Bill 84.

⁴ Ministry of Justice, *Transforming Legal Aid: Delivering a more credible and efficient system* 9 April 2013 and *Transforming Legal Aid: next steps*, 5 September 2013.

⁵ HL 245/HC 1127-I, 13 October 2006, Thirty-first report of session 2005-2006. See Chapter 7, conclusions and recommendations, available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/245/24510.htm>

⁶ 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, the 'Palermo Protocol') to the UN Convention against Transnational Organised Crime (adopted by General Assembly resolution 55/25 of 15 November 2000).

⁷ See also *Rantsev v. Cyprus and Russia* Application no. 25965/04, European Court of Human Rights.

1. *Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.*

10. As this assumes, defining a person who is to be recognised as trafficked and benefit from protection and additional services is a different task to enumerating the constituent elements of a criminal offence. It should not be assumed that one definition can be made to serve both purposes. The UK has sought to use the definition, designed to identify trafficked persons, for the purpose of prosecutions and has then refracted the limitations that imposes back on victims. The result works neither for trafficked persons nor for prosecutors.
11. The Report of the Modern Slavery Review⁸ recommended a child-specific exploitation offence to address the specific situation of children to ensure that all exploitation of children (whether or not they have been trafficked or subjected to sexual abuse) is made a crime. Children are subject to exploitation and the general law on child protection and child abuse should provide a framework, strengthened where necessary, within which exploitation of *all* children can be tackled. Any offence should cover all children, whether British or subject to immigration control; laws on child protection apply to all children and in our experience separate provision for children under immigration control in other areas has meant inferior provision⁹.
12. The offences should be made “lifestyle offences” subject to the Proceeds of Crime Act 2002¹⁰ and there should be confiscation orders against traffickers.

(ii) **Guardianship for Children**

13. The Government has recently trailed in the media the introduction of a “personal advocates” pilot for trafficked children¹¹; however this should not be allowed to detract from the pressing need for statutory guardianship scheme. **Legal guardianship should be introduced as part of the Bill**¹².
14. ‘Personal advocates’ without the requisite authority to make legal decisions on behalf of the child are not a solution to the problems legal representatives face because of the lack of an adult competent to give instructions in the case of a trafficked child. Where a separated child (i.e. a child without a guardian or parent in the UK) has an immigration case, as is very often the case, there frequently will be no one with the legal competence

⁸ *Establishing Britain as a world leader in the fight against modern slavery*, Report of the Modern Slavery Bill Evidence Review (16 December 2013), section 4.2, page 27: (accessed 12 February 2014)
<http://www.frankfield.com/upload/docs/PDF%20FINAL.pdf>

⁹ See ILPA’s *Children first; migrant second: ensuring that every child matters*, ILPA/Heaven Crawley, February 2006.

¹⁰ Section 75 and Schedule 2.

¹¹ This was announced by the Government to media, as reported, e.g., in the Guardian, 26 January 2014:
<http://www.theguardian.com/society/2014/jan/26/child-trafficking-victims-personal-advocates-home-office-trial>.

¹² See calls for guardianship in , e.g., Joint Committee on Human rights, *Human Rights of unaccompanied migrant children and young people in the UK*, First report of session 2013-2014 , HL Paper 9, HC 196. The Children’s Society, Press Release, *The Children’s Society welcomes draft Modern Day Slavery Bill* (13 December 2013), available at: <http://www.childrensociety.org.uk/news-views/press-release/childrens-society-welcomes-draft-modern-day-slavery-bill>; ECPAT, Press Release, *Protection needs of child victims overlooked in draft Modern Slavery Bill* (13 December 2013), available at: <http://www.ecpat.org.uk/media/protection-needs-child-victims-overlooked-draft-modern-slavery-bill-0> (accessed 12 February 2014).

to make the difficult decisions involved in litigation on behalf of the child. Until the case reaches the higher courts, where is the possibility of the official solicitor getting involved, lawyers can only take instructions from the child client him/herself. This creates myriad problems, not least where the child's instructions may be in conflict with his or her best interests. For example, we have had experience of situations where the child client is convinced that the person responsible for exploiting him / her is in fact acting in their best interests. The only way to ensure that such a child's welfare is safeguarded is by the appointment of legal guardians with full authority who can provide legal representatives with clear instructions upon which to act. The opportunity provided by this Bill to introduce a guardianship scheme should be seized. This is required to ensure that the UK meets its obligations to provide such guardians/representatives under the European Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims of Human Trafficking¹³. See further Document 4 in the Annex.

(iii) **Procedural Protection**

15. In a trafficking case, negative National Referral Mechanism decisions have a knock-on impact on individuals' immigration cases and on their entitlements. Negative 'credibility' findings in the National Referral Mechanism process can infect determination of the immigration case. The only means for individuals to redress erroneous decision-making in the National Referral Mechanism is to bring a judicial review.
14. **There should be a right of appeal against refusal to accept that there are reasonable grounds for thinking that a person has been trafficked** and legal aid should be available for such a challenge. See Documents 7 and 8 in the Annex.
15. Judicial review challenges may soon become inaccessible to persons without leave to remain in the UK, if the proposed residence test¹⁴ is introduced in its current form in May 2014 as planned. See further below.
16. A reflection period¹⁵ for a trafficked person should be just that. **The Bill should make provision for those who wish to use it to reflect on what application they wish to make to be allowed to do so.** Currently, the immigration cases progresses during the 'reflection period' whether the trafficked person wants it to or not.

(iv) **Legal Aid**

17. The Bill should address the gaps in protection left by Legal Aid, Sentencing and Punishment of Offenders Act 2012 and make provision for orders under section 9(2)(a) of that Act to bring cases back into scope. This Act removed all immigration cases from the scope of civil legal aid, save for cases involving asylum/protection applications or potential breaches of Articles 2 or 3 of the European Convention on Human Rights

¹³ Section 14(2) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

¹⁴ As set out in the Ministry of Justice's *Transforming Legal Aid: Next Steps* consultation, 5 September 2013, op.cit. Available at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/transforminglegalaidnextsteps.pdf (accessed 11 February 2013).

¹⁵ Council of Europe Convention, op.cit, Article 13(1).

(rights to life/freedom from inhuman or degrading treatment and torture)¹⁶. Such cases are focused on risks on return to the country of origin, and thus look to the future. This means that a person who has been subjected to torture and abuse in the past, will be denied legal aid unless s/he has a forward-looking fear of harm in the country of origin.

18. Other immigration cases will not be eligible for legal aid. An exception is made for cases involving human trafficking but only if there has been a conclusive determination under the National Referral Mechanism that the person has been trafficked¹⁷. As set out in Document 3 in the Annex¹⁸, delays are an endemic feature of the National Referral Mechanism – it could be weeks or months before a person gets a “reasonable grounds” decision. Wrongful decision-making, at both the initial “reasonable grounds” stage and the later “conclusive determination” stage, thus has serious consequences as it will result in trafficked persons being denied legal aid for their immigration cases.
19. Trafficked persons must succeed in a judicial review of a wrongful National Referral Mechanism decision to be eligible for legal aid as trafficked persons. The proposed residence test will mean that unless a person has accrued 12 months’ lawful residence in the UK, they will be unable to get legal aid for judicial review. The proposed exemption from the residence test for trafficked persons does not extend to judicial review¹⁹. By definition, a trafficking case involves a person being brought to the UK for the purposes of their exploitation²⁰. Many will have been taken to the UK through irregular means and thus will be unable to meet the requirement for 12 months lawful residence in the UK. See further Document 1 in the Annex. **ILPA urges that trafficked persons be exempt from the residence test for judicial review matters.** This is a minimum requirement to protect access to justice for trafficked persons and ensure that the UK abides by its international obligations, e.g. Article 47 of the Charter of Fundamental Rights of the European Union which provides that legal aid shall be made available to those who lack sufficient resources to ensure effective access to justice in the implementation of European Union law. European Union law is engaged in this case as the EU Trafficking Directive²¹ applies to the identification of trafficked persons.
20. A positive reasonable grounds decision should not be the gateway to legal assistance. Legal assistance may be needed to support the survivor of trafficking, where appropriate, to approach the authorities to make the disclosures that it is intended to facilitate. Under-reporting is a big problem in this area²² – getting a person access to a lawyer is a means not only of starting to work to ensure their protection, but of achieving the

¹⁶ Schedule 1, paragraph 30(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁷ Or a positive initial “reasonable grounds” decision, while the conclusive determination is still awaited.

¹⁸ See also the Anti-Trafficking Monitoring Group *Hidden in plain sight: three years on, updated analysis of UK measures to protect trafficked persons*, October 2013, which reported that the average wait for a ‘reasonable grounds’ decision was 40 days and the average wait for a ‘conclusive determination’ is 164 days, despite targets of 5 days and 45 days, respectively, for those decisions.

¹⁹ See *Transforming Legal Aid: next steps*, *op.cit.*

²⁰ As defined in the Council of Europe Convention on Action against Trafficking in Human Beings (2005) Article 4(a).

²¹ Directive 2011/36/EU, *op. cit.*

²² The Anti-Trafficking Monitoring Group collected information about more than 130 individuals in a 12 month period who were not referred to the National Referral Mechanism, despite being identified by a support agency as a victim of trafficking: *Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*, Anti-Trafficking Monitoring Group Report (2010), page 2.

objective of increasing reporting by victims and thereby increasing the likelihood of successful prosecutions.

21. Those who do not fall within the trafficking definition will not be eligible for legal aid and nor will those who have not disclosed trafficking. It may take a long period working with a legal or other advisor for trust and rapport to be established. Previously, because legal aid was available in all immigration cases, exploited persons could, over time, develop sufficient trust in a legal advisor to disclose the abuse. Details of their exploitation, of interest to the police and other agencies, were disclosed. In trafficking cases, it is a Catch-22 situation: the individual is not identified as trafficked because unrepresented, and because not identified as trafficked, is unrepresented. **Legal aid for all immigration matters and other matters related to slavery should be restored by means of an order under section 9(2) (a) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to ensure that effect is given to the modern slavery bill.**

(v) Amendment to the “Family Worker Exemption” (Secondary legislation)

22. A person is not entitled to the minimum wage if they live with their employer in their family home, are treated as a member of the family and share in the tasks and activities of the family because of an exemption in regulation 2(2) of the National Minimum Wage Regulations 1999²³. Originally designed to cover au pair arrangements, traffickers have sought to rely on the exemption to resist claims under this head of compensation. **The regulations should be amended so that such reliance is no longer possible.**

(vi) Safeguards for migrant domestic workers (secondary legislation/rules)

23. The overseas domestic worker visa was abolished in 2012²⁴ for all new applications after that date and replaced with a visa permitting a stay of a maximum of six months, with no right to change employer and no route to settlement. **It should be reinstated.** This is a key recommendation in the Report of the Modern Slavery Bill Evidence Review²⁵ and one which should be included in the Bill or implemented alongside it through a change to the immigration rules. If a domestic worker finds themselves in a position of exploitation they should not be left in the invidious position of having to choose whether to remain in a situation of abuse or exploitation or to face removal from the UK. Evidence from the charity Kalayaan which works with migrant domestic workers suggests that far from eradicating domestic slavery, the changes have reduced protection for migrant domestic workers, whose problems have been driven underground²⁶. See *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 313 (IAC). See further Document 5 in the Annex. The danger of linking an immigration status directly to one employer is that this simultaneously encourages abuse and deters disclosure of that abuse by the victim.²⁷ ILPA urges the Joint Committee to recommend that the Government reinstate the rights of overseas domestic workers to change employer.

²³ SI 1999/584.

²⁴ Statement of Changes in the Immigration Rules HC1888, 15 March 2012.

²⁵ See Section 5.3, p.54 of the Report, *op cit*.

²⁶ *Slavery by another name: the tied domestic worker visa*, Kalayaan 2013.

²⁷ Home Office data for the period from January 2003 to August 2010 shows that 41 per cent of migrant domestic workers cited abuse/exploitation as the reason for changing their employer. See fn. 54 in Kalayaan’s

D. What non-legislative action needs to be taken to ensure effective implementation of the draft Bill?

24. For changes that involve primary or secondary legislation and the immigration rules, see the section on legislative action above.

(i) National Referral Mechanism

25. The National Referral Mechanism is the process currently used to determine whether those identified as perhaps having been trafficked are indeed trafficked persons. Failure to identify trafficked persons is a huge problem, compounded by a combination of decisions not to refer cases to the National Referral Mechanism and failures to do so²⁸. See further the Annex, Documents 7 and 8. To have two different systems depending on nationality creates a risk of discrimination²⁹ and there is a potential conflict whereby the Competent Authority for the National Referral Mechanism is also the agency with the power to determine the individual's immigration status (i.e. UK Visas and Immigration). There is also the risk that trafficked persons are still regarded primarily as persons with immigration problems, rather than persons whose rights have been violated, as the Joint Committee on Human Rights urged in 2006. Many are deterred from approaching UK Visas and Immigration, and one consequence of this is that they will not be eligible for legal aid as trafficked persons. See Documents 2 and 3 in the Annex. **ILPA urges the Committee to recommend that the National Referral Mechanism be removed from the competence of UK Visas and Immigration.**

(ii) Prosecutions

26. Guidance to the Crown Prosecution Service and its implementation should be kept under regular review.

E. Does the draft Bill achieve its objectives effectively and fairly?

27. No.

28. As to efficacy see our response to *Would the draft Bill be effective in reducing the incidence of and preventing modern slavery?* above.

29. The collection of data on slavery must be improved; however we do not consider that notification of the National Crime Agency is the best means of achieving this. It may mean that individuals are deterred from disclosing information. Any notification requirement of this kind creates concerns about the passing on of personal data and of unlawful interference with individuals' rights to privacy under Article 8 of the European

Report *Ending the Abuse, polices that work to protect migrant domestic workers* (May 2011). Available at: <http://www.kalayaan.org.uk/documents/Kalayaan%20Report%20final.pdf>

²⁸ See *Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*, Anti-Trafficking Monitoring Group Report (2010). Available at (accessed 12 February 2014):

http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf

²⁹ The Anti Trafficking Monitoring Group's recent report *Hidden in Plain Sight, op.cit.*, found that whereas 80% of those referred into the NRM who are UK or EU nationals are granted protection, this is the case for only 20% of non-EU nationals.

Convention on Human Rights. **Full and informed consent to data being passed must be built in to any process.** To do otherwise risks *inter alia* undermining the work of First Responders with trafficked persons. **The Committee should examine what information can be passed by public authorities under existing powers and what, if any, lacunae exist.** Any information collected should inform service provision as well as law enforcement. The Anti-Slavery Commissioner, amongst others, will need data that is available. Data should be collected not only on trafficking, but also on forced labour, slavery and servitude.

30. As to fairness, the “Prevention Orders” in the Bill can be imposed on anyone, including children³⁰. They permit sweeping restrictions on a person’s civil liberties. Individuals’ free movement is the primary target; permissible restrictions include a ban on all foreign travel for periods of up to five years, which can be extended indefinitely. The scope of the potential Orders is vague: a person is to be prevented from doing anything which the Court (including a Magistrates or Youth Court) is satisfied is ‘necessary for the purpose of protecting others from physical or psychological harm’ in relation to a trafficking / human slavery offence. These Orders can be imposed on persons who have never been convicted of any crime, yet a breach of any of the conditions of an Order result in a penalty of five years’ imprisonment. This serves to indirectly make criminal conduct that Parliament has not determined should be a crime, in a similar manner to the controversial Anti-Social Behaviour Order regime. We highlight clause 11(4) which introduces retrospectivity into the provisions. **We do not consider that the case for this interference with civil liberties has been made out.**

F. Does the draft Bill provide for adequate safeguarding of survivors of slavery and trafficking?

31. No.

32. See responses to questions above.

33. The current focus in the Bill is very much on the offender, and not the victim: actual or future. Of necessity this means that, aside any deterrent effect, its efficacy will be limited to persons identified and within the purview of the criminal or civil justice system. Deterrent effect we judge marginal given that traffickers may already face maximum sentences for e.g. murder, rape, grievous bodily harm and punishment for offences such as money-laundering, as well as specific exploitation offences. In its current form the Bill does little to assist persons at risk of, being or who have been exploited.

G. How could the proposals for the Anti-Slavery Commissioner be improved?

34. The Anti-Slavery Commissioner should be wholly independent from Government and able objectively to scrutinise the Government’s treatment of persons who have subjected to slavery, as well as its efforts to prevent and punish perpetrators. S/he should report to parliament and reports should be published.

³⁰ See section 16(9)(c) which empowers Youth Courts to make such orders.

35. Section 34 of the draft Bill appears designed to restrict the Commissioner from being involved in particular cases before the courts. We consider that the Commissioner should be able to instigate and/or to intervene in litigation. As to other cases it is important that the clause does not prevent the Commissioner from examining what has gone wrong in ways compatible with both the independence of the judiciary and laws on double jeopardy. We know at the moment that victims of trafficking continue to be prosecuted in the criminal courts³¹, despite the Crown Prosecution Service's clear guidance to the contrary³² and the UK's obligations under Article 8 of the EU Directive on Trafficking³³ and Article 26 of the Council of Europe Trafficking Convention³⁴, as well as long-standing United Nations recommendations³⁵, all of which make clear that trafficked persons who have been compelled to engage in criminal conduct related to their exploitation should not be prosecuted in the criminal courts. There are parallels with the defence that a refugee has under Article 31 of the UN Convention Relating to the Status of Refugees and under section 31 of the Immigration and Asylum Act 1999 to prosecution for document offences and the recent case of *Mateta*³⁶ is further evidence of systemic failures to protect. The Commissioner should be able to ask the Director of Public Prosecutions and/or the Crown Prosecution Service to direct their attention to whether there is evidence to suggest that a person is victim of trafficking.
36. If a trafficked person has been wrongly prosecuted and convicted of a crime (in breach of European Union law and domestic policy) there are potentially serious repercussions for their immigration case. Such individuals may be subjected to deportation proceedings³⁷, or be more likely to have an application for leave to remain or for citizenship refused³⁸.

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Chair
ILPA
12 February 2014

³¹ See, e.g., *R v Let ors* [2013] EWCA Crim 991; *Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*, Anti-Trafficking Monitoring Group Report (2010), p. 63-4; http://www.ecpat.org.uk/sites/default/files/wrong_kind_of_victim_full_report.pdf

³² See the Crown Prosecution Service guidance on non-prosecution of victims of trafficking, available at: http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a32 [accessed 7 February 2014]

³³ Directive 2011/36/EU of the Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA EC 2011/36.

³⁴ Council of Europe Convention on Action against Trafficking in Human Beings (2005) 16.V.2005

³⁵ See, e.g., Principle 7, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Office of the UN High Commissioner for Human Rights (2002).

³⁶ *R v Mateta et ors* [2013] EWCA Crim 1372.

³⁷ Under the Immigration Act 1971, but also under the "automatic deportation" provisions of the UK Borders Act 2007.

³⁸ Under the general grounds of refusal set out in rule 320 of the Immigration Rules, HC 395 and also because of the requirement to be free from criminal convictions when applying for settlement in different categories of the rules.

Annex

ILPA's previous evidence as relevant to this Bill.

Presented in reverse chronological order.

Doc 1 Immigration Bill: ILPA Briefing For House Of Commons Committee Stage Part 3 Chapter ii Health General Briefing, 12 November 2013 (extract)

It was stated in the 2012 Review of overseas visitors charging policy, that the majority of migrants charged by the National Health Service are persons without the required immigration clearance or documentation⁴⁹. ...See the conclusion in the evidence document accompanying the consultation: debt recovery is difficult and “in most cases the burden falls on the state”⁵⁰. Again, there is a risk that people do not access healthcare until they require a (costly) emergency intervention. We highlight particular risks to persons unlawfully present who have been trafficked to the UK and have not yet been identified as trafficked. The UK Human Trafficking Centre in its 2012 baseline assessment identified that over half (54%) of all potential victims of trafficking in the UK were not referred for identification by the “competent authority” within the “National Referral Mechanism”⁵¹. In the press release introducing the 18 April 2013 Department of Health guidance on trafficked persons⁵² it is acknowledged that in many cases, victims need treatment for health problems so NHS staff are uniquely placed to spot, treat and support victims of trafficking⁵³.

⁴⁹ 2012 review of overseas visitors charging policy: Summary Report, International Policy Team, Department of Health, 2013.

⁵⁰ Department of Health, Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment, July 2013, page 11.

⁵¹ A baseline assessment on the nature and scale of human trafficking in 2011 UK Human Trafficking Centre 2012, Serious and organised crime agency Intelligence Assessment.

⁵² See <https://www.gov.uk/government/news/help-for-nhs-staff-to-spot-and-support-trafficking-victims> (accessed 22 April 2013).

⁵³ The guidance is Help for NHS staff to spot and support trafficking victims: Department of Health, 18 April 2013.

Document 2: ILPA's evidence to the Joint Committee on Human Rights: Implications for Access to Justice of the Government's Proposed Legal Aid changes, 30 September 2013. (extracts)

...

Exceptional funding is no answer

...

Trafficking cases (x two)

Both cases had been referred to the Home Office as the “competent authority” under the National referral Mechanism to determine whether there were reasonable grounds for thinking that the applicants had been trafficked. No reasonable grounds decision has been made in either case – delays continue for many months. Therefore applications for exceptional funding were made as advice would not wait. Both applications were refused. The reason given was that the case is outside the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

19. Cases in areas that parliament fought to keep in scope such as ...trafficking cases are in practice cases where it is difficult to find representation funded by legal aid because the legal aid contracts that came into force on 1 April 2013 dramatically limited the number of initial cases (applications to the Home Office and appeals to the First-tier Tribunal) that lawyers could bring. Most lawyers in Manchester, London, and Birmingham have an allocation of c.100 cases. These tend to get used for complex asylum cases involving a large volume of work⁹ and are thus not available for trafficked persons ...save where practices specialise in these types of cases. These are cases that engage Articles 3, 4, 5 and/or 8 of the Convention.

20. Paragraphs 32(2) and (3) of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides that trafficked persons seeking compensation in the civil courts and under employment law are eligible for legal aid. This is in line with Article 15(2) of the Council of European Convention on Action against Trafficking in Human Beings. However, under the Legal Aid Agency's Standard Civil Contract¹⁰ these cases can only be brought using the "Miscellaneous" allocation of cases. Each organisation with a legal aid contract can bring no more than five cases in the miscellaneous category: across all the cases, not just trafficking cases, which can be funded under "miscellaneous". Thus in practice it is very difficult for trafficked persons to find someone to represent them in such cases.

...

Trafficked persons

72. In the response to the consultation the Government conceded that trafficked persons falling within paragraph 32 of Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will continue to benefit from legal aid. This will assist those trafficked persons falling within the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. But as debated during the passage of that Act⁴⁶, not all trafficked persons do. For example, those who have just come to the attention of the authorities and are waiting for a decision on whether there are reasonable grounds to think that they have been trafficked. In the words of the Baroness Hamwee:

If legal aid is not available until there has been a reasonable-grounds decision, will the Border Agency put the immigration case on hold? In the meantime, what happens if the individual is in detention or is without housing and food? ⁴⁷

73. Now these trafficked persons will be cut out of judicial review which is the only way to challenge a decision that there are not reasonable grounds for considering that a person has been trafficked as well as being used for challenges such as age disputes and failures to provide support.

74. The protection for trafficked persons extends to certain immigration and employment cases and actions against the trafficker but not to, for example, claim under paragraphs 21 and 22, as described under detention above, or for community care services under paragraph 22: claims in tort or damages claims for breaches of the European Convention on Human Rights. This fails to respect Article 13, the right to an effective remedy, read with the right engaged the particular case (e.g. Article 5, Article 3). There is a risk of a breach of the UK's obligations under Article 4 of the European Convention on Human Rights, including its positive obligations⁴⁸ and of a violation of Article 47 of the EU Charter of Fundamental Rights, including when read with the EU Directive on Trafficking in Human Beings⁴⁹. The case of *OOO*, described below, would not be covered and *OOO* herself would fail the residence test.

***OOO & ors* [2011] EWHC 1246 (QB)**

The claimants succeeded in establishing that the police had violated their Article 4 rights by failing to investigate their allegations. At the time of the proceedings the claimants were a mixture of those who were still seeking asylum and one (*OOO*) who had been granted status by the time she applied for funding but who had had it for less than a year.⁵⁰

W

W was accepted to meet all parts of the definition of trafficking definition, having been exploited for domestic servitude and forced prostitution, yet deemed not to be a victim because she had “moved on” by continuing to attend therapy.

F

F was trafficked for domestic servitude. Her visa expired in August 2012. Her traffickers (who had control of her passport, and her movements. made an in-time application for an extension of her visa. In November 2012 she escaped her traffickers, who wrote then to the Home Office in her name, withdrawing the application and saying that she wanted to return home. In response, the Home Office sent her application papers and her passport to her previous employers' address, in December 2012 - despite having been notified in writing that all correspondence should go to Kalayaan, a charity working with migrant domestic workers. Her Embassy was unable to obtain her passport from the previous employers. She was now working for a new employer - but unlawfully, since her application had been withdrawn with her knowledge or intention, as Kalayaan discovered when they made enquiries of the Home Office. A specialised organisation providing legal advice to trafficked persons helped her to pursue a claim against her traffickers in the Employment Tribunal, and an out of time application for further leave as a migrant domestic. This was granted because of compassionate circumstances. At no stage was F referred to the National Referral Mechanism for a decision that she was a trafficked person. She preferred to be self supporting since her family was dependent on her salary.

Had she gone to her lawyers after 1 April 2014, to get legal aid she would have to have been referred to the National Referral Mechanism which would have delayed her application for a visa by possibly several months. Meanwhile she would have remained unlawfully in the UK, and lost an opportunity to remain self-supporting by work. Delay would also have prejudiced the visa application. If the residence test were implemented then were she to receive a negative 'reasonable grounds' decision, she would have no way of challenging that by way of judicial review, because the residence test would kick in.

A

A is a trafficked person. He fled his country during a family feud which cost the life of his brother and saw him violently attacked. The agent who helped him to flee in 2009 took his passport and he was made to undertake forced labour for the next five years in a restaurant, working seven days a week. He slept on a mattress on the floor of the food store room and was never paid more than £60 a week. He was threatened that immigration would remove him. He met his partner at a the restaurant and went to live with her. They have two children and expect a third. She and the children have recently been granted settlement. His case is complex because he escaped trafficking some time ago. He needs advice on his options. Even if he were to claim asylum there is currently no legal aid for his claim based on Article 8. An application for exceptional funding was made to obtain evidence in support of his Article 8 claim while the decision under the National Referral Mechanism is awaited and make the appropriate applications insofar as these were not asylum cases and thus out of scope. Exceptional funding was refused and this was upheld on review. An application for judicial review of the Legal Aid Agency was prepared. The Agency maintains its decision.

After several attempts, emergency legal aid funding to challenge the Legal Aid Agency's refusal of exceptional funding was obtained; the case is pending. It has taken almost six months to get his case for access to legal aid before a judge - although Article 12 of Directive 2011/36/EU, the Directive of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking

in human beings and protecting its victims states that victims of trafficking are entitled to 'early legal advice'. The residence test would make it impossible to bring the challenge to the refusal of funding.

Lydia

Lydia was referred to her representatives in March 2013 by Kalayaan, a charity assisting migrant domestic workers. She had been trafficked to the UK from the Philippines for the purposes of domestic servitude and forced to work up to 15 hours a day, 7 days a week. Lydia's passport was taken from her and she was not allowed to leave the house unaccompanied. She was paid £139 per month paid into an account in her home country. In late 2011, when the traffickers travelled abroad Lydia escaped. She obtained new employment but her new employer similarly exploited her. Complaints met with threats of denunciation to the police and other authorities, as an illegal worker. When she sought to leave she was subjected to both verbal and physical abuse and imprisoned. When two days later the door was unlocked so that the employer could go to work Lydia, having taken employers' children to school, fled.

Lydia issue breach of contracted and protection from harassment proceedings against her second employer, these complaints to be heard in mid-2014. Under the post 1 April 2013 funding regime Lydia would not receive legal aid as only complaints raised directly against the trafficker will be funded. If the proposals were implemented Lydia would thus also not benefit from the exemption from the residence test.

2 Form CIV ECF 1. See <http://www.justice.gov.uk/legal-aid/funding/exceptional-cases-funding>

3 Available at <http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/ecf1.pdf>

4 Available at <http://www.justice.gov.uk/downloads/legal-aid/funding-code/ecf-provider-pack.pdf>

...

46 See e.g. HL Report 7 Mar 2012 : Column 1798-1813, 27 Mar 2012 : Column 1291-2.

47 HL Report 27 Mar 2012 : Column 1292.

48 (*C.N. v. the United Kingdom*, (Application no. 4239/08) e.g. paragraph 66; *Siliadin v. France*, (Application no. 73316/01) e.g. paragraph 112; and *C.N. and V. v. France*, Application no. 67724/09) e.g. paragraph 105.

49 Directive 2011/36/EU.

50 OOO has confirmed that she is happy to be used as an example. A court order remains in place to protect her identity.

Document 3 Legal Aid Sentencing and Punishment of Offenders Bill, ILPA briefing for House of Lords Third Reading 27 March 2012 : Government Amendment to Schedule 1 *Victims of trafficking in human beings* (extracts)

Presumed purpose

The amendment ... makes provision for legal aid in the form of initial advice, assistance representation and (by virtue of the amendment to page 169 line 15) representation in the First-Tier tribunal for certain victims of trafficking in relation to certain matters. The matters in respect of which legal aid can be provided are:

- applications for leave to enter or remain in the UK (i.e. immigration applications); claims for compensation in the employment tribunal; and
- claims for damages.

Those who can be given legal aid are variously defined. In the case of employment and damages claims legal aid can be given to an individual who is a victim of trafficking in human beings, defined by reference to the Council of Europe Convention on Action Against Trafficking in Human Beings... or, if the individual has died, to that individual's personal representative, defined by their role in administering the estate of the deceased. In the case of immigration assistance can be given to persons where the relevant "competent authority" has made an initial determination that there are

“reasonable grounds to believe” (an expression used in the Convention... that they are victims of trafficking, has not changed this view to a final (“conclusive”) determination that they are not such victims, and/or has reached a conclusive determination that they are such victims. ... in the case of employment and damages claims legal aid must be provided to the individual victim (or his or her personal representative) only where the claim arises in connection with the trafficking or exploitation of the individual, the latter being defined by reference to section 4(4) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.... In the case of immigration, legal aid can be provided in relation to an application by the individual for leave to enter or remain. Thus we see that in immigration cases there is a relatively simple definition of what assistance can be given, and a complicated definition of the individual to whom it can be given; in the case of employment and damages claims the opposite is true.

Briefing

Persons who have been trafficked who fear persecution, torture or inhuman or degrading treatment or flagrant breaches of other human rights on return, are eligible for legal aid in connection with their status in the UK because legal aid has been retained for asylum cases. But there are persons who have been trafficked who do not have asylum claims, because they cannot demonstrate risk, or sufficiently high risk, on return. They may have histories of appalling ill-treatment and there may be immigration applications that they can most properly make, such as an application to remain in the UK until any civil claims have been heard and considered on the grounds of private and family life including that of any children.

Whether they have claimed asylum or not, trafficked persons may wish to claim compensation or damages from the person who has abused and exploited them.

...

Stage at which legal advice be available

In the cases of employment and damages this appears to be at any stage, including after the death of the individual.

In the case of immigration it is more problematic. If the person is only eligible for legal aid once the competent authority has determined that there are reasonable grounds to think that the person has been trafficked then eligibility for legal aid comes too late to ensure adequate protection against injustice. Such decisions are supposed to be made within five days. In practice they take very much longer.

The Anti-Trafficking Monitoring Group in its 2010 report *Wrong Kind of Victim?*¹ recorded:

Delays in decisions about referrals

While Competent Authorities are supposed to respond to initial referrals within five days and to make further inquiries during a 45-day reflection delay, in practice cases have been reported in which it took far longer ...

A...Freedom of Information request indicated that there were significant delays in assessing the cases of 66 of the 102 people who were referred to the N[ational] R[eferral] M[echanism] in 2009 but who had not been notified of a ‘reasonable grounds’ decision by the end of 2009.²

The report records that it became necessary to alter the Government’s funding arrangements for those providing initial support to presumed trafficked persons, in recognition that the “reasonable grounds” decision was not being made within five days.

The examples below are a mixture of cases where the person has claimed asylum and has not, but they all illustrate delays in the reasonable grounds decision.

The following examples are provided by Kalayaan, which works with migrant domestic workers, many of whom do not claim asylum.

Examples from Kalayaan

Case	Referral sent	Reasonable grds decision received	Period referral to receipt of decision
Case 1	27 April 2010	23 November 2010	7 months
Case 2	29 November 2011	14 December 2011	15 days
Case 3	23 December 2011	31 January 2012	5 weeks
Case 4	14 February 2012	5 March 2012	3 weeks
Case 5	9 March 2012	Pending (on 23 March 2012)	13 days and rising

...

Examples from Poppy

Time from referral to reasonable grounds decision in period 1 April 2009 to 31 December 2011

Time from referral to reasonable grounds decision in period	Number of cases
1-5 days	25
6 - 10 days	14
11 - 20 days	9
21 - 30 days	10
31 - 44 days	3
45 days	0
1 - 2 months	24
3 - 6 months	11
6 months - 1 year	1
1 year +	0

Cases studies from Poppy

Ms O

Referred to the National Referral Mechanism on 27 January 2012. Detained in Yarls Wood Immigration Removal Centre. Poppy project chased the decision repeatedly. Decision issued 14 March 2012; release from immigration detention in accordance with Home Office policy took until 17 March 2012. In total Ms O spent 336 days in both prison and immigration detention without being properly identified as a trafficked person. Forty-nine of those days were after the referral had been made and three of those days were after the positive 'reasonable grounds' decision had been issued.

Ms KO

Referred to the National Referral Mechanism on 12 March 2012 having been in immigration detention for 76 days. Medical evidence of health problems. As of 22 March 2012 a reasonable grounds decision was still awaited.

Ms B

In immigration detention awaiting an appeal and has been for 47 days. Her appeal has been adjourned and relisted. She has a letter from the Tribunal dated 14 March 2012, following the adjourned appeal saying —*It is not the role of the tribunal to contact the police on behalf of the appellant.* Staff in the detention centre indicated that they had not found the allegations of trafficking to be credible, and had therefore not referred her to the National Referral Mechanism. She was referred

by a non-Governmental organisation. A further adjournment has been secured, without which her appeal would have been heard.

Similarly with children's cases as complex child exploitation/trafficking investigations carried out by children services take time. In such cases both UK Border Agency and Children's Services procedures and guidance make clear that the interests of the child are of primary importance and that this is more important than the five day time limit.

That legal aid cannot be obtained until the reasonable grounds decision is made and that this may take weeks or months matters because processing of any immigration case; interviews, deadlines for submission of further evidence etc. continue apace, whether the reasonable grounds decision has been made or not. And indeed, trafficking may come to light at any stage in a case, for example the day before an interview. In the case studies above, Ms B's application for asylum had already been rejected in the accelerated Detained Fast Track asylum process before the referral to the National Referral Mechanism was heard, and it was very nearly the case that the appeal was not adjourned. Had it gone ahead, if only the immigration aspect of the case was to be pursued, or was of sufficient merit to be pursued, there would be no legal aid for representation at the appeal, not even for a lawyer who could make the case for an adjournment while the reasonable grounds decision was pursued.

A further complication in an immigration case is where the competent authority determines that the person has not been trafficked. This decision may be the subject of a judicial review, but in the meantime there will be no legal aid as the immigration case progresses, not even for a lawyer to ask for an adjournment to await the reasonable grounds decision. We already know from the asylum cases that this can be a problem.

Ana (name changed)

The UK Border Agency found that there were not reasonable grounds for concluding that Ana had been trafficked. Lawyers brought a judicial review against that decision. While that was on going, Ana's case came before the Immigration and Asylum chamber of the First-tier Tribunal where the immigration judge found Ana to have been trafficked for domestic servitude. Ana was given five years humanitarian protection. The judicial review was not pursued.

... Ana would not have had legal aid for the proceedings before the immigration tribunal, and hence would have been at risk of not being recognised in those proceedings as a victim of trafficking; and that might in turn have prejudiced any capacity to bring a damages case or claim compensation from her traffickers in the employment tribunal.

...for immigration cases and there is much less free help than in other areas of law because to give advice on immigration in the course of a business, whether or not for profit, a person must be a solicitor, barrister, legal executive or regulated by the Office of the Immigration Services Commissioner.³ Generalist agencies are unlikely to be so regulated.

Without advice on the implications for his/her immigration status the person may be reluctant to disclose trafficking at all or, having done so, may be reluctant or unable, because s/he does not understand the consequences, to give informed consent to a referral to the National Referral Mechanism. In the case of a child such support should be viewed holistically and funded to ensure the safety and welfare of the child and that his/her rights are protected.

If the person has no immigration status in the UK and has not claimed asylum, they may be unable, without a positive "reasonable grounds" decision to secure housing and support. They may be at

immediate risk of harm, or unable to secure the basic necessities of life. There is no legal aid to assist them in this ..

Employment appeals

The amendment does not cover appeals before the employment tribunals (save for (save for before the Employment Appeal Tribunal in relation to contravention of the Equality Act 2010, though does permit legal aid for appeals against the decision of an employment tribunal judge to the Employment Appeal Tribunal.

...

Without legal aid for initial advice and representation for immigration matters more generally it is likely that very many trafficked people will not be identified at all. Very often it is only once a lawyer has taken instructions that the facts that point to a person's having been trafficked become known. They may come out in an interview with the UK Border Agency, but it is more difficult for the Agency official to win the trust of a person whose case they will be deciding than it is for a lawyer to win the trust of a person whom they will be representing.

Advice to UK Border Agency staff who suspect that a child has been trafficked is to refer to social services but not to interview at that stage. This agreed good practice may result in children being among those not eligible for legal aid.

If a person is not identified, they will suffer and the State will not benefit from the assistance they could have provided to detect and prosecute traffickers. The removal of legal aid from immigration cases comes at great human cost, and is a false economy.

¹ *Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*, anti-Trafficking Monitoring Group June 2010

² Freedom of Information request 20100024 by Kalayaan, inquiring about the number of decisions pending at reasonable and conclusive grounds decision stage cited in *Wrong Kind of Victim*.

Doc 4: Protection of Freedoms Bill: House of Lords Report Stage Legal Guardians For Trafficked Children Briefing From The Immigration Law Practitioners' Association For The Amendment, New Clause After Clause 110, In The Names Of Professor The Lord Mccoll, Baroness Butler-Sloss And Baroness Royall, 3 February 2012 (extracts)

ILPA ...participated in the first year of the Anti-Trafficking Monitoring Group. ILPA has long been concerned that the UK is failing to meet its international obligations in respect of guardians for separated children, including children who have been trafficked.

It is often suggested, wrongly, that legal representatives can play the role of guardians.¹ This is incorrect. A legal representative acts on his/her client's instructions. A legal representative must always endeavour to act in his/her client's best interests, but this does not override the duty to act on instructions. As long as best interests and instructions march hand in hand (and the lawyer can be confident that this is the case) all is well. But what happens when they do not? The problem is raised in all its acuity in the case of children who may have been trafficked.

A real example may assist in illustrating the point. The client, a child of eight. The UK Border Agency case, that the child is trafficked by X. The child's instructions, that X is uncle and carer. Who is to instruct the lawyers? The child, who is only eight years old and may be acting under duress? The uncle/trafficker?

Legal representatives must be careful to ensure that the child understands the issues in the case and gives instructions freely. A child must be made aware of the circumstances in which a solicitor can breach the duty of confidentiality on child protection grounds.

A legal representative is not free to act on their own appreciation of the child's best interests (which may in any event be erroneous), irrespective of the particular instructions the child has given.

It is currently the case that the Official Solicitor does not become involved until a case reaches the higher courts, presenting enormous challenges for legal representatives, and enormous risks for children, while the case is before the UK Border Agency and, if refused, the Tribunals. The taking of infinite pains by the legal representative will not necessarily solve this problem.

Under Article 10 of the Council of Europe Convention on Action Against Trafficking in Human Beings,² when a child who is separated has been trafficked, States are obliged to appoint a legal guardian who will act in the best interests of that child, take steps to ascertain his/her identity and nationality, and locate his or her family.

As to separated children subject to immigration control more generally, both the UN Committee on the Rights of the Child and UNHCR recommend that a guardian or adviser should be appointed as soon as a separated child is identified. The guardian or adviser should have the expertise necessary to ensure that the rights and best interests of the child are protected, and that the child's legal, social, medical and psychological needs are appropriately met until a durable solution for the child has been identified and implemented.

The UN Committee on the Rights of the Child and UNHCR recommend that the guardian or adviser should be maintained until the child has either reached the age of majority or has permanently left the UK. The guardian or adviser should be consulted and informed regarding all actions taken in relation to the child. The guardian or adviser should be expected to work in close co-operation with the case owner, care workers, social workers, legal representative and immigration officials.

ILPA wrote to the Minister for Immigration and the Minister for Children and Families on 7 December 2010 following correspondence with the UK Border Agency on the subject of guardianship. The Agency had written to us on 23 August 2010, in the context of a consultation, stating:

Guardianship

Some respondents argued that a guardian should be appointed for each unaccompanied child. As many of you know this is a proposal that the Agency has been asked to consider on several occasions in recent years. The UNHCR made a recommendation for such a system in the "Quality Initiative Project" it published in April 2009

Our position remains that we are not clear what the roles and responsibilities of the proposed guardian are intended to be. There are already many professionals involved with this group of children – for example the social worker, independent reviewing officer, personal advisor and immigration legal representative. The Refugee Council Children's Panel also provides an advice service funded by UKBA. It is not clear how a system of guardianship will fit within the current systems and not duplicate functions already carried out by others.

We have, however, offered (in July 2009) to consider a detailed proposal. ... We will of course consider any detailed proposal that is submitted. We will also carefully consider the results of the small project being conducted by the Scottish Refugee Council to provide an independent guardian in order to support unaccompanied children through the immigration, social, legal and welfare system and promote interagency working.

We reiterate, yet again, that the Refugee Council's Panel of Advisors of Unaccompanied Children do not have the powers or the resources to play this particular role and this is not the role they are set up and trained to play. Similarly with social services staff. They cannot, are under Children Act provisions, be appointed to act as guardians *ad litem*. As explained below, local authorities do not have formal parental responsibility where care and support is provided under sections 17 and 20 of Children Act 1989, without more. In addition, because of conflicts of interest arising from the financial and decision-making relationships social services have with the UK Border Agency, where support is provided whilst the child remains in the UK, they do not have the necessary independence. It is of course the case that Local Authorities caring for children do not play the role of the child's guardian in the family courts or any other proceedings. The Scottish Guardianship Service currently being piloted³ does not address our concern regarding the role of legal representatives. It does not empower the guardian to give instructions to the child's legal representative, as opposed to advising the child on the instructions that he or she can or ought to give.

A child from overseas, alone in the UK, will most likely be accommodated by the local authority under section 20 of the Children Act 1989. But in ILPA's experience such children are rarely taken into care by the local authority. Assuming that, as is usually the case, the child has no contact with his/her parents, if any, then there is no one whatsoever in the UK with parental responsibility for that child. We suggest that it would be unthinkable other than for migrant children that there be a separated child, let alone one at risk and facing complex legal proceedings, for whom no known person has parental responsibility. Why then is it considered acceptable for children under immigration control?

Many children who have been trafficked make a claim for recognition as a refugee, or that return would breach their human rights. Obligations under the EU Directives pertaining to persons who have sought international protection are thus relevant.

The EU Reception Directive by which the UK is bound⁴ provides

"Article 19

Unaccompanied minors

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

The EU Qualification Directive by which the UK is bound⁵ states that:

"Article 17

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:

- (a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (1);*
- (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.*

2. Member States may refrain from appointing a representative where the unaccompanied minor:
(a) will in all likelihood reach the age of maturity before a decision at first instance is taken; or
(b) can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law to fulfil the tasks assigned above to the representative; or
(c) is married or has been married.
...[the article continues]”

Would a separated child's being required to bring a case unaided in this manner be tolerated in any other jurisdiction? The proposal that underlies the amendment, that separated children should have the protection and assistance of a guardian, is long overdue.

1 See e.g. Hansard, Lords Report, 17 March Col 38, per the Lord Adonis.

2 CETS No. 197, opened for signature 16 May 2005, into force 1 February 2008.

3 See <http://www.aberlour.org.uk/scottishguardianshipservice.aspx>

4 2003/9/EC

Doc 5: ILPA response to the Home Office *Employment-related settlement, Tier 5 and overseas domestic workers: a consultation, 5 February 2011*

QUESTION 26 – Should the route for domestic workers in private households be closed?

No.

...

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. In the UK at the moment there is a measure of protection that gives workers an escape route. The UK should be promoting the application of such protections around the world, not restricting them in the UK.

Domestic workers are advocating that the route be kept open, with protections.

Their remittances may support families at home who would otherwise lack for any support. The alternatives open to them may be much worse than the jobs that bring them to the UK. The UK should be proud of a response to domestic workers that tries to take account of global realities.

...

Successive reports of the International Development and Treasury Select Committees have highlighted the importance of remittances in addressing global poverty.³⁷ The Secretary of State for International Development has recognised the link between remittances and economic growth in developing countries.³⁸ The World Bank has this year highlighted that ‘persistently high unemployment rates and tightening of migration controls in Western Europe are adversely affecting remittance flows.’³⁹

These general observations should be considered against more specific and detailed consideration given by the World Bank in its 2006 report *Global Economic Prospects: Economic Implications of Remittances and Migration*. ...

The domestic worker who puts up with abuse and exploitation retains his/her job, and with it attendant immigration and other benefits. The domestic worker who turns to the National Referral Mechanism has a chance of being granted a year's 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. There is unlikely to be a route back to the employment. It is the case that many workers are deterred from engaging with the National Referral Mechanism for this reason. Kalayaan's submission to this consultation stated:

Kalayaan identified 157 domestic workers as trafficked under Operation tolerance (May-Sept 2008) and under the NRM (April 2009 - Dec 2010), 102 of these individuals choose not to be referred to the NRM. 68 of those individuals did not need accommodation and support as they found new work. An additional 10 domestic workers who were referred into the NRM chose not to take up accommodation and support as they wanted to work. Therefore without the domestic worker visa an additional 78 would have needed housing.⁴⁶

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 labor and trafficking of such workers ...⁴⁷

By keeping the possibility of changing employer, the worker has a potential route out of abuse and exploitation, while still having a job, and retaining a legal immigration status. In these circumstances, 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. Domestic workers, however abused, however exploited, have choices to make and improving the range of choices is more likely to provide protection than relying on them to choose to enter the National Referral Mechanism.

Domestic workers do not have an unrestricted right to change employment; they can only find other work as domestic workers in private households, a very serious restriction and one that ILPA considers should be lifted.

The risks that migrant domestic workers, including trafficked persons, will suffer abuse will be exacerbated if, as is currently proposed in the Legal Aid, Sentencing and Punishment of Offenders Bill before parliament, they have no access to legal aid for their immigration cases. Many migrant domestic workers are not well-paid and are not in a position to pay for legal advice and representation. Many are isolated with little knowledge of their rights and entitlements; they need assistance in having these explained to them and, given the prohibition on giving immigration advice unless a solicitor, barrister, member of the Institute of Legal Executives or regulated by the Office of the Immigration Services Commissioner, set out in the Immigration and Asylum Act 1999, they cannot get this advice from other, more general sources of help. A trafficked person may claim asylum if they fear persecution or a violation of their human rights on return to their country but not all domestic workers will have such fears and in any event many will want advice and/or representation in the matter of changing employer, or applying for settlement.

...

The 2011 US State Department international survey report⁴⁸ on trafficking, while recognising that 'the UK government generally complies with the minimum standards for the elimination of trafficking' and keeping the UK in its Tier 1 category, also stated:

Some domestic workers reportedly are subjected to forced labor by diplomats in the UK; there are concerns that these diplomatic employers are often immune from prosecution.

While prosecution of diplomats remains difficult, it would be wrong to reduce the protection and recourse for servants in diplomatic households further.

...

QUESTION 30 – Should an avenue to settlement be removed from overseas domestic workers (private servants in diplomatic households and domestic workers in private households)?

... the retention of the possibility of applying for settlement for these workers has been as a protection against 'their potential mistreatment and abuse' (paragraph 7.13). The consultation document does not seek to contradict that the possibility of settlement applications provides some real and effective protection, and expressly acknowledges the particular risk of exploitation faced by these workers.

³⁷ See e.g. 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); International Development Committee, Third Report of Session 2009-10 (DfID's Programme in Bangladesh), HC 95, paragraphs 1 & 41; International Development Committee, Fourth Report of Session 2009-10 (DfID's Performance in 2008-09), HC 48, paragraph 130; International Development Committee, Sixth Report of Session 2009-10 (DfID's Programme in Nepal), HC 168, paragraph 67 and International Development Committee, Eighth Report of Session 2009-10 (DfID's Assistance to Zimbabwe), HC 252, paragraph 9.

..

⁴⁶ Kalayaan submission, 4 August 2011, at www.kalayaan.org.uk

⁴⁷ The trade in human beings: human trafficking in the UK, 6th report, session 2008-9, May 2009, HC 26-i, paragraph 59

Doc 6: ILPA and Anti-Trafficking Legal Project Response to Crown Prosecution Service consultation (Prosecuting and Trafficking), October 2010 (extract)

...We should encourage the interests of the victims to be considered when making use of orders to deprive the traffickers of their profits: 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 can be made so that the compensation is paid out of the confiscated assets.

Doc 7: ILPA to Home Affairs Committee Inquiry into Human Trafficking (2nd), endorsed by the Anti-Trafficking Legal Project, March 2009

B.ii *The Definition of Trafficking in UK law under scrutiny*

...

6. At Report stage in the House of Lords on the Asylum and Immigration (Treatment of Claimants, etc.) Act the Baroness of Anelay of St. Johns, the Conservative Party's front bench spokeswoman, raised the risk of a lacuna and was supported by many other peers. She said:

*'I have tabled this probing amendment in response to a concern raised by the Refugee Children's Consortium in its Second Reading briefing ... The Government's new paragraph 4(4)(d), which has not yet been debated, improves the clause, which still appears to allow some people who traffic children and families to escape prosecution. I am sure that no one would wish that. It is contrary to the consortium's wishes, certainly to my wishes, and—the consortium believes—the wishes of the Government.... The references to "request or inducement" in subsection (4)(d), and the attempt to produce an exhaustive list of positions of vulnerability, still appear to the consortium not to cover all forms of exploitation that involve an abuse of power or of a position of vulnerability. That is the wording adopted in the United Nations Palermo Protocol on trafficking.'*⁶

7. The Baroness Scotland of Asthal, responding for the government, stated:

*'...I say to the noble Baroness, I hope by way of reassurance, that we think that mischief is caught by subsection (4)(d). In saying that, let me make it clear that the Government are absolutely committed to tackling human trafficking in all its forms. The noble Baroness is absolutely right to say that we are at one in that purpose... This is the sort of scenario at which the amendment is aimed, and we agree that the offences should cover this situation. However, we do not consider that an amendment is necessary to achieve this. Let me make it clear that a child will not have to know that they are being requested or induced to do something for an offence to be committed.... We think that there is not, therefore, a lacuna, which needs to be addressed or filled by this amendment.... We believe that these activities would and should be caught. I am very conscious of the Pepper v Hart basis on which I say that... If we thought there was a lacuna, we would want it plugged. The draftsmen and others believe that the mischief which noble Lords have highlighted is covered.'*⁷

8. Fulsome as the reassurance was, it did not satisfy those concerned, and the Baroness Anelay, with the same chorus of support, returned to the matter at Third Reading in the Lords. She said:

*The concern can be simply stated. Is Clause 4 sufficiently broad to cover all cases involving children? ... Does it cover situations where the child may not be conscious of what is happening to them? ... I have always accepted that the Government do not intend that there should be any lacuna. We have been working as one on this matter. However, it appeared that the gap was as follows. Children may not be subject to treatment amounting to slavery or forced labour. They could therefore not satisfy the definition of exploitation in Clause 4(4)(a). Children may not be trafficked for their organs; thus they may not satisfy the definition in subsection 4(b). As for subsection 4(c), the threat of violence may not be made to the child: the parent may be told that the child will be harmed. The parent may be asked to agree that the child become involved in an activity, and no one may ask the child anything at all. Thus it would appear that those who traffick in children may escape prosecution under this scheme.... Following our debates on Report on 18 May, I understand that the Government have had further discussions behind the scenes with the Refugee Children's Consortium. I understand that the Minister may now be in a position to put on record the Government's further statement on their understanding of the term "inducement" in the context of this clause. If the Minister is able to do so and can demonstrate that the clause makes it clear that children do not need to be conscious of what is happening to them, then I anticipate that I shall most certainly, and with great pleasure, be able to withdraw this amendment.'*⁸

9. The Lord Rooker responded for the government:

*'We are satisfied that the ordinary meaning of the word "inducement" is such that a person may be induced to do something notwithstanding his not being fully aware of what he is being induced to do. We therefore consider that subsection (4)(d) as drafted can apply in cases involving very young children, who may not be fully aware of the situation, of their actions, and of what it is they are being encouraged to do. ... We are satisfied that the ordinary meaning of the word "inducement" is such that a person may be induced to do something, notwithstanding the fact that that person is not fully aware of what it is he is being induced to do.'*⁹

10. The Peace Sandberg case demonstrates that the Baroness Scotland and the Lord Rooker were wrong and the Refugee Children's Consortium was right. On 16 May 2008 Peace Sandberg was jailed for 26 months at Isleworth Crown Court after being found guilty of facilitating illegal entry into the UK. The illegal entry in question was that of a baby believed to have been purchased in Nigeria, allegedly so that Ms Sandberg could claim to qualify for priority housing in the UK. Ms Sandberg was not prosecuted for trafficking because, it was concluded, that the section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was inadequate to capture the trafficking of babies and very small children, e.g. for benefit fraud. The CPS achieved a conviction but had to do so with one hand tied behind their backs. The government's intention is clear, but amendment to the primary legislation is required to address it.
11. ILPA brought the matter to the attention of the Bill team working on the Draft (partial) Immigration and Citizenship Bill in July 2008. ILPA urged that the lacuna be addressed in the Bill. That Bill has now been superseded by the Borders, Immigration and Citizenship Bill. There are now two bills: the Policing and Crime Bill and the Borders, Citizenship and Immigration Bill in which the matter could be addressed. This does seem to be more than ample an opportunity to correct these errors in this parliamentary session and the matter has been raised in debates on both bills¹⁰.
12. It was also suggested at the February 2009 workshop hosted by the OSCE and the TUC which brought together, *inter alia*, representatives of the UK Human Trafficking Centre, the UK Border Agency, the Home Office, the Crown Prosecution Service that the definition of trafficking creates difficulties for bringing a prosecution in practice in that the way the elements of the offence have been broken up in subsections 4(1) to (3) of Asylum and Immigration (Treatment of Claimants etc.) Act makes it necessary to prove the requisite intention at the requisite stage of the trafficking process (e.g. necessary to prove the intention of the trafficker at the time when the trafficker brought the person to the UK).
...
14. The term 'competent authority' is widely used in international law and indeed in other parts of UK law to describe the State – and make reference to the arm of State with responsibility for a particular area. 'Competent' is a reference to powers, rather than skills. Thus the Council of Europe Convention envisages that all organs of the State will incorporate protection of those who have been trafficked into their duties and responsibilities. The OSCE concept of a 'National Referral Mechanism'¹¹ is about co-ordinating those various efforts. But what this concept has become in the UK plans for implementation of the Convention is the notion of a centralised decision-making body who will sort those whom there are reasonable grounds to believe have been trafficked from those whom there are not, for all purposes.
15. The difficulties this creates are very clearly illustrated by the case of children. Trafficking of children is one form of abuse of children. Child protection teams should be skilled to identify and respond to cases of trafficking – this is a specialist area but sits firmly within the

framework of their responsibilities toward children at risk of harm. Under UK child protection law these teams have responsibilities to identify and to protect children at risk of trafficking. But under the proposed model for implementation of the Convention these teams will be obliged to refer the case to the UK Border Agency or the UK Human Trafficking Centre to determine whether there are reasonable grounds for believing the child to have been trafficked. Those with most information about the case, and most expertise in general child protection, will be referring the case to those with less. Whatever the decision of those UK Border Agency or the UK Human Trafficking Centre, the child protection teams will, under UK law, retain all their own responsibilities toward these children. If they think the child has been trafficked, they must act accordingly – a negative decision from the UK Border Agency or the UK Human Trafficking Centre cannot release them from their obligations under UK child protection law. So what purpose is the second decision serving at all?

16. The case of children is stark, but the same comment can be made for the whole concept of a central 'competent authority'. The police are not going to cease their efforts to prosecute a trafficker just because the 'competent authority' says that the person has been trafficked – or vice versa.
17. Having a central decision that will have implications for a person's support and for other aspects of their subsequent treatment, including immigration decisions on residence permits, raises questions of procedural fairness. We have repeatedly raised questions of procedural and substantive fairness in the procedures for determining whether or not a person has been trafficked. What assistance will a person get to make their case? What opportunity will they have to be heard? What opportunity will they have to challenge the decisions of the 'competent authority'? What records will be kept of the decision, and how will these be made available for use in subsequent criminal proceedings or, where relevant, the immigration decision?
...
20. What we have seen of the proposals for referrals to the 'competent authority' has shown little awareness of questions of consent, including informed consent, or of confidentiality. Nor has it shown awareness of the extent to which referring NGOs could find themselves giving immigration advice, a criminal offence under the Immigration and Asylum Act 1999 unless the NGO is regulated by the Office of the Immigration Services Commissioner. ...
...

C.iv People who have been trafficked – interface between the immigration and criminal justice systems

- ...
35. People who have been trafficked continue to be prosecuted for immigration (for example, document) offences. In *R v O* [2008] EWCA Crim 2835, O who had been trafficked into the UK for the purposes of sexual exploitation and escaped from the trafficker, had obtained a Spanish ID card and was apprehended at Dover fleeing to France. Although age was disputed she was charged and prosecuted as an adult (there being no finding as to her true age). She was advised to plead guilty to an offence of possessing an identity document which related to someone else with intent to use it to establish facts about herself, contrary to section 25(1)(c) of the Identity Cards Act 2006. Notwithstanding detailed information about her experience of trafficking being available pre-trial and the possibility of a defence of duress under the two Crown Prosecution Service trafficking-related Protocols, she was sentenced to eight months imprisonment.

34. An out of time appeal was brought against her conviction and sentence. Laws LJ, giving lead judgment in the Court of Appeal allowed O's appeal against her conviction and sentence. He referred to the disturbing facts of the case and, with a view to providing guidance, expressed the Court's desire that such events as occurred in O's case would not be repeated. The Court of Appeal recognised the clear intention of the UK Government, in signing the Council of Europe Convention on Action against Trafficking in Human Beings, to protect the rights of victims of trafficking in the UK and that these obligations require that both prosecutors and defence lawyers are "to make proper enquiries" in criminal prosecutions involving individuals who may have been trafficked.
35. ILPA continues to see cases of minors exploited e.g. in cannabis factories who have been prosecuted.

C.v Sanctions on workers and employers

36. ILPA has repeatedly raised the question of people who have been trafficked, in particular those trafficked for domestic servitude, in its representations on changes to the managed migration system, the subject of another enquiry by the Home Affairs Committee. These featured in prayers against the Statements of Changes in Immigration Rules HC 321 and HC 1113 in both the House of Commons¹⁷ and the House of Lords¹⁸.

...

40. ILPA was disappointed that in the debate on HC 1113²¹ the latter the Minister of State, Phil Woolas MP, indicated that he did not see the new rules on sponsor licensing as an opportunity to provide protection for workers against exploitation. However, he did indicate that he would give special consideration to the situation of migrant domestic workers, and indeed extended the transitional arrangements for migrant domestic workers in diplomatic households to May 2010.

...

⁶ Hansard HL Report 6 April 2004, col 1642ff

⁷ Hansard HL Report 6 April 2004 col 1645ff

⁸Hansard, HL Report 6 July 2004 cols 669-670

⁹Hansard HL Report 6 July 2004 cols 671ff

¹⁰ See the 2nd reading in the House of Lords on 11 February 2008 and in particular the comment of the Minister, Admiral the Lord West of Spithead, "...During the passage of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* the criminalisation of trafficking for non-sexual exploitation, including of children, was discussed and legislated for. I believe that this is an area where we can have even more focus; it is very important. We have tried very hard, but there are still things that can be done, and that will merit further discussion in Committee.'

Hansard HL Report 11 February 2009 Col 1212

¹¹See <http://www.osce.org/odihr/19054.html>

...

¹⁷ 13 May 2008, see www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080513/debtext/80513-0028.htm#0805147000002

¹⁸ 17 March 2008, see www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80317-0013.htm#0803183000002

...

²¹Fifth Delegated Committee on legislation , 15 January 2009, see

<http://www.publications.parliament.uk/pa/cm200809/cmgeneral/deleg5/090114/90114s01.htm>

Document 8: Trafficking and National Referral Mechanisms: ILPA paper following the UK Border Agency workshop on Monday 12th May, 29 May 2008

1. Introduction

Legal advice and representation are dealt with under Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings... .., which states

‘1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.

2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law. ...’

...We see nothing in the drafts circulated for the meeting on 12 May on rights of representation before the decision-making body proposed, including whether legal aid for representation will be available, nor on how it would be possible to appeal against the decision of the body proposed. Nor..., do we see any information on how to ensure that people have access as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language they can understand.

...How will records of the decision made by the body proposed be made available within the immigration jurisdiction, including to the appellant and representatives?

...

Evidence given before the body may also be relevant to criminal proceedings, whether a prosecution of the alleged trafficker, or of the alleged victim (e.g. document offences). Procedural safeguards and records will be required.

...

2. Competent authorities

... Article 10 imposes obligations on States. ILPA reads ‘competent authorities’ in Article 10, as in a number of other conventions, to be a synonym for the State and so it is used in other UK legal instruments in a range of different legal fields. The examples given in paragraph 129 of the Explanatory Memorandum to the Convention are simply those authorities who may come into contact with those who have been trafficked. For an example of this in the case of children see the Department for Children Schools and Families *Working Together to Safeguard Children guidance Safeguarding Children Who May Have Been Trafficked* December 2007.

Thus ILPA reads the reference to ‘a competent authority’ in Article 14 of the Convention as a reference to ‘the competent authority in question’.

3. Reasonable grounds

The reference to ‘reasonable grounds’ in Article 10 does not in ILPA’s view describe one level of evidence constant over time, but is a reference to how a competent authority should behave on the basis of the information available. What is reasonable after five minutes may be different from what is reasonable after three months; what is reasonable for a person in a place of safety may be different from what is reasonable for a person at risk; what is reasonable for a person whose mental/physical state is good may be different from what is reasonable from one whose physical/mental state gives cause for concern. Whether there are reasonable grounds for thinking that a person has been trafficked is not a hurdle set at a fixed height throughout the process – the person in the relevant competent authority is doing their best with the information they have been able to amass. At the initial stage, it is enough that trafficking cannot be ruled out. At a later stage, more will be required. During that period the State is under an obligation as per Article 10 of the

Convention to protect the person. In many cases, firm identification will only be as a result of disclosure. Thus the obligation must be to create the conditions that best facilitate disclosure.

Document 9: ILPA to Home Affairs Committee Enquiry into trafficking (1st) February 2008

...

1.B Cases of trafficking in the Detained Fast Track

19. The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking⁴ recommend ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

...

24. On 3 October 2007, the Strategic Director for Asylum in the Border and Immigration Agency, Matthew Coats, wrote to Asylum Aid and the Anti-Trafficking Legal Project (ATLeP), who had requested that referrals to the Poppy Project be treated in the same way as referrals to the Medical Foundation for the Care of Victims of Torture, saying

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

...

2.B Employer sanctions

34. The Immigration (Restrictions on Employment) Order 2007 (SI 2007/3290) will come into force on 29 February 2008. This will see the coming into force of the new regime for a combination of prosecutions and civil penalties for employers who employ people who do not have permission to work in the UK for which provision was made in the Immigration, Asylum and Nationality Act 2006. Not everyone trafficked to the UK will not have permission to work, but this will be the case for many. The March 2007 Border and Immigration Agency Enforcement Strategy which includes a statement that the Agency will 'develop regional partnerships with workplace enforcement teams from HM Revenue and Customs (HMRC), Department for Work and Pensions (DWP) and Department of Trade and Industry, to track down and punish unscrupulous bosses who exploit the system;'

35. Paragraph 7.5 of the Strategy says that the Agency will '...create a network of Border and Immigration Agency compliance teams by April 2008, to help licensed employers and academic institutions operating under the Points-Based System comply with the requirements of the new system, whilst also capturing knowledge about abuse in their sector and feeding the information back into the system. An increased number of compliance officers will check on prospective sponsors'...

38. On 20 June 2007 the UK published an Explanatory Memorandum⁹ on the European Commission's 16 May 2007 proposal for a directive¹⁰ on illegal working¹¹. The UK Memorandum evinces little enthusiasm for measures that would enhance the protection of migrant workers. The UK will have the option of opting into the proposed Directive if it becomes law. The proposed

Directive would allow foreign nationals to register complaints and have protection against exploitative working conditions¹². In its Explanatory Memorandum, the UK does not express a view on this proposal beyond references to the Gangmasters Licensing Act 2004 and to 'existing UN and EU Conventions' on trafficking.

39. Article 15 of the proposed Directive would require member States to inspect staff records at a minimum of 10% of companies in the country. Companies would be selected on the basis of a risk assessment. As to the matters on which the risk assessment will be based, breaches of health and safety law, breaches of tax or customs regulations, benefit fraud and general criminality are the examples given in the Home Office's Explanatory Memorandum on the proposal, which observes that the UK has no central department responsible for workplace assessments¹³.

40. The Committee could usefully devote resources in its enquiry to establishing the extent to which employer sanctions in the UK will be set within a wider framework of workplace inspections, with a view to protecting all workers from exploitation and abuse. Such an approach, carried through in careful joint working, could mean that enforcement work around employer sanctions had the potential to provide protection to people who have been trafficked, rather than increasing risk to them through a hasty removal.

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

...

9 Submitted by the Home Office on 20 June 2007.

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

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

12 Article 14.

13 Op Cit. para 37.

Doc 10: ILPA to Joint Committee on Human Rights Enquiry into Human Trafficking 2006

...

Nature

7. ...Members have seen cases involving trafficking for sexual exploitation, and for labour exploitation, including but not limited to domestic slavery. Cases such as the Victoria Climbié case can be viewed as cases of trafficking to obtain a social advantage, such as social security benefits. ...

8. The information gleaned during the police Operation Paladin Child⁶ was useful in moving people away from the stereotype of rich, international networks, who make up a part but by no means the whole of those involved in trafficking. Smaller scale operations: one family exploiting another, a few people exploiting those in a village or series of villages, also need to be taken into account.

...

The extent to which the UK legal framework is adequate to address the problem of human trafficking

10. We do not consider that existing frameworks are adequate. The relevant legal frameworks are:

- those providing specific protection for people who are trafficked;
- those providing protection to migrants, including but not limited to people who are trafficked, i.e. immigration, asylum and nationality law;
- those providing protection for people, including but not limited to migrants, who are vulnerable to particular types of exploitation: commercial sexual exploitation or labour exploitation for example.

11. Laws providing specific protection for those trafficked are needed in addition to general laws. This should be in addition to, not a substitute for, examining laws that apply generally as such laws may affect the efficacy of specific measures to protect victims and survivors of trafficking...

...

24. ... What is missing from specific legislation on trafficking in the UK is protection and redress for those trafficked. The necessity for such protection and redress is highlighted in international instruments on trafficking, including, but not limited to¹², the Palermo Protocol and the Council of Europe Convention on Action Against Trafficking in Human Beings¹³, all making specific reference to human rights. We draw particular attention to the recent International Labour Office (ILO) Guidance for Legislation and Law Enforcement on human trafficking and forced labour exploitation¹⁴ Among the rights engaged are those set out in the Convention on the Elimination of All Forms of Discrimination against women (CEDAW), Part 1, Article 6, the Convention on the Rights of the Child Articles 32, 35, 34 and 39, rights under the International Covenant on Economic, Social and Cultural Rights, and under the Convention for the Elimination of All Forms of Racial Discrimination (CERD).

25. ... The silence of UK law on matters of protection and redress means that it fails adequately to protect people who have been trafficked, in accordance with international human rights as set out in those instruments. It also reduces the likelihood of successful prosecutions thereby contributing to a climate of impunity, despite the criminal law framework, and reducing the likelihood that those trafficked will obtain redress.

26. We highlight the following as areas the UK has failed to address in domestic law. Some of them are discussed further in the context of the discussion of the Council of Europe Convention on Action Against Trafficking in Human Beings, below

....

- A presumption that repatriation should generally be voluntary (see UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (*Palermo Protocol*), Especially Women and Children, and the Council of Europe Convention *op. cit.*).
- Social welfare needs of those who have been trafficked (*Palermo Protocol* esp. Articles 6 & 7, although the provision of social assistance, education and housing is not made obligatory by the Protocol. However, see the Council of Europe Convention, *op. cit.*). To include specialized assistance and support such as appropriate accommodation, information in a language people can understand, medical, psychological and legal assistance and training opportunities.

28. ...*Tackling human trafficking* refers to witness protection having been placed on a statutory footing in the Serious Organised Crime and Policing Act 2005 (into force 1 April 2006). It is vital to draw on these provisions in the case of survivors of trafficking. Where a large network is at work, the conviction of one or a few people may not suffice to make the witness safe. The most appropriate form of witness protection would appear to be the provision of long term or indefinite leave to remain in the destination country.

29. It is misguided to distinguish at the outset of a case between those willing to cooperate in prosecutions and those reluctant to do so, and only to offer to protection conditional on cooperation. Given protection, a person who was initially reluctant to cooperate with a prosecution may over time become willing to do so: all forms of protection for those trafficked, not merely those designed for someone who has indicated a willingness to cooperate in a prosecution, are likely to increase the likelihood of being able to prosecute traffickers.

38. Traffickers control people through, for example:

- Threats of violence to the trafficked person or, not uncommonly, to family members including those overseas.
- Debt bondage
- Restrictions on freedom of movement. These include physical confinement, confiscation of documents, equipping the trafficked person with a mobile phone.
- Instilling a fear of authority – saying national police are in the pay of traffickers, or that if the person goes to the police s/he will be imprisoned/deported
- Isolation
- Emotional attachments
- In certain cases, from certain countries, use of religious and magic ceremonies with
- threats that harm will occur if the person seeks to escape the bond with the traffickers.

39. The situation of people who are trafficked may be characterised by some of the following list, which is not exhaustive:

- Working in an informal, often illicit sector
- Having limited knowledge of their rights and options
- Having limited personal freedom
- Being moved from place to place or traded between establishments
- Having experienced physical, sexual or psychological abuse or threats of abuse against self and your family
- Having no legal rights to stay in the country, no papers and being worried about removal
- Being in debt or under complex obligations to people with power over them
- Being used to discrimination: ethnic, social and on the grounds of gender
- Adopting self-protective mechanisms including under-estimation of risk; demonstrating symptoms of extreme stress, including risky behaviours
- Not being aware of having been trafficked, either because they do not give it that label or because it fits into recognised patterns of discrimination and exploitation that are treated as the norm.

40. UK asylum and immigration laws and practices exacerbate the risks created by all the above both while the person is under control of the trafficker and after they have evaded that control. This law now spans the fields of employment, and of social welfare law, all of which have implications for people who have been trafficked. Removing them from mainstream provision carries with it the risk of removing them from initiatives within the mainstream to protect those particularly vulnerable to exploitation. A (far from exhaustive) list of examples:

- Many migrants have no permission to work, nor access to social welfare systems. Access to health care is also limited for many. Because immigration status affects access, Documentation may be examined and questions asked. This is likely to make traffickers reluctant to allow trafficked people to have contact with those providing social care, and trafficked people reluctant to do so, or to seek help.
- Carrier sanctions privilege the desire to keep people out of the UK over the need to know who is in the country and for what purpose, reducing the chances of identifying survivors of trafficking.

- Accelerated procedures for decision-making decrease the likelihood of trafficked people, with all the pressures upon them, disclosing the truth of their situation. Out of country appeals for those whose case is certified as “clearly unfounded”, and the presumption of certification in cases from countries where trafficking is a recognised problem¹⁷.
- ...
- Increased difficulties in entering the UK and European union legally, and harsh border controls, make organising the evasion of those controls a more complex and profitable business and increase the chance that that illegal trade is operated not merely by smugglers, but traffickers.
- The increasing use of detention increases the pressures on those who have been subject to torture or other cruel inhuman or degrading treatment, or to deprivation of liberty.
- Difficulties in accessing competent, free legal advice because of shortage of supply, including shortage in particular areas, make it less likely that the person will have the opportunity to disclose their situation to a legal representative. Accelerated timescales make it more difficult for legal representatives to build the relationship of trust and confidence. Note that if a legal representative’s instructions from the client are that s/he has not been trafficked, the legal representative cannot, as a matter of professional ethics, make the submission that the client has been trafficked, whatever the evidence suggests.
- The threat of deportation or imprisonment if the person approaches the authorities is not merely a threat voiced by trafficker, it is a real one.
- Age dispute has created considerable problems in the immigration field, particularly in protection cases, where identification as a child is a, highly policed, gateway to superior rights and entitlements. The risks to trafficked people, often travelling on false passports to lessen the risks of identification, are exacerbated where they are not recognised as children.
- Prosecutions under s.2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and the resurgence of prosecutions under forgery and other legislation under that Act increase the risks of people arriving being prosecuted in a system unaware of their rights under the 1951 Refugee Convention and in particular the protection afforded by Article 31 of the Convention and ending up in the criminal justice system without getting specialist advice and help¹⁸.
- The isolation and poverty created by the asylum support system do not create circumstances in which the person will find it easy to make contact with others and situation
- ...
- The hostility toward asylum seekers, and more broadly toward migrants, in the UK also reduces the likelihood of the person making contacts with those to whom they can disclose their situation.
- The failure to use guardians for children seeking protection. A legal representative acts on instructions. Where a client is not able to give instructions because s/he is a child or under a disability the legal representative is placed in an impossible position and the client may not receive the protection s/he needs. The problem is raised in all its acuity in the case of trafficked children, who may be giving instructions on the instructions of their trafficker. We reiterate, yet again, that the Refugee Council’s Panel of Advisors of Unaccompanied Children do not have the powers nor the resources to play this particular role and this is not the role they are set up and trained to play...

Guardians in children’s trafficking cases

The client is a young child who denies having been trafficked and maintains that a wish to leave local authority care to live with “father”. The Immigration Service do not accept the relationship, nor that the document evidencing it is genuine. The client has an appeal against refusal of leave to enter as a returning resident (note that if the Immigration, Asylum and Nationality Bill 2005 becomes law in its

current form this right of appeal will no longer exist). The child maintains that he wants leave to enter to be with his father. The representative has no one else to whom to turn for instructions.

...

44. ... difficulties will not be resolved until the UK takes seriously the protection of the human rights of migrants in general and migrant workers in particular²¹. Take the European example. In summary, British policy since 1999 has been to decline to opt-in to immigration measures that would require the UK to grant a right of admission to certain categories of person. For example the UK has not opted into the EU Council Directive on short term permits (21004/81/EC) which sets out criteria for issuing a residence permit to people who have been trafficked. The UK has declined to opt into other, more general, measures, that could assist survivors of trafficking, the Long Term Residents Directive, which concerns the rights of people who have already been admitted to the European Union, after a not inconsiderable period of residence. The House of Lords European Union Committee Report *Economic Migration to the EU*²² is worthy of special study in this regard.

...

51. Law and practice on deportation creates a risk that people have no opportunity to put their case, as described below, and of violence attendant on removal, (including risks of breaches of Article 3 ECHR 26).

⁴ See pages 8 to 9 of the Consultation paper.

¹² See for example the UN GA Resolution *Trafficking in Women and Girls* 11 October 2002; UN JCHR resolution *Traffic in women and girls* (16 April 22002) Office of the High Commissioner for Human Rights' Recommended Principles and Guidelines on Human Rights and Human Trafficking (September 2002);

¹³ Council of Europe CM(2005)32 Addendum I final (May 2005)

¹⁴ September 2005 (ISBN 92-2-117347-X)

...

¹⁷ See the Nationality, Immigration and Asylum Act s.94(4) and the orders made under it. It is notable that the most recent order, the Asylum (Designated States

....

²¹ See Kaye, M. *The Migration-Trafficking Nexus – combating trafficking through the protection of Migrants' human rights* Anti-Slavery international 2003

...

²⁶ See for example Granville-Chapman, C., Smith, E., Maloney, N. *Medical Foundation for the Care of Victims of Torture*, 2004, especially Part II.

