

ILPA briefing for House of Commons Home Affairs Select Committee inquiry into the “European Migration Crisis”

The Immigration Law Practitioners' Association (ILPA) is 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 in 1984, 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 many Government and other consultative and advisory groups.

ILPA has provided evidence relevant to this enquiry to the House of Lords EU Select Committee on the European Union for its enquiry into the EU Action plan on migrant smuggling and this submission we append hereto as **annex 1** and ask the Committee to take into account. We also draw to your attention the oral evidence provided to that enquiry, in particular by UNHCR¹ and by representatives of Amnesty International and Human Rights Watch².

At the Conservative Party Conference, on 6 October, the Home Secretary made a speech about immigration. ILPA wrote to the Home Secretary to challenge what she had said. We append the text of that letter as **annex 2** and ask that it be taken into account.

In what follows we highlight the main points made and explored more fully in the appendices and also consider the Immigration Bill currently before the House of Commons.

I. This is a refugee crisis

ILPA concurs with the evidence given by Andrej Mahecic of UNHCR³ and by Steve Symonds of Amnesty International and David Mepham of Human Rights Watch⁴ to the House of Lords Select Committee on the European Union that the evidence indicates that those crossing the Mediterranean are for the most part, refugees. They come predominantly from Syria, from Eritrea, from Afghanistan and consideration of figures on rates of recognition as a refugee in the European Union attest to their protection needs. Over half of the total number of persons seeking asylum in the EU came from one of three countries: Syria, Kosovo or Afghanistan. Some 94% of Syrian asylum applications made in the EU were granted in 2014. In the same year 90% of Eritrean applications were successful and 88% of Iraqi applications.⁵

Failure to acknowledge the extent to which the problem is one of forced migration and to treat the movement as a humanitarian crisis and a crisis of protection risks a rich wealth of material,

¹ Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/eu-action-plan-against-migrant-smuggling/oral/18751.html>

² Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/eu-action-plan-against-migrant-smuggling/oral/18753.html>

³ Evidence session No. 1 15 July 2015 10.30am.

⁴ Evidence session No.3 Wednesday 22 July 2014 10.30am.

⁵ Asylum: 1st Quarter 2015: Eurostat news release 112/2015 18 June 2015; 2014 statistics: EUROSTAT news release 53/2015 20 March 2015.

analysis and recommendations being overlooked and responses being, as a consequence, ineffective.

2. Borders must be kept open

ILPA members have been in and are in touch with those working in Greece (Lesvos) and in Hungary. Hungary announced its intention to seal its border with Croatia at midnight on 16 October 2015. It did so and refugees have subsequently been moving through Slovenia, which has said that it will not close its borders as long as those of Austria and Germany remain open.

Reports from Lesvos provided to ILPA by those on the ground include the following:

*“The Turkish coastguard used just to let the boats through, but in the past few months, perhaps as a result of EU pressure, their approach has changed. One of their boats is armed with water cannon, while others just ride round and round the refugee boats seemingly trying to sink them, then, if successful, they “rescue” the refugees and take them back to Turkey. They also use sticks with lumps of metal which they swing around to damage engines and hit people. [***] has seen a baby with an injured face which she was told was as a result of this tactic. She says that the Greek coastguard are different. When they harass the arriving boats it seems to be just for sport. “*

We urge the Committee to endeavour to obtain evidence of the conduct of both coastguards.

The UK will be in a stronger position to call for borders to be kept open if it is seen to be taking a fair and proportionate share of refugees. This is not the current perception of the UK by other States. **Improvements should be made to the following:**

2.1 Family reunion including refugee family reunion

Refugees in the UK and British citizens of Syrian origin should be supported to bring family and friends to the UK where they have a ready-made support network and a real prospect of integrating and in their turn supporting the “most vulnerable” refugees, whom the government intends to resettle, to integrate. In particular,

- legal aid should be made available for refugee family reunion applications;
- those applying for refugee family reunion should be allowed to submit their applications in the countries in which they find themselves and not required to make hazardous journeys to reach designated posts. For example, family members in Turkey should be permitted to make applications in Istanbul, not to have to travel to Amman.
- Refugee relatives of British citizens, whether inside or outside the UK, should not be expected to meet the requirements of the immigration rules as to earnings, etc. Children who are refugees should have the same rights to reunite with their parents as do adult refugees with their minor children. The current UK immigration rules do not give children the same entitlements as adults in this regard. Instead they must rely on discretionary provisions of the rules.
- Refugees should be able to travel freely within the European Union to join family members.

Freedom from Torture (The Medical Foundation for the Care of Victims of Torture) highlighted the importance of family reunion for its patients in its evidence to the Ministry of Justice consultation on the Green paper for the Bill that became the Legal Aid, Sentencing and Punishment of Offenders Act 2014:

“... a 19 year old female client who, in addition to her psychological health problems, has a serious heart condition and residual paralysis following two strokes and who is the sole carer of her elderly mother has become so distraught following an unsuccessful attempt to secure entry clearance for her two sisters (the three sisters are triplets) that she is no longer able to engage in our therapeutic services. Likewise we had to suspend therapy with the children in another family because of acute trauma caused by separation from their mother and younger sibling... enforced separation was highly traumatic and caused the two older children to distance themselves emotionally from their mother. Medical Foundation clinicians took a decision to stop family therapy with the children in order to preserve the defence mechanisms they had erected to cope with this situation. Without legal aid, it is highly unlikely that the father in this case, due to his own traumatisation alone, would have been able to challenge the decision by the UK Border Agency to refuse entry to his wife.”

UNHCR stated⁶:

“Family reunification plays a significant role in meeting the long-term needs of resettled refugees ...The family is often the strongest and most effective emotional, social and economic support network for a refugee making the difficult adjustment to a new culture and social framework.”

The Government said in its response to the consultation:

“Applications to join family members are treated as immigration cases, and are generally straightforward because they follow a grant of asylum. Respondents argued that these cases are akin to claims for asylum but if a person wishes to claim asylum it is open to that person to do so either as a dependant of a primary asylum claimant or to do so in his or her own right. Legal aid for any such asylum claim will be in scope.”

This is incorrect. The family members are outside of the UK and hence cannot claim asylum. It would be unlawful⁷ to assist them to do. To deny family reunion increases the risk that they make hazardous and clandestine journeys to the UK.

The Home Office record in dealing with these applications is especially poor, and belies the suggestion they are straightforward. Management information collected in 2008-2009 indicated that some 61% to 66% of refusals are overturned on appeal.⁸

Refugee family reunion cases frequently take a long time. Often family members must be traced. Communication may then be indirect and very slow. Even when they can be reached, they may

⁶ June 2010 Background Note for the Agenda Item: Family Reunification in the Context of Resettlement And Integration: Protecting the Family: Challenges in Implementing Policy in the Resettlement Context, for the Annual Tripartite Consultations on Resettlement, Geneva, 20-21 June 2001

⁷ Immigration Act 1971, s25A

⁸ Management information collected by the UK Border Agency for 2009 and 2008, and shared with ILPA and others in discussion on refugee family reunion applications and policy. More recent evidence is not to ILPA's knowledge available. For further statistics, see *Hansard*, HC Report, 22 June 2010 cols 143-144W

be in a camp and unable under their own steam to travel to interviews at embassies or consular posts etc. Even submitting the application may be a matter of considerable difficulty.

There is ongoing litigation as to whether refugee family reunion should be regarded as being within the scope of legal aid which is provided for asylum cases, this turns on the meaning of the provisions on legal aid for asylum contained within Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The High Court held that the definition of asylum did include refugee family reunion; the Court of Appeal that it did not.⁹ The cases are currently on appeal to the Supreme Court.

It would be possible to extend legal aid to refugee family reunion cases by making an order under section 9(2)(a) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. **The Committee should recommend, alone, or through work with the Justice Select Committee, that such an order be made.**

As to family migration more generally, the All Party Parliamentary Group on Migration produced a report on the family immigration rules in June 2013.¹⁰ Its recommendations are of general application but are of particular pertinence when it comes to British citizens seeking reunion with family members who wish to come to the UK because of conflict. The recommendations include:

Minimum income requirement

...

2. *The level of the income requirement should be reviewed with a view to minimizing any particular impacts on UK sponsors as a result of their region, gender, age or ethnicity.*

3. *The family migration rules should ensure that children are supported to live with their parents in the UK where their best interests require this. Decision-makers should ensure that duties to consider the best interests of children are fully discharged when deciding non-EEA partner applications. Consideration should be given to enabling decision-makers to grant entry clearance where the best interests of children require it.*

4. *The list of permitted sources of funds should be reviewed to ensure that they fully reflect the resources available to families. In particular:*

- *Prospective non-EEA partner earnings should be considered for inclusion in the rules, for example in circumstances where the non-EEA partner has a firm offer of employment or self-employment in the UK, or where there is reasonable expectation that the non-EEA partner will gain employment or self-employment after entering the UK;*
- *The rules relating to income from cash savings and from self-employment should be reviewed;*
- *Third party support, particularly that provided by a close family member such as a parent, should be considered for inclusion in the rules.*

5. *The current evidential requirements in Appendix FM-SE should be reviewed, in order to ensure that they are clear and easy for applicants to understand.*

Adult dependent relatives

⁹ *Gudanaviciene v Director of Legal Aid Casework* [2014] EWCA Civ 1622.

¹⁰ http://www.appmigration.org.uk/sites/default/files/APPG_family_migration_inquiry_report-Jun-2013.pdf

7. Government should review the rules affecting adult dependents. Consideration should be given to amending the rules to ensure that:

- Where the UK sponsor can demonstrate their ability to provide full financial support to an adult dependent relative in the UK, or where the relative themselves has the means to financially support themselves, they are able to do so;
- An adult dependent relative can be eligible for sponsorship where they are in need of support from the UK sponsor, but before they become fully physically dependent.

The Committee should call for the implementation of these recommendations.

2.2 Resettlement/relocation

UNHCR identifies three durable solutions for refugees: return; local integration and resettlement.

Resettlement is an important tool for protecting those who cannot be given protection in safety and dignity in the country of first asylum and for helping countries of first asylum to cope. There is a wealth of experience in the UK, for example from the resettlement of refugees from Kosovo,¹¹ but also from earlier times, such as the experiences of and lessons learned from, the resettlement of Vietnamese refugees and of Ugandan Asians. The Home Office struggled to manage its Vulnerable Persons Resettlement Scheme which was set up in January 2014 with the aim of resettling around 500 Syrian nationals to the UK by 2017. As of 26 June 2015, only 187 persons had been resettled.

As far as possible resources should be directed at those with the greatest relevant experience. Local authorities, district and town councils have important coordinating role to play in resettlement programmes. They need adequate resources to do this given that cuts to their budgets which make it difficult for them to assume extra work that does not form part of activities planned and budgeted for. **We counsel against an exclusive focus on Syrian refugees for resettlement.** Resettlement places should be provided for those identified by UNHCR as meeting the criteria, rather than on nationality. Syria itself hosted very large numbers of refugees, many of whom have had to flee more than once. There are refugees from countries such as Eritrea who are also not safe in countries of first asylum and need resettlement.

We reject the Home Secretary's suggestion, made in her speech to the Conservative party conference) that for every refugee arriving in the UK under their own steam, one less person will be resettled. The UK's obligations under the 1951 United Nations Convention Relating to the Status of Refugees are to give international protection to refugees as defined within the Convention, howsoever they arrive.

As well as resettling refugees from outside the European Union, **the UK should be supporting countries at the borders of the European Union to keep borders open by taking refugees from those countries.** The 1951 UN Convention Relating to the Status of Refugees contains some 34 substantive articles,¹² of which the majority are about the rights and

¹¹ See HL Deb 31 March 1999 vol 599 cc459-68.

¹² Articles 1 to 34.

entitlements of refugees. These rights and entitlements are not respected and protected in overburdened or unsafe¹³ States.

The Dublin system which obliges refugees to claim asylum in the first European country they reach should be suspended as it has the effect of pushing refugees back to situations where they cannot live in safety and dignity,¹⁴ in countries already taking a disproportionate share of refugees who reach Europe. The recent study for the LIBE Committee of the European Parliament *Enhancing the Common European Asylum System: Alternatives to Dublin*,¹⁵ concluded that the Dublin regulation

... does not work effectively from the viewpoint of Member States or asylum-seekers. ... as long as it is based on the use of coercion against asylum seekers, it cannot serve as an effective tool to address existing imbalances in the allocation of responsibilities among Member States. The EU is faced with two substantial challenges: first, how to prevent unsafe journeys and risks to the lives of people seeking international protection in the EU; and secondly, how to organise the distribution of related responsibilities and costs among the Member States.

It is estimated that only about 3% of asylum seekers are ever actually subject to a successful Dublin transfer¹⁶ yet most have their claims determined in a country other than that in which they entered the EU.

2.3 Humanitarian Visas

There have for many years been calls for humanitarian visas to enable persons to travel to the UK to seek asylum.¹⁷

There is a clear risk of breaches of human rights if persons are left in places where their life and freedom is threatened and in circumstances where they face persecution on the territory or return from the territory to a place where they face persecution and *refoulement* contrary to Article 33 of the UN Refugee Convention, which provides

1. *No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the*

¹³ See the comments of Mr Symonds and Mr Medham on Libya.

¹⁴ See *M.S.S. v Belgium and Greece* (Application no. 30696/09), European Court of Human Rights and *NS v UK* (C-411/10), Court of Justice of the European Union.

¹⁵ PE 519.234. Authors Professor Elspeth Guild; Dr. Cathryn Costello; Ms. Madeline Garlick, and Dr. Violeta Moreno-Lax. Professor Elspeth Guild is co-convenor of ILPA’s European subcommittee.

¹⁶ European Asylum Support Office, Annual Report on the Situation of Asylum in the European Union 2013, July 2014, section 2.6, p 30, <https://easo.europa.eu/wp-content/uploads/EASO-AR-final1.pdf>, accessed 4 July 2015.

¹⁷ See e.g. HL Deb 31 March 1999 vol 599 cc466 per Baroness Park of Monmouth; HL Deb 2 Mar 2009 : Col 600 per Lord Avebury HL Deb 16 Sep 2015 : Col 1943 per Lord Hylton.

country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Similarly if Immigration Liaison Officers act to prevent persons from embarking from places where their life is in danger.

Extra-territorial operations, for example on Libyan territory. would be, unless the free consent of the Libyan authorities to them were secured, which appears unlikely, acts of aggression and unlawful under the Charter of the United Nations unless a specific UN mandate were obtained, which also appears unlikely.

3. Treat refugees with dignity and respect

Those who arrive under their own steam in the UK should be treated with dignity and respect and their claims for international protection determined in fair and effective procedures. We recall for the current suspension of the detained fast-track procedure, following the decision of the Court of Appeal in *Detention Action v Lord Chancellor* [2015] EWCA that the rules which govern fast track appeals are “systemically unfair and unjust” , to be made permanent.

Punitively low levels of asylum support, currently set at £36.95 for each individual, man woman or child, make it difficult for those who have suffered so much to manage, let alone start to find safety and security and begin rehabilitation. Levels of asylum support should be raised and thenceforth uprated in line with benefits uprating.

4. Immigration Bill

Part 6 of the Bill, *Border Security and Schedule 8, Maritime Enforcement* extends the powers of immigration officers onto the sea. This is of concern in the context of misuse of powers by Immigration Officers, but it is of very particular concern in the context of understanding what would happen to persons seeking asylum. The powers will allow immigration officers and their “assistants” to stop, board, divert and detain ships. They have powers of search, arrest without warrant and seizure. They can prevent persons from landing. Officers and “assistants” are absolved of civil and criminal liability for any of their actions provided they acted in good faith with reasonable grounds. It is an offence to obstruct them.

What if persons, whether in territorial waters or on the high seas, approach an immigration officer who has boarded a ship and claim asylum? If a distinction is made between high seas and territorial waters (broken down into English and Welsh, Scots and Northern Ireland waters), is it the case that hot pursuit cannot start if the ship is on the high seas as opposed to in territorial waters.

In *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), a case concerning “pushbacks” of refugees in the Mediterranean to Libya, the European Court of Human Rights found Italy to owe all obligations under the European Convention on Human Rights to those in need of international protection that it had taken onto on a ship flying its flag and under control of its personnel. But in these cases immigration officers will be boarding ships that fly other flags. They have powers to control the ship; although there is a defence to the offence of obstructing an officer of having reasonable excuse not to do so which may give a Master back some control.

The reports of the Children's Commissioner for England and Wales *Landing in Kent* and *Landing in Dover* brought to light the 20 April 1995 "gentleman's agreement"¹⁸ between The UK, Belgium and France allowing for the summary return of those refused entry within 24 hours. Although it was said not to apply to asylum cases after 1 September 1997, it was found to have been applied after that date to unaccompanied children and there was concern that they might not have had an opportunity to articulate a claim for asylum. The same concern applies here, in cases of those with a claim for asylum or victims of forced labour or trafficking.

The misuse of powers by immigration officers is a matter of concern. In October 2014, in *R v Ntege et ors*,¹⁹ a prosecution of persons accused of arranging sham marriages, His Honour Judge Madge stayed the prosecution because of both bad faith and serious misconduct on the part of the prosecution. He held "I am satisfied that officers at the heart of this prosecution have deliberately concealed important evidence and lied on oath." It is against this background that the proposals should be evaluated.

Immigration officers are not part of the regular police force yet they, and in many cases persons acting under their supervision, have powers as extensive as those of the police. These powers have been built up over successive pieces of immigration legislation. Seeming limitations on powers are illusory. The Home Office has repeatedly been found to have violated Article 3 of the European Convention on Human Rights²⁰ for its treatment of mentally ill detainees, with other cases pending or settled. The case for the powers in the Bill has not been made out.

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¹⁸ Available at <https://www.gov.uk/government/publications/gentleman-s-agreement>

¹⁹ See www.ilpa.org.uk/resources.php/30347/r-v-ntege-and-others-on-abuse-of-process-by-immigration-officers-21-october-2014

²⁰ *R(S) v Secretary of State for the Home Department* [2011] EWHC 2120; *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748; *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501; *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979; *R (S) v Secretary of State for the Home Department* [2014] EWHC 50