

**ILPA Briefing for House of Commons debates Monday 14 December on****RELOCATION OF MIGRANTS IN NEED OF INTERNATIONAL PROTECTION (OPT-IN DECISION) James Brokenshire:**

That this House takes note of European Union Documents [No. 9355/15](#) and Addendum and [No. 11132/15](#), international protection for the benefit of Italy and Greece, [No. 11843/15](#) and Addendum, establishing a crisis relocation mechanism, and [No. 11844/15](#) and Addendum, international protection for the benefit of Italy, Greece and Hungary; and agrees with the Government's decision not to opt in to proposals establishing provisional measures for the relocation of individuals in need of international protection or to the proposal establishing a crisis relocation mechanism.<sup>1</sup>

and

**EUROPEAN AGENDA ON MIGRATION James Brokenshire**

That this House takes note of European Union Documents [No. 8961/15](#), a European Agenda on Migration, [No. 9345/15](#), EU Action Plan against migrant smuggling, unnumbered Document, a Council Decision on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR Med), unnumbered Document, a Council Decision to launch EUNAVFOR Med, and a Draft Action Plan on Stepping up EU-Turkey cooperation on support of refugees and migration management in view of the situation in Syria and Iraq; and supports the Government's aim of working with the EU and Member States and other international partners to develop a coherent and sustainable approach to addressing current migratory pressures, focused on shorter and longer term actions to break the business model of people smugglers and traffickers, to break the link between rescue at sea and permanent settlement in the EU, and address the root causes of migrants' journeys.

***Amendment (a) Mr Douglas Carswell***

Line 7, leave out from 'and' to end and add 'considers that the proposal for a permanent common EU system for relocation would place undue pressures on EU countries, particularly as no system is in place to prevent a further relocation of those migrants upon arrival in the EU; is concerned that the European Union Document [No. 8961/15](#), a European Agenda on Migration, makes no mention of Saudi Arabia's promotion of Wahhabism, which has directly facilitated the rise of ISIL, by encouraging the extremist ideology that has led to mass displacement of people in Syria; and further notes the lack of engagement by majority Sunni and Gulf states in assisting with the resettlement of those affected by conflict in Syria, and calls on the Government to address this.'<sup>2</sup>

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<sup>1</sup> Relevant Documents:

[2nd Report of Session 2015-16, HC 342-ii, Chapter 3](#)  
[3rd Report of Session 2015-16, HC 342-iii, Chapter 8](#)  
[5th Report of Session 2015-16, HC 342-v, Chapters 1, 2, and 3](#)  
[9th Report of Session 2015-16, HC 342-ix, Chapter 3](#)

<sup>2</sup> Relevant Documents:

[2nd Report of Session 2015-16, HC 342-ii, Chapters 1 and 2](#)  
[6th Report of Session 2015-16, HC 342-vi, Chapter 1](#)  
[7th Report of Session 2015-16, HC 342-vii, Chapters 1 and 4](#)  
[9th Report of Session 2015-16, HC 342-ix, Chapter 1](#)

## INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

Those debating these motions will wish to consider the reports of the **House of Lords Select Committee on the European Union on The United Kingdom opt-in to the proposed Council Decision on the relocation of migrants within the EU<sup>3</sup>** and on the **EU Action Plan on Migrant Smuggling<sup>4</sup>**, one of the documents under consideration in the second debate. **ILPA's response** to that enquiry is **appended hereto**. We also **append hereto ILPA's response** to the Home Affairs Committee's on going enquiry into the "European Migration crisis."

There are two debates, but considerable overlap between them.

## RELOCATION OF MIGRANTS IN NEED OF INTERNATIONAL PROTECTION

Four documents are considered in this, the first, debate. Three<sup>5</sup> establish a relocation mechanism that would allow the transfer of up to 160,000 persons away from Greece and Italy. Hungary has benefited instead from grants under the Asylum Migration and Integration Fund and the Internal Security Fund to increase its reception capacity.<sup>6</sup> The fourth<sup>7</sup> amends the Dublin Regulation, to which the UK has opted in, to make provision for a relocation mechanism to be triggered in situations of crisis.

The twenty-second report of the House of Lords EU Select Committee<sup>8</sup> on the relocation proposals provides a comprehensive summary of the negotiations and of the position.

The House of Lords Select Committee on the European Union, in its twenty-second report, spoke of "... the urgency of adopting measures to alleviate the human suffering arising from the crisis."<sup>9</sup> That was in July, when it was warm in the Mediterranean. The Committee summarises the Government's opposition to the programme:

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<sup>3</sup> HL Paper 22, 2<sup>nd</sup> Report of Session 2015-2016, 14 July 2015.

<sup>4</sup> HL Paper 46, 4<sup>th</sup> Report of Session 2015-2016, 27 October 2015

<http://www.publications.parliament.uk/pa/ld201516/ldselect/lddeucom/46/46.pdf>

<sup>5</sup> 9355/15, 11132/15, 11843/15.

<sup>6</sup> European Commission Press Release Q and A on emergency relocation Of 22 September 2015.

[http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm)

<sup>7</sup> 11843/15

<sup>8</sup> *Op.cit.*

<sup>9</sup> *Op.cit.* para 27.

- First, it believes that “The relocation proposal is unlikely to prove effective in stopping dangerous journeys across the Mediterranean and could even act as a pull factor and encourage further illegal migration to the EU.”
- Secondly, it notes that the proposal contravenes “the position agreed by the April EU Council which clearly stated that any relocation mechanism should be voluntary.”
- Finally, it opposes the introduction of mandatory relocation and resettlement quotas on principle, as this “fundamentally changes the EU approach to asylum” by reducing national control over immigration.

Given that other member States have now reached agreement, the second proposition is now of less moment.

The House of Lords Select Committee described itself as “not convinced” by the Government’s reasoning<sup>10</sup>. It stated

*The proposal therefore has a limited, specific objective, to relieve a current humanitarian crisis. It has no direct bearing on wider objectives such as stopping migration across the Mediterranean, or reducing the flow of migrants from countries of origin.*

*31. ... we heard arguments that the Government’s concern that the proposal could act as a “pull factor”, which would encourage further migration to the EU, was not supported by evidence. The migrants affected by the present proposal are those belonging to nationalities for which international protection is on average granted in at least 75% of cases—at present, those from Syria, Eritrea and Iraq. The situation in each of these countries is dire: it is clear that the vast majority of those leaving these countries are fleeing civil war or the imminent threat of persecution. This is underlined, for instance, by the presence of millions of Syrian refugees in camps in Jordan and Lebanon. The Government’s argument that the relocation of 40,000 migrants who have reached Greece or Italy will somehow encourage more to leave their countries of origin is therefore unconvincing.*

*32. The Government’s approach will do little to help the response to a humanitarian crisis within the EU’s borders.*

*33...we are concerned that, by failing to opt in, the Government would fail to live up to its duty of solidarity and burden-sharing between the Member States during an “emergency situation”.*

*34. Finally, we recognise the international and domestic political implications of failing to opt in. The EU’s delayed response to the crisis has significantly weakened its credibility as an international actor and has attracted global criticism from refugee and human rights organisations including the British Refugee Council, Refugee Action and Amnesty International. Some 1,700 migrants have already died this year while attempting to cross the Mediterranean, and it is thought that the crisis is likely to worsen during the second half of 2015. The EU’s ability to act swiftly as one on this issue is crucial not only to the immediate safeguarding of human lives, but also to its ability to find a sustainable, long-term solution. The reputational risk of a continued failure to act, to individual Member States as well as to the EU as a whole, is great.*

It concluded

***“We understand that the Government is minded not to opt into the proposed Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece. Nevertheless, we believe that it is in the United Kingdom’s interest to take part in***

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<sup>10</sup> Op.cit. para 30.

*the negotiation of this proposal, and that, should an amended or a new proposal be brought forward giving effect to the European Council's Conclusions in April and June 2015, the Government should reconsider its position and opt in."*

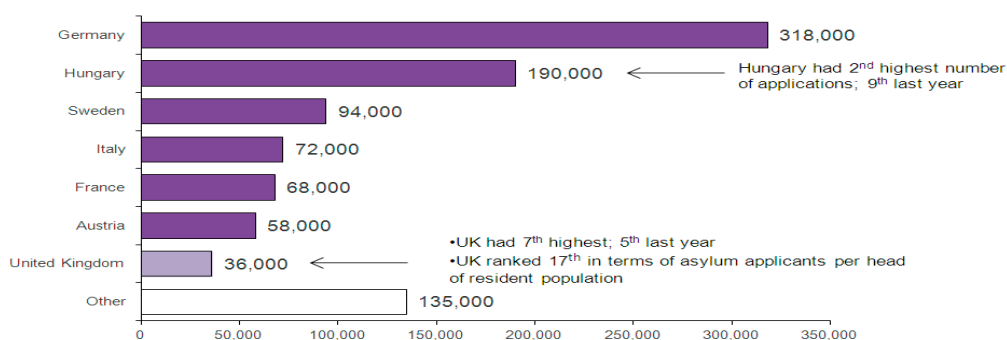
In fourth report<sup>11</sup> it wrote

**67. Since the Action Plan was published the Commission has put forward its resettlement scheme and another scheme to relocate asylum seekers arriving in the EU. We investigated the issue of relocating asylum seekers in a brief report in July.5 In that report we called on the UK Government to participate, on a voluntary basis, in a proposed relocation scheme. The Government has declined to do so.**

**68. We regret that the Government has declined to participate in the EU measures for the relocation of migrants. We urge the Commission and all Member States to make greater efforts to reach consensus on EU proposals on relocation and resettlement.**

ILPA concurs with the Committee. To describe the situation in terms of “pull factors” is to ignore that the push factors, persecution, war, torture, extra-judicial execution and overburdened countries of first asylum provide more than enough motive for persons to flee to the European Union. Conditions of insecurity in countries of first asylum, and basic needs not being met, are further push factors. These points are developed in ILPA’s responses to House of Lords European Union Select Committee for its enquiry into migrant smuggling, and to the Home Affairs Committee, both appended hereto. We also recall the speech of His Excellency Pasquale Terraciano, the Italian Ambassador, at the University of Glasgow on 3 December 2015 declared “we need unity and coordination.”

The current UK approach is to contemplate resettlement of 20,000 Syrian refugees from outside the EU over a five year period, but not to participate in programmes to relocate refugees who are within the EU. The UK is isolated in its position. Ireland, which can also opt out, has opted in. Denmark is ready to take refugees in the context of the agreement and Switzerland and Norway, Schengen associated countries, have agreed to participate<sup>12</sup>. The UK’s current position is illustrated from this table, taken from the Government’s statistical release of 26 November 2015<sup>13</sup>:



<sup>11</sup> *Op.cit.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Available at <https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2015/asylum>

The motion invites the House to agree with the Government's decision not to participate in the relocation. It does not propose an alternative. The UK is a party to the Dublin Regulation ("Dublin III") which makes provision as to which member State is responsible for examining a claim for asylum claim. It starts from a presumption that the claim will be examined in the first European Union country a person reaches, with exceptions created to protect the best interests of children and to promote family unity. Without the relocation programme it functions to channel refugees back to the countries from which attempts are being made to relocate them. The Italian Ambassador, speaking at the University of Glasgow on 3 December, described it as "An obsolete system of rules written 25 years ago in totally different circumstances. The UK's decision to opt-out thus means that not only is it not pulling with the other States of the European Union; it is pushing against their efforts.

**In these circumstances the Government should be pressed on what responsibility the UK, an EU member State, is taking for the survival and wellbeing of refugees within the European Union.**

Men, women and children who have fled persecution and war are now without adequate warmth, shelter, food and basic care in the European Union.

The United Nations and its implementing partners are having to contemplate shifting resources, already insufficient, from Turkey which is hosting 2.3 million refugees, Lebanon where one in three of the population is a refugee and Jordan, to one of the richest continents in the world, because the States of Europe have failed to get refugees to places where they can be provided with food and shelter<sup>14</sup>.

People are walking. Across Lesvos in the dark if they are not lucky enough to benefit from a lift from the volunteers on the island or unlucky enough to fall prey to gangs who take their money then dump them far from their destination. People are walking from Greece, through Macedonia, fearing to stop, fearing that borders will be closed again. A recent account described a child with a broken arm, continuing the long march with her mother who feared to stop to go a hospital until Austria, the final destination, was reached.

Winter is coming. Lesvos, Lampedusa, Sicily, Hungary, all are close enough to go and see what is happening and many have been. At the Society of Black Lawyers and Society of Asian Lawyers conference at Westminster Central Hall on 12 December 2015 one lady, a dentist, who had volunteered on Lesvos, described how difficult it is to take wet clothes off a shivering baby. She described volunteers coming from all over the European Union, and indeed further afield, to Lesvos, because of the limits on what they could do for refugees closer to home and the feeling that in a situation such as the present, to be a bystander was not an option.

The situations from which the refugees currently in the European Union have fled are worsening. These refugees are not about to leave. Large numbers of persons will remain displaced for many years, even if the situations which have produced refugees are rapidly resolved, which currently does not appear likely. This is what UNHCR defines as a protracted refugee situation. It is no good huddling in a corner and waiting for it to stop.

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<sup>14</sup> <http://data.unhcr.org/mediterranean/regional.php>

Refugees continue, and will continue, to move. Experience of the war in Kosovo teaches that movements of refugees increase when bombing increases<sup>15</sup>. This is not a comment on the rights or wrongs of bombing, simply a comment on its immediate consequences.

In these circumstances, is it the UK's intention that it be left to other EU States, whether to Italy Greece and Hungary or to those countries supported by the other EU States, to provide essential food and shelter and avoid deaths of refugees within Europe?

At the Society of Black Lawyers and Society of Asian Lawyers refugee conference on 15 December 2015, Dr Yasmeen Hasnain, an NHS consultant in emergency medicine at Milton Keynes NHS Foundation Trust and tutor of the School of Emergency Medicine at Oxford Deanery and Dr Tanveer Hussain a senior General Practitioner with considerable humanitarian assistance, described the results of a fact-finding mission to Sicily, and Lampedusa in June 2015 supported by the Pakistani Medical Association and a visit to Calais in September 2015. They described the considerable physical and mental health problems of the refugees. They also described meeting, by chance, refugees they had met in Catania who had made it to the Calais jungle, and the striking deterioration in their mental health during their time in Europe. It is when refugees think that they have reached safety and find that nothing is resolved that they are often most vulnerable to despair. They must be treated with dignity and their suffering not prolonged? What part is the UK playing in this for those who are within the EU?

We do not suggest that the following steps are a substitute for the relocation programme, but they are steps the Government could be taking to demonstrate its commitment to alleviating the plight of refugees within European Union:

- Provide safe and legal routes to the UK. In particular:
  - Commit to operating those provisions of the Dublin Regulation that allow persons seeking asylum to be reunited with family members in a broad and inclusive fashion.
  - Make provision for humanitarian visas so that persons seeking asylum can travel directly to the UK to claim there. Humanitarian visa schemes have been set up by States such as Brazil and Argentina; this can be done.
  - Extend the criteria under which recognised refugees can be reunited with family members (discussed below)
  - Lift requirements of the immigration rules pertaining to family reunion, including with adult dependent relatives, so that British citizens and settled persons wishing to sponsor who have family members persecuted overseas, can sponsor them to come to the UK (discussed below).
  - Lift carrier sanctions.
  - Ensure that those not recognized as refugees in the UK but given humanitarian protection, can be issued promptly with travel documents in the same way as refugees and negotiate to ensure that these “brown” (as opposed to blue”) travel documents are recognized by other EU member States<sup>16</sup>.

As to the broader UK response, we understand that in Berlin persons of Syrian origin are regularly being recognised as refugees within 24 hours. Gymnasiums are turned into homes for

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<sup>15</sup> See March 1999 in the timeline at <http://www.bbc.co.uk/news/world-europe-18331273> which is consistent with other sources.

<sup>16</sup> “Schengen” States recognize not only each other’s Refugee Convention travel documents but documents issued to those in receipt of subsidiary protection but the UK sits outside this agreement.

families within a week. What can the UK learn from these countries to enable it to speed up its own response?

We urge MPs to press Ministers

- **Regularly to visit Italy, Greece and Hungary and to meet and talk with refugees there**
- **To visit European countries that have managed rapidly to resettle and to support refugees to learn from their practice**
- **To visit those countries operating humanitarian visa schemes with a view to their implementation in the UK**

## EUROPEAN AGENDA ON MIGRATION

The motion invites the House to support

*“...the Government’s aim of working with the EU and Member States and other international partners to develop a coherent and sustainable approach to addressing current migratory pressures, focused on shorter and longer term actions to break the business model of people smugglers and traffickers, to break the link between rescue at sea and permanent settlement in the EU, and address the root causes of migrants’ journeys.”*

We suggest that the Government’s position on relocation has made it extremely difficult for it to work with the EU and Member States. On 3 December 2015 the Italian Ambassador, speaking at the University of Glasgow, declared “We are treated as the prison warder of Europe. ...It is unfair and unsustainable.”

The mayor of Catania, spoke, at the Society of Black Lawyers and Association of Muslim Lawyers conference in London on 12 December 2015, of the “blindfolds of selfishness.”

As to the “link between rescue at sea and permanent settlement in the EU,” the Italian Ambassador described his response to those who talk of pull factors being that there is a basic human duty not to let people drown. There is no necessary link between rescue at sea and permanent settlement in the EU and the motion appears deliberately to court controversy in suggesting otherwise.

There is indeed no link between being one of the 20,000 to be resettled from outside the EU over five years and permanent settlement in the EU. While those on the UK’s “gateway” resettlement programme are given indefinite leave to remain, resettled refugees on the Syria programme are to be given five years. This is potentially five years of uncertainty, wondering what will happen at the end of it.

ILPA has set out its views on the matters covered by the motion in its responses to the House of Lords EU Select Committee and the Home Affairs Select Committee. These are **appended hereto**. The Home Affairs Select Committee has yet to report, but the House of Lords EU Committee has done so and we commend that report<sup>17</sup> to you.

The House of Lords EU Committee said:

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<sup>17</sup> HL Paper 46 of session 25-2015, *op.cit.*

**38. ...The evidence suggests that in the majority of cases of irregular migration trafficking is not involved.**

**39. Nonetheless, governments, law enforcement bodies and other EU and Member State agencies must have regard to the likelihood that smuggled migrants are vulnerable people. They may at some time have been victims of exploitation, extreme hardship or indeed trafficking. Agencies must not simply treat migrant smuggling as a matter of criminal law, but also one with a humanitarian dimension. They must be ready to provide adequate support and assistance to smuggled migrants.**

...

**55. We welcome the fact that the Commission has sought to place the Action Plan within the context of a broader approach to migration. The Action Plan, however, must focus on the rights of refugees and vulnerable migrants and not just on law enforcement.**

**66. One effective way of addressing the root causes of irregular migration would be to create safe and legal routes for refugees to enter the EU. We welcome the Commission's recognition of this but urge that more be done at EU level to work towards the creation of such routes. It is regrettable that the Action Plan does not set out further details in this regard. We recommend that this be addressed as soon as possible. In particular, we recommend that the Commission should bring forward further initiatives to encourage Member States to create such routes, for example by making use of humanitarian visas.**

Safe and legal routes are essential. We call for an enlarged, and more rapid, resettlement programme. Humanitarian visas we have discussed above. We emphasise also, as we have done in debates on the Immigration Bill as well as in the reports appended hereto, that the UK could and should do much more to facilitate family reunion of persons in the UK with persons facing persecution.

ILPA is aware that many MPs are seeing constituents who have family members who are refugees whom they are desperate to bring to the UK by safe and legal means. Many MPs, moved not only by the plight of those overseas but by the suffering and distress of their constituents, have sought to identify a route through the UK's labyrinthine immigration rules for these constituents and their family members. ILPA has put detailed proposals to the Home Affairs Select Committee<sup>18</sup> on refugee family reunion.

Rules on refugee family reunion are contained within the immigration rules in Part II and Appendix FM. Part II provides for reunion of recognized refugees with spouses and minor children on more favourable terms than family applications from other persons (for example there is no fee and no financial threshold to meet). Appendix FM provides for refugees to be reunited with a wider range of family members and for British citizens and settled persons (including but not limited to persons who were recognized as refugees) to be reunited with spouses, minor children and a wider range of family members, but subject to onerous eligibility conditions, such as financial thresholds.

The current UK immigration rules do not give children the same entitlements to be reunited with their parents as adults have to be reunited with their minor children. Instead they must

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<sup>18</sup> <http://www.ilpa.org.uk/resources.php/31480/ilpa-briefing-for-house-of-commons-home-affairs-select-committee-inquiry-into-the-european-migration>



rely on discretionary provisions of the rules. This is often stated to be to ensure that children are not sent on ahead alone to secure leave for the family but this is based on a misunderstanding of the position of the children who could apply for refugee family reunion. Children asking for refugee family reunion are not given discretionary leave because they are unaccompanied; they are being recognized as refugees because they are at risk of persecution by reason of their race, religion, nationality, political opinion or membership of a social group in the country of origin. They have as much right to international protection and to respect for their rights as refugees as any adult. Many people will recognize the choice of parents, forced to pay smugglers because of a lack of safe and legal routes to safety and not having enough money to bring the whole family out, to get their child to safety first and put the child's needs before their own. We have seen the dangerous journeys parents make both with and without their children to try to get them to safety.

The position could be changed without primary legislation. British citizens and those settled in the UK, not only those themselves recognized as refugees, should be supported to bring refugee family and friends to the UK where they would 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;
- Refugee relatives of British citizens and settled persons, whether inside or outside the EU, should not be expected to meet the requirements of the immigration rules as to earnings, etc. and the adult dependent relative route should be reviewed.
- Children who are refugees should have the same rights to reunite with their parents as do adult refugees with their minor children.
- 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.
- Refugees should be able to travel freely within the European Union to join family members.

We also highlight the House of Lords EU Committee's recommendation

***155. International law requires Member States to protect refugees and assess asylum claims on an individual basis. There is a danger that the proposed extensions to the mandates of EU Agencies may encourage Member States to distance themselves from this responsibility. Changes to the mandate of Frontex in particular should be monitored closely by the Fundamental Rights Agency and others on the Agency's consultative forum.***

...

***64. The Commission must ensure that funds are allocated transparently and based on clear criteria. While some Agencies have been generously funded, others are under-resourced. We urge the Commission to review and address such discrepancies.***

The Committee dealt in its report with the establishment of "hotspots" for the identification of persons seeking asylum and processing of claims for asylum plus dealing with those who do not wish to claim. We urge MPs to press the Minister on:

- **The legal basis of these hotspots as a matter of EU law**
- **Whether those within them have access to a lawyer**
- **Whether the way in which persons are dealt with within a hotspot varies according to their nationality**

- **What proportion of those within hotspots are recorded as having claimed asylum**
- **How many people have been removed directly from hotspots?**
- **When data on the outcomes for those in the hotspots will be published?**

## **Conclusion**

Large scale movements of refugees to and within Europe are no different from large scale movements of refugees anywhere in the world in terms of the essential requirements of a response:

- Borders must be kept open
- Refugees must be registered to facilitate the provision of humanitarian assistance to them in the short to medium term and a durable solution (return, resettlement, local integration) in the long term
- Essential supplies and services must be distributed rapidly to those who need them: whether by bringing the services to the refugees or the refugees to the services.

The priority must be to keep Europe's borders open so that persons can flee persecution. Fences should not be going up to keep refugees out or keep them from moving to a place of safety. This is so that they can flee Syria, but not only Syria. Refugees in desperate need are coming also from countries such as Eritrea, Afghanistan, Iraq.

One million refugees is 0.2% of the population of the European Union. The numbers that have come and that continue to come are not overwhelming. Rather, there is a need to get organized. It should be the priority facing this parliament.

## **APPENDICES**

### **ILPA Response to the House of Lords Committee on the European Union call for evidence on the action plan on migrant smuggling**

#### **Summary**

- i. We answer questions 1, 2, 4, 5, 6 and 8.
- ii. In answer to question 1 we emphasise, as did UNHCR, Amnesty International and Human Rights Watch in their evidence to the Committee, that the evidence indicates that those crossing the Mediterranean are for the most part, refugees and that the world is in the middle of the biggest refugee crisis since the second world war. The European Action Plan is more focused on pull than push factors and as such does not present a comprehensive response. Safe, legal ways into the EU should be the priority and in this context we draw attention to the conclusions of the recent study for the LIBE on the Dublin III regulation which identified the main tools needed to stop dangerous journeys across the Mediterranean. We warn of the risks of resources being diverted and doubt the efficacy of some of the proposed measures.
- iii. We answer "no" to question 2, because the Action Plan starts from the wrong place in failing to acknowledge the extent to which it is dealing with a problem of forced migration. We touch on the minimum standards with which the plan must comply to be compatible with international refugee law.

- iv. In answer to question 4 we suggest that the question of political will is central to the question of whether the mandate of the EU Agencies will suffice and express concern that funds will be directed at more general immigration enforcement work and as a consequence the sums allocated to address the humanitarian crisis in the Mediterranean will be lower than the headline figure.
- v. We answer “no” to the first part of question 5: the Action Plan does not sufficiently differentiate between smuggling and trafficking. As to the extension of **Council Directive 2004/81/EC of 29 April 2004** from the trafficked to the smuggled, we are in favour of this provided that the safeguards in its preambles (4) to (7), as to the primacy of refugee protection and respect for human rights, remain in place.
- vi. We answer “no” to question 6; the Action Plan does not strike the correct balance between law enforcement and the human rights of migrants, most fundamentally in that it fails to give effect to the rights of refugees as set out in the 1951 UN Convention Relating to Refugees and its 1967 protocol.
- vii. We answer no to question 8: the actions proposed in the Action Plan are not compatible with the UN Protocol on Smuggling of Migrants by Land, Sea and Air because that protocol requires compliance with the international law of the sea and explain why we do not consider that the Action Plan complies with this.

## **ILPA Response to the House of Lords Committee on the European Union call for evidence on the Action Plan on migrant Smuggling**

- I. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.
1. **One of the priorities of the European Agenda on Migration is the prevention of migrant smuggling, with the goal of transforming migrant smuggling networks into “high risk, low return” operations. Are the four objectives of the Action Plan the right ones to achieve this goal? Which, if any, of the proposals in the Action Plan should be prioritised in this context?**
2. ILPA concurs with the evidence given by Andrej Mahecic of UNHCR<sup>19</sup> and by Steve Symonds of Amnesty International and David Mepham of Human Rights Watch<sup>20</sup> 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.
3. In 2014 there were a total of 624,000 (first) applications for asylum made in the 28 EU Member States. For the 1<sup>st</sup> quarter of 2015, 185,000 (first) asylum applications were made in the EU. Of them:
  - 4% were made in the UK
  - 8% were made in France
  - 39.6% were made in Germany
  - 1.4% were made in Greece (Sweden with a similar size had 6.3% of the total)
  - 8.2% were made in Italy.
4. Over half of the total number of persons seeking asylum in the EU came from one of three countries: Syria, Kosovo or Afghanistan.
5. 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. In the same period, 66% of Afghan applications succeeded.<sup>21</sup> Statements such as the Action Plan's "...migrants are likely to pay a high price to smugglers to bring them to the EU if they know that they will be returned home quickly after reaching their destination" fail to acknowledge that many of those on boats have no choice but to flee for their lives and fail to acknowledge that many will be recognised as refugees or persons in need of humanitarian protection.
6. As the witnesses mentioned explained and other commentators have addressed,<sup>22</sup> the world is in the middle of the biggest refugee crisis since the second world war, with countries through which

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<sup>19</sup> Evidence session No. 1 15 July 2015 10.30am.

<sup>20</sup> Evidence session No.3 Wednesday 22 July 2014 10.30am.

<sup>21</sup> Asylum: 1<sup>st</sup> Quarter 2015: Eurostat news release 112/2015 18 June 2015; 2014 statistics: EUROSTAT news release 53/2015 20 March 2015.

<sup>22</sup> See Professor Guy Goodwin Gill's *Refugees – Challenges for Protection and Assistance in the 21st Century*: Notes for a Presentation Parliamentary Assembly of the Council of Europe Ad Hoc Committee on Large Scale Arrivals of Refugees to

persons are travelling hosting enormous numbers of refugees, for example some two million are in Turkey. Mr Maheci reminded the Committee in his evidence that every second Syrian is now forcibly displaced. Professor Guy Goodwin addressing the *Parliamentary Assembly of the Council of Europe's Ad Hoc Committee on Large Scale Arrivals of Refugees to Turkey* said in June:

*The movement of people leaves few States untouched, and much of that movement is driven by desperation – unremitting conflict and persecution, failed and exhausted economies. Nor is that movement a problem waiting for a solution; on the contrary, it is a phenomenon in a modern, globalized world presently no more able to resolve major economic challenges than to broker peace in conflict. It is a phenomenon we must learn to live with, and to manage as best we can in the interests of all. Among other matters, this will require States dealing with each other on a basis of equity and equality, not outmoded and unrealistic expectations of sovereign entitlement. In addition, better 'management' will require investing in long-term responses, not short-term, ad hoc measures focused simply on symptoms, not causes. Only an approach combining protection, humanitarian assistance and opportunity with political and financial investment in mitigating and removing the underlying push factors can have any impact.*

7. The European Action Plan is more focused on pull than push factors and as such does not present a comprehensive response. With its focus on measures such as taking stronger action against the employment of irregular migrants, it is written for those who have a choice to stay put, ignoring that so many of those crossing the Mediterranean have no choice but to move if their human rights are to be secured. The 1951 UN Convention Relating to the Status of Refugees contains some 34 substantive articles,<sup>23</sup> of which the majority are about the rights and entitlements of refugees. These rights and entitlements are not respected and protected in overburdened or unsafe<sup>24</sup> States.
8. The current system of distribution of persons seeking asylum around the EU is the Dublin III Regulation which is predicated on returns to the first EU country in which the person could have sought safety: thus in theory funneling persons toward Greece, Italy, etc. until such time as because of problems of capacity or competence those states are deemed unsafe.<sup>25</sup> It is estimated that only about 3% of asylum seekers are ever actually subject to a successful Dublin transfer<sup>26</sup> yet most have their claims determined in a country other than that in which they entered the EU. The recent study for the LIBE Committee of the European Parliament *Enhancing the Common European Asylum System: Alternatives to Dublin*, paper for the LIBE committee of the European parliament,<sup>27</sup> concluded that the Dublin system

*... 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*

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Turkey, 15 June 2015 available at <http://www.kaldorcentre.unsw.edu.au/news/professor-guy-goodwin-gill-speaks-challenges-refugee-protection-and-assistance-21st-century> (accessed 19 August 2015); 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action' Notes for a Presentation Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean University of Naples 'L'Orientale' Palazzo du Mesnil, May 2015 available at <http://www.jmcmigrants.eu/guy-s-goodwin-gill-refugees-and-migrants-at-sea-duties-of-care-and-protection-in-the-mediterranean-and-the-need-for-international-action/> (accessed 19 August 2015); 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' An International Workshop" National and Kapodistrian University of Athens Faculty of Law Friday, 20 March 2015 available at <http://www.kaldorcentre.unsw.edu.au/news/professor-goodwin-gills-address-regulating-%E2%80%9Cirregular%E2%80%9D-migration-international-obligations-and> (accessed 19 August 2015).

<sup>23</sup> Articles 1 to 34.

<sup>24</sup> See the comments of Mr Symonds and Mr Medham on Libya.

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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.

*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.*

9. As Mr Symonds of Amnesty International pointed out in his oral evidence, while the preamble to the Action Plan refers to the importance of opening “more safe, legal”<sup>28</sup> ways into the EU, this is not addressed in the body of the document. It should be the priority.
10. The study for the LIBE committee concluded that

*Those seeking refuge undertake dangerous journeys as they have few other options - mandatory visa requirements coupled with carrier sanctions on transport companies preclude regular means of travel. Without these two EU measures, unsafe access and the demand for the services of smugglers would greatly diminish.”*
11. It identified the main tools as (1) humanitarian evacuation and transport; (2) humanitarian visas, (3) resettlement; and (4) immigration visas.
12. The study for the LIBE Committee also argues for mutual recognition of positive asylum decisions so that those recognised as refugees are free to move and is critical of the wrongful characterisation of the onward movement of persons seeking asylum as ‘irregular secondary movement’, asylum seekers and refugees are seeking a place of refuge and access to reception standards and fair procedures in line with their entitlements under international and EU law.
13. It suggests that distribution keys which identify the reception capacity of states based on indicators, such as population, GDP, economic success and current hosting of asylum-seekers and refugees could be used and that this could compel closer attention to the extent to which Member States are meeting their responsibilities and provide benchmarks for developing institutional capacity. However it cautions against distribution keys that lead to coercive transfers or allowing Member States to buy their way out of their protection responsibilities. On the other hand, additional financial support for those who provide protection over and above their allocation should be made available.
14. We recognise a response couched in terms of enforcement is designed to appeal to those States whose political stance on immigration is based on an enforcement approach. But insofar as this approach was designed to sugar the pill of responsibility-sharing and make it politically acceptable to States to agree to take refugees from Italy, Malta, Greece and parts of Europe under most pressure, it has failed. States rejected calls for compulsory quotas in May and June 2015. It carries with it risks, including risks of diverting resources to information-sharing, prevention of illegal working, etc. While States may choose to fund these from other budget lines, they should not be counted as part of the funding used to deal with the movement of refugees across the Mediterranean and for their reception in Europe, where funds are already limited and evidence of responsibility sharing scarce. Mr Mahecic reminded the Committee in his oral evidence that UNHCR’s appeal for Syria is “severely underfunded” and described the current responsibility sharing in Europe as “untenable.” He reminded the Committee that the UK has resettled a mere 187 Syrians, compared with Germany’s 30,000.
15. Demand for a passage across the Mediterranean looks set to remain high and with it the profits of smugglers. We are doubtful whether increased criminal penalties will affect the behaviour of smugglers in those circumstances.
16. Financial investigations are long term measures and new EU bodies are only as effective as their mandate and resources. The need to respond to the current movements and deaths at sea is the higher priority in the short to medium term.
17. Many of the vessels used to transport persons across the Mediterranean are unseaworthy. They are used once and abandoned to the persons being carried to bring to shore, so that the smugglers

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<sup>28</sup> See further the response to question 3 below: in the circumstances described in Article 31 of the Refugee Convention there is nothing illegal in a person’s crossing the Mediterranean in a boat to seek asylum, although those who convey them may be committing one or more crimes.

escape prosecution. In these circumstances we question the extent to which measures to establish lists of vessels and to destroy vessels will have much effect on patterns of movement and suggest that priority should not be accorded to them.

18. Work with third countries to tackle border management, youth and employment and mobility are unlikely to affect patterns of movement where the causes of that movement are war, famine, pestilence and death.

**2. According to the European Commission, the Action Plan “should be seen in the broader context of EU efforts to address the root causes of irregular migration”. Does it suggest the correct set of measures to bring this about?**

19. No.

20. As set out in response to question 1 above, the Action Plan starts from the wrong place because it fails to acknowledge the extent to which it is dealing with a problem of forced migration. The failure to treat the movement as a humanitarian crisis and a crisis of protection has led to a rich wealth of material, analysis and recommendations such as that described in response to question 1, being overlooked.

21. Article 31 of the Refugee Convention provides

*1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

*2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*

22. See further s 31 of the Immigration and Asylum Act 1999.

23. These set out minimum standards with which the Action Plan must comply to be compatible with international and UK domestic law.

24. The Action Plan appears to place undue faith in the efficacy of gathering and sharing information without identifying clearly the use to which the information will be put. There is considerable joint working between states in the areas of transnational organized crime, of which smuggling is one example, and the notion that increased regional information gathering and sharing could make the step change in tackling smuggling is nowhere justified in the Action Plan. Our experience over the years suggests that smugglers are very quick to adapt to interference with their activities. Information gathered is almost always yesterday's news.

**3. Are Member States currently meeting their obligations under the existing EU framework against migrant smuggling? What are the deficiencies of the current framework, and do the actions foreseen in the Action Plan address these?**

25. Not answered.

**4. EU Agencies are expected to play a significant role in carrying out the objectives of the Action Plan. Do they have the mandate, budget and other capacities to fulfil this role?**

26. We suggest that as with the question of compulsory quotas, the question of political will is central to the question of whether the mandate of the EU Agencies will suffice.
27. As to budgets, the sums allocated to States are also relevant. The European Commission approved financial allocations for asylum, migration and integration for some of the front line states for the period 2014 – 2020 as follows:
- Cyprus: 32 million euro
  - Greece: 259 million euro
  - Italy: 310 million euro
  - Spain: 257 million euro
  - Sweden | 18.5 million euro.
28. The funding is being released urgently to the front line states in light of the reception crisis. As explained in response to question 1 above, we are concerned that funds will be directed at more general immigration enforcement work and as a consequence the sums allocated to address the humanitarian crisis in the Mediterranean will be lower than the headline figures.

**5. Does the Action Plan sufficiently differentiate between migrant smuggling and human trafficking? What is your opinion of the proposal to extend the 2004 Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings to smuggled migrants?**

29. No.
30. *Smuggling* is the clandestine movement of people across borders. It is a crime against the State. People hide in vehicles, or use false documents, to cross borders. Many are brought by an agent, or smuggler and disrupting smuggling routes is a key concern of those involved in migration control. In the UK media attention has focused on disrupting routes used to bring people to claim asylum in the UK. Article 31 of the 1951 Refugee Convention says that countries should not impose penalties on people fleeing persecution who have had to use clandestine methods of entry to flee. This does not prevent States from taking action against the person who did the smuggling.
31. *Trafficking* is the movement of people in order to exploit them. It is a crime against the individuals concerned and a violation of their human rights. It need not involve clandestine measures: some people move on their own passports.
32. The distinction between trafficking and smuggling does not present a conceptual difficulty: see above, the differences are clear. However, when looking at factual situations, it is can be complex to sort out what is going on. Imagine two persons wish to flee. The smuggler's charge is £10,000. The man can pay, and does. Once he reaches his destination, he never sees or hears of the smuggler again. The woman cannot pay. The smuggler says that he will still carry her, but she will have to pay back the £10,000 once she gets to her destination. So far so good, neither she nor man have been trafficked. But if she works for the smuggler once she gets to her destination, if the smuggler can *control* her actions because of her debt and uses that control to exploit her, then the situation starts to look like trafficking. By contrast, if the smuggler simply wants his money and she engages in forced and exploitative labour for someone else to repay her debt, she may be a victim of slavery, but she is not trafficked.
33. **We recall preambles four to seven to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of**



**trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities:**

*(4) This Directive is without prejudice to the protection granted to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments.*

*(5) This Directive is without prejudice to other provisions on the protection of victims, witnesses or persons who are particularly vulnerable. Nor does it detract from the prerogatives of the Member States as regards the right of residence granted on humanitarian or other grounds.*

*(6) This Directive respects fundamental rights and complies with the principles recognized for example by the Charter of Fundamental Rights of the European Union.*

*(7) Member States should give effect to the provision of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.*

34. Provided those safeguards remain in place, then we consider that the extension of the Directive to persons who have been smuggled could offer valuable additional protection for such persons.

**6. Does current EU action against migrant smuggling, including the actions suggested in the Action Plan, strike the correct balance between law enforcement and the human rights of migrants, including particularly vulnerable migrants such as minors and pregnant women?**

35. No.

36. See above, most fundamentally it fails to give effect to the rights of refugees as set out in the 1951 UN Convention Relating to Refugees and its 1967 protocol. These obligations apply to all: minors, pregnant women and single adult men.

37. It fails to recognise that the risks of staying put may be as great as the risks of undertaking a hazardous journey. The suggestion that a person would not flee Syria or embark from Libya if warned of the hazards of the journey is, for the reasons given in the oral evidence of Mr Symonds and Mr Medham, dubitable. It wholly underestimates the desperate need of those trying to flee. Alternatives, rather than deterrents, are required to change behaviour.

38. The Action Plan suggests "...monitoring of the pre-frontier area for early identification of smuggler and prevention of irregular departures of migrants". This carries 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 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.*

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

40. It also appears to envisage extra-territorial operations, for example on Libyan territory. Such operations, unless the free consent of the Libyan authorities to them were secured, which

appears unlikely, would be acts of aggression and unlawful under the Charter of the United Nations unless a specific UN mandate were obtained, which also appears unlikely.

**7. Do the Action Plan and other, related EU strategies (such as the European Maritime Security Strategy, Cyber Security Strategy and the EU Strategy towards the Eradication of Trafficking in Human Beings) form a coherent whole?**

41. Not answered.

**8. Are the actions proposed in the Action Plan compatible with the international framework on preventing human smuggling, including the UN Protocol on Smuggling of Migrants by Land, Sea and Air? Do they add to this framework in a coherent and meaningful manner?**

42. No.

43. That protocol requires compliance with the international law of the sea.

44. The primary obligations of Shipmasters and member States of the International Maritime Organisation when faced with persons in distress at sea are set out under the United Nations Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea and the International Conventions on Search and Rescue and Salvage.

45. Regulation V 33.1 of the International Convention for the Safety of Life at Sea obliges the Master of a ship to proceed with all speed to assist persons in distress at sea. See also Article 98(1) of the United Nations Convention on the Law of the Sea. Article 98(2) of that Convention obliges coastal States to promote search and rescue services in cooperation with other States. See also Regulation V/7 of the International Convention for the Safety of Life at Sea. The International Convention on Search and Rescue at chapter 2.1.10 obliges State Parties to provide assistance to persons in distress at sea, Chapter 1.3.2 requires States to provide for initial medical or other needs and deliver persons to a place of safety.

46. Thus rescue is situated with a framework of obligations to commit resources to search and rescue and these must be the primary focus of all actions. Within that framework it is vital that the judgement of Masters of their ships on the safety of rescue obligations be accepted. In particular, it should be for Masters to assess the time for which a ship should stand by before attempting rescue and rendering assistance. It is vital that the action plan recognise that a place of safety means dry land, and specifically a place where obligations under the Refugee Convention can be met or from when there is a plan to be able to render the person safely, without delay and with respect for their dignity to a place where those obligations can be met.

ILPA

21 August 2015

**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 UNHCR<sup>29</sup> and by representatives of Amnesty International and Human Rights Watch<sup>30</sup>.

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.

## **1. This is a refugee crisis**

ILPA concurs with the evidence given by Andrej Mahecic of UNHCR<sup>31</sup> and by Steve Symonds of Amnesty International and David Mepham of Human Rights Watch<sup>32</sup> 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.<sup>33</sup>

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, 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*

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<sup>29</sup> Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/eu-action-plan-against-migrant-smuggling/oral/18751.html>

<sup>30</sup> Available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/eu-action-plan-against-migrant-smuggling/oral/18753.html>

<sup>31</sup> Evidence session No. 1 15 July 2015 10.30am.

<sup>32</sup> Evidence session No.3 Wednesday 22 July 2014 10.30am.

<sup>33</sup> Asylum: 1<sup>st</sup> Quarter 2015: Eurostat news release 112/2015 18 June 2015; 2014 statistics: EUROSTAT news release 53/2015 20 March 2015.

*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 stated<sup>34</sup>:

*“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.”*

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<sup>34</sup> 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

This is incorrect. The family members are outside of the UK and hence cannot claim asylum. It would be unlawful<sup>35</sup> 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.<sup>36</sup>

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 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.<sup>37</sup> 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.<sup>38</sup> 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**

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<sup>35</sup> Immigration Act 1971, s25A

<sup>36</sup> 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

<sup>37</sup> *Gudanaviciene v Director of Legal Aid Casework* [2014] EWCA Civ 1622.

<sup>38</sup> [http://www.appgmigration.org.uk/sites/default/files/APPG\\_family\\_migration\\_inquiry\\_report-Jun-2013.pdf](http://www.appgmigration.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,<sup>39</sup> 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,<sup>40</sup> of which the majority are about the rights and entitlements of refugees. These rights and entitlements are not respected and protected in overburdened or unsafe<sup>41</sup> 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,<sup>42</sup> in countries already taking a disproportionate share of refugees

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<sup>39</sup> See *HL Deb 31 March 1999 vol 599 cc459-68*.

<sup>40</sup> Articles 1 to 34.

<sup>41</sup> See the comments of Mr Symonds and Mr Medham on Libya.

<sup>42</sup> 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.

who reach Europe. The recent study for the LIBE Committee of the European Parliament *Enhancing the Common European Asylum System: Alternatives to Dublin*,<sup>43</sup> 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 transfer<sup>44</sup> 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.<sup>45</sup>

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

3. *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.*
4. *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 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.

## 5. 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

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<sup>43</sup> 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.

<sup>44</sup> 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.

<sup>45</sup> 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*.

security and begin rehabilitation. Levels of asylum support should be raised and thenceforth updated in line with benefits upgrading.

## 6. 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 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”<sup>46</sup> 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*,<sup>47</sup> 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 Rights<sup>48</sup> 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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<sup>46</sup> Available at <https://www.gov.uk/government/publications/gentleman-s-agreement>

<sup>47</sup> See [www.ilpa.org.uk/resources.php/30347/r-v-ntege-and-others-on-abuse-of-process-by-immigration-officers-21-october-2014](http://www.ilpa.org.uk/resources.php/30347/r-v-ntege-and-others-on-abuse-of-process-by-immigration-officers-21-october-2014)

<sup>48</sup> *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



ILPA

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Physical fences are going up along external borders of the European Union, as in Hungary.

The difficulties of integration should not be exaggerated. Refugees are not a separate “other,” different in all respects from the population. We have so much in common. Proper deployment of resources, leadership and the goodwill the British public has demonstrated toward those undertaking these terrible journeys.

Refugees are drowning crossing an eight kilometre (less than five miles) stretch of water between Turkey and Lesbos. Smugglers and traffickers are making a fortune out of that crossing because of the lack of safe and legal routes to take instead. The House of Lords EU Committee in its report on The EU Action Plan on Migrant Smuggling<sup>49</sup> said

*One effective way of addressing the root causes of irregular migration, and of reducing the need for large numbers of refugees to turn to smugglers, would be to create safe and legal routes for refugees to enter the EU. Greater priority needs to be given to this.*

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<sup>49</sup> Fourth report of session 2015-2016.