

ILPA Response to the Home Office Consultation on proposals to improve the civil penalty regime

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.

ILPA has confined itself in this response to matters within its expertise as a membership association of immigration lawyers and has therefore answered only questions 1 and 4.

1. We want to work with industry to refresh the codes of practice to ensure they take account of recent developments in the transportation sector. But we also need to ensure that the revised codes are fair and transparent, and provide a clear incentive for hauliers to properly secure their vehicles. Do you have any comments on the refresh of the codes of practice or the policy objective overall?

On the overall policy objective:

Hauliers already have incentives, aside the civil penalty regime, to secure their vehicles in that cargos and vehicles can be damaged and journeys delayed if a person manages to break into the vehicle. It is only if the time, expense and trouble of securing the vehicle is greater than the time, expense and trouble occasioned by persons stowing away on board, that incentives are lacking.

The policy objective should encompass reduction of the loss of life and of injury to those attempting to effect a clandestine entry. Fifteen year old Masud from Afghanistan suffocated in a lorry attempting to make the journey from Dunkerque to the UK. Mohammed Hussain, 18, who was Kurdish, died clinging to the underside of a lorry when the vehicle crashed in Oxfordshire. He had travelled from Dunkerque, trying to reach family members in Oxfordshire.

Both cases illustrate that to reduce clandestine entries it is necessary to ensure that there are safe and legal routes by which persons can reach the UK. This should form part of the policy objective.

The *R[ZAT] v SSHD* [2016] UKUT 61 case has illustrated the shortcomings of the operation of the Dublin "take charge" system as it operates for the UK to take charge of cases from France under the provisions of the Dublin system which provide for children to be reunited with family members. We are aware of similar difficulties in the operation of take charge requests from other countries. No provision is made in the rules for humanitarian visas which would enable

persons to come to the UK to claim asylum. Refugees should be able to travel freely within the European Union to join family members.

We recommend that under the policy objective of creating safe and legal routes for persons to reach the UK the following be addressed:

- Provision should be made for persons in need of international protection to reunite with family members in the UK. In particular
 - legal aid should be made available for refugee family reunion applications.
 - Refugee relatives of British citizens should not be expected to meet the requirements of the immigration rules on family immigration 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.
- More opportunities for resettlement should be provided. 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,¹ of which the majority are about the rights and entitlements of refugees. These rights and entitlements are not respected and protected in overburdened or unsafe² States.
- The “take back” provisions of the Dublin system which oblige refugees to claim asylum in the first European country they reach should be suspended as they the effect of pushing refugees back to situations where they cannot live in safety and dignity,³ 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*,⁴ 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 transfer⁵ yet most have their claims determined in a country other than that in which they entered the EU.

- Humanitarian visas should be introduced to enable persons to travel to the UK to seek asylum.⁶

¹ Articles 1 to 34.

² See the comments of Mr Symonds and Mr Medham on Libya.

³ 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.

⁴ 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.

⁵ 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.

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,⁷ 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.”

It identified the main tools as (1) humanitarian evacuation and transport; (2) humanitarian visas, (3) resettlement; and (4) immigration visas.

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.

4. The sophistication of migrant attacks on goods vehicles has increased whilst the technology available to secure these vehicles has moved on a pace. There is a variety of security measures on the market, some of which are relatively inexpensive. But despite the growing awareness of what is available there are still high numbers of vehicles coming to the UK with poor security in place. What do you see as being the obstacles to operators achieving these security standards, and how can these be overcome?

The language of “migrant attacks on goods vehicles” is unhelpful. As described in response to question 1, desperate children who have fled persecution and are trying to be reunited with family members in the UK are among those attempting to effect a clandestine entry. People are attempting to make these journeys because of a lack of safe and legal routes to reach the UK and/or because existing routes are not working and the result has been death and injury.

6. Again, the vehicle level of penalty code is over ten years old. We would like the code to provide a fair and transparent charging framework. But we also want the framework to effectively address the full range of behaviours, so it should be harsh on the reckless, encourage the careless to improve, and reward those who have invested in security.

- **How should the level of penalty be refreshed? In particular:**
 - **Should we retain the approach of a single minimum standard?**

⁶ 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*.

⁷ 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.

- **Or should we move to a more graded charging regime that provides discounts based on the level of security investment (above a base minimum)?**
- **How can operators best evidence their compliance with the prevention code, and how should this link into the level of penalty code?**

What of those who are careful but do not have large sums to invest in security? Businesses may have less money to invest in security but be diligent in their efforts to comply with the rules. They should not be penalized for being unable to afford to invest in expensive technology.

8. The vast majority of hauliers are law abiding. However, there is a small minority that deliberately flout the rules around illegal migration, and neither Government nor industry should tolerate this. The regulators for the sector – in the UK and elsewhere in Europe - are primarily responsible for managing this behaviour.

How can haulage regulators best manage errant hauliers? How can regulators best operate across national boundaries?

The criminal law already reaches across national boundaries. It is a criminal offence (Immigration Act 1971, s 25) to assist unlawful immigration to a member State, not only the United Kingdom. Anyone can commit this offence; it is not limited to British citizens, for example. There are pan-European mechanisms, such as the European Arrest Warrant that permit warrants issued in one member State to be enforced in another. To what extent have existing penalties been used? If they have not, this should be tried before costly work to investigate new regimes is undertaken.

See comments above re the provision of safe and legal routes. When desperate people are denied a lawful means to flee, there are profits to be made by those who exploit their desperation. Only the provision of safe and legal routes can break this cycle.

9. The problems in Northern France this year have highlighted the importance of vehicle security to the UK Government. However, this is a European issue as most of the hauliers coming to the UK are not registered in this country; but also, we are seeing repercussions of poor lorry security elsewhere in Europe.

How can we address the problem of poor vehicle security at European level? What should be the role of other European Governments in encouraging better lorry security?

The ability to propose pan-European measures is likely to depend upon the UK's membership of the EU. If the UK leaves the EU then its ability to return persons who have entered the UK from another European under the Dublin regulation may disappear, increasing the attraction of effecting a clandestine entry to the UK to claim asylum there.

Maritime traffic

Although there is no specific question on the point, the consultation questionnaire says

We are seeing significant numbers of migrants attempting to enter the UK illegally on rail freight wagons and freight shuttle wagons. We are working closely with rail operators and the French authorities to strengthen the security around their operations as part of our broader work to strengthen port security. We would welcome views on whether the extension of the civil penalty regime to this and the maritime sectors would be effective and/or proportionate.

We do not consider that the extension of the civil penalty regime to maritime sectors would be proportionate. We see no justification for an extension of civil penalties until the effects of new and proposed extensions to the criminal law have been tested.

The provisions of the Policing and Crime Bill on maritime powers give the Secretary of State powers to require ships (of any nationality) intercepted in UK waters to be stopped, detained and/or sent to a port outside the UK. The proposed powers build on what is contained in Part 3 of, and Schedule 2 to, the Modern Slavery Act 2015 and in Part 6 of, and Schedule 14 to, the Immigration Bill currently before parliament in respect of specific offences: offences under sections 1 and 2 of the Modern Slavery Act in respect of the former⁸ and offences under sections 25, 25A and 25B of the Immigration Act 1971⁹ in respect of the latter.

The proposed powers differ from those contained in the Modern Slavery Act 2015 and in the Immigration Bill currently before parliament which only permit the diversion of ships to UK ports rather than to ports anywhere in the world. We highlight the risk of *refoulement* of refugees and persons in need of international protection on those ships.

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.

⁸ Modern Slavery Act 2015, Schedule 2 paragraph 2.

⁹ Immigration Bill, Schedule 14, paragraph 2. The offences are assisting unlawful immigration to an EU Member State, helping an asylum-seeker enter the UK, and assisting entry to the UK in breach of a deportation or exclusion order.