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European Union Committee

32nd Report of Session 2005–06

**Illegal Migrants:
proposals for a common
EU returns policy**

Report with Evidence

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(Q) refers to a question in oral evidence

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ABSTRACT

- The principle of a common EU policy for the return of illegally staying third-country nationals is one with which we sympathise, though it is questionable whether the EU should proceed with this before a common policy governing admissions is in place.
- The current proposal is right to give primacy to voluntary return. Forcible removal is an alternative which should be used only when all opportunities for voluntary return have been exhausted.
- The mandate given to the Commission in the Hague Programme was to provide for common standards for persons to be returned in a humane manner, and with full respect for their human rights and dignity. The proposed Directive could have been an opportunity for raising those standards to the highest currently in force in the Member States. This opportunity has not been taken. The standards proposed are generally a compromise between the best and the worst. There is a danger that this may result in the lowering of standards in some Member States.
- The proposals for judicial supervision of detention and removal are a welcome exception. They set high standards which all Member States should attain.
- Incorporation into the Directive of the Council of Europe Guidelines on Forced Returns would do much to safeguard the position of vulnerable persons, especially children.
- We reiterate our view that the United Kingdom should in general participate fully in immigration measures under Title IV of the Treaty, but we believe that the Government were in this particular case justified in not opting in to the proposed Directive.
- This is not a reason for the Government to be complacent. They should strive to raise United Kingdom standards to the high levels we recommend, and use such influence as they have in the negotiations on the draft to improve the standards it seeks to set.

Illegal Migrants: proposals for a common EU returns policy

CHAPTER 1: INTRODUCTION

Background

1. The return of illegal migrants is a topic never far from the headlines. This is a problem which, to a greater or lesser extent, affects all Member States of the EU. In this report we look at an EU initiative for dealing with it.
2. It is now just over four years since the Commission published its Green Paper on *A Community Return Policy on Illegal Residents*.¹ This followed from the Commission's earlier *Communication on a Common Policy on Illegal Immigration*² which we considered and reported on during 2002.³ We considered the Green Paper in the course of that inquiry, and we sent our comments to the Commission,⁴ broadly supporting the paper's general thrust. The Government's response was somewhat more ambivalent.⁵
3. In our report we stated that we saw considerable scope for adopting a common approach to returns, and emphasised that this should be based on returning illegal immigrants to their countries of origin, rather than moving them round the EU. Our conclusion was that "the Member States have a common interest in securing the removal of illegal immigrants, not just from the country where they happen to be when detected but from the territory of the Union as a whole."⁶ We urged that this approach should be further explored.
4. The Commission's Green Paper was followed on 14 October 2002 by a policy paper.⁷ This Communication was the basis for the Return Action Programme adopted by the Council on 28 November 2002, which called for improved operational cooperation between the Member States and with third countries, and the establishment of common standards to facilitate operational return.
5. Thereafter this project, which at the time was accorded a high degree of priority, seems to have lost any sense of urgency. There was certainly action on other aspects of the return process. A Directive had already been agreed

¹ COM(2002)175 final, 10 April 2002.

² COM(2001)672 final, 15 November 2001.

³ A Common Policy on Illegal Immigration, 37th Report, Session 2001–02, HL Paper 187.

⁴ Letter of 17 July 2002 from Lord Brabazon of Tara to Mr Adrian Fortescue, Director-General, Justice and Home Affairs Directorate-General, European Commission, and to Lord Filkin, Under-Secretary of State, Home Office; published in *Correspondence with Ministers*, 49th Report, Session 2002–03, HL Paper 196, at page 222. Lord Filkin's reply is also at page 222; Mr Fortescue's is at page 231.

⁵ Correspondence with Ministers, 49th Report, Session 2002–03, HL Paper 196, at page 224.

⁶ A Common Policy on Illegal Immigration, 37th Report, Session 2001–02, HL Paper 187, paragraph 92.

⁷ Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents, COM(2002)564 final.

on the mutual recognition of expulsion decisions,⁸ and under the Return Action Programme further measures were agreed on transit assistance for removal by air,⁹ and on the organisation of joint flights.¹⁰ Readmission agreements were also concluded between the EU and a number of countries of origin or third countries from which irregular migrants originally travelled, in particular Hong Kong,¹¹ Macao,¹² Sri Lanka¹³ and Albania,¹⁴ facilitating the identification and return of persons to those countries.¹⁵

6. However there were no developments on the proposal for common procedures on returns between November 2002 and the adoption by the European Council on 4–5 November 2004 of the Hague Programme, a new five-year programme for EU action in justice and home affairs.¹⁶ The Commission, in its quinquennial assessment of the Tampere proposals, had confined itself to saying:

“A stronger fight against trafficking in human beings, and the development of an effective policy on returns and re-admission, will be facilitated by the future Constitutional Treaty.”¹⁷

7. However the Hague Programme itself specifically called for a return and re-admission policy, stating:

“Migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, a compulsory basis. The European Council calls for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity.”¹⁸

⁸ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ 2001 L 149/34.

⁹ Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air, OJ 2003 L 321/26 (transposition deadline 6 December 2005).

¹⁰ Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ 2004 L 261/28.

¹¹ Council Decision 2004/80 of 17 December 2003 concerning the conclusion of the Agreement between the European Community and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorization, OJ 2004 L 17/23.

¹² Council Decision 2004/424 of 21 April 2004 concerning the conclusion of the Agreement between the European Community and the Macao Special Administrative Region of the People’s Republic of China on the readmission of persons residing without authorization, OJ 2004 L 143/97.

¹³ Council Decision concerning the conclusion of the Agreement between the European Community and the Democratic Socialist Republic of Sri Lanka on the readmission of persons residing without authorisation, Council doc.10666/03, 9 July 2003.

¹⁴ Council Decision on the signing of the Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, Council doc.5614/05, 15 February 2005.

¹⁵ As at 14 March 2006 the agreements with Hong Kong and Macao were in force, but not the agreements with Sri Lanka and Albania. Negotiations on an agreement with Russia have been concluded, but the agreement is not yet signed. Negotiations are ongoing with Algeria, China, Morocco, Pakistan, Turkey and Ukraine: supplementary written evidence of Tony McNulty MP, page . See also the reply of Lord Triesman to Q 738.

¹⁶ See our report *The Hague Programme: a five year agenda for EU justice and home affairs*, 10th Report, Session 2004–05, HL Paper 84.

¹⁷ Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations, COM(2004)401 final, 2 June 2004, paragraph 2.4.

¹⁸ Presidency Conclusions (document 14292/04), Annex 1, paragraph 1.6.4.

8. The Council called for Commission proposals which would enable the Council to begin discussions “in early 2005”. In the event, it was not until 1 September 2005 that the Commission submitted the *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*.¹⁹ This is the draft Returns Directive which is the subject of our inquiry.²⁰ We set it out in full in Appendix 5.

The position of the United Kingdom

9. Because the legal basis of the Directive is Article 63(3)(b) of the Treaty establishing the European Community, which falls within Title IV of that Treaty (Visas, asylum, immigration, and other policies related to free movement of persons), the Directive once adopted will not be binding on the United Kingdom unless it opts into it. If it wishes to do so, it must notify the Council within three months of the proposal being presented to the Council, and in that case, but not otherwise, it can participate in the adoption of the Directive.²¹ If it does not at that stage opt in, it is still open to the United Kingdom, once the Directive is adopted, to notify the Council and the Commission that it wishes to accept it and be bound by it.²² There is however no precedent for the United Kingdom having done so in similar situations.
10. The Government had always been doubtful of the value of setting standards in this field, and their first reaction was to list a number of provisions which gave particular cause for concern, and to say that they would “make a decision on [United Kingdom] participation in the directive, based on a careful analysis of the benefits and risks, before the Christmas recess”.²³ On 8 December 2005 they told us that “our initial position is that we are minded not to opt into this Directive”.²⁴ In the event, the Government decided not to opt in,²⁵ and so informed us.²⁶ Subsequently a Home Office witness summarised the position thus: “The Directive as it stands would, in total, be a hindrance to the sort of common action that we would like to see take place and would not facilitate returns.”²⁷ The view of Mr Tony McNulty MP, the Minister of State, was: “I do not think, for our purposes, this Directive written in this form is appropriate to what we seek in terms of those common standards.”²⁸
11. “Adoption” of an instrument includes the negotiations leading to its adoption. It is however not the case that the United Kingdom, by not opting

¹⁹ COM(2005)391 final, document 12125/05. Also published as 12125/05 ADD 1 was an Impact Assessment, and as ADD 2 a Commission staff working document with detailed comments.

²⁰ We refer to this throughout as “the Directive”, although it is of course still only a proposal for a directive.

²¹ Protocol to the Treaty of Amsterdam on the Position of the United Kingdom and Ireland, Articles 1 and 3.

²² Ibid, Article 4. And see the evidence of Susannah Simon, Q84: “It does remain open to us to opt in. Once the negotiations are finished, once the Directive has been adopted, we could opt in after the event. This would be subject to the Commission’s agreement.”

²³ Explanatory memorandum of 26 October 2005, paragraphs 16 and 19.

²⁴ Home Office evidence to the inquiry, p 27.

²⁵ Ireland has also not opted in: Q 526.

²⁶ Letter of 11 January 2006 from Tony McNulty MP, Minister of State, Home Office, to Lord Grenfell.

²⁷ Tom Dodd, Q83.

²⁸ Q 407.

in, will have no say in the forthcoming negotiations on the Directive. The Home Office told us that British officials and ministers will be present during negotiations and will be able to seek to have changes made, though other Member States, and in particular the Commission, are less likely to take account of their views.²⁹ Jonathan Faull, the Director-General of DG Justice, Freedom and Security at the Commission, told us that British representatives were listened to because they were respected, but that “it is of course a great handicap, which everybody will be aware of...that they are not part of the final legislative process”.³⁰ **We hope that changes suggested by the United Kingdom will include those we recommend in this Report, and that the Directive may thereby be improved and so facilitate the establishment of a safe, fair and effective common approach on returns.**

The timetable for negotiations

12. It does not seem that work on this Directive is being given a high priority by the Austrian Presidency,³¹ possibly because the Presidency shares a view we have heard expressed elsewhere that Governments hold widely differing views, so that there is little prospect of early agreement in the Council. Lord Triesman, the Parliamentary Under-Secretary of State at the Foreign and Commonwealth Office, told us that other Member States had even more reservations than the United Kingdom: “I have not a strong sense that the Directive is at the top of anybody’s agenda”.³² But even once the Council has agreed on a common position, the Directive could be adopted only if agreement is reached with the European Parliament under the co-decision procedure.³³ The Parliament has taken the view that money should be spent on the return of third-country nationals only in accordance with common EU standards, and has therefore made the adoption of the proposed European Return Fund, which would run from 2007–13,³⁴ subject to agreement with the Council on the Directive. But it was suggested to us that the positions of the European Parliament and the Member States are so far apart that there is little prospect of any early agreement.³⁵
13. A failure of the Council and the Parliament to reach any agreement would be fatal to the Directive. Our inquiry proceeded however on the assumption that

²⁹ Susannah Simon, Q85; Tony McNulty MP, Minister of State, Home Office, Q417–420.

³⁰ Q 531.

³¹ Q 503. In an address to the Conference of Chairpersons of the Home Affairs Committees of the National Parliaments of the Member States, meeting in Vienna on 10 April 2006, Liese Prokop, the Austrian Federal Minister of the Interior, listed the matters to which the Presidency was giving priority. The Directive was not among them.

³² Q 745.

³³ The procedure set out in EC Treaty Article 251 now applies to Title IV instruments other than those dealing with legal migration, and gives the European Parliament an equal voice with the Council in the adoption of instruments under Title IV. This proposal is the first in the field of immigration to be governed by this procedure.

³⁴ Proposal for a Decision of the European Parliament and Council establishing the European Return Fund for the period 2007–2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ (COM/2005/0123 final).

³⁵ Susannah Simon (Home Office) Q 449; Cristina Castagnoli, Committee on Civil Liberties, Justice and Home Affairs of the European Parliament, (LIBE Committee), Q 621; Mr Manfred Weber MEP, rapporteur of the LIBE Committee, Q770.

negotiations on the text are continuing, and that it may be possible to improve it sufficiently for it ultimately to be acceptable to both institutions.

Conduct of the inquiry

14. This inquiry was undertaken by our Home Affairs Sub-Committee (Sub-Committee F). The membership is shown in Appendix 1. Our Call for Evidence is set out in Appendix 2, and a full list of witnesses in Appendix 3. We are most grateful to all of those who gave us written and oral evidence, not least those whom we heard on our visit to Brussels on 2 and 3 March 2006.
15. We were particularly interested in the conditions under which vulnerable persons, and especially children, are held in detention in this country, and on 7 March we visited the immigration detention centre at Yarl's Wood, near Bedford. A full account of our visit is set out in Appendix 4. We are grateful to our hosts, and to all those who helped us on that visit.
16. We were fortunate to be assisted during our inquiry by Professor Jörg Monar, holder of the Marie Curie Chair of Excellence at the Université Robert Schuman de Strasbourg (currently on leave from the University of Sussex). He has acted for us in previous inquiries, and his help was invaluable.
17. **In view of the significance of the issues raised by the draft Directive, we make this Report to the House for debate.**

CHAPTER 2: THE PRESENT DRAFT OF THE DIRECTIVE

18. Since November 2005 there have been negotiations at Council Working Party level on the text of the draft Directive.³⁶ As we have said,³⁷ the United Kingdom, although it has not opted in, takes part in the negotiations. Ireland is in the same position. A third Member State not bound by the Directive is Denmark, which has no possibility of opting in at any stage.³⁸ Recitals (22) and (23) make clear that the Directive will be part of the Schengen *acquis* within the meaning of the agreements between the EU and Iceland, Norway and Switzerland, and those countries are therefore represented on the Working Party. At the date of this report no changes have been agreed to the text of the Directive, which therefore remains as set out in Appendix 5.

The text of the Directive

19. Article 1 states that the draft Directive “sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.” In outline, the Directive:
- obliges Member States to issue a return decision to those falling within the scope of the Directive, and a removal order where necessary to enforce the obligation to return, subject to granting a period for voluntary departure which cannot exceed four weeks (Articles 6 and 7);
 - allows postponement of removal in specific circumstances linked to the situation of the individual concerned, such as personal and family reasons, and provides for exceptions to removal in circumstances linked to the physical or mental health of the individual, or when removal cannot be enforced for practical reasons (for instance for lack of appropriate transport facilities), or when minors are involved (Article 8);
 - obliges Member States to issue an EU-wide “re-entry ban” of up to five years, or longer in cases of a serious threat to public policy or public security (Article 9);
 - requires any coercion used in forcible removals to be proportionate and in accordance with fundamental rights (Article 10);
 - governs the form and content of return decisions and removal orders (Article 11);
 - provides for a right to an effective judicial remedy against return decisions and removal orders; it is left to Member States to decide whether the remedy should have automatic suspensive effect (Article 12);
 - provides for a minimum level of support for those whose removal has been postponed, or who cannot be removed (Article 13);

³⁶ As at 2 March there had been four sessions of the working party: Q490.

³⁷ Paragraphs 10 and 11.

³⁸ Under the Protocol to the Treaty of Amsterdam on the Position of Denmark, Articles 1 and 2, Denmark does not take part in, and is not bound by, measures adopted pursuant to Title IV of the Treaty establishing the European Community.

- introduces a maximum time limit of six months for the use of temporary custody, and provides for review by a court or tribunal of the reasons for detention at not more than monthly intervals (Article 14); and
- requires those held in detention to be treated in a humane and dignified manner, and not in prison accommodation, special consideration being given to children and other vulnerable persons (Article 15).

The return decision, its form and content, and any detention involved, are matters considered in Chapter 3. Chapter 4 deals with judicial remedies, and Chapter 5 with the re-entry ban.

20. We did not specifically call for evidence on Article 16, which governs the rules applicable when a third-country national subject to a removal order or return decision in one Member State is apprehended in another Member State, nor have we considered this provision.

Scope

21. The question which immediately arises is the categories of persons to which the Directive applies. They are described as “illegally staying third-country nationals”, and the expressions “third-country national” and “illegal stay” are defined in Article 3(a) and (b). We have referred before to the pejorative use of the word “illegal” in this context,³⁹ with its imputation of criminality. The expression probably does not immediately conjure up in most people’s minds a picture of a gap year student who has overstayed his conditions of entry, yet such British students are one of the largest groups of “illegally staying third-country nationals” in Australia. We note that the French text refers to those “en séjour irrégulier”, and the Joint Council for the Welfare of Immigrants (JCWI) urged that the term “irregular migration” should be used,⁴⁰ a term which the European Economic and Social Committee also prefer.⁴¹ On the other hand, “illegal immigrant” is a commonly used English expression, and Article 63(3)(b) of the Treaty establishing the European Community, the legal base of the Directive, refers to “repatriation of illegal residents”. **We emphasise that this Directive is dealing with widely differing categories of persons, some of whom will have entered the EU legally and resided there legally.**
22. This is not merely a question of semantics, or of verbal infelicity. Professor Elspeth Guild pointed out to us the difficulties there would be in implementing this Directive so long as there was no “definition independent of the vagaries of national law, which can determine EU status of regularity and irregularity”.⁴² The JCWI took the same view: “There has to be much more clarity on the definition of what constitutes an ‘illegal’ third country national”.⁴³ UNHCR thought the definition needed to make clear that asylum-seekers on whose application a final decision had yet to be issued at first instance or on appeal were not included.⁴⁴ **The definition must in any**

³⁹ *A Common Policy on Illegal Immigration*, 37th Report, Session 2001–02, HL Paper 187, paragraph 18.

⁴⁰ Written evidence, p 220.

⁴¹ Q 701.

⁴² Q384.

⁴³ Written evidence, p 221.

⁴⁴ Written evidence, p 55.

case clarify the position of those with pending appeals, and those whose rights of appeal have not been exhausted.

The need for a Directive

23. There is as yet no EU instrument governing the conditions of entry of third-country nationals into the Member States. This is still a matter for the law of the individual Member States. It may seem anomalous to be negotiating a Directive on a common returns policy when there is no instrument governing a common arrivals policy, nor any immediate prospect of one. The Refugee Council were disappointed that the Member States had not “first addressed the serious deficiencies in their asylum procedures before going on to look at returns”.⁴⁵ This was a view also put to us by the JCWI,⁴⁶ and we understand that it is shared by the European United Left Group and the Political Group of the Greens in the European Parliament.⁴⁷ Professor Elspeth Guild thought there was some merit in the argument that one should start at the beginning.⁴⁸
24. The Commission’s view is that a common return policy is “an integral and crucial part of the fight against illegal immigration”⁴⁹ and “an essential component of a well managed and credible policy on migration”.⁵⁰ The Commission was in any event required by the Hague Programme to produce a policy on the establishment of common standards for returns. It did not however follow that this should necessarily take the form of a Directive. Other options considered by the Commission included the adoption of a non-binding legal instrument, such as a Recommendation, or full harmonisation by the adoption of a Regulation. The first was rejected precisely because it would not have been legally binding, the second because it would have been too rigid and inflexible.⁵¹
25. Some of our witnesses have questioned whether there is any need for or advantage in an EU initiative for returns. MigrationWatch UK believe that “these are largely domestic matters better handled on a national basis”, and “purely a matter of internal law and order”.⁵² In their written evidence they said that “the Commission document reeks of mission creep”.⁵³ Other witnesses, like Mr Illka Laitinen, the director of FRONTEX,⁵⁴ simply believe that for someone dealing with the practicalities of removals the Directive is of limited value.⁵⁵ Mr Manfred Weber MEP, the rapporteur of the LIBE Committee,⁵⁶ told us that in many countries returns were still seen as an

⁴⁵ Q195

⁴⁶ Written evidence, p 220.

⁴⁷ Q 651.

⁴⁸ Q 381.

⁴⁹ Communication of 15 November 2001 on a Common Policy on Illegal Immigration.

⁵⁰ COM(2005)391 final, page 3.

⁵¹ COM(2005)391 final, Annex, Impact Assessment, section 3.

⁵² QQ49, 51.

⁵³ Paragraph 4, p 17.

⁵⁴ European Agency for the Management of the Operational Cooperation at the External Borders of the Member States of the European Union (established by Council Regulation (EC) 2007/2004 of 26 October 2004, OJ L 349/1 of 25 November 2004).

⁵⁵ Q 614.

⁵⁶ The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament.

internal matter, and there was a lot of fear about EU agreements in this area.⁵⁷

Subsidiarity

26. A further question has also been raised: whether the matters covered by the Directive not only could with advantage have been left to the Member States for policy and practical reasons, but should for reasons of subsidiarity not have been the subject of a Directive. It has to be acknowledged that regulating this matter at EU level will not automatically lead to more advantageous results than those obtained at national level, where Member States have over very long periods of time developed mechanisms and rules which are often well adapted to their particular situations and needs.
27. However there can be no doubt that through the Treaty of Amsterdam the EU has acquired competence to act in this field, and that through paragraph 1.6.4 of the Hague Programme the Council has given a political mandate to the Commission to propose a Directive on the issues concerned. One may have different views as to whether this is justified in principle, but the political and legal decision not to leave this to the Member States has clearly been taken, and taken with the full consent of the Government, although they have—in the case of the proposed Directive—made use of the United Kingdom’s right not to opt in to measures in this field.
28. As far as the more specific question of subsidiarity is concerned, it is the view of the Commission that the objectives of the Directive, in its current form, could not be achieved by the Member States alone, without Community rules. The re-entry ban is the most obvious example of this.⁵⁸ No Member State has argued that there is a subsidiarity problem,⁵⁹ and the Home Office also takes this view.⁶⁰ It seems difficult not to agree that, in accordance with the principle of subsidiarity as formulated in Article 5 TEC, the objectives of the proposed Directive are likely not to be sufficiently achieved by the Member States individually, and that common rules are more likely to do so. We regret however that the proposed Directive fails in many respects to set standards for return procedures at EU level which are significantly higher than current average standards at national level. In this respect at least there is some doubt as to whether the Directive actually passes the subsidiarity test for EU measures by achieving better results than national measures.

Views on the current draft

29. The Commission witnesses explained to us more than once that there were wide differences between the national laws and practices of the Member States on the matters covered by the Directive, and that the proposal was a compromise which attempted to steer a middle course between these extremes.⁶¹ They “expect...the majority opinion in the Council to be that [they] are erring on the side of protection, but expect the European

⁵⁷ Q 762.

⁵⁸ COM(2005)391, Explanatory Memorandum, page 5, and Q 520.

⁵⁹ Q 517.

⁶⁰ Explanatory memorandum, paragraph 9, and the evidence of Mr Tony McNulty MP, Minister of State, Home Office, Q406.

⁶¹ QQ 505, 521, 547.

Parliament, or at least the Civil Liberties Committee...to say the contrary”.⁶² Some of our witnesses supported particular provisions of the Directive,⁶³ but not a single one of the witnesses who gave evidence to us, written or oral, favoured adoption of a Directive in the form of the current draft. Usually the reason given was that the draft did not do enough to protect the rights of those to be returned.⁶⁴ We understand that this is the view of a majority of members of the European Parliament, and is likely also to be the view of the LIBE Committee when it reports.⁶⁵ The Government however believe that existing United Kingdom laws are adequate to protect the rights of individuals, and that the Directive would limit the Government’s freedom of action. In this they are not alone; other Member States too believe that the Directive is too rights orientated.⁶⁶ **The Commission themselves, by attempting a compromise which would please all, appear to have satisfied none.**

30. As will be seen from the following chapters, we too believe that there must be “an effective removal and repatriation policy”, but we do not believe that the current draft sufficiently provides “for persons to be returned in a humane manner and with full respect for their human rights and dignity”.⁶⁷ We recognise therefore that our recommendations will be urging the Government to adopt, both in their negotiating stance on the Directive and in domestic law (whether or not complying with provisions of the Directive), a position some distance removed from the one they currently occupy. We hope nevertheless that our arguments may persuade them to think again.

⁶² Q 491.

⁶³ For example, the Children’s Commissioner supported the provisions of Article 5 on the best interests of the child: Q 248.

⁶⁴ A conspicuous exception is MigrationWatch UK, which takes the opposite view.

⁶⁵ Q 628.

⁶⁶ Tom Dodd (Home Office) told us that a number of Member States would have liked, like the United Kingdom, to be able to opt out of the Directive (Q 94).

⁶⁷ The language of the Hague Programme: see paragraph 7 above.

CHAPTER 3: RETURN AND REMOVAL

31. The Directive is built around the mandatory return of illegally staying third-country nationals. The return can take the form of voluntary return, perhaps with encouragement from the State, or forcible removal by the State. In this chapter we consider first the countries to which individuals are repatriated. We then look at voluntary return, and at removal. Removal frequently involves detention pending removal, and we examine the periods for which, the places in which, and the conditions under which, persons in detention are held. Lastly we look at the position of those who, though subject to a removal order, are for whatever reason not in fact removed.

Return where?

32. Where a third-country national is staying illegally in the territory of a Member State, Article 6 of the Directive requires that State to issue a return decision, that is “an administrative or judicial decision or act, stating or declaring the stay of [the] third-country national to be illegal and imposing an obligation to return”.⁶⁸ Article 3(c) defines “return” as “the process of going back to one’s country of origin, transit or another third country, whether voluntary or enforced”. There is however no requirement that the return decision should identify the country of origin, country of transit, or third country to which the individual is directed to return.
33. In the case of voluntary return, the destination of the individual is of no great concern to the authorities of the Member State. So long as the individual leaves that Member State, and does not go to another Member State, the obligation imposed by the return decision will be satisfied.
34. Matters are altogether different in the case of forcible removal, since it will then be for the State to determine the country to which the individual will be sent. Sometimes, as in the case of young children born in the Member State, the notion of ‘return’ is almost meaningless, since the child may never have known another country, or indeed another language. Sometimes there will be no doubt about the country to which the return should be made, but every doubt as to whether an individual can safely be returned to that country without risk of ill-treatment, torture or worse. Article 6(4) of the Directive forbids the issue of a return decision in a number of cases, prominent among which are cases where return to a particular country would be in breach of the right to non-refoulement,⁶⁹ or other fundamental rights arising in particular from the ECHR. Member States therefore have to decide which countries can be regarded as “safe” countries for returns.
35. It is only to be expected that organisations acting on behalf of immigrants and asylum-seekers have different views from Member States as to which countries are “safe”. It is more surprising that there are differences between the Member States themselves. The United Kingdom starts from the proposition that no country is intrinsically unsafe, and is for example

⁶⁸ The definition in Article 3(d).

⁶⁹ This expression, used in the English as well as the French text of the Directive, is derived from Article 33(1) of the 1951 Geneva Convention on the Status of Refugees: “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.”

- prepared to enforce removals to Iraq. The Netherlands has recently followed this example. Other European countries strongly disagree that Iraq is a safe country for return; Sweden for example grants status to Iraqis who seek protection.⁷⁰
36. More frequently it is not so much the safety of the country of origin that is an obstacle to return as the difficulty of ascertaining the identity of the third-country nationals, and the problems experienced in obtaining travel documentation from the countries concerned. A few bilateral readmission agreements at Member State level, and an even smaller number at EU level, have been negotiated with third countries.⁷¹ More are in the process of negotiation,⁷² and the Commission regards them as essential to the working of the Directive.⁷³ Ultimately they facilitate the identification and re-documentation of those whose passports have expired or been lost or destroyed, which is a cause of substantial delay and hence lengthened detention. Attempts have also been made to increase the use of the EU travel letter⁷⁴ as a substitute for official passports. Mr Fabian Lutz from the Commission told us that the problem is that “the EU cannot create an obligation on third countries to recognise these documents.”⁷⁵ **We believe that more effort should be made by the EU in the negotiation of readmission agreements, and in promoting the use of EU travel letters as a substitute for official passports.**
37. In the particular case of third-country nationals who are a threat to security, some Member States negotiate bilateral agreements with the States concerned to ensure that their nationals can safely be returned. The United Kingdom has negotiated Memoranda of Understanding (MoUs) with Jordan, Lebanon and Libya, and is negotiating further MoUs with other countries. These agreements seek assurances from the country of origin as to the treatment on their return of named individuals who are believed to threaten the security of the United Kingdom. The Minister of State at the Home Office, Mr Tony McNulty MP, told us that the United Kingdom was “at the cutting edge” of such agreements.⁷⁶ Whether the agreements, and the bodies supposed to monitor their working, are adequate to secure the safety and protection of persons returned to those countries is a matter which has been exercising the Committee outside the context of this inquiry, and which we have been pursuing with ministers.⁷⁷
38. Apart from assurances specific to individual cases, such as those dealt with by MoUs, the general question whether a particular third country is safe for returns should be assessed as an objective matter. Even if a country is

⁷⁰ Evidence of Ms Juma for the Refugee Council, Q198.

⁷¹ *A Common Policy on Illegal Immigration*, 37th Report, Session 2001–02, HL Paper 187, paragraphs 93–94.

⁷² See the details in paragraph 5 above.

⁷³ Address by Jean-Louis de Brouwer, Director for Immigration, Asylum and Borders, DG JLS, to the Conference of Chairpersons of the Home Affairs Committees of the National Parliaments of the Member States, meeting in Vienna on 10 April 2006.

⁷⁴ EU travel letters are standard travel documents used for the removal of third-country nationals. They were introduced by a Council Recommendation of 30 November 1994.

⁷⁵ Q513.

⁷⁶ Q414.

⁷⁷ Letters from Lord Grenfell to Mr McNulty of 10 November 2005, and to Mr Douglas Alexander MP, the Minister for Europe, of 2 February 2006 can be found on the website: http://www.parliament.uk/parliamentary_committees/lords_s_comm_f/cwm_f.cfm

objectively assessed as safe, it may still be unsafe for some individuals or categories of individuals; the merits of each case need to be carefully assessed. In the United Kingdom for instance Ghana and Nigeria are treated as safe for men but not women;⁷⁸ and it is arguable that Jamaica is unsafe for the return of gays, and Afghanistan unsafe for apostate Muslims. If in a specific case a country is safe, it should be safe for returns from all Member States—including the United Kingdom, despite its not having opted in. To achieve this, information on conditions in countries of origin should be shared and assessed, and conclusions as to the safety of individual countries reached, on a common basis.⁷⁹ It would still be for States to decide on individual cases, but at least decisions would be made on the basis of the same information. Mr McNulty made it clear to us that there was at present no discussion of the development of a Europe-wide country of origin information service, but that there was “at the very least an enthusiasm to start to discuss all these areas”.⁸⁰ We believe that this enthusiasm should be translated into action, and we were glad to hear from Liese Prokop, the Austrian Federal Minister of the Interior,⁸¹ that the Austrian Presidency shares our view of the importance of establishing a common list of safe countries of origin.

39. It was suggested to us by the Refugee Council that the information should be prepared by an independent body to agreed criteria.⁸² In his evidence to us Lord Triesman, though enthusiastic about sharing country of origin information, thought that this would add an unnecessary additional layer of bureaucracy.⁸³ We note however that the Commission has already proposed the setting up of a European Support Office which, among other things, would collate all national country of origin information on a single website in accordance with agreed guidelines.⁸⁴ The Home Office supports the principle of practical cooperation, but is less supportive of moves to harmonise the collation of information unless this can be done without compromising standards, and without undue cost.⁸⁵
40. **There must be close cooperation between Member States in determining the conditions prevailing in countries to which illegal residents are to be returned. The Government should support the setting up a central country of origin information service for processing information about conditions in those countries, and monitoring changes in those conditions. The Commission proposal is a useful starting point.**

⁷⁸ See the United Kingdom list of designated countries set out in section 94(4) of the Nationality, Immigration and Asylum Act 2002, as amended from time to time. See further paragraph 91, post.

⁷⁹ In our report *Handling EU asylum claims: new approaches examined*, 11th Report, Session 2003–04, HL Paper 74, paragraph 117, we recommended that an independent documentation centre should be managed on an EU, if not UNHCR, basis, to ensure that decisions taken throughout the EU were based on the same country information.

⁸⁰ QQ 415–416

⁸¹ In an address to the Conference of Chairpersons of the Home Affairs Committees of the National Parliaments of the Member States, meeting in Vienna on 10 April 2006.

⁸² Q 205.

⁸³ Q 753.

⁸⁴ Communication from the Commission to the Council and the European Parliament on strengthened practical cooperation: *New structures, new approaches: improving the quality of decision making in the common European asylum system*, COM(2006)67 final, 17 February 2006.

⁸⁵ Supplementary written evidence of Tony McNulty MP, p 139 .

Voluntary return

41. Voluntary return is more dignified and more humane than enforced removal. This hardly needs elaboration. Voluntary return is also quicker, easier, and more cost-effective. These are aspects we now consider.
42. Though in the great majority of cases voluntary return takes less time than enforced return, the time needed varies greatly. At one extreme there will be individuals with no strong ties to this country and with all the necessary documentation who want to leave as soon as they are able, and can often do so in a matter of days. At the other extreme are those who have been in this country for some time, who may have jobs, mortgages, children at school, and other links which will have to be severed. They will need time to wind up their affairs. Others, whether or not they have links with this country, will find it difficult to get the appropriate documentation to return to their country of origin. It is therefore a matter of concern to us that Article 6(2), which requires the return decision to set “an appropriate period for voluntary return”, sets a four week limit on that period. Two questions arise: should there be any fixed limit to what is “an appropriate period”; and if so, is four weeks the right cut-off point.
43. The Government are firmly opposed to any fixed limit. Mr McNulty told us that, whether a person sought to go on a voluntary basis or subsequently on an enforced basis, there was no compelling reason why that should be within a four week period. “It smacks of arbitrariness and flies in the face of practicalities and flexibilities.”⁸⁶ The International Organization for Migration (IOM), the inter-governmental organisation which implements on behalf of governments programmes for voluntary returns, agreed that a limit—any limit—was inappropriate. They pointed out that, after the initial application is made to them, the return most commonly took “several weeks” to arrange, and longer where they needed to go to embassies or high commissions to get documents. In those cases, it could take more than a month just to get the documents.⁸⁷
44. We have no doubt that persons who have indicated a wish to return voluntarily to their country of origin, and are making all reasonable efforts to do so, should not be penalised because their affairs take an unusually long time to sort out, or their documentation is delayed through no fault of their own. The setting of an arbitrary time limit will result in persons who are unable to return within that time being subject to forcible removal, when a little extra time might have allowed them to return without coercion. What is an “appropriate period” should depend on the individual case. In the case of someone who would have been able to leave in a matter of days, it may be clear after a fortnight that there is no intention of going voluntarily. In other cases, it may be appropriate to allow five or six weeks, or more. If any time limit is to be imposed, it should be considerably longer than four weeks.⁸⁸ But we believe that the better solution is to have no fixed upper limit.
45. **We agree with the requirement of Article 6(2) that a return decision should “provide for an appropriate period for voluntary departure”. We do not however believe that there should be a fixed upper limit**

⁸⁶ Q 424.

⁸⁷ Evidence of Mr Jan de Wilde, QQ 349, 350.

⁸⁸ In the United Kingdom voluntary return remains an option until all rights of appeal have been exhausted.

(whether of four weeks, or any longer period). In some cases a few days may be sufficient to prepare for return. In others, considerably longer than four weeks will be necessary. It should be for the authorities to determine, on a case by case basis, what is the appropriate period.

46. The IOM told us that it was odd—almost counter-intuitive—that among the top countries of voluntary return were countries such as Iraq, Zimbabwe, Sri Lanka and Iran. The reasons were usually personal.⁸⁹ However, it was also put to us that in many such cases people apply for ‘voluntary’ return as a way out of forced destitution.⁹⁰ But whatever the country and whatever the reason, the return process will be eased if assistance is provided for reintegration, training, education and self-employment. This is one of the tasks of the IOM, which for returns from the United Kingdom is assisting returnees after their arrival in the country of origin.⁹¹ Reintegration assistance is provided on an individual basis, with specific advice in business planning for the large proportion who wish to go into small businesses.⁹² The Government announced on 12 January a scheme offering failed asylum seekers voluntarily leaving the country between 1 January and 30 June a further £2,000 (over and above the £1,000 in reintegration assistance), to be taken either as further reintegration assistance, or in cash. The Government thought this might increase the number of returns predicted for that period from 1,950 to over 3,000. Mr de Wilde told us on 8 February that the number of phone calls received by the IOM had been “overwhelming”.⁹³
47. We do not suggest that the Directive should attempt to harmonise national voluntary return programmes, or the practice of offering incentives, or their amount; this must be a matter for the individual Member States. We do however support the Council in its call for the exchange of best practice between Member States, the promotion and implementation of voluntary return programmes, and the strengthening of cooperation between Member States, third countries and international organisations.⁹⁴
48. The National Audit Office calculated that the cost of an enforced removal was between £11,000 and £12,000, as against £1,700 for voluntary return.⁹⁵ Even with the additional £2,000, cost-effectiveness is still a strong argument for the United Kingdom, and the Directive, to promote voluntary return.

Enforced removal

49. However great the advantages of voluntary return, both for the individual and the State, provision still has to be made for those who choose for whatever reason not to avail themselves of this option. The only alternative contemplated by the Directive is enforced removal.
50. Because under the Directive it is mandatory for Member States to issue return decisions, in the absence of any voluntary return enforced removal

⁸⁹ Q 363.

⁹⁰ Written evidence of Refugee Council and Amnesty International, paragraph 3.6.1, page

⁹¹ Q 336.

⁹² Q 348.

⁹³ Q 373.

⁹⁴ Justice and Home Affairs Council, 12 October 2005; document 12645/05.

⁹⁵ Q 132.

also becomes mandatory. There are however a number of exceptions listed in paragraphs (4) to (8) of Article 6: fundamental rights obligations such as non-refoulement; compassionate or humanitarian grounds; the holding of a residence permit issued by another Member State; and a pending application for the grant or renewal of a residence permit. There are also provisions for the postponement of execution of a removal order on grounds of physical or mental incapacity, technical reasons such as lack of appropriate transport, or doubts whether an unaccompanied minor will be met by a qualified person. The Commission view is that it is precisely because so many matters are left to the discretion of Member States that a majority of them are able to support the principle of a mandatory return decision.⁹⁶

51. There is here a basic contradiction. The purpose of the Directive is to set common standards; that is its title, and Article 1 so provides. But we doubt whether there will be uniform interpretation, or uniform application, by 25 Member States, or even 22,⁹⁷ of a prohibition on issuing a return decision where there is a risk of breaching fundamental rights. There will certainly not be a uniform application of the right to grant a residence permit on compassionate or humanitarian grounds, which by definition is a matter left to the discretion of individual Member States.
52. The Immigration Law Practitioners' Association (ILPA) gave us examples of cases where it might well be in the interests of this country not to expel illegal residents. The Secretary of State might tolerate illegal stayers while awaiting a decision of the Appellate Committee of the House of Lords on how to deal with a particular group of people; it might be expedient for the Secretary of State not to remove individuals (for example Zimbabweans) though without conceding that their removal would breach human rights; or there might be borderline cases where it was more costly and burdensome for the State to carry out a removal decision rather than to leave things be.⁹⁸ All those seem to us to be examples of cases where it is right for each Member State to retain a discretion additional to those already provided for. Some at least of the other Member States may take the same view, and may wish to see Article 6 amended accordingly. If this happens, that Article will have changed from an absolute obligation to issue a return decision, and enforce it by compulsory removal, into a provision requiring those Member States which at present readily remove illegal residents to apply exceptions which they would not apply now.

Detention

53. Whatever form Article 6 ultimately takes, forcible removal will continue to be the ultimate sanction. At the time of removal the State must have immediate and unfettered access to the person concerned. Often this means that the person must be detained by administrative order—or be in “temporary custody”, in the language of Articles 14 and 15. We turn now to consider the periods and conditions of detention envisaged by those Articles, and we compare them with the current position in the United Kingdom and other countries. Judicial supervision we leave to the following chapter.

⁹⁶ Q 541.

⁹⁷ Assuming the absence of the United Kingdom, Ireland and Denmark: see paragraph 18 above.

⁹⁸ Q 8.

Period of detention

54. Article 14 provides that where there is a serious risk of absconding, and where other measures such as regular reporting, financial guarantees, handing over of documents or staying in a designated place, are inadequate, Member States are obliged to keep under temporary custody third-country nationals subject to a removal order. This detention is subject to regular judicial supervision, but subject to that, it can last for a maximum of six months. The Directive provides for no possibility of extension, even subject to judicial supervision. This is one of the most contentious provisions of the Directive, and not just for the United Kingdom.
55. The laws of the Member States on periods of detention at present vary widely. Until 2003 the upper limit in France was just 12 days, but this was then increased to 32 days.⁹⁹ This compares with an upper limit of 40 days in Spain, 60 days in Italy, 3 months in Portugal, 6 months in Austria, the Czech Republic, the Slovak Republic and Slovenia, 8 months in Belgium, 1 year in Poland, Hungary and Lithuania, 18 months in Germany and 20 months in Latvia. There is no limit in the United Kingdom, Denmark, Estonia, Finland, Greece, Ireland, the Netherlands or Sweden.¹⁰⁰ In its Green Paper the Commission simply asked for views on this. The United Kingdom, in its response of 31 July 2002, argued against any fixed time limit. The European Economic and Social Committee (EESC) suggested 30 days.¹⁰¹ In its White Paper the Commission acknowledged that there should be a time limit, without however suggesting what it should be. It was only when the draft Directive was published that the time limit of six months was first proposed. This was “a political decision taken at Commission level”, and believed to be “a reasonable basis for discussion”.¹⁰²
56. It is unfortunate that the Commission, in proposing an upper limit, should have picked a figure which is above the current limit in a number of Member States. This surely would have been an appropriate opportunity for it to enquire why there is such a disparity in current maximum times of detention. Presumably all Member States face similar obstacles in organising the return of third-country nationals. Why then is it possible for some of those States to operate a successful policy with a maximum period of detention lower than 6 months—in some cases, much lower? An earlier examination of this problem might have resulted in a common standard being proposed which brought all countries up to the level of the best. It is not yet too late for this. We urge the Commission to undertake such an inquiry.
57. For the present, however, Article 14(4) proposes a six month limit. Inevitably, those States which have high time limits will feel that their laws are to some extent vindicated, and will be reluctant to compromise. Equally inevitably, for those States which at present have lower limits, any compromise will represent a considerable increase in those limits. Finally if, as seems quite possible, no agreement is reached on the Directive, the fact

⁹⁹ The initial period set by the Préfet is limited to two days. A judge can authorise two extensions of 15 days each. Detention is on average for 11 days, and the maximum of 32 days is seldom reached. Anyone not removed and still in detention at the end of that time must be released. France has no particular surveillance methods, and so relies on readmission agreements and cooperation with third countries.

¹⁰⁰ As at January 2004. These figures from the IOM were given to us by the Commission, QQ 506, 507.

¹⁰¹ Opinion on the Green Paper on a Community return policy on illegal residents, 18–19 September 2002, CES 1019/2002, paragraph 5.3.

¹⁰² QQ 545, 547.

that a six month limit has been proposed will itself incline States to believe that it would not be wrong for them to raise their limits.¹⁰³ This was accepted by a Commission witness who told us: “As we consider six months would be appropriate we do not see a problem if some Member States even without the Directive align themselves to these standards.”¹⁰⁴ The EESC may have been unrealistic in suggesting a limit lower than that of any Member State except (at that time) France, but the Commission should have suggested a lower limit than six months as a basis for discussion.

58. Our criticism of the Commission position may sound strange, coming as it does from the Parliament of a country which has no limit at all, but it is in line with the views of many of our witnesses. ILPA pointed out that six months of detention was equivalent to a year’s prison sentence, and argued that in the vast majority of cases it should be possible to remove migrants and asylum seekers within 60 days.¹⁰⁵ Bail for Immigration Detainees (BID) argued that a six month upper limit “would normalise detention of this length”, and urged us to recommend a limit of 28 days “which should be plenty of time for removal to take place”.¹⁰⁶ Church Pressure Groups¹⁰⁷ were among witnesses who argued that six months was too long, but without suggesting a specific shorter maximum period.¹⁰⁸
59. The Home Office, as might be expected, held the opposite view. In their written evidence they stated that detention for over six months was only in “exceptional cases”; but the Quarterly Asylum Statistics for July to September 2005 show that, out of 1,695 people held in detention on 24 September, 140 had then been held for more than 6 months, and 55 for more than 12 months.¹⁰⁹ The Home Office added that knowledge of an upper limit, whether of six months or some other period, “would in many cases inevitably provide applicants or those who have exhausted their appeal rights with further motivation to frustrate and delay the immigration and asylum processes, refuse to cooperate with identification procedures and documentation prior to return, and do all that they can to frustrate any actual removal attempts. A fixed upper limit on length of detention would...at the very least significantly reduce the possibilities of successful removal in many cases.”¹¹⁰ The oral evidence of officials was to the same effect.¹¹¹ Lord Triesman expressed a similar view: “Where you have an explicit limit...and that is known to people, they tend not to cooperate for that period. The documents vanish, their capacity to speak the language

¹⁰³ A draft Resolution tabled on 12 April 2006 in the French Assemblée Nationale by the Rapporteur of the Delegation for the European Union “questions the opportunity of introducing in the directive a maximum six month period for remand in custody”, and states in its explanatory memorandum: “Admittedly, the directive would not impose a lengthening of the French period to six months, but the adoption of such a period in a European text would tend to make it a European standard in this field.” (Official translation)

¹⁰⁴ Q 578.

¹⁰⁵ QQ 35, 36.

¹⁰⁶ Written evidence, paragraph 17, p 101.

¹⁰⁷ Caritas Europa, Churches’ Commission for Migrants in Europe, Commission of the Bishops’ Conferences of the European Community, International Catholic Migration Commission, Jesuit Refugee Service Europe, and Quaker Council for European Affairs.

¹⁰⁸ Written evidence, paragraph 24, p 209.

¹⁰⁹ Written evidence of the Commission for Racial Equality, page [9]; Home Office Asylum Statistics, 3rd Quarter 2005.

¹¹⁰ Written evidence, paragraph 17, p 29.

¹¹¹ Q 103.

vanishes, they turn out to be coming from a different country from the country they first said they came from...”¹¹² Somewhat to our surprise, Mr Manfred Weber MEP wondered whether there was in fact a need for a maximum limit, and saw no need to harmonise the maximum period of detention in Europe. He thought each country should be able to do as it pleased.¹¹³

60. **In the EU, deprivation of liberty is a State sanction normally imposed only on those who have been accused or convicted of a crime. Using it for the wholly different purpose of detaining illegal immigrants is a serious matter. Where detention is essential, it must be for as short a period as possible, not only for the sake of the individual concerned but also to lessen the burden on the taxpayer.**
61. How that is best achieved is more debatable. The key is effective judicial supervision, a matter we consider in the next chapter. With such supervision, no detention will continue, whether for six weeks or six months, unless a court or tribunal is satisfied that it is essential and that there is no alternative. Once that supervision is in place, it will make no difference to the individual whether he is governed by a provision imposing no limit to his detention, but with regular judicial supervision, or by a provision imposing a six month limit which is extendable by judicial authority in exceptional cases. **We do however accept that an absolute and non-extendable maximum (whether of six months, as proposed by Article 14(4), or any other period) will give Member States insufficient flexibility to deal with exceptional cases.**

Statistics

62. There is a remarkable paucity of detailed statistics on periods of detention—or at least of publicly available statistics. As Anne Owers, the Chief Inspector of Prisons, explained: “...what you can get...is a snapshot of the number of people detained at one moment in time. The last snapshot that was provided by the Immigration and Nationality Directorate was that there were 2200 people in detention all together, of whom I think around 60 were children...what crucially we do not have is two other bits of information, which is how many people over a year, how many children over a year, were detained in total, and for what kind of lengths of time they were detained.”¹¹⁴ Professor Aynsley-Green, the Children’s Commissioner for England and Wales, agreed, and his senior legal adviser, Professor Carolyn Hamilton, told us: “...they can tell you at any one time how many children are there on a particular day. What they cannot tell you is: ‘How long has each child been there?’”¹¹⁵ Professor Aynsley-Green asked for “regular information on children and young people; particularly, how many are in the whole process and the breakdown by ages, country of origin and family structure. We want to know how long they have been here and where they have been detained. We want to know more about those whose applications have failed and those who have experienced a frustrated removal process.”¹¹⁶ We confirmed from

¹¹² Q 751.

¹¹³ Q 763.

¹¹⁴ Q 249.

¹¹⁵ Q 262.

¹¹⁶ Q 250

our conversations with staff during our visit to the Yarl's Wood detention centre¹¹⁷ that such figures are not routinely kept, but we formed the view that it would be neither difficult nor expensive to collate them.

63. We find it difficult to believe that the Home Office do not have such figures available for their own purposes. It would be hard otherwise for them to tell us that detention in excess of six months was only in "exceptional cases". If the relevant figures are indeed not collated and statistics are not kept, this is something which should be put right immediately; if they are kept for the Home Office's own purposes, they should be made public. No policy can be formulated unless the basic facts are available. Professor Aynsley-Green told us that he had put this view to the Home Office, and was awaiting their response.¹¹⁸
64. The provisions of the Directive on maximum periods of detention would not be workable unless national authorities kept the relevant figures. Member States at present collect and collate them on different bases, so that they are not directly comparable. In parallel to this Directive, the Commission has proposed a Regulation on Community statistics on migration and international protection.¹¹⁹ This would include non-Schengen countries like the United Kingdom. It is also subject to co-decision, and is currently being discussed in the Council and Parliament. It is hoped that it would come into force in time for the figures for 2010 to be available.¹²⁰
65. We agree with those of our witnesses who have complained about the remarkable lack of statistics on those in detention. Figures should be readily available which will show how many persons are detained at any one time, and what numbers have been detained for different lengths of time. Separate statistics should be kept in the case of children. Figures on the frequency of absconding among families with children who are receiving support would help to show whether there is a case for taking them into detention at all. **The Directive provides a good opportunity to make the systematic collection of comparable data on detention a mandatory EU-wide requirement.**

Conditions of detention

66. Once it is accepted that States have a right to detain illegally staying third-country nationals for checks on their identity or nationality, or pending voluntary return or enforced removal, the manner in which they are taken into detention and the conditions under which they are held become all-important. On our visit to Yarl's Wood we heard anecdotal evidence of people being taken into detention in the middle of the night. This confirms what the Chief Inspector of Prisons told us in her written evidence, where she referred to detention taking place at home in the early hours, at school, or at an immigration reporting centre; if not detained at home, children could be detained with only the clothes they stood up in.¹²¹ In a report published last month she highlighted the case of a woman who had been left at a Leeds police station from the morning of 4 October 2005 until midnight

¹¹⁷ A report of this visit is at Appendix 4

¹¹⁸ Q 251. This evidence was given on 1 February 2006.

¹¹⁹ COM(2005)375 final.

¹²⁰ QQ 554, 555.

¹²¹ Paragraph 10, p 84.

the following day with no change of clothing, no shower, no exercise and no telephone access; she was subsequently found to be 16–20 weeks pregnant.¹²² We heard of children taken into detention “literally days before sitting GCSE exams”.¹²³ We have seen correspondence about a mother who was taken into detention without warning and separated from her six-month old baby, whom she was breast-feeding.¹²⁴

67. Article 15(1) of the Directive requires Member States to ensure that “third-country nationals under temporary custody are treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law”. However it says nothing about the manner in which persons are initially taken into detention. We believe it should be expanded to cover this. These are not criminals; they have not been charged with, let alone convicted of, any offence; and the only reason for their detention is the administrative purpose of facilitating their removal, and preventing them from absconding in the mean time. We accept that this may occasionally require persons to be detained unexpectedly at home, but there can never be any justification for detention to take place in the ways we have described. **The requirements of Article 15 in relation to conditions of temporary custody should apply to the manner in which third-country nationals are taken into custody, as well as to their treatment when in custody.**
68. It is precisely because detainees are not criminals that Article 15 requires them to be held in specialised custody facilities rather than in prison. Where holding them in prison is unavoidable (as in Northern Ireland, where there is no immigration detention centre), they are to be “permanently physically separated from ordinary prisoners”. However the evidence we have received shows that in some centres and in some countries the conditions are deplorable, and worse than those in which many “ordinary prisoners” are held. We have not received any direct evidence that the conditions of detention in this country are inhumane or undignified, but we have seen recent reports of a hunger strike at the Haslar detention centre in Portsmouth, with all but five of the 130 inmates (including children as young as 15) refusing food in protest at the conditions under which they are held.¹²⁵
69. Matters seem to be worse in some other Member States. Lampedusa, an island near Sicily, has a detention centre notorious for its poor conditions: Cristina Castagnoli, from the LIBE Secretariat of the European Parliament, described to us a visit by five members of the LIBE group who had found up to one thousand people held in accommodation designed for 180.¹²⁶ She also told us of horrifying conditions in the Ile de la Cité in the heart of Paris.¹²⁷ The underground holding centre under the Palais de Justice was described by *Le Monde* as “the equivalent of Lampedusa, except that in Lampedusa

¹²² Report on unannounced inspections of short-term holding facilities at Heathrow, 5 April 2006, paragraph 1.20.

¹²³ Professor Aynsley-Green, Q 255.

¹²⁴ Correspondence between a member of the Sub-Committee and Mr Tony McNulty MP, 16 and 17 March 2006; not published.

¹²⁵ *The Guardian*, 17 April 2006. The report of the Chief Inspector of Prisons on a visit to the Haslar centre in May 2005 contains severe criticisms of some aspects of the accommodation.

¹²⁶ Q 640.

¹²⁷ QQ 636–639.

there's a little more light".¹²⁸ Alvaro Gil-Robles, the Council of Europe Human Rights Commissioner, described the conditions there as "catastrophique et indigne de la France".¹²⁹ We are glad to record that Nicolas Sarkozy, the French Interior Minister, announced on 15 February that this centre is to close in June 2006.

70. The chief problem is that the Directive is wholly lacking in any detailed explanation of what conditions of custody will satisfy the high-sounding aspirations of Article 15(1). Fortunately, the Committee of Ministers of the Council of Europe has recently issued Guidelines on Forced Returns which we reproduce in Appendix 6. It will be seen that Guideline 10 sets out in some detail the conditions under which detainees should be held. We commend these Guidelines, which make it unnecessary for Member States to consider expanding Article 15. The Directive must simply make it mandatory for Member States to keep detainees in conditions not less favourable than those set out in these Guidelines which Ministers have already endorsed in the context of the Council of Europe. We can see no reason why EU standards should be lower than those of the Council of Europe.
71. **The provisions of Article 15 are insufficiently precise, and do not adequately take into account the needs of particularly vulnerable groups. The Directive should mention in its recitals and incorporate into its substantive provisions the Council of Europe Guidelines on Forced Return, which would thus be given statutory force.**

Children

72. In looking at detention conditions, all vulnerable groups need special consideration. Article 15(3) of the Directive acknowledges this in a somewhat cursory manner by requiring Member States to pay particular attention to the situation of vulnerable persons. No group is more vulnerable than children. At present the Directive refers to "children" and "minors" without attempting to define what is meant by those words. Before provision can be made in the Directive for children, a common definition is needed. In a different context, the EC Directive on the right to move and reside for citizens of the Union¹³⁰ treats children under 21 of an EU migrant citizen as children for family reunification purposes.¹³¹ However Article 5 of this draft Directive requires Member States to "take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child", and Article 1 of that Convention defines a child as a person under 18. This is also the age favoured by the European Parliament,¹³² and accords with our domestic law. This Directive should adopt this definition for both 'child' and 'minor' (since it uses the two terms indiscriminately, sometimes even in the same sentence).
73. **We recommend that the Directive should define a child, and a minor, as a person under the age of 18.**

¹²⁸ 22 February 2006.

¹²⁹ Report of 15 February 2006 to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe, paragraph 239.

¹³⁰ Directive 2004/38 EC.

¹³¹ Q 393.

¹³² Q 645.

74. Professor Elspeth Guild thought that it was unsatisfactory for Article 5 simply to rely on the UN Convention. She told us: "...there are a substantial number of continental Member States where the expulsion of minors is prohibited—completely, utterly and totally... You have other Member States where the expulsion of minors is considered perfectly normal and part of the daily routines of life. What has happened in this Directive? It seems to me that there has been an attempt to paper over a very fundamental difference about how we treat children by saying, 'The best interests of the child shall prevail'." There was a fundamental difference between those States where children were first and foremost children and entitled to protection, and only secondarily foreigners, and those States like the United Kingdom where children were first and foremost foreigners and only children subsidiary to their status as foreigners.¹³³
75. The United Kingdom has ratified the UN Convention but has entered a reservation to the effect that the protection it accords does not apply to children who do not have the right to enter and remain in the United Kingdom.¹³⁴ This led Anne Owers, the Chief Inspector of Prisons, to say: "We know that the welfare of the child cannot be paramount because of the UK's reservation in regard to the Convention on the Rights of the Child, but that does not mean that the child, as often happens in immigration decisions, in our view, becomes invisible. The interests of the child are not even noted."¹³⁵ The Refugee Children's Consortium believed that children should not be detained for more than seven days prior to removal,¹³⁶ while the Churches Pressure Groups thought the Directive should forbid the detention of minors altogether.¹³⁷ Tim Baster, on behalf of Bail for Immigration Detainees, thought the detention of children was "completely inconsistent with the culture and traditions of this country". He thought that until five or six years ago it would not have crossed the mind of senior immigration officers to detain children.¹³⁸
76. We do not believe it is practicable altogether to eliminate the detention of children as part of a family group, though collection of the figures on the frequency of families absconding, which we recommend in paragraph 65, might show that more are at present being detained than is necessary. We agree with the Chief Inspector of Prisons that "the detention of children should be exceptional, and for the shortest possible time".¹³⁹ Her written evidence gave us examples of "cases where those effects [of detention] are so adverse that it is hard to believe that the child's interests were even considered when detention was authorised."¹⁴⁰ Professor Carolyn Hamilton, the legal adviser to the Children's Commissioner, referred in oral evidence to the requirement of Article 5 of the Directive that account be taken of the best interests of the child, but thought minimum standards should be specifically

¹³³ Q 391. One State which prohibits the expulsion of minors is France.

¹³⁴ The Government currently have no plans to review the decision to maintain this reservation: supplementary written evidence of Tony McNulty MP, p 138.

¹³⁵ Q 255.

¹³⁶ Written evidence, p 230.

¹³⁷ Written evidence, paragraph 28, p 210.

¹³⁸ QQ 305, 325.

¹³⁹ Written evidence, paragraph 5, p 83.

¹⁴⁰ Paragraph 11, p 84.

set out in the Directive itself.¹⁴¹ Here again we believe that reference to the Council of Europe Guidelines would make a major difference; Guideline 11 requires separate accommodation, adequate privacy, and the rights to education, leisure, play and recreational activities.¹⁴²

77. **We agree that, in accordance with the Council of Europe Guidelines, children should be detained only as a measure of last resort, and for the shortest appropriate period of time.**
78. In this country the chief detention centre at which children are held, and the only one considered appropriate for longer-term detention, is Yarl's Wood near Bedford. This is the only centre where children can be detained for more than 72 hours. Ms Owers told us in her written evidence of the results of an inspection carried out in February 2005, and of the recommendations made by her inspectors. Subsequent to that inspection the Children's Commissioner, Professor Aynsley-Green, had visited Yarl's Wood on 30 October 2005 at 24 hours' notice. At the time of his visit the majority of children were detained for between 1 and 3 days, but over the previous six months 15% of children had passed more than 3 weeks in detention, and 3 children over 8 weeks.¹⁴³ He stressed particularly the need for better explanation to children, in terms that they could understand, of why they were in detention, for how long it was likely to be, and where they might be going at the end. Not one child he had spoken to could say why they were there. Some thought that they had no links with countries other than this country. Many of those aged 15 to 18 were concerned with what was going to happen to them in their countries of origin; they were concerned in particular about trafficking, safety and security.¹⁴⁴
79. We visited Yarl's Wood ourselves on 7 March 2006. A full note of our visit is at Appendix 4. Plainly security must be one of the first aims of a detention centre. We are not qualified to comment on whether the security was in fact excessive, but in places it certainly gave us that appearance, and we were glad to hear that efforts are to be made to make it less obtrusive.¹⁴⁵ The buildings we saw were relatively spacious, comfortable and clean; children were accommodated only with their families, and there were adequate medical and nursing facilities. Given that detention was thought to be essential, our impression was that caring staff were doing their best to make it as painless as possible, though we were concerned that they might not be receiving the support needed to make their work fully effective.¹⁴⁶ Some of the

¹⁴¹ Q 285.

¹⁴² When the Guidelines were adopted on 4 May 2005 the United Kingdom entered a reservation to a number of guidelines, including guideline 11. This reservation would of course have to be lifted.

¹⁴³ Children's Commissioner's report on his visit to Yarl's Wood, paragraph 25.

¹⁴⁴ QQ 279, 288.

¹⁴⁵ In his report on his visit to Yarl's Wood the Children's Commissioner said (paragraph 18): "In order to reach the gym, children had to pass through the barred cell door, and then through another locked door. Any child wishing to re-enter the wing, for instance to use the toilet, had yet again to pass through the two locked doors, and pass through a security check involving a search. The children at Yarl's Wood are detained for immigration purposes and not because they are in conflict with the law. It is questionable, given this, whether the level of security needs to be so high. The UN JDL Rules require that minimum security should be used with respect to children. The need for a barred, cell door is particularly questionable." The contractors have told us that consideration is being given to replacing the barred gate, if this can be done consistently with security.

¹⁴⁶ The national minimum standards for children's homes require all staff to receive at least 1½ hours of one to one supervision from a senior member of staff each month. The contractors have told us that all staff

recommendations of the Chief Inspector's report had already been implemented. There was for example a full-time social worker in post, but rejection of other recommendations of the Chief Inspector means that the social worker may have little influence on the manner and circumstances in which families are first gathered out of the community or in which they are physically removed from the country.

80. We believe that progress is being made towards achieving the minimum standards set out in the Directive, and in the Council of Europe Guidelines. Nevertheless there was among those we spoke to, especially older children, deep unhappiness, not so much about the conditions of detention as about the fact of detention. They did not know what their fate might be, and they felt powerless to control it.

Return of unaccompanied children

81. Article 8(2)(c) requires Member States to postpone the return of unaccompanied minors unless there is an assurance that they will be met on arrival by a family member, a guardian, or "an equivalent representative...or competent official". This last phrase caused concern to the Refugee Council, particularly with regard to returns to Albania and Vietnam, both notorious for child trafficking.¹⁴⁷ We have been told of fears that children can be met by persons who purport to be family members but are in fact themselves involved in trafficking. We share that concern, and believe that wherever possible children should be accompanied.
82. **Ideally, children should be removed only in the company of a family member or other responsible adult. Where unaccompanied removal is unavoidable, the child should be handed over only to a person with proven parental responsibility. The legal guardian in the Member State in question must be informed of the identity of that person. Article 8 of the Directive should be amended accordingly.**

Status of those not removed

83. Illegally staying third-country nationals who, for whatever reason, cannot be returned pose particular problems. Should the return decision and removal order continue in force indefinitely unless and until conditions (whether of the individual or of the country of return) change sufficiently for the return to take place? What should be their conditions of stay? What in the long term should be their status?
84. Article 13 of the Directive does not deal with the first and third of these questions, but does specify that the minimum conditions of stay should be not less favourable than some of those of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (the Reception Directive).¹⁴⁸ Among those conditions not included are those on employment, social assistance and housing. The Refugee Council and Amnesty International believe that "by allowing states to

have confidential access to an independent counselling service, and that there are plans to develop the group of staff working on the family unit.

¹⁴⁷ Written evidence, paragraph 3.8.4, p 65; oral evidence of Ms Nancy Kelley, Q 229. Mr McNulty confirmed (Q 409) that these two countries are the principal sources of unaccompanied children.

¹⁴⁸ Considered in our report *Minimum standards of reception conditions for asylum seekers*, 8th Report, Session 2001–02, HL Paper 49.

disregard a large number of these minimum standards in relation to those who are in their territory but who cannot be returned, the draft directive is countenancing a situation where large numbers of people will be vulnerable to destitution and homelessness, surviving at the fringes of society for an indefinite period of time.¹⁴⁹ Refugee Action would also like to see enhanced support.¹⁵⁰ Mr Jeremy Oppenheim, Director, National Asylum Support Service, told us that the Government does not accept this, believing that Member States should be free to put in place any arrangements which provide adequate safeguards, in line with the ECHR.¹⁵¹

85. **We would like to see Article 13 amended so that all the relevant provisions of the Reception Directive,¹⁵² including those on employment, social assistance and housing, apply to those who for whatever reason cannot be returned to their countries of origin.**
86. We agree with ILPA witnesses that a return decision and removal order cannot be left indefinitely hanging over the head of an individual who cannot return.¹⁵³ The time has to come when the State acknowledges that return is not going to be possible in the foreseeable future, and grants a residence permit on compassionate grounds in accordance with Article 6(5). When that time should come must be a matter for the discretion of the State in individual cases since circumstances, particularly in the country of origin, will vary greatly. But when that time does come, we believe that some status must be granted. We welcome and endorse the view of Mr Oppenheim that in the case of those who cannot return (as opposed to those who will not), some status has to be granted.¹⁵⁴ We accept however that this cannot be done by the Directive, since conditions of residence would require an instrument with a different legal base (Article 63(3)(a) of the EC Treaty), and unanimity in the Council.¹⁵⁵
87. **Where, for whatever reason, the removal of an illegally staying third-country national is impossible, it is inequitable that such a person should remain indefinitely without legal status, and with a continuing threat of removal. Where there is no foreseeable prospect of removal, the position should be reviewed, the removal order should lapse, and some temporary status should be granted.**

¹⁴⁹ Written evidence, paragraph 3.13.3, p 67.

¹⁵⁰ Written evidence, p 226.

¹⁵¹ Supplementary evidence, p 53.

¹⁵² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

¹⁵³ Dr Toner, Q 36.

¹⁵⁴ Q 184.

¹⁵⁵ Evidence of Mr Fabian Lutz from the Commission, Q 512.

CHAPTER 4: JUDICIAL SUPERVISION

88. A mandatory order to leave a country and not return is a matter which must be subject to judicial control. Article 12 of the Directive provides for judicial remedies against return decisions and removal orders. Likewise, since deprivation of liberty is now the most serious sanction available to Member States, it too must be subject to judicial oversight. This is dealt with in Article 14. In this chapter we consider whether those provisions are adequate.
89. Article 12(1) refers to “review of a return decision”, and Article 14(3) to “review by judicial authorities”. We refer specifically to judicial review only when we mean a claim in the High Court for judicial review of an administrative act¹⁵⁶ (and comparable procedures in Scotland and Northern Ireland). Otherwise we use the terms judicial control, judicial supervision or judicial oversight.

Appeals against return decisions

90. Article 12(1) requires Member States to give a third-country national a right to appeal to a court or tribunal against a return decision or removal order. This is plainly essential, and none of our witnesses has questioned this provision. The problems start when considering where and how this right is to be exercised. This is dealt with by Article 12(2), and the drafting is opaque. It states that the judicial remedy is either to have suspensive effect, or must include the right of the third-country national to apply for enforcement of the return decision or removal order to be postponed. This appears to mean that no one can be removed without some form of access to a court. In effect, there would be an in-country right of appeal. This however is apparently not the intended meaning of the provision. According to the Commission’s written evidence, “it is left to Member States to determine whether an appeal should be given suspensive effect. Article 12(2) provides that in those cases in which the appeal has no suspensive effect, the third-country national shall be permitted to apply for special leave to remain in the Member State.”¹⁵⁷ Mr Fabian Lutz confirmed that this was the intended meaning: “The choice whether [the] legal remedy should be given suspensive effect or not, and in which cases, is left with Member States.”¹⁵⁸
91. The present position under United Kingdom law is that where a person is to be returned to a country listed in section 94(4) of the Nationality, Immigration and Asylum Act 2002—the list of designated countries—the right of appeal can normally be exercised only after the return to that country.¹⁵⁹ Inclusion of a country in that list implies that the Secretary of State is satisfied that there is no serious risk of persecution, and that removal of a person to that State will not “in general” contravene this country’s obligations under the European Convention on Human Rights. An in-country appeal is allowed only where the person has made an asylum claim, a

¹⁵⁶ i.e. a claim under Section I of Part 54 of the Civil Procedure Rules 1998.

¹⁵⁷ Paragraph 8, p 152.

¹⁵⁸ Q 571

¹⁵⁹ The list of countries was last amended in December 2005, and now comprises Albania, Bulgaria, Serbia and Montenegro, Jamaica, Macedonia, Moldova, Romania, Bolivia, Brazil, Ecuador, Sri Lanka, South Africa, Ukraine, India, Mongolia, and (in respect of men only) Ghana and Nigeria.

- human rights claim or a claim based on the Community Treaties, and even then only if it is not certified by the Secretary of State as clearly unfounded.
92. The Government argue strongly that a right of appeal without suspensive effect—an out-of-country right of appeal—is more than adequate.¹⁶⁰ Bridget Prentice MP, the Parliamentary Under-Secretary of State at the Department for Constitutional Affairs (DCA) said: “I do not accept that because an application has to be made outside the United Kingdom that it cannot be made in as fair and as robust a way as any within the country...I do not think that the process is any different because you have to make your application from outside the country.”¹⁶¹ Certainly this procedure has every advantage—from the Government’s point of view. It allows the individual to be returned without spending time in this country exercising a right of appeal, and being supported during that time. It is also far less likely that an appeal will be brought once the would-be appellants have been returned.
93. We asked Home Office officials how many people had successfully appealed from overseas and been returned to this country. The answer was that in the three years 2003 to 2005 just four people had done so: one Jamaican, one Albanian and two Romanians.¹⁶² We have no means of knowing how different the figure would have been if there had been an in-country right of appeal, but we suggest that the number might have been many times greater.
94. MigrationWatch UK had no problems with out-of-country appeals,¹⁶³ but all our other witnesses who considered the issue strongly supported the requirement for a suspensive appeal. The Refugee Council and Amnesty International believed that all those subject to a removal order should have an in-country right of appeal and be able to raise fears of refoulement or ill-treatment on return contrary to Articles 3 and 8 of the ECHR.¹⁶⁴ They criticised the fact that those removed had to demonstrate severe protection needs in the very country where they were at risk.¹⁶⁵ ILPA considered that only in exceptional circumstances should a remedy not have suspensive effect, and in such cases the right to apply for suspension must be to a judicial body and not to an administrative body.¹⁶⁶
95. Two of our witnesses were even concerned that Article 12(2) did not go far enough. UNHCR felt it should ensure an automatic suspensive effect, saying: “A judicial remedy against a removal decision is ineffective if the third country national is not allowed to await the outcome of an appeal.”¹⁶⁷ The Church Pressure Groups had the same concern: “Migrants facing removal may have to ‘apply for the suspension of the enforcement of the return decision or removal order’. In practice, the lack of information or the short delay between the issuing of the removal order and its application may lead to a situation in which migrants are removed before reaching the end of the appeal procedure. The suspensive effect of appeal against a return or removal

¹⁶⁰ Written evidence, paragraphs 31–36, p 31; oral evidence of Tom Dodd, Q 93.

¹⁶¹ Q 458.

¹⁶² Letter from Tom Dodd of 15 February 2006, p 44. Although this does not appear from the letter, the Home Office confirmed that the return of the four persons was over the three years 2003–2005.

¹⁶³ Written evidence, paragraph 11, p 20.

¹⁶⁴ Written evidence, paragraph 3.12.1, p 67.

¹⁶⁵ Q 242.

¹⁶⁶ Written evidence, paragraph 60, p 8.

¹⁶⁷ Written evidence, p 57.

order should be automatic in order to allow migrants to stay in the territory of Member States before a final decision about their removal is taken.”¹⁶⁸

96. The Home Office in their written evidence also raised a jurisdictional objection: “We do not contest the need for an effective remedy, but instruments should not prescribe the content and nature of that remedy to be provided by Member States. Indeed were they to do so, it may raise questions of competence. Therefore, the proposal should not address the suspensive nature of a remedy, and the notification of such a remedy.”¹⁶⁹ We do not understand this argument, which seems to be based on a misunderstanding of the meaning—or intended meaning—of the provision. It is of course not for the Directive, nor for the Member States, but for the courts of the Member States to prescribe the content and nature of the remedy in each individual case. Article 12, in referring to the “right to an effective judicial remedy”,¹⁷⁰ is talking about the right to apply to a court or tribunal for a remedy, not about the order made on that application. In stating that the judicial remedy should have suspensive effect, it is requiring the fact of having applied to a court to have the consequence that the return decision will not be implemented until the application has been disposed of. Whether at that stage the return decision will be implemented depends on the order made by the court. We do not see any issue of competence here, but we do see a case for further clarifying the English text of this provision.
97. We agree with those of our witnesses who believe that out-of-country rights of appeal are not always adequate. The fact that, since out-of-country appeals became the norm when Part 5 of the Nationality, Immigration and Asylum Act 2002 came into force on 1 April 2003, barely one person a year has successfully appealed from overseas and been returned to this country, may be evidence that such appellants seldom have very strong cases, but perhaps also demonstrates the problems of bringing proceedings in another country without adequate access to legal advice, and probably without adequate resources.
98. This is a Directive whose aim is to bring common standards to return procedures. It is unacceptable that the important question whether or not the lodging of an appeal should suspend the return process is left entirely to the discretion of Member States. We accept that in this country and, we believe, in many other Member States, large numbers of appeals against decisions on asylum applications are manifestly ill-founded. The rapid disposal of such cases can be achieved by appropriate rules of procedure. In other cases, an appeal against or review of a return decision or removal order should have suspensive effect, and the appellant should be allowed to remain in the State pending the outcome of his appeal.
99. **The drafting of Article 12(2) is defective. It must be amended so that, in all Member States, appeals which are not rejected at a preliminary stage as manifestly ill-founded should result in suspension of the return decision or removal order until the appeal is disposed of.**

¹⁶⁸ Written evidence, paragraph 18, p 208.

¹⁶⁹ Paragraph 36, p 31.

¹⁷⁰ In the French, “un droit de recours effectif devant une juridiction”.

Judicial oversight of detention

100. “There is no greater interference with the liberty of the individual permitted in EU Member States than detention...Therefore, in view of the seriousness of detention, it seems to me to be self-evident that...detention has to be subject to judicial control; there has to be the opportunity for the individual to test whether or not the administration’s decision of detention is correct...Judicial oversight is only repellent to poor administrators making bad decisions.”¹⁷¹ These words of Professor Elspeth Guild are self-evidently true. A person accused of a criminal offence and arrested must be released unless a court orders otherwise. A person convicted of a criminal offence loses his liberty only if the court so orders. Deprivation of liberty by administrative decision cannot be right without judicial oversight.
101. Article 14(2) and (3) of the Directive requires detention orders to be issued by judicial authorities. Where in urgent cases they are issued by an administrative authority, they have to be confirmed by a court within 72 hours, and the order is subject to reconsideration by the court at least once a month. This is a laudable objective, and one already achieved in a few Member States, but for many, including the United Kingdom, this is perhaps a counsel of perfection.
102. In their written evidence, the Department for Constitutional Affairs (DCA) told us that there was provision for any detained person to challenge the lawfulness of his detention before the courts. If there was currently an appeal before the Asylum and Immigration Tribunal, an application for bail could be made to the tribunal.¹⁷² However Bail for Immigration Detainees (BID) pointed out that the provisions for automatic bail hearings in the Immigration and Asylum Act 1999 were repealed without being brought into force. Many detainees had no legal representation and so no access to bail procedures, with the result that the Home Office were never required to justify their detention decision.¹⁷³
103. In the great majority of cases of detention pending removal there is no pending appeal to the Asylum and Immigration Tribunal, so that judicial review will remain the sole possible source of judicial oversight. However judicial review is primarily concerned with the legality of the procedure by which the administrative decision was taken; it is concerned with the administrator’s exercise of his discretion only where human rights issues are involved. There is no automatic recourse to judicial review; it is subject to permission, and the decision whether or not to grant that permission is usually made only on the papers. Although in emergencies (usually to prevent an imminent removal in violation of a court order or of some basic human right) claims for judicial review can be heard in a matter of hours, a claim for review of a detention decision will take weeks rather than days.
104. Finally, the Government do not regard themselves as being under any obligation to bring the possibility of a judicial review claim to the attention of a detainee. Article 11 requires the Government to inform a third-country national in writing about available legal remedies. However that Article applies in terms only to return decisions and removal orders, and DCA

¹⁷¹ Professor Elspeth Guild, Q 401.

¹⁷² DCA written evidence, p 140; Home Office written evidence, paragraph 35, p 31.

¹⁷³ Written evidence, paragraph 14, p 101.

believe that it is not clear whether the requirement extends to generally available legal procedures such as judicial review.¹⁷⁴ We have little doubt that a failure to notify a detainee of the right to apply for judicial review would be treated as a violation of Article 5(4) of the ECHR, particularly if this was the only available remedy.¹⁷⁵ **We believe the Governments of the Member States should regard themselves as bound to inform detainees of all available judicial remedies.**

105. In the previous chapter we mentioned criticisms made of French detention centres by Alvaro Gil-Robles, the Council of Europe Human Rights Commissioner.¹⁷⁶ He has also been critical of this country. “The possibility of effectively contesting one’s detention is all the more important, as it is indefinite and subject only to internal administrative review...Of the 1,514 asylum seekers detained on 27th December 2004, 55 had been detained for between 4 and 6 months, 90 for between 6 months and a year and a further 55 for over one year...It is not acceptable...that such lengthy detention should remain at all times at the discretion of the immigration service, however senior the authority may be. It seems to me that there ought, at the very least, to be an automatic judicial review of all detentions of asylum seekers, whether failed or awaiting final decisions, that exceed 3 months, and that the necessary legal assistance should be guaranteed for such proceedings.”¹⁷⁷
106. The stricter regime proposed by Article 14 is of course greatly preferable, and we hope that it will survive the negotiation process in the Council working parties. Whether or not the United Kingdom ever becomes party to the Directive, we hope the Government will adopt this as a model. We recognise however that they are unlikely to do so before the Directive is adopted, if then. For the present therefore we believe that as an absolute minimum the Government should set up a system of judicial oversight of detention within the first month, and thereafter (in line with the recommendations of the Human Rights Commissioner) at not less than three-monthly intervals. It would not be lawful for the detention to continue beyond one month, and thereafter for any period in excess of three months, unless the Home Office obtained from a court or tribunal an order confirming the legality of the continuing detention. We do not suggest that the court in question should necessarily be the High Court; the Asylum and Immigration Tribunal might be thought suitable. The procedure would in any event involve legally aided representation for the detainee, a matter which we examine below.
107. It will be argued that this would involve considerable resources, both financial and by way of court time. To this we make two answers. The first is

¹⁷⁴ DCA written evidence, p 141; Home Office written evidence, paragraph 35, p 31.

¹⁷⁵ Article 5(4) reads: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” In *Farmakopoulos v Belgium*, 4 December 1990, the applicant was held in detention pending extradition. He had 24 hours in which to lodge an appeal, but was not informed of this right. The European Commission of Human Rights held that the shortness of time and lack of information did not afford the applicant a real opportunity to have the lawfulness of his detention reviewed..

¹⁷⁶ Paragraph 68.

¹⁷⁷ Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4th–12th November 2004; Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005, para. 49. Cited in the evidence from Bail for Immigration Detainees, p 101.

that it will involve no resources at all unless detainees are kept for more than a month. Since Home Office policy is that detention should be for as short a period as possible, it has nothing to fear except a failure of its own policy. The second answer was given by Professor Guild: “[This question] poses the possibility that the necessary instruments of the rule of law are in fact an unreasonable burden on the taxpayer...if we decide to pass laws which interfere with the liberty of the individual...to place them in detention and to expel them...the corollary obligation is to ensure that those laws are carried out in conformity with the rule of law.”¹⁷⁸

Legal advice and assistance

108. Judicial review would still remain an option. It requires legal advice and assistance. So would the judicial oversight of detention which we have recommended, and so do appeals against return decisions. Article 12(3) requires Member States to ensure that third-country nationals are able to obtain legal advice and representation, and that legal aid is available to those who lack sufficient resources “insofar as such aid is necessary to ensure effective access to justice”. As in the case of Article 11 (notification of rights of appeal), this provision is in terms confined to remedies against return decisions and removal orders. As in the case of that Article, DCA express doubt as to its applicability to detention. Again, we believe that whether or not the provision is amended, the Government should regard itself as bound to apply this provision to judicial oversight of detention.
109. DCA argue that it is not clear whether Article 12(3) covers all stages of any proceedings irrespective of merit, or whether, in cases where the grounds for challenging removal are weak, its requirements may be met by providing legal aid to obtain advice on the merits of a claim without providing further funding to bring proceedings. They do not contest the need for legal aid to be available for those who lack sufficient resources, but they do not accept that this should extend as far as providing funding to pursue claims where statutory tests have been applied and the claim has not satisfied these tests.¹⁷⁹ The argument on the language of Article 12(3) seems to us to confuse the broad objects sought to be achieved by a directive with the detailed provisions of the implementing regulations. To us it is quite clear that what is intended is legal advice and assistance on the same scale and subject to the same conditions as for domestic criminal proceedings. What is at issue is mandatory expulsion and deprivation of liberty.
110. During our visit to Yarl’s Wood detention centre we were told of improved access to legal advice. Bridget Prentice MP told us that the Legal Services Commission had for two and a half months been running pilot schemes providing on-site legal advice surgeries open to any individual detained in a removal centre. These were available twice a week at Campsfield, Colnbrook, Dover, Harmondsworth, Tinsley House, and Yarl’s Wood. She would be deciding in May whether these should be continued. We look forward to hearing her conclusions.¹⁸⁰
111. With, again, the exception of MigrationWatch UK, which believes that Article 12(3) “appears to give a blank cheque to appellants to draw on UK

¹⁷⁸ QQ 397, 398.

¹⁷⁹ Written evidence, p 141.

¹⁸⁰ QQ 463, 464.

public funds”,¹⁸¹ all our witnesses agreed on the need for legal advice and assistance. The Refugee Council and Amnesty International reiterate that “in order for a judicial remedy to be effective, it is essential that publicly funded legal advice and representation is available for all those who require it.”¹⁸² ILPA are unhappy with the requirement that legal aid should be subject to a test that it is necessary to ensure effective access to justice. “The decision by a Member State to issue a return decision, removal order or a re-entry ban is a serious matter for the individual concerned. It may include forcible removal and prevent re-entry to the territory for some time. Effective access to justice on such matters will always require provision of legal assistance where requested”.¹⁸³ UNHCR agree, saying that the wording of Article 12(3) should be adjusted in line with the Article 15(2) of the Asylum Procedures Directive, which establishes the right to free legal assistance for all asylum-seekers whose claims have been rejected at first instance. That provision permits States to limit that assistance under some conditions, but does not impose the same mandatory constraints as Article 12(3).¹⁸⁴

112. We are not persuaded that the words “insofar as such aid is necessary to ensure effective access to justice” have the pernicious effect suggested by ILPA and UNHCR. They seem to us however to be unnecessary. If DCA intend to rely on them in order to limit their obligations, then we agree that they should be deleted.
113. Inevitably, legal advice and assistance on this scale will involve considerable resources. We believe such expenditure is justified, for the reasons we have already given in relation to judicial oversight of detention.
114. **We urge the Government to use their influence in negotiations to ensure that the strict regime of judicial oversight of detention proposed by Article 14 is not diluted. United Kingdom law on judicial oversight of detention should as far as possible be brought into line.**
115. **If the regime of Article 14 does not prove attainable, we recommend as a minimum that detention by administrative decision should be unlawful unless the detaining authority obtains from a court or tribunal, not less than one month after the beginning of the detention, and thereafter (in line with the views of the Council of Europe Human Rights Commissioner) at not less than three-monthly intervals, an order certifying the continuing lawfulness of the detention.**
116. **We accept that such regular judicial oversight will impose a considerable burden on the courts, and a financial burden on legal aid budgets. We nevertheless regard it as an essential concomitant of the assumption by the State of the power to place in custody persons who have not been accused, still less convicted, of a criminal offence.**

¹⁸¹ Written evidence, paragraph 12, p 20.

¹⁸² Written evidence, paragraph 3.12.2, p 67.

¹⁸³ Written evidence, p 8.

¹⁸⁴ Written evidence, p 57.

CHAPTER 5: THE RE-ENTRY BAN

117. A Directive on common standards for returns might have confined itself to just that topic. It might have dealt only with the return, whether voluntary or enforced, of an illegally staying third-country national to a non-Member State. This draft goes further and proposes, in Article 9, a ban on re-entry to any of the Member States. In this chapter we consider this proposal in detail.

The legal base of Article 9

118. Before doing so, we raise an important question on the legal base of Article 9. As we have said,¹⁸⁵ the legal base for the Directive is Article 63(3)(b) of the Treaty establishing the European Community. Article 63(3) is the base for—

“measures on immigration policy in the following areas:

- (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;
- (b) illegal immigration and illegal residence, including repatriation of illegal residents”.

Plainly sub-paragraph (b) is the correct legal base for the rest of the Directive, dealing as it does with the repatriation of illegal residents. However a re-entry ban, which deals with persons the majority of whom wish to enter and reside in a Member State legally, seems to us to concern “conditions of entry and residence”, and so to fall under sub-paragraph (a). Article 9(5) in particular (the exception for asylum applications) can come into play only if and when a person on whom a re-entry ban has been imposed makes an application to enter a Member State as an asylum-seeker.

119. It is only instruments under Article 63(3)(b) which are subject to the co-decision procedure, that is, a decision jointly of the Council (acting by qualified majority voting) and the Parliament. Instruments under Article 63(3)(a) still require unanimity in the Council, and the Parliament has no legislative role. It might therefore not be possible for a single instrument to have both legal bases.
120. The issue of the correct legal base or bases is not a matter on which we have received any evidence, and it does not appear to have troubled any of the EU institutions, or the Government. The jurisprudence of the Court of Justice is well-established:
- “If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component... By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding legal bases.”¹⁸⁶

¹⁸⁵ Paragraph 9 above.

¹⁸⁶ Case C-338/01, *Commission v Council*, [2004] ECR I-4829, at paragraphs 55 and 56.

121. It can be argued that the re-entry ban is merely incidental to the removal order or return decision which imposes it, which is the predominant purpose of the Directive. In that case Article 63(3)(b) of the Treaty is an appropriate legal base for a re-entry ban. This, we understand, is the view of the Home Office. It seems to us to be equally arguable that, if the re-entry ban is indeed inseparably linked to the removal order or return decision which imposes it (which we doubt), neither is secondary to the other. In that case, subparagraphs (a) and (b) of Article 63(3) would both be required as a legal base. This is not a matter on which we can reach any conclusion. **The Government should consider whether Article 63(3)(b) of the Treaty is an adequate legal base for a Directive dealing with returns which includes a re-entry ban as proposed in Article 9.**

The provisions of Article 9

122. The full text of Article 9 is set out in Appendix 5. In summary, what is proposed is that a return decision may, and a removal order must, incorporate a re-entry ban. Curiously, Article 9 does not itself state whether this is intended to be a ban on re-entering only the Member State issuing the return decision, or a ban on re-entering all Member States, but it is clear from recital (10) that it is the latter which is intended. There would in fact be no need for an EU instrument to allow a Member State to ban a person from re-entering only that State.
123. The ban is without prejudice to the right to seek asylum in a Member State. It can be for an indefinite period where the person concerned presents a serious security risk. Otherwise it is limited to a maximum of five years, and a number of matters are listed which must be taken into account when determining the length of the ban in any particular case. The ban may be suspended “on an exceptional and temporary basis”. It may be withdrawn altogether where the third-country national (a) is the subject of a return decision or removal order for the first time; (b) has reported back to a consular post of a Member State; (c) has reimbursed all the costs of his previous return procedure. It is not clear from the text (either English or French) whether these three conditions are cumulative, which is perfectly possible, or alternative (as seems to have been assumed by our witnesses). At the very least, Article 9(3) needs to be amended to make this clear and to provide adequate legal certainty.

Arguments of principle

124. Mr Faull, the Director-General of DG Justice, Freedom and Security, described imposing a re-entry ban for the whole of the European Union as a novel proposal, but justified it in these terms: “We believe that adding this European-wide dimension to the effects of national return measures will promote prevention, i.e. will send discouraging signals to would-be illegal immigrants and those who exploit their vulnerable positions, and make the European return policy more credible...these are proportionate and flexible rules and they do allow for sufficient discretion on the part of the national authorities to take account of the specific characteristics of individual cases.”¹⁸⁷

¹⁸⁷ Q 516.

125. The proposal is novel in the sense that neither the Commission Green Paper nor the White Paper contained any such suggestion. The White Paper confined itself to distinguishing between voluntary and forced returns, saying that “A refusal of a future visa application in order to re-enter the EU some time in the future should not be based only on the fact the he or she has previously stayed in the Member State illegally, if the person has returned voluntarily. On the other hand restrictions should be imposed in cases of forced returns.”¹⁸⁸ It was not at that stage suggested that those restrictions should take the form of an EU-wide re-entry ban.
126. Under our current law, re-entry bans are in effect only for those who have been deported under the Immigration Act 1971, either where a person has been convicted of a criminal offence and the court itself recommends deportation as part of the sentence, or where deportation is considered to be conducive to the public good. To introduce into our law a re-entry ban on anyone who has been forcibly removed (subject to the exceptions noted above) would therefore be a major departure. In the words of the JCWI it “would constitute a levelling down of current legal principles.”¹⁸⁹
127. The only aspect of a re-entry ban which received support was the potentially indefinite ban on those constituting a serious security risk. That apart, not one of our witnesses had a good word to say for it. Although, as we have said, the ban is subject to an exception for asylum applications, some of the organisations most strongly opposed to the ban believed that it would nevertheless hinder returnees attempting to seek asylum. For example, Ms Juma for the Refugee Council, after saying that they were “entirely opposed to the introduction of an EU-wide re-entry ban”, added that “an EU-wide entry ban is just not compatible with the right to asylum.”¹⁹⁰ On the other hand, UNHCR welcomed the specific exception made by Article 9(5) for asylum claims, and suggested useful ways in which the exception could be made more effective in practice.¹⁹¹
128. Opposition to the principle of a re-entry ban came from across the spectrum. Perhaps most serious was the opposition from the European Parliament; the re-entry ban was described by Cristina Castagnoli as the most controversial point of the Directive. As she explained, “...at the moment in the majority of the Member States if someone is asked to leave the country he can come back the day after as a legal migrant who has a contract and can work. The re-entry ban is something that is considered to be really controversial because for five years someone cannot be back...That is one of our red lines that we are not accepting.”¹⁹²
129. Home Office officials were among the strongest critics of the ban. Mr Tom Dodd told us that they regarded it as arbitrary. Deportation orders should have flexibility to state how long the ban should be. “The other point in our system is that, just because you have been removed from this country for entering illegally or overstaying, it does not necessarily mean that you cannot then apply to come back to the United Kingdom as a legal entrant. You

¹⁸⁸ Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents, COM(2002)564 final, paragraph 2.3.6.

¹⁸⁹ JCWI written evidence, p 223.

¹⁹⁰ Q 226.

¹⁹¹ Written evidence, p 57.

¹⁹² Q 629.

could seek a visa; you could seek to enter using immigration rules from a country which does not have a visa regime placed upon it; and the case would need to be judged on its merits at that time.”¹⁹³

130. The most outspoken language was reserved for the provision allowing a re-entry ban to be withdrawn where the third-country national “has reimbursed all costs of his previous return procedure”. While a number of Member States which have re-entry bans have shorter bans (or none) for those who have left voluntarily, we have been unable to discover any Member State which has in its law a provision comparable to this. Mr McNulty said: “...at the risk of being intemperate, that was probably one of the most outrageous suggestions in the whole Directive, that somehow if you paid for your own return, you would be treated in a different way to if you did not. I just cannot see the public policy call of that at all”.¹⁹⁴ On behalf of the European Parliament, Mr Manfred Weber took the same view: “I do not think people should be able to pay for their re-entry. We should not allow this by giving them back the costs of removal. That cannot be the reason. In the end we have to ask ourselves: ‘Is this person dangerous? Is this a person who can earn his own livelihood? Are there good reasons for letting him back in?’ I do not think it should be whether he has the money to buy.”¹⁹⁵ We agree.
131. **The withdrawal of a re-entry ban should not be in any way dependent on or influenced by the ability of a third-country national to repay the cost of his previous return procedure.**
132. A further difficulty with the re-entry ban is the absence of any legal remedy. One is needed for a matter as important as this, but no appeal system is specified. This is a matter of concern to the European Parliament,¹⁹⁶ and also to the Bar Council, which thought Article 12(1) should be extended to cover re-entry bans.¹⁹⁷

Practical problems facing the United Kingdom

133. A re-entry ban operating throughout the EU presupposes that each Member State has access to the information from other Member States on, at the very least, the persons who have been returned, the date, whether the return was voluntary or forced, and the length of the re-entry ban imposed. Only in this way can each State decide whether to admit someone returned from another State. As the Commission explained in its written evidence, the proposal itself makes no express link to reliance on the Schengen Information System (SIS), but recital (15) makes clear that this information sharing should take place in accordance with the provisions which will govern the SIS II.¹⁹⁸
134. While the SIS is the only sensible way in which this information can be shared, data entered in the SIS will, in the absence of harmonised European standards on removals, not necessarily reflect the same legal and factual conditions leading to the issue of a return decision. This is very likely to compound the problem, already acute, of inconsistency of immigration data

¹⁹³ Q 152.

¹⁹⁴ Q 428.

¹⁹⁵ Q 764.

¹⁹⁶ Q 629.

¹⁹⁷ Written evidence, p 201.

¹⁹⁸ Written evidence, p 152.

entered by Member States under Article 96 of the Schengen Convention. Professor Guild gave the example of Germany which, unlike other Schengen countries, enters into the SIS the details of failed asylum seekers; the data are not removed if the persons concerned become family members of citizens of the EU.¹⁹⁹ A recent judgment of the European Court of Justice found that a refusal to allow into Spain two nationals of a third country who were members of the family of EU citizens, solely on the ground that they appeared on the SIS list, violated Community rules on freedom of movement.²⁰⁰ **We are concerned at the lack of equivalence in the data entered by the different Schengen countries in the Schengen Information System, and we hope that their practices may be brought into line.**

135. The United Kingdom and Ireland are not full participants in the SIS, and in particular do not have access to the immigration section.²⁰¹ This means that in practice we, like the Irish, could not put the relevant data into the system in order to inform other Member States of any third-country nationals who are the subject of a re-entry ban issued by us, nor could we access information on third-country nationals who are the subject of re-entry bans issued by other Member States in order to monitor the re-entry ban.²⁰² The Commission suggests that those Member States which do not participate in the SIS will have to look for other forms of information sharing, such as bilateral administrative cooperation between competent authorities. This would be wholly impracticable. Instead of sending information to one central body, and receiving it in the same way, the data would have to be sent to 24 other Member States, and each of those would in turn have to send information separately to the United Kingdom and Ireland. Lord Triesman told us that this would “pose some very sharp operational difficulties”.²⁰³ The simplest and most cost-effective way of overcoming this difficulty would be for the United Kingdom to negotiate an agreement on access to the immigration data in the Schengen Information System. Such an agreement would be useful even in the absence of a re-entry ban. **We recommend that the Government should initiate such negotiations.**
136. A failure to have any sort of access to the immigration data in the SIS would in practice make it impossible for us to apply the re-entry ban, or for other countries to apply it to persons returned from the United Kingdom. This would be a matter of concern only if Article 9 as currently drafted were to remain part of the Directive. We do not believe it should. Quite apart from the problems with the legal base, we regard the concept of an indiscriminate re-entry ban as flawed. If a third-country national comes to the borders of a Member State seeking leave to enter either as a legal migrant or as an asylum-seeker, the application should be assessed on its merits. The applicant may be refused entry on the basis of an alert on the SIS resulting

¹⁹⁹ Q 390.

²⁰⁰ Case C-503/03, *Commission of the European Communities v Kingdom of Spain*, 31 January 2006.

²⁰¹ Ireland is in the same position as the United Kingdom, since it wishes to preserve the common travel area. Denmark is a party to Schengen. Since however it cannot participate in instruments under ECT Title IV, it has problems with regard to instruments under Title IV which build on the Schengen *acquis*. This is dealt with by Article 5 of the Protocol to the Amsterdam Treaty on the Position of Denmark, which provides that if Denmark adopts similar instruments under its national law, this will create obligations under international law similar to those assumed by other Member States under Community law.

²⁰² Written evidence from the Home Office, paragraph 29, p 30. Oral evidence of Mr Tom Dodd, Q 152.

²⁰³ Q 750.

from the decision taken by a Member State, in accordance with Article 96 of the Schengen Convention, to enter his data because his presence is considered to pose a threat to public policy or to national security. In all other circumstances, the fact that the applicant was removed by another Member State should not be a relevant consideration.

137. It has been suggested to us that the Schengen countries may legitimately take a different view.²⁰⁴ For the purpose of border controls they are treated as a single entity. They will need to know of persons returned or removed from other Schengen countries, and the reasons for this, since these are matters they may wish to take into account when deciding on their own admissions policy. But so long as each of those countries has its own admissions policy, potentially different from that of other Schengen States, it will remain within the discretion of that country to admit someone removed from another State, whether or not that removal was in the previous five years. Matters may change if and when there is a common EU policy on inward migration and the Schengen States align their admissions policies, but that is still some way off.
138. **We believe that re-entry bans should be imposed only on those persons who represent a serious security risk or have been convicted of a serious criminal offence.**

²⁰⁴ For example, the explanatory memorandum to a draft Resolution tabled on 12 April 2006 in the French Assemblée Nationale by the Rapporteur of the Delegation for the European Union states: “The creation of a re-entry ban valid throughout the EU, banning any re-entry into the territory of the EU for a person who has been the subject of a removal order, would, in particular, represent genuine progress.” (Official translation)

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

General conclusions

139. Given that the European Union has competence to act with regard to the return of illegally-staying third country nationals, we sympathise with the aim of trying to achieve a common EU returns policy, but only if that policy allows for persons to be returned to their country of origin safely and humanely, with respect for their human rights and dignity. The current Commission proposal does not achieve this. It is deeply flawed in a number of respects, and might, if agreed in its present form, result in the lowering of the standards currently applicable in a number of Member States, including the United Kingdom.
140. The differences of opinion between the individual Member States, and between the Council and Parliament, make it likely that if an instrument is ever adopted it will bear little resemblance to the current draft Directive.
141. We believe that the United Kingdom, though justified at this stage in not having opted in to the Directive, should play an active part in the negotiations, and seek to improve the draft in line with our recommendations.
142. The slow pace of negotiations need not delay the incorporation into our domestic law of the improvements we have suggested. To do so as soon as possible will strengthen the Government's hand when arguing for a similar incorporation of higher standards into the Directive.
143. We hope that changes to the Directive suggested by the United Kingdom will include those we recommend in this Report, and that the Directive may thereby be improved and so facilitate the establishment of a safe, fair and effective common approach on returns. (*paragraph 11*)
144. In view of the significance of the issues raised by the draft Directive, we make this Report to the House for debate. (*paragraph 17*)

The present draft of the Directive

145. The use of the term “illegally staying” in the description of third-country nationals is unfortunate but unavoidable. We emphasise that this Directive is dealing with widely differing categories of persons, some of whom will have entered the EU legally and resided there legally. (*paragraph 21*)
146. The definition of “illegal stay” must clarify the position of those with pending appeals, and those whose rights of appeal have not been exhausted. (*paragraph 22*)
147. In drafting the proposal for a Directive the Commission, by attempting a compromise which would please all, appear to have satisfied none. (*paragraph 29*)

Return and removal

148. More effort should be made by the EU in the negotiation of readmission agreements, and in promoting the use of EU travel letters as a substitute for official passports. (*paragraph 36*)

149. There must be close cooperation between Member States in determining the conditions prevailing in countries to which illegal residents are to be returned. The Government should support the setting up a central country of origin information service for processing information about conditions in those countries, and monitoring changes in those conditions. The Commission proposal is a useful starting point. (*paragraph 40*)
150. We agree with the requirement of Article 6(2) that a return decision should “provide for an appropriate period for voluntary departure”. We do not however believe that there should be a fixed upper limit (whether of four weeks, or any longer period). In some cases a few days may be sufficient to prepare for return. In others, considerably longer than four weeks will be necessary. It should be for the authorities to determine, on a case by case basis, what is the appropriate period. (*paragraph 45*)
151. In the EU, deprivation of liberty is a State sanction normally imposed only on those who have been accused or convicted of a crime. Using it for the wholly different purpose of detaining illegal immigrants is a serious matter. Where detention is essential, it must be for as short a period as possible, not only for the sake of the individual concerned but also to lessen the burden on the taxpayer. (*paragraph 60*)
152. We accept that an absolute and non-extendable maximum to the period of detention (whether of six months, as proposed by Article 14(4), or any other period) will give Member States insufficient flexibility to deal with exceptional cases. (*paragraph 61*)
153. The Directive provides a good opportunity to make the systematic collection of comparable statistical data on detention a mandatory EU-wide requirement. (*paragraph 65*)

Conditions of detention

154. The requirements of Article 15 in relation to conditions of temporary custody should apply to the manner in which third-country nationals are taken into custody, as well as to their treatment when in custody. (*paragraph 67*)
155. The provisions of Article 15 are insufficiently precise, and do not adequately take into account the needs of particularly vulnerable groups. The Directive should mention in its recitals and incorporate into its substantive provisions the Council of Europe Guidelines on Forced Return, which would thus be given statutory force. (*paragraph 71*)

Children

156. We recommend that the Directive should define a child, and a minor, as a person under the age of 18. (*paragraph 73*)
157. We agree that, in accordance with the Council of Europe Guidelines, children should be detained only as a measure of last resort, and for the shortest appropriate period of time. (*paragraph 77*)
158. Ideally, children should be removed to their country of origin only in the company of a family member or other responsible adult. Where unaccompanied removal is unavoidable, the child should be handed over only to a person with proven parental responsibility. The legal guardian in the Member State in question must be informed of the identity of that

person. Article 8 of the Directive should be amended accordingly. (*paragraph 82*)

Status of those not removed

159. We would like to see Article 13 amended so that all the relevant provisions of the Directive laying down minimum standards for the reception of asylum seekers, including the provisions on employment, social assistance and housing, apply to those who for whatever reason cannot be returned to their countries of origin. (*paragraph 85*)
160. Where, for whatever reason, the removal of an illegally staying third-country national is impossible, it is inequitable that such a person should remain indefinitely without legal status, and with a continuing threat of removal. Where there is no foreseeable prospect of removal, the position should be reviewed, the removal order should lapse, and some temporary status should be granted. (*paragraph 87*)

Judicial supervision

161. The drafting of Article 12(2) is defective. It must be amended so that, in all Member States, appeals which are not rejected at a preliminary stage as manifestly ill-founded should result in suspension of the return decision or removal order until the appeal is disposed of. (*paragraph 99*)
162. The Governments of the Member States should regard themselves as bound to inform detainees of all available judicial remedies. (*paragraph 104*)
163. We urge the Government to use their influence in negotiations to ensure that the strict regime of judicial oversight of detention proposed by Article 14 is not diluted. United Kingdom law on judicial oversight of detention should as far as possible be brought into line. (*paragraph 114*)
164. If the regime of Article 14 does not prove attainable, we recommend as a minimum that detention by administrative decision should be unlawful unless the detaining authority obtains from a court or tribunal, not less than one month after the beginning of the detention, and thereafter (in line with the views of the Council of Europe Human Rights Commissioner) at not less than three-monthly intervals, an order certifying the continuing lawfulness of the detention. (*paragraph 115*)
165. We accept that such regular judicial oversight will impose a considerable burden on the courts, and a financial burden on legal aid budgets. We nevertheless regard it as an essential concomitant of the assumption by the State of the power to place in custody persons who have not been accused, still less convicted, of a criminal offence. (*paragraph 116*)

The re-entry ban

166. The Government should consider whether Article 63(3)(b) of the Treaty is an adequate legal base for a Directive dealing with returns which includes a re-entry ban as proposed in Article 9. (*paragraph 121*)
167. The withdrawal of a re-entry ban should not be in any way dependent on or influenced by the ability of a third-country national to repay the cost of his previous return procedure. (*paragraph 131*)

168. We are concerned at the lack of equivalence in the data entered by the different Schengen countries in the Schengen Information System, and we hope that their practices may be brought into line. (*paragraph 134*)
169. The Government should initiate negotiations for an agreement on access to the immigration data in the Schengen Information System. (*paragraph 135*)
170. We believe that re-entry bans should be imposed only on those persons who represent a serious security risk or have been convicted of a serious criminal offence. (*paragraph 138*)

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)

The members of the Sub-Committee which conducted this inquiry were:

Lord Avebury
 Baroness Bonham-Carter of Yarnbury
 Earl of Caithness
 Lord Corbett of Castle Vale
 Baroness D’Souza
 Lord Dubs
 Baroness Henig
 Lord Marlesford
 Earl of Listowel
 Viscount Ullswater
 Lord Wright of Richmond (Chairman)

Professor Jörg Monar, holder of the Marie Curie Chair of Excellence at the Université Robert Schuman de Strasbourg, was appointed as Specialist Adviser for the inquiry.

Declared interests in connection with this inquiry

Lord Avebury

President, Peru Support Group
Chairman, Cameroon Campaign Group
President, TAPOL (Committee on Indonesian human rights)
President, Kurdish Human Rights Project
Chairman, Friends of Kashmir
Author of the foreword for an Immigration Law Practitioners’ Association publication “Challenging Immigration Detention: a best practice guide”
Member, Amnesty International

Baroness D’Souza

Redress Trust: Director 2003–2004, Consultant 2004 to present
Trustee, Zimbiala Trust (Human rights in Zimbabwe)
Member, Independent Board of Monitors for Wormwood Scrubs Prison
Governor, Westminster Foundation for Democracy

Lord Dubs

Former Director, Refugee Council, London
Former Trustee, Immigration Advisory Service

Baroness Henig

President, Association of Police Authorities

See also the Register of Members’ interests, available on the Parliamentary website at www.parliament.uk

APPENDIX 2: CALL FOR EVIDENCE

Sub-Committee F (Home Affairs) of the House of Lords Select Committee on the European Union is conducting an inquiry into the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for returning illegally staying third-country nationals (COM (2005) 391 final).

The Commission's proposal for a directive aims to establish common rules and procedures across Member States for the return of illegally staying third country nationals. The proposal includes rules on removal, the use of coercive measures, pre-removal detention and appeal procedures. It includes an EU-wide re-entry ban and provisions on apprehension in another Member State.

The proposed directive follows on from the Community's policy against illegal immigration. It is based on the Return Action Programme adopted by the Justice and Home Affairs Council in November 2002, which called for improved operational cooperation between Member States, intensified cooperation with third countries, and the establishment of common standards with the aim of facilitating operational return. The Hague Programme renewed calls "for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for human rights and dignity".

Evidence is invited on all aspects of the draft directive. The Sub-Committee would particularly welcome comments on:

- the legal basis of the draft directive, and premises on which it is based;
- whether the standards proposed comply with human rights law;
- the merits of the procedural rules, particularly of a two-step process—return decision followed by removal order—and whether they allow for an informed choice of voluntary return;
- the provisions for individuals who cannot be removed, whether temporarily or indefinitely;
- the conditions and duration of detention;
- the safeguards for individuals to be removed (such as concerning their arrest and escort), particularly where removal action is sub-contracted to private companies;
- provisions allowing or requiring postponement of removal;
- the proposals for a re-entry ban, including reliance on the Schengen Information System in the application of the ban;
- the provisions on judicial remedies and the effect of delays;
- the impact of this proposal on Member States' operational cooperation, as for example in the context of the European Border Agency.

APPENDIX 3: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- * Bail for Immigration Detainees (BID)
- Bar Council Law Reform Committee
- Sergio Carrera (CEPS)
- * Children's Commissioner for England and Wales
- Church Pressure Groups
- Commission for Racial Equality
- * Department for Constitutional Affairs
- * European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)
- * European Commission, Directorate-General Justice, Freedom and Security (D-G JLS)
- * European Economic and Social Committee (EESC)
- * European Parliament LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs)
- * Foreign and Commonwealth Office
- * Professor Elspeth Guild
- * Her Majesty's Chief Inspector of Prisons
- * Home Office
- Immigration Advisory Service (IAS)
- * Immigration Law Practitioners' Association (ILPA)
- * International Organization for Migration
- Joint Council for the Welfare of Immigrants (JCWI)
- * MigrationWatch UK
- Refugee Action
- Refugee Children's Consortium
- * Refugee Council and Amnesty International UK
- * United Nations High Commissioner for Refugees (UNHCR)
- * Mr Manfred Weber MEP

APPENDIX 4: VISIT TO YARL'S WOOD IMMIGRATION REMOVAL CENTRE

1. The Committee visited Yarl's Wood Immigration Removal Centre in Bedfordshire on 7 March 2006. It was welcomed by Brian Pollett, the Director of Detention Services, and greeted by a number of Home Office and contracted GSL staff working at Yarl's Wood. It also met Liz Luder, the Chair of the Independent Monitoring Board; Bruce McClerny, the welfare officer; Sarah Seekins, the full time social worker (in place since January 2006); Sue Jones, the Healthcare Manager; Matthew Beams, the Childcare Manager; and the Reverend Larry Wright, the Head of Religious Affairs.
2. The Director explained that Yarl's Wood is a purpose-built Immigration Removal Centre. It originally comprised two similar blocks. One however was damaged and razed following a disturbance and a fire in February 2002. The Prison and Probation Ombudsman published the *Report of the inquiry into the disturbance and fire at Yarl's Wood Removal Centre* in October 2004. The second opened in September 2003. This is the one which the Committee visited.
3. Yarl's Wood's population consists of families and single women. It is also a fast-track asylum processing centre for single women. Men are held only as part of a family unit. There is an immigration appeals hearing centre on site.
4. The Removal Centre consists of four accommodation units, with a total capacity to hold 405 people although, given the restrictions on the sharing of accommodation by families, it is not in practice possible for more than 330 inmates to be accommodated at any one time. At the time of the visit, 288 people were detained at the Removal Centre. The fast-track facility has a bed-space capacity of about 130 people but occupancy is routinely around 50. Residential units are connected by secure corridors and passage through the different units is through a barred cell door.
5. The Centre is run for the Home Office by private contractors who themselves have sub-contractors. Some of the staff are former members of the prison service, but they try to build a different atmosphere from prisons—successfully, we thought. The contract of GSL, the main contractors, has recently been renewed for 6 years.
6. After the brief introduction, the Committee divided into two groups and took a tour of the Removal Centre. One group was brought to the Crane Family Unit; the other group to the Avocet Single Female Unit. Each group visited the reception area, the healthcare and teaching facilities, and the gym. Every move from one room to the next required opening and locking of a number of doors, and staff carried a considerable number of keys on key-chains.
7. The standard of accommodation was found to be generally good. Detainees' rooms were clean, well equipped and had en-suite facilities. The two units that were visited had a multi-faith room, a library, association areas, laundry facilities, a kitchen and dining area, shops (operated on cashless basis) and designated telephones. Detainees were issued with a pager so that they could be notified of any incoming calls. The single female unit had a hairdressing salon.
8. Healthcare facilities were in common but were run separately for single women and families. They were clean and well equipped and included a dental surgery. Doctors were General Practitioners from the local GP practice. All

new arrivals were seen by a healthcare professional not later than 2 hours after arrival, and by a doctor within 24 hours. Counselling was offered, but language could represent a difficulty. In such cases staff often used other detainees as translators. Before leaving, detainees were seen by a nurse to ensure that they were fit to travel.

9. Members of the Committee met the social worker who has recently been appointed in accordance with recommendations of the Chief Inspector of Prisons. The Home Office has rejected other recommendations, and the social worker's authority will only become clear as her post becomes established. The Chief Inspector also recommended the appointment of an independent welfare officer. A welfare officer has indeed been appointed, but he is not independent; the Committee felt that he would be more effective if he were.
10. The care of those at risk of suicide and self-harm (SASH) was managed through four-weekly multi-agency meetings where individual cases were discussed. The Committee was shown what was referred to as the SASH room for people at suicide watch. This had soft furnishing and lighting and provided a calm and soothing environment.
11. Education for those under 16 is compulsory, and is run on OFSTED rules. Staff admitted that the short time in detention caused problems. The Committee saw teenagers having computer training, and a class of toddlers in a play-school who appeared to be enjoying themselves very much. There is a reasonably sized library, but given the large number of languages involved, the number of books in any language except English is small.
12. During the visit members of the Committee had the opportunity to meet and speak with a number of women and children individually and in the absence of staff. Many were of course unhappy their detention, some not knowing when it might end or where it might lead, some of the younger ones not even sure why they were detained at all. However we heard few complaints about the accommodation, or the way they were treated.
13. The visit ended after lunch with a brief open forum and discussion. The Committee queried whether the changes recommended by the Children's Commissioner had been implemented. Staff explained that several changes had already been implemented to make the place more child-friendly, including a recent decision to decorate the corridors with murals by the detainees. A process of deinstitutionalization was under way which included the reduction of locking. The gate separating the residential units had to stay for security reasons, but would be camouflaged.
14. Members asked about access to legal advice, and were told that detainees could learn about specialist immigration advice through the leaflets which were widely available in the centre. There were also weekly workshops giving general information on legal advice run by the Legal Services Commission. However one of the main concerns was the paucity of sources of specialist advice in the region. The Legal Services Commission was trying to address the issue of those coming to the centre from police cells, who needed advice on immigration issues rather than criminal law issues.
15. The Committee was told that IOM programmes for assisted voluntary return (AVR) were advertised in the centre, but there were not many AVR applications. Staff believed that it could be an important factor in encouraging removal and that such programmes should be more vigorously promoted.

16. Asked about the length of detention, staff told the Committee that those detained at entry point for the purpose of fast-tracking were held for an average of 34 days plus another 30 days if they failed their asylum claim and were subject to removal. In other cases, length of detention was on average one week for families and two weeks for single females. However, it was acknowledged that Yarl's Wood consistently had a significant number of people in detention for longer periods: some as long as six months and a few had been detained for over a year. This was due to problems with documentation, and lack of cooperation. Sometimes disruptive people had to wait for charter airlines because airline staff refused to take them on commercial flights. Most of those removed travelled voluntarily and with dignity; it was only a small rump who caused problems by resisting. One woman had been detained for three years because she declined to speak, and it was not possible to determine her name, nationality, country of origin or other details. Staff admitted that such cases were unsuitable for a detention regime designed to cater for short term needs; prolonged detention created boredom and institutional despondency, and was likely to result in considerable psychological harm.
17. Finally, the Committee was told that the detention centre was run on a budget of around £120 million a year. About 7000 people had come through Yarl's Wood in 2005. Those managing the centre were asked whether they believed this was a good way of spending public money. There was a general opposition to Home Office plans to open a new removal centre in Bicester; the feeling was that the immigration detention estate should be kept to a minimum, because the more you have the more you fill.
18. We are very grateful to Marina Enwright, the team leader who arranged the visit.

APPENDIX 5: FULL TEXT OF THE DRAFT DIRECTIVE

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL
on common standards and procedures in Member States for returning
illegally staying third-country nationals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.
- (2) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.
- (3) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for stay in a Member State.
- (4) Member States should ensure that the ending of illegal stay is carried out through a fair and transparent procedure.
- (5) As a general principle, a harmonised two-step procedure should be applied, involving a return decision as a first step and, where necessary, the issuing of a removal order as a second step. However, in order to avoid possible procedural delays, Member States should be allowed to issue both a return decision and a removal order within a single act or decision.
- (6) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted.
- (7) A common minimum set of legal safeguards on return and removal decisions should be established to guarantee effective protection of the interests of the individuals concerned.
- (8) The situation of persons who are staying illegally but who cannot (yet) be removed should be addressed. Minimum standards for the conditions of stay of these persons should be established, with reference to the provisions of

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers²⁰⁵.

- (9) The use of coercive measures should be expressly bound to the principle of proportionality and minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subject of individual removal orders²⁰⁶.
- (10) The effects of national return measures should be given a European dimension by establishing a re-entry ban preventing re-entry into the territory of all the Member States. The length of the re-entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed 5 years. In cases of serious threat to public policy or public security, Member States should be allowed to impose a longer re-entry ban.
- (11) The use of temporary custody should be limited and bound to the principle of proportionality. Temporary custody should only be used if necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient.
- (12) Provision should be made to deal with the situation of a third-country national who is the subject of a removal order or return decision issued by a Member State and is apprehended in the territory of another Member State.
- (13) This Directive includes provisions on the recognition of return decisions or removal orders which supersede Council Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country nationals²⁰⁷. That Directive should therefore be repealed.
- (14) Council Decision 2004/191/EC²⁰⁸ sets out criteria and practical arrangements for the compensation of financial imbalances resulting from mutual recognition of expulsion decisions, which should be applied *mutatis mutandis* when recognising return decisions or removal orders according to this Directive.
- (15) Member States should have rapid access to information on return decisions, removal orders and re-entry bans issued by other Member States. This information sharing should take place in accordance with [Decision/Regulation ... on the establishment, operation and use of the Second Generation Schengen Information System (SIS II)]
- (16) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

²⁰⁵ OJ L 31, 6.2.2003, p. 18.

²⁰⁶ OJ L 261, 6.8.2004, p. 28

²⁰⁷ OJ L 149, 2.6.2001, p. 34.

²⁰⁸ OJ L 60, 27.2.2004, p. 55.

- (17) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.
- (18) In line with the 1989 United Nations Convention on the Rights of the Child, the “best interests of the child” should be a primary consideration of Member States when implementing this Directive. In line with the European Convention on Human Rights, respect for family life should be a primary consideration of Member States when implementing this Directive.
- (19) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.
- (20) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (21) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds—to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement²⁰⁹—upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark should, in accordance with Article 5 of the said Protocol, decide, within a period of six months after the adoption of this Directive, whether it will implement it in its national law.
- (22) This Directive constitutes—to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement—a development of provisions of the Schengen acquis within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis, which fall within the area referred to in Article 1, point C of Council Decision 1999/437/EC²¹⁰ on certain arrangements for the application of that Agreement.
- (23) This Directive constitutes a development of the provisions of the Schengen acquis within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the latter’s association with the implementation, application and development of the Schengen acquis which fall within the area referred to in Article 4(1) of Council Decision 2004/860/EC²¹¹ on the provisional application of certain provisions of that Agreement.

²⁰⁹ OJ L 239, 22.9.2000, p. 19.

²¹⁰ OJ L 176, 10.7.1999, p. 31.

²¹¹ OJ L 370, 17.12.2004, p. 78.

- (24) This Directive constitutes—to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement—an act building on the Schengen acquis or otherwise related to it within the meaning of Article 3(2) of the Act of Accession,

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations.

Article 2

Scope

1. This Directive applies to third-country nationals staying illegally in the territory of a Member State, i.e.
 - (a) who do not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement, or
 - (b) who are otherwise illegally staying in the territory of a Member State.
2. Member States may decide not to apply this Directive to third-country nationals who have been refused entry in a transit zone of a Member State. However, they shall ensure that the treatment and the level of protection of such third-country nationals is not less favourable than set out in Articles 8, 10, 13 and 15.
3. This Directive shall not apply to third-country nationals
 - (a) who are family members of citizens of the Union who have exercised their right to free movement within the Community or
 - (b) who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those of citizens of the Union.

Article 3

Definitions

For the purpose of this Directive the following definitions shall apply:

- (a) ‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty;

- (b) ‘illegal stay’ means the presence on the territory of a Member State, of a third country national who does not fulfil, or no longer fulfils the conditions for stay or residence in that Member State;
- (c) ‘return’ means the process of going back to one’s country of origin, transit or another third country, whether voluntary or enforced;
- (d) ‘return decision’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing an obligation to return;
- (e) ‘removal’ means the execution of the obligation to return, namely the physical transportation out of the country;
- (f) ‘removal order’ means an administrative or judicial decision or act ordering the removal;
- (g) ‘re-entry ban’ means an administrative or judicial decision or act preventing re-entry into the territory of the Member States for a specified period.

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:
 - (a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;
 - (b) bilateral or multilateral agreements between one or more Member States and one or more third countries.
2. This Directive shall be without prejudice to any provision which may be more favourable for the third country national laid down in Community legislation in the field of immigration and asylum, in particular in:
 - (a) Council Directive 2003/86/EC on the right to family reunification²¹²,
 - (b) Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents²¹³,
 - (c) Council Directive 2004/81/EC 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 authorities²¹⁴,
 - (d) Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted²¹⁵,
 - (e) Council Directive 2004/114/EC on the conditions of admission of third country nationals for the purpose of studies, pupil exchange, unremunerated training or voluntary service²¹⁶,

²¹² OJ L 251, 3.10.2003, p. 12.

²¹³ OJ L 16, 23.1.2004, p. 44.

²¹⁴ OJ L 261, 6.8.2004, p. 19.

²¹⁵ OJ L 304, 30.9.2004, p. 12.

²¹⁶ OJ L 375, 23.12.2004, p. 12.

- (f) Council Directive 2005/XX/EC on a specific procedure for admitting third country nationals for purposes of scientific research.
3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

Article 5

Family relationships and best interest of the child

When implementing this Directive, Member States shall take due account of the nature and solidity of the third country national's family relationships, the duration of his stay in the Member State and of the existence of family, cultural and social ties with his country of origin. They shall also take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child.

Chapter II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory.
2. The return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.
3. The return decision shall be issued as a separate act or decision or together with a removal order.
4. Where Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights, such as the right to non-refoulement, the right to education and the right to family unity, no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn.
5. Member States may, at any moment decide to grant an autonomous residence permit or another authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In this event no return decision shall be issued or where a return decision has already been issued, it shall be withdrawn.
6. Where a third-country national staying illegally in the territory of a Member State holds a valid residence permit issued by another Member State, the first Member State shall refrain from issuing a return decision where that person goes back voluntarily to the territory of the Member State which issued the residence permit.

7. If a third-country national staying illegally in its territory is the subject of a pending procedure for renewing his residence permit or any other permit offering the right to stay, that Member State shall refrain from issuing a return decision, until the pending procedure is finished.
8. If a third-country national staying illegally in its territory is the subject of a pending procedure for granting his residence permit or any other permit offering the right to stay, that Member State may refrain from issuing a return decision, until the pending procedure is finished.

Article 7

Removal order

1. Member States shall issue a removal order concerning a third-country national who is subject of a return decision, if there is a risk of absconding or if the obligation to return has not been complied with within the period of voluntary departure granted in accordance with Article 6(2).
2. The removal order shall specify the delay within which the removal will be enforced and the country of return.
3. The removal order shall be issued as a separate act or decision or together with the return decision.

Article 8

Postponement

1. Member States may postpone the enforcement of a return decision for an appropriate period, taking into account the specific circumstances of the individual case.
2. Member States shall postpone the execution of a removal order in the following circumstances, for as long as those circumstances prevail:
 - (a) inability of the third-country national to travel or to be transported to the country of return due to his or her physical state or mental capacity;
 - (b) technical reasons, such as lack of transport capacity or other difficulties making it impossible to enforce the removal in a humane manner and with full respect for the third-country national's fundamental rights and dignity;
 - (c) lack of assurance that unaccompanied minors can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return, following an assessment of the conditions to which the minor will be returned.
3. If enforcement of a return decision or execution of a removal order is postponed as provided for in paragraphs 1 and 2, certain obligations may be imposed on the third country national concerned, with a view to avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place.

*Article 9***Re-entry ban**

1. Removal orders shall include a re-entry ban of a maximum of 5 years.
Return decisions may include such a re-entry ban.
2. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case, and in particular if the third-country national concerned:
 - (a) is the subject of a removal order for the first time;
 - (b) has already been the subject of more than one removal order;
 - (c) entered the Member State during a re-entry ban;
 - (d) constitutes a threat to public policy or public security.The re-entry ban may be issued for a period exceeding 5 years where the third country national concerned constitutes a serious threat to public policy or public security.
3. The re-entry ban may be withdrawn, in particular in cases in which the third-country national concerned:
 - (a) is the subject of a return decision or a removal order for the first time;
 - (b) has reported back to a consular post of a Member State;
 - (c) has reimbursed all costs of his previous return procedure.
4. The re-entry ban may be suspended on an exceptional and temporary basis in appropriate individual cases.
5. Paragraphs 1 to 4 apply without prejudice to the right to seek asylum in one of the Member States.

*Article 10***Removal**

1. Where Member States use coercive measures to carry out the removal of a third country national who resists removal, such measures shall be proportional and shall not exceed reasonable force. They shall be implemented in accordance with fundamental rights and with due respect for the dignity of the third-country national concerned.
2. In carrying out removals, Member States shall take into account the common Guidelines on security provisions for joint removal by air, attached to Decision 2004/573/EC.

Chapter III**PROCEDURAL SAFEGUARDS***Article 11***Form**

1. Return decisions and removal orders shall be issued in writing. Member States shall ensure that the reasons in fact and in law are stated in the decision and/or

order and that the third-country national concerned is informed about the available legal remedies in writing.

2. Member States shall provide, upon request, a written or oral translation of the main elements of the return decision and/or removal order in a language the third-country national may reasonably be supposed to understand.

Article 12

Judicial remedies

1. Member States shall ensure that the third-country national concerned has the right to an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision and/or removal order.
2. The judicial remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order in which case the return decision or removal order shall be postponed until it is confirmed or is no longer subject to a remedy which has suspensive effects.
3. Member States shall ensure that the third-country national concerned has the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

Article 13

Safeguards pending return

1. Member States shall ensure that the conditions of stay of third-country nationals for whom the enforcement of a return decision has been postponed or who cannot be removed for the reasons referred to in Article 8 of this Directive are not less favourable than those set out in Articles 7 to 10, Article 15 and Articles 17 to 20 of Directive 2003/9/EC.
2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation that the enforcement of the return decision has been postponed for a specified period or that the removal order will temporarily not be executed.

Chapter IV

TEMPORARY CUSTODY FOR THE PURPOSE OF REMOVAL

Article 14

Temporary custody

1. Where there are serious grounds to believe that there is a risk of absconding and where it would not be sufficient to apply less coercive measures, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents, an obligation to stay at a designated place or other measures to prevent that risk, Member States shall keep under temporary custody a third-country national, who is or will be subject of a removal order or a return decision.

2. Temporary custody orders shall be issued by judicial authorities. In urgent cases they may be issued by administrative authorities, in which case the temporary custody order shall be confirmed by judicial authorities within 72 hours from the beginning of the temporary custody.
3. Temporary custody orders shall be subject to review by judicial authorities at least once a month.
4. Temporary custody may be extended by judicial authorities to a maximum of six months.

Article 15

Conditions of temporary custody

1. Member States shall ensure that third-country nationals under temporary custody are treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Upon request they shall be allowed without delay to establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations.
2. Temporary custody shall be carried out in specialised temporary custody facilities. Where a Member State cannot provide accommodation in a specialised temporary custody facility and has to resort to prison accommodation, it shall ensure that third country nationals under temporary custody are permanently physically separated from ordinary prisoners.
3. Particular attention shall be paid to the situation of vulnerable persons. Member States shall ensure that minors are not kept in temporary custody in common prison accommodation. Unaccompanied minors shall be separated from adults unless it is considered in the child's best interest not to do so.
4. Member States shall ensure that international and non-governmental organisations have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary custody conditions. Such visits may be subject to authorisation.

Chapter V

APPREHENSION IN OTHER MEMBER STATES

Article 16

Apprehension in other Member States

Where a third-country national who does not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement and who is the subject of a return decision or removal order issued in a Member State ("the first Member State") is apprehended in the territory of another Member State ("the second Member State"), the second Member State may take one of the following steps:

- (a) recognise the return decision or removal order issued by the first Member State and carry out the removal, in which case Member States shall compensate each other for any financial imbalance which may be caused, applying Council Decision 2004/191/EC *mutatis mutandis*;

- (b) request the first Member State to take back the third-country national concerned without delay, in which case the first Member State shall be obliged to comply with the request, unless it can demonstrate that the person concerned has left the territory of the Member States following the issuing of the return decision or removal order by the first Member State;
- (c) launch the return procedure under its national legislation;
- (d) maintain or issue a residence permit or another authorisation offering a right to stay for protection-related, compassionate, humanitarian or other reasons, after consultation with the first Member State in accordance with Article 25 of the Convention Implementing the Schengen Agreement.

Chapter VI

FINAL PROVISIONS

Article 17

Reporting

The Commission shall periodically report to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

The Commission shall report for the first time four years after the date referred to in Article 18(1) at the latest.

Article 18

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by, (24 months from the date of publication in the Official Journal of the European Union) at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 19

Relationship with Schengen Convention

This Directive replaces Articles 23 and 24 of the Convention implementing the Schengen Agreement.

*Article 20***Repeal**

Directive 2001/40/EC is repealed.

*Article 21***Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

*Article 22***Addressees**

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...]

For the European Parliament

The President

For the Council

The President

APPENDIX 6: COUNCIL OF EUROPE GUIDELINES ON FORCED RETURN²¹⁷

Chapter I – Voluntary return

Guideline 1. Promotion of voluntary return

The host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.

Chapter II – The removal order

Guideline 2. Adoption of the removal order

Removal orders shall only be issued in pursuance of a decision reached in accordance with the law.

1. A removal order shall only be issued where the authorities of the host state have considered all relevant information that is readily available to them, and are satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;

b. a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or

c. other situations which would, under international law or national legislation, justify the granting of international protection.

2. The removal order shall only be issued after the authorities of the host state, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim.

3. If the state of return is not the state of origin, the removal order should only be issued if the authorities of the host state are satisfied, as far as can reasonably be expected, that the state to which the person is returned will not expel him or her to a third state where he or she would be exposed to a real risk mentioned in paragraph 1, sub-paragraph a. and b. or other situations mentioned in paragraph 1, sub-paragraph c.

4. In making the above assessment with regard to the situation in the country of return, the authorities of the host state should consult available sources of information, including non-governmental sources of information, and they should consider any information provided by the United Nations High Commissioner for Refugees (UNHCR).

5. Before deciding to issue a removal order in respect of a separated child, assistance—in particular legal assistance—should be granted with due consideration given to the best interest of the child. Before removing such a child

²¹⁷ Adopted by the Committee of Ministers of the Council of Europe on 4 May 2005.

from its territory, the authorities of the host state should be satisfied that he/she will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return.

6. The removal order should not be enforced if the authorities of the host state have determined that the state of return will refuse to readmit the returnee. If the returnee is not readmitted to the state of return, the host state should take him/her back.

Guideline 3. Prohibition of collective expulsion

A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned, and it shall take into account the circumstances specific to each case. The collective expulsion of aliens is prohibited.

Guideline 4. Notification of the removal order

1. The removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate:

- the legal and factual grounds on which it is based;
- the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised.

2. Moreover, the authorities of the host state are encouraged to indicate:

- the bodies from whom further information may be obtained concerning the execution of the removal order;
- the consequences of non-compliance with the removal order.

Guideline 5. Remedy against the removal order

1. In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution.

2. The remedy shall offer the required procedural guarantees and present the following characteristics:

- the time-limits for exercising the remedy shall not be unreasonably short;
- the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;
- where the returnee claims that the removal will result in a violation of his or her human rights as set out in guideline 2.1, the remedy shall provide rigorous scrutiny of such a claim.

3. The exercise of the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights as set out in guideline 2.1.

Chapter III – Detention pending removal

Guideline 6. Conditions under which detention may be ordered

1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.

2. The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation.

Guideline 7. Obligation to release where the removal arrangements are halted

Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible.

Guideline 8. Length of detention

1. Any detention pending removal shall be for as short a period as possible.

2. In every case, the need to detain an individual shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority.

Guideline 9. Judicial remedy against detention

1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful.

2. This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation.

Guideline 10. Conditions of detention pending removal

1. Persons detained pending removal should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.

2. Such facilities should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a “carceral” environment. Organised activities should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation.

3. Staff in such facilities should be carefully selected and receive appropriate training. Member states are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical and social support.

4. Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.

5. National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover, the functioning of these facilities should be regularly monitored, including by recognised independent monitors.

6. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees. Complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.

7. Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detainees should be informed of their entitlement to contact a lawyer of their choice, the competent diplomatic representation of their country, international organisations such as the UNHCR and the International Organization for Migration (IOM), and non-governmental organisations. Assistance should be provided in this regard.

Guideline 11. Children and families

1. Children shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy.

3. Children, whether in detention facilities or not, have a right to education and a right to leisure, including a right to engage in play and recreational activities

appropriate to their age. The provision of education could be subject to the length of their stay.

4. Separated children should be provided with accommodation in institutions provided with the personnel and facilities which take into account the needs of persons of their age.

5. The best interest of the child shall be a primary consideration in the context of the detention of children pending removal.

Chapter IV – Readmission

Guideline 12. Cooperation between states

1. The host state and the state of return shall cooperate in order to facilitate the return of foreigners who are found to be staying illegally in the host state.

2. In carrying out such cooperation, the host state and the state of return shall respect the restrictions imposed on the processing of personal data relating to the reasons for which a person is being returned. The state of origin is under the same obligation where its authorities are contacted with a view to establishing the identity, the nationality or place of residence of the returnee.

3. The restrictions imposed on the processing of such personal data are without prejudice to any exchange of information which may take place in the context of judicial or police cooperation, where the necessary safeguards are provided.

4. The host state shall exercise due diligence to ensure that the exchange of information between its authorities and the authorities of the state of return will not put the returnee, or his/her relatives, in danger upon return. In particular, the host state should not share information relating to the asylum application.

Guideline 13. States' obligations

1. The state of origin shall respect its obligation under international law to readmit its own nationals without formalities, delays or obstacles, and cooperate with the host state in determining the nationality of the returnee in order to permit his/her return. The same obligation is imposed on states of return where they are bound by a readmission agreement and are, in application thereof, requested to readmit persons illegally residing on the territory of the host (requesting) state.

2. When requested by the host state to deliver documents to facilitate return, the authorities of the state of origin or of the state of return should not enquire about the reasons for the return or the circumstances which led the authorities of the host state to make such a request and should not require the consent of the returnee to return to the state of origin.

3. The state of origin or the state of return should take into account the principle of family unity, in particular in relation to the admission of family members of the returnees not possessing its nationality.

4. The state of origin or the state of return shall refrain from applying any sanctions against returnees:

– on account of their having filed asylum applications or sought other forms of protection in another country;

- on account of their having committed offences in another country for which they have been finally convicted or acquitted in accordance with the law and penal procedure of each country; or
- on account of their having illegally entered into, or remained in, the host state.

Guideline 14. Statelessness

The state of origin shall not arbitrarily deprive the person concerned of its nationality, in particular where this would lead to a situation of statelessness. Nor shall the state of origin permit the renunciation of nationality when this may lead, for the person possessing this state's nationality, to a situation of statelessness which could then be used to prevent his or her return.

Chapter V – Forced removals

Guideline 15. Cooperation with returnees

1. In order to limit the use of force, host states should seek the cooperation of returnees at all stages of the removal process to comply with their obligations to leave the country.
2. In particular, where the returnee is detained pending his/her removal, he/she should as far as possible be given information in advance about the removal arrangements and the information given to the authorities of the state of return. He/she should be given an opportunity to prepare that return, in particular by making the necessary contacts both in the host state and in the state of return, and if necessary, to retrieve his/her personal belongings which will facilitate his/her return in dignity.

Guideline 16. Fitness for travel and medical examination

1. Persons shall not be removed as long as they are medically unfit to travel.
2. Member states are encouraged to perform a medical examination prior to removal on all returnees either where they have a known medical disposition or where medical treatment is required, or where the use of restraint techniques is foreseen.
3. A medical examination should be offered to persons who have been the subject of a removal operation which has been interrupted due to their resistance in cases where force had to be used by the escorts.
4. Host states are encouraged to have “fit-to-fly” declarations issued in cases of removal by air.

Guideline 17. Dignity and safety

While respecting the dignity of the returnee, the safety of the other passengers, of the crew members and of the returnee himself/herself shall be paramount in the removal process. The removal of a returnee may have to be interrupted where its continuation would endanger this.

Guideline 18. Use of escorts

1. The authorities of the host state are responsible for the actions of escorts acting on their instruction, whether these people are state employees or employed by a private contractor.
2. Escort staff should be carefully selected and receive adequate training, including in the proper use of restraint techniques. The escort should be given adequate information about the returnee to enable the removal to be conducted safely, and should be able to communicate with the returnee. Member states are encouraged to ensure that at least one escort should be of the same sex as that of the returnee.
3. Contact should be established between the members of the escort and the returnee before the removal.
4. The members of the escort should be identifiable; the wearing of hoods or masks should be prohibited. Upon request, they should identify themselves in one way or another to the returnee.

Guideline 19. Means of restraint

1. The only forms of restraint which are acceptable are those constituting responses that are strictly proportionate responses to the actual or reasonably anticipated resistance of the returnee with a view to controlling him/her.
2. Restraint techniques and coercive measures likely to obstruct the airways partially or wholly, or forcing the returnee into positions where he/she risks asphyxia, shall not be used.
3. Members of the escort team should have training which defines the means of restraint which may be used, and in which circumstances; the members of the escort should be informed of the risks linked to the use of each technique, as part of their specialised training. If training is not offered, as a minimum regulations or guidelines should define the means of restraint, the circumstances under which they may be used, and the risks linked to their use.
4. Medication shall only be administered to persons during their removal on the basis of a medical decision taken in respect of each particular case

Guideline 20. Monitoring and remedies

1. Member states should implement an effective system for monitoring forced returns.
2. Suitable monitoring devices should also be considered where necessary.
3. The forced return operation should be fully documented, in particular with respect to any significant incidents that occur or any means of restraint used in the course of the operation. Special attention shall be given to the protection of medical data.
4. If the returnee lodges a complaint against any alleged ill-treatment that took place during the operation, it should lead to an effective and independent investigation within a reasonable time.

Appendix

Definitions

For the purpose of these guidelines, the following definitions apply:

- State of origin: the state of which the returnee is a national, or where he/she permanently resided legally before entering the host state;
- State of return: the state to which a person is returned;
- Host state: the state where a non-national of that state has arrived, and/or has sojourned or resided either legally or illegally, before being served with a removal order;
- Illegal resident: a person who does not fulfil, or no longer fulfils, the conditions for entry, presence in, or residence on the territory of the host state;
- Returnee: any non-national who is subject to a removal order or is willing to return voluntarily;
- Return: the process of going back to one's state of origin, transit or other third state, including preparation and implementation. The return may be voluntary or enforced;
- Voluntary return: the assisted or independent departure to the state of origin, transit or another third state based on the will of the returnee;
- Assisted voluntary return: the return of a non-national with the assistance of the International Organization for Migration (IOM) or other organisations officially entrusted with this mission;
- Supervised voluntary return: any return which is executed under direct supervision and control of the national authorities of the host state, with the consent of the returnee and therefore without coercive measures;
- Forced return: the compulsory return to the state of origin, transit or other third state, on the basis of an administrative or judicial act;
- Removal: act of enforcement of the removal order, which means the physical transfer out of the host country;
- Removal order: administrative or judicial decision providing the legal basis of the removal;
- Readmission: act by a state accepting the re-entry of an individual (own nationals, third country nationals or stateless persons), who has been found illegally entering, being present in or residing in another state;
- Readmission agreement: agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not or no longer fulfil the conditions of entry to, presence in or residence in the requesting state;
- Separated children: children separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives.

Note: When adopting this decision, the Permanent Representative of the United Kingdom indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, he reserved the right of his Government to comply or not with Guidelines 2, 4, 6, 7, 8, 11 and 16.

APPENDIX 7: LIST OF ACRONYMS

ARC	Asylum Registration Card
ADSS	Association of Directors of Social Services
AIT	Asylum and Immigration Tribunal
AITC Act	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
AVR	Assisted Voluntary Return
AVRIM	Assisted Voluntary Return for Irregular Migrants
BID	Bail for Immigration Detainees
CBI	Confederation of British Industry
CEPS	Centre for European Policy Studies
CIPU	Country Information Policy Unit
COI	Country of Origin Information
CRE	Commission for Racial Equality
DCA	Department for Constitutional Affairs
DfES	Department for Education and Skills
DG JLS	Directorate-General Justice, Freedom and Security of the European Commission
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECO	Entry Clearance Officer
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
EPP	European People's Party
EU	European Union
Eurodac	A computerised EU database for storing the fingerprints of asylum applicants
FCO	Foreign and Commonwealth Office

FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States
GCSE	General Certificate of Secondary Education
GDP	Gross Domestic Product
GUE	European United Left
HMCIP	Her Majesty's Chief Inspector of Prisons
IAN Bill	Immigration, Asylum and Nationality Bill (which received the Royal Assent on 30 March 2006)
IAS	Immigration Advisory Service
ILPA	Immigration Law Practitioners' Association
ILR	Indefinite leave to remain
IND	Immigration and Nationality Directorate of the Home Office
IOM	International Organization for Migration
IPPR	Institute for Public Policy Research
JCWI	Joint Council for the Welfare of Immigrants
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
MEP	Member of the European Parliament
MoU	Memorandum of Understanding
NAO	National Audit Office
NASS	National Asylum Support Service
NGO	Non-governmental organisation
NIAA Act	Nationality, Immigration and Asylum Act 2002
NSA	Non-suspensive appeal
ODPM	Office of the Deputy Prime Minister
RCO	Refugee Community Organisations
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum of the EU Council
SIS	Schengen Information System
SIS II	The second generation Schengen Information System
TEC	Treaty Establishing the European Community
UASC	Unaccompanied asylum-seeking children

UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
VARRP	Voluntary Assisted Return and Reintegration Programme

APPENDIX 8: OTHER RELEVANT REPORTS FROM THE SELECT COMMITTEE

Session 2005-06

Annual Report of the EU Select Committee 2005 (25th Report, HL Paper 123)

Relevant Reports prepared by Sub-Committee F

Session 2000-01

A Community Immigration Policy (13th Report, HL Paper 64)

Session 2001-02

The legal status of long-term resident third-country nationals (5th report, HL Paper 33)

A Common Policy on Illegal Immigration (37th Report, HL Paper 187)

Session 2003-04

Handling EU asylum claims: new approaches examined (11th Report, HL Paper 74)

Session 2004-05

The Hague Programme: a five year agenda for EU justice and home affairs (10th Report, HL Paper 84)

Session 2005-06

Economic Migration to the EU (14th Report, HL Paper 58)

Minutes of Evidence

TAKEN BEFORE THE EUROPEAN UNION COMMITTEE (SUB-COMMITTEE F)

WEDNESDAY 11 JANUARY 2006

Present	Avebury, L	Henig, B
	Caithness, E	Listowel, E
	Corbett of Castle Vale, L	Marlesford, L
	D'Souza, B	Ullswater, V
	Dubs, L	Wright of Richmond, L (Chairman)

Memorandum by Immigration Law Practitioners' Association (ILPA)

1. ILPA is a professional association with some 1,200 members, who are barristers, solicitors, advisers and academics practising in all aspects of immigration, asylum and nationality law at the national and European levels. ILPA welcomes the opportunity to comment on the draft directive. This submission is organised as closely as possible to address the specific points raised in the call for evidence.

THE LEGAL BASIS OF THE DRAFT DIRECTIVE AND PREMISES ON WHICH IT IS BASED

2. ILPA is fundamentally opposed to the basic premise of this proposed Directive, that Member States should be compelled to expel non-nationals from their territories. We do not see that there is any legitimacy for the European Union to be making mandatory forcible expulsion of non-nationals.

3. We would welcome a directive that sets minimum standards for the procedures surrounding the removal of non-nationals from the Member States. Given the tragedies that have occurred in a number of Member States during the course of forcible removals, it is apparent that it is necessary to set standards for the protection of the individuals being removed. In our view the minimum standards set by a Directive on removals need to be sufficiently high and in compliance with international human rights law. At their core such standards need to protect those facing removal from arbitrary decision-making and unnecessary use of detention and force as well as to ensure respect for human dignity and personal welfare.

4. Regrettably the proposed Directive does not achieve this. In our view, not only do we have a fundamental objection to the basic premise of the Directive, but we would also argue that it does not set standards that can properly be described as "minimum". The proposed Directive in our view needs substantial amendment if it is to provide proper protection for the individuals facing forcible removal from the EU.

5. As it stands, the proposed directive is concerned with the expulsion of those in an irregular position, which need not necessarily entail their return to a state of origin. This is clear from the definition of "return" in Article 3(c). If that remains the case, the title of the directive and Article 1 ought to be changed to use the term "expulsion".

PRE-LEGISLATIVE SCRUTINY: A CAUSE FOR CONCERN

6. There is an impact assessment report on the Proposal, SEC(2005)1057. It is structured around four options. It considers four general approaches: no change; non-binding legal instrument; gradual harmonisation by directive, and full harmonisation by regulation. No further formal consultation was carried out immediately before this Proposal was published so the Commission relies on the consultation that took place in 2002, although it appears that some further informal consultation took place in 2004 with "Member State experts active in the field of return". Most striking about the impact assessment is the lack of detail: the entire process seems taken up with comparing at a rather superficial level the costs and benefits of the four general approaches above, with far less consideration of the actual substantive content of the partial harmonisation envisaged.

7. The explanatory memorandum to the Directive states that the Proposal was "subject to an in-depth scrutiny to make sure that its provisions are fully compatibility (sic) with fundamental rights as general principles of community law as well as international law, including refugee protection and human rights

11 January 2006

obligations derived from the ECHR. As a result, particular emphasis was put on the provisions dealing with procedural safeguards, family unity, temporary custody and coercive measures". It is not made clear whether this is a reference to the impact assessment or to some other scrutiny. As noted, the impact assessment is rather short on detail and although it does mention fundamental rights hardly qualifies as an in depth scrutiny of the proposal to ensure full compatibility with fundamental rights—it seems most likely that there is another document. Without sight of this document it is difficult to judge the extent or scope of this scrutiny and the extent of its impact on the final proposal.

WHETHER THE STANDARDS PROPOSED COMPLY WITH HUMAN RIGHTS LAW

8. We set out below our view on the human rights compatibility of the proposed standards in our discussion of the various aspects of the draft directive. In summary: (1) The directive should not apply to family members of nationals of the state in question in so far as the removal of family members would interfere with Article 8 of the European Convention on Human Rights (paragraph 12 below); (2) Article 5 should be strengthened to emphasise that respect for family life should be a primary consideration of Member States' implementation of the directive (paragraphs 15–16 below); (3) Under Article 6(4), all return decisions must respect the ECHR but see our comments at paragraph 20 below; (4) Mutual recognition of expulsion decisions under Article 16(a) may give rise to human rights violations (paragraph 27 below). It goes without saying that the Articles 14 and 15 on temporary custody must be underpinned by the standards of Article 5 ECHR.

SCOPE: ARTICLE 2

9. Article 2(2), first sentence: In our assessment, the directive ought to apply to all cases of return/expulsion from the territory. There is no reason to permit Member States to designate "transit zones" where the Directive's safeguards do not fully apply. Jurisprudence of the European Court of Human Rights makes clear that transit zones do not fall outside State responsibility under the European Convention on Human Rights (*Amuur v France*, 10 June 1996, 22 EHRR 533). There is no justification in international human rights law for drawing a distinction between transit zones and other parts of State territory.

10. Equally, it should be made clear that the Directive's safeguards apply where individuals are admitted to the territory on a provisional or temporary basis, for example to permit adjudication of an asylum claim.

11. Article 2(2), second sentence: The proposal contemplates the application to those in transit zones of the safeguards in Article 8 (postponement), Article 10 (coercive measures), Article 13 (treatment pending return) and Article 15 (conditions of temporary custody). We take the view that, with suitable modifications, the following safeguards should also be applied to those in transit zones: Article 6(5) (Member State freedom to grant a residence permit), Article 11 (decisions to be in writing), Article 12 (judicial remedies) and Article 14 (decisions on temporary custody).

12. Article 2(3): In addition to those listed in the proposal, in our assessment, the following categories of third country national should be excluded from the Directive since they either have directly effective Community law rights to reside or their removal would interfere with Article 8 of the European Convention on Human Rights:

- a. the family members of nationals of the state in question;
- b. the family members of EEA and Swiss nationals who exercise rights under those agreements; and
- c. nationals of states with association agreements with the EU, and who have exercise rights under those agreements.

DEFINITIONS: ARTICLE 3

13. Article 3 (c) "return": We are concerned at the open-endedness of the phrase "going back to one's country of origin, transit or another third country." "Return" must mean above all going back to a state of nationality. The circumstances in which return to state of transit is allowed—eg under the Dublin II Regulation—should be precisely defined. We do not consider that this proposed Directive is appropriate to set out the mechanism for Member States to remove third country nationals to countries other than their countries of origin. The safeguards and procedures for sending third country nationals to transit or other third countries should be the subject of a separate document as different factors are relevant (such as admissibility to those countries) which will not necessarily be relevant in cases of return to country of nationality.

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FAMILY RELATIONSHIPS AND BEST INTEREST OF THE CHILD: ARTICLE 5

14. Article 5 places a duty on Member States, when implementing the Directive, to “take due account” of the nature and solidity of the third country national’s family relationships, the duration of his stay in the Member State and of the existence of family, cultural and social ties with his country of origin. Member States must also “take account of” the best interests of the child in accordance with the 1989 UN Convention on the Rights of the Child. This is complemented by a preambular provision, recital 18, according to which the best interests of the child and respect for family life “should be a primary consideration” of Member States when implementing the Directive.

15. We recommend that the text of the Directive should be strengthened to be aligned with existing Community measures such as the reception conditions Directive (Article 18) and the refugee Qualification Directive (Article 20(5)). Recital 18 should replace current Article 5. New Article 5(1) should thus read: “In line with the 1989 UN Convention on the Rights of the Child, the ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive. In line with the ECHR, respect for family life should be a primary consideration of Member States when implementing this Directive”.

16. The best interests of the child and the protection of family life can be further enhanced by the insertion of a second paragraph in Article 5, modelled upon Article 23(2) of the temporary protection Directive, according to which, in cases of returns: “The Member States may allow families whose children are minors and attend school in a Member State to benefit from residence conditions allowing the children concerned to complete the current school period.”

17. Article 5 does not contain any provision on the protection of vulnerable persons. Their needs are taken into account only with regard to the conditions of temporary custody in the draft. We recommend that this provision is reiterated in the general part of the Directive—this will oblige Member States to pay attention to the situation of vulnerable persons in all cases when implementing the Directive. A new Article 5(3) can be inserted, stating that: “When implementing the Directive, Member States shall pay particular attention to the situation of vulnerable persons, taking account of factors including age, mental and physical health and sex”.

18. Finally, Article 15(3) obliges Member States to ensure that minors “are not kept in temporary custody in common prison accommodation”. The words “in common prison accommodation” should be deleted. Minors should never be kept in custody.

THE MERITS OF THE PROCEDURAL RULES, PARTICULARLY OF A TWO-STEP PROCESS—RETURN DECISION FOLLOWED BY REMOVAL ORDER—AND WHETHER THEY ALLOW FOR AN INFORMED CHOICE OF VOLUNTARY RETURN

19. As mentioned in the Introduction, we consider that expulsion decisions should be a matter of discretion for Member States. Additionally we are of the view that the criteria for determining whether a return decision can be made should be made clearer. We consider that no return decision should be taken if there are compassionate or humanitarian reasons for the person remaining in the Member State.¹ Plainly the forcible removal of a person in such situations cannot be condoned by the European Union and should not be left to the discretion of Member States. Further no return decision can be made if the return would breach the State’s obligation under international human rights law. We do not consider that such obligations should be limited to the European Convention on Human Rights or particular provisions within that Convention.

20. Furthermore we are concerned that if return decisions are not made, that third country nationals should not be left in limbo without any legal status in the Member State. If third country nationals are left without legal status it affects their ability to access services, employment and social support as well as leaving them unstable and insecure. The case of *Ahmed v Austria* will be recalled in this instance (9 October 1997, 24 EHRR 62). Mr Ahmed had been denied a residence permit confirming his right to stay in Austria following the decision of the European Court of Human Rights that removal would contravene his human rights. Tragically he took his own life as he was left without support or stability.

¹ Subsequently clarification was received from ILPA in relation to the third sentence of paragraph 18: “ILPA takes the view that the current wording of the EU Commission’s proposal is insufficiently strong to prevent the expulsion of third country nationals where there are compassionate, humanitarian or other reasons against expulsion. In line with our view that expulsion should be discretionary, we believe that Article 6 of the proposal should give Member States the discretion to issue a return decision but that that discretion must be constrained not only by human rights obligations but also by compassionate or other humanitarian factors. Where these exist, removal must not take place and residence must be granted”.

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21. We recommend that Article 6(1) is therefore amended to read:

- “(a) Member States may issue a return decision to any third country national staying illegally on their territory provided that: (i) return would not constitute a breach of international human rights law and in particular the European Convention on Human Rights, the UN Convention on the Rights of the Child; or (ii) there are no compassionate or other humanitarian reasons why the person should not be removed.
- (b) In the event that a return decision has already been made and there are compassionate or humanitarian reasons or the return would constitute a breach of international human rights obligations, that decision should be withdrawn.
- (c) Where return would breach international human rights obligations or there are other compassionate or humanitarian reasons why the third country national should not be removed the Member State must issue the person with an autonomous residence permit or another authorisation granting a right to stay.”

22. As a consequence of the above amendment Article 6(4) should be deleted and Article 6(5) should be amended to read: “Member States may, at any moment decide to issue an autonomous residence permit or another authorisation offering a right to stay for [delete] any reason to a third country national staying illegally on their territory. In this event no return decision shall be issued or where a return decision has already been issued, it shall be withdrawn.”

23. As regards the two-step process of return and removal, and whether it enables an informed choice of voluntary return, we must point out that any return under threat of forcible removal risks not being truly voluntary. Thus safeguards must be in place to ensure that those with good reason to remain for compassionate or humanitarian reasons or because return would breach fundamental rights are not forcibly returned.

24. Individuals under threat of expulsion should know as soon as possible the country to which they are to be expelled in order to give them adequate opportunity to put forward any reasons why expulsion should not take place to that country (eg because the individual is not a citizen of the country or because expulsion there would be prohibited on asylum or human rights grounds). Therefore we are of the view that the expulsion destination must be expressly included in a return decision. If the State wishes to alter the expulsion destination, a new return decision must be taken. The State must not be permitted to await the removal order before specifying the expulsion destination.

25. We consider that Article 6(8) should be mandatory on Member States since it is illogical for a return decision to be made if the individual has made an application for a residence permit or right to stay in the Member State which is pending consideration. A return decision made before the application for residence permit or stay is processed would be premature and could lead to administrative error where an individual is removed before the outcome of their residence permit application is known. Furthermore the provision should be clarified to including in procedure, any appeal against refusal by the administrative authorities, in order that an individual may not be subject to a return decision if they are exercising a right to appeal in relation to a residence permit application. We recommend therefore that Article 6(8) is amended to read: “If a third country national staying illegally in its territory is the subject of a pending procedure, including any appeal or judicial review, for granting his residence permit or any other permit offering the right to stay, that Member State shall refrain from issuing a return decision, until the pending procedure is finished.”

26. A further point on procedural rules concerns Article 11. We are concerned that decisions are only to be provided to individuals in a language they understand where they request a translation. Furthermore we are concerned that the language the information is provided in is not one known to be understood by the individual but only one “reasonably” supposed to be understood.

APPREHENSION IN OTHER MEMBER STATES: ARTICLE 16

27. This section also seems the appropriate point to address Article 16. This Article concerns the apprehension of third-country nationals who do not fulfil conditions of entry as set out in Article 5 of the Schengen Convention, to which the UK is not a signatory. In November 2005, the Home Office told the IND Users Group (which ILPA attends) that the UK will not implement Article 16 as it is Schengen-based. It is unprecedented for the UK to opt out of a single provision of a directive which it otherwise adopts. It is questionable whether other Member States will accept this: it may raise political issues. We suggest that the Home Office should set out its position on this Article clearly and early.

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28. According to this provision, the principle on which the Directive on mutual recognition of decisions on the expulsion of third country nationals (2001/40) is based (that is to say the automatic recognition of such decisions is abandoned—though in any event even under the Directive, the Member States were not obliged to accord mutual recognition to an expulsion decision). Recital 13 of the proposal announces the repeal of the Directive in total.

29. In place of the principle of mutual recognition of expulsion decisions, the new proposal provides for four alternatives—(a) to (d)—covering fairly fully all of the possibilities open to a Member State so that it can hardly be considered as a step towards harmonisation or even approximation in the field. Although, as far as we are aware, there are no statistics on the use of the Directive on mutual recognition of expulsion decisions, from anecdotal evidence we understand that this has been extremely rare. Our criticisms of that Directive remain relevant to option (a) of Article 16. We do not consider that mutual recognition is a lawful way to proceed in light of the potential human rights breaches which may result. For instance, if an expulsion decision is made in one Member State which fails to take into account the duties of the Member States toward long resident third country nationals with family members in the state under Article 8 ECHR, the second Member State in executing the decision may also be in breach of Article 8 ECHR (*T.I. v UK* by analogy).

30. The most tempting course of action is for the second Member State to seek to return the individual to the first Member State. However, we are concerned that such an approach may be used as a ground for the further extension of databases and access to information about individual's immigration status across and within EU borders. In our view the collection, retention and transmission of such information which may be highly prejudicial to the individual needs to be very carefully controlled and tested against the right to privacy which is embodied in Article 8 ECHR.

31. As the first option has proven highly unattractive to the Member States under the existing directive and as the second option has what we consider to be inherent flaws, the third option—commencing with a new expulsion decision—becomes the default preferred position. However, we would insist that this option must be accompanied by a right of appeal against the decision to expel which has suspensive effect. Expulsion is a very serious interference with the private life of an individual. Thus the individual must be given the opportunity to counter any decision to expel him or her before a judicial authority which has the power to take into consideration all the relevant facts of the case in reviewing the decision.

32. We are content that the power in subsection (d) to issue a residence permit is not limited to compassionate or humanitarian reasons but also includes other reasons. However we consider that it would be advantageous to specify in an annex the circumstances in which there will be a presumption in favour of issuing a residence permit. In our view these would include:

- a. where the individual is married to or in a stable relationship including a same sex relationship with a citizen of the Union or a third country national with lawful residence on the territory;
- b. where the individual has a child on the territory with whom the individual has contact and which child has a right of residence on the territory;
- c. where the individual has substantial family links within the EU albeit not in one Member State alone and few links left in the country of origin;
- d. where the individual has resided within the Union for a period in excess of five years albeit irregularly or with a mix of regular and irregular stay;
- e. where the state is constrained by international human rights obligations from expulsion—including where the individual is a refugee, or a person entitled to protection on the basis of Article 3 ECHR or Article 3 UNCAT; and
- f. where the individual is gainfully employed and there are no reasons of public policy, public security or public health to justify his or her expulsion from the state.

THE PROVISIONS FOR INDIVIDUALS WHO CANNOT BE REMOVED, WHETHER TEMPORARILY OR INDEFINITELY, AND PROVISIONS ALLOWING OR REQUIRING POSTPONEMENT OF REMOVAL

33. We deal with these points together. Our fundamental concern is that individuals should not be left for long periods of time with the possibility of removal decisions hanging over them.

34. As mentioned above no return decision can be made if the return would breach the State's obligation under international human rights law. We do not consider that such obligations should be limited to the European Convention on Human Rights or particular provisions within that Convention. We therefore welcome Article 6(4).

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35. We consider that if the enforcement of the return decision is to be postponed because of individual circumstances for an unreasonable period the Member State should be compelled to reconsider whether the return decision should be withdrawn. We consider that if there is non-enforcement of a return decision for reasons of ill-health, humanitarian reasons or due to the young age of the individual, the individual should not be left in limbo with the threat of the return decision hanging above him or her.

36. The circumstances set out in Article 8(2) where the execution of a removal order must be postponed, in our view are circumstances which engage with the individuals' human rights and the right of the child. We are very concerned that a removal order could simply be postponed for an indefinite period of time with the threat of such removal hanging over the individual for that time. We consider that such threat can cause mental suffering and create insecurity that is highly undesirable and potentially itself in breach of international human rights obligations. We consider that if postponement of the removal order occurs for lengthy periods of time the removal order and return decision should lapse.

37. To this end we recommend that the following words are added to Article 8(1): “. . . In the event that the Member State postpones enforcement of a return decision for longer than two weeks for reasons of ill-health, other humanitarian reasons or in the case of a minor, the State should consider whether the return decision should be withdrawn. In all other cases where the Member State postpones enforcement of a return decision for longer than four months, the State should consider whether the return decision should be withdrawn.”

38. We recommend that the following words are added to Article 8(2): “. . . In the event that the execution of the removal order has been postponed for longer than four weeks due to circumstances set out in (a) or (c) above or for reasons of difficulty of removal in a humane manner with full respect for the third-country national's fundamental rights, the return decision and removal order will lapse automatically. Where the execution of the removal order has been postponed for longer than six months for any other reason, the return decision and removal order will lapse automatically.”

THE USE AND DURATION OF DETENTION: ARTICLE 14

39. We note from the Commission's Explanatory Memorandum that this Chapter seeks to limit the use of temporary custody to circumstances where it is necessary to prevent the risk of absconding. We support this limitation but are concerned that it should be expressly spelt out in Article 14(1). We suggest that Article 14(1) should expressly state that Member States must not detain third-country nationals unless there is a risk of absconding.

40. It is particularly important that decisions to detain are taken on the basis of a full and substantive assessment of the individual case. We suggest that this is expressed in Article 14(1). Furthermore we do not accept that the use of detention can ever be made mandatory on the Member State.

41. On its current wording Article 14(1) places a duty on Member States to detain potential absconders where less coercive measures would not be sufficient. The mandatory nature of the provision fails to take account of:

- a. Humanitarian factors (such as mental or physical disability; pregnancy; age).
- b. Circumstances where a person is genuinely unable to comply with less coercive measures (eg a person is unable for financial reasons to deposit a financial guarantee).

42. In our view, it is important that Member States should have discretion not to detain potential absconders where humanitarian factors or other personal factors would render detention disproportionate. Furthermore unaccompanied minors and families with children should never be detained. In cases where there is a risk of absconding, alternatives to detention should be utilised such as more frequent reporting, supervised accommodation or electronic supervision.

43. In light of these comments we recommend that Article 14(1) is amended to read as follows: “Only where there are serious grounds . . . [retain existing text] that risk, Member States may detain a third country national, who is or will be subject of a removal order or a return decision. Detention should never be used where humanitarian factors or other personal circumstances render the detention disproportionate. Detention should never be used in the case of an unaccompanied minor or families with children. A decision to detain should be taken only on the basis of a full and substantive assessment of the individual case.”

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44. In our view given that the liberty of the individual is at stake, temporary custody orders should not be issued, even in urgent cases, by administrative authorities: the decision to detain should always be judicial.

45. In order to ensure that detention is for the shortest possible period, an individual should be entitled to a review of his/her detention by judicial authorities whenever there is new evidence supporting release or whenever his/her circumstances change. We suggest that this is made clear in Article 14(2). In light of these comments we recommend that Article 14(2) is amended as follows: “Detention orders shall be issued by judicial authorities. [delete remaining text]. A person subject to such order shall be entitled to a review of his/her detention by judicial authorities whenever there is new evidence supporting release or whenever his/her circumstances change.”

46. We are concerned that temporary custody orders may be extended by as long as six months. This long period is inconsistent with the regular judicial scrutiny which the Article seeks to establish elsewhere. We suggest that a maximum period of 60 days is more appropriate in all cases. To this end Article 14(4) should be amended to read: “Detention may be extended by judicial authorities to a maximum of 60 days.”

47. We also suggest that Article 14 should stipulate that detainees must without delay be provided with written reasons for detention in a language they understand. They should also be informed of their rights to challenge a temporary custody order. We recommend the addition of a new Article 14(5) which reads: “Third country nationals subject to detention orders must be provided without delay with written reasons for detention in a language they understand. They should also be informed of their rights to challenge the detention order.”

CONDITIONS OF TEMPORARY CUSTODY: ARTICLE 15

48. It is important that immigration detainees are subject to a security regime and have access to facilities which recognise that they are not detained by virtue of having committed a crime.

49. Article 15(1) should be expanded so that it places a duty on Member States to provide immigration detainees with access to useful activities such as education, physical exercise, recreational activities, and religious practice. To this end we recommend that the following words are added to Article 15(1): “. . . Member States shall provide immigration detainees with access to useful activities such as education, physical exercise, recreational activities, and religious practice.”

50. We welcome the emphasis in Article 15(2) on specialised temporary custody facilities but we do not believe that it goes far enough: there should be no circumstances in which immigration detainees should be accommodated in ordinary prisons.

51. In addition, we believe that Article 15 should stipulate that staff employed within temporary custody facilities should have adequate training related to the needs of immigration detainees rather than criminal prisoners. We recommend that Article 15(2) is amended as follows: “Detention shall be carried out in specialised detention facilities [delete remaining text]. Staff employed at such facilities should have adequate training related to the needs of immigration detainees rather than criminal prisoners.”

52. We welcome the emphasis on vulnerable persons under Article 15(3). We consider it necessary to make clear that Member States are obliged to take account of age, mental and physical health and sex. However, as stated above children and families should never be detained Accordingly Article 15(3) should be amended to read: “Particular attention shall be paid to the situation of vulnerable persons [delete remaining text] and other relevant factors such as age, mental and physical health and sex of the detainee.”

53. We suggest that Article 15(4) should expressly give international organisations the right to unlimited access to places of detention and the right to move inside such places without restriction. International organisations should have the right to interview detainees in private and communicate freely with anyone who can provide information. This would provide the same safeguards as are provided by visits of the European Committee for the Prevention of Torture.

54. In addition, Article 15(4) should stipulate that all detainees should have access to a procedure dealing with complaints about conditions of detention. Article 15(4) should be amended to have the following words added at the end of the existing text: “. . . International organisations shall have the right to unlimited access to places

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of detention and the right to move inside such places without restriction. International organisations shall have the right to interview detainees in private and communicate freely with anyone who can provide information. Member States shall have in place a procedure for detainees to complain about conditions of detention.”

THE SAFEGUARDS FOR INDIVIDUALS TO BE REMOVED (SUCH AS CONCERNING THEIR ARREST AND ESCORT), PARTICULARLY WHERE REMOVAL ACTION IS SUB-CONTRACTED TO PRIVATE COMPANIES

55. The phrase “where Member States use coercive measures” in Article 10 may imply that the Directive imposes a duty/authorises Member States to use coercive measures routinely in carrying out removals. Coercive measures must always be a measure of last resort.

56. It is imperative that personnel who are responsible for and who actually carry out the arrest, escort and removal of third country nationals should be skilled in, and put into practice, methods that are appropriate for the individual’s age, mental and physical health and sex. The same standards and methods should be applied by both private and public sector personnel.

THE PROPOSALS FOR A RE-ENTRY BAN, INCLUDING RELIANCE ON THE SCHENGEN INFORMATION SYSTEM IN THE APPLICATION OF THE BAN

57. Article 9(1) as currently drafted would impose an obligation to Member States to include a re-entry ban when issuing removal orders—the necessity and legality of the imposition of such absolute obligation by Community law is questionable. It may cause the Member State to act in breach of individuals’ human rights protected by the ECHR—for instance if the removal would separate the individual from family members and the individual’s re-entry to rejoin family members is prohibited. The relationship between the first indent of 9(1), which imposes a mandatory duty to issue re-entry bans with removal orders, and the second indent, which leaves discretion to Member States to do so at the stage of issuing return decisions is unclear. Finally, the duration of the ban, if such ban is imposed by the Directive, should not exceed five years in the most serious of circumstances. In the light of these comments, Article 9(1) should be amended to read as follows: “If Member States issue a removal order this may include a re-entry ban. This ban should be of a maximum of five years if the third country national concerned constitutes a serious threat to public policy or public security. Otherwise a re-entry ban may be of a maximum of six months”.

58. Paragraph 2 remains as it stands, with the deletion of its paragraph from “The re-entry ban” to “public security”.

THE PROVISIONS ON JUDICIAL REMEDIES AND THE EFFECT OF DELAYS

59. We welcome the inclusion of provisions on judicial remedies. These are essential to ensure against arbitrary decision making, unlawful removals of third country nationals and decisions which interfere with individuals’ fundamental human rights. However we consider that there should be judicial remedies available in respect of a re-entry ban issued under Article 9 above. We recommend that Article 12(1) is amended as follows: “Member States shall ensure that the third-country national concerned has the right to an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision, removal order and/or re-entry ban.”

60. We consider that suspensive effect of decision of a judicial remedy should be the norm, and only in exceptional circumstances should the remedy not have suspensive effect. In such cases the right to apply for suspension must be to a judicial body and not to an administrative body. We recommend that Article 12(2) is amended as follows: “The judicial remedy shall [delete word] have suspensive effect [remaining paragraph deleted].”

61. We do not agree that the provision of legal aid should be subject to a test that it is necessary to ensure effective access to justice. The decision by a Member State to issue a return decision, removal order or a re-entry ban is a serious matter for the individual concerned. It may include forcible removal and prevent from re-entry to the territory for some time. Effective access to justice on such matters will always require provision of legal assistance where requested. To this end we suggest that Article 12(3) is amended to delete the words “insofar as such aid is necessary to ensure effective access to justice”.

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62. In our view it is necessary to ensure that there is suspensive effect of any removal order or re-entry ban where the individual has brought an appeal on grounds of asylum, subsidiary protection, temporary protection or other form of international protection. To this end we recommend the addition of a new Article 12(4): “Without prejudice to Article 6(9), where an appeal is brought or is pending against a decision refusing an application for asylum, subsidiary protection, temporary protection, or any other form of international protection, including an admissibility decision, an appeal or review of a return decision, a removal order or re-entry ban shall have suspensive effect until the final decision on that application is taken.”

ILPA

12 December 2005

Examination of Witnesses

Witnesses: MS JUDITH FARBEY, Barrister, Took's Chambers, and DR HELEN TONER, Lecturer in Law, University of Warwick, Immigration Law Practitioners' Association, examined.

Q1 Chairman: Ms Farbey and Dr Toner, thank you very much. You are very welcome. Thank you for coming here today. Thank you also for the written evidence that you supplied, in fact for the two bits of written evidence you supplied. I know you only want to regard the second one as formal evidence but all the Committee have seen your earlier letter and will no doubt want to take that into account in the questions they ask you. This session is on the record, it is being transcribed, and you will of course receive a copy of the draft transcript. It is also being recorded, possibly for later broadcasting. Welcome to both of you. Could I ask, would you like to make some sort of opening statement before we fire questions at you?

Dr Toner: Thank you, my Lord Chairman. Yes, very briefly. I would just say that you have our written evidence which will be the gist of our comments. We are not necessarily in principle of the view that a Directive of this nature covering this subject is undesirable, but we think some serious amendments and improvements could be made before we could give it any significant support. There are three main points that we see as key: the mandatory nature of expulsion decisions; the mandatory nature of detention for the prevention of absconding risk; and the mandatory EU-wide re-entry ban. Those are the three key concerns that we have that we would just point out at the very beginning. I think I would leave my opening statement at that, thank you.

Q2 Chairman: Thank you very much. Do you wish to add anything?

Ms Farbey: No, I do not.

Q3 Chairman: Can I start off by asking do you accept the Commission's assumption that a Directive on common return procedures is needed and is desirable for the development of a well-managed and credible EU immigration policy? For instance, minimum standards. Do you accept that it would be a good thing to establish minimum standards across the EU, and if the Directive were able to achieve that,

that would be, to quote “1066 and All That”, a good thing?

Dr Toner: If I might kick off. I think our view on that would be that it would rather depend on the content of the minimum standards.

Q4 Chairman: Of course.

Dr Toner: Yes, if the minimum standards are good standards we would have no reservations about that and in principle we would not be opposed to it.

Ms Farbey: We think that minimum standards would promote trust and confidence between Member States. One perhaps can take the example of the old third country litigation where asylum seekers who came to the UK and were threatened with expulsion to a third country would go to court and say that the third country was not safe. Those were the days when the EU was far behind its current position in terms of minimum standards in asylum procedures and it is fair to say that the courts on a number of occasions had no trust and confidence in other Member States' procedures. We say minimum standards could be a modest step towards promoting trust and confidence.

Q5 Chairman: Do you think there is added value in EU involvement in that?

Ms Farbey: I think it goes back to what Dr Toner said in her opening statement. We do feel that the three main planks which concern us are the mandatory nature of expulsion, the mandatory nature of detention and the mandatory nature of re-entry bans. We do feel that the Member States' competence in those would be sufficient. It is interesting to note the difference between what is set out in the proposal and current UK practice. We do not have mandatory expulsion at the moment. We do not have mandatory detention, even for absconding risks. We do not have mandatory re-entry bans. Indeed, we have moved away from re-entry bans in many respects. We used to have a procedure whereby overstayers went through the full deportation process and were liable to re-entry bans but that was done away with by

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Parliament for overstayers and now we have a simpler process of administrative removal. I think it would be wrong to say that the UK since then has become a pull factor or a pull country for migrants. In the UK, we manage it at a domestic level and ILPA's view is that this is appropriate.

Chairman: Incidentally, there is a question to which I think the Committee would be interested to hear your answer that I should have asked you perhaps at the beginning. Do you regard yourselves as representing immigrants or as representing the wider case? Do you see what I mean? Perhaps I should ask Lord Avebury who is much more aware of your activities. What question do I want to put?

Q6 Lord Avebury: I think the question is whether you are a friend of court attempting to arrive at an impartial solution to the dispute between applicants and the appellate authorities or whether you consider yourselves to be *prima facie* on the side of the appellants?

Ms Farbey: ILPA's membership consists of solicitors, barristers and other legal advisers who in the main act solely for migrants. That said, ILPA is not in the habit of putting forward bad or insupportable propositions of law, we would regard that as unprofessional and we do not seek to do it today.

Chairman: Thank you very much indeed.

Q7 Earl of Listowel: Do you accept the Commission's argument that the common standards and procedures established by the Directive could facilitate co-operation between Member States and, therefore, enhance efficiency of return measures throughout the Union? You have already addressed that question in what you said earlier to some degree but is there anything you would like to add to what you have said already?

Dr Toner: I do not think we have any more specific points to make on that particular question, no. We think it might be a modest step forward and to the extent that trust and confidence might enhance and facilitate future co-operation this might be a modest step in the right direction if the standards are good but, as I have said, we have reservations about some of the contents of the standards. I do not think I necessarily want to anything more specifically on that point.

Q8 Lord Dubs: May I ask a supplementary relating to that and the previous question. You said you thought it was better if individual members of the EU ran the system themselves rather than having a common policy. I think that is roughly a fair statement of what you said. Is there a difficulty that by having different procedures and different approaches between one state and another that, in fact, the immigrants themselves are confused because

they will have less sense of what their rights are? Secondly, is there not a danger the people will move from one country to another to another to get the best deal, thereby causing even more confusion?

Dr Toner: I would start off by saying that I think it is fair to say that our comment is not so much having reservations about an idea of common minimum standards. Our specific comment was that the content of the Directive and the mandatory nature of certain aspects of it, which on the face of it appear to compel Member States automatically to take certain actions, we have reservations about whether that is appropriate and necessary and we think in certain respects rather more discretion ought to be left to the Member States in terms of minimum standards. That does not necessarily mean abandoning the whole idea of a Directive of this nature.

Ms Farbey: Removal decisions, as I am sure we are all aware, can be very complex to make. It is also sometimes in the interests of the state to tolerate illegal stayers. Just to give some examples which are pertinent to practice in the UK: at times, the Secretary of State will tolerate illegal stayers because he is awaiting, say, a decision of the House of Lords on how to deal with a particular group of people; there might be a fluid situation in the country of origin, one thinks in particular of recent examples such as Afghanistan and Iraq; it may be expedient for the Secretary of State not to remove, even though he would not concede that removal would breach human rights, one thinks in particular of Zimbabwe there; and also there may be borderline cases and in those cases it may be costly and burdensome for the state to go through the process of taking a removal decision rather than to leave things be, and I think in particular of family members of asylum seekers who do not fall within the Secretary of State's policy for being dependants in the formal sense, for immigration purposes they are separate individuals, and in effect it often suits the Secretary of State to wait and see what happens to other family members and then to take a decision. It is really that kind of discretion that is best taken, we say, at the level of the Member States rather than Community-wide.

Q9 Lord Avebury: Following on from what Lord Dubs has just said, I want to ask whether you consider under Dublin II there is less incentive or ability for people to shop between different European Union countries because they know if they do that they are going to be effectively and immediately returned to the country where they first made an application or set foot. Secondly, on the returns, have you noticed that there is a tendency for European Union members to design common programmes for returning people? I think in the case of Britain and the Netherlands, for example, there have been recent cases where aircraft have been chartered to take

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removals or deportations from both countries. Would that not develop in the absence of any common European policy simply as a matter of common sense?

Ms Farbey: It is very difficult to see that if one takes, for instance, joint charter flights between different EU Member States quite why the text or the concept of this Directive promotes that. In terms of Dublin, I think it is the case, and certainly it is the case from my experience as a UK practitioner, that Dublin II is working somewhat better than Dublin I. Could I just add that in terms of toleration we are not aware of any evidence that the toleration practices of Member States are necessarily a pull factor, and if we look at two toleration practices of our own government, firstly the regularisation scheme for overstayers, which was introduced by the Immigration and Asylum Act 1999, and secondly the current one-off exercise for families who claim asylum who have been in the UK since 2000, no-one has regarded those as pull factors. We need not have toleration which is either widespread or regular or predictable. In any event, there is no evidence that kind of toleration encourages shopping around, if I can put it that way.

Q10 *Baroness Henig:* You stressed in your evidence, and again you have reiterated it most strongly this morning, that you are opposed to the basic premise that Member States should be compelled to expel illegally resident non-nationals from their territories. Is not establishing this as a principle essential, because could it not be argued strongly that the various toleration practices of some EU Member States add to the attraction of the EU as a target zone for illegal immigrants?

Dr Toner: As Ms Farbey indicated, we are not convinced of that case either way. We are not convinced that it is a major or significant draw. Our position is not that widespread or long-term toleration is desirable. We do think that leaving individuals with uncertainty for prolonged periods of time is undesirable and we would be in favour of minimising that. Our concern is the mandatory nature. We have concerns that compelling, requiring, Member States to issue these return decisions and removal orders is not necessary, it is not desirable. As my colleague indicated, there are perhaps some instances in which we would see limited degrees of toleration as not necessarily against the interests of the state. We think the element of compulsion is somewhat going overboard and not necessary, and we have reservations about it.

Ms Farbey: The possibility for limited toleration does not prevent states from having efficient and effective removal practices, the two can go together. We fear that the proposal does not allow for that sufficiently.

Q11 *Lord Avebury:* Would you agree that in the past, particularly in the case of the 2000 toleration practice you have just mentioned, this was a product of the failure of the IND to make decisions promptly, and the failure of the appeal system to hold their hearings promptly after refusal and that if, as a result of changes in government policy, decisions are made immediately and there is a one-stop appeal process, would that not virtually eliminate any necessity for future toleration practices?

Ms Farbey: That is right. One has to look at it, if I can put it this way, front forward. The decision making process must take place, it must take place fairly and it must take place fast. If one deals with it at that end then there is less need for toleration practices at the other end.

Q12 *Lord Avebury:* To that extent if we could persuade other European Union Member States to follow the practices that we are now adopting, and although there are flaws in the current legislation, everybody now seems to be agreed a one-stop appeal process is necessary, if all EU Member States went in that direction then nobody would need toleration policies.

Ms Farbey: Again, we think that is right. Also, we think it will increase trust and confidence between Member States.

Dr Toner: But we still have reservations that compelling Member States under a duty is not necessary or desirable. We are not convinced of the case for it as an answer to these problems.

Q13 *Lord Marlesford:* Just looking at your paragraph 18 where you say: "... we consider that expulsion decisions should be a matter of discretion for Member States", and that of course in a sense goes to the heart of what we have just been talking about, you then say: "We consider that no return decision should be taken if there are compassionate or humanitarian reasons for the person remaining..." Presumably there will always be perfectly arguable compassionate or humanitarian reasons for people to stay, but surely it is not a matter whether there are such reasons, it is a matter of the state deciding whether they are sufficient for them to stay. Yours is a pretty absolute statement: "We consider that no return decision should be taken if there are compassionate or humanitarian reasons for the person remaining..." That is what you say in your evidence.

Dr Toner: I think this refers to—

Q14 *Chairman:* Would you like to come back to this and we will go on for the moment?

Dr Toner: I think our comment there was this linked into the way that Article 6 was constructed.

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Q15 Lord Marlesford: What do you mean? In other words, you do not mean what it says here?

Ms Farbey: Certainly there should be no compulsion to expel if there are compassionate or humanitarian or other reasons.

Q16 Lord Marlesford: The point I was making was that there will always be perfectly arguable and sustainable compassionate or humanitarian arguments for people to stay, but surely as to whether or not they are allowed to stay for those reasons is a matter of balance against other matters, or are you saying it is an absolute barrier to people being made to return?

Ms Farbey: I think it probably depends on where you place the bar for compassionate, humanitarian or other reasons. There may be reasons why one might sympathise with a migrant but that would not necessarily amount to compassionate, humanitarian or other reasons. We can all have personal compassion, but the issue is whether in law certain circumstances should be treated as compassionate or humanitarian in the United Kingdom. Where there are sufficiently compassionate, humanitarian or other reasons then the courts will compel the Secretary of State not to remove.

Q17 Chairman: But it is a question of adequacy, is it not?

Ms Farbey: Yes.

Q18 Lord Marlesford: May I suggest you give us a note perhaps redrafting that paragraph rather more precisely.

Ms Farbey: Yes.

Q19 Baroness D'Souza: The Government's present position is that the UK should not opt in to the Directive, but is there not a case to be made for opting in in order to be in a position to shape the content of the Directive and in particular perhaps to promote some of the safeguards that you have outlined in your briefing?

Dr Toner: I think our position on this, if I understand correctly the mechanism of the opt-in discussions and the mechanism whereby that works, is there is a period for opting in to discussions which has, in fact, now passed. In the current state of the Directive we do not see any benefit in opting in, we would want to see significant improvements in it before we could support any suggestion of opting in. I will hand over to my colleague in a minute. We do believe that as constructed at the moment the Directive would necessitate certain changes in UK law, not all of which we think would be changes for the better. Of course, we would always be in favour of putting forward suggestions to improve it, but we do not think that opting in at this stage, unless there were

quite significant changes, would be something that we could support.

Q20 Chairman: This Committee has taken the view in the past in previous reports that there are quite often disadvantages in opting out of those areas of the Schengen process from which we have opted out. Is it not possible that this is another case where it might be advantageous to opt-in?

Ms Farbey: If we were to opt-in, not simply for the purposes of shaping the Directive but afterwards in terms of implementing it, I think it would require quite significant change to English law and practice.

Q21 Chairman: I am sorry, I probably did not express myself very clearly. What I am really talking about is opting out of the Schengen Information System. Might there not be advantages in actually opting into that in this case?

Dr Toner: I do not think we would have any comments to make on that particular issue.

Ms Farbey: Sorry, I misunderstood.

Q22 Lord Marlesford: In a sense we are back to what we were discussing earlier. In paragraph 20 you take the view: "... that any return under threat of forcible removal risks not being truly voluntary." The question is would there be any effective voluntary return without the threat or the sanction of forcible removal if the person was not prepared to move voluntarily?

Dr Toner: I think to a certain extent we would see putting it in those stark terms as a little bit of a red herring. Our position is not to oppose outright the ultimate possibility of enforced removal, but our view does remain that, yes, return under this kind of threat does risk being not truly voluntary. We do think that risk remains and we do think one has to be aware of that risk in dealing with this subject. We do consider that comment to be defensible, but that does not necessarily mean that our position is one of outright opposition to enforced removal processes if carried out humanely.

Q23 Lord Marlesford: You then go on in the second sentence of that paragraph to indicate there should be almost two standards for removal, one which would justify only voluntary removal and the other forcible removal. You say: "Thus safeguards must be in place to ensure that those with good reason to remain for compassionate or humanitarian reasons or because return would breach fundamental rights are not forcibly returned." You are indicating they can be asked to go voluntarily but not forcibly. Is that what you mean?

Dr Toner: I do not think that was necessarily meant to be part of what was read into that.

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Q24 Lord Marlesford: What does that sentence mean?

Ms Farbey: Our view would be this: if one has fair procedures, fair hearings, if migrants have positive experiences of the authorities, they are much more likely to make a voluntary departure at the end of the procedure. If one gets the substantive decision right then people will not feel that if they do leave the United Kingdom they will be in danger or they will have some other problem. Again, I think it goes back to front loading and getting the decision right. That would decrease the need for enforced removal, which I think is probably a better word to use.

Q25 Lord Marlesford: What you are saying is the better the decision-making process the more likely it is that people will leave voluntarily, and one can totally understand that, but I do not see how that changes the present situation. There will still be people who prefer to stay here whatever the reasons are that they should go and, therefore, will have to be removed forcibly if, in fact, the decision, whatever body has made it, is to be upheld.

Ms Farbey: We do not disagree with that.

Dr Toner: No, we do not disagree with that. Our position is not one of outright opposition to that. We accept as a longstop that is indeed the case. However, we do say that one has to be aware of the fact that when using these enforced removal techniques and that threat at the end of the road there are some risks that this return is not truly voluntary and we would like to stress that any coercive return does have to be part of a holistic approach to making good decisions in the first place and making sure that any return to the state of origin is truly feasible and lasting, as many carrots as sticks, as it were. We have to look at this in the round.

Q26 Earl of Listowel: Following on your discussion, is there a danger that if a system is not sufficiently seen to be fair by the applicants they may disappear from the asylum system and enter the other floating numbers of irregular migrants? That is one question related to this. The other is, is there a place for a common European Union instrument in order to ensure that no states go to such an extreme that they drive asylum applicants away from asylum application and into this large unknown body of people who are irregularly staying in this country?

Ms Farbey: To answer the latter question first, the advantage of the minimum safeguards in the asylum instrument is precisely that. Everybody has a minimum level of fairness, everyone has a minimum level of openness and this, one hopes, encourages in particular genuine refugees to use the asylum door. In terms of asylum seekers disillusioned with the process and moving away, so to speak, into the greater pool, we need to reiterate that fair procedures where the

asylum seeker's voice is fully heard coupled, with as positive an attitude as there can be towards the authorities, with the right to have legal advice where we can explain to them exactly what the weaknesses of their case are and what their prospects are, those will act as carrots to using the formal processes rather than the informal processes.

Q27 Viscount Ullswater: I wonder if I could ask a supplementary before we move away from this subject. Although you do not mention it in your evidence, I have read in other evidence that the concept of four weeks might be a very limiting period for people to make a decision as to whether to go back and even to get the right papers to return. Have you any comments to make about this rather narrow window of four weeks which comes in Article 6, the voluntary departure? Is it in itself a bar to making people decide to go back voluntarily?

Dr Toner: Which sub-paragraph is this?

Q28 Viscount Ullswater: In Article 6, it is in paragraph two.

Dr Toner: Thank you.

Q29 Viscount Ullswater: If you do not have any comment about it so be it.

Ms Farbey: I do not think it would carry great weight. In the United Kingdom we have a practice which is colloquially called "packing up time" which is usually negotiated between the person who is about to depart and the Secretary of State. There can be very good reason for allowing packing up time, perhaps children might be taking exams, there may be difficulties in getting documentation, perhaps somebody has put down roots here and it is very difficult to sort things out in a short period. I do not necessarily think that a period of four weeks works upon the minds of applicants to that extent.

Q30 Viscount Ullswater: You come out firmly in favour of the proposed judicial review of detention orders. Having regard to the numbers involved, do you not think that judicial review of all detention orders as a matter of course, as Article 14 proposes, even once a month that might result in an unjustifiable burden on the court system and the taxpayer?

Ms Farbey: What is important for ILPA is that there should be independent scrutiny of the decision of government to detain. When we talk about judicial review, ILPA's concern is not with the public law process of judicial review in the High Court that we have here, it is with some form of judicial and independent scrutiny. One can remember back to the Immigration and Asylum Act 1999 Part 3 which was to introduce a system of routine bail hearings. One remembers back to the policy impetus that underlay

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that and the concerns of the Commission were the concerns of Parliament at that time. That has now been repealed. From my own experience there is, of course, ample opportunity for migrants and asylum seekers to apply for bail now. ILPA's view is that it would not be a huge step from our current situation to introduce routine bail hearings. They need not be procedurally complex, they need not be formal. At the moment bail hearings can be very swift and reviews can be very swift. We think that we are probably not as far away from that as might meet the eye. We are concerned that detainees can become very easily isolated and may not be their own best advocates for obtaining bail or temporary admission. We feel that judicial review by a person carrying out a judicial function would prevent the risk that detainees are kept in detention when, in fact, they could easily be released.

Q31 Viscount Ullswater: Would you say through the magistrates' court then?

Ms Farbey: That was the issue in the 1998 Bill as it was. As I recall, it was the government's idea that routine bail hearings would be heard by magistrates. My recollection is that ILPA's view was that they could be better heard within the Immigration Appellate Authority as it then was. That would probably remain our view, that the current Immigration and Asylum Tribunal could find the resources, the capacity and the flexibility to deal with it much more easily than magistrates' courts.

Q32 Lord Marlesford: I am not a lawyer and I am confused. I thought there was a sort of technical definition of judicial review which is used to review government decisions, but you are saying what you mean by judicial review is very much lower case, not capitals.

Ms Farbey: That is right.

Q33 Lord Marlesford: So the words "judicial review" could be a bit confusing to non-lawyers because one might be thinking of judicial review. What you are really saying is a review by some other judicial body.

Dr Toner: That is what seems to be envisaged in the terms of the Directive.

Q34 Lord Avebury: Before we leave this point, it is your suggestion that this matter is cleared up in Article 14(2) and the exact wording of any revised Article 14(2) could presumably give Member States some latitude in deciding precisely how a person should be able to challenge his or her detention. I was rather surprised to hear you say that there is already ample opportunity to apply for bail because in my experience it frequently occurs that people cannot get in touch with solicitors or representatives and that in

many cases when they do so it turns out that the Legal Aid available for their case has been exhausted and, therefore, nobody wants to take it on. This is the reason why you have independent organisations now trying to help people in this situation, and I think Bail for Immigration Detainees have submitted some written evidence to us. I would like you to reconsider if you would what you have said about the ample opportunities that exist in applying for bail.

Ms Farbey: I should have qualified that by saying there are ample opportunities in law. In practice, of course, it is much more difficult for the reasons your Lordship has outlined. It perhaps goes back to my point that detainees can become isolated and do have limited practical opportunities to apply for bail, if I can put it that way, and in that way we say an automatic judicial review by a judicial person is very useful. I think that was also part of the thinking behind the routine bail hearings in the 1999 Act.

Q35 Lord Avebury: We may have an opportunity of coming back to that in the course of the proceedings on the current IAN Bill in the form of restoring rights that were taken away in the repeal of Part 3. We will see about that later. May I ask you about the Government's opinion that in exceptional cases longer detention periods, even in excess of the six months provided by the Directive, are justifiable, especially in the case of attempts to frustrate removal. You say the maximum period of temporary custody of 60 days is correct. Is there any merit at all in the Government's position?

Ms Farbey: We are prepared to accept that possibly 60 days might be optimistic but we also say as follows: in the vast majority of cases migrants and asylum seekers should be able to be removed within a period of 60 days. I do say that is in the vast majority. My experience is that the difficulties lie in terms of those who are undocumented and there then, for want of a better way of putting it, becomes a bit of a tug-of-war as to how that category become documented. Very often nothing happens for long periods of time. ILPA would take the view that if there are strict maximum time limits for custody, the burden would perhaps shift towards the state in reacting and taking the initiative itself and that would act as a spur to action to the state, in particular liaising with the receiving country, the country of origin, to sort out the issue of identification and travel documentation.

Q36 Lord Avebury: If there are particular nationalities who are causing this difficulty, and I understand, for example, that the Chinese are not particularly prompt in accepting persons who appear to be their nationals—this is a problem common to the whole of the European Union, is it not—is it not something which might well be best served on a

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European-wide basis rather than by individual countries trying to get the Chinese, for instance, to accept that their nationals should be documented properly?

Ms Farbey: I would say the answer to that would be yes. Certainly using the method of stick at the government level, the inter-government level and at the international level, we say, has at times come about and there is some responsibility on government perhaps to take those steps.

Dr Toner: If it be that co-operation on the European Union level between governments to facilitate these processes is going to help to clear this up then that may well be the case. We would stress that cases in which such very long periods of detention are necessary should be absolutely exceptional and we would stress that these are not people who are convicted of criminal offences, they are not criminals, they should not be treated as such and we should always keep that in mind. Where there are long-term intractable difficulties we have suggested, and we are firmly of the view, that long-term uncertainty is not desirable. We have suggested that in appropriate cases these decisions should lapse after a period of time and if it be the case that at a later stage the process of removals can begin again or difficulties can be cleared up then maybe a new order should be made. We do not think it is in anyone's interest to have prolonged periods of time with removal orders and so on hanging over people. Certainly a period of six months is equivalent to a one year prison sentence and we think that should be absolutely exceptional.

Q37 Lord Avebury: Again, a one-stop appeals process would substantially diminish the necessity for detaining anybody beyond 60 days, would it not?

Ms Farbey: I think that is right. Certainly within the 10 or so years that I have been practising asylum law it appears that detention periods are going down. I remember representing one person from the adjudicator level to the Court of Appeal who managed to break the record for time spent in detention, and I have a feeling if that were to happen nowadays he would not be detained for so long.

Q38 Earl of Caithness: Do you think the Directive should offer possibilities of rewarding compliance, and penalising non-compliance, by withdrawing or extending re-entry bans?

Ms Farbey: ILPA accepts in principle that there may be circumstances in which re-entry bans can properly and should properly be set. We have concerns about the mandatory nature contemplated in the proposal. We also think that there should always be an opportunity to ask for the withdrawal of the ban and there should be open and transparent procedures for that. As I mentioned earlier, it is interesting that the United Kingdom has chosen to move away from the

deportation process, which could always lead to a re-entry ban, in the absence of voluntary departure, to the removal directions process, and that is a much simpler process. As I say, there is no evidence that that change has acted as a pull factor. Of course, having a re-entry ban removed does not automatically mean that a person will re-enter the European Union or the United Kingdom, there would still be visa regimes in place.

Dr Toner: One of the other concerns we have about the provisions on the re-entry bans, as my colleague said, is the mandatory nature of the ban when a removal order is issued. We are not convinced that simply the necessity—my colleague may be able to give you an example—that somebody has taken it to the wire, as it were, and a removal order has had to be made in and of itself is a good reason to have a hard and fast rule that a re-entry ban should always be made in those circumstances. We also have certain concerns about the re-entry ban being EU-wide. Without pushing this too far, although in Article 2 there is some attempt to co-ordinate, as it were, with other elements of EU law, we do have concerns that there may be complications, to put it mildly, where someone has been removed, a removal order has been made and then a re-entry ban for the whole of the EU is made. We have some concerns that this may cause difficulties with perhaps the exercising of rights that the person may have vis-à-vis another Member State: there may be family members in another Member State, for example. We think that needs to be thought through and we are not sure that a provision that starts from the proposition that re-entry bans shall always follow a removal order is the best approach.

Ms Farbey: If I could give two examples along the theme that it is not necessarily the case that somebody who is subject to enforced removal is less palatable than somebody who makes a voluntary departure. One can think of somebody who has claimed asylum in the United Kingdom who has failed but who has managed to make a genuine marriage while being here. That person, through lack of funds, through disorganisation, for a number of factors might end up being subject to removal directions and removed. At the moment that person would not be subject to a re-entry ban and it would be possible for that person to apply for a visa to come back as a spouse. That would not be the case under the proposal. Contrast that situation with somebody who has served, say, a five year prison sentence for a very serious offence where the Secretary of State believes that his deportation is conducive to the public good but he nevertheless makes a voluntary departure, of course it is very unlikely he will be granted another visa to enter but, nevertheless, under the proposal he may come out the better of the two.

Q39 Earl of Caithness: Can I just follow this up. Given your dislike of this section of the Directive, what are your thoughts on a time limit of five years?

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Why can a Member State not ban somebody for life? What is wrong with that?

Ms Farbey: I think the issue is really the proportionality of doing that. As I say, the person who is banned has a two stage process. He has got to get rid of the ban and then persuade the entry clearance officer that he is suitable to come back to the United Kingdom. I think one has got to look at it from a practical point of view, from the point of view of decision-makers, members of the Foreign Office, members of the Home Office, who are putting into operation what can often be a difficult and complicated system. There may be very exceptional cases where a life ban may be warranted but those are going to be so few and far between that in terms of general practices I do not think they should necessarily play their part. It is practical to have bans of lesser periods. In most cases you will not have somebody who should be banned for life. One has to balance anything that a person may have done to be banned against other human rights factors.

Dr Toner: Indeed.

Q40 Lord Avebury: Presumably if there was a re-entry ban it would have to have some exception clause for countries that might in future join the European Union, such as Bulgaria, Romania and Turkey, or countries which might have rights under Association Agreements?

Ms Farbey: It may well be that it is a little more complicated than meets the eye.

Q41 Lord Marlesford: I think we all agree that one wants to minimise the cases of forcible removal. Is there any case for regarding the re-entry ban as a sanction which can be applied where it is necessary to go for forcible removal which would, as it were, be an added disincentive to not requiring? I am not talking about a removal order because a removal order can be voluntarily complied with, but somebody who goes to the extent of having to be forcibly removed, is there a case for having either a longer or indefinite removal ban?

Dr Toner: We think this may have a legitimate role to play in determining whether a re-entry ban is imposed, or the length of it or lifting it. We are not opposed in principle to some use of that. When we are talking about periods of five years, 10 years or a life ban, this is an awfully long time. I think our view would be to have a useful effect in encouraging voluntary departure the periods ought to be quite a lot shorter than that because if somebody is being told that they are not going to be able to come back for five years, and if that is the period of the ban, one wonders how much of an incentive that is going to be. We think that certainly in routine cases we should be looking at quite a lot shorter periods than that. As to a life ban, circumstances change and we are not

convinced of the proportionality of that. One has a little bit of distaste for absolute life bans of that nature.

Q42 Lord Dubs: I would like to turn to the question of imprisonment. In your submission you say that immigration detainees should in no circumstances be accommodated in ordinary prisons. As a general proposition I understand that, but surely there must be some exceptions. Let me give you one instance. Let us take the case of an immigration detainee who has served a prison sentence for an offence committed some years previously and he is currently held in prison pending deportation. Would that not be a legitimate exception to your general proposition?

Ms Farbey: I think the issue is the regime. Prisons operate under different rules from detention centres and have different practices, many of them punitive. If it were the case that those who finish their criminal sentences were simply kept in the same cell in the same prison, that would in effect amount to extending their sentence by the backdoor. Once they have served their time, to put it rather tritely, they have served their time. ILPA does not think that they should be subject to the prison regime simply because of administrative convenience, they should be subject to a regime which is consistent with their status, which by that time would be the status of the ordinary immigration detainee. That does not mean to say, of course, that there are not imaginative solutions, and one thinks perhaps of Lindholme near Doncaster where one has a prison and a removal centre side by side. The important issue for ILPA is regime. Those who have served their prison sentences should have some of the privileges which detainees have which prisoners do not have.

Chairman: Can I perhaps ask a question of Lord Dubs who must know more about this than anybody else. There is a particular Northern Ireland problem, is there not, in that there are no detention centres in Northern Ireland?

Q43 Lord Dubs: I think that is right but I am not sure how many immigration detainees are in Northern Ireland, although clearly there are some. I understand exactly why in principle you are saying what you are saying, and it is right, but in practice suppose we have somebody who has finished a five year sentence, say, and is due to be deported within two or three weeks. Are you seriously saying they should be transferred from there to somewhere else for the two or three weeks before they are removed? I think it is straining the system a bit to make them do that, is it not?

Dr Toner: We are saying that, yes. The individual has served the sentence and we do not see administrative convenience as a good reason for keeping them banged up in prison. As my colleague said, there may

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be imaginative solutions but we would be opposed in principle to keeping someone under the prison regime after they have served their sentence.

Q44 Lord Avebury: I have had detailed correspondence with ministers about the necessity for removing somebody promptly at the end of a sentence. The difficulty is that if a person has been recommended for deportation by a court then that cannot be considered by the Secretary of State until right at the end of the sentence, because they say that circumstances might have changed between his appearance in court and, as Lord Dubs was suggesting, five years later when it comes to the end of the sentence. Therefore, a period has to elapse following the end of the sentence while the person is given the opportunity of appealing against the deportation order, and that may take a matter of weeks to be heard. I think the only way round this is for the Home Office to act immediately when somebody does come to the end of their sentence and for the hearing to be held as quickly as possible

thereafter. I cannot see any way round keeping somebody in prison for the short time that it would take between the conclusion of the sentence and the hearing of that appeal, because I do not think there is any possibility in the world that the Home Office would entertain the suggestion that you make, that somebody should be moved from a prison to a detention centre for that short time.

Ms Farbey: My experience is that the Home Office do make efforts to transfer those who have served their sentences into the detention estate and away from the prison estate.

Viscount Ullswater: Or into the remand wing where they would be with unsentenced prisoners.

Q45 Lord Avebury: That would be sensible.

Ms Farbey: As we say, it really goes back to a matter of regime.

Chairman: Ms Farbey and Dr Toner, thank you very much indeed. Unless you have got any last points you want to make to us, can I thank you very much for coming and for your very helpful answers to our questions. We wish you good luck.

Memorandum by MigrationWatch UK

SUMMARY

1. A dangerous step down a slippery slope. The Commission documents are drafted in generalities but this is just the first slice of salami. As a non-Schengen country, there is little to be gained for the UK and a good deal to be lost in terms of our autonomy in dealing with an issue of great public concern.

INTRODUCTION

2. So far it has been the policy of the present Government to “opt-in” to Directives concerning asylum and illegal immigration. However, this draft Directive poses potential difficulties by extending EU influence, indeed jurisdiction, into a key area of policy.

3. The removal of those whose presence in Britain is (or has become) illegal is crucial to the credibility of the entire immigration and asylum system. It is also now the weakest aspect in the case of the UK where the number of people illegally present is approaching 750,000.²

4. The Commission document reeks of “mission creep”. For the reasons set out in detail in Annex A paragraphs 2–7, we do not believe that the criteria of subsidiarity and proportionality have been met—certainly not in respect of the UK which is not a member of the Schengen area.

5. The UK is not bound to opt-in to this Directive. The question, therefore, is whether doing so would help tackle a problem of considerable public concern. To opt into it would tie our hands to no useful purpose. Indeed, it would give the commission (and the European Court of Justice) oversight over a range of issues that are essential to the effectiveness of our own immigration arrangements.

6. There are a number of points at which the Directive might bite:

(a) Re-entry ban (Annex A paragraph 10)

The proposal that a ban should not normally exceed five years is an unnecessary limitation. There is no reason why a ban should not, at least in some cases, be indefinite.

(b) Suspensive Judicial Remedy (Annex A paragraph 11)

The proposal that an effective judicial remedy must be suspensive may put at risk the non-suspensive appeal process which currently applies to “white list” countries.

² Migrationwatch UK briefing paper number 9.15.

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(c) Review of Detention (Article 14)

The requirement that such a review be conducted by a judicial authority goes beyond what is normally the case in the UK.

(d) Charter of Fundamental Rights (paragraph 20 of the recital)

The inclusion of a reference to this charter is a hostage to fortune.

(e) Schengen Information System

It is proposed that this system should be the basis for information exchange. Our understanding is that the UK has been excluded from this system.

CONCLUSION

For a non-Schengen country there is nothing significant to be gained from this agreement and a good deal to be lost. The best policy would be to stay out of it but to “shadow” its main elements.

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Annex A

EU DRAFT DIRECTIVE ON RETURNS EVIDENCE FROM MIGRATION WATCH

1. We have not previously been involved in the consultations preceding the issue of the draft Directive and have only recently been made aware of the impending consideration of the draft by the Select Committee. That being the case, the time we have had to consider its contents and produce written evidence has been very short, but we have done our best, having regard to the obvious importance of the subject.

SUBSIDIARITY

2. The consultation document concedes that the principle of subsidiarity applies but fails to give an adequate explanation of why nevertheless there should be an EU Directive on the subject. The relevant paragraphs state *inter alia* that the objectives of the proposal cannot be sufficiently achieved by the Member States because “the objective of this proposal is to provide for common rules on return, removal, the use of coercive measures, temporary custody and re-entry. These common rules, which aim to ensure adequate and similar treatment of illegal residents throughout the EU, regardless of the Member State where they are apprehended, can only be agreed at Community level.” Clearly if that is the objective then the common rules must be agreed at Community level, but there is no explanation of why the objective is regarded as desirable. Control over immigration is an essential part of the exercise of responsibilities for internal law and order of individual Member States and it is not apparent why the parameters of such control should become a Community function. No evidence is provided either in the consultation section of the document or in the preamble to the draft Directive to show that there have been such shortcomings in national stewardship of immigration control as to necessitate its wholesale transfer to the Community.

3. This draft Directive purports to be made under the provisions of Article 63(3)(b) of the Treaty, which covers “illegal immigration and illegal residence, including repatriation of illegal residents”. However, Article 64.1 clearly states:

“This Title [which includes Article 63] shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”

This is obviously a necessary safeguard against the usurpation by the Community of the basic responsibilities of Member States and it is clear that although Article 63(3)(b) specifically refers to the adoption of measures on repatriation of illegal residents, the purported provisions designed to regulate the internal immigration procedures of Member States are *ultra vires* the overriding words of Article 64.1. Repatriation of illegal residents obviously involves sending them outside the Member State concerned, but the procedures which result in decisions to remove and removal itself are within the internal control of the Member State and in our view should remain so.

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4. While insisting that immigration control, including removal and deportation procedures, are internal matters for each Member State, we acknowledge that there are areas where cooperation between Member States is essential. In recent years there has been a long running problem over large numbers of asylum seekers making their way to Sangatte and trying to enter the United Kingdom unlawfully by secreting themselves on trains using the Channel Tunnel or on ferries. This led to pressure having to be put on the French authorities by the United Kingdom government to cooperate in frustrating the efforts of would-be stowaways and has also resulted in agreements with French and Belgian governments to allow the establishment of British immigration control points at certain French and Belgian ports. The proposal itself refers at page 3 to decisions already reached in recent years concerning assistance in cases of transit for the purposes of removal by air and the organisation of flights chartered by two or more Member States for the purpose of removing deportees.

It is not apparent, however, that the existence of a Directive as proposed would do anything to facilitate or improve cooperation of this kind.

5. The third paragraph under the heading “Subsidiarity principle” on page 5 reads:

“Community rules are in particular indispensable for addressing cases in which a third country national who is already subject of a return decision, removal order and/or re-entry ban issued by one Member State, is apprehended in another Member State or tries to enter another Member State.”

The substance of this is repeated in Article 12 of the Preamble to the draft Directive. Article 10 of the Preamble refers to the establishment of a re-entry ban which prevents a person expelled from one State re-entering any Member State. Articles 13, 14 and 15 refer to provisions on the recognition of return decisions and the exchange of information on such decisions. These are no doubt worthy objectives, though it is questionable how often cases arise which are covered by the substance of Article 12 and the mutual recognition of return decisions is surely a matter which under normal conflict of laws principles comes about as a matter of the comity of nations. We do not believe that these objectives provide an adequate justification for a Directive covering removal procedures, custody, appeal rights and other purely internal matters falling properly within the competence of each Member State.

PROPORTIONALITY

6. The consultation document states that the proposal complies with the requirement of proportionality because it lays down general principles but leaves it to the Member States to which it is addressed to choose the most appropriate form and methods for giving effect to those principles in their respective legal systems. From a cursory examination of the draft Directive we feel confident that the existing legislation in the United Kingdom can be shown to comply with those principles, which prompts us to ask again why the Directive is felt to be necessary so far as the United Kingdom is concerned.

7. The next paragraph of the document reads:

“The proposal aims to support effective national removal efforts and to avoid duplication of national efforts. It should thus—once adopted—lead to a reduction of the overall administrative burden of the authorities charged with its application.”

No explanation is given in support of these remarkable claims. It is not apparent from the draft how duplication of national efforts will be avoided or how national administrative burdens will be reduced—they are much more likely to be increased. Indeed the draft gives rise to considerable cause for concern in relation to the working of the asylum and immigration appeals system. For years the complexity of the appeals system made it possible for asylum seekers and others to spin out appeals for years, and so long as any appeal was pending they could not be deported or removed. The government eventually realised that something had to be done about this and reform came about through the provisions of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, which came into force on 1 April 2005. The former two tier appeals system was abolished in favour of a single tier tribunal and the possibility of judicial review was removed by the substitution of a system of statutory review on papers only and with no oral hearing. This has resulted in a much needed speeding up of the appeals system. If questions of removal come to be governed by a Directive, that will give the European Court of Justice jurisdiction to give preliminary rulings on the validity and interpretation of the Directive under Article 234(b) of the Treaty of Amsterdam, previously Article 177 of the Treaty of Rome. Courts or tribunals of Member States may request the Court of Justice to give such rulings in any cases where they think that rulings are necessary to enable them to give judgment in particular cases. In the normal way such a request is a matter for the discretion of the court in question, though it is to be expected that lawyers acting for persons appealing against removal decisions would take advantage of any

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possible doubts there might be about the application of the Directive to press for such requests to be made so as to extend the time during which their clients may not be removed from the United Kingdom. Asylum and immigration appeals do from time to time reach the House of Lords and it is to be noted that if such a question about the interpretation or validity of a Directive is raised in a case before a court or tribunal “against whose decisions there is no judicial remedy under national law”, that court, in this case the House of Lords, must refer the matter to the European Court of Justice. The possibility of further delays caused by references to the ECJ would be a seriously retrograde step.

COMMENTS ON THE TEXT OF THE DRAFT

8. There has not been an adequate opportunity to examine the text of the draft Directive closely and in any event our main objections are to the whole principle of having a Directive on this subject. Nevertheless there are certain aspects of the draft on which comment is appropriate.

9. We find it curious that several obligations imposed on Member States are made mandatory when clearly they must be matters for the exercise of sovereign discretion. Thus Article 6 obliges Member States to issue a return decision to any third country national staying illegally on their territory. There are estimated to be some hundreds of thousands of illegal immigrants in the United Kingdom not known to the immigration authorities as well as hundreds of thousands of overstayers, asylum seekers who have stayed after exhausting their appeal rights and other categories of persons to whom the draft Directive is intended to apply. Clearly this is an absurd obligation to place on Member States and is impossible of fulfilment. Article 7 makes it mandatory to issue a removal order concerning a third country national who is the subject of a return decision if there is a risk of absconding etc. No doubt in most cases a removal order will follow a return decision, but the Member States must surely have discretion not to remove if they see fit. Article 8.1 allows a general discretion to postpone the enforcement of a return decision but 8.2 imposes an obligation to postpone in the circumstances there set out. We do not understand the justification for such an obligation. It is clear from the distinction drawn between “shall” and “may” in these two paragraphs, and from a similar distinction appearing in the various paragraphs of Article 9 that “shall” in the Articles in which it is used is intended to be mandatory in its effect. We regard this as a wholly unjustifiable restriction on the sovereignty of Member States in the exercise of immigration controls.

10. In Article 9 a maximum term of five years is imposed on re-entry bans except in cases where the third country national concerned constitutes a serious threat to public policy or public security. The duration of a re-entry ban should be wholly a matter for national discretion.

11. Article 12 requires Member States to ensure that the third country national has a right of appeal or review of a return decision and/or removal order. 12.2 requires that the judicial remedy shall have suspensive effect. Section 94 of the Nationality, Immigration and Asylum Act 2002 as amended by the 2004 Act rules out any possibility of an in country appeal in asylum or human rights claims in certain circumstances if the Secretary of State certifies that the claim in question is unfounded. The Secretary of State may so certify if the claimant is entitled to reside in one of the countries on the “White List” as per section 94(4). The purpose of this was to reduce the huge burden of asylum appeals by eliminating those from countries reasonably judged not to engage in acts of persecution within the meaning of the Refugee Convention. The effect of Article 12 would be to require Parliament to reinstate full rights of appeal in asylum and human rights cases to all appellants from those countries.

12. Article 12.3 imposes on Member States an obligation *inter alia* to provide legal aid to appellants if they “lack sufficient resources insofar as such aid is necessary to ensure effective access to justice”. This appears to give a blank cheque to appellants to draw on UK public funds. Since 1 April 2005, with the coming into force of the new appeals regime under the 2004 Act, more restrictive legal aid provisions have been introduced, making the provision of aid conditional on the appellant’s having an arguable case, the onus for judging that being placed on his representative. This and other restrictive regulations on legal aid could well be held to be invalid by reference to 12.3.

13. Article 14.1 says that Member States shall keep under temporary custody third country nationals who are or will be subject of a removal order or return decision. How are the words “or will be” to be interpreted? Are the immigration authorities of Member States required to have some form of forecasting which particular individual third country nationals may at some indeterminate future time become the subject of removal orders or return decisions? In many cases it suits the immigration authorities in the UK to keep in custody persons who are about to be removed, but it is not apparent that there is any justification for making this a mandatory obligation.

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14. Immigration and asylum have become major problems over the last 12 years in particular and Migration Watch has long been critical of the government's lack of success in many aspects of managing them. We do however acknowledge the fact that considerable efforts have been made to tighten up the legal structures, with the passing of six substantial Acts of Parliament on the subject since 1993 plus the present Bill going through the House of Lords at the time of writing. Some progress has been made in relation to the appeals process and in other areas. This Directive, if implemented, would be retrograde in requiring backtracking on much of that progress and would be seriously detrimental to the interests of the United Kingdom.

Harry Mitchell QC

Honorary Legal Adviser to MigrationWatch UK

12 December 2005

Examination of Witnesses

Witnesses: SIR ANDREW GREEN KCMG, Chairman, MR HARRY MITCHELL QC, Honorary Legal Adviser, and MR ANDREW DENNIS, Head of Research, MigrationWatch UK, examined.

Q46 Chairman: Sir Andrew, welcome back to this Committee.

Sir Andrew Green: Thank you very much, my Lord Chairman.

Q47 Chairman: It is very nice to see you again today. Thank you very much for your written evidence. Can I perhaps ask you to introduce your colleagues.

Sir Andrew Green: Yes, thank you. Harry Mitchell QC is our Honorary Legal Adviser and Andrew Dennis is our Head of Research.

Q48 Chairman: Indeed and welcome back to you.

Mr Dennis: Thank you.

Q49 Chairman: Would you like to make any opening statements? You have given us some helpful written evidence.

Sir Andrew Green: I think a very brief one, my Lord Chairman, because I think it just sets the scene. We think this is pretty clear-cut. We support strongly what we understand to be the Government's decision not to opt into this Directive for three reasons. One is a reason of principle, that we think these are largely domestic matters better handled on a national basis. Secondly, because to opt in would be seriously to complicate the Government's efforts to remove illegal immigrants, an effort which is absolutely critical to the credibility of the immigration system, and I think the Committee will be well aware that that credibility is rather thin. Only about one in five failed asylum seekers are being removed in total and, secondly, the scale of illegal presence in Britain is of the order of three-quarters of a million, not all failed asylum seekers. That is roughly the number of people who are here illegally. Finally, our understanding is that the UK has not been granted access to the Schengen Information System in respect of this matter and if that continues to be the case then joining it would be, frankly, pointless.

Q50 Chairman: Right, thank you very much. You will notice a certain familiarity in our questions since you were present at the previous session. I hear what you say about your views on the Government's opt-out, but would you not accept that there is in principle a certain advantage in trying to reach common or minimum EU standards and procedures on the return of illegally staying third country nationals? We have had evidence from other witnesses whom we will be hearing later suggesting that in principle we ought to be aiming for some sort of common standard across the EU, and the Commission made the point that this would help co-operation between Member States and enhance the efficiency of return measures throughout the EU. Do you not accept that argument at all?

Sir Andrew Green: No, I do not. There may be some advantage in moving towards common standards, but not very much in our view. I do not think the Commission paper makes that case very effectively nor does it make the case that joining this particular Directive would help with the problems that we face. It is a balance of advantage here. I see very little disadvantage in staying out and very severe disadvantages in going in, which we will no doubt come to later. If we were actually members of Schengen it might be a different matter but we are not members of Schengen and we are not going to be given access to the information systems. I really do not see the point of opting in.

Chairman: Lord Marlesford?

Q51 Lord Marlesford: I think in a way you have already dealt with it. Do you see any inconsistency or disadvantage for the UK arising from the decision not to opt in?

Sir Andrew Green: No, in a word, there is nothing in this for us.

Mr Mitchell: If I may add, my Lord Chairman, I would regard the content of this Directive as purely a matter of internal law and order and how to deal with

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illegal immigrants and people similarly who have no settled right under the immigration law to stay here. Now it is true that at the end of the process you end up sending them somewhere else and they may pass through other countries and co-operation is needed possibly on certain matters, as was mentioned earlier—chartering aircraft and so on—but essentially, however, the Directive is dealing with a purely internal matter of law and order and I am not aware of any previous Directive which on the subject of immigration (and I have looked through those issued in the past) has concerned itself so closely with purely internal matters. The nearest point, if I may say so, is the Directive on asylum seekers where there is some justification for saying that the EU should have a common standard for dealing with asylum seekers on the territory of a Member State because we are all subject to the same international agreement, the 1951 Convention, but I do not think that argument holds good for other people or for how you deal with internal matters relating to law and order as regards immigrants.

Q52 Chairman: Are you suggesting that a matter of internal law and order in the United Kingdom has no relationship whatsoever to the internal law and order in, shall we say, Poland, or future accession countries, Turkey for example?

Sir Andrew Green: If I may say so, my Lord Chairman, I think the question that we face is whether to go into this or not. You are quite right of course there are connections between law and order and there are people who come from Poland who traffic people and so on and so forth, that is a matter of police co-operation, but in terms of this proposal that they are putting forward, this draft Directive, it provides nothing useful for us and, as we will come to I think, it ties our hands in a number of important respects. That is not necessarily an argument against looking at some of the things that they mention and seeing if we can improve. Shadowing is what we are suggesting where there are good reasons. Your earlier discussions pointed, I think, to various areas where we could look at what the EU are doing and see how it fits into our particular legal and administrative system, but to go into this thing, there is no case for that at all.

Q53 Chairman: I am glad you made that point because I think we ought to be clear what this inquiry is about. It is not whether the British Government should sign up to everything in the Directive; it is whether there are elements in the Directive from which we can benefit and indeed ways in which we can improve it. It is a very important point.

Sir Andrew Green: Yes, indeed it is. If by that, my Lord Chairman, you mean ideas in this that we should be looking at, certainly I would agree with that.

Q54 Chairman: I am talking about opting into the discussion really?

Sir Andrew Green: Once you are in you are in, you cannot get out again so you either opt into the Directive or not. Is that not so?

Lord Avebury: I would have thought we can embark on discussion and then still say at the end of the day we are not satisfied with the outcome and refuse to sign up to it.

Q55 Baroness D'Souza: The time for that is now over apparently. There was a limited period and that has now elapsed.

Sir Andrew Green: There are two things here. One is there is a period in which, as you say, one can take part in the discussion, and the argument in other cases has been that if you do not at that point then opt in your voice is not going to be listened to because it is not going to apply to you. We are now in the situation but I would not go down that road anyway. You only have to look at this thing to see that there is nothing of value to the problems that we face here, which are very serious problems indeed. It is the credibility of our immigration and asylum system that is at stake when you are in a situation where removals are so poor, not to speak of public opinion and so on. These are very serious and central issues, and to tie our hands to no benefit seems to me to be very unwise.

Q56 Lord Corbett of Castle Vale: This takes us back to the earlier discussion with the ILPA representatives. There is currently, which you acknowledge, no regular review of detention decisions as proposed in Article 14. Do you accept the point that ILPA was making that it is such a serious matter to rob somebody of their liberty that there ought to be some independent legal review of those detentions? You will remember the spat about judicial review?

Mr Mitchell: I was very interested to note the almost relaxed view that the two ILPA representatives took of the present arrangements. Any person detained can apply for bail although, as was conceded, it is difficult sometimes for them in practical terms to get bail, either because they cannot find sureties or because of no legal aid or whatever. So I would not feel that we were too far apart from ILPA on that particular subject. We would not be opposed to some form of review of detention but I think we would have to wait and see what positive proposals were

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made on the subject and how practical it was going to be.

Sir Andrew Green: With the emphasis on the practical. I will leave it at that.

Chairman: Thank you very much. Lord Dubs?

Q57 Lord Dubs: In your submission you take the view that the mandatory issuing of a return decision to any illegally staying third country national is in practice impossible because of the numbers involved. Why do numbers really affect this, apart from the fact that it is slightly surprising from your organisation hearing that view?

Sir Andrew Green: Is it? What we want to see is an effective and practical policy. When you have got three-quarters of a million people in the country who should not be here, to take a mandatory requirement to issue a document to three-quarters of a million people, most of whom you probably cannot find (unless you come across them when you go into some workplace or other) it is just not practical. We are certainly in favour of removing people with no right to be here but accepting a European mandate to dish out pieces of paper to them does not seem to us to be a step forward.

Q58 Lord Dubs: Leaving aside whether the three-quarters of a million is a figure—

Sir Andrew Green: I will come back to that if you like.

Q59 Lord Dubs: We have had that discussion on a previous occasion.

Sir Andrew Green: Have you?

Q60 Lord Dubs: With you. Surely in one sense you have answered my point because you have said a lot of the people who are here illegally are not known to the authorities and they become known to the authorities in dribs and drabs. Surely that is exactly the point when a mandatory issuing of an order would fit in very well?

Sir Andrew Green: Absolutely, we should certainly do that but not by reason of a requirement from the European Union.

Mr Mitchell: But the Directive does not even allow that minor concession. According to the Directive you are supposed to issue the removal notice to every illegal immigrant whether you can identify them or not. It is just ludicrous and to my way of thinking to pass a law which is plainly impossible to put into effect is to bring the law into disrepute.

Q61 Lord Dubs: Okay, but insofar as they are known to the authorities then it would be a legitimate way forward in your view?

Sir Andrew Green: Under national arrangements.

Mr Mitchell: I think it is a matter for government discretion; it must be. Can we quote actual figures? Can I just remind members of the Committee that I think it was in 2003 (I may be wrong) that the Government set itself a target of 30,000 removals and they fell short of that by about 20,000 or so. That is the sort of problem that the Government is up against. It is not only a matter of identifying the particular individuals. You then face physical problems in actually enforcing removals. After all, we have seen recently in Scotland with the case of the Kosovan family which was arrested in a dawn raid to be deported and that led to a protest from the Scottish Executive, the Scottish Parliament, and that is just one problem. Apart from that you are talking about many thousands of people who have to be got together, who often need to be detained the day before, aircraft have to be chartered, people then have to be shepherded on board, sometimes they may have to be forced to go on board, a strong posse of security officers probably has to travel with them to make sure they do not disrupt the flight, and then they have to make sure they disembark at the other end. On top of that of course the receiving country may not want to receive them because they may have thrown away their passports before they came here.

Q62 Lord Avebury: Of course they do not get on the plane until they are properly documented so the problem of their reception at the other end ought not to arise, but obviously we do accept that it can be very difficult to remove people. May I come on to the question of the proposed limitation of re-entry bans to a maximum of five years which is provided in the Directive. I think you argue that at least in some cases those bans ought to be made indefinite. Could you elaborate a little bit on the kind of cases that you have in mind, having regard to the fact that in this Directive there is already a potential exception case of public policy or security cases and also bearing in mind what the witnesses from ILPA were saying about the proportionality of a ban which is longer than five years, particularly an indefinite ban, which they rule out for that reason?

Mr Mitchell: I do not think we had particular cases in mind but our view is that this Directive is inappropriate and this should be a matter for the discretion of national governments. It should not have its hand tied by the Directive.

Q63 Lord Marlesford: Could I just follow up on that. If we were part of the Directive would this in practice mean the introduction of a whole new system of appeal as being somebody saying we were acting against the Directive?

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Mr Mitchell: I would assume that we would keep the same appeal system as at present.

Q64 Lord Marlesford: Would they be able to appeal to some European body?

Mr Mitchell: Not directly, no, because the EU law is part of the law of this country and it is administered by the courts of this country and by the immigration judges if necessary. I have myself when I was an adjudicator on one or two occasions had to deal with matters of EU law on the Association Agreements. So, no, it would not require any separate legal machinery, but a point I did make in our written submissions was that it does raise the possibility of a dispute on a matter of EU law which could need to be referred to the European Court of Justice and therefore add to delays.

Sir Andrew Green: It adds a new range of possibilities for lawyers!

Q65 Viscount Ullswater: You say that you think it should be a matter for national discretion.

Mr Mitchell: Yes.

Q66 Viscount Ullswater: I understand that well if it was a ban on re-entry into the UK but this is a ban on re-entry into any of the Member States, and so do you feel that there is no reason why the Member States themselves should have a collective view of the criteria for a ban and the length of time?

Sir Andrew Green: There is a reason if you are a member of the Schengen system obviously because there is free movement within the Schengen area. If you are not part of the Schengen area there is no particular reason why that linkage should apply.

Q67 Baroness D'Souza: The Directive offers possibilities of rewarding good compliance and penalising non-compliance by withdrawing or extending re-entry bans. Do you not consider that this might be a useful approach?

Mr Mitchell: In view of our total opposition to the Directive I think the answer is no, we do not.

Q68 Baroness D'Souza: But what about the principle of having a carrot and stick, given that one is dealing with an intractable problem?

Sir Andrew Green: To take the Chairman's point of whether this is a good idea in principle that we might learn from, possibly, but I think there are much more important things to look at than this. I rather doubt that the length of a re-entry ban is a big factor in someone's decision as to whether to come back here. The biggest factor will be whether he can do it undetected. At the moment he can. He just gets another passport and walks back in; it is terribly simple, they often do it. So let's get some border

controls and then you might possibly be able to operate some system of this kind if you thought it was useful, but I am not convinced that it would be.

Q69 Lord Avebury: Would he not be detected by Eurodac if he comes in under the same name even if he has a new passport?

Sir Andrew Green: Yes, if he is then discovered again and his fingerprints are taken, but there is nothing to stop him coming straight back to the UK. We do not check fingerprints when they come in.

Q70 Lord Avebury: No, but we do check whether their name is on Eurodac.

Sir Andrew Green: They have changed their name and they get another passport. It is easily done.

Q71 Viscount Ullswater: Do you think that the Directive could potentially infringe the rights of family members and children as particularly vulnerable persons?

Mr Mitchell: We considered this question but I cannot see anything in it that would, no.

Chairman: Earl of Listowel, do you want to pursue that.

Q72 Earl of Listowel: I am going to move on from that if I may, my Lord Chairman. I think the sense is that you totally oppose this Directive, but is there any element within this Directive that you think the Government might have given some thought to which is a starting point for some useful work to be done?

Sir Andrew Green: Not a lot, but I think there is something in this question of reviewing detention particularly for long term immigration prisoners, provided that we do not introduce such a heavy system as to slow up a process that is already extraordinarily difficult to run for the reasons that all know and which we briefly describe.

Q73 Earl of Listowel: May I just follow that question up with a question of principle again and that is concern that with such pressure across the European Union everybody recognises the importance in terms of establishing credibility in the immigration system by having an effective returns policy, but the danger in that is that some nations might go to the extreme in seeking to make that happen. Is there an argument for such a measure as this across the European Union to prevent nations going to extremes? I am thinking particularly of asylum seeking applicants. If they see at the end that there is a very draconian returns policy they might be more tempted to forego the asylum process and disappear? For instance, in Section 9 of the recent Immigration and Asylum (Treatment of Claimants) Act, in the pilot project there for families

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Mr Andrew Dennis

who are now having the threat of removal of all benefits and housing from them, I understand that 15 or 16 families have just disappeared and not one has returned voluntarily as a consequence of this. Do you see the danger that extreme action in some countries might give rise to less controllable, irregular migrant numbers, if you like?

Sir Andrew Green: I think it is certainly true that there is a risk of this displacement of asylum claims and that exists now. If people perceive that the asylum system is tougher in one country than another, they will go to the other, and indeed in the UK we have in the past suffered from that. People come all the way across Europe in order to claim asylum here in the expectation that they may have a better chance of getting it. Even if they fail they have got an 85 per cent chance of staying here. The two are related, both the toughness or otherwise, as perceived, of the asylum system and the effectiveness or otherwise of removal. Could I add to that, Chairman, to slightly widen the point, on the question of amnesties, which cropped up in earlier evidence, because it is related. There seems to be developing a move towards granting amnesties to those who have been illegally in Britain for some time. It is related in particular to the introduction of ID cards, should they be introduced, when you are left with the residue. We do not, of course, deny that there is a problem there and potentially a very difficult one. What we would certainly point to is that the history of amnesties in Europe is an extremely poor one. This is where it ties into your point, Lord Listowel. There have been five amnesties in Italy in the last 20 or 30 years and there have been six in Spain. The most recent one in Spain was of the order of 700,000 people. The immediate effect of that was some pretty strong criticism from the French Foreign Minister and the German Interior Minister because, of course, those people once they have documents can travel within the Schengen area. An even more clear consequence was the problems that occurred in the Spanish enclaves in North Africa just a few months after this amnesty had been granted. So it seems to us that they do not work and that they are also wrong in principle. To reward people for illegal behaviour, however long they have been behaving illegally, seems to us to be entirely wrong and extremely costly because to each person to whom you grant ILR (permission to stay) you are granting the whole welfare state and you are probably also granting them the right to family reunion and so on and so forth. It is a hugely expensive business and the amnesty by another name that has been granted to families in October 2003 is going to be extremely expensive. We do not know the total numbers yet because they are still being worked through. It maybe that in that case there was little alternative because they would have had a human

rights claim in any case. I think that is what delayed it. The point I would like to stress is that as we move forward we must be very clear that amnesties are an extremely doubtful way to proceed. So what do we do? What I would suggest is that we tighten up conditions in Britain, that is to say we take much more effective action against employers of illegal immigrants. The Government is moving in that direction. I think I am right in saying that the total number of successful convictions in the last five years is less than 10 (it might be 20 but I think it is less than 10) so there is a lot of tightening up to be done on that front. I think we also need to tighten up access to the National Health Service to people who quite clearly are not entitled to it and there may also be a case for looking at access to schools, not in the sense of preventing children from getting education obviously but in the sense of making sure that people presented to a school are actually legally present in Britain. So there is a whole range of things that could be done to tighten up the system in Britain and therefore to discourage illegal immigrants either from coming or from staying.

Mr Mitchell: Could I just make a point in response to Lord Listowel's question. As regards asylum applicants who disappeared, in my own experience as an adjudicator for 10 years they often do that anyway. They fail to turn up to the Home Office; if they have an appeal they fail to turn up, they just disappear anyway if it suits them. So I do not think the existence of legislation is going to affect them one way or another. If they want to disappear they will do so.

Q74 Earl of Listowel: If I may my Lord Chairman, I can see that that happens and there may be various factors that come into play that encourage or discourage that. I suppose my concern is when they are in the asylum system and going through the process we know roughly where they are and there is some sort of control over them, if you like. I suppose what you are saying is it is pretty limited but at least, particularly if it is a family applying, it is easier to keep tabs on them but if one makes the process so unattractive there is a danger that they will even more so simply walk away and then they become even more difficult to pursue. Is that a reasonable concern?

Mr Mitchell: Possibly, but I am not quite sure what you have in mind when you talk about making the system more unattractive. Bear in mind that we are governed by the 1951 Convention protocol and of course we do have already this existing Directive regulating the way we treat asylum seekers in common with other Member States.

Earl of Listowel: Thank you.

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Q75 Baroness Henig: Your written evidence is fairly forthright, if I can put it in those terms. The conclusion is very clear-cut and you have reiterated again this morning that for the UK there is nothing significant to be gained from this agreement and a good deal to be lost. You make an interesting suggestion that the best policy would be to stay out but to shadow the main elements. I wondered which of these elements would you consider useful enough for the United Kingdom to implement on a “non opt-in basis”.

Sir Andrew Green: Not a lot, but I do think this question of detention is one that needs to be looked at, especially long term. Short term I think we have got to make sure we know where these people are and if people are being put through the fast track system because *prima facie* they are weak cases then they ought to be detained until the decision is taken. I think to grant bail to people in that category would be a mistake. The devil will be in the detail of course and each case will be different and so on but there are may be an area there to be looked at.

Q76 Baroness Henig: Right, so your suggestion of shadowing is minimal?

Sir Andrew Green: It is shadowy, yes.

Baroness Henig: It is a fairly minimal policy.

Q77 Chairman: Sir Andrew, thank very much indeed and thank you to your colleagues. Is there anything you want to say in conclusion?

Sir Andrew Green: Not on this, I think it has been a very clear session, my Lord Chairman. I am sure your Committee know that our last evidence was sent to the National Statistician and they have seen the letter that he sent in reply in which he confirmed every point that we had made. Is that well-known? I hope so. They may also have seen our exchange with the Home Office. Two things have happened since then. One is that the Turner Commission has reported on pensions and it did not even mention the question of immigration as a solution. That is because they dismissed it in their interim report. Finally we now have the statistics for vacancies last August (which was after we gave evidence) and vacancies are still at 600,000, so the Government’s argument three years ago that we need immigration in order to fill vacancies is quite clearly disproved by the facts. 600,000 three years ago; net immigration of about

700,000; we still have 600,000 vacancies. There is a reason for that which is that immigration fulfils demand but also creates it, and as Martin Wolf wrote in the *Financial Times* in January, the argument on labour shortages is actually an argument for a continuous cycle of immigration for the reason I described. So in a nutshell, for those seven arguments, which I call the “seven deadly sins”, which I put to your Committee in writing after our meeting, the score is rather interesting. One has been dropped by the Home Office. Two have been ruled out by the Statistics Commission to whom we appealed on them. One has been ruled out by the Turner Commission, and another one has been ruled out by the facts of the case. So five of the seven arguments that the Government have from time to time used have been effectively disproved. That leaves two, if I may, in a sentence. One is the fiscal contribution, the famous £2.5 billion. That has been reviewed and revised by the IPPR who described the first estimate as “meaningless”. We are looking at that calculation and we think that it has a very substantial flaw but we will speak when we are ready to speak on that. The final Government case is the Prime Minister’s in which in his speech to the CBI last year he said that immigrants add .5 per cent to our trend growth. It is actually .4 per cent and if you take it in terms of GDP per head you have to subtract the extra population, which brings you down to a very small amount, £2 a week per family.

Q78 Chairman: That is helpful. I hear what you say but, I am sorry, I do not want to prolong this discussion because it relates to our past inquiry, not this inquiry. I think nothing that you have said would probably make this Committee change its mind in its general conclusion and that was that the effect of economic migration in this country is positive.

Sir Andrew Green: I am not saying it is negative. I am saying it is small and either neutral or slightly positive.

Q79 Chairman: I think I must bring this session to a close. Thank you very much indeed. I am sorry to bounce you but thank you very much indeed both for coming today and for your written evidence. It has been extremely helpful and very useful and it is very nice to have seen you again.

Sir Andrew Green: Thank you for your hospitality.

WEDNESDAY 18 JANUARY 2006

Present	Avebury, L Caithness, E Corbett of Castle Vale, L Dubs, L D'Souza, B	Henig, B Listowel, E Marlesford, L Ullswater, V Wright of Richmond, L (Chairman)
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Memorandum by the Home Office

1. On 14 November 2005, you issued a call for evidence in relation to the above proposal from the European Commission. The Government thanks the House of Lords' Select Committee on the European Union for the opportunity to comment.
2. On 16 November, the House of Commons' European Scrutiny Committee recommended that the European Standing Committee B should debate the proposal. This took place on 6 December 2005. The Government's initial assessment of the provisions of the Directive, put forward during the debate, are that the changes required in our domestic practices would, in many cases, present us with an additional and unnecessary burden of bureaucracy and administration. It would reduce the effectiveness of our returns effort and would undermine much of the good work done by Member States. Consequently, our initial position is that we are minded not to opt into this Directive.
3. We have set out in turn below, our comments in relation to the areas highlighted in your call for evidence.

I. LEGAL BASIS

4. The legal basis of the proposal is Article 63(3) (b) of the Treaty establishing the European Community.

This proposal is based on the premise that an effective return policy is an integral and crucial part of the fight against illegal immigration and a necessary component of a well-managed and credible policy on migration. It was first proposed by the Commission in its Communication of November 2001. This was followed by a Commission Green Paper on Community Return Policy in April 2002 and a Commission Communication on a Community Return Policy on Illegal Residents in October 2002. The Council decided, in adopting the Return Action Programme in November 2002, to place the focus on operational co-operation in the short term, with a provision for the Commission to bring forward standard setting in the medium term. The Hague Programme, agreed in November 2004, called again for the Commission to present a proposal on the establishment of common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity. The directive issued on 1 September.

II. COMPLIANCE WITH HUMAN RIGHTS LAW

5. The Directive provides that no return decision shall be issued where Member States are subject to obligations "derived from fundamental rights, in particular, from the European Convention on Human Rights".
6. The European Convention on Human Rights (ECHR) is a treaty of the Council of Europe, which is legally entirely separate from the EU. However, all EU Member States are members of the Council of Europe and are signatories to the ECHR. In addition, the Treaty of the European Union states that the Union respects the ECHR, which means that it treats the Convention as a rule of law. As the EU's recent Charter on Fundamental Rights reaffirms, the ECHR is a major part of the Union's quest to place human rights standards at the heart of everything it does.
7. The UK supports and fully complies with its obligations under the ECHR. Not opting into this Directive in no way changes our obligations with regard to the ECHR or any other international obligations.

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III. A TWO-STEP PROCESS

8. The proposal provides that the “return decision” shall allow a period of up to four weeks for a voluntary departure, unless there are reasons to believe the person may abscond.

9. Individuals will be aware from the point of the first negative decision that they have no right to remain in the United Kingdom should any appeal against that decision be refused. The UK Immigration Service already has provision to allow an individual to depart voluntarily where it is appropriate to do so. For instance, information and support on voluntary return is available throughout the entire asylum process starting with Asylum Screening Units through to the notification of first adverse decision. In addition to information available from the Home Office, there is considerable outreach and targeted media advertising by International Organisation for Migration (IOM) and its implementing partners.

10. There will always be a significant body of individuals who are determined to frustrate removal at any cost. These individuals will have no intention of leaving the United Kingdom voluntarily, and the delays that a mandatory requirement would impose will undermine the Immigration Service’s ability to take swift and effective action against those who wish to abuse immigration controls.

11. In addition, prompt and automatic enforced return following a negative decision/failed appeal is an integral part of the Fast Track Process. National Asylum Support Service (NASS) support is terminated after 21 days and any extension would have implications for support costs.

IV. PROVISIONS FOR INDIVIDUALS WHO CANNOT BE REMOVED

12. The Directive seeks to equate support for failed asylum seekers with support provided to applicants, and would require us to provide freedom of movement to failed asylum seekers, maintain family unity (which would render section 9 of the Asylum and Immigration Treatment of Claimants etc Act 2004 unworkable), provide access to secondary, as well as primary healthcare, and education (currently children of asylum seekers and failed asylum seekers receive mainstream education up to the age of 16 years), along with provisions for vulnerable individuals. The Government has reservations about the implications for support of failed asylum seekers under this provision.

V. CONDITIONS AND JUDICIAL OVERSIGHT OF DETENTION

Judicial Oversight

13. The Directive seeks to impose limits on the use of detention which are considerably more restrictive than domestic law and the ECHR, and which will impact significantly on our ability to detain pending removal or deportation.

14. The UK does not accept that detention is only appropriate where less coercive measures would not be sufficient. UK domestic law (and the ECHR) allows the detention of a person pending removal on grounds other than risk of absconding. For example, we might wish to detain a person even if we were satisfied that reporting restrictions were sufficient to ensure compliance with the eventual removal order (eg in national security cases and those where there is a risk of serious criminal activity (re-offending)).

15. The decision to detain is administrative, not judicial, and the proposal that it is made or confirmed by judicial authority would undermine effective immigration control. Detention decisions, and reviews of detention, are not subject to automatic judicial supervision in the UK at present as would be required by the Directive, nor are they required to be by the ECHR. Detention decisions are, however, kept under regular review at successively higher levels within the Immigration Service. In addition, any detained person may challenge the lawfulness of their detention before the courts through the processes of judicial review and habeas corpus, which complies fully with Article 5(4) of the ECHR.

16. The UK does not agree to an upper limit on the period of detention. Domestic and ECHR case-law is clear that a person detained for immigration purposes must be detained for no longer than is reasonably necessary and that their detention should not be prolonged unduly. In the case of persons detained pending removal there must be a realistic prospect of removal within a reasonable period of time, the length of which will vary from case to case. Detention in the UK complies with these well-established principles without being subject to a fixed upper limit. Although the majority of individuals are detained pending removal for very short periods, there are cases where individuals maybe detained for longer periods, including in some exceptional cases for periods in excess of six months. Such periods of extended detention are most often caused by repeated

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frustration of removal on the part of the individual concerned, including failure to co-operate with the re-documentation process.

17. Knowledge of a fixed upper limit on the length of detention, whether of six months as proposed by the Directive or some other period, would in many cases inevitably provide applicants or those who have exhausted their appeal rights with further motivation to frustrate and delay immigration and asylum processes, refuse to co-operate with identification procedures and documentation prior to return, and do all that they can to frustrate any actual removal attempts. A fixed upper limit on length of detention would have the effect of preventing removal or, at the very least, significantly reduce the possibilities of successful removal in many cases. This is not acceptable and is contrary to current national removal practices (including the use of detention and fast track procedures) and the Government's overall efforts to manage asylum and illegal immigration.

18. Current detention policy and practice reflects the less restrictive requirements of domestic and ECHR caselaw and is not compliant with either the requirement for judicial oversight of detention or a maximum period of detention as proposed by the Directive.

19. This provision would effectively make it more difficult and more expensive to remove illegally resident third country nationals and impede the removals programme.

Conditions of Detention

20. The Directive requires immigration detainees to be accommodated in "specialised temporary custody facilities." It is further provided that where this is impossible and resort is made to ordinary prison accommodation, immigration detainees must be permanently physically separated from other prisoners.

21. All immigration removal centres within the United Kingdom are subject to The Detention Centre Rules 2001 (SI 2001 No 238) which came into force in April 2001 and which make provision for the regulation and management of removal centres. The purpose of removal centres is to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible. In addition to rules governing matters such as the welfare, health care, religious observance and correspondence, the Rules also provide for the duties of detainee custody officers. Further to the Rules, we have developed a comprehensive set of Operating Standards that underpin the Rules and determine an auditable minimum level of care and service across all aspects of life in removal centres. Independent Monitoring Boards are appointed to all removal centres and members report regularly as to the state of the premises themselves, the administration of the centre and the treatment of detained persons.

22. In practice, the UK aims to avoid holding immigration detainees in prisons. The routine use of prison accommodation for immigration detainees ended in January 2002. However, it was made clear at that time that there would always remain a need to hold individual detainees in prison for reasons of security and control. Such individuals would include those held pending deportation on completion of prison sentences for serious criminal offences and those whose conduct and/or background make them unsuitable for the more relaxed regime of an Immigration Service removal centre. Where individuals are held in prison accommodation they will normally be held with other unconvicted prisoners and thus separate from convicted prisoners. Given the relatively low numbers concerned, it would not be practicable to hold such individuals entirely separate from all prisoners.

23. In addition to this general position, there is a particular difficulty in Northern Ireland given the absence there of dedicated detention facilities. Individuals detained in Northern Ireland will, if they are not to be removed immediately, be held in prison accommodation. However, in all cases there is a presumption of transfer to an Immigration Service removal centre in Britain as soon as practicable, unless the person concerned expresses a wish to remain in Northern Ireland, in which case they will have to remain in prison accommodation.

VI. THE SAFEGUARDS FOR INDIVIDUALS TO BE REMOVED

24. Individuals whose removal from the UK is being enforced are usually escorted to the port of removal and, in some cases, may be escorted throughout their journey to their destination country. Immigration escorts are conducted under arrangements made under section 156 of the Immigration and Asylum Act 1999. In practical terms, a number of private companies are contracted to provide escort services. Individual escorting officers are certified as Detainee Custody Officers under section 154 of the 1999 Act, with much the same powers, duties and responsibilities as those of officers employed in removal centres. Under paragraph 2(5) of Schedule 13 to

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the 1999 Act detainee custody officers acting as escorts have the power to use reasonable force where necessary for the discharge of their statutory duties. They are liable in law in relation to the use of any such force.

25. Monitoring of escort arrangements is provided for by Schedule 13 to the 1999 Act and is carried out by IND officials appointed to act as escort monitors. The monitors not only have duties to keep the arrangements and conditions of escorts under review but also have a particular duty to investigate complaints made against escorting officers by detained persons. Where a complaint amounts to an allegation of assault, the matter is referred automatically to the police for criminal investigation.

26. In the interests of ensuring that all detention arrangements are subject to independent scrutiny, HM Chief Inspector of Prisons (HMCIP) was invited in May 2005 to carry out inspections of the escort arrangements on a voluntary basis. It is intended that this will be placed on a statutory basis by the Immigration, Asylum and Nationality Bill. In addition to HMCIP oversight, the Independent Monitoring Boards have been invited to consider ways in which they might extend their existing monitoring functions at removal centres to escorts. We consider UK escorting arrangements to be fully in line with the Common Guidelines on Security Provisions for Joint Removal by Air, as referred to in Article 10 (2) of the Directive.

27. Immigration officers with powers of arrest are permitted to use reasonable force in the course of their duties. The use of handcuffs or any other form of restraint is only done after a thorough risk assessment. Restraint is only ever used to protect the safety of the arresting immigration officer or the person being arrested, or when there is risk of other persons being harmed. Immigration Officers with powers of arrest use equipment consistent with that provided to police forces throughout the UK. They are trained in the use of restraint and equipment by accredited police trainers to standards that are laid down by the police, and this training is regularly reviewed. Investigations into complaints against immigration officers are overseen by the independent Complaints Audit Committee. It is intended to introduce legislation which will enable UK police forces and law enforcement organisations including the Immigration Service to enter into agreements with the Independent Police Complaints Commission in England and Wales and equivalent bodies in Scotland and Northern Ireland in order to further strengthen independent oversight of complaints against enforcement officers operating in the community.

VII. PROVISIONS ALLOWING OR REQUIRING POSTPONEMENT OF REMOVAL

28. UK practices are fully in line with the mandatory requirement to postpone removal in the circumstances specified in the proposal. We take into account all relevant individual circumstances when considering removal.

VIII. RE-ENTRY BAN AND SCHENGEN INFORMATION SYSTEM

29. An EU wide re-entry ban would be arbitrary in nature and involve considerable administration in monitoring bans. It would also present difficulties for the UK as we do not have access to the relevant parts of the Schengen Information System in order to inform other Member States of any third country nationals who are the subject of a re-entry ban issued by the UK; and access information on third country nationals who are the subject of re-entry bans issued by other Member States.

30. Additionally, we could not accept that a person previously removed from the UK could have their ban effectively withdrawn by simply paying the costs of the removal. This is an area of concern as it would condone the abuse of the control by those who are financially well off, while those without such financial means are excluded.

IX. JUDICIAL REMEDIES

31. The effect of the related provision in this proposal is to guarantee access to a judicial remedy which either postpones return automatically or allows the subject to apply for removal action to be suspended.

32. Where an immigration decision as defined in section 82(2) of the Nationality, Immigration and Asylum Act 2002 has been made, there will be a statutory right to appeal this decision to the Asylum and Immigration Tribunal. The UK provides out of country rights of appeal against immigration decisions in a variety of circumstances. One example is in the case of decisions to remove illegal entrants and overstayers from the UK. The exception is where the affected party has made an asylum or human rights claim that is not clearly unfounded or alleges that removal would breach his rights under the Community Treaties.

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33. The availability of an in-country right of appeal is designed to provide adequate protection for anyone who argues that the execution of a decision to remove would breach their rights under the Refugee Convention, the ECHR or the Community Treaties. In all other cases the need to safeguard such fundamental rights does not arise and the relevant issues can be fully considered during an appeal from outside the UK. In these cases we would argue that an out of country appeal is an effective remedy.

34. Judicial review is available in respect of any decision made by a public body and accordingly lies in respect of all decisions made in the context of enforcement of removal from the UK. Where an application for judicial review is lodged the applicant may apply for the enforcement of the decision being challenged to be suspended pending resolution of the proceedings. That said, where Parliament has provided an out of country right of appeal against an immigration decision or the relevant issues have already been considered during an in country appeal prior to the setting of removal directions, we would argue strongly that permission to apply for judicial review should be refused.

35. In any case where an immigration decision is made, we are obliged to notify the affected party of their available statutory right of appeal. Where there is such a statutory right of appeal we would argue that this provides an effective remedy and there is accordingly no need to notify the relevant party as to the availability of judicial review.

36. We do not contest the need for an effective remedy, but instruments should not prescribe the content and nature of that remedy to be provided by Member States. Indeed were they to do so, it may raise questions of competence. Therefore, the proposal should not address the suspensive nature of a remedy, and the notification of such a remedy.

X. MEMBER STATES OPERATIONAL COOPERATION—EUROPEAN BORDER AGENCY

37. The proposal for the Community Return Policy outlines a framework, which the European Border Agency (Frontex) will be required to work within. The Regulation for the establishment of Frontex states that subject to this Policy, the Agency shall provide the necessary assistance for organising joint return operations of Member States and identify best practices on the acquisition of travel documents and the removal of illegally present third-country nationals. The Agency may also use Community financial means available in the field of return. Article 12(2) of the Regulation states that the support provided by the Agency in relation to joint return operations shall include operations in which the UK participates.

38. Although Frontex is still in the very early stages of its development, plans to assist Member States effectively on joint return operations should be in place by the end of 2006. In particular, Frontex's two main objectives for next year will be the establishment of a system to manage the assistance on joint return operations and assistance to Member States in at least four joint return operations. We do not yet know any more detail on how these objectives will be achieved or how it will achieve its aims in this area, but will consider any proposals that come forward in due course. Further to the objectives outlined in the Work Programme and the Regulation, the Agency's role on returns is yet to be confirmed.

39. We do not consider that the adoption of the Returns Directive without the participation of the UK will in itself prevent the Agency from carrying out activities in relation to joint return operations involving the UK, organised by Frontex or otherwise.

Tony McNulty

8 December 2005

Examination of Witnesses

Witnesses: MRS SUSANNAH SIMON, Director, European Policy Directorate, MR TOM DODD, Director of International Delivery, MR SIMON BARRETT, Assistant Director, Detention Services Policy Unit, and MR DIGBY GRIFFITH, Director, Enforcement and Removals Directorate, Immigration and Nationality Directorate, Home Office, examined.

Q80 Chairman: Good morning and thank you very much for coming, in some cases coming back—particularly Susannah Simon. It is very nice to welcome you back. To remind you, this session is on the record; in fact it is being taped for broadcast, if necessary, and you will of course be sent a copy of the transcript in due course for your agreement or corrections. Would you like to start with any statement? Thank you very much for your minister's memorandum.

Mr Dodd: Should I start by introducing the team here?

Q81 Chairman: Please do.

Mr Dodd: I am Tom Dodd. I am the recently arrived Director, International Delivery, and I hold the policy lead for this particular instrument. To my left is Susannah Simon, who is the Director of European Policy and the EU expert in IND. To my right is Digby Griffith, who is the Director and Deputy Head of Enforcement and Removals and in charge of removal operations and, on the end, is Simon Barrett, who is from Detention Services and deals with detention policy. We thank you for the opportunity to come to the Committee today and give evidence on the returns Directive, or the Draft Directive on Common Procedures for the Return of Illegally Staying Third Country Nationals. You will be aware that this was debated in the other Chamber in December. At that stage, Mr McNulty, the Home Office minister responsible, said that we were minded not to opt in to this Directive and I can confirm that, as you know, we had not opted in to this Directive by the time of the deadline for notification, which was 10 January this year. We have, as a Government, opted in to most EU measures on asylum and immigration and combating illegal immigration, and we are very much committed to working with our European partners to achieve an effective and managed system of immigration and asylum. However, we feel in this particular instance that on balance the draft Directive as proposed does not help us deliver our asylum and immigration objectives and, because of that, we have decided not to opt in.

Q82 Chairman: Can I start the questioning by concentrating on that point? Is there a risk that, by not opting in, we have lost any influence in trying to get the Directive more on the lines that we would like to see, or is the Home Office view that the Directive itself is so undesirable that there is really no point in trying to change it?

Mr Dodd: Could I ask Susannah to answer that question, if I may?

Mrs Simon: I think we agree that our scope for influencing the content of the Directive is limited by not opting in. At the same time, we would propose to engage constructively during negotiations, particularly in offering support to other Member States, many of whom do share our concerns. However, what we are talking about is a balance of risk. We have the ability not to opt-in and, in this very rare case, we have taken advantage of it. Our judgment is that it would be more damaging, as Tom said, to our national asylum and immigration efforts had we opted in, and there would have been serious challenges in delivering the Directive in the shape that we would want it, in the light of qualified majority voting and co-decision of the European Parliament.

Q83 Chairman: The premise that the Commission are working from is that a common approach to the return of illegally staying third-country nationals is desirable because it forms an integral part of the fight against illegal immigration at European level. Do you basically disagree with that premise?

Mr Dodd: The answer is no, we do not disagree with the premise. It is a question of what we define as common action. The Directive as it stands would, in total, be a hindrance to the sort of common action that we would like to see take place and would not facilitate returns. Practice and policy in legislation on returns varies greatly between Member States, and it does not actually prevent us from doing a lot of practical things with them to achieve returns. For example, we engaged in joint charters with a number of Member States, and that sort of practical activity we would like to see increase in the future.

Q84 Chairman: My next question reveals my ignorance in Community procedure but, having not opted in at this stage by the deadline, is it open to the Government at a future stage to opt in? If so, when might that happen?

Mrs Simon: It does remain open to us to opt in. Once the negotiations are finished, once the Directive has been adopted, we could opt in after the event. This would be subject to the Commission's agreement.

Q85 Lord Corbett of Castle Vale: Can I ask Mrs Simon a question which arose from an answer she gave you, My Lord Chairman, earlier? I think you told the Committee that, because we have decided not to sign up to the Directive, we had only

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Mrs Susannah Simon, Mr Tom Dodd, Mr Simon Barrett and
Mr Digby Griffith

a limited opportunity to influence it. The fact of the matter is that we do not have a seat around that table, do we?

Mrs Simon: In practice, because the negotiations take place within working groups and within the Council, when the discussions take place we will have a seat around the table and it is open to us to make any comments that we like about the Directive, as the negotiations proceed; but clearly other Member States, and particularly the Commission, are less likely to take account of what we say if we have not opted in.

Q86 Lord Corbett of Castle Vale: This is perhaps slightly going back over the ground we covered earlier, but although you do not like the Directive—and I think Mr Dodd said that it would hinder efforts at removals—do you not accept the Commission’s argument that common standards and procedures in the Directive would facilitate co-operation between Member States on removal, and stand a chance of improving the efficiency of return measures throughout the EU? At least, it has that going for it—or has it?

Mr Dodd: Without wishing to repeat myself, I think it is a question of what you mean by common standards. In this case there are many aspects of the Directive that we would find very difficult indeed, which probably you will get into. On that basis, we feel that we cannot actually sign up to it. That does not necessarily mean that, as Susannah says, if the instrument changed into a negotiation at the end of that period, if the package as a whole has a better balance between elements, at that stage we would decide that it is in our interests to opt in.

Q87 Lord Corbett of Castle Vale: I understand the reservations you make, and it does of course depend on those common standards; but, theoretically at least, it would be better if we were all to spit in the same bucket on this issue, would it not?

Mr Dodd: For example, as I recall on the Asylum Procedures Directive, we have opted into that Directive and have accepted the principle of common standards in that area. So we are not inherently opposed to common standards on returns: it is a question of what those standards are and what those procedures are.

Q88 Lord Dubs: As I understand it, the Directive is based on the premise that the return of illegally staying third-country nationals should be mandatory. What is your view on that, and do you think that generally Member States should retain discretion to allow individuals to remain where there are particular circumstances attaching to their background?

Mr Dodd: I think the answer to your question is yes. If I may step back slightly, in essence there are two categories of people in the United Kingdom. There are people here who have the right to be here because they have nationality, or leave to remain, or entry clearance, and there are people who do not have the right to remain here because they are here illegally, or they have overstayed their visas and so on, and those people should leave the country, either voluntarily or, if not voluntarily, then we will take measures to try to remove them in enforced removals, if necessary. I think that it comes down to the word “mandatory”. If it is mandatory, then we must be in a position to be able to deliver return of these people. The fact is that in many cases there are problems with documentation with individuals; there are problems in the countries to which we wish to return these people, which means that those countries are unwilling or find it hard to accept them back; and, of course, also the circumstances of individual cases can change over time. The benefit of our system is that people are able to make representations about their changing circumstances as they develop. For example, a decision may be made that somebody is ineligible for asylum at one point and then subsequently the situation changes in the country they have come from or their personal circumstances have changed, and then they are being granted asylum at that point. So there is some flexibility in our system.

Q89 Lord Dubs: Given that you do have a seat at the table at working groups where these various things are being discussed, is that an argument you are using against the mandatory requirement? Are you arguing that it should not be in the Directive?

Mr Dodd: Along with many other measures, we feel that the mandatory requirement is not correct. There are many Member States that share our concerns on this particular point in the Directive.

Q90 Chairman: Going back to the question of common standards, relating to the question by Lord Dubs, are there common standards that you would support? I understand that you do not want mandatory requirements, but are there certain minimum human rights standards, for instance?

Mr Dodd: In terms of human rights, our position is that there is a common human rights standard in the European Union, and that is the ECHR effectively. We believe that people who have failed in their claims for asylum or who are here illegally have sufficient protection through the ECHR to defend their interests. Their situation is different, for example, from those who are granted refugee status, who have an added form of protection.

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Q91 Lord Avebury: If we did have a mandatory policy of returning, it would not prevent the United Kingdom from doing as it does now, and that is to allow a second asylum application to be made where the circumstances have changed. For that to happen, the residence of the individual in this country must be rendered lawful for the period of the second application. So you could still continue with the existing policy even if there was a mandatory requirement to return people whose residence here was unlawful, could you not?

Mr Dodd: I suppose it comes back to the point about whether a mandatory policy is appropriate and workable, and I take your point on that. Across the board, however, I do not think a mandatory approach is enforceable.

Q92 Lord Avebury: Are you ruling out amnesties or special arrangements, such as we made for the people who have been here since before 2000, for the families that we allowed a special right to remain?

Mr Dodd: Obviously people's cases have to be looked at on a case-by-case basis. Again, we have the flexibility to do that; so amnesties could be decided to be appropriate for classes of people as we go forward.

Q93 Baroness Henig: It is clear that the Government have major concerns about the potential negative impact of the Directive on the effectiveness of the UK's returns policy. I wonder if you could expand on the main changes that you would wish to see before the UK could consider opting in to the Directive?

Mr Dodd: As I said, we have a number of concerns with the Directive. To summarise—Article 14 on detention—we believe that an upper limit of six months is arbitrary and unnecessary. Article 9 on re-entry bans—again, we think that is arbitrary and we should have discretion in that area; and actually it is not operationally possible, because of our exclusion from parts of the Schengen database. Article 12 on judicial remedy—another area where we have concerns about the suspensive nature of the appeals that are envisaged in the Directive. There are other areas as well.

Q94 Baroness Henig: Do we have any information, operating through the EU networks, about whether these sorts of concerns are shared by other countries?

Mr Dodd: Yes, we understand that many Member States are concerned by exactly these areas in the Directive, yes. We are in a fortunate position that, because of our Schengen position, we do not have to opt in to this Directive, and individual Member States have said to me that they would rather be in our position on this particular Directive, because they do not like it so much!

Q95 Chairman: You referred to the Schengen database. Are you in practice finding disadvantages in being excluded from the Schengen Information System?

Mrs Simon: Again, there is a balance and of course there are disadvantages. We will be part of SIS II, but it is very unlikely, for instance, that we would get access to some of the immigration data on SIS II. We would get access to law enforcement data, because we are part of that bit of Schengen. However, that is a disadvantage.

Q96 Lord Marlesford: I would like to go to a slightly different point. In a sense one could say, I suppose, the success of HMG's asylum policy can be measured by the success in removing those who have failed to establish grounds for asylum. Therefore, in a sense one measure of the failure of the policy is the cost of failing to remove people who have not established a right to remain. I was very struck by the National Audit Office report *Returning Failed Asylum Applicants*. On page 9—and I am sure you have the report with you—it does show that £308 million was spent by your department in 2003–04, supporting failed asylum applicants who have not been removed from the UK. I would like to ask you first of all to comment on that situation. Secondly, and in particular, to say what the latest figure is and what you are budgeting for the next three years in that respect.

Mr Griffith: Perhaps I could pick that one up, My Lord Chairman. The figure of £308,000 was a figure concluded by the National Audit Office, which looked at the cost of supporting failed asylum-seekers. I think that the Committee is taking evidence from the National Asylum Support Service after this session, so this particular question may be one which is more relevant to that session rather than to this one. We certainly have an obligation to support asylum-seekers through the process. The amount of money spent providing support is entirely dependent on the ability to remove at the end of that process. What we have seen in recent years is a fundamental difficulty in returning people to certain countries; difficulties in obtaining documentation; the high numbers of asylum-seekers in recent years—it has gone down dramatically over the last couple of years—has meant that there have simply been a lot of people applying for asylum, and the enforcement process has not been able to keep up with the numbers. That is very much changing. We are achieving a greater sense of balance now between the numbers of failed asylum-seekers entering the country and the numbers of people that we are removing. I just wonder, My Lord Chairman, if the question on the specific amount of money spent on

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asylum-seekers is best kept to the next session with the National Asylum Support Service.

Q97 Lord Marlesford: With respect, My Lord Chairman, I do not think it is. It is government money, it is taxpayers' money, and you are the government department spending it. You have not answered my question and I expect, from what you have already said, the figures will be lower. What are you budgeting in this particular category for the next three years, comparable to the £308 million in 2003–04?

Mr Griffith: I do not have those figures because that is the responsibility of the National Asylum Support Service, who are giving evidence next.

Q98 Lord Marlesford: Can you supply us with those figures?

Mr Dodd: I am sure we will be able to supply those figures, yes.

Lord Marlesford: Frankly, one measure of the extent to which something needs to be done about a situation is the cost to the taxpayer of the failure of the present system, and that is a very large sum of money.

Chairman: Lord Marlesford, I think that probably we should hear what Mr Griffith has said but perhaps we can return to this in the next question session.

Q99 Lord Avebury: Since every European country is having the same difficulty and presumably the reason for it is the same in their case as it is in ours—let us take the documentation issue, which you say is one of the main reasons why we have to spend large sums of money on maintaining failed asylum-seekers—is there not a case for a common European approach in obtaining agreements of countries such as China, which I believe has been difficult in the past, to standard procedures for documenting their nationals?

Mr Griffith: I think there is a case, and there is an enormous amount of co-operation going on between European countries on particular issues. For example, where an individual has claimed asylum in another European country we have the Dublin regulation, which allows European countries to move people back to the point of first claim. So that is a very useful bit of co-operation. In terms of the documentation processes, what we find is that across Europe different nationalities tend to end up in different countries. We may not be dealing with the same source countries all the time. There is also the issue that the documentation processes have to be seen in terms of the overall relationship between two countries, and may be subject to quite intense negotiations between the UK and another foreign

country. Other European countries will be having similar negotiations.

Q100 Earl of Listowel: A brief question, and a brief answer if you can give it to me. Can you give an indication of how we are performing in terms of returns, compared with our European Community neighbours?

Mr Griffith: Like-for-like comparisons are very difficult, because it very much depends on the source countries. I think that among European partners we are seen as being one of the leading players. Our growing ability to open up return routes to difficult countries is one that other European partners are very interested in, and we are seeing many more approaches now from European countries to us for advice and even some information about how to do a return successfully.

Q101 Baroness D'Souza: Part of the rationale of the Directive is to ensure minimum standards for the protection of procedural and substantive human rights during the return process, and that would include conditions of detention. Is there not some merit in this objective, given the widely differing standards in the Member States?

Mr Barrett: Certainly in relation to detention we would welcome the support of what Article 15 does, not least because the UK probably complies with most of the requirements in that particular Article. Certainly if there are Member States who are beneath those proposed standards and who would then be brought up to it, that would obviously be a good thing.

Q102 Baroness D'Souza: I wonder whether it would be a good thing for the UK.

Mr Barrett: In terms of the UK, in terms of the particular example of detention with Article 15, we actually do comply with those standards in there. There is only one issue in Article 15 that we do not comply with and would have some difficulty complying with; that is where it is necessary for a detained person to be held in prison accommodation. Article 15 requires that they be separated from all ordinary prisoners, as the Directive terms it. That simply is not practicable. The low numbers of immigration detainees in prison accommodation in the UK would be such that it would be difficult to set up a separate system for them within the Prison Service estate. So they have to be held with other unconvicted prisoners, for example remand prisoners, and be treated accordingly, but would be kept separate from convicted prisoners. That is the only area in Article 15 where we have a difficulty with the Directive.

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Q103 Baroness D'Souza: Perhaps I have given undue emphasis to the detention aspects of this, and I would like to go slightly broader. Before doing that, however, can I ask you about the maximum detention period?

Mr Barrett: Article 14 is much more of a problem for the UK, setting out as it does an upper limit of six months on a person's detention. That is not something which happens in the UK at present. As you will know, immigration detention is not time-limited. That has been a longstanding legal and policy position within the UK and is fully in accord with ECHR, Article 5. So in that sense we are meeting the minimum standards required under the ECHR. Our particular difficulty with upper limits on detention is that whatever limit is set, whether it is six months or some other period, it is inevitably arbitrary and takes no account of the individual's circumstances. More importantly perhaps, we believe that it poses a very serious risk, in encouraging people to prolong and frustrate the immigration and asylum processes they are going through in order to reach the point where they will be released. We do not regard that as something which is likely to help an effective return system.

Q104 Baroness D'Souza: Slightly wider than that, what about setting a standard for the question of detention of failed asylum-seekers at all—those awaiting deportation?

Mr Barrett: It very much depends what the standard is. There are two standards in the Directive which deal with detention, Articles 14 and 15. Article 15 seems to be a very sensible one overall; it sets out minimum standards for the treatment of the detained person. Article 14, however, contains proposals which we would have a fundamental problem with; so, in that particular case, not such a good idea.

Q105 Chairman: I cannot remember whether it was you or Mr Griffith who said that quite a number of our European partners are consulting us about return policy and how we do it. Is it fair to ask you if you have any comment on Mr Justice Collins's complaint about removing an asylum-seeker at midnight on a weekend?

Mr Griffith: I think that the comment by Mr Justice Collins referred to the forced removal of a number of Iraqi asylum-seekers in November. The issue was the amount of time between the removal directions being set and when the removal took place. We are very keen to try to maximise the amount of time—to have a set amount of time between those two things. The timing of the flight, which was the specific issue you mentioned, is something that is not within our control. We use commercial airlines; we use charter airlines; we are bound sometimes by air traffic control

and getting through air space across and within foreign countries. We are therefore not always able to arrange flights during office hours or during the working week. We are very much bound by the practicalities of doing removals and the reception arrangements in the country which is receiving the removees.

Q106 Chairman: Can I also ask you if there is anything you have to add to Mr McNulty's written statement about paying failed asylum-seekers an extra £2,000 to persuade them to go voluntarily?

Mr Griffith: I have nothing to add to the minister's statement.

Q107 Chairman: A bit early to see whether that is working, is it?

Mr Griffith: The initiative started very recently and will run for a period of six months. So it is very early days.

Q108 Chairman: Have we discussed it with our European partners?

Mr Griffith: They will be aware of it. Different European countries do very different things on voluntary returns. We are very much trying this as a pilot, to see what happens if we extend the package available to people. We hope that it will generate more returns, but we will see what happens during the period and we will do an evaluation after six months.

Q109 Lord Marlesford: Is there a danger that, if they are going to get a package for voluntarily returning, they will make a trip over here in order to return with some money in their pockets?

Mr Griffith: It is a risk. We think we have managed that risk by drawing a line, after which people are unable to apply. So anybody who applied for asylum after 31 December 2005 is not eligible for this enhanced scheme. We think that will limit attempts by people to circumvent our controls by trying to get here to benefit from that package.

Q110 Lord Corbett of Castle Vale: Could you explain the basis on which you come to the conclusion that this extra £2,000 on offer will encourage the removal of an extra 1,050 people during this six-month period? How do you work that one out—given, if I may say so, your complete inability to remove 30,000 people a year?

Mr Griffith: These are estimates.

Q111 Lord Corbett of Castle Vale: I know. I want to know the basis on which you do it. Why not another 2,000 or 1,500, or whatever?

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Mr Griffith: What we have seen over the past five or six years is a significant increase in the number of people going through this voluntary return process. In 1999, when the scheme was introduced, 50 people went; the following year it was 500. This year we expect to see well over 3,000. The estimate of 1,000-odd people going through the enhanced scheme is very much an estimate based on what the various stakeholders have been telling us about enhancing the scheme: that it would give us more returns. It is very difficult to pinpoint a precise number, and the minister's estimate was very much just that. We will monitor this very closely during the six-month period and determine after that period whether this has been a success or not.

Q112 Lord Avebury: It is very good to know that you are monitoring the use of voluntary return so carefully, and I wonder if you could give us those figures on an annual basis since 1999, broken down by nationality. Could I also ask this, further to the question by Baroness D'Souza on detentions? Do you not think that, as we move towards a single appeals system and you solve the problem of documentation, it would no longer be necessary to detain people for longer than six months, and therefore we could comply with the Directive?

Mr Griffith: The period during which people are detained is very much dependent on the individual circumstances of each case. There is no doubt that, while most people comply with the immigration law, there are some people who will seek to frustrate it. The difficulty of drawing a very clear line in the sand—that detention must stop at six months or any other period—means that people will know that if they can frustrate the process up to that point, they will be released.

Q113 Lord Avebury: The point is that, with a single appeals process, the opportunities for frustrating the process are seriously diminished.

Mr Griffith: Diminished but they do not dissolve completely, because there are other barriers to removal during that six-month period; for example, documentation. We are seeing people saying they do not have documentation to return home; so we sometimes cannot remove. If we could not obtain documentation within a six-month period from the home government, we would not be able to remove; we would have to release. Likewise, it is open to people to carry on making representations to us. People's circumstances change. So, with something that came up after the appeals process had been concluded, we would still have to look at that, and it is open to people to make representations to us and we will look at the circumstances. Someone who is very desperate to stay could well be given to trying to

frustrate the removal process by prolonging the documentation process as long as they could, by continually making representations to stay, thereby reaching the six-month period and possibly, if we took this line, facing release.

Q114 Chairman: One of you has told us that some of our European partners have similar reservations about the Directive to ours. Some of them, presumably, also have similar schemes for voluntary return for failed asylum-seekers or illegal stayers. Can you tell us anything about the experience of our European partners: how far their scheme has been successful?

Mr Griffith: It very much varies from country to country and no two schemes are exactly the same. What we have done over the past couple of years is to do a number of joint charter operations with the Italians, the French, the Germans and the Dutch, where we have returned people, either forcibly or voluntarily, jointly with them. This has been very successful and we are increasingly looking at doing some joint work with European countries. It is incredibly successful when it works well; it can be very hard work in terms of not having compatible procedures sometimes; and sometimes European countries are starting from a different starting point, if you like, in terms of legislation and approach on policy.

Q115 Viscount Ullswater: The Directive envisages a two-step process of return and removal. Would you be good enough to explain what happens at the present time in the UK, and would adopting this particular part of the Directive, do you think, help or hinder the effective enforcement of removal?

Mr Griffith: I think that this part of the proposal is one that we are very much doing already. We have a three-stage removal process at the moment. The first step is to identify the person's status and advise them of their liability to removal. The second stage is the decision to remove, and the third stage is to set a removal directions to carry out the removal process. So this particular part of the proposal is one that seems quite familiar to us. What is worrying perhaps is what might follow after the proposal. There is a very much linked part of the proposal which is proposing a four-week period to allow reflection for a voluntary return. When you start to build in fixed timescales between the various parts of the removal process, you begin to raise issues of extra costs; you begin to raise issues of increasing the risk of people absconding. So although the notion of a multiple-stage removal process is one that does not cause us grave concerns, the next step beyond that is one that does cause us a worry.

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Q116 Viscount Ullswater: In the process that you explain that happens in the UK, is there always a voluntary element to it, or do you find in some circumstances that, when you have identified the circumstances of any individual, a removal order—or what they call a removal order here—is imposed?

Mr Griffith: We are pushing the voluntary process increasingly.

Q117 Viscount Ullswater: Obviously, from the comments that you made to Lord Corbett, yes.

Mr Griffith: It is more humane; it is more cost-effective; it is the sensible thing to do, I think. Throughout the immigration processes, therefore, people are advised of their ability to make a voluntary departure at any point. Certainly when the application for whatever the person has applied for is refused, when any subsequent appeal is dismissed people are given very clear advice that they should leave, and they can make arrangements to go voluntarily, sometimes with assistance. There is therefore no circumstance in which anybody would be in any doubt that they should be making a voluntary departure; but clearly a lot of people will not do that. So, when we then apprehend, it is still open to the person to make a voluntary departure at that point. Some do; many do not; many continue to fight the removals process, and so we have no option but to forcibly remove. There are very many points in the system at which someone can make a voluntary departure, sometimes assisted by us, before we reach the point of the person being forcibly removed.

Q118 Viscount Ullswater: You would not like to see a statutory period?

Mr Griffith: A statutory period brings with it some very significant difficulties. First of all, it would bring the likelihood of increased NASS support costs if we had to maintain a gap of four weeks to allow reflection for voluntary removal. A failed asylum-seeker, under the present system, would almost certainly have to be supported by NASS, raising the support costs. There is also the detention cost and detention space for those people whom we think would abscond. We would almost certainly want to detain the person for that four-week period, thereby raising detention costs and using up detention space.

Chairman: Maybe this is a question you would want to ask NASS after this session. However, can you quantify the increased costs that would follow on a four-week statutory period? Perhaps I am trespassing on Lord Avebury's question, in which case I apologise.

Q119 Viscount Ullswater: I think I have too, My Lord Chairman!

Mr Griffith: I could not quantify the precise costs, but NASS do operate a system in which, after the refusal of asylum, NASS support is continued for 21 days. If the period for voluntary return reflection was raised to 28 days, you would see a notional increase in the NASS costs, of about 33 per cent or so.

Q120 Lord Marlesford: This is really a follow-up to the reply to Lord Ullswater. I would find it rather helpful if you could let us have examples of the sorts of letters that go to the people for the various stages—liability to remove, decision to remove, decision to enforce removal—to give us a feel for how it is handled. Would that be possible?

Mr Griffith: We would be very happy to let the Committee have those.

Q121 Lord Corbett of Castle Vale: My Lord Chairman, may I ask a quick question following on this discussion we have just had about the four-week period? Are there circumstances under the present arrangements where, on specific grounds, a period of four weeks or six weeks may be allowed? For example, if I am a child of a failed asylum-seeker but I am due to take GCSEs in six weeks' time, would you consider that, and do you in fact respond to those kinds of requests?

Mr Griffith: Yes, we do.

Q122 Lord Avebury: There are two aspects of this that perhaps still need to be explored. First of all, how long people are getting to accept or reject the offer of the £2,000 that has been mentioned. Is that the same as the three-week period that NASS continue to provide support and accommodation? Secondly, could you say whether there is any difference in the case of families to that of single individuals? When we were talking about this in the Grand Committee on the IAN Bill yesterday, the minister said that no less than four notices were served on a person who had exhausted their rights of appeal. I wonder if you could tell us how that system of four notices fits into the 21 days that you say NASS allow them.

Mr Griffith: Picking up the final point, when someone applies for asylum they will have that asylum claim looked at; they will then get a notice if that claim is unsuccessful, saying that they have been unsuccessful; they will also be allowed to appeal. So they will have a notice at that point.

Q123 Lord Avebury: This is at the end of the process, when they have exhausted the rights of appeal, that I am talking about. She said four notices were issued after that period had elapsed. When someone had received a notice that their final appeal had been unsuccessful, she said that four notices were given to families before they were finally removed.

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Mr Griffith: I think this may refer to a particular pilot that we are doing on section 9, in which there are a number of extra notices served on people. That may be it.

Q124 Lord Avebury: Yes, she did. That was in relation to the three-week period that you mentioned?

Mr Griffith: Yes.

Q125 Lord Avebury: So they would all come within the three-week period?

Mr Griffith: They ought all to come within the three-week period, unless there are particular circumstances why that was not possible. I think that I may want to check that process out, if you do not mind, and write to the Committee if that is permissible. I would not like to mislead you with precise timescales on this.

Q126 Lord Avebury: And the question of whether or not the families are granted any longer than single individuals?

Mr Griffith: If you are talking about the section 9 process in particular, NASS support is maintained for families. It is curtailed after three weeks for singles. Where families are involved, however, NASS support continues beyond that three-week period. The section 9 pilot is beginning to look at whether we can encourage people to leave, primarily voluntarily, after that period has elapsed.

Q127 Lord Avebury: How long are they given to accept the £2,000?

Mr Griffith: The assisted voluntary return enhanced incentive scheme, will run for six months. So, between January and the end of June this year, that process will run.

Q128 Lord Avebury: I know. What I am asking, however, is if you give somebody notice saying “Here is an offer of £2,000”, how long does that lie on the table before you take enforcement action?

Mr Griffith: It will lie on the table for the full six months. If we are to take enforcement action against one of the individuals who might be thinking about it, we will have to make a judgment on each individual case, if they can show that they are very serious about taking up this offer and will go voluntarily—and we would far prefer if they did that. If, looking at the case very carefully, we believe that they have no intention of taking up the offer, they have no intention of going voluntarily, but they are trying to prolong their stay by claiming they are interested in a voluntary return, then we may well take forcible action against them.

Q129 Lord Dubs: Do you have any figures on whether there is a relationship between the length of time a person has been in the country and their willingness to return voluntarily?

Mr Griffith: No, we do not. The willingness to return voluntarily can happen at any time during their stay here, interestingly. We therefore do find people going voluntarily who still have an asylum claim pending. It seems as though people are willing to take up the voluntary return offer, enhanced or not, at any point after they arrive in the UK: before the asylum claim has been considered; while they have an appeal pending; and after the rejection of any appeal.

Q130 Lord Dubs: Perhaps my question is a wider one than the question Lord Avebury asked; it is on a wider issue. The question is what is the relationship between your ability to remove people and the length of time they have been here?

Mr Griffith: Yes, I can see where you are coming from. Clearly, the longer people are here the more roots they are able to put down. It becomes very difficult and very sensitive when we are starting to take enforcement action against people, perhaps with a family, where the children may have been born here, where the children will be at school here. Those are the most difficult cases for us to deal with. There is no doubt that the immigration system as a whole will work more effectively the narrower the gap between a refusal decision, or a dismissal of an appeal, and enforcement action.

Q131 Lord Dubs: Yes, it seems sensible, but do the figures of removals confirm that?

Mr Griffith: Removal can take place at any time, and the people whom we are removing vary dramatically from people who have made a very recent claim and are put down a fast-track process, and perhaps people who have been here for several years, having not been in detention, having been at liberty, perhaps with whom we have lost contact over many years and we then apprehend them as a result of an operation. So we are removing a whole range of different people. What we are trying to do, not least through the creation of a new asylum process, is to make the system more effective by narrowing the gaps between the different elements in the process, so that we can take action towards people, voluntarily or forcibly, much earlier during their stay in the country.

Q132 Baroness D’Souza: Would an enforced removal in every case be more expensive than a voluntary return, taking into account the additional payment of £2,000?

Mr Griffith: Yes. The National Audit Office figures suggest the cost of an enforced removal is £11,000 to £12,000. They found that the cost—and this is of

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voluntary return at the previous rate—was about £1,700. Even with the addition of an extra £2,000 worth of assistance, we still do not come anywhere near the cost of an enforced return. In addition to that, if we can prompt people to go voluntarily quicker, there will be additional savings in terms of NASS accommodation costs, NASS support costs, and possibly detention costs.

Q133 Chairman: But not travel costs, presumably?

Mr Griffith: Not travel costs, no, but the other savings more than outweigh the travel costs.

Q134 Lord Corbett of Castle Vale: Mr Dodd, you told us earlier that you had concerns about the provision for suspending removal orders where somebody is waiting for a decision on a substantive in-country appeal. Could you give us two or three instances of what those concerns are?

Mr Dodd: I think that our starting point is that individuals should have an effective remedy, a right of appeal against removal for example, but that remedy does not need to be suspensive. There are two categories of people to whom the Directive applies. There are those who have applied for asylum and had their claims rejected and there are those who have either overstayed or entered the country illegally in the first place. We believe that the current system allows effective remedy for the first category of people and there should not be a barrier, which suspension would impose, to their removal when they have completed that process. Similarly with the second category of people: they should not automatically be entitled to suspension of their removal.

Q135 Lord Corbett of Castle Vale: The implication of that, if I have understood you properly, is that there could be circumstances where you would spend £11,000 to £12,000 on forcibly removing someone who is waiting for a decision on their substantive in-country appeal, and are sent back—

Mr Dodd: No, I am sorry, we cannot. We cannot remove somebody until their appeal . . . The system works in different ways. People have a statutory right of appeal to the AIT—the Asylum and Immigration Tribunal. We believe that, unless they claim ECHR grounds or Refugee Convention grounds or Community Treaty grounds, that claim should be made from outside the United Kingdom. Even if they have asserted asylum on human rights grounds, the secretary of state can certify that their claim is unfounded and then they can use the judicial review route to query that decision, if they so choose. That is how the system works currently.

Q136 Lord Corbett of Castle Vale: I am sorry, I am being a bit dense on this one. I think that what you have just told the Committee is that you would not remove somebody until they had a response to a substantive final—

Mr Dodd: Yes, they are not removed. I am sorry, if they have in-country appeal rights then they will not be removed until those appeal rights have been completed. Clearly, if they do not have in-country appeal rights, they have to appeal from outside.

Q137 Lord Dubs: If there is a judicial review on top of that, what is the position then?

Mr Dodd: The judicial review is not in law a suspensive remedy, but our usual policy is that, when a review is threatened or has actually been lodged, then we will in effect not remove at that point. There have been a small number of instances when a review has been threatened but, on a case-by-case basis, a decision has been made to continue with removal. This is an area which we are looking at very closely at the moment, and one which will be discussed next week, for example between the Director General of IND and the senior judge on the IAT; but I understand that is very much the exception.

Q138 Chairman: Have a significant number of people appealed from overseas and been brought back? Appealed successfully?

Mr Dodd: I do not have the figures immediately to hand. We could provide some figures for you, if you would like to have them.

Q139 Chairman: When somebody has been deported, either voluntarily or forcibly—if that is the right word—

Mr Dodd: If I may say, you cannot be deported voluntarily.

Chairman: I am sorry, no. If somebody has been persuaded to go—

Viscount Ullswater: Expelled.

Q140 Chairman: . . . with their £2,000 in their pocket.

Mr Dodd: Removed, yes.

Q141 Chairman: Removed, or somebody has been deported, are their names registered on the Schengen Information System?

Mr Dodd: Again, one of the problems with the Directive at the moment is that we do not have access to those parts of Schengen, so we cannot input those names onto Schengen and we could not extract from Schengen the names of other people who have been forcibly excluded from—

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Q142 Chairman: But that is our decision, is it not?

Mr Dodd: No, that is not our decision, I do not think.

Q143 Baroness D'Souza: By not signing up to Schengen, yes. However, that will change, will it not, with SIS II?

Mr Dodd: No, the position will not change.

Mrs Simon: The position will not change. We still would not have the access to the immigration data, which is effectively what this is about.

Q144 Baroness D'Souza: Would we put the names of those who have failed onto that system?

Mrs Simon: I am not aware that there would be a mechanism by which we could do that.

Mr Dodd: We have discussed this issue with our partners the feasibility of somehow exchanging data, for example on deportations, outside the Schengen Information System on an informal basis, but that would be quite difficult and there are data protection and legal issues.

Chairman: Is it not in our mutual interest that people who have been deported from the Netherlands should not come back and seek asylum here?

Lord Corbett of Castle Vale: Could Europol not help with this? In a sense, this is a criminal offence, is it not? If you have to be forcibly removed, you have committed an offence, a criminal offence in the UK. I am not trying to cheat, but perhaps a way round this might be through Europol.

Q145 Lord Avebury: The person who has been deported from the Netherlands would be on Eurodat, would he not? So why can we not get information that way?

Mr Dodd: There are different categories. For example, we can deport people from this country on the basis that they are not conducive to the public good. Those people may not have actually committed criminal offences; so they will not be picked up by Europol, for example.

Q146 Lord Corbett of Castle Vale: Would that not be reported to Europol?

Mrs Simon: Europol has the responsibility for serious organised crimes, rather than a small-scale crime, as in being removed.

Q147 Baroness D'Souza: What you are actually saying is that if we deport or remove a family or whatever from this country, there is no way in which we can have any control as to whether they reapply to any of the other Member States.

Mr Dodd: There is a difference between removal and deportation. Under removal, there is the Eurodat system that we have available to check whether they have sought asylum in another country. People who have sought asylum in another Member State and turn up in this country, then we can check the Eurodat database and we have the ability to return them to the country in which they are looking to apply for asylum. Deportation applies, as I understand it, only to serious criminal cases or to non-conducive public good cases. It is a different category of individuals.

Q148 Baroness D'Souza: In effect, what you are saying is that there is a category of people who could reapply to other Member States whom we have deported.

Mr Griffith: I think that we may be talking about different things here. There is the asylum process. If someone claims asylum in any European country, they will appear on Eurodac. So any Member State can access that data and will find out if an asylum claim has been made. Where we have made out a deportation order out against someone, by and large those people tend not to be asylum claimants.

Q149 Baroness D'Souza: But some of them are.

Mr Griffith: A small proportion are, yes.

Mr Dodd: Very few indeed.

Mr Griffith: The vast majority do not enter the asylum system at all. If they did apply for asylum in another European country, it may be the first time ever that they had gone down the asylum route.

Lord Marlesford: I want to focus for a moment on this interesting figure of the £11,000 cost of an enforced return. You have had the imagination, as it were, to have the enhanced scheme. Have you considered other variants of that? Perhaps I may suggest two. One would be a sliding scale: go within two weeks and you get £4,000; four weeks, £3,000; six weeks, £2,000. Alternatively, you could have an auction. You could set aside £1 million a month; let people bid, and take the lowest bids, until you have used up the money.

Chairman: You cannot say that we are not giving you some ingenious ideas!

Q150 Lord Corbett of Castle Vale: Get Chris Tarrant to do it!

Mr Dodd: The eBay attitude to immigration!

Chairman: Perhaps you would like to respond by letter!

Q151 Earl of Listowel: You have already given us helpful information on your view of the idea of a maximum period of detention. I would like to address my question to Mr Griffith. I think that he

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would be the appropriate person to answer. It is specifically on families. There is a concern which I have heard from inspectors that more families are being detained than is absolutely necessary, and there is considerable concern about the numbers of children being detained. That has increased from 50 last year, or the previous year, and then 60 the following year, whilst applications have been reducing. There is very considerable concern about the situation of families in detention centres. Is there a case therefore for a maximum period for families set across the European Union or, if not, perhaps some guidelines from the European Union, bearing in mind that, as various colleagues have said already, this returns policy is seen as the litmus test of the success of immigration policies and there is huge pressure across Europe to put pressure on families and others to return?

Mr Griffith: I think that you have raised one of the most sensitive parts of this whole issue, to be honest, and that is the debate on what is the right thing to do with families and children. I think that the number of families being detained simply reflects the increasing amount of enforcement activity. We are removing more people now than we have in the past, and so inevitably some of those people are families. We have to be aware that, in terms of NASS support and accommodation, families are the most expensive people to support. From a financial perspective, therefore, there is a sensitivity that costs can be reduced by tackling the families' issue. We want to keep detention to an absolute minimum, and we want to detain only where there is a possibility of removal. Certainly when one thinks of children being in our removal centres, we really want to keep that to an absolute minimum. Is that compatible with the line in the sand which we have discussed—the six-month line in the sand? I think that you still come back to the same problem: that if someone is determined to remain in the UK, they could frustrate the removal process until they reach that six-month point and then simply face release. So, whether someone is a single male or a family unit, the desire to remain in the UK may be equally strong. Their desire and ability to remain in detention as long as it takes to frustrate the removal process may well be strong. Our approach to this is that we take the family issue incredibly seriously, because it is incredibly sensitive—from all sorts of angles, including the angle of our own staff, who are having to detain mum and several children perhaps, with the children crying and mum in a distressed state. So we detain only where absolutely necessary; we try to keep that to a minimum. If at any point in the case we feel that detention is going to be prolonged too long because of other barriers in the case, then we will release; we will give the person

temporary admission. However, some kind of mandatory line in the sand would simply give people a target to aim for—"Frustrate the removal until this point and removal won't take place".

Q152 *Earl of Caithness:* The Directive proposes an EU-wide re-entry ban. Do you think that is a good idea? If you do not, why not?

Mr Dodd: We regard such a ban as arbitrary and it would involve considerable administration. We have already talked about the Schengen Information System and the fact that we do not have access to the immigration section of SIS, which would mean that in practice we could not put the information in or extract information to monitor the ban. There is one particular section of the draft Directive which effectively allows wealthy people to have their bans removed by paying the cost of their removal, which I think is fairly outrageous on fairness grounds. Also, there is a question about the duration of the ban. I think the Directive refers to a five-year period. In some cases, deportation orders have specified a period beyond five years and that deportation orders should have flexibility to state how long the ban should be. The other point in our system is that, just because you have been removed from this country for entering illegally or overstaying, it does not necessarily mean that you cannot then apply to come back to the United Kingdom as a legal entrant. You could seek a visa; you could seek to enter using immigration rules from a country which does not have a visa regime placed upon it; and the case would need to be judged on its merits at that time.

Q153 *Chairman:* We would, in theory anyway, know that that person had previously sought asylum in this country; but if they went to Italy, the Italians have no way of knowing at all.

Mr Dodd: They do, from Eurodac. They do know from Eurodac.

Viscount Ullswater: From asylum they would, but it is the other bits.

Q154 *Chairman:* But not illegal immigrants?

Mr Dodd: It depends on the illegal immigrants. Clearly, if they are facilitators or have been involved in other criminal activity, then there are networks between immigration authorities and police authorities, for instance, where information can be shared. If they have simply been an overstayer, then that information does not go on. We do not have access to the Schengen database. That information would not be communicated to other Member States.

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Q155 Chairman: I am not remotely pre-empting what conclusions we will come to in our report because we are still at quite an early stage, but previous reports from this Committee have drawn attention to the disadvantages of not taking part in the Schengen Information System. I think that today's evidence has actually produced quite a few examples of where it is a disadvantage—but I say that only as a passing comment.

Mr Dodd: Obviously our position on Schengen has to take Schengen in the round. It is not just a question about the database itself.

Chairman: That has been our recommendation in the past.

Q156 Lord Corbett of Castle Vale: I want to ask you two questions about the application and the appeal process. Can you tell me what percentage of those who have an initial asylum application refused make use of the appeals process?

Mr Dodd: I could not give you that figure.

Q157 Lord Corbett of Castle Vale: Just a round figure. It is most of them, I assume—or is it?

Mr Dodd: Who are actually rejected?

Q158 Lord Corbett of Castle Vale: Yes.

Mr Dodd: Off the top of my head, I think that only one in 10 applications is successful.

Q159 Lord Corbett of Castle Vale: No. It is when an initial application has been refused, how many of the applicants then go on to exercise their right of appeal? What percentage, roughly?

Mr Dodd: I do not have that figure immediately available.

Q160 Lord Corbett of Castle Vale: Could you let us have that?

Mr Dodd: I could certainly let you have that.

Q161 Lord Corbett of Castle Vale: The second point is that 19 per cent of appeals in 2004 were a “no” by the tribunal—one in five, roughly. That is saying something—I am not saying that it is the only factor—about the quality of the initial decision. This must be of concern to you.

Mr Dodd: I think that it is of concern.

Q162 Lord Corbett of Castle Vale: What is being done to try to improve that position?

Mr Dodd: What we are developing—and I am afraid that I am not an expert on this issue—is something called the New Asylum Model, which is a new, streamlined, and more efficient way of dealing with asylum claims. One of the key elements of that system will be that there will be a single person responsible for the claim from the moment that it is made, right the way through the system. That, along with other measures, we believe will improve the efficiency of the system and improve the quality of decision-making.

Q163 Lord Corbett of Castle Vale: I much welcome that, because it must be the case—it is speculation, but it must be the case—that there are some applicants for asylum who hold stuff back. They feel that they are virtually certain to be refused on the first application and so they hold information back, because that gives them the grounds for the appeal, as it were. I do not know—I do not know if anybody knows—but I suppose some of the solicitors involved would know.

Mr Dodd: Clearly there are some people who—

Q164 Lord Corbett of Castle Vale: So the case officer thing could deal with that.

Mr Dodd: That would improve it. There are clearly some people who apply for asylum even in the knowledge that their asylum claim is completely unfounded, and they are seeking to stay in this country as long as they possibly can; so they will play the system as best they can. Obviously, through successive changes to the asylum system, the Government have sought to maintain a fair and efficient system but one which treats such people in the right way.

Q165 Chairman: Thank you very much indeed. Is there anything you would like to say in conclusion?

Mr Dodd: Just to say, My Lord Chairman, thank you very much for giving us the opportunity to come before you.

Chairman: Thank you, all four of you, for coming and for the very helpful and frank way in which you have dealt with some fairly demanding questioning. I wish you good luck. You will remind yourselves, when you see the transcript, that there are quite a number of points on which we have asked if you would be kind enough to let us have the answers, and I would be very grateful if you could ensure that that is done.

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**Supplementary written evidence from Tom Dodd, Director, International Delivery Directorate,
Immigration and Nationality Directorate, Home Office**

I was grateful for the opportunity to give evidence to you and your Committee on 18 January regarding the above draft directive. My colleagues and I agreed during the evidence session to provide you with additional information on some points that were raised. I have addressed these below.

ASYLUM AND APPEALS (Q160)

Around 75 per cent of initial refusals of applications made in 2004 resulted in an appeal. This estimate for 2004 in the annual published statistics is the most recent year available. The estimate for 2005 will not be available for several months.

The 2004 figure is an estimate because it requires a cohort analysis. Some asylum applicants are refused in one year and appeal in the following year. It is not therefore a simple case of looking at volumes of applications decided and appeals lodged in a single year.

Out of Country Appeals (Q138)

A total of four persons have been successful in out of country appeals and been returned to the UK (one Jamaican, one Albanian and two Romanians).

ENFORCEMENT AND REMOVAL

Voluntary Return Statistics (Q112)

Please see the statistics enclosed at Annex A. I regret that a nationality breakdown is only available from 2004 onwards.

Letters at different stages of the process (Q 120)

Please see the following letters attached/enclosed at Annex B:

Stage 1

IS151A NOTICE TO A PERSON LIABLE TO REMOVAL

This notice is served on those liable to removal.

Stage 2

The decision stage uses IS 151A Part 2 or IS 151B (below) in the case of those who have submitted an asylum or human rights claim.

IS151A Part 2 NOTICE OF DECISION

IS 151B DECISION TO REMOVE AN ILLEGAL ENTRANT/OTHER IMMIGRATION OFFENDER OR A FAMILY MEMBER OF SUCH A PERSON—ASYLUM/HUMAN RIGHTS CLAIM REFUSED

Stage 3

IS 151D REMOVAL DIRECTIONS

The removal directions served on the carrier and copied to the person to be removed.

Appeal notices

IS75 ONE STOP WARNING

IS76 STATEMENT OF ADDITIONAL GROUNDS

IS 75 warns the person that they must declare any grounds for appeal on IS76.

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THE SECTION 9 PROCESS (Q125)

The Section 9 Implementation Team, working with key stakeholders, devised robust and fair procedures for the implementation of the provisions with due consideration being given to the potential impact on both individuals and the community.

A full process map is enclosed at Annex C.

Stage 1

Asylum refused and appeal rights exhausted. No legal basis to remain in the United Kingdom.

The family is advised, by letter, that they must leave the United Kingdom. Details are provided on voluntary departure and voluntary returns processes. Warning is given that support may be withdrawn if they fail, in the opinion of the Secretary of State, without reasonable excuse, to take reasonable steps to leave the UK or place themselves in a position in which they are able to leave voluntarily (sample of letter enclosed at Annex D).

Stage 2

The family is invited, by letter, to attend interview to discuss arrangements for departure. Further warning is given that support may be terminated. (Sample of letter enclosed at Annex E).

Stage 3

The family is interviewed or fail to attend.

UKIS conclude that the family are co-operating with the process, support continues until family depart or co-operation is deemed to have ended.

UKIS conclude that the family is failing, without reasonable excuse, to co-operate with the process. Third warning given and family informed that support may be terminated unless acceptable reasons, for non co-operation, are provided within seven days. Case passed to NASS (sample of letter enclosed at Annex F).

Stage 4

NASS conducts a human rights assessment.

Where there is assessed to be no breach of the ECHR, NASS issue the certificate. Notification will be provided that support will terminate in 14 days. Information provided on voluntary departure and voluntary returns processes. (Sample of letter enclosed at Annex G).

Notification is provided if NASS decide to continue support (Annex H). An example of a NASS reconsideration letter is also at Annex I.

There is a right of appeal, against the decision to terminate, to the Asylum Support Adjudicator.

On average it took a case 21 weeks to progress from Stage 1 to the issue of the Stage 4 letter.

Stage 5

Support terminated (subject to the outcome of any appeal).

UKIS continues with efforts to remove.

In cases where support is terminated the relevant local authority is required to conduct its own assessment of the family's circumstances. The authority is precluded from supporting the adults, unless a failure to do so would represent a breach of their human rights. However, where the parent is unable to provide suitable accommodation or care, the local authority can provide accommodation for their child. This, depending on the outcome of the human rights assessment, could lead to their child being accommodated, while the parents are not. Where the parents are unable to satisfactorily support their child, this may result in the local authority taking the child into their care.

In cases where the IND concurs with the assessment the Local Authority may apply for reimbursement of their support costs.

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Examination of Witnesses

Witnesses: MR JEREMY OPPENHEIM, Director, National Asylum Support Service, and MR TOM DODD, Director of International Delivery, Immigration and Nationality Directorate, Home Office, examined.

Q166 Chairman: Mr Oppenheim, welcome and thank you very much for coming. Mr Dodd, welcome back. Thank you for staying. Would you like to say anything for starters?

Mr Oppenheim: My Lord Chairman, just a very brief something, if I may. There is some confusion where people think—I am sure none of your Lordships do—that the National Asylum Support Service is somehow a government quango, or something separate from the Immigration and Nationality Directorate. Just to be clear, we are an absolutely integral part of the Home Office. I am a member of the senior executive group in IND. We work as joined-up as we possibly can.

Chairman: Thank you very much for your hardly necessary explanation, with Mr Dodd sitting at your side! Thank you for that, and we will go straight into questions if we may.

Q167 Lord Marlesford: We focused a bit in the last session on the National Audit Office report *Returning Failed Asylum Applicants*, published in July last year, and in particular on the £308 million supporting failed asylum applicants who have not been removed from the United Kingdom. That was the cost for 2003–04. We have asked that you give us a note of a more recent figure, if there is one, and your budget for the future years; so we will not ask you to produce those figures now. I wonder if you could explain a little bit about how that is made up and whether there is a breakdown which indicates the components, in terms of the sorts of things you do for the people.

Mr Oppenheim: Yes, of course. There is some good news here, and I would be very happy to send you a written note about these matters. Broadly speaking, however, in 2003–04 the overall budget for asylum support was running at over £1 billion—which struck me as a very sizeable sum of money. In 2005–06, in the current financial year, we have got that down to about £580 million and for the next financial year, subject to approval, we would estimate to spend only just over half a billion pounds. How we have done that, how we have got those reductions in place, has been very much focused on making sure that we work closely with other parts of the Immigration and Nationality Directorate, to do three big things—which may help with the components. The first is the Indefinite Leave to Remain Scheme, which was announced by the Home Secretary a couple of years ago. That has saved about £140 million over the last two years, by granting status to people where it is safe and sound to do so. That scheme is still running, and will continue to draw savings from the support budget as a result. The second thing we have done is

that we have taken very careful stock of our housing and accommodation contracts, both for applicants in progress but also for a sizeable number of unsuccessful family applicants who we continue to need to support, because government policy is to continue support while there is a child, a dependant under 18, until they can be removed—which I think is at the heart of the issue. By getting our accommodation costs down we have managed, through three particular routes, to save about £160 million. I do not think that was as a result of our being profligate in the past, but I think that it was based upon the National Asylum Support Service beginning, in 1999–2000, to have contracts in the context of an inexorable rise in the number of people we were supporting. By 2003, your Lordships will know, the numbers began to drop and we needed to adjust our contracts to reflect a reduction in asylum support numbers. The last two areas where I think we have made a real difference is that we have saved about £9 million over the last two years with our casework colleagues, getting improved decision-making, speeding up decision-making. With our New Asylum Model, which is being rolled out currently in Liverpool and Croydon—and ministers announced last week that they would trial the same in Solihull and Leeds—what we want to do is get a faster asylum decision made. As a result, people will not need to get support for so long. The final component—and I hope this makes sense—is that we also want to make sure that our links, particularly with the judicial processes that deal with both appeals and judicial reviews, are as efficient as possible; so that what we colloquially call “cessations”—the ending of support—happens in a very timely fashion. We estimate, by having improved cessation schemes, computers that talk to one another for example, we have been able over the last two years to save about £18 million in support costs, by making sure that, when somebody is no longer entitled to support and they have been through the judicial process, their support is switched off. Those are the components through which we have tried to really make a difference. However, I will happily give you a note on the estimated amount of money that we are spending on unsuccessful applicants who cannot be removed.

Lord Marlesford: That is very helpful and encouraging.

Q168 Chairman: Can you include in that an estimate of what the extra support costs would be if, as the Directive suggests, the period was extended?

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Mr Oppenheim: Yes, of course I can. If it helps—and it is always a hard one—our estimates are that if we found that the 21 days went up to the maximum of 28, which I think is suggested in the Directive, it would cost about £6,100 per day; so about £2–£2¼ million per year, in increased costs on that basis.

Q169 Lord Corbett of Castle Vale: I am most impressed, Mr Oppenheim, with how you carry this detailed information in your head. Perhaps you can help me with this one now.

Mr Oppenheim: I am about to fail, I suspect!

Chairman: No doubt you dream about it every night!

Q170 Lord Corbett of Castle Vale: You mentioned the adjustment of the contracts for accommodation for asylum-seekers. I am not trying to score cheap points on this at all, but inevitably there will be spare capacity in that system. Are you able to put a figure on that? What percentage is not currently in use?

Mr Oppenheim: It is very small. Apologies—I will happily send you a note about today's percentage. It will be very small because in the previous contracts, the longstanding contracts, we were paying for voids, about which the NAO is quite explicit. Other than one contract, where we were not able to renegotiate away from voids, every other supplier, both public and private sector, agreed that we would not have to pay for accommodation that we were not using. So the amount that we are now paying is literally in the pounds, not the millions.

Q171 Lord Corbett of Castle Vale: Did you have to buy your way out of those contracts, in that sense?

Mr Oppenheim: No. We used review and termination clauses. We terminated two large private sector contracts, and I think sent a clear, unequivocal message to all the other contractors that we were really serious, in the changed circumstances, about getting better value for money. We have placed, quite sensibly I think, some of the risk back to the supplier. The numbers are very small. I can also assure you, if it helps, that we are in the process of completing the new contracts for the next five years. They are subject to Home Office Group Investment Board approval on the last day of this month. Those negotiations have been complex but quite fruitful. What we would hope is that we would get an improved price—which I am always interested in—and also an assurance that we are not paying for voids anywhere within the system, and also that we have an improved link with the social housing needs for local authorities and others in communities. So, if we do not need the stock, we want to make sure that our providers would be linked with local authorities, so that local authority requirements, particularly around homelessness, are being met with the stock that we do not otherwise need.

Q172 Lord Corbett of Castle Vale: You have impressed me again, Mr Oppenheim.

Mr Oppenheim: It will be the last time, I fear!

Q173 Earl of Caithness: Mr Oppenheim, can you see any benefit in having an EU-wide Directive on returns?

Mr Oppenheim: Bluntly, it will depend upon what the Directive has within it. If the Directive does not increase the length of time that people would remain in the United Kingdom before they should leave, that might be all right. However, while it does have the potential for increasing from 21 to 28 days—the component which I am the most interested in, because it does increase costs—I can see little benefit from having the Directive in its current form.

Q174 Earl of Caithness: What would be your criteria for having a Directive that you could support?

Mr Oppenheim: It is an interesting point. There are some things that I think could be done far better together than apart. There is no doubt in my mind about that. Because returns are such a priority for the Immigration and Nationality Directorate, anything that can have a positive impact on returns has to be of benefit. I am sure you have heard from colleagues earlier that returns are not a UK issue alone: they are a European issue. We have seen things happen in one part of Europe and it has impacts elsewhere. Making sure that there is as much “joined-upness” as possible is really important. The other thing I would say is that a Directive that had procedures that were able to diminish levels of secondary migration must be useful. Those are the two areas that I would focus on in terms of the positive nature of the potential.

Q175 Lord Avebury: You have already partially answered this by saying that you can calculate what the increased costs would be if you had to support people in NASS accommodation for 28 days instead of 21. Can you say whether there are any other parts of the Directive that we are looking at which would have an impact on the work that you are doing?

Mr Oppenheim: The Directive wants to place a limit on the length of time that people are detained. One of the questions that I would be wishing to explore is, if people are not detained, what sort of support mechanism would be available. That support mechanism is likely to fall back to the National Asylum Support Service, so community-based support will again cost money. That is an area which I think needs exploring somewhat more. The other area is around the issue of suspensive appeals. If there is any limit on the issue of suspensive appeals, it would again mean that the people were remaining likely to be supported—not everybody, but likely to be supported—in the United Kingdom rather than leaving the United Kingdom. Again, that would be

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an area which is likely to increase costs. It would be unfortunate if I left your Lordships with the impression that cost is the only thing that the National Asylum Support Service is interested in, because we are actually interested in supporting people who have a legitimate claim for support. I think that there is a message which, quite critically, needs always to be conveyed to people. It is that, if you are at the end of the asylum process, if you have been through the judicial and appeal mechanisms and your claim is not accepted by either the Home Office or the AIT, or the High Court if it goes there, we have to find effective measures to say to people, “Your rights here have come to an end”, and the message has to be, “You need to return”. I think there is quite a sense in the Directive that it perhaps does not really help us keep that as sharp as it needs to be.

Q176 Lord Avebury: To take the first part of your answer, where you said that if somebody was not detained beyond the end of the six months they would have to be supported in another way, i.e. the burden of that cost would fall on NASS, would not the saving in having to provide fewer places in detention be more than the additional expense that NASS would incur? In other words, does it not cost more to keep somebody in detention than it does to keep somebody in NASS accommodation?

Mr Oppenheim: Very much more. It costs very much more. I entirely agree with that point, Lord Avebury. There is no doubt about that; but there are other factors. One is the one I last mentioned, which is the message that one conveys to somebody about what the state expects people to do, ie to go home when they have been through the process. The other thing is that clearly we do not detain as an Immigration and Nationality Directorate, unless there is very good reason to do so and there is a prospect of return. The one difficulty is that, if we are not able to detain people beyond a certain timescale, it means that those people may come into NASS-supported accommodation, but they may disappear. Some people wish to do that. Having the right and ability to be able to detain is therefore an important, critical part of the immigration control.

Q177 Lord Avebury: Can I ask you one question about the excellent figures which you gave—and I must say I share Lord Corbett’s admiration for the way in which you carry all of them around in your head? It sounds impressive when you say that the budget in 2003–04 was £1 billion and that you expected that to come down to half a billion, or thereabouts, in 2006–07. However, if you look at this in relation to the number of asylum-seekers, it is not a proportionate reduction. If I remember correctly, the peak in the number of asylum-seekers was 78,000,

and in the last year it was probably slightly under 30,000—although we have not yet had the last quarter’s figures—and one would expect that in 2006–07 it would be something lower than that, say 25,000. So that whereas the total number of asylum-seekers has been reduced to a third of the level it was at the peak, your costs have been reduced by only 50 per cent. That does not sound quite so impressive a performance, if I may say so.

Mr Oppenheim: You must say so—thank you! May I come back on a couple of points? As I hope I will put in a note, a sizeable proportion of the National Asylum Support Service budget is not spent on supporting claimants who are going through the system: it is paying for people who have already gone through the system, are unsuccessful applicants, mainly families, and that group has not actually diminished enormously. The numbers that we are dealing with are approximately, as of today, about 35,000 people. You are absolutely right that at the peak it was about double that; it was at about the 70,000 mark. We manage to find savings through three principal routes. One is by being more commercially astute than perhaps we have been able to be previously. We have more leverage at the moment. The second is that, because we are joined up with the rest of the Immigration and Nationality Directorate, by getting decisions made more quickly we have been leading on trying to push those decisions through; because we have said, “The faster you can get a decision, the more support costs we save”. The third area, as I think I have mentioned, was the issue of getting cessations working and the ILR scheme working. So I think that they are very sizeable, and the way we can calculate this is by what our unit costs are. In other words, how much does it cost to support an asylum-seeker per week? Has that gone up or has that gone down since the start of the National Asylum Support Service? I am pleased to say that, particularly with the renegotiated contracts, our prices are significantly down—very significantly down—by numbers of pounds per asylum-seeker per week.

Q178 Lord Avebury: Would you accept, however, that NASS is a very opaque organisation, that many of the figures that people would like to see on your website cannot be found there, and that your accounts are always very late in appearing?

Mr Oppenheim: It is very kind of you to suggest that. I know that we have had correspondence about this, Lord Avebury. There are two things that I would say very seriously. First, we do not wish to be opaque in the least. We want to make sure that we are entirely transparent, so long as we are not giving away commercially sensitive information that might aid some of the organisations with which we spend a great deal of money. We want to be transparent, and

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we want to be clear with people about what we spend, why we spend, et cetera. As to the accounts, I think that historically there have been enormous difficulties in some of the accounts around the Home Office generally, but certainly IND and NASS who spend an enormous sum of the Home Office's money. We have got our financial situation in far greater order over the last two to three years, and I am always happy to share as much information as we possibly can, with anyone we can.

Q179 Lord Corbett of Castle Vale: Can you give us those unit cost figures then, please?

Mr Oppenheim: Off the top of my head, I would struggle. If I say that, excluding the cash that we provide, we were paying for accommodation at a rate of about £105–£107 per person per week, with some wrap-around services, and we have it down at the moment to nearer £95 per service user per week. However, I would be more than happy, Lord Corbett, to write with the precise figures.

Chairman: You do realise that Lord Corbett is the “Ann Robinson” of this Committee!

Q180 Viscount Ullswater: I just want to come back to something you said about people disappearing. I can well understand that singles would find it easy to abscond and to be absorbed into the community. Is it really so easy for families to disappear and not rely on any of the government support services, whether it is education, whether it is health, whether it is some form of assistance? In terms of detaining families in detention centres, therefore, there must be some other, very good reasons why they are so detained.

Mr Oppenheim: There are two things to say about that. One is that we would be very concerned if families were disappearing. It is fair to say that local authorities, the voluntary sector and others have been concerned about the number of families that may have disappeared during the section 9 pilot, which is the pilot that terminates support in three pilot areas in the United Kingdom. As somebody who has some responsibility formally for the termination of that support, it is a matter of very significant concern to me. We have been talking to the DfES and others about this, and we know local authorities in the North West have been very concerned about it indeed. I want to be very clear: we will take those sorts of disappearances very seriously. The other thing to say is that ministers and senior officials take the detention of families with dependent children very seriously. Children can only be detained with their families by ministerial approval beyond the 28th day. In the next quarter's IND statistics we will be publishing the numbers that are detained, because we think we need to be as transparent as possible about that. Both Lin Homer, the recently appointed Director General of IND, and

I have been in discussion with the Children's Commissioners for all the United Kingdom, and one from Ireland also came along to the meeting, to discuss these very issues. So I think that we take the detention very seriously indeed and would want families to be detained only if there were really good reasons—much of which has to rely on the prospect of removal.

Q181 Chairman: Mr Dodd, do you want to add anything to that? I am not encouraging you to speak.
Mr Dodd: No, I think that Jeremy is the expert on this particular area.

Q182 Baroness D'Souza: Article 13(1) of the draft Directive provides for minimum standards of support for those whose return has been postponed or who cannot be removed. Do you think that the support outlined in the draft Directive is adequate? The second part of the question is would the UK add to that support, extend it or expand it?

Mr Oppenheim: I am broadly familiar with Article 13. I think that the standard suggested in Article 13 goes beyond what we currently provide in the United Kingdom. I think that the UK currently has adequate levels of support for those people who have a barrier to removal, through no fault of their own, and who fall under the section 4 eligibility criteria, which is what NASS provides for unsuccessful applicants who cannot go home for a number of reasons—which I am happy to expand on. There are two things to add to it, if this helps. The first is that section 4 support was always intended to be time-limited; it was always intended to be a temporary form of support for people about to leave the UK and, while of course it must be compatible with ECHR, ministers have been very clear in not wanting it to provide any form of incentive to remain in the United Kingdom. It goes back to my, probably ineptly made, point about conveying the right message to people. I would wish to do nothing that would encourage people to be under a misapprehension. Having been through all the processes—where they only cannot return because there is not a viable route temporarily, or there is a personal circumstance, pregnancy or whatever, and they cannot return at that point—I think that it is important that we continue to convey the message, “You will have to go quite soon”. The danger in Article 13(1) is that it might stretch things further.

Q183 Baroness D'Souza: Could you give a specific example of where Article 13(1) perhaps gives rather too much support for your liking?

Mr Oppenheim: Perhaps I may just read it again for a moment. I have it in front of me. It is the phrase “no less favourable”, and in Articles 7 to 10, Articles 15 to 17 and 20 of the Directive. My interpretation is that it

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is making the support we offer under section 4 comparable to that which we provide for asylum applicants whilst their applications are being determined. Section 4 does not provide identical support. The accommodation is the same, in the main; the quality and standards of accommodation are the same; but the way in which we offer the support is somewhat different. For applicants, and for unsuccessful families that we continue to support, we offer accommodation plus a payment through a scheme called the ARC card scheme, where you take your card to the Post Office each week and get an amount that you are eligible for. For section 4 applicants, at the moment we use a scheme of vouchers, where the accommodation provider provides either a full board scheme—though most no longer do so—or a scheme where you get vouchers which you can exchange for food. That is slightly different, and what this would do would be to say that you would have to have the ARC card payment. I think that conveys a very confusing message to unsuccessful applicants who need to be going home quite soon.

Q184 Baroness Henig: What provision do you think the Directive should make about the status of those who cannot be removed?

Mr Oppenheim: The first thing to say is that it clearly is not an issue for the National Asylum Support Service alone: it clearly has to be an IND, Home Office-wide issue. Our view is that we would prefer to ensure that a Directive allowed states to approach matters on a case-by-case basis and, at the moment, that does not seem to be the way it is framed. I think that we need to try to draw a clear distinction between—and it probably goes back also to Lady D’Souza’s question—the issue of who cannot be removed and who will not go. We have to distinguish between these two groups. In cases where people cannot be removed, where asylum-seekers are not granted refugee status, we need to make sure that we can think about whether we can grant some status for people who simply cannot be removed—whether that be using the section 4 mechanism or something else, depending on individual circumstances. We always have to keep this very strong distinction between the cannot and the will-not-go groups. We would like to do that on a case-by-case rather than a blanket basis, because they tend to be very complicated and I think that we need to consider the cases individually. Our New Asylum Model, which we are rolling out gradually and is very much a part of the Home Secretary’s five-year strategy, is all about making sure that there is real case ownership. Rather than people moving from silo to silo, team to team, it is making sure that there is somebody who manages the applicant all the way through the system.

Q185 Baroness Henig: You obviously do share my view that this is a very important area. If some advances could be made in looking at those who cannot, as opposed to those who will not, that would make a difference.

Mr Oppenheim: If I may, My Lord Chairman, the other point to make is that, given that these are often very complicated sets of circumstances, they need to be considered in some detail by skilled caseworkers. I am not suggesting that a majority of our caseworkers are not skilled, but there is a particular set of skills when you are dealing with people who have been this far through a system and who have a set of circumstances that need to be understood. It is sometimes easy—and I am sure that your Lordships would not—for institutions to forget that, at the end of the day, we are dealing with individuals and families whose circumstances need to be given really careful attention.

Q186 Earl of Listowel: Just to follow this particular point of “cannot” and “will not”, it is argued that some of the families who have exhausted the objective system of asylum and appeal, and objectively are families that will not return, are desperate. Their view is that objectively it may appear safe but, to their mind, it is a very unsafe environment; they have had terrible experiences in the place from which they have originated; and perhaps another group who may just think, “This is a terrible place to take my children back to”. For understandable reasons, therefore, they will not. In your sensitive, case-by-case system will you be taking those sorts of considerations into account, or do you really rather dismiss these concerns and, if they have been through the objective system, then “They are people who will not abide by the law and we must be very firm with them”?

Mr Oppenheim: I think that, happily, it is a combination of the latter and the former. Clearly there is a group of people who, as you have expounded, feel very uncomfortable—particularly people who have been around and people who have had children in the United Kingdom, children who have never been back to their home country—who are a matter of concern. How do parents explain what is happening? That is why the Home Secretary went through the ILR exercise, particularly to try to capture that group of people. I think that is why the ILR process to date has been such a success; not just a financial success, but it has been granting leave to a substantial number of people who, as families, have been in the United Kingdom a substantial period of time. Alongside that, I strongly believe that we do have to be clear what the law says. It is the deal you do when you claim asylum. You do not just claim asylum: you say, “After you have been through the process, if your claim is unsuccessful, you will go

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home". I think that deal, that contract, that agreement, has to be followed through. We cannot be saying at the end of the day that we will take a case-by-case view of everybody. I am suggesting that, for the group of people who have very special circumstances—and there is a small group which does—they have to be looked at on a case-by-case basis. For a majority, however, who have been through both the Home Office substantive decision and through the AIT, and potentially through a judicial review, if at the end of those three processes the asylum claim is not accepted, I think that what we have to do is work very hard to encourage and help families go home. If that means doing what Tony McNulty did last week—which was increase the amount of money that is available for voluntary returns until the end of June—that is a good thing to do. If it means NASS caseworkers visiting families in supported accommodation and explaining the options to families, I think that is a good thing to do. If that does mean detaining some families and removing them, because that is the only way we will manage to get them to go home, that too has to be a sensible thing to do.

Q187 Earl of Listowel: Given that there is such pressure across Europe, the success of this particular policy of returning failed asylum-seekers and illegal migrants, and the particular vulnerability therefore of families and children, is there enough in this Directive to ensure that there are basic minimum protections for children? In saying this, I acknowledge that there is human rights legislation and so on, which is also important. Given the particular circumstances, however, is there enough in this Directive to ensure that there are minimum protections for the families and children?

Mr Oppenheim: I think that the proposed Directive does address the position of family members and children, through the phrase "best interests of the child" being the primary consideration of Member States when implementing the Directive—which I see, and I know that colleagues see, as being in line with the 1989 UN Convention on the Rights of the Child. So I think that it does adequately address the position of groups who are, as you have said, vulnerable. I think that the UK already has sufficient procedures in place for the protection of vulnerable groups. My sense is that the UK takes its international obligations very seriously in these terms, and is very committed to the welfare of children. That is evidenced by our domestic legislation primarily, by the Children Acts. We are obliged under the 1951 United Nations Convention to consider all applications for asylum in the United Kingdom, and the domestic legislation then provides for the protection, both, as you have acknowledged, under the Human Rights Act and from the Children

Act 1989 onwards. So I think that we probably do a lot already. I hope that adequately answers your question.

Q188 Earl of Listowel: In your previous answer you did not mention the families affected by section 9. Perhaps that is an example of a case where there is a danger of going to an extreme which is counterproductive, in terms of losing contact with these families who have exhausted the asylum procedures, their disappearing, and one is no longer in a position to offer them incentives to repatriate themselves, and so on. I understand that sort of measure is current in some countries across Europe and not current in other countries. Perhaps that is therefore an example of a particular measure on which a European Union standard, or at least advice, might be helpful: in terms of just how far one can go in the laudable and necessary aim of ensuring that people applying for asylum, if it fails, do return, but not going to an extreme whereby children come to harm and where it is counterproductive—if you see what I mean.

Mr Oppenheim: I do. As I said a little earlier, it is clearly reported to us by local authorities that there is some concern about a few families who may have disappeared from the local authority and the Home Office radar. We do not have the evidence of that as yet. We are in the process of evaluating with the DfES the section 9 pilot in the three areas of the United Kingdom. Ministers are keen to take stock of its success or otherwise. Clearly, one of the things that ministers and senior officials are concerned about is the issue of the safety of children and families. We do not want families disappearing. However, we have to confront the fact that, through the section 9 process, we have not been asking families simply to manage without resource; we have been asking only one very simple thing of families: "Would you confirm with us that you are working towards re-documentation?". That has been the principal thing we have asked families to do. What society has to think about is if section 9, the termination of support to families who will not even co-operate with that process, is not to work—and I should not take anything that I have said as code that we will recommend that, as it really is a ministerial matter—what else do we do, to say to families with children, "Look, your time here has to come to an end. You have to co-operate in removal". You met my colleague Digby Griffith a little earlier, I assume. Digby cannot move everybody tomorrow. It takes a lot of time. We know that detention and removal, rather than a voluntary return, will always be more painful and difficult for everybody. We therefore want to do everything possible to encourage people. There are a group of people, however, who simply will not take any notice of that, and we have to confront what we are going to do

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about that. I am not sure that the Directive gets there, really.

Q189 Lord Avebury: You said that there was not any evidence about the disappearances of the families that were involved in the pilots, but there is a report from Barnardo's which mentions a specific figure of 35 families. Have you asked Barnardo's to provide you with the evidence? In assessing the success or otherwise of the pilots, are you in contact with the Association of Directors of Social Services?

Mr Oppenheim: Yes, we have had the Barnardo's report. The Barnardo's report will very much be taken into account, as are all the other views. We have had a lot of views from local authorities and the voluntary sector, including the Refugee Council, Barnardo's, and groups all round the country. So we have been very keen, and we will take those things into account, including the evidence from Barnardo's. So far as the Association of Directors of Social Services is concerned, I am in regular contact with Peter Gilroy, the Chief Executive of Kent County Council, who is the lead person from the ADSS task force. I am an associate member of the ADSS, from another world. So, yes, we are closely in

touch and will be listening very carefully to all those views before presenting options to ministers.

Q190 Lord Corbett of Castle Vale: Can we go back to section 9? On 25 October, Tony McNulty said, "No one has yet returned on a voluntary basis", referring to the families. Is that still the position, do you know? If you do not know, perhaps you could include it in the note.

Mr Oppenheim: It is not any longer the position, I am pleased to say. I will be very happy in the note to give you the most contemporary figures we can, both about families that have now returned as a result of section 9 and also families who have signed up but where we are just waiting for the final processes to be completed.

Q191 Chairman: Mr Oppenheim, thank you very much indeed. We have already heaped praise on you for your impressive replies, but I would like to thank you very sincerely for the very frank and full answers you have given us. I would also like to thank our silent witness!

Mr Oppenheim: As my mother taught me to say, "Thank you for having me"!

Supplementary evidence from Mr Jeremy Oppenheim, Director, National Asylum Support Service IND, Home Office

Thank you for the opportunity to give evidence at the Inquiry on 18 January, related to the proposed EU Returns Directive. I am writing further to my appearance as a witness to provide you with additional information that you requested, and information that I believe may be of use to your Inquiry.

I would like to thank the Committee for the useful comments that were raised during the discussion, particularly where Lord Avebury raised the issue of the perceived opaqueness of NASS accounts. I have taken Lord Avebury's comments away, and we are considering further within NASS how we can be as transparent as possible. For example, we intend to publish at the end of the year a summary reflecting the unaudited outturn, summarised under main expenditure headings.

At the Inquiry, you showed a particular interest in the National Audit Office report, *Returning Failed Asylum Applicants*, published in July 2005. Lord Marlesford requested an update on the figure of £308 million, published in the report as the total cost of supporting failed asylum seekers who have not been removed in 2003–04, as well as a budget for future years. We estimate the cost of supporting failed asylum seekers for 2005–06 to be around £170 million, of which £150 million will be allocated toward the provision of accommodation and cash support for those in accommodation. Around £20 million will be spent on cash support for those only requiring cash support (subsistence only applicants.)

These figures relate to failed asylum applicants with dependant minors under the age of 18. In addition to this, around £58 million will be spent on supporting unsuccessful applicants supported under section 4 of the Immigration and Asylum Act, 1999. Section 4 support is a limited and temporary form of support for unsuccessful asylum applicants who are destitute and unable to leave the UK immediately due to circumstances beyond their control. We do not have a specific budget for supporting failed asylum seekers for future years. The amount required will depend on both the future costs of accommodation and cash support and the numbers of failed asylum seekers that we will support.

These figures are, you will appreciate, a significant reduction in expenditure in this area since 2003–04, as quoted by Lord Marlesford from the NAO report. As I have already mentioned within my oral evidence, we have achieved these savings partially through the reduction in costs of accommodation and becoming more commercially astute. Lord Corbett of Castle Vale specifically requested information on the unit cost figures

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for support. The cost of accommodation and cash support per person in dispersed accommodation is £610 per month. The costs of cash support for those requiring “subsistence only” support (ie no accommodation required) is £170 per month. The cost of section 4 support per person is £560 per month covering accommodation, which is usually full-board for those supported under section 4.

As I explained when giving oral evidence, our commercial position has been further improved by renegotiation of contracts with accommodation providers, which has allowed an improvement of terms of contract, including the position on voids. In answer to Question 170 from Lord Corbett of Castle Vale, I said that we have one contract where we currently continue to pay voids. There is only one contract in the private sector where we pay for voids, but I have since been advised that there remain a number of contracts in the public sector where NASS does continue to pay voids at an average 80 per cent of the occupied rate. However, it remains the case that our most recent contracts have undoubtedly reduced the number of paid voids, and significantly reduced the associated costs. We are now moving into new “Target Contracts”, which will soon be signed, and will see all of our providers operating on a zero void charge basis.

At the oral evidence session on 18 January, a number of Committee Members’ questions related to the impact that the EU Returns Directive would be likely to have on the support of asylum seekers, should the UK opt in. As I stated in my evidence, our estimates predict that should the period before which support is terminated after appeal rights are exhausted be extended from 21–28 days, the cost would be around £2–2.25 million per year.

A further point discussed in answer to Question 183, proposed by Baroness D’Souza was the impact of Article 13(1) of the Directive on support arrangements. I have considered again the question as to where specifically Article 13(1) gives too much support. As I explained, the Government’s position is that it should be allowed to provide unsuccessful applicants with a more limited level of support, as compared with applicants awaiting a decision or appeal. The most tangible illustration of this is the change I mentioned from cash support under section 95 of the Immigration and Asylum Act, 1999 to voucher support under section 4. I have been advised since giving evidence at the hearing that the Directive might not necessarily require us to offer cash payments to unsuccessful applicants currently on section 4 support. However, the point remains that as a matter of principle, we do not subscribe to the spirit of Article 13 of the proposed Directive. Rather, we believe that Member States should remain free to put in place such arrangements as they see fit for unsuccessful applicants, and that in this context, the European Convention on Human Rights provides an adequate safeguard on the treatment of individuals.

When discussing the implications of the Directive at the Inquiry, we discussed its impact on children. In response to Question 180 from Viscount Ullswater, I detailed current arrangements for the detention of families where this is a necessity. In my response, I said that in the next quarterly asylum statistics, due for publication in February 2006, we would be publishing the number of children detained. I would like to take this opportunity to expand upon this point. IND statistics already include information on the total number of children detained. What we will be doing in the next publication is including a figure showing the number detained in Yarl’s Wood. Yarl’s Wood is the only removal centre where children can be detained in excess of 72 hours.

Further to the Committee’s interest in protection of children in the current system, Lord Corbett of Castle Vale asked for the most contemporary figures and an update on the progress of the pilot of section 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. Around 60 of the 116 families involved in the pilot are no longer in receipt of NASS support, of which 26 families are currently not being supported for section 9 reasons. Five families have no barrier to removal, as their travel documents are now available, following their active cooperation engendered through section 9. One family has made a voluntary return to their country of origin. The pilot is now in the final stages of evaluation. Following the publication of the evaluation, which has had input from DfES and the ODPM and a series of discussions with stakeholders, Ministers will take decisions on ways forward.

I have provided information in this letter on those subjects for which specific requests were made at the Inquiry for supplementary information. However, I would be more than happy to provide further assistance, should this be necessary for the Inquiry.

Jeremy Oppenheim
Director
National Asylum Support Service

3 February 2006

WEDNESDAY 25 JANUARY 2006

Present	Avebury, L Caithness, Earl of Corbett of Castle Vale, L Dubs, L Henig, B	Listowel, Earl of Marlesford, L Ullswater, V Wright of Richmond, L (Chairman)
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Memorandum by the United Nations High Commissioner for Refugees

INTRODUCTORY REMARKS

The Office of the United Nations High Commissioner for Refugees (UNHCR or “the Office”) welcomes the efforts of the European Union to adopt common standards on return. Such standards are a key component of a comprehensive migration management policy which takes into account the responsibilities of States of origin, transit and destination as well as the rights of the affected individuals.

The European Union’s multiannual programme in the area of freedom, security and justice (the “Hague Programme”)³ provides that common standards on return must ensure that persons are returned “in a humane manner and with full respect for their human rights and dignity”. This is important in view of the extensive existing operational co-operation at EU level with respect to return. Proposals for the 2007–13 EU financial perspectives include significant funds to support returns of third country nationals with no legal right to enter or stay in the EU.⁴ Common standards, including effective human rights safeguards, should be a prerequisite for these plans.

UNHCR welcomes the fact that the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals⁵ requires that its provisions be applied in line with international law, including refugee protection and human rights standards. However, the Office believes that these standards, as well as appropriate procedures to ensure their implementation, need to be set out in more detail. UNHCR strongly recommends that the draft Directive explicitly state that no return decision may be issued and no removal be carried out, which would violate the non-refoulement principle in Article 33 of the 1951 Convention Relating to the Status of Refugees (1951 Convention) or in human rights instruments such as the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR).

Furthermore, particular safeguards need to be put in place for the return to third countries of asylum-seekers whose applications have not been determined on substance in a Member State. In those cases, removal should be implemented only if access is assured to an asylum procedure in the relevant country and to effective protection in cases where it is needed.

UNHCR welcomes the fact that the Directive expresses the preference for voluntary return, but suggests that this important principle should be reiterated through an operative provision encouraging Member States to provide counselling, material assistance and other appropriate forms of support to voluntary return. UNHCR recognizes that the return of persons who are not in need of international protection and who have no compelling humanitarian or other grounds justifying stay is important for ensuring the credibility and viability of national asylum systems.⁶ Nonetheless, UNHCR stresses the need to ensure the sustainability of returns, which States are urged to promote through the provision of concrete support to voluntary returnees in line with good practice.

There is at present a lack of consistent and independent monitoring of the safety and welfare of individuals who are removed from the territory of EU Member States. UNHCR recommends that the EU consider setting up effective monitoring mechanisms, in order to be able to assess the effectiveness of the safeguards it establishes.⁷

³ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, 3.3.2005.

⁴ “Solidarity and Management of Migration Flows”, COM (2005) 123 of 6.4.2005.

⁵ COM(2005)391 final of 1.9.2005, hereinafter “the proposed Directive”.

⁶ This approach is reflected in the Executive Committee (EXCOM) Conclusion No. 96 (LIV) of 2003 on the return of persons found not to be in need of international protection.

⁷ This is also recommended in the “Guidelines on Forced Return” adopted by the Council of Europe Committee of Ministers, CM (2005) 40 final, 9 May, Guideline 20, “Monitoring and remedies”.

25 January 2006

DETAILED COMMENTS ON THE PROPOSED DIRECTIVE

Preamble

UNHCR particularly welcomes the references in preambular paragraphs 1, 7, 9, 18, 19 to the international obligations of Member States, including references to the 1951 Convention relating to the Status of Refugees and the 1989 UN Convention on the Rights of the Child. Reference could also usefully be made to two other fundamental instruments, the UN Convention against Torture (CAT) and the ECHR, as well as to Guidelines on Forced Return adopted recently by the Council of Europe.⁸ Given their importance for the implementation of the Directive, UNHCR strongly encourages a reiteration of these fundamental legal instruments in the operative parts of the proposed Directive.

UNHCR furthermore welcomes the explicit preference for voluntary rather than forcible return expressed in paragraph 6. Voluntary return, supported by appropriate counselling and material assistance, presents fewer risks of human rights violations and of individual hardship.⁹ Accordingly, and as stated above, UNHCR suggests the insertion of an operative provision encouraging Member States to offer practical forms of support to voluntary return.

Article 1: Subject Matter

UNHCR welcomes the reference in Article 1 to obligations of Member States under international refugee and human rights law. Reference could usefully also be made here to existing international and regional standards on return such as those which are outlined in UNHCR's EXCOM Conclusion 96(LIV) of 2003 on the return of persons found not to be in need of international protection, as well as in the Council of Europe Guidelines on Forced Return.

Articles 2 and 3: Scope and Definitions

Article 2(1): Where the Directive is applied to asylum-seekers being removed under a "safe third country" procedure or a "responsibility sharing" agreement, minimum safeguards should apply. This pertains, in particular, to assurances from the third country that the person will be admitted to a full and fair asylum procedure and have access to protection if required. UNHCR refers in this respect to its comments on Article 27 of the Asylum Procedures Directive.¹⁰

Article 2(2): UNHCR recommends deletion of Article 2(2) which allows States the option not to apply all standards of the draft Directive to persons refused entry in transit. Although some of the Directive's standards remain applicable to persons in transit zones, other important safeguards are missing, including: those provided by Article 5 (family relationships and best interests of the child); Article 6 (the right to comply voluntarily with a return decision); Article 12 (judicial review of the return decision and/or removal order) and Article 14 (mandatory judicial oversight of detention).

The Directive's safeguards should be applied without distinction. This is in line with the jurisprudence of the European Court of Human Rights which has affirmed that States remain bound by their international obligations also in "transit zones".¹¹ Some current practices observed by UNHCR in the removal of people from border areas or transit zones give rise to serious concern and underline the need for clear safeguards at border entry points.

Article 3 (b): UNHCR recommends further clarification of the definition of "illegal stay" to exclude from the scope of the Directive asylum-seekers on whose applications a final decision has not yet been issued at first instance or on appeal.¹²

Article 3 (c): UNHCR recommends further clarification of the definition of "return" to ensure that asylum-seekers whose claims have not been considered on their merits are not sent to countries in which they have never been and with which they have no connection.

⁸ Ibid.

⁹ Ibid, Guideline 1, "Promotion of voluntary return".

¹⁰ UNHCR Provisional Comments on the Proposal for a European Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004). Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326/13, 13.12.2005).

¹¹ See ECHR, *Amuur v. France*, 19776/92, Reports of Judgments and Decisions, 1996-III, no. 11, 25 June 1996.

¹² See also comment on Article 12, below.

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Article 4: More Favourable Provisions

Article 4(2): UNHCR recommends an explicit reference to the Asylum Procedures Directive¹³ as another instrument from which higher standards should prevail.

Article 4(3): The specific reference to the entitlement of States to apply more favourable standards is welcomed. It is UNHCR's understanding of this provision that more favourable national standards which reflect international obligations and standards are always compatible with the Directive.

Article 5: Family Relationships and the Best Interest of the Child

UNHCR recommends strengthening the reference to the best interest of the child. Article 3 of the Convention on the Rights of the Child¹⁴ requires States to ensure that the child's best interest is "a primary consideration" in all actions concerning the child. It is further important for States to set up an appropriate process for assessing within a reasonable timeframe what is in the child's "best interest". No return or removal decisions should be issued without completion of such assessment.¹⁵

Article 6: Return Decision and Article 7: Removal Order

Article 6(4): UNHCR recommends the addition of an explicit reference to the 1951 Convention. The non-refoulement principle of Art. 3 ECHR and Article 33 of the 1951 Convention are complementary and both need to be taken into account for the return decision to be in line with international law.

Article 7: UNHCR also strongly recommends a stipulation that the issuance of removal orders must be in line with international obligations, in particular the non-refoulement principle contained in Article 33 of the 1951 Convention and Article 3 ECHR. This would also be in line with the Guidelines on Forced Return.¹⁶ According to the approach taken by the proposed Directive, the return decision and removal order are separate administrative acts which are not necessarily issued at the same time. Valid protection concerns may arise at any stage of the process, and safeguards need to be in place to ensure that they are considered.

Where persons are removed under "responsibility sharing" arrangements or "safe third country" rules, the receiving State should be informed of the fact that the claim has not yet been examined on its merits. UNHCR recommends the inclusion of a reference to this requirement.

Proposed New Article: Confidentiality

UNHCR recommends the introduction here of a new article to ensure that the confidentiality principle is respected, and information relating to an asylum application is not shared with the individual's country of origin.

Proposed New Article: Prohibition of Collective Expulsion

UNHCR recommends the insertion here of a reference also to the prohibition of collective expulsion according, inter alia, to Article 4 of Protocol No 4 to the ECHR and the Guidelines on Forced Return.¹⁷

Article 8: Postponement

UNHCR welcomes the positive obligation in Article 8(2) to postpone execution of a removal order in certain cases. It is suggested that a reference be included to the need, in cases where the individual has applied for asylum, to postpone removal until a final decision has been taken on the application, including on appeal. The suspensive effect of appeals is necessary to ensure the effectiveness of judicial remedies, and exceptions to this vital principle should be made only in extremely narrow and precisely-defined cases, where the possibility

¹³ OJ L 326/13, 13.12.2005.

¹⁴ UN Document A/44/49 (1989), adopted 20 November 1989, entered into force 2 September 1990.

¹⁵ See recommendations of the Committee on the Rights of the Child: General Comment No 6(2005): Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, Chapter VII(c), Return to the country of origin.

¹⁶ Supra, note 5, Guideline 2, "Adoption of the removal order".

¹⁷ Supra, note 5, Guideline 3, "Prohibition of collective expulsion".

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should nonetheless exist for the applicant to seek postponement of removal in the particular circumstances of his or her case.¹⁸

It is further suggested that reference be included in Article 8(2)(b) to cases where the third country fails to co-operate in the issuance of travel documents.

Article 9: Re-entry Ban

UNHCR welcomes the confirmation in Article 9(5) that a re-entry ban shall not prejudice the right to seek asylum in the European Union, as well as the possibility set out in Article 9(4) to suspend the re-entry ban under certain circumstances. However, to ensure these provisions are effective in practice, clarification and certain guarantees are needed.

UNHCR suggests that any re-entry ban under Article 9(1) be the subject of an individual examination and be discretionary. Furthermore, UNHCR recommends setting clearer rules for determination and for remedies available against the imposition of a re-entry ban, its withdrawal and suspension. These should indicate the responsible body, the procedures involved, and the timeframes for decisions. There should be a clear and realistically accessible opportunity to request and obtain withdrawal of a re-entry ban in case of an asylum claim or refugee resettlement request. If circumstances change in the country of origin, or in the individual's profile or activities, resulting in a need for international protection, s/he must realistically be able to seek entry to the EU through a speedy procedure—including at Member State representations abroad as well as at the EU's external borders. A re-entry ban should, furthermore, not be issued for asylum-seekers whose claim has been rejected on formal grounds.

A process for withdrawal of a re-entry ban would need to be available at border posts as well as at consular posts abroad. The possibility to seek withdrawal in cases related to family circumstances, or situations of humanitarian need, should be provided. Finally, an additional provision would be needed requiring all EU States to withdraw and/or recognize the withdrawal, in case one State withdraws the re-entry ban.

Article 10: Removal

UNHCR welcomes the proposed limits on use of force but calls for greater clarity and binding standards in this provision.¹⁹

Article 11: Form

It should be specified that the return decision must be supplied in writing (or in oral translation) in a language which the recipient understands (as opposed to “may reasonably be supposed to understand”). Legal advice must be available to enable the recipient to understand the implications of the decision, as well as possible avenues of appeal.

Article 12: Judicial Remedies

UNHCR notes with concern that Article 12(2) does not ensure automatic suspensive effect of appeals, even if the applicant raises arguments based on protection needs against the deportation decision. A judicial remedy against a removal decision is ineffective if the third country national is not allowed to await the outcome of an appeal. Where arguments based on protection needs are raised against the removal, exceptions to suspensive effect should be permitted only in very narrowly defined cases, and an application for the suspension of the enforcement decision must remain possible.²⁰

The wording of Article 12(3) should be adjusted in line with the broader entitlement conferred by Article 15(2) of the Asylum Procedures Directive,²¹ which establishes the right to free legal assistance for all asylum-seekers whose claims have been rejected at first instance. The Asylum Procedures Directive permits States to limit that

¹⁸ See also comment on Article 12, below.

¹⁹ In particular, reference could be made to the Conclusion of UNHCR's Executive Committee 96 (LIV) 2003 para (c) and the Council of Europe Guidelines on Forced Return (supra, note 5, Chapter V, “Forced removals”).

²⁰ See also UNHCR's Provisional Comments on the Proposal for a European Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), comment on Article 38 (which has been renumbered as Article 39 in the published version of the final Asylum Procedures Directive, OJ L 326/13, 13.12.05).

²¹ OJ L 326/13, 13.12.05

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assistance under some conditions, but does not impose the same mandatory constraints expressed in Article 12(3).

Article 13: Safeguards Pending Return

UNHCR welcomes the fact that some of the guarantees provided for in the Reception Conditions Directive²² apply, but notes the absence of other key entitlements—including those contained in Articles 5, 11, 13 and 21 of that Directive. In particular, UNHCR would welcome an explicit reference to the right to acceptable material conditions pending return.

The obligation contained in Article 13(2) to notify the individual in writing of postponement of enforcement of a decision is welcome. However, it should be specified that this notification will be in a language the individual understands.

Article 14: Temporary Custody

The term “temporary custody” may give rise to confusion, since the term commonly used is “detention” (or “pre-removal detention”).

Pre-removal detention under the draft Directive may concern two groups of persons who are of concern to UNHCR: asylum-seekers whose applications have not yet been considered on their merits, and persons who apply for asylum while in pre-removal detention. This needs to be taken into account. UNHCR therefore suggests that provision should be made in Article 14 to oblige the authorities, when examining or reviewing the necessity of detention, to consider the situation of a person who may be in need of international protection but whose asylum application has not been examined on the merits because another State has been deemed responsible for considering the claim.

Article 14 should also clearly provide for the release of persons who apply for asylum while in detention, to enable their claims to be pursued fairly. UNHCR’s position on the detention of asylum-seekers is set out in the “Guidelines on Detention of Asylum-Seekers”,²³ UNHCR’s Executive Committee has also adopted relevant Conclusions, including Conclusion No 7 (XXVIII), para e), No 44 (XXXVI) 1986; as well as No 96 (LIV) 2003.

In line with Article 5(2) ECHR and the “Guidelines on Forced Return”,²⁴ a requirement should be included in Article 14 to inform the detained person promptly, in a language which s/he understands, of the legal and factual reasons for the detention and the possible remedies available to him or her.

UNHCR further suggests explicit reference be made to the obligation to release, where the removal arrangements are halted. Detention pending removal is only justified for as long as removal arrangements are in progress. If such arrangements are not executed with due expedition and diligence, the detention will cease to be permissible. Due diligence is particularly required if return of an asylum-seeker is contemplated to another State for the assessment of the asylum request.

In line with Article 5(4) ECHR and the “Guidelines on Forced Return”,²⁵ Article 14 should provide for the possibility of judicial review of the detention decision.

The provision in Article 14(4), which provides for a maximum six-month period of detention, is a welcome acknowledgement that pre-removal detention should not be unlimited. However, UNHCR is concerned that six months could become the new norm in countries which currently limit pre-removal detention to shorter periods. Moreover, the current practice in some Member States of releasing and immediately re-incarcerating people should be expressly prohibited, where it is used as a means of circumventing time limits.

²² Council Directive 2003/9/EC of 27 January 2003 on minimum standards on the reception of applicants for asylum in Member States, OJ L 31/18, 6.2.03.

²³ UNHCR Revised Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers, February 1999.

²⁴ *Supra*, note 5, Guideline 6(2), “Conditions under which detention may be ordered”.

²⁵ *Supra*, note 5, Guideline 9, “Judicial remedy against detention”.

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Article 15: Conditions of Temporary Custody

UNHCR welcomes the guarantees contained in Article 15(1) but notes that for these to have effect, States must ensure access in practice to qualified advice, including to lawyers, NGOs and international organizations. This may require providing access to communications facilities, as well as directories of relevant organizations.

UNHCR recommends inclusion in Article 15 of a specific provision guaranteeing appropriate facilities in detention for vulnerable persons and those with special needs. UNHCR remains concerned about the inappropriate conditions of detention, in particular for families and children, which it has observed in many Member States.

With reference to Article 15(3) concerning detention of minors, UNHCR considers that children who have not been accused or convicted of a criminal offence should not be held in custody. The Convention on the Rights of the Child provides that the detention of a child shall be used only as a measure of last resort and for the shortest time possible.²⁶ Unaccompanied children should be represented by a guardian.²⁷

UNHCR welcomes the assurance contained in Article 15(4) of access to detention facilities for international and non-governmental organizations. For this to have effect, specific wording is needed to ensure that access is reasonably and practically available at short notice, and not deniable, for example on “security” grounds, without a demonstrable threat to safety. UNHCR remains concerned that it continues to be denied access to some immigration detention facilities in EU Member States.

UNHCR

December 2005

Joint Memorandum by the Refugee Council and Amnesty International UK

1. INTRODUCTION

1.1 The Refugee Council is the largest organisation in the United Kingdom working with asylum seekers and refugees. We not only give help and support to asylum seekers and refugees, but also work with them to ensure their needs and concerns are addressed by decision-makers. Our members range from small refugee-run community organisations to international NGOs, such as Christian Aid, Save the Children and Oxfam. We are a member of the European Council on Refugees and Exiles (ECRE), a network of 80 non-governmental refugee-assisting organisations in 33 countries working towards fair and humane policies for the treatment of asylum seekers and refugees.

1.2 Amnesty International is a democratic, self-governing worldwide movement of 1.8 million members and supporters in over 150 countries who campaign for internationally recognised human rights to be respected and protected. Amnesty International UK is the UK section of the organisation and has 257,000 supporters working together to improve human rights worldwide.

2. OVERVIEW

2.1 The Refugee Council and Amnesty International UK welcome the opportunity to comment on the Commission’s proposal for a directive on common procedures for the return of illegally staying third country nationals—the “returns directive”. Whilst the draft directive covers all third country nationals who are illegally staying in an EU Member State, our comments in this submission are restricted to the implications of the directive for asylum seekers whose applications have been rejected by a Member State, as well as individuals who have had refugee or complementary protection status in the past, but whose status has subsequently been withdrawn.

2.2 Our main interest in this draft directive relates to the extent to which it will ensure the safety of individuals who are returned by an EU Member State. We make particular reference to the implications of the draft directive for returns from the UK, and the extent to which safeguards in the directive are sufficient to prevent unsafe returns in the future.

²⁶ CRC Article 37(2).

²⁷ In the case of asylum-seeking children, this would be consistent with the guardianship requirement in Article 17 of the Asylum Procedures Directive, OJ L 326/13, 13.12.05.

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2.3 We believe that setting a high standard for safe returns is crucial to the integrity of asylum systems. Recent case law, particularly *AA v Secretary of State for the Home Department* AA/0457/2005 [2005] UKAIT CG, has identified serious shortcomings in the UK's practice as regards both assessing the safety of countries of return, and monitoring of returnees.

3. COMMENTS ON THE DRAFT DIRECTIVE

3.1 General Comments

3.1.1 The Refugee Council and Amnesty International UK are concerned that the standards contained within this Commission proposal may be considerably watered down during the course of Member State negotiations. Negotiations on measures in the first stage of the Common European Asylum System, including the qualification, procedures and reception directives, resulted in standards within the adopted directives that were significantly lower than those proposed by the Commission. It is our view that the UK played a leading role in this process of driving standards down.²⁸ We note, however, that this directive will be adopted by co-decision with the European Parliament and Qualified Majority Voting by the Council, and hope this will prevent any substantial reduction in the minimum standards that are the subject of the Committee's Inquiry.

3.1.2 We recognise that there are wide divergences between Member States' policies and practices in relation to the issues covered by the draft directive.²⁹ We also note that in recent months there have been many examples of unsafe returns, including the UK's return of rejected asylum seekers to Zimbabwe prior to the Asylum and Immigration Tribunal (AIT) decision regarding the risks faced on return, and Italy's returns of irregular migrants to Libya.³⁰ We thus support measures that will result in improved national practice and guarantees of safe, dignified and durable returns for those at the end of the asylum process, as well as those whose status has been withdrawn.

3.1.3 However, we regret the fact that states are negotiating an EU law on return before they have addressed the serious deficiencies in their asylum procedures. Asylum seekers cannot currently be assured that their protection needs will be provided for in the same way wherever they apply for asylum in the EU. Prima facie evidence of this can be seen in comparative recognition rates across EU Member States. The Slovak Republic, for example, recognises 0 per cent of Chechen asylum seekers as being in need of international protection, whilst 84 per cent of Chechens applying for asylum in Austria are granted status.³¹ This is a stark reminder that seeking asylum in the EU remains a protection lottery.

3.1.4 The Commission asserts that "An effective return policy is a necessary component of a well managed and credible policy on migration".³² The Refugee Council and Amnesty International UK, however, believe that a more important indicator of a credible migration policy is whether asylum systems can provide protection to those who need it. We have profound concerns about the asylum processes and procedures in place in the UK and other EU countries and we cannot be confident that EU Member States only return individuals who do not have protection needs.

3.1.5 We regret the fact that the European Council has recently adopted the procedures directive without addressing the serious concerns raised about its provisions by the United Nations High Commissioner for Refugees (UNHCR), the European Parliament, and a wide range of NGOs.³³ The asylum procedures directive represents a catalogue of Member States' worst practices with some standards set so low that breaches of

²⁸ One such example is the UK's role in negotiations on the reception directive. Member States reached agreement on the directive in April 2002. Despite this, the UK later pressed for negotiations to be re-opened as it had subsequently introduced a range of restrictive provisions with the Nationality, Immigration and Asylum Act 2002. As a result of the 2002 Act, the UK needed to lower EU minimum standards so that its new national reception policies could continue once the EU reception directive came into force. In particular, the UK wanted to ensure that it would not be prevented from removing support from asylum seekers who did not apply in good time without good reason, a policy the government had introduced in Section 55 of the new 2002 Act. The UK was successful in persuading other countries that a provision almost identical to Section 55 be incorporated into the reception directive. The result is that the reception directive permits EU states to introduce a similarly punitive and inhumane policy into their national law. In the recent case of *R v Secretary of State for the Home Department, ex parte Adam, Limbuela and Tesema* [2005] UKHL 66, the UK House of Lords held that s55 breached Article 3 of the ECHR when applied to asylum seekers dependent on the state for accommodation and support.

²⁹ An example is that of states' use of detention: in France, for example, there is a 32 day maximum time limit on detention, whereas in the UK there is no maximum time limit.

³⁰ For more information about Italy's returns from Lampedusa see paragraph 3.2.3.

³¹ ECRE (June 2005) *Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum seekers and refugees in Europe*.

³² Returns directive explanatory memorandum, p3.

³³ *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*. The 25 EU Member States formally adopted the directive on 1st December 2005 at the Justice and Home Affairs Council.

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international refugee and human rights law will be permitted.³⁴ As highlighted by UNHCR, the final text contains “serious deficiencies”, for example in allowing states to designate “safe third countries” outside the EU to which asylum seekers can be turned back without even having had their claims heard in an EU Member State. This absence of meaningful procedural safeguards for asylum seekers means that, whilst we recognise that the returns directive is not concerned with reasons for ending an individual’s right to stay, we believe that it cannot be considered in isolation from national asylum procedures.

3.2 Article 2—Scope

3.2.1 The Refugee Council and Amnesty International UK note that the scope of the directive is extremely broad and is intended to apply to a wide range of individuals who have very different experiences and needs. Those affected will include individuals who have overstayed their visas; asylum seeking adults and children whose applications have been rejected as well as those whose Convention refugee status or complementary protection status has been withdrawn.

3.2.2 We believe it is imperative that the directive allows sufficient flexibility to enable Member States to respond to the very different circumstances of those falling within its scope. For example, an asylum seeker whose claim has been fast-tracked and who a Member State is seeking to remove after a presence of a few weeks in the country, will have very different needs from an individual who has been through an asylum process, been granted Convention refugee status, and integrated into the host country before their status has been withdrawn.

3.2.3 We are concerned that the draft directive allows Member States to selectively apply its provisions to transit zones (Article 2.2).³⁵ So, for example, Lampedusa, which is classified as an international transit zone under Italian law, would not necessarily fall within the scope of the directive. This is of utmost concern to us in light of the Italian government’s actions in Lampedusa and their responses to the arrival of migrants by sea. We believe that Italy’s actions in Lampedusa have seriously compromised the fundamental right to seek asylum and the principle of non-refoulement, which prohibits the forcible return of anyone to a territory where they would be at risk of serious human rights violations.³⁶ The returns directive will do nothing to oblige the Italian authorities to change their practices.

3.2.4 There is no justification for allowing states to distinguish between transit zones and other parts of their territory. The distinction is also without justification in international human rights law.³⁷ The same safeguards and minimum standards must apply to asylum seekers and those whose status has been withdrawn, regardless of whether or not they happen to be present in an area that has been designated a transit zone. Further, the fact that the minimum standards outlined in the EU procedures directive can also be selectively applied to transit zones, makes it all the more important that the full range of safeguards is in place for returns.

3.3 Article 3—Definitions

3.3.1 The definition of return in the draft directive encompasses enforced return to a country of origin or transit, as well as to another third country. We do not believe that mere transit through a country proves that a person has any meaningful link with that country. Further, we would like to draw the Committee’s attention to the fact that there is no obligation under international law for countries to accept persons who are neither nationals nor former habitual residents. In order to ensure the safety of those returned to a transit country we believe that the directive should stipulate that prior to return the receiving state must explicitly agree to accept the individual being returned, and the sending state must establish that the individual’s human rights will be fully respected in the country to which they are being transferred.

³⁴ For more information on these breaches see European Council on Refugees and Exiles (2005) *Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, as agreed by the Council on 19 November 2004*.

³⁵ Member States will only have to ensure that treatment of individuals in transit zones complies with articles 8 (postponement), 10 (removal), 13 (safeguards pending return), and 15 (conditions of temporary custody).

³⁶ On 10 May 2005, The European Court of Human Rights asked the Italian government not to further proceed with expulsion measures regarding a group of eleven “irregular” migrants who were arrested in Lampedusa in March 2005. However Italy continued to operate large-scale expulsions of “irregular” migrants to Libya. ANSA News, 16 May 2005.

³⁷ The European Court of Human Rights in the *Amuur* case ruled clearly that the European Convention on Human Rights and Fundamental Freedoms fully applies in transit zones and that the latter should be considered as an integral part of their territory. *Amuur v France* 10 June 1996, 22 EHRR 533.

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3.3.2 The Refugee Council and Amnesty International UK strongly oppose the transfer to third countries of those whose asylum claims have been rejected, or whose status has been withdrawn, unless the individual has given informed and express consent to voluntarily return to the third country concerned. Forced removal to a third country raises concerns as it involves a serious risk of chain removal and may violate the principle of *non-refoulement*.³⁸ However, we acknowledge that states are intent on removing people to third countries, and we support ECRE's position that if they do so, stringent safeguards must be in place to ensure that states do not breach their obligations under international law and that the individual will benefit from a dignified and sustainable standard of living in that country.³⁹

3.4 Article 4—More favourable provisions

3.4.1 We welcome the proposal that Member States will be able to adopt or maintain more favourable provisions than the minimum standards outlined in the directive. However, during the transposition of instruments from the first stage of the Common European Asylum System we have seen that where minimum standards are set, some states reduce their national standards accordingly. Harmonisation of asylum and immigration laws and policies must not become an opportunity for convergence of practices at the lowest common denominator. We believe that a “standstill clause” is required to ensure that Member States with national standards higher than those in the directive do not lower them.

3.4.2 We are concerned that the directive as currently drafted does not permit states to maintain more favourable provisions in all situations, namely where they are not compatible with the directive.⁴⁰ For example, the tripartite Memorandum of Understanding between the United Nations High Commissioner for Refugees, the UK and Afghanistan allows for a period of up to two months for rejected Afghani asylum seekers to opt for voluntary repatriation.⁴¹ Article 6.2 of the draft directive, however, provides that a return decision “shall provide for an appropriate period for voluntary departure of up to four weeks”. We are concerned that states such as the UK that currently allow for a longer period would not be able to continue to do so were the draft text to become law.

3.5 Article 5—Family relationships and best interest of the child

3.5.1 We welcome the proposed obligation on Member States to take due account of family relationships, duration of stay in the Member States and the existence of family, cultural and social ties with country of origin. This is a positive acknowledgement of the fact that return procedures are not executed in a social vacuum and that there are essential considerations that must be taken into account before deciding whether or not to remove someone from the EU.

3.5.2 However, we are concerned that the meaning of “due account” is not clear and believe that it requires clarification if the directive is to result in safe, durable, dignified returns and harmonisation of state practices. The Refugee Council and Amnesty International UK note that individuals whose status has been withdrawn,

³⁸ “Chain removal” describes the process whereby an asylum seeker or rejected asylum seeker is returned from one country to the next and ultimately back to his or her country of origin without a substantive examination (or reexamination) of his or her claim.

³⁹ ECRE sets out these essential safeguards:

- under no circumstances should the transfer entail the individual being sent (either directly or indirectly) to a country where their human rights might not be respected;
- the voluntary and informed consent of the individual must be obtained and access to information and advice from independent organisations, such as NGOs, must be provided before a decision to consent is taken;
- the individual must have a meaningful connection with the third country, such as for example family ties, a previous legal status or cultural background;
- there must be the possibility for an individual to have a dignified standard of living in the third country and a legal residence status must be guaranteed;
- the particular potential risks faced by mixed couples must be carefully examined before any transfer;
- an agreement with the receiving country should be in place, but governments should not give inducements to third countries, whether in the form of development aid or otherwise, to take asylum seekers whose asylum applications have been rejected in Europe.

From ECRE (2005) *The Way Forward: Europe's role in the global protection system. The return of asylum seekers whose applications have been rejected in Europe*. p 36.

⁴⁰ Article 4.3: *This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive* (emphasis added).

⁴¹ Tripartite Memorandum of Understanding (the MoU) between the Government of the United Kingdom of Great Britain and Northern Ireland (the UK Government), the Transitional Islamic Administration of the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees (UNHCR), October 2002. Paragraph 3.IV:

“Afghans without protection needs or compelling humanitarian reasons who applied for asylum after 1 October 2002 or who were in the asylum procedure pending a decision on their claim on 1 October 2002, can opt for voluntary repatriation until two months after a final negative decision on their asylum claim or on their leave to remain.”

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as well as asylum seekers whose claims have taken many years to determine, may have established themselves in the country of asylum and have stronger ties to the EU state than to their country of origin.

3.5.3 We note that the draft directive does not set out a definition of family. Where children are concerned, it is essential that the primary carer/s (which might be an aunt, uncle or grandparent) be considered family and, where appropriate, that the child remain united with their carer. Further, we believe that the directive should contain an explicit provision that families must not be separated because of return, for example in situations of mixed nationality marriage.

3.5.4 We believe that the directive should oblige states to ensure that best interests determinations are carried out by child care specialists, with particular regard to Article 12 of the Convention on the Rights of the Child.⁴² Best interests determinations require an in depth understanding of child welfare and child development, and given the additional complexity involved in assessing a child's best interests across two national contexts, it is essential that this task is undertaken by competent officials. The impact of return on children is likely to be particularly acute, given the fact that they are more likely to be fully integrated in their country of refuge; consequently there is a clear need to ensure that their views are properly reflected in the decision making process.

3.5.5 We note that it is particularly problematic to determine a child's best interests in situations where states, such as the UK, withdraw refugee and complementary protection status from those who have been living in the host state for several years. It is difficult to see how return could be in a child's best interests where they have closer links to the host country than to the country of their parents' origin. This would be the case for children who arrive in the EU when very young, or who are born in the EU and remain there for several years before their parents' status is withdrawn.

3.5.6 With regard to determining the best interests of unaccompanied children, we support the principles and arguments set out in the Save the Children and the Separated Children in Europe Programme paper on returns of separated children.⁴³ In order to assess whether or not voluntary return is in the best interests of an unaccompanied child, the following interrelated factors should be fully considered: safety; family reunification; the child's view; voluntary return; legal guardian and carer's views; socio-economic conditions in the country of origin; the child's level of integration in the host country; and the age and maturity of the child. The UK is one of the few EU countries not to appoint independent legal guardians to represent the best interests of separated children. We are of the view that without such a guardian, separated children should never be forcibly returned.

3.5.7 We remind the Committee that the UK has a standing reservation to the UN Convention on the Rights of the Child as it relates to immigration control. The UK is thus not currently compliant with the provisions as set out in Article 5 of the draft returns directive.

3.6 Article 6—Return decision

3.6.1 Whilst we agree with the general principle that individuals should have an opportunity to leave the territory of their own accord as an alternative to forced removal, we have the following concerns:

- The use of the term “voluntary” to describe all departures that are undertaken as an alternative to forced removal has led to confusion and misunderstanding. For example, in the UK many rejected asylum seekers, such as those from Iraq, have only been able to obtain the means to avoid destitution by agreeing to participate in “voluntary return” even when the UK was unable to facilitate forced removals to their country of origin. We support ECRE's suggestion that the term “mandatory return” be used to describe situations whereby a person consents to return to his/her country of origin instead of staying illegally or being forcibly removed.⁴⁴
- The draft directive provides that Member States may deny individuals the opportunity to return “voluntarily” where “there are reasons to believe that the person concerned might abscond during such a period.” We believe that the text as currently drafted may result in states utilising a very broad

⁴² Convention on the Rights of the Child, Article 12:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

⁴³ Save the Children and The Separated Children in Europe Programme (September 2004) *Position Paper on Returns and Separated Children*.

⁴⁴ See ECRE *Position on Return*, October 2003, para 9.

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range of grounds for believing an individual may abscond. In order for “voluntary return” opportunities to be meaningful, a clear obligation must be placed upon the state to demonstrate sound reasons for believing that there is a risk of absconding, through transparent and fair procedures. Unless this is the case, states will be free to deny the opportunity to return voluntarily to all those receiving a return decision.

We note that in the UK there is a lack of official data on the risk of absconding, despite the Home Affairs Committee’s 2003 recommendation that:

*in the absence of adequate statistics, it is difficult to know the extent of the problems caused by absconding. The current situation, in which the Home Office simply does not know—even in broad outline—what proportion of failed asylum seekers abscond is unacceptable. It ought to be possible to obtain at least a snapshot of the scale of the problem and we recommend that steps are taken to do this without delay.*⁴⁵

- We are concerned that a period of “up to four weeks” (Article 6.2) may prove insufficient for many individuals who would otherwise choose to depart voluntarily. We suggest that four weeks is designated as a minimum period to allow for departure. Maximum time limits are inappropriate in this context as they fetter states’ capacity to respond flexibly to individual needs.
- In some cases, four weeks may be insufficient time to obtain a travel document and finalise practical travel arrangements, including obtaining any transit visas that are required. Many rejected asylum applicants have difficulty in obtaining travel documents from their Embassy or High Commission. Often the delays in such procedures are beyond the control of the individual seeking to leave or that of any organisation assisting departure. We understand that other Member States in the EU experience similar difficulties to the UK when arranging forced removals.
- The appropriate period of time will also depend on factors such as the length of time an individual has been present in the country: asylum seekers who have been fast-tracked through an asylum system are likely to require less time to make practical arrangements than those who have been living in an EU Member State for a number of years. The latter group is likely to require more than four weeks to sort out their affairs including, for example, ending a mortgage, closing bank accounts, or selling property. Allowing time to resolve such matters may help to ensure any return is dignified and durable.
- Many individuals and families would benefit from the opportunity to make considered and well-informed decisions about their return. Access to information, advice and counselling services, independent of governments and of intergovernmental organisations, can assist returns. Coming to terms with the return decision and obtaining accurate and confidence building information about return prospects may take time.
- People who have been recognised as refugees but have subsequently had their status withdrawn may need time to prepare mentally for return to the country from which they were forced to flee. Others who have been absent from the country of origin for prolonged periods of time may benefit from time to explore the conditions in the country to which they will return.
- We regret the fact that the draft directive is silent as to measures states should introduce to assist return. We advocate the inclusion of a provision in the directive obliging states to introduce packages to assist the return of those they have issued with a return decision, as well as measures to make return more viable.
- The draft directive is silent as to the minimum social and economic support that individuals should have while they decide whether or not to return voluntarily. It is essential that individuals are not left destitute during this time. Situations where individuals are driven into destitution while making such an important decision are simply unacceptable and may lead to violations of states’ obligations under ECHR. We strongly believe that the provision of socio-economic benefits should continue until an individual’s actual departure. Forcing individuals and families into destitution or a desperate scramble to find any means to survive is likely to undermine their capacity to prepare properly for return.

3.6.2 We welcome the recognition in Article 6.4 of Member States’ obligations derived from fundamental rights, including those resulting from the European Convention on Human Rights. However, we would urge that the directive make reference to other relevant international human rights instruments. Further, it is essential that where states have these obligations towards individuals, they should not only refrain from

⁴⁵ House of Commons Home Affairs Committee. Fourth report of session 2002–03. *Asylum Removals*. HC 654.

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issuing a return decision, but also ensure that individuals are provided with legal status for remaining in the EU. Unless this is the case, the directive will result in large numbers of individuals left in limbo with no prospect of integrating or exercising the full range of rights to which otherwise they would be entitled.

3.6.3 Whilst we welcome the proposal in Article 6.5 that Member States have scope to grant the right to stay for compassionate, humanitarian or other reasons, we are concerned that unless framed as an obligation, this discretion will not be used in practice.⁴⁶

3.7 Article 7—Removal order

3.7.1 As outlined in paragraph 3.6.1 in relation to the removal decision, we believe it is essential that the directive proscribe more tightly the grounds on which states may conclude that there is a “risk of absconding”.

3.7.2 Our concerns in paragraph 3.6.1 about support also apply to Article 7: individuals must be provided with support where it is needed until their return has been effected.

3.7.3 The Refugee Council and Amnesty International UK believe that there is a real risk that if Article 7.3 is retained in the directive, then the option of issuing a removal order at the same time as the return decision may become the norm in many states, with a consequent lack of opportunity for individuals to choose to leave before their return is enforced.

3.8 Article 8—Postponement

3.8.1 The Refugee Council and Amnesty International UK welcome the provision in Article 8.1 for Member States to postpone the enforcement of a return decision as a result of the specific circumstances of the individual case. We further welcome recognition that the removal order should be postponed if an individual cannot travel because of their physical or mental health, or for technical reasons, which might include natural disasters in the country of origin.

3.8.2 However, we urge states to recognise that there are additional factors that provide sound grounds for postponing a return decision but which are not referred to by the draft directive. For example, we believe that it is essential to specify an obligation on states to ensure that returns do not destabilise fragile countries. The directive should oblige states to consider conditions in countries of return as well as the impact of return on the receiving country before enforcing any returns. We further recommend that states consult with UNHCR about the conditions for enforcing removals to countries of origin which have experienced large scale forced migration, conflict situations, or are facing significant reconstruction, relief or development challenges.

3.8.3 We are concerned that the draft directive sets no time limit on the period of postponement. Thus, it is possible that individuals who cannot be returned to their country of origin will be left in limbo, with no status, no means of support,⁴⁷ and facing the constant and unsettling prospect of imminent return. The Refugee Council and Amnesty International UK believe that if return is postponed for more than a short period, the removal order should be withdrawn and the individual issued with temporary, renewable status with associated entitlements to work and receive state support. This period could usefully be viewed by states as an opportunity for individuals who cannot be returned to use their time profitably so that their long term prospects for sustainable return or successful integration are enhanced.

3.8.4 We welcome the provisions of Article 8.2 (c) in relation to the return of unaccompanied children. However, we are concerned about references to ‘a competent official of the country of return’ and the “equivalent representative”. We believe that unaccompanied children should only be returned where they are handed over to the person who will be their primary carer, whether that be a family member or a legal guardian. They may be handed over to a competent official, but only if that official becomes the child’s legal guardian. The child and his/her legal guardian in the EU Member State must be informed of the name of the person to whom the child will be handed over, as well as that person’s future relationship to the child. We further believe that an additional provision is required to ensure that any postponement of a separated child’s return is communicated to that child and to their legal guardian.

⁴⁶ We note that most of the obligatory provisions of this draft returns directive relate to enforcement measures, whilst Member States are given discretion in relation to measures that provide safeguards for those being returned, or safeguards against indefinite limbo situations.

⁴⁷ Under Article 13 of the draft returns directive, the conditions of stay for those who are not returned must only be as favourable as the following articles of the EU reception directive: residence and freedom of movement (article 7); families (article 8); medical screening (article 9); schooling and education of minors (article 10); health care (article 15); provisions for persons with special needs (articles 17–20).

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3.9 Article 9—*Re-entry ban*

3.9.1 The Refugee Council and Amnesty International UK are opposed to the draft directive's requirement that states impose a re-entry ban of up to five years in removal orders. We do not believe that there is a need for such a drastic measure. The draft directive proposes that the re-entry ban may also be imposed on people departing "voluntarily", thus clearly reducing any advantage for individuals who depart before their removal is enforced. In all situations, it is proposed that the ban may be extended indefinitely for people constituting a "serious threat to public policy or public security". However, we are concerned that there is no clear definition of what amounts to such a "serious threat". We are particularly concerned about the lack of access to legal remedies in the face of such a ban. We note that withdrawal and suspension of the re-entry ban are permitted, albeit under stringent conditions.

3.9.2 Whilst the draft directive states that the ban is "without prejudice to the right to seek asylum in one of the Member States" (Article 9.5), it is difficult to foresee in practice how this right could be realised. If a person is denied entry to the EU for any purpose, s/he will have little chance in practice of ever getting access to an EU asylum procedure for the purpose of making a claim. There is a clear need for the directive to be amended to safeguard the right to seek asylum in the EU. If the re-entry ban is retained in the directive, changes are needed to ensure that the withdrawal of a re-entry ban would have cross-territorial effect and would be automatically effected in cases where there is a change in the situation in the country of origin, creating the need for an individual to flee to access safety in the EU. Further, it is essential that any ban be withdrawn if an individual is subsequently deemed in need of resettlement to an EU country.

3.9.3 Re-entry bans are a blunt instrument that are entirely inappropriate in light of the fact that future changes in a country of origin, and thus an individual's need for international protection, cannot be predicted. As currently drafted, the re-entry ban could apply to Convention refugees where states have accepted that they have been at risk of persecution in the past and granted them status, but where it has been decided that due to changes in the country of origin, the risk of persecution is no longer present. If this article is retained we believe that asylum seekers' lives, including those who have previously been recognised as refugees, will be put at risk since they are likely to be denied entry to the EU without any consideration of their asylum claim.

3.10 Article 10—*Removal*

3.10.1 The Refugee Council and Amnesty International UK welcome the requirement that coercive measures shall be proportional and not exceed reasonable force, but believe that states need more guidance than is currently provided. We recommend that the directive specify that coercive measures must only ever be used as a last resort, and that physical force must never be used where vulnerable persons are concerned, including children and the elderly.

3.10.2 We regret that the draft directive does not provide any clarity as to what "coercive" measures are envisaged by the Commission and urge states and the European Parliament to set clear limits to the measures that are permitted. Amnesty International has documented cases of people who have been hurt and traumatized at the point of being removed from the UK.⁴⁸ We cannot see how the directive, as currently drafted, would safeguard against this.

3.10.3 The Council of Europe's Guidelines on Forced Return were drawn up to provide guidance for states on how to carry out return in a way which is effective whilst fully respecting human rights.⁴⁹ The Guidelines stipulate particularly dangerous coercive measures that shall not be used, and outline the training that members of any escort team should undergo. We believe that the European Council and the European Parliament should draw on these guidelines and ensure that the returns directive includes stringent safeguards on states' use of coercive measures.

3.11 Article 11—*Form*

3.11.1 We welcome Member States' obligation to issue return decisions and removal orders in writing. However, the importance of the information contained in these documents makes it imperative that these documents are automatically translated into a community language that the individual can understand. The current requirement that the translation be provided in a language the individual "may reasonably be supposed to understand" is inadequate: it is essential that all individuals fully understand the implications of the return decision and removal order.

⁴⁸ Amnesty International UK (June 2005). *Seeking Asylum is not a Crime—detention of people who have sought asylum.*

⁴⁹ Forced return: 20 guidelines adopted by the Committee of Ministers of the Council of Europe on 4 May 2005 and commentaries.

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3.11.2 A further essential safeguard that is missing from the draft directive, is a requirement that states issue the removal order in a manner that allows sufficient time before removal for the individual to obtain expert, publicly funded legal advice and representation and, wherever appropriate, seek a judicial remedy.

3.12 *Article 12—Judicial remedies*

3.12.1 The Refugee Council and Amnesty International UK believe that all those subject to a removal order should have an in-country right of appeal against the removal decision before an independent judicial body and be able to raise fears of refoulement or ill-treatment on return contrary to Article 3 and 8 of the ECHR and other international human rights treaties.

3.12.2 We would like to draw the Committee's attention to our particular concern that there is no guarantee under the draft directive that the judicial remedy will have suspensive effect. It is of the utmost importance that appeal against removal is robust, given that EU minimum standards on asylum procedures do not guarantee effective protection from refoulement. We would also like to reiterate our position that in order for a judicial remedy to be effective, it is essential that publicly funded legal advice and representation is available for all those who require it.

3.13 *Article 13—Safeguards pending return*

3.13.1 According to the draft directive, those who cannot be removed, or for whom the return decision has been postponed, should be provided with written confirmation of their situation. They will also be provided with conditions of stay in line with a limited number of provisions of the reception directive.⁵⁰

3.13.2 Whilst we recognise that this will be an improvement in many Member States, we strongly believe that people who cannot be returned should be provided with temporary, renewable status and the right to work and access state benefits. Where there is no prospect of return, it is inappropriate for states to detain individuals, and the returns directive should contain a provision to this end.

3.13.3 We believe it is unacceptable that the draft returns directive makes no reference to the reception directive's provisions on employment, social assistance or housing, or to provisions on appeal if any benefits are refused, reduced or withdrawn. The reception directive outlines the minimum standards that will normally suffice to ensure asylum seekers a dignified standard of living.⁵¹ By allowing states to disregard a large number of these minimum standards in relation to those who are in their territory but who cannot be returned, the draft directive is countenancing a situation where large numbers of people will be vulnerable to destitution and homelessness, surviving at the fringes of society for an indefinite period of time.

3.13.4 An example of the risk posed by this failure to ensure minimum standards of support is the situation of Zimbabweans whose claims for protection in the UK have failed. For these people the choice is stark: either they must sign up to return voluntarily to a country the AIT has found to be unsafe for returned asylum seekers, or they must survive without any support whatsoever.

3.14 *Articles 14 and 15—Temporary custody*

3.14.1 The Refugee Council and Amnesty International UK are opposed to the detention of people who have claimed asylum and whose claims have been dismissed by the authorities, unless the detaining authorities can demonstrate an objective risk that the individual concerned would otherwise abscond and that other measures short of detention, such as reporting requirements, would not be sufficient to meet the requirements of immigration control. The right to liberty is a fundamental human right set out in international human rights instruments. This should be reiterated on the face of the directive.

3.14.2 We welcome the reference to the primacy of alternatives to detention, but are concerned that this draft directive makes reference to Member States detaining individuals who "will be" subject of a removal order or a return decision. This is inappropriate. Article 14 should only be concerned with detention immediately prior to return and for the sole purpose of effecting return.

⁵⁰ Under Article 13 of the draft returns directive, the conditions of stay for those who are not returned must only be as favourable as the following articles of the EU reception directive: residence and freedom of movement (article 7); families (article 8); medical screening (article 9); schooling and education of minors (article 10); health care (article 15); provisions for persons with special needs (articles 17–20).

⁵¹ This is stated in the preamble to Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

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3.14.3 The Refugee Council and Amnesty International UK believe that authorities should be required to demonstrate in each individual case that detention is necessary, and should only detain people for the shortest possible time. The directive should further require states to give clear reasons as to why there are serious grounds to believe that there is a risk of absconding. As currently drafted, states will have wide discretion to interpret the meaning of having 'serious' grounds for such a belief.

3.14.4 The draft directive obliges Member States to detain individuals: this is highly problematic. As a minimum, reference must be made to an obligation not to detain unaccompanied asylum seeking children, families with children, pregnant women and particularly vulnerable groups, including those with serious mental health problems and survivors of torture. We are additionally opposed to any detention in prison of those who have claimed asylum or whose refugee status has been withdrawn. Seeking asylum is not a crime. Allowing for detention in prisons serves only to further criminalise and stigmatise asylum seekers, those with status, and the institution of asylum.

3.14.5 In all cases, detention should not last longer than is strictly necessary. We consider the draft directive maximum time limit of six months to be an unacceptably long time for individuals to be kept in detention where no crime has been committed and where detention is solely to effect removal. We believe there is a particular need for a standstill clause to ensure that states don't view the minimum standard on detention as grounds for increasing their national time-limits. Indeed, we would like to see states sharing best practise in relation to detention, and learning from countries such as France where there is a 32 day limit on detention.

3.14.6 We agree that any decision to detain should be taken by a judicial authority and note that this would necessitate a change to current UK practise, whereby the decision to detain is taken administratively. We further welcome the obligation for review by judicial authorities at least once a month, but consider that there is an additional need for an explicit reference to the possibility for review at other times, whenever circumstances change or new elements emerge to support an individual's release.

3.14.7 We believe that there is need for a provision to guarantee systematic granting of access to effective legal assistance, to the services of competent, qualified and impartial interpreters and access to qualified medical personnel.

4. OUTSTANDING ISSUES NOT ADDRESSED BY THE DRAFT DIRECTIVE

4.1 The Refugee Council and Amnesty International UK do not believe that, as currently drafted, the returns directive will sufficiently safeguard the rights of those being returned, or of those who cannot or should not be removed. We believe that the following additional elements must be incorporated into the directive in order to ensure that returns from the EU are only ever carried out in a safe, dignified and durable manner.

4.2 *Reporting*

4.2.1 We believe that states should be required to report on measures they have taken to make voluntary return more viable. Further, they should be required to demonstrate that returns are safe, dignified and durable, and to report on the steps they have taken to ensure that returns have not led to conflict, or undermined relief or development efforts in poor countries.

4.3 *Independent monitoring and country information*

4.3.1 We deplore the fact that the draft EU return directive does not include any adequate provision for monitoring the safety of returns. In order to ensure that returns are safe and that international obligations, including those of non-refoulement, are not breached, EU Member States must as a matter of urgency develop mechanisms to monitor what happens to people once they have returned. Monitoring should be comprehensive, undertaken by an independent body and include voluntary, mandatory and forced return.

4.3.2 We are further disappointed that the draft directive does nothing to end the current situation where Member States separately assess the safety of countries for the purpose of return and arrive at radically different conclusions. For example, whilst the UK has decided that parts of Iraq are safe for those forcibly removed there, Switzerland has recently concluded that return to Iraq is not a reasonable course of action.

4.3.3 The danger posed to returnees by biased and misleading country information was exposed in the UK when asylum seekers were returned to ill-treatment in Zimbabwe on the basis of country information produced by the Home Office that conflicted with the assessment of the situation in that country by the Foreign

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and Commonwealth Office (FCO).⁵² As noted by the Asylum Rights Campaign, of which we are members, “This caused considerable embarrassment and a belated decision that removals should be suspended until the CIPU [Country Information Policy Unit] assessment could be revised”.⁵³ Although we note that the UK CIPU has been separated from the County of Origin Information Service, we believe that country information should be collated by a body that is independent of any party involved in the asylum process. This would enhance the prospects for impartial and authoritative country of origin information and in this way may better assure the safety of returnees.

4.4 We draw the Committee’s attention to recent caselaw in the UK demonstrating that the manner of return can itself give rise to protection needs. In *AA v Secretary of State for the Home Department AA/0457/2005 [2005] UKAIT CG*, the AIT was highly critical of the process used to return people to Zimbabwe, a finding which was influential in their granting Convention refugee status to the applicant, AA.

In conclusion, the Refugee Council and Amnesty International UK believe that substantial changes must be made to the draft returns directive if it is to safeguard the rights of those who fall within its scope.

Refugee Council and Amnesty International UK

12 December 2005

⁵² Asylum Rights Campaign (2004) *Providing Protection in the 21st Century: refugee rights at the heard of UK asylum policy*. Chapter two.

⁵³ *Ibid.*

Examination of Witnesses

Witnesses: Ms ANJA KLUG, Senior Legal Officer, Geneva, and Ms JACQUELINE PARLEVLIET, Deputy UK Representative, UNHCR; and Ms GEMMA JUMA, International Protection Manager, and Ms NANCY KELLEY, Head of International and UK policy, the Refugee Council; examined.

Q193 Chairman: Good morning, ladies. Thank you very much for coming. Thank you also for your written evidence, which we have read with great interest and on which I think most of the questions which we want to ask you are based. Can I thank particularly Anja Klug for coming, because I gather you have come from Geneva and it is very good of you, but you are all very welcome. This meeting is on the record, it is not only being transcribed but also it is being recorded for subsequent broadcast, but you will be sent a copy of the transcript and it is open to you to suggest changes or amendments to it. Does either side, as it were, want to say anything, as an opening statement: Ms Klug?

Ms Klug: Yes, with your permission, my Lord Chairman. I would like to thank you very much for the invitation. We very much welcome the opportunity to present our views on the draft Returns Directive to this distinguished Committee. I just wanted to point out that, due to UNHCR’s restricted mandate, our comments may not touch upon all the aspects of the Directive but only those that relate to persons of concern to UNHCR. Because for us return is a key component of any functioning asylum system, provided that protection needs have been examined in a full and fair procedure beforehand, our two main objectives are that in the return process no case of direct or indirect *refoulement* takes place and that return takes place in a safe and dignified manner. Thank you.

Q194 Chairman: Thank you very much. Ms Juma? *Ms Juma:* I would like to thank you as well for the opportunity to give evidence. As you may be aware, the Refugee Council is an advocacy organisation that works on UK, EU and international refugee protection issues and we also provide direct services to refugee and asylum-seeking adults and children throughout England.

Q195 Chairman: Thank you very much. Can I start by asking you, do you see a need for common EU standards and procedures on returns policy, or do you think this should be left to individual Member States?

Ms Klug: UNHCR has supported from the start the EU harmonisation process in asylum policy throughout, because they always saw it as an opportunity to establish standards in Europe which are of high quality and are consistent over Europe. As I pointed out at the beginning, since returns for us are a key component of the asylum system, we would think that common returns standards could be a useful opportunity again to establish adequate return standards all over Europe. However, our experience with the harmonisation process so far is a little bit mixed. All of our expectations have not been met so far. While we have some Directives that indeed have raised the standards in some EU countries, we are extremely unhappy with the standards in especially

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the Asylum Procedure Directive. Harmonisation, yes; but of course it does not have merit in itself, only if it aims at establishing adequate protection standards in line with international and regional standards.

Ms Juma: The Refugee Council believes that harmonisation in this area does have the potential to bring positive results for those who have sought asylum, but only if standards are set at the highest level and States are required to meet them. We do not want common standards just for the sake of common standards. If you look at Member States's policies and practice in relation to returns at the moment, there are significant divergences which have profound implications for those who are being returned. We think that common EU standards are needed to drive up standards and ensure that States are required to comply with safeguards that are sufficient to make sure that returns are both safe and sustainable. If I could just make reference to the UK's recent practice of commencing forced removals to Zimbabwe, which is of incredible concern to us. As the Asylum and Immigration Tribunal found in October 2005, by forcibly removing people to Zimbabwe the UK was putting people at risk of persecution by the very act of removing them. The Tribunal also identified serious shortcomings in the UK's assessment of whether the country was safe for return, as well as the Secretary of State's regard for the welfare and the safety of those individuals that the UK did return. Just to add, in terms of the general harmonisation process, we are really disappointed that EU Member States have not first addressed the serious deficiencies in their asylum procedures before going on to look at returns. If you look at comparative recognition rates, you can see that people who apply for protection in an EU Member State do not get the same outcome on their claim wherever they apply, which is what we would like to see. For example, in 2004, while Austria recognised more than 50 per cent of asylum claimants as having protection needs, Greece recognised only 0.3 per cent of asylum-seekers as having protection needs. We do not think it can be that all the well-founded claimants went to Austria, whereas all the unfounded claimants went to Greece; we think it is more that there are real deficiencies in asylum procedures at the moment.

Q196 Chairman: Are there other differences between the EU procedures that cause you particular concern?

Ms Juma: Yes, particularly in relation to pre-removal detention; we have a situation where the UK allows indefinite detention for the purposes of effecting removal, whereas France has an absolute limit of 32 days. Additionally, the treatment of rejected asylum-seekers at the end of the process; Member States vary

significantly in whether they allow rejected asylum-seekers to work, and whether they give them any means of support at all. We have a situation where some Member States, like the UK, have tens of thousands of rejected asylum-seekers who are absolutely destitute and there is no prospect for them to return. What we believe must happen across the EU is that individuals must not be driven into enforced destitution as a means of coercing them to return, but should be supported until the point of return. If they cannot, or should not, for compassionate reasons, be returned we believe they should be given status. We think that the current limbo situation is absolutely unacceptable.

Q197 Chairman: Ms Klug, do you have any comments to add?

Ms Klug: Maybe not so much on the return process, but you also asked about the differences in standards of procedure. You know that the bare minimum standards have been adopted but they have not yet been implemented and we do not think that those minimum standards will contribute significantly to harmonisation in Europe. As regards, for example, safe third country principles, as regards the interpretation of the refugee definition, as well as judicial review, there are still significant differences in the law and practice of Member States, so it is a very slow process, the harmonisation.

Q198 Lord Avebury: You mentioned the case of returns to Zimbabwe, but that is not the only country to which the UK has started sending people back where one would consider that conditions are equally appalling, such as Somalia or Iraq. When this happens, do you see a knock-on effect with other European States and are there countries now that are copying the UK in treating people from Zimbabwe, Iraq, Somalia and Afghanistan as being eligible for return and adopting the UK's policy of saying that no country is intrinsically unsafe any more?

Ms Juma: If I can use the example of Iraq, just a few days ago, or perhaps a week ago, The Netherlands announced that it too was going to follow the UK example and enforce removals to Iraq. I understand, from the evidence that the Home Office gave to this Committee, that the UK is proud of the fact that it leads the way in opening up routes of return and we do see that when the UK introduces a new policy of return others tend to follow suit. In the case of Iraq, it is also interesting to note that some EU countries utterly disagree that Iraq is a safe country for return. For example, Sweden is granting status to Iraqis who come to seek protection and they are not enforcing returns because they do not believe it is safe to do so. We have concerns about these politicised notions of

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whether or not a country is safe for return and we think it has implications for individuals' safety.

Q199 Lord Avebury: One consequence of not having a Directive, not necessarily this Directive, is that States tend to conform to the policies of the harshest EU country?

Ms Juma: We see that some States do, yes.

Q200 Lord Avebury: Do you imagine this will happen also in the case of the dispute that we are having about Article 4 of the Convention now, where we are treating people very harshly as regards the standard of Article 4(c), particularly in the current Immigration, Asylum and Nationality Bill? Is there a danger that those sorts of tightening-up procedures will be fed over into other European States, in the absence of a Directive, and that a Directive of some sort might help to avoid that sort of copy-cutting?

Ms Juma: We would hope so; we would hope though that it did not just stop States reducing their current national practice, because we think that current national practice is insufficient to ensure the safety and sustainability of returns. We would like to see the standards raised to ensure that practices such as those that you have mentioned are not permissible.

Ms Klug: The decisions of States as to how they organise their removals is complex, of course. One element definitely is in the whole of the asylum system, to make sure that your standards are not much, much higher than those of your neighbour, to ensure somehow that people do not just try to come to your country because you have the highest standards. That is always an argument for States in Europe. Of course, there are also other considerations. As has been pointed out, the recognition rates are quite diverse in Europe, so it is not the only consideration. There is a lot of co-operation and consultation among EU Member States in the negotiation process, so there is also a tendency once negotiations start to make sure that national standards are met. Unfortunately, we have seen the tendency in the harmonisation process which states that the objective of the harmonisation negotiations is not so much to establish a European system which makes sense and which is in line with the national standards but to ensure that the outcome of the harmonisation process is in line with existing national standards. That is something which sometimes was an impediment to adopting higher standards in the Directives.

Q201 Lord Marlesford: This very difficult question of differing views on the safety of a State to be returned to; how do you feel that can be reconciled?

Ms Klug: As you know, the UNHCR tries to issue return advice, so to speak, on countries where we have a greater number of asylum-seekers, so we are asked by States for our advice. We would hope, of course, that facilitates the decision process of States as regards the situation in the country of origin.

Q202 Lord Marlesford: What I am really getting at is, in the context of a possible EU Directive, at the moment States make their own decision as to whether they regard a third country as safe. I can see you have a view on a particular country, but how do you suggest that individual Member States of the EU should come to a conclusion as to whether or not the country is safe to send somebody back to?

Ms Klug: That is a question of practical co-operation, and for us country of origin information and the exchange of country of origin information, the building up of a database of reliable country of origin information accessible to all Member States, with the element that could lead to a more harmonised decision practice of European Member States, and evaluation as to whether you can return somebody to a certain country, because we see that the country of origin information in the different Member States is quite diverse. Some Member States have extensive databases, whereas other Member States lack really basic information on countries of origin. As you know, we have a database, Refworld, on some key countries but that is not sufficient. We would like to work together with the EU to see how we can improve access to country of origin information, reliable country of origin information, to make sure that all the Member States have access to the same information, that information is shared and that the assessment of the information, because it is not only the information, it is also the decision on how you assess the information available to you, there is already EURASIL where there is really an open and frank dialogue among Member States as well as organisations working in the area on how to assess the country of origin information available.

Q203 Chairman: Can I ask, and I think perhaps this is particularly for you, what sort of dialogue you have already with the Commission? Have you fed your reservations about the Directive direct to the Commission?

Ms Klug: Yes, we have. I have to say, we have excellent working relationships with the different EU organs, not only with the Commission but also with the Council as well as with the Parliament, and we have just started establishing a relationship with the Court. When the Commission is drafting, before it issues a draft, it is consulting with Member States as well as with selected organisations and from the start

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we were always among those that were consulted in the drafting process.

Chairman: That is very encouraging.

Q204 Lord Avebury: We have a separate question on quality of country information so maybe I could ask you, it seems that we could do this without the Directive, does it not? The co-operation and alignment of the country information between one country and another is such a commonsense matter and presumably would allow some countries to reduce the amount of money that they spent on scanning the literature and accumulating the references. Would you not agree that these are largely scissors and paste jobs? If you look at the UK's country information, what they do is collect together quotes from the US State Department, Human Rights Watch, Amnesty International, and string them all together without any covering observations of their own. Once that job has been done it should be suitable for use in any country of Europe, and there is no point in everybody else repeating it; would you not agree?

Ms Klug: I agree with you that you do not need a Returns Directive to harmonise and to co-operate better on country of origin information. Although we would think, not in the context of the Returns Directive, that some guidelines on how to draft country of origin information and how to compose country of origin information, what information do you need, how do you do your assessment, would be useful to try to establish, as we have suggested, such a common country of origin information database. Not a Directive but some guidance and guidelines, how to bring together different information and what sources need to be consulted and what elements need to be covered in the assessment; we would think that could be quite useful.

Ms Kelley: On that point, the Refugee Council is very interested in exploring the idea of an independent body to provide country information for Member States. Our view, based on our participation in the Advisory Panel on Country Information, is that an independent body would be more robust and enable better harmonisation and protection across the EU, as well as offering opportunities to drive down costs of providing accurate country information.

Q205 Lord Marlesford: It is a very interesting idea and I can see that it is undesirable to have different databases where there is an adequacy for one database. I do not know whether, in the case of Sweden and the UK vis-à-vis Iraq, the problem was that they had a different database where they received new things we did not have, or what, but ultimately, whatever the database, somebody has got to make the decision as to whether or not a country is a safe

country to send somebody back to. Who do you think should make that decision?

Ms Kelley: In our view, we would prefer to see country information prepared by an independent body to agreed criteria. Inevitably then there would be a political decision for Member States about their perception of that independently-provided data. At the moment, the differences you see across States do not appear to be related to different data sets, they appear to be related to that political decision-making process. From our perspective, a first step would be to make sure that country information is robust, and some analytical framework that is shared, so there is common ground in terms of assessment of safety, but inevitably there will be a political decision made by individual States.

Q206 Lord Marlesford: Ultimately, it will have to be left to the States?

Ms Kelley: Yes.

Q207 Lord Corbett of Castle Vale: Would the independent body perhaps be the UNHCR? What is an independent body really is what I am asking?

Ms Kelley: Without wanting to volunteer colleagues for extra work, it would need to be a similar body. It is not necessarily a matter for this Directive but we think it is an issue that should be explored, in terms of building better practice in developing country information.

Q208 Lord Dubs: May I go back to a point the Refugee Council made about Iraq. You said there should not be any returns to Iraq, I think that is more or less what your position is. How would you respond to the argument that is true for some parts of Iraq, but if you take the Kurdish part of Iraq that is reasonably safe for people to return to; how do you respond to that one?

Ms Juma: I think we are not convinced that there is sufficient stability and security in the northern areas of Iraq. There are numerous examples of suicide bombings and other dangerous activities that would put people's lives at risk. It also would depend on the individual. There may be some people who are incredibly well-connected and their safety could be assured, but to designate these areas as safe for general returns we think is absolutely unacceptable. It is also essential that everybody can access adequate, high quality legal advice, and in the case of the forcible removals of the Iraqis to northern Iraq in November that was not the case. Indeed, the Home Office was ordered to bring back one particular individual who had not had an opportunity to consult a lawyer and was removed unlawfully. We think that it needs to be on a case-by-case basis, but at the moment, given the security conditions, we do

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not believe that it is appropriate. Also we think what is the rush? Why does the Government need to rush ahead and do it now? Can we not take a step back, wait until we can be assured of the safety of those who are being returned before commencing such drastic action, with which other countries do not agree.

Q209 Lord Avebury: In the meanwhile, they would have to exist on thin air here, would they not?

Ms Juma: We think that there should be support provided until the point of removal. The fact that we have tens of thousands of destitute Iraqis in this country who are not allowed to work, nor are they entitled to support unless they opt to return voluntarily, we find unacceptable; support and temporary renewable status are required.

Q210 Earl of Listowel: There is considerable concern about monitoring the safety of those who do return. Should that be part of the Directive or should that be part of any institution set up to provide the country information that you are describing? Do you have a view?

Ms Klug: I think that is a very interesting point and we have made that point in our statement, that there should be independent monitoring of the returns process. Indeed, Austria has such a monitoring system and, from what I read and the information that we have on that system, it seems to work quite well. Apparently they have fewer problems with forced returns because they do have this monitoring system in place and we would recommend that such a monitoring system be established in other Member States as well.

Q211 Lord Dubs: We may partly have touched on this, but some aspects of the Directive are mandatory and would you agree that some of them may be too stringent and would aggravate the position of returnees and it would be better if they were not mandatory?

Ms Klug: I think you have to make a distinction between the mandatory nature of provision and the possibility to leave room for discretions. For us, the mandatory nature of provision is necessary to bring the harmonisation process forward. We would put more emphasis on the need to have room for discretion, for the authorities to make assessments in the individual cases and to come to a correct decision in the individual case. For us it is not so much the mandatory or non-mandatory nature of the provision which gives rise to concerns, but the fact that most of the provisions here in the draft Directive do not foresee sufficient discretion for the authorities really to take individual circumstances of the specific case at hand into account.

Ms Juma: We agree with the Home Office's position on this, that there must be sufficient flexibility to allow for national governments to provide status either to individuals or to groups and to decide not to return them. If you take the recent family ILR exercise that granted status to families with children who had been in the country for a long period of time, we believe that was quite right because it recognised that these children had been here for several years and had integrated. We would not like to see a mandatory return for groups such as that. Also, in relation to the mandatory four-week upper limit for people to be allowed to choose to go of their own accord, as opposed to being forcibly removed, we are not happy with four weeks as an upper limit because some Member States allow greater time for individuals to prepare their belongings, and so on.

Q212 Lord Corbett of Castle Vale: Ms Klug, I wonder if you could clear something up for me. We had a discussion earlier, just a few minutes ago, about the need to monitor what happens to people who are returned, touching on which countries are safe. You also argue here, on page two, paragraph two, what you call "the sustainability of returns, which States are urged to promote through the provision of concrete support to voluntary returnees in line with good practice." Okay, I understand that. However, on page five, "Confidentiality" you say in terms: "information relating to an asylum application is not shared with the individual's country of origin." How do you square all that?

Ms Klug: I think the principle of confidentiality is key for safeguarding the integrity of the asylum system, because if people cannot be assured that what they have said and the information they have given in the asylum process will be kept confidential they may not come forward with all the details of the individual case. We have had cases where such information was shared with the country of origin—

Q213 Lord Corbett of Castle Vale: If I may just interrupt you, you have cleared it up now; it was that bit, I thought it was the whole thing. You were going to say a word about the fact they had applied and were refused?

Ms Klug: That depends on the case and the country at hand. It may already be that the fact that somebody has applied for asylum may put a person at risk, as this one case which colleagues from the Refugee Council have mentioned showed, but that is not an overall feature. I think here we have to be a little bit flexible. I think the co-operation and trying to ensure that each one is sustainable does not need to encompass information as to why the person is returning. It is just necessary that the country where the person is staying and the country the person is

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returned to get into a dialogue, to try to ensure that once a person is returned the person is accepted on the territory, and try to see whether the return of the person can be supported by other means.

Q214 Lord Corbett of Castle Vale: Thank you very much for that. Both your organisations oppose non-voluntary return. How on earth does anybody operate any kind of fair and reasonable asylum policy that does not have a stop on the end of it somewhere? We can argue about the length of the process and the detail of it; at the end of the day, Member States have got the right to say “You’ve made the application, we’ve turned it down, you’ve appealed, that’s been rejected,” when it is safe to do so and there are no overriding humanitarian or compassionate arguments. At the end of the day, in many cases, all that will be done perfectly properly: bang. You are saying that, in that case, you say, “Please go home” and just leave it, do they go or not; it is not logical, is it?

Ms Juma: I would like to make it clear that the Refugee Council does not oppose non-voluntary returns. What we oppose is the forced return of people who have protection needs, and I think we would not be giving evidence to this Committee if we did not have concerns that there are people who are forcibly removed who should not be because they are in need of international protection. If people do not have protection needs, have not been living in this country for years, are not well integrated, do not have other compelling humanitarian or compassionate reasons to stay, we do not oppose their return.

Q215 Lord Corbett of Castle Vale: I am sorry; we have misunderstood the memo. I am sorry about that.

Ms Klug: I think that needs clarification. I can subscribe fully to what the Refugee Council said. At UNHCR also, we are not opposed in principle to forcible returns.

Lord Corbett of Castle Vale: Thank you for clearing that up.

Q216 Lord Avebury: At what stage then do you think that compulsory returns are justifiable? You say that what we have at present is a system where some people get returned when they still have claims, and everybody knows about individual cases where somebody has found solicitors, the circumstances have not allowed them to present their claim properly and yet, technically, they do reach the end of the process and they are liable to be sent back. In any large-scale system are you not bound to get a few of those cases, where you have got 20,000, 30,000 people coming through the system every year, where you

cannot guarantee that every single one will be dealt with impeccably by the appellate authorities?

Ms Klug: Yes, you are right, there is always a certain danger of wrong decisions, but this danger needs to be minimised, that is the first point, and therefore we very much welcome the quality initiative in the UK. We have promoted it, and we have really spread the information about that initiative in other EU countries to try to ensure that decisions are done in a fair and effective procedure to minimise the risk of wrong decisions. That is the first point. I have to say, with regard to this Returns Directive, that there are certain cases which do fall under the Directive although those persons continue to have protection needs. For example, that is the case of persons whose asylum application is rejected not on the merits but because another EU Member State is responsible under the Dublin Regulation, or because of the application of the safe third country principles. These persons continue to be asylum-seekers so they are in a very specific situation, and we find it necessary to make sure that specific safeguards are in place for the return of those persons to a third country, not to their country of origin.

Ms Kelley: From the Refugee Council’s perspective, firstly we are dealing with a system in which decision-making is operating at a level very much lower than just a few cases being decided wrongly. I believe our current overturn at appeal is 20 per cent, and given the numbers of our clients who have to represent themselves at appeal and who have no legal advice, I think that is a salutary thing to bear in mind in the context of returns. We are hopeful that the new asylum model will be a vehicle for driving up standards, but as it is we are fearful that there are many people with protection needs liable to return. In terms of your question, at what point might people be returned or removed, I think particularly now, where we have time-limited status, it is important that there is some consideration of the nature of the group we are addressing. If someone has been in the UK for only two weeks for a fast-track process, the length of time we ought to give them to prepare for return might be comparatively short. If someone has been a Convention refugee and on review after five years it is held there are no longer protection needs, that person may be employed, is likely to have a mortgage; the winding up of their affairs and preparing for return will take much longer. We think timescales need to reflect the needs of the specific groups or individuals concerned. Ultimately, we accept that in some cases the UK will need to remove people forcibly, and we would urge that is done in line with key international rights standards and in a way which minimises distress to the people concerned.

Lord Corbett of Castle Vale: We were assured by the IND last week that there is flexibility on that period of return.

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Q217 Viscount Ullswater: Really this deals with the mandatory nature of what we have just been discussing, this voluntary period and the Directive talking about four weeks. I believe in your evidence, from the Refugee Council, you talk about that as being a minimum period and in fact you would like to see no maximum period put down in the Directive. I do not know whether you would like to comment on that? Some organisations, perhaps not your two organisations, favour not imposing any time limit on the period for voluntary departure. Could this not lead to widespread abuse, undermining any effective return policy? I think you have both subscribed to the fact that there does need to be a returns policy, so I wonder whether you would like to comment?

Ms Juma: Our concern about the Directive is that it conflates two different categories under the term “voluntary return”. We think actually there are two distinct categories that need to be treated and considered separately. The first is voluntary return and we believe that the term “voluntary” can be applied only to situations where an individual has a real choice to make, that choice being to remain in the country of asylum or to return to the country of origin on a voluntary basis. No pressure of any kind can be involved in a voluntary return, in the terms that we understand voluntary return. We employ a separate term, “mandatory return”, to describe situations whereby a person has no legal basis for remaining in the country and consents to return to the country of origin instead of remaining illegally or instead of being forcibly removed. We would draw that distinction. When it comes to voluntary return, as we understand it, we do not believe there can be any time limit on it because it relates to people with status making a well-informed, carefully considered decision about whether to go home voluntarily. With mandatory return we can see that there will be situations where a time limit is necessary. Again, as my colleague has said, there needs to be flexibility. For somebody who has been fast-tracked, the time that is required is likely to be relatively short, but if you are talking about selling a property or winding up a mortgage, four weeks is certainly insufficient. Some people who are complying with removal are taking steps to return to their country of origin; but it may take them much longer than four weeks to get a travel document to return. We believe that this Directive would penalise people in those sorts of situations.

Q218 Viscount Ullswater: Would you like to comment on assisting people to make a voluntary return by giving them financial assistance, upping from £1,000 now to £3,000 for this six-month period, an additional subsidy for returning home?

Ms Juma: We think that for some people that is going to be an attractive option and that is going to be something which is going to enable them to return to their country of origin and to reintegrate and to have a sustainable return. Certainly we welcome it, in that it will assist some people. However, what we do not like is the use of such incentives and methods to coerce people to go home and then describe it as voluntary when actually there is no real element of choice involved. We do agree that for some people the enhanced financial assistance certainly is going to be very welcome.

Q219 Chairman: Do either of you know of any other country that is following this example?

Ms Klug: I have worked in Germany and I know that Germany provides some lump sums to some returnees, not overall, and I think they are much lower than what you provide for them, but there are other countries. Financial incentives are definitely one methodology to try to encourage people to return, but for us it is more important that people are well informed, first about exactly the situation in the countries where they are staying, because many people throughout the whole process do not really understand what is going on. That experience we have had time and again, that, because they have been wrongly advised, or whatever, people do not really understand that they have no possibility of staying in the countries, no legal possibilities of staying in the countries. So proper information as to why there are no possibilities for a person to stay on, as well as information on the situation in the country of origin. This is all the more important for persons who either had protection needs that cease to exist or who come from a country in transition, like, for example, Kosovo, where UNHCR has been involved, together with other organisations, to provide detailed information on what is going on in the country of origin, on the areas to which people can return without any danger and the areas, as regards groups, where it is more difficult to return. We have seen that financial incentives, a lump sum of money, may not always be the best solution. Sometimes it is good to help people to start something new in their country of origin and to support the local community to which people are returning to make their return sustainable. We have a lot of experience in the context of repatriation of refugees, so that is where we come from, and it is on this information that my suggestions are based.

Q220 Viscount Ullswater: I think it is useful to try to keep the discussion about one particular area, while we are dealing with returns, particularly the voluntary returns. At the end of the day, when a removal order has been issued and the Government

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feel that people are going to then abscond, the Government believe that actually a fairly long period of detention, even in excess of six months, can sometimes be justified, especially if individuals are frustrating the removal attempts. What are your views on this particular aspect?

Ms Klug: We would like to point out that the right to liberty, the right not to be arbitrarily detained, is a key human right which is enshrined in many international Treaties and also in the regional European Convention of Human Rights Article 5, and there are a lot of requirements that need to be met so that their detention order is in line with those requirements. It needs to be lawful, to have the purpose and be proportionate. For us, it is really important to underline, time and again, these essential human rights, which also applies to foreigners, it is not restricted to nationals. While detention may be necessary in some cases, it needs this requirement and there must be due diligence in the assessment as to whether indeed detention is necessary in the individual case and it should not be inflicted upon a person just because of administrative convenience. That is our position at UNHCR, principally that asylum-seekers should not be detained; really that is our key position. If somebody applies for asylum while in deportation detention, the person should be released if possible, or at least it should be ensured that the person has access to the asylum procedure. Furthermore, there must be exceptions for children and vulnerable groups, as regards the detention. Indeed, if detention is necessary, it should be for a very short period of time, it should be clearly restricted in time, and there must be sufficient safeguards and special control mechanisms to make sure that those requirements are met throughout the detention process.

Q221 Lord Avebury: The witnesses that we had last week agreed that with one-stop appeals and better agreements on documentation with third countries the necessity for long periods of detention would be diminished, if not entirely eliminated. Is this a view that you would share? Do you think, therefore, that European States should try to get together on making agreements with third countries, particularly the Chinese, with whom, I understand, there have been difficulties on documentation in the past, so that there is a uniform procedure throughout Europe for obtaining documentation in the case of these nationals who have reached the end of the process and are simply awaiting those travel documents in order to be removed?

Ms Klug: Yes, indeed. As I have said before, co-operation with the country to which the person is returned is a key component, and of course the better the co-operation is between the countries the easier

the return can be proceeded with. Of course, documentation is very often a problem and it would be good if countries could try to co-operate more effectively to ensure that persons are properly documented. In some cases, UNHCR may also be offering its good offices to try to negotiate that the return of persons not in need of international protection can indeed take place.

Ms Kelley: On the question of return, we agree with our colleagues that detention violates a basic human right. Our view is that currently the UK Government is using detention for the purposes of administrative convenience and in fact has stated, through the five-year plan, that it regards detention as a preferred option for processing claims, which falls very much short of something that is both necessary and proportionate. It is also our view that detention is largely unnecessary. There are some evaluated programmes, such as the Assisted Appearance Program from New York and the Hotham Mission programme in Australia, where there is good evidence that supported casework with families leads in some cases to very high levels of compliance with removal decisions. Hotham Mission, which is now being incorporated into the Australian Government's version of the new asylum model, which was evaluated in 2003, dealt with 111 cases, of which 43 people got status, 57 people were refused and left, and nobody at all absconded. Our perspective is that the UK Government should make a commitment to community alternatives and we do not accept that there is a need to detain people at the kind of levels that we see currently. Amnesty estimates 25,000 people detained at some point last year; this is clearly, in our view, a very long way from something that is necessary and proportionate.

Q222 Earl of Listowel: You referred to the experience in France, of 32 days maximum. Do you have more information on that? How do they get around the problem of perhaps people not co-operating in order to be able to achieve release?

Ms Kelley: I cannot speak specifically to the experience of France. The information that we have suggests that one of the things that creates a risk of absconding is precisely the withdrawal of support that the UK currently enforces at point of decision. One of the things that happens is that people cannot be removed easily because the Home Office does not know where they are living, because the Home Office has withdrawn their accommodation. The community support option, where you retain contact with people, means that absconding is a vastly lower risk. I think that is the case in France, but I do not have detailed information on that country.

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Ms Klug: I do not know the situation in France sufficiently well really to respond to your question. We have commissioned a study on alternatives to detention from an independent consultant, which will come out hopefully in the coming weeks, and that may contribute to this debate so I will share that with you.

Q223 Chairman: It will be very helpful if you are prepared to send it to us?

Ms Klug: Yes, we will.

Q224 Lord Corbett of Castle Vale: My Lord Chairman, can I ask the Refugee Council to let us have a note on the Hotham Mission that you mentioned?

Ms Kelley: Absolutely; I am happy to provide that.

Q225 Lord Avebury: Will the study on alternatives to detention examine the risks to mental health and self-harm of long periods of detention? Do you have any comparative figures between European countries on the number of people who self-harm or commit suicide, as, for example, in the case of the young person who committed suicide in Harmondsworth last Thursday, and the attempted suicide of yet another person the following day, coming on top of, as you will remember, a suicide which led to serious disturbances in Harmondsworth only 18 months ago? Are these symptoms of a system which is in failure, which should be compared with other European countries to see whether our experience, as one assumes it must be, is very much less favourable than theirs, because we do not hear about these events in France, as we have just been discussing?

Ms Klug: At UNHCR, unfortunately we do not have an overview about detention conditions in general. Detention relates just to persons under our mandate under specific circumstances, so we do not have an overall examination about detention conditions of illegal migrants in Europe. I would like to draw your attention to the CPT, the Committee for the Prevention of Torture, which did a lot of work on detention conditions in Europe and which also came up with a lot of recommendations as to what detention facilities should look like and what would be the best procedure and what should be the safeguards for the detention of persons. That may be helpful for your consideration.

Lord Avebury: Thank you. That would be very useful.

Chairman: Thank you very much.

Q226 Earl of Caithness: I would like to turn to Article 9, and in the Refugee Council's evidence you seem to object to a re-entry ban in principle. Surely if you are going to have an EU policy on returns you ought to have an EU-wide re-entry ban and, bearing

in mind the Schengen lack of borders, would not any return policy be ineffective without a re-entry ban EU-wide?

Ms Juma: We are entirely opposed to the introduction of an EU-wide re-entry ban because we do not believe that, in practice, it can be compatible with the fundamental right to seek and enjoy asylum from persecution. Our position is that the fact that an individual has been removed from the EU has absolutely no bearing on whether they will have protection needs in the future and need to flee their country of origin. The AA case relating to Zimbabwe, from last October, showed that the very fact of being forcibly removed can give rise to a real risk of persecution in itself. If you then impose an absolute EU-wide re-entry ban it is going to be very difficult for people to reach safety. It is difficult enough as it is, but we think that an EU-wide entry ban is just not compatible with the right to asylum. We think also that where returns themselves are not safe and sustainable, that can give rise to a need to flee. So if we have safe and sustainable returns, there should be no need for an EU-wide entry ban, if the purpose is to prevent people getting into the EU to claim asylum.

Q227 Earl of Caithness: Do you think that should apply to every single case, or should there be exceptions where there is a justifiable terrorism risk of somebody, for instance; is not that where an EU ban would not be a sensible thing to do?

Ms Juma: We are concerned with people who have applied for asylum at some point in the process, not any group beyond that. Our position is that it is incredibly difficult to get into the EU as it is, in terms of getting a visa, having sufficient money to be able to pay to get in and you see people who are dying trying to cross the Mediterranean. It is not an easy thing to get into the EU to claim asylum and we do not have thousands of people queued up who have been returned from the EU, anxious to get back in again, particularly if they have had experience of living in enforced destitution when they were here. I do not think that it is a proportionate measure and I think that border controls are sufficiently stringent as they are to provide security.

Q228 Earl of Caithness: The UNHCR seem to take certainly a more relaxed view than you do, they do not seem to oppose it in principle, they want to tighten it up and add some more conditions. Could you go a bit more into what conditions you think are needed to make this work satisfactorily?

Ms Klug: Yes, indeed. We would be opposed in principle to any re-entry ban because we do not think this is necessary to safeguard the protection needs of persons under our mandate. Again, there we have a

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provision that does not make sufficient distinction, so for us it is important that the decision on the re-entry ban is that there is an individual decision which takes the individual case into account, and the most important thing for us is that the re-entry ban does not impede a person from seeking asylum. Once a person tries to re-enter EU territory and has been forcefully removed before, there must be the possibility to re-enter the EU if the person can show he, or she, has protection needs. For that, we suggest there must be a procedure for removal of the re-entry ban and that it must also be possible to apply that procedure at border entry points. Then there is another point, that we do not think a re-entry ban should be imposed on persons whose asylum application has not been rejected on substance but only on formal grounds, because if then they have been deported to another Member State, or a safe third country, for us that would be a different situation as somebody who has no protection needs and whose asylum application has indeed been fully examined in the Member State.

Q229 Earl of Listowel: The rights of children, as a particularly vulnerable group, are of special concern to this Committee. What do you regard as the main defects of the proposed Directive as regards children?
Ms Klug: We welcome that the Directive makes mention of the “best interests of the child” principle but, in our view, how it applies to different stages of the removal procedure is not sufficiently elaborated. We would recommend that there should be specific provisions which make sure that the “best interests of the child” is taken into account when making the removal decision, when returning the person. Especially there should be, as I have said before, an exception as regards detention for children. There we think, again, a lot more work needs to be done, that the “best interests of the child” principle is indeed taken into consideration; furthermore, the language of the Directive does not follow the language of the Convention on the Rights of the Child, where the “best interest” determination is the primary consideration and not just one consideration. We would like to see also, of course, the language brought in line with the Convention on the Rights of the Child.

Ms Kelley: The Refugee Council has specific concerns about some of the weaknesses in Article 5 and Article 8 on postponement, as regards children. In commenting, we would like to point out that we are drawing on our experience of working with unaccompanied children through our Children’s Panel and children and families, particularly those living in destitution as a consequence of Section 9 of the 2004 Act. In terms of Article 5, we feel that the Article should contain an absolute prohibition on

families being broken up as a consequence of return, which can happen in a range of circumstances, including dual-national marriages and children of those marriages, or primary care givers other than parents being considered family for the purposes of the Directive. If someone has been raised by their aunt, returning them to their mother in their country of origin would be a break-up of the family, so we feel there should be a complete prohibition on breaking up families as a consequence of return. Also we feel that there should be a guarantee that basic support, health and welfare services should remain available to children and their families until point of return. We are completely opposed to Section 9. We have worked with families who have been involved in that pilot and we have seen enormous distress and terrible destitution caused as a result, so we feel that the Directive should make it clear that children and families should be supported up until point of return. We think that there needs to be very much more clarity around child protection safeguards, in terms of manner of removal, ensuring that the manner of removal or return is both UNCRC and Children Act compliant. We are aware of children being removed at night, very early in the morning, literally taken from their beds, taken from classrooms; we think it should be absolutely clear that the manner of the removal should be compliant with those standards. We agree with our colleagues that the child’s best interests needs to be assessed both professionally and independently and that the best interests of the child should be the primary consideration. Numerous public statements from the UK Government have indicated that their view of best interests of children lies very far from that of the mainstream social work profession. There is a standing assumption that return to country of origin is always in the best interests of the child, or almost always in the best interests of the child, which does not take into account child protection issues, trafficking issues, or the particular needs of individual children. Finally, we think there is a clear need for the Directive to stipulate additional safeguards for unaccompanied children, particularly in the form of a legal guardian, and we have referred the Committee to the Separated Children in Europe guidelines on guardianship for unaccompanied minors in that matter. As regards postponement, we think that there should be a pre-removal risk assessment that looks at whether an enforced return can be achieved humanely and with regard to the fundamental rights and dignity of children, as well as the primary asylum applicant. Our view is that one of the reasons that returns of families are so complex and so difficult to achieve is that assessments are based on the primary applicant, typically the father, and do not take into account the needs and circumstances of the children. For

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instance, someone with a five year old disabled child is very likely to be reticent about return unless they can be assured that child's needs will be met on return, so we would like a pre-removal risk assessment that looks at the whole family. We feel also there needs to be more clarity in the Directive in terms of conditions to which the minor will be returned, as the current language puts it; we feel it needs to be clear that this refers to ongoing care arrangements and not simply that there is an appropriate person at the airport to receive the child. We have got particular concerns with regard to this matter, given the UK Government's current exploration of returns programmes to Albania and to Vietnam, which are both major send countries for trafficking of children. In terms of removals, we believe there should be a complete prohibition on the use of force with minors and that restraints should be used only where it is necessary to prevent self-harm or harm to others, we do not regard force as appropriate in the context of removals of children, and, as with our colleagues, a complete prohibition on the detention of children. It is very clear, from all available evidence, that the impacts on the mental health and health of children in detention, as well as their access to education and social opportunities, are so wide-ranging as to make it completely unacceptable.

Q230 Chairman: We took evidence last week from the National Asylum Support Service. Have you got any additional comments you want to make on arrangements—I am sorry to make this a rather British question—for supporting asylum-seekers?

Ms Kelley: I think our main comment, in the context of return, is that we are completely opposed to the withdrawal of support as a mechanism for, in the Government's language, "encouraging return". Our view is that this has created immense suffering and hardship and is not conducive either to the good standing of our asylum policy, to the well-being of the people involved, or indeed to uptake of returns. We would like to see both support through NASS and health entitlements being available to people to the point of return.

Q231 Lord Corbett of Castle Vale: You say, very reasonably, that families should not be broken up, but there are going to be circumstances, are there not, where right at the end of the process, and somebody has been detained because they would not return voluntarily, if you are saying do not break up families do you then go on to say and where there are children in the family therefore the parents cannot be detained? We are talking about somebody who has really frustrated attempts to remove them after all the processes have been gone through properly and, in a

sense, using the children and then disappearing. Those are hard decisions. I understand that it is a hideous position to be in, I acknowledge that.

Ms Kelley: Our view is that children should not be detained with their families or as unaccompanied minors. From the work that we do with families at the end of the process, we believe that families with children are at lower abscondence risk than other groups, as a result of the fact that their children tend to be in school, tend to be more integrated into mainstream contexts. I refer your Lordship back to our earlier answer in the context of supported returns; it is our belief that working with people at the end of the process in itself is a sufficient safeguard against abscondence.

Q232 Lord Avebury: You touched on the question of the Section 9 pilot and you gave certain illustrations from your knowledge of the cases that have occurred; it is going to be a little while, I think, before the Government's own analysis of the Section 9 pilot is produced. If you had any preliminary information you could let us have, it would be very useful?

Ms Kelley: I am happy to give some indication of what has come out of our casework, if that is helpful. I am drawing on a witness statement for a forthcoming judicial review of which the Committee is no doubt aware.

Q233 Lord Avebury: It is based on a very small sample, is it not?

Ms Kelley: Absolutely: 116 families were involved in the pilot and a significant number were removed from the pilot by the Home Office because they had been misallocated to it, as it were. We worked directly with 29 of the families, in Leeds and in London, by which I mean we had ongoing casework contact with those families. Broadly speaking, we found that around three-quarters could not understand, on any level, the process that they were involved in and were incredibly frightened by the process. Many were under the impression that their children might be removed from them at any point. Our view is that prevented them being able to think about the choices they were faced with: trying to think about the possibility of return whilst thinking that at any moment one might be evicted or one's children might be taken away is impossible. We found about a third of the families had outstanding asylum claims, or further representations, so therefore should not have been involved in the pilot. That included cases like a woman who had separated from her husband, had lodged an individual asylum claim but had been allocated to the pilot on the basis of her estranged husband's claim having failed, when hers had not even reached substantive interview point. There were huge problems with access to legal advice and, on the

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basis of those kinds of concerns, we feel that some families with protection needs might be vulnerable to return. There were very wide-ranging physical health needs in the cohort we worked with; over a third had significant health needs, ranging from heart conditions onwards, and in almost all of the families the parents had mental health problems, in some cases quite clearly as a result of involvement in the pilot. We worked with one woman, a single mother, who had a history of post-traumatic stress disorder, depression and anxiety, which had been diagnosed and for which she had received treatment, who became so distressed that she attempted suicide three times, in the belief that she and her children were about to be evicted at any point, and eventually attacked a housing worker. Our understanding is that a limited number of children have been separated from their families, but I refer to the Home Office for accurate figures on this point. Our experience is that a very large number of families have disappeared and we have been unable to contact them.

Q234 Lord Avebury: Can I interrupt you there, because earlier on you said that, with families, there is a very low risk of abscondence and yet we understand that in the pilot 35 families disappeared off the map. Is not there a contradiction between those two?

Ms Kelley: Not really. I think families are a low risk of abscondence if you are not starving them, making them homeless and saying "We're going to take your children away from you." We believe that where people have access to support and accommodation and their children can stay in school they are going to stay where they are. Where people are under the impression that at any moment they might be evicted, that their support will be withdrawn and that their children might be taken from them, I think the abscondence risk is correspondingly high. I think the two circumstances are very different.

Q235 Lord Marlesford: Really this is just a follow-up, not to talk about children; what is the age at which people cease to be a child?

Ms Kelley: For the purposes of Section 9, as with UK law in general, it is 18.

Q236 Lord Corbett of Castle Vale: Can you tell us a bit about the nationalities' language problems and their ability to understand English, or not?

Ms Kelley: The main nationalities involved in the Section 9 pilot are as you would expect, given the cohort of asylum applications overall. There is a great number of Zimbabweans in there, for instance, and Iraqis, etc. From our casework, you will be aware that the form of communication used by the Home Office was letters written in English, and it is our

belief that, generally speaking, families could not understand the letters; in fact, they were quite complex even for a native speaker of English. One of the things that we did with the families we worked with was translate the letters into their community languages. Some families were at stage three of the process and still had not understood what was happening as a result of the correspondence being conducted exclusively in English.

Q237 Chairman: Ms Klug, have you got any comments you want to add to this?

Ms Klug: I do not have any comments but I would like to ask my colleague, who is working in the UK.

Ms Parlevliet: No. I think, at this point in time, we do not really have comments on Section 9, because UNHCR has not really been involved in Section 9 matters. It concerns mainly people who are not of concern to UNHCR.

Chairman: Thank you very much.

Q238 Earl of Listowel: May I put just one supplementary on this. I would be interested in receiving information, I think the Committee would find it helpful perhaps to receive information, on where this practice has been implemented elsewhere in the European Union and what the impact has been in terms of abscondence or other impacts on families. Perhaps you would be good enough to send us a note on that, if that is within your capacity; then to move on to another matter. In its evidence on Article 15, UNHCR refers to "inappropriate conditions of detention" for families and children in many Member States. Could you give us examples of this, please?

Ms Klug: As I have said before, we do not have an overview. We did not commission a study on detention conditions in the whole of Europe because detention conditions are relevant for us only when it concerns persons of concern to us. I can give you only some anecdotal evidence, so to speak, because we do not really have an overview on that. One thing that we see in many European countries is that children are detained, it is not only in the UK, in many European countries they are either detained with their families or with family members, or also when they are supported separated children. There are only a few laws, in a few countries, which forbid the detention of children. There is very rarely special treatment for families in detention, which also is of concern to us, and they may be detained for longer periods of time, and there are very rarely specific provisions for other vulnerable groups, such as women or persons who suffer from traumatic experiences. I cannot really go into more detail as regards detention conditions because we do not monitor it throughout Europe.

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Q239 Lord Dubs: I wonder if I could just say something I should have said earlier. I should have declared an interest, because I used to work for the Refugee Council, and I apologise that I did not say so at the appropriate time earlier. If I could turn to the question of judicial appeals, do you think that, given that potentially the numbers will be quite large, the possibility of a full judicial appeal against any removal decision actually could be quite complicated and put a pretty heavy burden on courts and the taxpayer? What do you think about that?

Ms Klug: For us, again, quality first instance decisions in asylum claims are key, to make sure that removal decisions do not violate the *non-refoulement* principle. Even if we do have quality first instance decisions, situations in country of origin may change, so there is the necessity at any stage of the removal procedure to take such changes into account. Therefore, we think that the judicial remedy is a very important safeguard to ensure that such reasons are duly taken into account, and indeed the risk that it may be abused and may be very cost-intensive will be reduced by quality first instance decisions. If then a person is just reiterating what has already been examined in the asylum procedure, the judicial remedies would be very short and would not be very cost-intensive, in our view. We have seen that judicial remedies are a very important safeguard really to make sure that such protection considerations are duly examined, and sometimes also the fact that the administration knows that judicial remedies are available to the people will contribute to the quality of the decision-making process.

Q240 Lord Avebury: Intrinsically, you are not opposed to the idea of a single appeal, if it covered both removal and the substantive application?

Ms Klug: That depends; it depends as to how much time you have between a decision on the asylum application and the removal. If there is a substantial time period between the decision on the asylum application and effectual removal, there must be the possibility to take a new situation or new evidence into account in the removal process. There must be the possibility to refer the case back to the asylum procedure, if indeed there is a change. If you combine those decisions but then a substantial period lapses before the removal is taken out then there may be a risk that such new situations or new evidence will not be taken into account.

Q241 Lord Avebury: That would be up to the authorities of the particular State, would it not? Once you have heard an appeal which covers both the substantive case for asylum and the objection to removal then either the State takes measures to remove that person immediately or he departs under

voluntary arrangements immediately and there should not be any gap at all.

Ms Klug: In practice, there is very often a gap between the decision and the removal of the person.

Q242 Lord Avebury: It is not a necessary gap; it is not intrinsically part of the process, is it?

Ms Klug: No; that is what I said. If there is no gap, yes, both can be examined in one procedure.

Ms Juma: If I could add, for the Refugee Council, that it is precisely judicial oversight that has prevented unsafe removals very recently, in the case of Zimbabweans. We know, from IND's own statistics, that unsafe and unlawful removals do take place with the current system that we have. For example, in the National Audit Office report, it states that in just five months, from January to May 2003, 15 unlawful or improper removals of asylum-seekers were recorded, so we think it is essential that the safeguards are sufficient to get away from the situation we have currently, of people being removed unsafely. It is particularly important when people do not have a right to a full appeal on the substance of their asylum claim in this country. Many people are expected to conduct their appeal from overseas. We have examples of the UK removing people to conduct their appeal from another country and some people have won those appeals; they have demonstrated that they do have severe protection needs and yet they have had to demonstrate that fact from the very country where they are at risk. One other issue is that we come across women who have been the victims of sexual and gender-based violence, who are very reluctant to disclose their experiences, for example, in a fast-track process, where they have just two weeks to get across all information and evidence to support their claim. Sometimes it is only at the point of removal that people disclose information which is fundamental to the consideration of the likelihood of them being safe upon removal. It is a very complex matter but really we need to have sufficient safeguards to ensure safety.

Q243 Baroness Henig: I think maybe some aspects of this have been touched on already, but anyway I will go ahead. You have concerns about the absence of safeguards at borders and transit zones; why is this of particular concern, given that asylum-seekers as such are not all within the scope of the Directive? I take it that this is the view, and I think we have touched on this already, that EU-wide standards developed for asylum-seekers are not, in your view, a sufficient safeguard against unsafe returns? Clearly, that is one of the issues.

Ms Klug: I think there are several points which need to be looked at here. First, as I have already said, asylum-seekers are not, as such, excluded from the

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scope of the Directive, so certain groups of asylum-seekers will fall under this draft Directive as it is currently drafted. First, those that will be removed to safe third countries, the Dublin cases that we talked about earlier, but also persons whose asylum application has been rejected at first instance, who appealed against the decision but whose appeals do not have suspensive effect. As the Refugee Council has pointed out, for us these are asylum-seekers, so they may come under the terms of the Directive as asylum-seekers. That is the first point. The second point is, yes, we are not very satisfied with the standards of the Asylum Procedure Directive, especially as regards border entry points, because the Directive foresees that even the minimum standards of the Directive may not be applied by Member States. There is discretion from Member States to derogate from some basic provisions of the Asylum Procedure Directive at border entry points. On the other hand, we have seen that border entry points are points that are a particularly difficult environment. It is where persons are in a particularly vulnerable situation, because removal to the country of origin may take place immediately after a decision has been taken, so there is a much greater risk involved here than decisions taken in the country where you have better support and it will take a longer period of time until the removal has been carried out. We have seen quite a number of cases where the quality of the decision has been tremendously lower than decisions in the country. Therefore, we are extremely concerned about the fact that the Asylum Procedure Directive, as well as this draft Returns Directive, accepts the possibility of exceptions for these border entry points. We do not see that there is any reason for differentiated treatment of asylum-seekers just because their asylum claim is examined either at the border or in-country.

Q244 Baroness Henig: Thank you; that is very helpful. If I could go on perhaps to ask specifically of UNHCR, generally are you consulted in the development of the EU standards which affect asylum-seekers?

Ms Klug: Yes, we are consulted, I have to say, at all the different levels of the drafting and negotiation process. We are consulted by the Commission in the drafting process. We have the opportunity to issue statements, such as the one that we elaborated on, this draft Returns Directive. We have been invited by the Council, by the SCIFA, to report on our concerns, our proposals, suggestions, with regard to specific Directives. In most Member States, I have to say, we are in dialogue with the authorities, and of course this dialogue also extends to the EU

harmonisation, so that is another channel where we try to make proposals, to make our concerns known to the Member States.

Q245 Lord Marlesford: Overall, would you be in favour of us opting in to the Directive as it is presently, or not?

Ms Klug: I think we have discussed that question before, because it is related to whether harmonisation in Europe is a good thing or not. Although we have been quite disappointed with some of the developments in the past, we were extremely optimistic in the beginning; we still support the harmonisation process. We do not see that there is a way back to national asylum systems and we still think that harmonisation, in principle, is key for Europe. Of course, harmonisation should lead to adequate protection standards in line with international law, of course that goes together, really they are working from international standards, but in principle we are still in favour of harmonisation; therefore we would be in favour of a UK opt-in, provided that the standards of this Directive are in line with international standards. Of course, we hope that the UK Government will take our views on board and will be very strong in the Council to take those positions forward.

Q246 Chairman: I can assure you that this Committee will have taken your views very firmly on board and that when we produce our report we hope the British Government will also take our views into account. We shall be having further evidence, of course, from British ministers at a later stage in this inquiry. Is there anything more you want to say? We have covered the field so adequately, I think, that I rather doubt there is more to say, but is there anything you want to add?

Ms Klug: I just want to thank you for the session. I think we have had the opportunity to touch upon the basic points. You have our statement and, of course, we are always at your disposal. If any question comes up at the next sessions, during the next hearings, we would be very happy to look at any additional question you may have.

Chairman: Thank you all for your contribution, both written contribution and your very full and frank and helpful answers to our questions today. Just to remind you, I think both UNHCR and the Refugee Council, that there are one or two points you have told us you will follow up and I would be very grateful if, when you look at the transcript, you could just check what it is we want from you. With that, may I thank you, all four, very much for coming today. I have found it myself an extremely useful and productive session. Thank you very much.

WEDNESDAY 1 FEBRUARY 2006

Present	Avebury, L Corbett of Castle Vale, L D'Souza, B Dubs, L Henig, B	Listowel, E of Marlesford, L Ullswater, V Wright of Richmond, L (Chairman)
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Memorandum by HM Inspectorate of Prisons

1. This submission focuses only on the detention of third country nationals who may be removed from the United Kingdom. This Inspectorate has the statutory duty to inspect all places of immigration detention in the UK, and also inspects short-term holding facilities and immigration escorts (which will shortly be given statutory form in the current Immigration, Asylum and Nationality Bill). In particular, we focus on the detention of children with their families, one of the most contentious detention issues.

2. Independent inspection of places of detention is an important safeguard. It has revealed a number of systemic weaknesses in immigration removal centres—such as poor suicide and self-harm procedures, the absence of welfare support, lack of access to e-mail and the internet, inappropriate or unsafe searching and segregation procedures, poor health and safety arrangements, insufficient activity. This has led to improvements in individual centres, and general improvements across the detention estate.

3. However, there has not been progress on two of the inspectorate's principal concerns. The first is the absence of competent, independent legal advice. Detainees report high levels of insecurity, in the main related to uncertainty about their cases. It has become increasingly difficult to obtain legal advice, except in the one centre where it is available on-site (Oakington) and which is about to close. At the same time, immigration officers are being withdrawn from centres, so that there is no-one on site who can provide up-to-date information to detainees on the progress of their cases. Information from recent inspections shows the paucity of legal visits. At Haslar and Dungavel there had been fewer than one legal visit a day; at Colnbrook and Dover less than three legal visits a day.

4. This is a significant concern, given that detention in the UK is on the basis of an administrative decision, and for an indefinite period. Detainees need never come before a court, and will only do so if they make applications for bail: for which competent legal advice is evidently necessary. Inspectors have come across numerous cases where it is extremely difficult to establish the reason for detention; as well as examples where the circumstances of the individual case would seem to provide strong arguments against continued detention. This is, however, outwith our statutory responsibility, which excludes taking on individual cases.

5. The second of our major concerns is the detention of children. The Inspectorate believes that the detention of children should be exceptional, and for the shortest possible time. Where it does take place, there must be safeguards, equivalent to those that exist for children in the community. However, increasing numbers of children are detained: a snapshot showed 50 in March 2005 and 75 by September 2005. It is impossible to know the precise number of children detained, or the length of time for which they are detained, as those statistics are not provided. This is a major impediment to transparent monitoring of the use of detention. Nor is it known how many lone children were detained, on the assumption that they were adults, because there was a dispute about their age.

6. Three immigration removal centres currently hold children. Yarl's Wood has 123 family places and is considered appropriate for longer-term detention; Dungavel (50 family places) and Tinsley House (30) are designed for short stays of no more than three days. The family unit at Oakington (150 capacity) is currently not in use. In addition, children and families can be held for up to seven days in short-term holding facilities (STHF).

7. The proposed Directive stresses:

- The need for limited and proportional use of “temporary custody”—ie detention (Preamble, 11).
- The need for the best interests of the child to be a primary consideration, in line with the UN Convention on the Rights of the Child (Preamble, 18).
- The need to take due account of family relationships, duration of stay in the Member State, and the existence of family and social links in the country of origin; as well as the best interests of the child (Article 5).

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- The need for judicial authority to confirm any period of detention longer than 72 hours, reviewed judicially every month, with a maximum time limit of six months (Article 14).

It does not specify what enhanced safeguards should be present for children in the process and conditions of detention, or exempt them from the presumptive re-entry ban. It does envisage that “temporary custody” will be a last resort.

8. The UN Convention on the Rights of the Child (UNCRC) provides that:

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The detention . . . shall be in conformity with the law . . . as a last resort, and for the shortest appropriate period of time . . . Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.” (Article 37).

9. In inspection reports, we have found a lack of a framework of care, and of joint working to protect children. Detention is not necessarily proportionate; the best interests of the child are not necessarily given primacy, either at the time of the decision to detain or during detention; children, as well as their parents, are not guaranteed access to legal advice and the court. Only a minority of detainees make bail applications to an immigration court.

10. First, there is little evidence of considered decision-making, at senior level, when a decision is being made as to whether to detain children and families; in spite of immigration service operational guidance, requiring this. Files examined do not show that an exercise has taken place in which the welfare of the child is balanced against the necessity or proportionality of detention. We have met immigration officers of supervisory grades who did not appear to be aware of the relevant guidance. The process of detention itself can be ill-thought-out and abrupt: at home in the early hours, at school, at an immigration reporting centre; and if they are not detained at home, children can be detained with only the clothes they stand up in.

11. All children will necessarily be affected by detention. But inspectors have come across cases where those effects are so adverse that it is difficult to believe that the child’s interests were even considered when detention was authorised.

N, aged five, had been detained for 10 days with her parents. She had previously been assessed by a psychiatrist as having an “autistic spectrum disorder” which meant that she had difficulties facing even small changes in her routine, which made her confused, anxious and withdrawn. At the time of the inspection, she had not eaten properly for four days.

M, aged 16, had been at his local college since 2001. He was in year 11 at the time of his removal and due to sit his GCSE examinations imminently. Both he and his 13-year-old brother, removed from the school at the same time, had excellent records of school performance, attendance and behaviour. The family had been detained, at two different places, for a month. The college believed that the boy’s education had been seriously affected by his removal at such a critical stage. A model pupil, M’s departure deeply distressed many members of the local community, his friends and teachers.

(Yarl’s Wood HMI Prisons Report 2005, paras 5.47 and 7.10)

12. There is also a lack of information available to centres about the children they hold. The accompanying documentation may only be the detention warrant, with no risk assessment of child or family welfare either when detained or later despatched to the detention centre. There is nothing comparable to the Youth Justice Board’s YJB T(1)V form, to assess a child’s vulnerability and risks within an hour of reception, which provides custodial staff with a basis for continuing assessment and appropriate action.

13. Following detention, there is no continuing assessment, or detailed guidance on how to care for children in IRCs. We found centre staff doing their best, but not always appropriately trained, qualified, supervised or supported. Some centres had attempted to draw up a child protection policy, but based on the traditional abusive family model, without any recognition of the specific safeguarding issues that arise due to the stresses of being in a detained family. Policies have reflected poor understanding of the main cause for concern: that children in detention were failing to thrive. There was a lack of information and understanding about possible troubled histories; about the stresses of transition points; and the stress on family dynamics of detention and risk of imminent removal; which in some cases reversed traditional responsibility roles, with children striving to cope with distressed parents.

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24 child protection “cause for concern” forms had been opened in the previous nine months. Most had been raised because of concerns about the child’s failure to thrive, rather than abuse. There was evidence of feeding and sleeping problems, depression connected with the trauma of removal from habitual surroundings or from the fact of detention. 15 children had stayed in the centre that year for between one and four weeks; the longest stay of a child was 149 days.

(Oakington HMI Prisons report (2004))

14. With the exception of Dungavel, we found limited if any links with the local authority or area child protection committee (these committees are now evolving into local safeguarding children boards). When we visited Yarl’s Wood in February 2005, despite the fact that it was the principal family detention centre and within a few weeks of opening had 40 children on site, no effective links had been made with Bedfordshire social services. Protocols are now beginning to be drawn up.

The protocol concerning initial assessments between the centre and social services had not yet been written and the purpose of the assessment was unclear. IND had not been involved in negotiations with social services about the completion of the initial assessments and had no linked procedures to take this forward. Consequently, the assessments would be taking place in a vacuum and there was no guarantee that children at Oakington would realise any potential benefits. (Oakington HMI Prisons report 2004).

15. We have also repeatedly set out the need for an independent review of the welfare and needs of each detained child, to be carried out as soon as possible after detention, and repeated at regular intervals. This was repeated, and endorsed by all seven Chief Inspectors in the recent second joint report on Safeguarding children, released in July 2005. It called for:

- the appointment of child care specialists to inform detention decisions and welfare considerations in relation to detained children;
- an assessment of welfare needs, including a multi-disciplinary conference convened by the local ACPC if the assessment shows the child to be at risk of significant harm under s.47 of Children Act 1989, and a multi-disciplinary review in any event for any child detained for more than three weeks; and
- effective guidance and procedures, for the welfare of children in IRCs, agreed between IND and ACPCs/LCSBs. Such guidance should include immediate and continuing independent social services assessments, child protection team strategy conferences, education and care plans, in line with the Framework for the Assessment of Children in Need and their families (2000) drawn up at the point of detention, which inform decisions about detention.

16. There is a process for ministerial review of detained children after 28 days. In our view, this is too late; and there is also no evidence that that review is informed by expert independent opinion on the effect of detention on a child: or indeed by the involvement of the child or family. It is proposed that a social worker, seconded from the local social services department, will be placed in Yarl’s Wood from next year. It is understood that the postholder will undertake assessments that can feed into the Ministerial 28-day decision. But it is as yet unclear whether he or she will be required, or able, to make immediate assessments of detained children, and if so whether such assessments will be fed into administrative decisions to maintain detention. Nor is it clear whether this will provide an avenue for independent age assessments of those claiming to be minors, but detained on their own account, and sometimes alone, as adults.

Anne Owers

HM Chief Inspector of Prisons

13 December 2005

Examination of Witnesses

Witnesses: Ms ANNE OWERS, Chief Inspector of Prisons, PROFESSOR AL AYNSLEY-GREEN, Commissioner and PROFESSOR CAROLYN HAMILTON, Senior Legal Adviser, Children's Commission, examined.

Q247 Chairman: Ladies and gentlemen, thank you very much indeed for coming. Chief Inspector, welcome back to this Sub-Committee.

Ms Owers: Thank you.

Q248 Chairman: I think there are a number of us here who remember your last appearance before us. Thank you very much for coming this morning. Professor Aynsley-Green and Professor Hamilton, thank you also for coming. This is, as you know, on the record; there will be a transcript taken of this meeting, a copy of which will be sent to you before it is finalised. Also, the meeting is being recorded for later broadcast on the web. You are all very welcome. Chief Inspector, we are very grateful to you for your written evidence. Professor Aynsley-Green, I think we did not give you time to submit written evidence but may I ask you both (first, perhaps, Chief Inspector) if there is anything you would like to say to start? I know Professor Aynsley-Green would like to make a short statement.

Ms Owers: Mine will be brief given that you have had the written evidence I provided. The written evidence, I think, points to two major concerns around immigration detention. The first, as we say, is the difficulty of getting competent legal advice for detainees, and also I think the increasing difficulty of getting information about their cases now that the immigration officers are largely being withdrawn from the removal centres. The insecurity of people held in detention, who of course have not been through any judicial process is, in our experience, greatly heightened by the fact that they cannot easily get access to competent advice, nor can they get information about the progress of their case, which is of course of overwhelming importance to them. The second issue we raise, which I know Professor Aynsley-Green will be dealing with in some detail, is the detention of children, which has been a particular concern of my Inspectorate and others, both in relation to the way in which those decisions are made and to the safeguards that are in place to provide sufficient protection to children who then are detained. Those are our concerns. I think, overall, we see our inspection as being a way both of improving things, we hope, within removal centres but, also, providing some transparency within a system which has not been very transparent, detention is not subject to automatic judicial oversight.

Professor Aynsley-Green: Thank you, my Lord Chairman. This is the first time I have appeared before your Committee, so I would just like to draw attention to the powers I have, as the first independent Children's Commissioner for England, under the post created under the Children's Act 2004.

My remit is to make sure that the views, the interests and the needs of children are taken seriously. I have wide powers which encompass the ability to enter any premises, to question and to talk with children and young people, as I shall outline shortly. I can research or inquire into anything that affects children's interests, I am obliged to publish reports and report to Parliament. I do have some UK-wide responsibility for non-devolved matters, one of which is asylum and immigration. I must make sure the work of my office is guided by the United Nations Convention on the Rights of the Child, and I am obliged to make sure I consult with children for everything that I do. So I bring to this particular table, I hope, the experiences and the insights of children and what they have told me about their experiences through the process of immigration and asylum. We have eight themes for our work in the first year, one of which is asylum and immigration. I hope you will be pleased to hear that the four UK commissioners have already had two summits with senior staff and we have agreed unanimously that asylum and immigration is something that concerns all of us. We have been to the Home Office together to express our concerns and we have published our first report from my office on Yarl's Wood Immigration Removal Centre. We are concerned about two aspects. The first is concern over the process leading to deportation and to detention as seen through the eyes of the child. The second is the conditions in which children are being kept for that removal. We support the principles of the European Directive, particularly since under that instrument detention can only be through a judicial process, as a matter of last resort and for the shortest possible time. We support the principle that all actions taken should be in the best interests of children and, finally, we are concerned to support the principle of measures being proportionate. If the UK Government has decided not to opt in, we would nevertheless urge that the principles expressed in the Directive should apply to children in the asylum process as we believe that such children are profoundly disadvantaged at the present time.

Q249 Chairman: That is very helpful. Thank you very much. Although we did not give you time to submit written evidence, I think all of us would have read the very interesting article about your visit to the Medical Foundation in January, which reflects many of the things you have said to us. Could we start with a question, please, about statistics? I address this to somewhere in between you both. Do you have an estimate of the overall number of persons detained at any one time and the range of detention times before

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removal? I should say that one Member of this Sub-Committee, Lord Caithness, unfortunately, has not been able to be here today but he has sent me a note to say that when he was a Home Office Minister in the previous Conservative Government he used to have a chart of the prison population completed weekly. He says: "I also knew how many women were being held. So why do we not know how many children are held now as a matter of course?" Which of you would like to answer those questions?

Ms Owers: Perhaps I can start and then Professor Aynsley-Green can come in with further information. I think the problem about statistics on immigration detention is that what you can get, if you ask through Parliament or quarterly through the Immigration and Nationality Directorate's website, is a snapshot of the number of people detained at one moment in time. The last snapshot that was provided by the Immigration and Nationality Directorate was that there were 2,200 people in detention all together, of whom I think around 60 were children. So what we can get are snapshots. What we do not get are regular reports on population. In my capacity as Chief Inspector of Prisons, receive from the Prison Service every week the number of people in prison detention. It happens automatically; it is posted on the Prison Service website. So we do not get regular information about even the numbers at any one time, but what crucially we do not have is two other bits of information:- which is how many people over a year, how many children over a year, were detained in total, and for what lengths of time they were detained. Nor do we have, for each individual detainee that I see when I go into immigration removal centres, anything equivalent to a custody record which would tell you where that person had been held, because that person would likely have been held in a number of different places—perhaps in a police cell or in a short-term holding facility—before they even get to a removal centre. We do not have a record of that person's history of detention, if you like. So we do not have, in my view, enough robust statistics to allow us to know what is happening overall within immigration detention.

Q250 Chairman: Are the statistics that you refer to all for failed asylum seekers, or do they include and specify which are terrorist suspects being held for deportation or return?

Ms Owers: These will be people held under administrative powers. The statistics do separate out the number of that 2,200 who are failed asylum seekers.

Professor Aynsley-Green: I would support everything that has just been said. We are concerned, primarily, for children and young people and to know what has happened to them. It has proved to be difficult to get

appropriate statistics. It is also not possible to obtain all the snapshot statistics that we would like. For example, we asked the Home Office to give us the fact of how many children were detained over Christmas, and we have not been given that information. We would like to receive regular information on children and young people; particularly, how many are in the process of removal, broken down by ages, country of origin and family structure. We want to know how long children have been in the UK and where they have been detained. We want to know more about those whose applications have failed and those who have experienced a frustrated removal process. We also want information on those who have been returned to the countries of origin. I agree, also, with the issue of the custody record, particularly with respect to those children who have special needs, for instance children health issues—mental health issues or physical or emotional disability. It is impossible to obtain this information, and we feel that children need to have that record when they are moved from one place to another.

Q251 Chairman: Have you made it clear to the Home Office that these are statistics that you want, and have you had a response to that?

Professor Aynsley-Green: We have expressed those needs strongly. We had a meeting with Home Office officials where we expressed that and we wait to see what action will follow from our concerns being expressed.

Q252 Lord Avebury: Personally, I agree with you strongly about the need for statistics. I remember we did raise this matter in the 2002 Bill proceedings and we got a part answer from Lord Bassam—not just the stats snapshot, as you say, of how many people were in detention but the length of time for which they were detained, including the things on children that you are now seeking. Have you ever put it to the Government that if they could produce the figures on one occasion to suit their case when a Bill was going through Parliament, there could not have been any physical barrier to doing it on several other occasions, as was necessary?

Ms Owers: I think that has been raised. It is not, of course, strictly within the remit of the Inspectorate of Prisons, as what we do is report on individual prisons and removal centres, but I know it is something that, for example, Amnesty International in their recent report on immigration detention raised very strongly.

Professor Aynsley-Green: With respect to those who are actually being held in detention, we were able to get some information in the light of our visit to Yarl's Wood, which gave us a break down on children detained between May and October of last year. So

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we do have some limited analysis of the distribution by age and duration of detention.

Q253 Lord Avebury: The question is there is no physical barrier to the production of that information on a regular basis. Looking through the Directive, it does not actually say very much about the use of statistics, does it? Is that a defect in it? Should we, if we are going to make any suggestions about altering the Directive, try to beef it up as far as statistics are concerned throughout Europe?

Professor Aynsley-Green: We would agree with a requirement to produce regular figures. Our philosophy in the Commission is to make sure that everything we say is based on fact. If you do not have that facts it is difficult to advocate effectively.

Q254 Lord Marlesford: May I express absolute astonishment at your answers, for the very simple reason that over 30 years ago when I was working as a temporary civil servant with the central policy review staff in the Cabinet Office we asked the Home Office whether they could not use basic hotel-keeping procedures so they knew something about the prison population. At that time they were wholly resistant to the idea that anybody should have the impertinence to tell them their job. It sounds to me as if, 30 years later, no progress has been made. Would you consider, therefore, perhaps, getting people in who do look at their clients (and, after all, hotels and prisons have certain similarities) and getting hotel consultants in to draw up a statistic so you get all the information you need?

Ms Owers: In relation to prisons, prison information technology is not necessarily the best in the world but it does mean that when my inspectors go into a prison the computer system in the prison can tell them not only how many prisoners they hold but what their length of sentence is, what the average length of stay of each prisoner is, what the age breakdown is. Those figures sit in each prison and can be got at very easily. I am not aware that there is any similar system either centrally or locally for immigration detention.

Q255 Viscount Ullswater: I think your first answer was quite chilling, in that you did not know how long anybody had been in the system. Obviously, from the statistics that we have been talking about you cannot know how long they might remain in the system because it is purely an administrative decision. It is not a question of serving a sentence which comes down day-by-day until you get a release date; this one can be an indeterminate form of detention. One of your particular concerns in your written evidence, you say, is that you find it difficult to determine the reasons for detention. Is that not at any time written on the form that you might be inspecting?

Ms Owers: It is. I have to say that the detention process itself is not strictly speaking within my remit, although the availability of information about detention to detainees is. So that is the angle through which I am looking at the documentation that exists in immigration removal centres about the decisions to detain. Frequently, my inspectors will find that it is so vague as not to be very helpful; it is not individualised. Particularly in relation to the detention of children, what we would expect to see on the face of a casework file is some evidence that the welfare of the child has been noted and considered in the decision to detain. We know that the welfare of the child cannot be paramount because of the UK's reservation in regard to the Convention on the Rights of the Child, but that does not mean that the child, as often happens in immigration decisions, in our view, should become invisible. The interests of the child are not even noted. So, for example, the consequences of that can be those that we have mentioned in inspection reports where we have found children who have been taken into detention literally days before sitting GCSE exams, and where we found one child who was suffering from an autistic spectrum disorder, for whom detention was clearly—it is always a traumatic experience—but for such a child an immensely traumatic experience and who, as a result, had not properly eaten for three or four days. The interests of those children had clearly not even registered in the decision to detain the family. That, in relation to children, is one of our main concerns. We want to see that, at least, taken note of and proportionality then applied. The necessity for detention would need to be sufficiently high to detain a child in such circumstances.

Q256 Chairman: I know Lord Dubs wants to ask a question, but just before he does, you have mentioned various things that you would ideally like to know about children detained. I think this really gets on to the next question, but have you got other particular points that you would like to know about children in detention that you are not getting? I think, perhaps, this particularly applies to the Children's Commissioner.

Professor Aynsley-Green: Thank you, my Lord. We need much more information generally about the whole journeys of children through the system. At the moment there are no child-centred statistics or facts and, as was said just now, they are often invisible—they are seen as appendages to families and not as people in their own right. So we would ask for much greater clarity: how many children and young people; the breakdown by ages, country of origin, family structure; how long they have been here, where they have been detained and their experience of detention, particularly those whose applications have failed and

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have been frustrated. We also want information on returns. It is not just a question of a child to the point of deportation, we must know what happens to them when they get back to their countries of origin, and that is just not available at the present time.

Q257 Chairman: The European Union Select Committee took evidence from Mr Douglas Alexander, the Minister for Europe, sometime ago, and we asked him whether the Government routinely sought the views of statutory independent advisers like yourself, and he told us that Home Office officials had met you just before Christmas to discuss among other things the return of families with children. I think what you have said so far suggests that this consultation may be somewhat inadequate. Have you got any comment on that?

Professor Aynsley-Green: In fairness, my Lord, I would just say I have only been in post since July of last year and we are on a rapid learning curve of how to establish good, profitable and trustworthy relationships with departments of state. We hope to very much build on our original contacts and discussions.

Chairman: That reply will be on the record.

Q258 Lord Dubs: I would like to go back to the point that Anne Owers made a moment or two ago, namely that the recording of the reasons for detention was very poor in immigration centres. Does that suggest that the reasons themselves are also equally poor?

Ms Owers: I could not comment. All I can comment on is what we see when we go in. Of course, in a system where there is no automatic judicial oversight, in a system which depends entirely on administrative decision making it is, in my view, very important—indeed essential—that the reasoning that has gone behind such administrative decisions should be transparent.

Q259 Lord Dubs: Which it is not?

Ms Owers: Which it often is not, and certainly not sufficiently transparent to those who are detained and who, very, very rarely, will have access to competent legal advice—because there is so little of it—that can guide them through this maze and, now, increasingly no access to immigration officers who might be able to act as a link with the centre to find out more about what is going on.

Q260 Lord Dubs: On the question of competent legal advice, this Committee went on another investigation to Oakington a year or so ago, and there were people there, I think, from the Immigration Advisory Service and the Refugee Legal Centre who seemed to be permanently there. How does that relate to your

point about competent legal advice? Or am I leading you into difficult paths?

Ms Owers: No, not at all. Oakington was a model of a centre (it was referred to I think as a reception centre rather than a detention or removal centre initially) where legal advisers and immigration staff were both present on site and could both establish immediate contact with people detained and, also, with each other. That model has not been replicated in any other removal centre.

Professor Aynsley-Green: May I also comment on the repeated concern expressed to me by children and young people especially about how they are not told of the reasons for deportation or about their rights and the responsibilities of others? They are invisible; they are spoken to through their parents; they are not seen as individuals, with no one being charged to make sure they understand what is going to happen to them.

Chairman: A very valid point.

Q261 Lord Corbett of Castle Vale: Professor, can you just clear up a point? I think you said, in relation to the absence of the statistics that you want, that when you went to Yarl's Wood you got them. Is that what you said?

Professor Aynsley-Green: Yes, that is true.

Q262 Lord Corbett of Castle Vale: So the Governor has got them sitting on his desk, or wherever.

Professor Hamilton: Yarl's Wood were able to provide statistics on the number of children present in Yarl's Wood between May and October 2005. Essentially, Yarl's Wood keep statistics of "heads on beds," thus they can tell you at any one time how many children are detained at Yarl's Wood on a particular day. What they cannot tell you is: "How long has each child been there?". We have asked Yarl's Wood and the Home Office to provide that information to us. In particular with respect to Yarl's Wood we have asked for a breakdown of each child detained over the last three years, how the length of time each child spent in detention-

Q263 Lord Corbett of Castle Vale: Have you had a response to that?

Professor Hamilton: No, not yet, as we have only just sent that letter.

Chairman: I think, to go back to Lord Marlesford's point, most hotels would be able to tell you how long children had stayed there.

Q264 Viscount Ullswater: This is really going to another question about statistics. Do you find, in your experience, the repeated frustration of removal a serious problem? Could you give us any figures for

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the numbers involved? More importantly, has that an impact on the average detention times?

Ms Owers: When you talk about frustration of removal, what is it that you have in mind? The difficulty of actually effecting removal or further representations made?

Q265 Viscount Ullswater: I think it could be from both. Either they cannot be sent back to a particular country or they might have wanted to prolong the process for as long as possible; the difficulty of getting documentation, and whether that has an impact on detention times.

Ms Owers: It is difficult for me to comment fully on this because that is an area that lies outside my remit; my remit is simply to inspect and report on the conditions and treatment of those who are detained. I would say two things have come out of our inspections, both of immigration removal centres and of short-term holding facilities which we now inspect, which are those places where people will either be first of all detained or will be sent to at an airport immediately prior to removal. The two things which come out there, which strike you, are, first of all, that the process can be lengthened because of the absence of proper, competent legal advice and information early on. A long while ago I did a report on asylum procedures which stressed the importance of frontloading in asylum decisions. If matters are not dealt with at an early stage then they will rear their heads at a later stage. So I think the comments I have already made to the Committee about legal advice also apply to the question that you have asked. The other thing is that when we look at those places from which people are actually put on to aeroplanes and removed, the preparation for removal both in immigration removal centres and in short-term holding facilities is not good. There is no removal plan and people are not told what is going to happen to them and when. They are often given, almost, no notice of the fact that they are about to be removed. I think our view, from having seen that in operation, is that that is neither humane nor efficient. It is not humane because it is not treating people as individuals who need some indication of what is happening to them. That, particularly, of course, is true of families with children. It is also not efficient because it can lead to frustrated removals because the person physically resists removal and then cannot actually be removed.

Q266 Chairman: This may be a difficult question for you to answer, but we have been told in the course of this inquiry that there have been some removals by charter aircraft in co-operation with, for instance, the Dutch. Do any of you have any evidence at all as to

whether the Dutch are handling these things differently—better or worse?

Professor Aynsley-Green: We have no information on this.

Q267 Chairman: I am sorry, it is probably not a relevant question for you.

Professor Hamilton: Perhaps I could add that the Commissioner is currently undertaking research looking at different models for dealing with removal of children and their families. The Netherlands is one of the states we shall be examining.

Q268 Chairman: If you have any information that you are prepared to let us have later, that would be very helpful.

Professor Aynsley-Green: Most certainly.

Q269 Lord Dubs: The question I want to ask may be frustrated by the problem with figures that you have referred to, but I will ask it anyway. The Home Office said in evidence that individuals might “in exceptional cases” be detained for a period in excess of six months. My question is: how exceptional is that? You probably do not know.

Ms Owers: I am afraid I cannot assist the Committee on that. Our frustration, as I have said, is that when we go into immigration and removal centres we can find out an enormous amount about the people who are there, and we can find out how long the people who are then there have been there. We can do a trawl and we can, in our snapshot, detail lengths of stay—maximum lengths of stay, minimum lengths of stay and all of those kinds of things—but that is not routinely available so there is no global overall figure.

Q270 Lord Dubs: Has the Home Office any basis for the statement they made that in exceptional cases individuals might be detained for periods in excess of six months? Surely, they have to know what the norm is to know what is exceptional. Therefore, they have to have the figures.

Professor Aynsley-Green: We suspect there are very few children under that circumstance. However, when we went to Yarl’s Wood, as our report articulates, we did find small numbers of children who were there in excess of 57 days. We want to know why were children there in excess of 57 days. All this must come back to the point made just now about adequacy of preparation before children are taken to the point of deportation and departure.

Ms Owers: I would just add to that that I think, in our own inspections, it is true that we very rarely come across somebody who has been detained for more than six months. I can think of very few examples of that.

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Professor Aynsley-Green: However, with proper preparation, we would argue, there should be a target of no person being held for more than three days and, ideally, no longer than 24 hours.

Q271 Baroness D'Souza: You have come across one or two cases?

Ms Owers: I have.

Q272 Baroness D'Souza: I wonder whether you have been able to find out why, in those particular cases.

Ms Owers: I cannot immediately think of any over six months. I would need to go back to our inspection reports and have a look but I could give the Committee further information about that if that would be helpful.

Q273 Viscount Ullswater: To what extent can you make sure that persons detained for immigration purposes are completely separated from convicted prisoners?

Ms Owers: The answer is that while they are in the immigration detention estate, which is the immigration removal centres and short-term holding centres, in England and Wales—and Scotland—then you can do so. They are held in completely separate places, and there is only one which is an adjunct to a prison but it is totally separate from that prison and is now, I am glad to say, managed completely separately from the prison, too. However, there are people, fewer than there were but still some, who are held in prisons after their sentence has expired. They have been convicted of a criminal offence and sentenced and they are held in prisons after the expiry of sentence under administrative powers before they are removed. It is simply not possible for those people to be held separate from ordinary prisoners.

Q274 Viscount Ullswater: Are they removed to the remand wing, for instance?

Ms Owers: Not all prisons have remand wings these days. It is more common, these days, to manage remanded prisoners and short-term prisoners together, and that would happen in many prisons. To be honest, moving to the remand wing is not necessarily good news because remand prisoners, in some prisons, have access to less by way of activities and regime than convicted prisoners do. Once someone is held in a prison establishment, particularly with the overcrowding in our prisons at present, it is simply not possible to hold them separate from those charged with or convicted of criminal offences. There is also the situation in Northern Ireland, which does not have a specific immigration removal centre, where immigration detainees not convicted, not ever having been convicted of a criminal offence, are held in Crumlin

Road prison, which is managed as part of Maghaberry prison and which is an open prison for prisoners who are safe to work out in the community but it is also used for holding immigration detainees.

Q275 Chairman: Are those detainees treated differently from prisoners?

Ms Owers: They are in Crumlin Road, yes. If people are held post-expiry of sentence in prisons then they will be treated in the same way as remand prisoners and the same way as prisoners who have not been convicted of a criminal offence.

Professor Aynsley-Green: I do not want to add to the detail but just to illustrate a point, though, that with the focus increasingly on Yarl's Wood as the place of detention for children, it means children are travelling vast distances from Wales and from other counties to reach Yarl's Wood, and we are concerned this whole process.

Q276 Lord Avebury: Am I right in saying that there is nothing in the Directive which refers particularly to people who have been convicted of criminal offences and either recommended for deportation by the courts or whom you know in practice are going to be served with notice of deportation as a result of the offence? Do you think the Directive should be expanded to cover those people and, if so, should it make provision for the notices to be served prior to the end of the sentence so that process of appealing against deportation could be heard while the person is still held under the original sentence and removed without further delay on completion of the sentence? As you know, the Home Office always say they cannot do this because the circumstances may change between the date of a person's conviction and the date of his release from prison. If these steps were taken, let us say, three weeks prior to the end of the sentence, could not the whole process be completed before he is due to be released?

Ms Owers: That is certainly something that we have raised with the Home Office, because when I first began to do this job, around four years ago, it was not uncommon to find people who had literally been lost in the system; who had been serving months detained under administrative powers because their sentence having expired and then being in a safe place, as it were, out of sight, they had literally dropped out of sight. I think the procedures are now much more efficient, not least because the pressures of the prison population mean that there is pressure to remove from prisons those who do not need to be there and should not be there. My understanding is that there is now a process where a few weeks before a sentence expires there should be contact. Indeed, Immigration and Nationality Directorate officials are going into prisons to try to assist those who genuinely just want

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to go home as soon as possible once their criminal sentence has expired. Also, and we would argue very strongly for this, in some prisons independent legal advisers are going in to make sure that those people have access to legal advice at that point.

Q277 Lord Avebury: Could I ask one more question? Where an individual may indicate that at the end of the sentence he or she be voluntarily returned to the country of origin, should not the authorities (I do not quite know whether this should be the prison authorities or the IND) put that person in touch with the international organisation for immigration so that, wherever possible, return at the end of the sentence can be on a voluntary basis?

Ms Owers: The answer to your question is yes.

Q278 Lord Avebury: Why do they not do that?

Ms Owers: It is happening more but in some prisons we still find that it is not happening enough. Later this year we will publish a thematic report on foreign nationals held in prisons in England and Wales, and that I hope will provide better information about what the current state of play is.

Professor Aynsley-Green: I would just add, my Lord, that there are implications for the families of convicted prisoners. We would welcome some focus in exploring what those implications are when a prisoner has come to the end of his term. How does it link in with the family circumstance and the whole family's deportation?

Q279 Baroness D'Souza: The UNHCR in its written evidence to this Committee has pointed to what it calls "inappropriate conditions of detention" for families and for children in Member States. I wonder whether either or both of you could say if you have any examples of these conditions, either in Member States or in the UK.

Professor Aynsley-Green: Thank you. That is an extremely important question and it was that question which led me to exercise my powers to enter any premises and talk to children, for the first time, by going to Yarl's Wood. We made an announced visit with 24 hours notice to see the journey, thought the child's eyes, of the removal experience. At Yarl's Wood we had a very important meeting with the staff there, who were open and honest. I do want to pay tribute to the immigration staff who are, after all, public servants doing an important job. They have tried very hard to look at the issues of children, not least since the report of the Chief Inspector last year about Yarl's Wood. So we went to see for ourselves what it was like. I actually positioned myself as a child to walk through the estate. I started in the reception area and then walked through the corridors, as if I were a child, to see what the

impression would be on a child. Of course, the adult going in there would say: "What is all the fuss about? It is warm, it is clean, it is light, there is food provided", but through the child's eyes it is very different. The starkest example I can give you is that on that morning, in the reception area, we found a distraught black child, impeccably dressed in his school uniform. I sat down and asked him why he was there. He said: "No one has told me". I asked him: "What is going to happen to you?" He said: "No one has told me". I said: "What has happened through the day?" He said that that morning he was dressed and ready to go to school. He went to the corner shop to buy a pint of milk and when he came back he saw his house surrounded by policemen and a white van. He and his mother were brought to Yarl's Wood. He did not have time to say goodbye to his friends, he did not have time to collect all his possessions and he did not know what was going to happen to him. That is the experience of the child, through a child's eyes. We then walked, as he would walk, through the building. We passed through a number of locked doors, some of them very much cell-like with strong, iron bars, and each door was opened by staff in uniform. We are told by the Medical Foundation for the Victims of Torture that this process reinforces the experiences of what children may have experienced in their own countries and with what they see to be prison guards and not immigration staff. We found the whole atmosphere totally child-unfriendly. Very few people had thought of what this process meant to the child. As a result of the visit, we made 17 recommendations in our report to the Government on what we saw as necessary changes to Yarl's Wood. Essentially, we are asking for children to be seen as children; for someone to be charged with seeing they are given all the information they need to understand their circumstance. Not one child interviewed in Yarl's Wood could tell us why they were there.

Q280 Chairman: Would it be possible for us to see that report?

Professor Aynsley-Green: Yes, most certainly.

Q281 Baroness D'Souza: Do you think the EU Directive, if we opt into it, would in any way move either of your agendas along?

Professor Aynsley-Green: I think the phrase "in the best interests of children" must be a very important phrase. We would like the whole process, as far as children are concerned, to be child-centred.

Q282 Chairman: Professor Aynsley-Green, you earlier mentioned that you were doing a study of what is happening in other countries, particularly other EU Member States. Again, would you bear

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that in mind? I think I ought, perhaps, to remind all of us that this is an inquiry into a Directive. You have given us admirable answers to questions but I think we should all bear in mind in your answers, if you could mentally connect them with your understanding of the Directive and what you would like to see in that Directive.

Professor Aynsley-Green: I would link my comments, my Lord, with coercion, and the whole process. We would certainly want to see proportionate security in Yarl's Wood and other detention centres by hard fact—how many people have tried to abscond, etc?

Chairman: Thank you very much indeed.

Q283 Earl of Listowel: May I ask you to develop slightly what you have already been saying in this area about how to adapt conditions in removal centres to the special needs of children generally? Specifically, can you give an indication of the level of expertise in the staff? How many, approximately, will have had a long experience of working with children? How many, for instance, have an NVQ Level 3 in childcare? What access is there to childcare experts for these people working with these vulnerable children?

Professor Aynsley-Green: Thank you for that question. Firstly, commendable attempts have been made in Yarl's Wood to address the issues raised by the Chief Inspector's report of last year. For instance, there is now better provision for education. We went into the school room, which appeared cheerful and with a motivated teacher who understood the issues. There is a social worker about to be appointed—and may even now be in post—and there are some opportunities for entertainment. I do want to, again, pay tribute to the staff who, as I said, were public servants doing a very difficult job. Having said that, we found repeatedly that children and young people were not seen as individuals. Children themselves told us that some staff were friendly and others were not. The issue about not knowing what was going to happen to them was a very important point, and we also felt that the whole environment was very child-unfriendly. In the gym, where children were playing games, they needed to pass through two locked doors if they wanted to use the toilet. The whole situation was prison-like. So, as I say, we put forward 17 recommendations. We need each stage of the journey to include an assessment of the needs of the child at that stage and consideration of the staff competencies to meet those needs: the needs and competences from the point of removal at the home, for example; the needs and competences on the journey to Yarl's Wood, and at reception, etc. We do believe that preparation is key here; the children deserve to be informed about what is going to happen to them, so they can go through a period of grief, in many ways,

of saying goodbye to their friends in a humane way. We also want inspection to be seen through the eyes of the child. Whilst we were in Yarl's Wood we met members of the independent monitoring board and we asked them whether they thought the children were secure and comfortable. They said they seemed fine. We said: "Have you asked children?" "No, we don't ask children, we ask parents." This is also the attitude of the staff. So we do feel that children and young people should be asked about their experiences and given an opportunity to make comment on their circumstance, their environment and, above all, to make sure they are fully informed about what is going to happen to them. We feel the impact on their emotional well-being could well be profound.

Q284 Chairman: Chief Inspector, do you want to add anything to that?

Ms Owers: Yes, I would, more broadly on that, if I may, my Lord Chairman. I would agree with Professor Aynsley-Green that the services available for detained children have improved and I hope that that is, at least in part, the result of independent inspection—the reports that we have produced. That is always my hope when we have produced inspection reports. However, it clearly cannot replicate the developmental needs of a child within the community; by definition these are places of custody, and the consequences on children of any detention are going to be negative consequences. All these institutions—and I would agree that most of the staff in them are caring—can do is try to mitigate that as much as they can. In answer specifically to Lord Listowel's question, we have, again, found some improvement in both the training, and the vetting, more importantly, of staff who work with children. When we first began these inspections those staff were not vetted to enhanced criminal records bureau levels—they are now. However, we have recently been carrying out inspections of what I referred to earlier as short-term holding facilities, which will often be both the first and the last place where a child is actually detained. That will be where detention starts, and may finish. I do not think we have found any, from memory, and certainly the vast majority of them, we have said, are not suitable for the detention of children because they do not have separate places where children can be detained or facilities that are needed for children. Nor, when we inspected them, were the staff working there subject to enhanced criminal records bureau checks.

Professor Hamilton: When we talked to the staff at Yarl's Wood it is my impression that none of them have childcare-specific qualifications at all, other than the teachers who are brought in to teach. There is a social worker, employed as from January 06, but

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my understanding is that the social worker will focus mainly on children who are coming up to the 28-day detention period and for whom reports must be prepared in order for the decision to be made on whether they should continue to be detained. There are a couple of other issues that it might just be worth raising. Although the social worker will sit on the local children's safeguarding board and, therefore, does have more of a child protection role, obviously children are kept at Yarl's Wood with adults about whom we know nothing. Families are all kept together on one wing and are free to move about as they will within the wing. That must raise child protection concerns which are not addressed by the child protection policies, although child protection policies do now exist. The other issue perhaps worth mentioning is that children do complain about bullying, both from other children and from staff, and there is no policy and no practice of being able to resolve or deal with those particular skills. There is not the skill in the staff base.

Chairman: I think we should move on.

Q285 Earl of Listowel: Very briefly, referring to the Directive, is this an area you would like the Directive to be more explicit about, about quite detailed standards for detention centres so that they are child-centred centres?

Professor Hamilton: I think it is just worth mentioning that in Article 5 there is already a requirement that account be taken of the best interests of the child. Behind that would come all the concepts that go into "best interests of the child". So I would assume that all those issues we have been talking about would be in the minimum standards that would be set rather than specifically set out in the Directive itself.

Q286 Earl of Listowel: Are you aware that, often, these Directives are very loosely applied, so there is concern that unless one is pretty specific about these very sensitive areas—and I recognise what you say—there is the danger that they can be missed. I do take on board what you have said.

Professor Aynsley-Green: We also, my Lord, call for the Home Office to ensure their duty of care for the recipients of this process, and that their commissioning contracts are robust enough with respect to the training, the qualifications and the expertise of the staff to cope with children.

Ms Owers: If I may add, following what Professor Hamilton was saying, it would be the minimum standards where you would want to see some very specific provisions for the children who were detained. It may mean that the Directive ought to be clearer about this. .

Q287 Lord Avebury: I certainly think that what you have just said applies to my question, which is about the evidence of the Home Office where the Prisons Inspectorate has been invited to carry out inspections of the escort arrangements. My question was whether you consider the UK arrangements to be fully in line with the proposed Directive. The only paragraph that I can see which is directly applicable to this is Article 10(1), which speaks about the need for proportionality in these methods. Once again, this is a very general requirement and when you come down to the detail of what provision is made for escorts, particularly those which are in the private sector, and how that performance is monitored, I wonder if you think that either the UK arrangements are in line with the Directive or you think the Directive should, as in the case of children, be made more specific.

Ms Owers: We do, as the Home Office has said, now have responsibility for looking at immigration escort arrangements as well as short-term holding facilities and immigration removal centres. I think it is very important to be clear about what inspection can and cannot do. Inspection is about the conditions and treatment of those who are detained; it cannot go to the proportionality of the decision to detain in the first place. That needs to be a legal and judicial matter. Nor can it provide a constant watch on what is going on, particularly things like escorts and so on. All that inspection will be able to do and can do in relation to any of the areas that I am responsible for is to dip in from time to time, take a snapshot of what is going on then and there and report on it. So inspection would be part of what would be needed to satisfy the Directive, but it certainly could not deal with all the areas that you describe. Whether in terms of escort arrangements the Directive would need to be more prescriptive, to answer your question, I cannot easily answer.

Q288 Lord Avebury: In that case you are going to find it difficult to answer my next question, which is, in the case of the detention of parents prior of removal and the subsequent escorting to the point of departure or to the country of destination, do you think that the measures that the UK has put in place take into account the special needs of children? In answering that question, would you please address, in particular, the arrangements which are foreshadowed in the Immigration, Asylum and Nationality Bill where families including children will be detained by private contractors in the juxtaposed ports of entry into the United Kingdom? How does that fit in with Article 16: "Apprehension in other Member States" in the Directive? They do not take account, do they, of a situation where we exercise jurisdiction in an overseas country, such as France? By the way—I am sorry—does either the Children's

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Commissioner or the Chief Inspector have jurisdiction over what happens over these juxtaposed ports of entry?

Ms Owers: Yes, and I have just drafted a report on the Calais arrangements. I do not know which others are envisaged, but certainly I have the power to inspect Calais, and have just done so. I think the answer to your broad question, Lord Avebury, is that from what we have said up to now we do not believe that there are sufficient measures in place to take account of the special needs of children in terms of the decision to detain, in terms of the effect of detention or in terms of removal and what happens afterwards. I know that Professor Aynsley-Green has particular issues around the return of children and what happens at that point once they are removed.

Professor Aynsley-Green: Yes, from our discussions with quite a large number now of children and young people in this process, many of the older children, the 15–18 year-olds, are profoundly concerned about what is going to happen to them when they go back to their countries of origin. They are concerned about trafficking, they are concerned about their safety and security when they get back there, and above all they are profoundly unhappy with emotional ill-health. Conversely, very young children often have no idea what they are going back to. In fact, when we asked children: “Where do you come from?” one little girl said: “I come from London”. We said: “Where does your mother come from?” “She comes from London.” She had no concept at all of the country she was going back to, let alone speaking the language and knowing the culture. So I think this does raise profound issues about the humanity of this issue when children are born here or are very young and being taken to a place where we have little hard information on how safe they will be, let alone their circumstance when they get back there.

Q289 Chairman: Can I just ask whether any of you have any experience at all of the return of families or individuals to countries with whom the Government has reached a memorandum of understanding?

Ms Owers: None at all.

Q290 Chairman: Such as Libya, the Lebanon and Jordan.

Professor Aynsley-Green: It will be a very interesting exercise for me as Commissioner, perhaps, to follow the track of some of these children. That is something worth thinking about.

Ms Owers: My powers have not yet been extended to any of those countries!

Chairman: You may think you have enough powers, Chief Inspector!

Q291 Lord Corbett of Castle Vale: I think we have got an answer to this question, actually, the way the discussion has gone, but the Directive aims at establishing minimum standards across the EU for detention prior to removal, especially in the case of children. The question is: do you think this is useful and necessary? I think you have indicated it is.

Professor Aynsley-Green: Most certainly yes, my Lord.

Q292 Lord Corbett of Castle Vale: Can you be a bit more specific? Are there bits you want to add to this? We have got quite a long list—

Professor Aynsley-Green: I think that adherence to this is an extraordinarily important statement of principle about children in our society, and we would argue that the minimum standards should be the best standards and not the lowest common denominator. There is a need to ensure there is a debate on what we mean by being child-centred, the views of children, the best interests of children, the training and inspection of staff and the incorporation of the UN Convention on the Rights of the Child. We certainly support the development of minimum standards and we will be very keen to help define those standards.

Ms Owers: Indeed, we may be able, if this Committee or any other would wish, to help in that, in that we have our own independently set criteria for conditions and treatment of detainees in immigration and removal centres, which we publish as ‘Expectations’. They are very detailed, much more detailed than minimum standards would be, but they do reflect what we consider to be best practice in the detention—

Q293 Lord Corbett of Castle Vale: May we have a copy of that?

Ms Owers: You may indeed.

Lord Corbett of Castle Vale: Thank you very much. I think it will be very helpful.

Q294 Lord Marlesford: This is a question for the Chief Inspector, if I may. Do you think any of the standards in the proposed Directive would pose any particular problems for the Prison Service?

Ms Owers: You are thinking particularly, presumably, about Article 15 and the conditions?

Q295 Lord Marlesford: Anything on which the Prison Service would say: “We do not, or cannot, do that. It would cut across our practices or philosophy”.

Ms Owers: First of all, most immigration detainees are, of course, held not by the Prison Service but by private contractors contracted to the Immigration and Nationality Directorate. I cannot see that anything here should pose difficulty for them. As I

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have already said to the Committee, there will be difficulties for those who are actually held in prisons, having served a criminal sentence and then being held under administrative detention, in the requirement in the Directive that they are “permanently physically separated” from ordinary prisoners. In the current circumstances I do not think the Prison Service would be able to follow that part of the Directive. However, in terms of the general conditions—and, of course, one would need to see what the minimum standards were that were put out—I cannot think that they would be any higher (at least, I hope they would not be any higher) than those that we currently expect to find when we inspect places of immigration detention at present.

Q296 Chairman: Can we just go back to an earlier question about the extent to which both the Chief Inspector and the Children’s Commissioner are consulted by the Home Office? On EU proposals and on Directives and so on, do you have any direct communication from the Home Office asking for your views?

Professor Aynsley-Green: We are in the process of developing those links.

Ms Owers: Speaking for ourselves, not usually. We do have communication with the Immigration and Nationality Directorate and they will send us draft copies of proposed rules and standards on immigration detention, but we have not had any regular contact in relation to EU Directives, in my memory.

Q297 Earl of Listowel: One issue which we have missed is this removal of support to families in order to enforce or encourage returns. I know Professor Hamilton has just spoken about not needing to be too explicit but would it be helpful to be more explicit about not removing or making families destitute in order to encourage removals, whether this is a debate across Europe—some countries do and some countries do not? Would it be helpful to have more guidance in the Directive on this particular matter?

Professor Hamilton: I think it is a matter of particular concern to us that Section 9 allows children to be removed from their families not because it is in their best interests, not because they are at risk of significant harm, but because there is no financial support or material support for them. That is a particular matter of concern for the Commissioner. Yes, we would support something being placed in the Directive that children should not be separated from their parents for financial reasons and should not be separated unless it is in their best interests to do so. I think that would be of great help.

Q298 Viscount Ullswater: What seems to have come out in my mind is that a lot of people who are in detention lack the information as to why they are in detention and for how long they may be held in detention. Although the Directive talks about what information they should be given on the return decision and the removal decision and it should be in an appropriate language that they should understand, should the Directive be more explicit in terms of giving them further information about what is going to happen to them? I was struck by what you said, Professor Aynsley-Green, about children just not knowing what was going to happen to them. Should there be some form of written document given to a child? In some cases it might be a token, but at least they would have something in their possession. If they were asked what was going to happen to them they could say, “Well, I’ve been given this form. I don’t quite understand what it means”, but at least they have been treated in some way.

Professor Aynsley-Green: I would very much support that suggestion. It is one we have put to Government already. Repeatedly children tell us that nobody has sat down with them as children and explained to them as individuals what their rights entitlements and future is going to be and we think there should be someone charged to make sure children are told about the whole process.

Q299 Lord Corbett of Castle Vale: The inference is the parents have not done it either.

Professor Aynsley-Green: That is a very tricky issue. As many parents will be in a state of denial they may not wish to tell their children about what is going on. Conversely, we have been told by young people that many of their parents do not speak English very well and so there is a burden on the young people themselves to act as interpreters, often conveying very bad news from bureaucratic letters to a family. So there are different ways of looking at this.

Q300 Chairman: Interpretation is clearly a massive problem for detention centres to cope with. Have you any reflection on how it is coped with?

Ms Owers: It is coped with—either by using other detainees or sometimes, as Professor Aynsley-Green has said, by using children or by using Language Line, which is a very expensive telephone interpretation service and therefore not always used in circumstances where it should be. What we have found repeatedly in talking to detainees is that in those centres where they have got access to a person, not a document, who can explain to them what is happening, what is likely to happen and what may happen next then their sense of security is increased and the possibility of being able to organise a

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removal without it being a traumatic event, but rather a planned event is greatly heightened, and for that reason we are very concerned about the fact that legal advice is much less easily available now and about the withdrawal of onsite immigration staff.

Q301 Baroness Henig: We have already found out that HMG has indicated they do not propose to opt-in to the Directive. Perhaps that is not a great surprise. I just wondered whether that was a disappointment to you, whether you supported that and whether you had any views at all about that indication from the Government.

Ms Owers: I can really only speak to chapter 4, which is the bit that is directly relevant to the work I do, which is temporary custody for the purpose of removal. The problem in that for the UK Government is the requirement for judicial oversight and that, of course, was something which was in the 1999 Asylum and Immigration Act, in a section that was never implemented and has since been repealed. That would be the big difference were the UK to sign up to this. As I say, I cannot really take a view on that part because that is outside my remit, but what I would repeat is that if that is not there then the administrative process by which this happens needs to be very transparent indeed.

Professor Aynsley-Green: We are disappointed by the decision. We think it is a missed opportunity for this country to fly a very powerful signal of its intent to make sure the best interests of children are being protected. We would urge the Government to consider implementing the Directive as it relates to children come what may. We want the Government to demonstrate its commitment to the rights of children as individuals and not as appendages to the family. There is this extraordinary paradox, even dichotomy because we have *Every Child Matters* and *Youth Matters* and a national service framework, which are hailed internationally as benchmarks of excellence for policy thinking for children as long as you are not in the immigration system. So every child really should matter and we think government should be held to account over those philosophies for these children.

Q302 Baroness Henig: That is very helpful. Thank you.

Ms Owers: The advantage of judicial oversight of these procedures is that there is a formal procedure and things have to be formalised. The problem that we find with immigration and detention at the moment is, because there is no such oversight, things can just happen without the formal processes being sufficiently transparent and sufficiently known to those to whom they apply.

Chairman: You have been very helpful, all three of you. I wonder whether I could just finish by asking you for your advice. We have a very full programme of witnesses to come still, we have got a lot of work to do on this inquiry, but one of the things which we have considered is whether, as a Committee, we should visit a detention centre. Would you support the idea of the Committee visiting a detention centre and, if so, which detention centre would you recommend?

Q303 Baroness D'Souza: And why?

Ms Owers: Yes, I would support that. I think it does give you a flavour of what immigration detention means to go and see where people are detained. If the Committee wants to look at the detention of children, then the only centre which would provide that would be Yarl's Wood. If, on the other hand, the Committee wanted to see a centre where people in detention and transit was a particular issue, then Harmondsworth would provide an example of that.

Professor Aynsley-Green: I very much support that. We only have personal experience of being to Yarl's Wood. I think it would be important for you to go there with the rider that you please take off your glasses for seeing the world through an adult's eyes and imagine what it is like to be a child. I am sure you are thinking about seeking evidence from others, but I spent a most important if not harrowing evening at the Medical Foundation for the Victims of Torture to hear for myself the stories of children and young people and families who have been subjected to these experiences.

Q304 Chairman: I cannot promise to take my glasses off, but I will try not to see through the glass darkly! Thank you very much indeed. Is there anything any of you want to say in conclusion? If not, may I thank you very warmly both for your earlier written evidence, Chief Inspector, but also for the very helpful and frank way in which you have answered our questions, and I wish all of you good luck!

Professor Aynsley-Green: Thank you.

Memorandum by Bail for Immigration Detainees (BID)

1. Bail for Immigration Detainees (BID) is a registered charity that exists to improve access to bail for asylum seekers and migrants detained under Immigration Act powers. BID does not receive public or Legal Services Commission funding. BID's key activities are:

- Providing free information and support to detainees to help them to exercise their right to liberty and represent themselves in bail applications before Immigration Judges.
- Preparing and presenting free applications for release for detainees who are unable to represent themselves, in particular families, using free assistance from barristers to present the bail application.
- Working to influence detention policy and practice, including through research.
- Sharing and encouraging best practice with the legal profession, for example through the *Best Practice Guide to Challenging Immigration Detention* written by BID and published jointly with ILPA, the Law Society and the Legal Services Commission.

2. BID was established in 1998, and has considerable casework experience of the detention and removal policies and practices of the UK Immigration Service. Based on that experience, we would like to put forward information to the Sub-Committee on the following aspects of the Draft Directive where they have implications for the UK, or suggest measures that will improve national practice, namely:

- The provisions for individuals who cannot be removed, whether temporarily or indefinitely.
- The conditions and duration of detention.
- The safeguards for individuals to be removed (such as concerning their arrest or escort), particularly where removal action is sub-contracted to private companies.

BID also wish to comment briefly on the treatment of children in UK immigration detention.

3. BID welcomes the Commission's recognition that removals must be governed by clear, transparent and fair rules, which also respect the human rights and fundamental freedoms of those facing removal. BID is concerned that current practices in the UK may fail to balance the rights and dignity of the individual with the objective of immigration control and an increase in removals. *BID hopes that this Directive will be developed in such a way as to ensure that standards are driven up, and that this inquiry provides an opportunity for scrutiny of some of the excesses of current UK policy.*

4. In particular, BID feels it is important that the following stated aims of the Draft Directive be preserved throughout the negotiation process:

- "limiting the use of coercive measures, binding it to the principle of proportionality and establishing minimum safeguards for the conduct of forced return." (point 6, p 4)
- "Limiting the use of temporary custody and binding it to the principle of proportionality" (point 10, p 4)
- "Establishing minimum safeguards for the conduct of temporary custody." (point 11, p 4)

We agree with the Refugee Council and Amnesty International that "states need more guidance than is currently provided" if these principles are to be put in to practice.⁵⁴

5. The provisions for individuals who cannot be removed, whether temporarily or indefinitely (with reference to Article 8 "Postponement"): BID wishes to highlight that where there is no possibility of removal, it is imperative that individuals are not detained under Immigration Act powers. In BID's view, the desire of the Government to be seen to be taking action to increase the number of removals has resulted in detention being maintained in some cases even though removal is not imminent. No statistics are collected as to the overall periods spent in detention by each detainee, but in BID's experience there are lengthy delays in removals to certain countries that result in long periods of detention. In particular, prolonged detention may occur whilst waiting for the Home Office to obtain travel documents from Indian and Chinese authorities, for example. Certain nationalities are detained despite the fact that no removals are taking place. For example, in 2004 and 2005, nationals of the Democratic Republic of Congo (DRC) who did not have travel documents from their embassy were detained for prolonged periods of time despite the fact that the Embassy appeared not to be issuing such documentation for many months at a time. In relation to Iraq, despite practical difficulties blocking removal to Iraq for nearly 18 months from February 2004 up to October 2005, many undocumented Iraqi nationals remained in detention for long periods of time without the slightest possibility of removal to

⁵⁴ Joint Refugee Council and Amnesty International UK response to the House of Lords Select Committee on the EU Inquiry into the Draft Directive on common procedures for the return of third country nationals, December 2005.

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their country. Similarly, in 2005, the UK detained Zimbabwean nationals despite the fact that removal was not imminent, and removal to that country was ultimately suspended by the Courts.

6. The conditions and duration of detention (with reference to Article 13, “Safeguards pending return”, and Article 14 “Temporary Custody”, and Article 15 “Conditions of Temporary Custody”): BID is opposed to the use of immigration detention and would like to see alternatives being employed. However, where detention is used as a part of immigration control, BID call for its use to be in line with international and domestic human rights standards.⁵⁵ Detention should only be used where removal is imminent, and must be justified in each case. This requires automatic and prompt scrutiny by an independent judicial body. At present, detention policy and practice in the UK fails to provide adequate legal safeguards for detainees. BID hopes that this Directive will result in fundamental changes to the UK’s practice by introducing an element of judicial scrutiny and the safeguard of a time limit on detention. In BID’s experience, change of this nature is urgently needed for the following reasons:

- The decision to detain is an administrative one. There is no automatic judicial supervision of detention and many detainees have no, or very poor, legal representation and many experience great difficulty in accessing an independent review of their detention by way of a bail application. HM Inspectorate of Prisons has drawn attention to the fact that “Access to competent and independent legal advice is becoming more, not less, difficult as fewer private practitioners offer legally aided advice and representation.”⁵⁶
- Very limited statistics are available about the use of detention. The UK Government does not publish details about the numbers affected by detention each year, or the total length of time that people remain locked up. Amnesty International believes that upwards of 25,000 people who had at some stage sought asylum were detained in the UK in 2004, some possibly just overnight and others for prolonged periods of time.⁵⁷
- Detention is without limit of time, and can be for prolonged periods (official snapshot figures for the end of June 2005 show more than 20 per cent of detainees had been detained for more than three months, and up to more than a year in 55 cases).
- Detention can take place at any stage of a person’s case: from arrival under “fast track” processes for a decision on the asylum claim, to just before removal.
- Detention is increasingly being used for vulnerable people, including families. Over 13 per cent of the total beds are now dedicated to families. Save the Children think up to 2,000 children each year may be detained.⁵⁸
- The number of self-inflicted deaths in detention has significantly increased—seven immigration detainees took their own lives between January 2003 and September 2005, yet there were only four such deaths between 1989 and 2003.
- The Government wants to increase the number of people who are detained. *Controlling our borders: A Five Year Strategy for Asylum and Immigration* published by the Home Office on 7 February 2005 sets out plans to increase the use of detention with the aim of removing more people each month than the number of new unfounded claims received, and increasing the use of fast-track processes based on detention. In the strategy, the Prime Minister writes “. . . we will move towards the point where it becomes the norm that those who fail can be detained.”

⁵⁵ Human rights standards require that detainees can challenge the deprivation of their liberty.

— Article 5(4) of the European Convention on Human Rights requires that: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

— UNHCR “Guidelines on applicable criteria and standards relating to the detention of asylum-seekers” (revised 1999) state that regard should be had to the general principle that asylum seekers should not be detained. These guidelines also set out the need for prompt review by a court.

— Guarantee 3 of the United Nations Working Group on Arbitrary Detention states that detainees should be “be brought automatically and promptly before a judge or a body affording equivalent guarantees of competence, independence and impartiality.”²

— Council of Europe: Twenty guidelines on forced return², Guideline 9, “Judicial remedy against detention” states: “(1) A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful. (2) This remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation.”

⁵⁶ HM Inspectorate of Prisons, inspection report on Dover Immigration Removal Centre, July 2004.

⁵⁷ Amnesty International report, United Kingdom: Seeking asylum is not a Crime—Detention of people who have sought asylum, 20 June 2005.

⁵⁸ See “No Place for a Child: Children in UK immigration detention—Impacts, Alternatives and Safeguards”, Save the Children, February 2005.

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7. *Article 13 (2)*—written confirmation that return has been postponed. BID welcomes this proposal, which would be useful for detainees who may experience repeated setting and cancelling of removal directions. This can block release on bail even where there is repeated failure to remove. In BID’s experience, this increased transparency would help to avoid the situation where detention becomes unlawful but an illusion that removal is imminent is maintained, in order to maintain detention.

Article 14—provides for temporary custody orders to be issued by judicial authorities, subject to review once a month and extendable to a maximum of six months.

8. *Article 14 (1)*—BID welcomes the provision that less coercive measures than detention should be used unless necessary. We believe that this decision about the level of monitoring required and the decision as to who represents “a risk of absconding” must be taken by a judicial authority and subject to transparent regulations. There must be an opportunity to challenge the monitoring mechanism imposed, particularly where the mechanism impinges on the civil liberties of the individual, for example “tagging” or electronic monitoring. In the UK, the power already exists to tag anyone who is subject to residence or reporting. This was introduced in S 36 of the 2004 Immigration and Asylum (Treatment of Claimants etc) Act. The provision to order electronic monitoring is not restrained by clear criteria, appeal or time limit and there is no burden on the state to demonstrate that it is a necessary or appropriate measure for a particular individual. There is no research to show how many people abscond⁵⁹ so no evidential basis for introducing the criminalising policy of tagging. In a written Ministerial statement on the 8 November 2005, the Immigration Minister Tony McNulty informed the house that since the pilot began in October 2004, 49 people have been tagged.⁶⁰

9. *Article 14 (2)*—BID welcomes the provision of judicial involvement in the decision to detain and to maintain detention. It is important that such review is thorough and robust, in particular with access to legal advice and representation. It is important that this monthly review does not obstruct the right to apply for bail, judicial review or habeas corpus at any stage.

10. The Home Office have refuted the need for automatic bail hearings or an increased element of judicial review as unnecessary and administratively burdensome. The parliamentary Joint Committee on Human Rights have cautioned that “[Judicial] safeguards are meaningful and effective only if appropriate legal advice and information are available to detainees”.⁶¹ However, the government continue to reject the suggestion that bail hearings should be automatic: “. . . we do not accept that there is a need for an automatic bail hearing at any point in a person’s detention. Detainees are able to apply for bail at any time to a Chief Immigration Officer, the Secretary of State or an Adjudicator to be released on bail. In addition, every person’s detention is subject to administrative review by the Immigration Service at regular intervals and at progressively more senior levels as detention continues.”⁶²

11. BID’s casework experience illustrates that detainees are not in fact able to exercise their right to a bail application under the present system, and there is a need for the measures proposed in this directive.

12. Instructions to immigration officers state that (i)n all cases detention must be for the shortest possible time⁶³. However this instruction carries no practical compulsion and has failed to prevent the Immigration Service from employing administrative detention for prolonged periods. Detention periods of six months are not uncommon, and in some cases that BID is aware of, detention was maintained for over two years, the worst case being incarcerated for just short of three years before removal could be carried out. Concern about this situation was expressed in the Concluding Observations of the Human Rights Committee when monitoring the UK’s compliance with the International Covenant on Civil and Political Rights (ICCPR) in 2001⁶⁴.

13. In 2004, the UK was criticised by Mr Alvaro Gil-Robles, Commissioner for Human Rights, Office of the Commissioner for Human Rights, Council of Europe, on his visit to the UK. His report found the reasons provided to detainees by the immigration officer at the time of the decision are at best cursory and the explanation of bail rights technical and perfunctory. The report states: “The possibility of effectively

⁵⁹ A letter from Home Office Research and Development Statistics (RDS) to BID in May 2002 stated that “the Home Office has not commissioned any research on the subject of compliance with Temporary Admission in connection with detention criteria over the past 12 years.”

⁶⁰ House of Commons, Hansard, 8 November 2005: Column 11WS.

⁶¹ Joint Committee on Human Rights report on the Nationality, Immigration and Asylum Bill, 21 June 2002, p 32.

⁶² House of Commons, Home Affairs Committee, “Government Response to the Committee’s Fourth Report: Asylum Removals”, HC 1006, 18 July 2003, p 8.

⁶³ Operational Enforcement Manual, Chapter 38.1 (last published and disclosed July 2001).

⁶⁴ ICCPR Concluding Observations of the Human Rights Committee, 2001 “Asylum seekers have been detained in various facilities on grounds other than those legitimate under the Covenant, including reasons of administrative convenience. The Committee notes, moreover, that asylum seekers, after final refusal of their request, may also be held in detention for an extended period when deportation might be impossible for legal or other considerations”.

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contesting one's detention is all the more important, as it is indefinite and subject only to internal administrative review. It is not entirely clear what form this review takes—the Home Office guidelines refer only to the need to keep detention “under close review to ensure that it continues to be justified”. The ability of asylum seekers to contest their detention is not a hypothetical question. Of the 1,514 asylum seekers detained on 27 December 2004, 55 had been detained for between four and six months, 90 for between six months and a year and a further 55 for over one year. These are not negligible figures . . . It is not acceptable . . . that such lengthy detention should remain at all times at the discretion of the immigration service, however senior the authority may be. It seems to me that there ought, at the very least, to be an automatic judicial review of all detentions of asylum seekers, whether failed or awaiting final decisions, that exceed three months and that the necessary legal assistance should be guaranteed for such proceedings.”⁶⁵

14. The 2002 Nationality, Immigration and Asylum Act repealed the never implemented provision for automatic bail hearings for all detainees. Many detainees have no legal representation and therefore cannot access elective bail procedures. This means that in many cases, the Home Office is never required to justify their decision to deprive an individual of their liberty.

15. An example from BID's casework shows that detention may be maintained for no reason in some cases:

N was detained for eight months before BID made a bail application on his behalf. Whilst in detention, N had no visits from his solicitor and no telephone communication he could understand. He received some papers in English which he could not read. N had been given Temporary Admission on arrival in the UK but inexplicably was detained later after being hospitalised as a result of a racist attack. At N's bail hearing the Home Office did not contest his release and the Immigration Service could offer no reason for incarcerating him for over eight months. N was released with 1 surety and no reporting conditions. He is now living with relatives and has a new solicitor.

16. The following example of detention of French nationals illustrates that, if left unchallenged, detention may be maintained even where clearly unlawful:

In July 2003, BID became aware that two French nationals had been detained, although they had provided French passports. It took determined representations from BID (South) to secure their release following nearly three weeks of detention. It also took equally determined representations to secure the release of the French passports which were retained for three weeks or so, meaning one of the French nationals couldn't return to France and therefore lost his job.

17. *Article 14 (4)*—BID agrees that there should be an upper time limit on detention, although we do not agree that six months is an acceptable length of time to be detained for the administrative convenience of the state, where imprisonment is not a result of a criminal act. *BID is concerned that an upper time limit of six months would normalise detention of this length. BID urges the Committee to consider recommending a lower time limit of 28 days, which should be plenty of time for removal to take place.*

18. BID have argued repeatedly that there must be an upper limit on the length of detention, not least because detainees have told us that not knowing how long they are to be incarcerated is one of the most distressing aspects of detention. “‘They took me away’—Women's experiences of immigration detention in the UK” by BID and RWRP highlights shocking testimony from 13 women asylum seekers, who were detained for periods ranging from a week to 86 weeks. The women's experiences illustrate that detention is often not used in line with stated policy. Women described struggling to find lawyers and being unaware of, or unable to exercise, their legal rights. Women also described being unable to access physical and mental health care and treatment in detention, and felt that their health deteriorated as a result. The women who got out of detention and went back to live in the community continued to experience a fear of being re-detained and lived under the shadow of the ultimate fear of being removed from the UK. One woman interviewee stated “The information on bail is in the small print. Also, by the time you get the letter in detention, your state of mind is such that you don't always take it in. They don't explain it to you.” [Q13] Another commented that “I just felt like it is better to die than to live. I never thought I could take it. The problem is ‘for how long?’”⁶⁶

19. In particular, BID would draw attention to the vulnerability of many of those detained. Children in families, rape survivors, people with serious medical and physical health problems are all detained in the UK. There can be no justification for detaining such people for lengthy periods.

⁶⁵ Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4–12 November 2004, Office of the Commissioner for Human Rights, Council of Europe, 8 June 2005, para 49.

⁶⁶ “They took me away—women's experiences of immigration detention in the UK”, BID and Asylum Aid, August 2004.

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20. *Article 15 (1)*—provides for contact with legal representatives without delay. In BID's experience, such contact is a particular problem for those detained under Immigration Act powers in prisons. BID is concerned about the number of foreign national prisoners who remain detained solely under Immigration Act powers at the end of their sentence. Official statistics for the last quarter show 170 people were detained under Immigration Act powers in prisons.⁶⁷ Their detention is indefinite, and this double punishment effectively goes beyond punishment meted out by the courts in response to a recognised offence. BID welcomes the provisions in Article 15 (2) regarding the use of specialised custody facilities but also calls for there to be steps taken to ensure that people are not held under Immigration Act powers at the end of their criminal sentence.

21. *Article 15 (3)*—instructs states to ensure that minors are not kept in temporary custody in common prison accommodation. BID condemns the use of detention for children, and is concerned that the Draft Directive does not provide stronger protection for minors. BID urges the Sub-Committee to examine the issue of the detention of children in some depth to seek assurances that the detention of children will not be legitimised by this Directive. Article 5 "Family relationships and best interest of the child" states that Member States "shall also take account of the best interests of the children in accordance with the 1989 United Nations Convention on the Rights of the Child". For this to be the case, it is important that children are protected from detention, which can never be in their best interests.

The safeguards for individuals to be removed (such as concerning their arrest or escort), particularly where removal action is sub-contracted to private companies (with reference to Article 10 "Removal", in particular, not exceeding reasonable force, and in accordance with fundamental rights)

22. BID is concerned that current practice in the UK has led to people being forcibly removed using extreme physical force that has resulted in harm to individuals. Two inquiries have been undertaken by the Prison and Probation Ombudsman, Stephen Shaw, into undercover stories by the Daily Mirror and the BBC into levels of violence, racist and sexist abuse and intimidation by guards and escorts.

23. Reports by the Medical Foundation and the Institute of Race Relations have documented the level of harm done to detainees during forced removal attempts. These reports are consistent with BID's experiences.⁶⁸ BID has experience of forced removals of women in the advanced stages of pregnancy, and cases where a family has been split by removal, leaving the children in the UK and forcibly returning the mother to her country of origin.

Sarah Cutler, Policy and Research Manager
BID

December 2005

⁶⁷ Quarterly Asylum Statistics, 24 September 2005.

⁶⁸ See "Harm on Removal: Excessive Force Against Failed Asylum Seekers" The Medical Foundation, November 2004.

Examination of Witness

Witness: MR TIM BASTER, Legal Director, Bail for Immigration Detainees, gave evidence.

Q305 Chairman: Mr Baster, thank you very much indeed for coming. This is on the record, a transcript is being taken and it is also being recorded for the web. First of all, thank you very much indeed for your very helpful written evidence which we will all have read and on which we will base our questions. Perhaps I could start by referring to paragraph 3 of your written evidence where you say you hope the Directive will be developed in such a way that standards of treatment are driven up. How far do you think the initial proposals in the Directive actually meet that aim?

Mr Baster: Perhaps I could start by saying to the Committee that you are meeting and considering this matter at a time when I think the evidence demonstrates there are very serious problems with the whole issue of the return of Third Country

nationals. You are sitting today 13 days after the last successful suicide in a detention centre. A man who we think was called Bereket Yohannes hanged himself in the stairwell of Harmondsworth Immigration Removal Centre on the nineteenth. That is particularly ironic bearing in mind that on the eighteenth, in London, there was a photographic exhibition mounted by the charities in this area which detailed the damaging effects of detention. On the nineteenth Bereket Yohannes killed himself in Harmondsworth and on the same day my organisation received a letter from Tony McNulty saying that his aim was to ensure that detainees were treated with dignity and humanity. At the current moment, from 2000, 32 asylum seekers have killed themselves and 12 of those have been in detention when they took their own lives. It is from that point

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of view that I am addressing the Committee and giving evidence today. Clearly, in terms of the development of the Directive, we are delighted that the Directive actually requires judicial authority for detention; I think that is a very positive step. We are concerned, however, that the Directive allows a 72-hour gap before judicial authority is required under certain circumstances. We are also extremely concerned in that in Article 14 there is a suggestion there should be a six month maximum. That maximum is far too high. We are also concerned that in Article 15 the fact that there should be particular care of vulnerable persons is not gone into in any greater detail. Currently the Operation Enforcement Manual which requires immigration officers to consider these matters before detention actually has a phrase which is very similar. There is a series of categories of people who should not normally be detained. In our experience on the coal face of this people who are vulnerable are frequently detained and often for very little reason. In terms of children, everything has been said in a way by the previous speakers, but it does seem to me that the detention of children is something which is completely inconsistent with the culture and traditions of this country and it should not happen full stop. I hope that standards of treatment do get driven up. I understand—and I am not an expert in this—that Directives can be watered down over time through the negotiations process, but it certainly is a first step towards raising some of the issues about detention in this country and throughout Europe.

Q306 Lord Corbett of Castle Vale: You have just said that there are no circumstances in which children should be detained.

Mr Baster: The Operation Enforcement Manual is the instructions to the Immigration Service on the use of detention and chapters 38 and 39 deal with detention and bail. These have recently been put out on the website, I am pleased to say. Prior to 2001, though in theory the Immigration Service could have detained families, they did not as a matter of practice. We asked the Immigration Service at that point why there had been a decision to start detaining families and said that presumably they had some statistical evidence that shows that families abscond, but the Assistant Director of the Detention Services Policy Unit, who is central to the decision-making process in terms of detention policy, actually wrote back to us in 2001 and said there was no statistical evidence which suggests that this is a policy which needs to be pursued, it is a ministerial decision. If you look at it from that point of view, is it necessary to detain families because if you do not they will abscond? There is no evidence to suggest that it is necessary.

Q307 Lord Corbett of Castle Vale: Incidentally, on the radio yesterday I heard some figures—and this refers to the section 9 pilot that is going on at the moment—which conflicted with evidence we heard here last week on this issue, which is that there is quite a high rate of absconson by families. That is really a side point on that. Where a decision is taken that people have been all through the process, they have been refused and the IND come to the conclusion that unless they are detained they are likely to abscond, and against what you said about children not being detained, what are you saying then, that you should take the parents into detention and you should get the kids looked after by some other sort of proper care for them but not have them locked up, so you split the family?

Mr Baster: No, I am not suggesting you split the family. I am suggesting that there is a substantial body of evidence which suggests that there are alternatives to detention. Perhaps I could refer you to the Assisted Appearance Programme which was a pilot project set up in New York by the Vera Institute with the Immigration and Naturalization Service in New York. The report came out in 2000. It is my understanding from the Detention Services Policy Unit that they had a staff member on the board of that investigation, and from that piece of research, which effectively was a pilot project assessing whether one could ensure compliance with instructions by the immigration services of that country by having a community-based signing on and checking procedure (I should add that it was very cost-effective), they discovered that in fact they got to very, very high rates of compliance even at the end of the process.

Q308 Lord Corbett of Castle Vale: We had some evidence on that last week. Can you give us some examples where you think that current detention practices in the UK fall short of those in the proposed Directive?

Mr Baster: As I have suggested, the lack of judicial authority in relation to detention is the primary issue. I think this was mentioned by the Chief Inspector. Currently there is a serious problem with legal advice inside detention centres. Although in theory a lot of detainees would have access to a bail procedure in front of an immigration judge in The Asylum and Immigration Tribunal, in practice they have huge problems getting legal representation to run these applications for bail and as a result our organisation, which is a tiny charity, has had to set up a procedure whereby we are assisting people who are detained to prepare and present their own bail applications with evidence that we provide through legal bulletins and this seems to me quite extraordinary in this situation. For instance, in three detention centres, in Harmondsworth, Yarl's Wood and Colebrook, there

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are immigration judges onsite actually in the area of the detention centre. There is now a new pilot project being set up by the Legal Services Commission which is bringing immigration advisers onsite and yet there is no automatic review of detention. You have the judge, you have the hearing room and you have the lawyers, but there is no connection and you have people 100 yards away in detention who do not have access to that judicial oversight of detention.

Q309 Earl of Listowel: In his evidence to the Committee Jeremy Oppenheim of the National Asylum and Support Service, when asked why more families are being taken into detention, said that perhaps one reason was that it is highly costly to keep families in supported accommodation. Does that suggest to you that indeed the emphasis here is very much on the administrative process of removal rather than the fear of absconion?

Mr Baster: That is my understanding. I have seen some evidence where it has been suggested that that is the reason that families are a target. I presume that the obvious other reason is that you know where the families are. Of all the groups of people that are picked up for detention, families are the least likely to be elsewhere because they have to have children going to school. Children can be picked up at school and they are unfortunately. We have immigration officers visiting schools and picking up children from schools and taking them straight to detention centres.

Q310 Lord Dubs: The Home Office made it clear that in “exceptional cases” immigration detainees may be kept in excess of six months. How “exceptional” are these cases bearing in mind that we have been told that there are doubts about the accuracy of the figures that are being kept?

Mr Baster: There are all kinds of issues in relation to that. The last figures that you were referred to this morning were the snapshot on 24 September. At that point, as was said this morning, there were 2,220 people in detention. They break it down into 14 days or less, 15 to 29, et cetera, right up to over a year. One does not know what is going to happen to these people, whether they are going to remain in detention or whether they are going to be removed. Taking that group of people who have been detained for six months, less than a year and one year or over, you have got 199, but if you include the four months as well you have something in the region of 325 out of that 2,220 have been detained for periods of four months, up to a year and over. So it is a fairly substantial number of people who have been detained for a prolonged period of time. We obviously do quite a lot of work on statistics in terms of detention and removal in relation to the preparation of bail applications. If, for instance, someone is removed to a country and they are

bounced back, in other words they are not received by that country, it is not clear whether the clock starts ticking again. I am not able to give you any evidence on that, but it is possible that those people who are bounced back would start again from day one even though, apart from their trip to and from the country, they might have been in detention for a long period of time.

Q311 Chairman: How do these figures compare with other EU Member States?

Mr Baster: I do not know.

Q312 Lord Avebury: I want to ask you a question arising from your first statement about the suicide which occurred in Harmondsworth the Thursday before last. First of all, am I right in thinking that you had information about an attempted suicide the night after this one? Secondly, do you think the process of enquiring into suicides in places of detention satisfies the requirement in Article 15 that particular attention shall be paid to the situation of vulnerable persons, bearing in mind that the previous suicide in Harmondsworth which occurred in 2004 was the subject of an inquiry by Stephen Shaw, as they all have to be now, which has not yet been published because the inquest has not been held on that person? Is there a fundamental defect in the process of looking into vulnerable people who may commit suicide in that, first of all, it is taking the west London coroner, who has jurisdiction over Harmondsworth, months and months to get around to looking at these cases and that the Government considers Stephen Shaw’s report to be *sub judice* even though they may be given as evidence consequently in the coroner’s hearings? Is that not something that could be addressed under Article 15?

Mr Baster: That is a very involved question and I am not really capable of answering a lot of it. When the Chief Inspector of Prisons gave evidence this morning she did not deal with this. The suicide in Harmondsworth occurred about a year after her report into the conditions in Harmondsworth. In fact, one of the things that she highlighted in that report was that there was ineffective protection for people who were vulnerable. What I cannot tell the Committee is how much action has been taken in Harmondsworth. The death of Mr Yohannes indicates that perhaps not enough action has been taken about people who are vulnerable. One of the problems is the secrecy and the difficulty of finding out exactly what is going on, how long people have been detained and what is happening inside the detention estate and hopefully Stephen Shaw’s inquiry will make it clearer in time.

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Q313 Lord Avebury: You say you favour a 28-day limit for detention and that that should give “plenty of time for removal to take place”. If there was a 28-day limit, how do you think that would affect both the need for bail and also the requirement to pay special attention to the needs of vulnerable persons?

Mr Baster: If there was a shorter time limit in terms of detention it would mean the Immigration Service would be required to act in a more coherent fashion and I think this is an important point in relation to what is going on inside detention centres. It is perhaps something that BID is more aware of than anything else. Obviously, as you can imagine, we are a small charity. We represent detainees who come directly to us from detention centres. We do not advertise inside the detention centres in any way, but our number is known and detainees can contact us directly. We deal with people who have been detained for prolonged periods at the end of their asylum procedure awaiting travel documentation. We often find that the Immigration Service has failed to do quite simple things, for example contact the Embassy, fill in the necessary form for application for an emergency travel document, or they have contacted the Embassy but there has been no follow-up action for three months. Frankly, if you do not have the maximum limit in terms of detention you will have a situation where the Immigration Service feel they are able to detain people for very long periods of time and there is no comeback, they can do effectively what they want. I mentioned that we produce information for detainees. Most of the information we produce is for detainees going into court and putting forward to the immigration judge sometimes information that goes back over three years, noting the failure of the Immigration Service to pursue travel documentation for removal. One of the most perhaps well known cases is the case of the Iraqi detainees who were held post-February 2004. Some of you might know that at that point Beverley Hughes indicated in a statement that there was a procedure that was going to be set up. Iraqis were then detained for a long period of time, from 2004 right up to when removals actually started in around August 2005. When we went in to run the bail applications and to get these Iraqis out of detention, indicating that it was a disproportionate use of detention, the Immigration Service repeatedly said throughout that 20-month period that arrangements were going to be made and that they were in the process of doing x, y or z. It was absolutely appalling to see these kinds of things being put into bail summaries, in other words the reasons for detention, before immigration judges without any evidence to support this kind of assertion. When we published bulletins on Iraq and we published the exchanges of correspondence we had detainees who were able to go into court, put the bulletin in front of the

immigration judge and they were often released and that was even in conditions where possibly their immigration record was not the best. This kind of thing is going on all the time. The most recent case is the Zimbabweans. Eventually there was a decision taken at The Asylum and Immigration Tribunal that in fact no one should be sent back at the present minute. There was a period at the end of June, the beginning of July when there was upwards of 100 Zimbabweans in detention. Publicly the Home Office was saying that returns were going ahead. As it happened, BID had been sent information from a detainee, which was an internal document from the Immigration Service he should not have had, which indicated that a unit called the Central Booking Unit was instructing all Immigration Service staff to stop all removals to Zimbabwe. Again, when this was used by detainees, they were able to go into court with the pack of information and they were successful in many cases in getting out even without legal representation because the evidence was demonstrating that in fact the entire process of removal had stopped. Going back to the 28-day limit, the more time that the Directive gives for the Immigration Service to do this kind of procedure the more it will just be a *carte blanche* for them to behave in a completely haphazard fashion and it will allow their procedures to be completely ineffective, and it is something that I think is extremely important. It is a sort of control of officers of the Immigration Service if you have a short period of detention with the maximum time limit.

Q314 Baroness Henig: How does the procedure for applications for bail by detainees compare with that for remand prisoners?

Mr Baster: I am not able to answer that.

Q315 Baroness Henig: In paragraph 6 of your evidence you call for automatic and prompt scrutiny of detention by a judicial body. Would that include scrutiny of bail decisions? If it did, would that not place an unjustifiable burden on the judicial system and on the taxpayer?

Mr Baster: The Directive itself requires there to be a judicial decision to initiate the detention process. I would also suggest prolonged detention itself puts a fairly large burden on the taxpayer. If, from the evidence you have already heard, there are alternatives to detention, that should be enthusiastically pursued because it is going to be cheaper anyway quite apart from the human rights issues. As to the procedure in terms of bail, the detainee or his/her representative basically has to fill in a form and the President of the AIT has issued instructions that indicates the bail application should be listed within three days. There is no appeal right from the decision of the immigration judge once the

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bail decision has been made, you can go back as many times as you like. If your legal representative felt there was some argument, that could be pursued through the High Court in the form of a judicial review, but in our experience that is very rare. It is mostly a matter of people returning to the immigration courts. I should stress that there are these situations where you have immigration judges and immigration courts 100 yards away from detention centres and people cannot get into them, which is absurd.

Q316 Baroness D'Souza: The Home Office categorically rejects the provision of a period of up to four weeks for voluntary departure as they say it would be open to abuse. I wonder what your view about that is.

Mr Baster: Again it comes down to evidence. If the Home Office is able to put forward evidence which suggests that if people are given advance leave that they must go they abscond or do something like that then I suppose there would be an argument for not giving this period. The evidence that came from the South Bank research in 2002, the evidence from the Assisted Appearance Programme and the evidence from the Institute of Criminology back in 2000 was that there was not really enough statistical evidence to suggest that people, when they are treated with humanity, respect and dignity, do not respond in a fairly straightforward and fair manner and say, "Okay, if that is the situation then I will go". We have had quite extraordinary cases where people have been told to go to an airport. There was a case where we did a bail application for someone who had made an asylum claim, gone back to his country, had a very, very rough time and come out again. He was detained on his second arrival here when he claimed asylum again. The evidence was that at the end of his procedure he had gone to the airport when told to with his bags packed and met his family there. There was some problem with the flight so he was sent away again and told to come back the next morning and there he was the next morning with his bag ready to go.

Q317 Baroness D'Souza: You mentioned earlier in this session that there had been 32 people who had committed suicide, 12 of those in detention. Were those 32 other than the 12 those who had been given notice to depart that you know of?

Mr Baster: The information came from the Institute of Race Relations at the end of 2005. It is not entirely clear, but running through them, it looks like many of them who had died outside of detention took their lives at the point where they had been refused asylum and they were either facing destitution or return. In the case of those who are detained, certainly with the last two it appears that the decision to take their own

lives was the point where they felt they were going to be returned to the country from which they had fled. In other words, I suppose it raises a question mark about the effectiveness of the asylum determination procedure in this country about which I will not give evidence. It raises a question because I think it could be arguably advanced that this level of suicide is directly related to people's fear of return and perhaps people who eventually decide to take their own life are people who are not quite so sanguine as the Home Office is about the safety of the countries to which they are being sent.

Q318 Viscount Ullswater: Obviously in making an application for bail you will have run through all the list of things which the Directive says you have got to run through before you consider detention. If bail is granted, do you have any statistics about whether the bail conditions are usually met or whether people fail to meet those bail conditions and then are re-apprehended for the failure?

Mr Baster: As I say, the evidence is from South Bank University who took 100 of our cases in 2002 and they tracked them. We are a charity. All we do is represent people at the bail procedure. We do no other immigration work or legal work at all. At the point we get them out we would shut their file, so we do not track them. South Bank did a research project tracking 100 people who had been granted liberty under the bail procedure and I think they indicated that there was around 90 per cent adherence to the conditions of bail, so it is quite high. The conditions of bail in ordinary bail applications before the immigration judges are usually a residence requirement, a reporting requirement, which might be one or two times a week to the local police station or to an immigration sign-in centre, there may or may not be a surety, sometimes sureties are required and sometimes they are not, and there usually is a date at which one returns to the court or to an immigration office and one surrenders oneself.

Q319 Viscount Ullswater: Those are all the things in Article 14 which should have been gone through before a detention is made in the first instance. It is interesting that no further conditions are put on in most cases, as you have indicated, for a successful bail application.

Mr Baster: What should have happened in a lot of the cases that we are representing is they should never have been detained in the first place because the immigration officer considering the matter should have taken on board his/her instructions from the Operation Enforcement Manual, which is to look at all the alternatives. If someone is an asylum seeker and they have reached the end of their procedure, then the logical thing would be, if they are signing on anyway, to increase the regularity of signing or to

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impose perhaps a slightly stricter requirement in terms of residence, ie you have to be in the house between certain periods of time. They could also, of course, instruct people to ring in on a regular basis. I think it is worth bringing to your attention that in some of the recent SIAC cases—SIAC is the Special Immigration Appeals Commission that deals with terrorism cases and it deals with the issue of bail amongst other things—it was felt appropriate to release someone who was deemed to be a danger to the state on bail with strict reporting conditions. If that is the case and the court could be satisfied that there are strict reporting conditions which will ensure this person is kept under control and is in contact with the authorities, is it not possible for the immigration officer considering the matter of detention to impose very strict conditions, which might be residence requirements or it might be signing on even daily? Bail judges have occasionally granted bail on the basis that you sign every single day at the local police station. There are very stringent reporting conditions which can be imposed which would avoid the necessity of someone being in detention in the first place. I think this is something that is useful in the Directive, but it is there already in the Operation Enforcement Manual. It is just quite often ignored by immigration officers. Going back to the point I raised, if there is no judicial control of the powers of detention then immigration officers can do this without there being any recourse at all to any kind of independent review of this decision.

Q320 Viscount Ullswater: Would tagging not be preferable to detention for those at risk of absconding, and what forms of tagging would you consider to be acceptable?

Mr Baster: At the minute The Asylum and Immigration Tribunal has been asked by the Home Office not to impose a tagging condition because there simply are not the facilities to do it. In principle we are not particularly in favour of tagging for fairly obvious reasons, in terms of the fact that these people who are being tagged have not been convicted of any criminal offence and many people find it extremely offensive, based on our experience of talking to detainees, to face tagging. It is one of the conditions that could be imposed by an immigration officer doing his or her level best to avoid a situation where someone has to go into detention, yes.

Q321 Viscount Ullswater: So you would say tagging is better than detention, would you?

Mr Baster: It is one of the methods that can be used, yes.

Q322 Lord Marlesford: I wanted to ask two things. First of all, in your strictures about the detention of children do you actually have an age which you

regard as the right age? I know formally it is 18. Do you regard your strictures against the detention of children as applying equally to children up to that age or do you have in mind a lower figure?

Mr Baster: Yes, up to 18.

Q323 Lord Marlesford: You do not see a difference in possible risk—

Mr Baster: As I have said, and I think it is important to stress this, if the procedures were adequately followed in relation to looking at the alternatives to detention you would not have a detention estate with enough spaces to put 2,700 people in detention and you would be able, in my submission, to use alternatives much more widely. This is really, I hope, where the Directive will assist this Government at least and hopefully other European countries to go down that road, which is to look at alternatives to detention and it would require some careful research into alternatives and what is actually happening with people who are given their liberty with these kinds of conditions.

Q324 Lord Marlesford: My next question is the extent to which you are working with other countries, charities and NGOs on this particular Directive.

Mr Baster: I cannot assist you with that.

Q325 Earl of Listowel: Does the proposed Directive address sufficiently the specific situation and needs of family members, and particularly children? Is it sufficiently explicit in what needs to be done?

Mr Baster: No. It is in Article 15(3) where it implies that the detention of minors is acceptable under certain conditions. It is perhaps something that is worth keeping in mind that at the present minute the Operation Enforcement Manual (chapter 38) does not give any guidance at all to immigration officers with respect to children. It is quite extraordinary, but immigration officers are not given any guidance to suggest that children should not be detained. What concerns me greatly about Article 15(3) is that without very strict guidelines—and it should come through the Directive—you would have a situation where quite bland comments would be made in terms of guidance to immigration officers and there might be additional pressures on immigration officers, as has been suggested, by those (?) wishing to get families out of accommodation and therefore cut the costs of the operation, which would override any obvious human feelings they have about putting children into detention, and that is effectively what is happening. Five or six years ago the senior immigration officers with whom I am in contact on a regular basis and who make these decisions would not have had it cross their mind to detain children. They had the complete authority to do it before 2001, but it simply would not have crossed their mind to do

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it. Once the Minister had made the decision and there was no clear guidance to restrict the use of detention against children and to take into account the best interests of the child, as the Children's Commissioner said this morning, they have done the most appalling things in terms of the detention of children. It is not because I believe immigration officers are terrible people, it is just they have to be given very, very strict guidance and there has to be judicial control of detention so they can be pulled up every time they step outside that guidance.

Q326 Lord Avebury: Have you noticed the comment that was made by Baroness Ashton in the Grand Committee on the Immigration, Asylum and Nationality Bill where it was being suggested that £2,000 should be given to families to assist them in making voluntary returns? I think she said that compared with a cost of £11,000 for the average detention of a family. Do you think this is a good way for avoiding detentions, and is it something that should be considered as part of a Directive, that all states should consider making payments to families who are returned with a view to assisting them not only in their voluntary departure but in their resettlement back in their countries of origin?

Mr Baster: This is not a part of our remit. I see no particular problem with that kind of financial assistance if the family decides voluntarily to go back to their country of origin. What is beginning to happen now is that the word voluntary is being misused on a fairly grand scale because, of course, the International Organization for Migration is now taking the decision, under heavy pressure, I imagine, to involve itself in assisting voluntary departures from detention centres. A year ago they would never have done that. I think it has to be quite carefully monitored—and perhaps that is something the Directive could look at—to ensure that voluntary does not turn into this kind of quasi coercive method of using detention to force people out of the country.

Q327 Lord Corbett of Castle Vale: Mr Baster, you have made reference to the Legal Services Commission running some kind of pilot and putting advisers into some of these centres.

Mr Baster: Obviously, as a result of a number of reports, including the Chief Inspector of Prison's most notably, the Legal Services Commission finally accepted in about October that they had to provide legal advice for people in detention who could not access any other form of legal advice. The Legal Services Commission set up a project at the end of December which allows legal advisers to use government funding to enter seven detention centres. In two of them they do it on the telephone because there are no legal advisers in the area. In five centres there is a legal adviser who goes in two days a week

and they offer 10 slots per day, so they have 10 half-hour slots over the day, it is 20 in a week and detainees can come to them and ask for legal advice. If the adviser takes the view that there is some issue which has to be addressed and it is appropriate to use more government funding to represent that person, in theory they should take that on and pursue it. Unfortunately what we are finding in terms of bail is that those advisers are saying they cannot do bail. The most recent case was one last week where a man had been detained for nine months and there did not appear to be any action taken with regard to removal back to his country of origin. I think he had exhausted all his rights of appeal. He went to one of the advisers and they said they could not assist him because the merits test would not allow them to do so but that he could always ask BID if they could help. That is absurd. We are far too small to take on that quantity of work.

Q328 Chairman: This question may seem slightly unfair. We have taken evidence from Home Office officials and we will be taking evidence from Home Office Ministers later and we have also had correspondence in writing from the Home Office about their decision not to opt-in to this Directive. From your perspective and reading the Directive, what do you think is the main difficulty for the British Government?

Mr Baster: It is Article 14 from my point of view. It is the requirement that there is judicial control of the powers of detention. There was a period, as was mentioned this morning, prior to the 1999 Act, when the White Papers were coming out, when there was a lot of discussion about it and there were brave comments made by members of the Government saying we should ensure judicial control. The reality of the matter is if they had that kind of level of judicial control of detention you would have a very small detention estate in this country because it simply would not be necessary and the Immigration Service would not be able to do what they are doing. It is administratively convenient and it is politically very convenient, as I am sure everyone in this room is very well aware. It is politically extremely convenient to put large numbers of asylum seekers in detention. It is inhumane and brutal but it is convenient. This is really what it is about. BID is a very small organisation, it is tiny. We have three small offices. We have been around for about eight years. We actually started at the point where we assumed, prior to the 1999 Act, that we would only be existence for a year or two. We felt after that there would be effective judicial control. At that time the major NGOs in the field and the Immigration Advisory Service were of the view that a substantial proportion of their work would be post the 1999 Act. We assumed that would cut down the detention

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estate and it would make our job completely irrelevant. It seems to me Article 14 is what they are really worried about. I think in the end it is administratively inconvenient to have judicial control of detention.

Chairman: That is a very fair answer to an unfair question.

Q329 Earl of Listowel: Governments may argue that it is kinder to children and families to detain them for a short period and accelerate their repatriation rather than keep them for long periods of uncertainty where they do not know what will be happening to them. How would you answer that question?

Mr Baster: It is very simple. The Assisted Appearance Programme basically ensured that those people who were not legal in the country, who were going through an asylum procedure for instance, or those people working on building sites had contact in the community and there was regular contact with that organisation, ie you had to ring in, you were visited, that kind of thing. I get the impression it was low key community involvement in keeping an eye on these people and that dealt with the issue. I have been

to a bail application where the father was detained at that point and the argument was that the father would run away. The Home Office official actually turned to me in court just before the hearing and said, "The kids are going to school, aren't they?" and I said yes and she said, "Whatever the Home Office has said, I'm not going to defend this decision". To give her credit, she did not defend it and the man was released on the spot. It is absurd to detain families with children who are going to school, it is nonsense and it is nonsense also to carry on detaining families when there is effectively no statistical evidence to suggest they are an absconding risk as a group. I am sure there are individual families who have absconded, I take that as read. To have this kind of huge detention of state, with thousands of children put through detention, in a procedure graphically described to you this morning, when there is no evidence to suggest that it is a proportionate response is a matter of national shame.

Chairman: Mr Baster, thank you very much indeed. You have been extremely helpful. Thank you again for your written evidence and for answering our questions so fully and frankly.

WEDNESDAY 8 FEBRUARY 2006

Present	Avebury, L Corbett of Castle Vale, L D'Souza, B Dubs, L	Listowel, E Marlesford, L Ullswater, V Wright of Richmond, L (Chairman)
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Memorandum by the International Organization for Migration

IOM (International Organization for Migration) is grateful for the opportunity to give written evidence to the inquiry into Draft Directive on Common Procedures for the Return of Illegally Staying Third Country Nationals.

Since 2002, IOM has participated fully in providing expert advice to the drafting of EC documents such as the Green Paper on a Community Return Policy on Illegal Residents, and subsequent to that has engaged in further discussion and communication, via IOM offices in Brussels and Geneva (IOM's Headquarters), with EC officials on the issue of return of irregular migrants.

The Communication from the Commission to the Council and the European Parliament on a Community return policy on illegal residents in October 2002 recommends that priority should be given to voluntary return over forced returns, not only because of humane reasons, but also due to cost-efficiency and sustainability. It calls for more efficient ways to promote voluntary return. Furthermore it recommends that information should be available as early as possible for potential returnees on the possibilities for voluntary return to the country of origin.⁶⁹

A number of evaluations undertaken in Europe—eg, by the UK Home Office, a special Norwegian MOI working group, the Swiss Federal Office for refugees, the Danish Refugee Council and the European Commission—have confirmed the importance of information for preparation of the potential returnee, promoting voluntary return and contributing to its sustainability.⁷⁰

Programme evaluations by IOM in Netherlands and in the UK indicated a strong link between the levels of information delivery and the increase in the number of those individuals applying to the respective Assisted Voluntary Return (AVR) programmes.

In the UK, IOM implements AVR programmes for both asylum seekers and irregular migrants who are illegal residents in the UK. The AVR for irregular migrants is fully funded by the Home Office.

The aims of the AVRIM (Assisted Voluntary Return for Irregular Migrants) programme are to assist irregular migrants residing in the United Kingdom with voluntary return to their countries of origin, as well as to initiate, build and strengthen IOM's outreach and information activities to this target group in the UK. The category of people assisted are visa overstayers, people who are smuggled or trafficked into the country and people who have entered illegally and never made themselves known to the authorities. IOM assists returnees with their return travel and facilitates the acquisition of their relevant travel documentation. In conjunction with other agencies and local NGOs, IOM provides: pre-departure information and advice on voluntary return; assistance with departure in the UK and at arrival in the country of origin and onward transportation to the returnee's final destination in their home country. For vulnerable individuals such as victims of trafficking, unaccompanied minors and individuals with serious health problems, the programme will provide special assistance.

To date, 318 individuals were assisted to return to their country of origin in more than 50 different countries worldwide. AVRIM information material is translated into 15 different languages. Information materials—including leaflets, posters, and project cards—are widely disseminated on an ongoing basis in the UK. In addition to this outreach, meetings have involved more than 120 organizations so far in the UK. TV advertisements are broadcast on a regular basis on nine ethnic community channels in eight different languages.

⁶⁹ The communication, 14 October 2002, COM (2002) 564 final, recommends: "To every extent possible, priority should be given to voluntary return for obvious humane reasons, but also to costs, efficiency and sustainability. More efficient ways to promote voluntary returns should therefore be developed and implemented (p 8)"; "information should be made available—as early and possible—for potential returnees on the possibilities for voluntary return to the country of origin. Such information should comprise information on return programmes, vocational, or other training available, on the situation in the country of return and on possibilities for establishing a new life" (p 22).

⁷⁰ 2004, Return Migration, Policies Practices in Europe, IOM, January 2004, p 16.

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With funding secured until 31 March 2006, IOM intends to continue its information strategies, especially the advertisements in various media channels which have proved to be an effective way to reach individuals who live “outside the social system”. And in order to ensure that information is available as early as possible after the migrant entered the country illegally or becomes an illegal resident in the UK, the programme aims to continue building contact with networks, communities, Embassies and agencies across the UK that are likely to come into contact with irregular migrants with the aim of increasing awareness of the voluntary return assistance that IOM can provide. In addition to the ongoing efforts to strengthen the information element of the programme, IOM intends to continue the discussions with HMG on the possibility of making the overall assistance for AVRIM returnees as comprehensive as the assistance provided at present under the other AVR for asylum seekers (VARRP)⁷¹. In discussion will be the possibility of offering reintegration assistance to irregular migrants returning under the AVRIM programme, so that voluntary return to this category of migrants can be more effective and sustainable. Reintegration assistance may consist of in kind support to set up small businesses in the returnees’ countries of origin, provision of vocational training and formal education for the children of the returnees.

Ana Fonseca
 Project Development Officer
 IOM London
 (in coordination with Jan de Wilde)

12 December

⁷¹ Voluntary Assisted Return and Reintegration Programme run by IOM London to provide assistance to asylum seekers and those who have received negative decision on their asylum application.

Examination of Witnesses

Witnesses: MR JAN DE WILDE, Chief of Mission, and Ms ANA FONSECA, Project Development Officer, International Organization for Migration, examined.

Q330 Chairman: Welcome to you both and thank you very much for coming to give evidence to this inquiry, which as you know is an inquiry into a Commission Directive on returns policy. This meeting is on the record. A transcript will be sent to you in due course for any comments that you have, and it is also being recorded for subsequent broadcast on the Web. We have read your written evidence with great interest, but would either of you like to start with any sort of statement?

Mr de Wilde: I do not think so, My Lord Chairman, at least not at great length. To declare our own interest, we are very much partisans of voluntary return for people who have no legal right to remain in the country in which they find themselves. In the UK in particular, I think that, in co-operation with the Home Office, we have had quite a successful, and an increasingly successful, programme for the voluntary return of such people from the UK. I assume that it is in that capacity that we have been asked to come, and we are at your disposal to answer any questions that you might have.

Q331 Chairman: Thank you very much. Ms Fonseca?

Ms Fonseca: I have nothing to add to my Chief of Mission’s statements, but I am happy to answer any other questions that come up.

Q332 Chairman: The implication of your opening remarks—but perhaps I am misunderstanding this—is that the standards that we adopt are possibly worth copying by other Member States. In the course of this evidence I would be very interested in anything you can tell us about the practice of other Member States. The first question I was going to ask which is relevant to that is this. Do you see any need for common EU standards and procedures on return policies, or is it better left to individual Member States and perhaps individual Member States to copy best practice from each other?

Mr de Wilde: The practical answer is that it is best left to individual states, because there seems to be no practical alternative to that at the current time. One of the many reasons Ana is here with me is because she can speak more naturally as a European to these European questions than perhaps I can. However, in our own dealings with the Commission and with Member States of the EU we have certainly always been very interested in efforts to harmonise practices with regard to migration, fully knowing all the time that this is probably something that is a very long-haul process.

Q333 Lord Marlesford: My Lord Chairman, can I just follow that up? It is just to give me a flavour because in your evidence you, I am sure quite rightly,

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assumed that we would know all about you and I am afraid that I did not. I looked it up in the Web and I gather that you were established in 1951 as a non-governmental organisation. Could you give us some idea of where you are centred, what your total funds are, and the number of people? A little bit of background?

Mr de Wilde: We are an inter-governmental organisation not a non-governmental organisation, which means that we are composed of Member States. I think that currently it is 116. It seems to grow, with the interest in migration, every year. As you point out, we were founded in 1951. When I joined the organisation in 1993 we had 47 Member States. So there has been almost a tripling of the membership during the past 13 years. I think that very much reflects the increasing interest that states have in issues of migration, which have become more serious and more pressing since the end of the Cold War. We have a total budget of a little over a billion American dollars. A very small portion, which is curiously enough calculated in Swiss francs—35 million Swiss francs—is our administrative budget which is supposed to pay for the core staff in the organisation but really does not cover that. That administrative budget, the 35 million Swiss francs, is raised on the basis of an assessment of Member States, which includes the UK, and it is based on the UN assessment scale. IOM, however, is not a formal part of the UN although we work very closely with the UN on migration issues. It was purposely established outside of the framework of the UN, on the grounds that it could thereby be less political and more pragmatic, which I think was generally a good decision and it is still a characteristic of the organisation today.

Q334 Chairman: Incidentally, I should have said at the beginning that the acoustics of this room are very poor. Could all of us please, particularly for the benefit of the public who are sitting behind you, raise our voices when speaking? If I could revert to the question I was referring to before, are either of you—and I realise that this is very much confined to the practice of EU Member States—aware of wide differences of standards and procedure between EU Member States? Are there particular areas of concern to you, which you would like to bring to our attention? I should say that last week we heard the Chief Inspector of Prisons. On British procedure, one of her criticisms was the frequent lack of information given to those who were being returned. They very often did not actually know—particularly children—why they were being held in a detention centre, where they were going and, in some cases, when asked where they came from, they said “London”. That is just one criticism that was made last week and one of the many areas of concern that have been reported to

this Committee. Are you aware of particular concerns among some Member States? I do not know whether you would like Ms Fonseca to answer this question.

Mr de Wilde: I would. Perhaps I may briefly say this, before asking Ana to elaborate. Migration, I hardly have to tell this Sub-Committee, is an extremely political issue. As such, it tends to be relatively well, and perhaps even jealously, guarded by various national legislatures, who are perhaps reluctant to turn much of it over to Brussels or to any EU-wide mechanism. That said, the differences in each EU Member State with regard to return are pronounced. Maybe Ana can say something about that and then, if you are interested, My Lord Chairman, we can say why we think what happens in the UK—and I think you alluded to this earlier—is perhaps something that deserves to be more widely known and emulated.

Ms Fonseca: My Lord Chairman, I would add that there are different elements of the return policy, as the Directive states, and these are the forced removals, the deportations, and the voluntary return. I do not think IOM can comment on the different procedures on forced removals or deportations, as it is an area that is totally given to Member States to implement, and IOM is not involved in these processes. We might be involved in assisting returnees after arrival, whether they were forced removal or voluntary returnees, but we are not involved in the procedures as such. In terms of procedures for voluntary return, yes, there are differences within EU Member States. There is one clear fact, which is that since 2002 there has been an increased interest by EU Member States to include voluntary return as an option within their migration management policies, which is welcomed by IOM and we are here to develop this further, or to assist governments in further developing these voluntary return programmes. Yes, there are differences in terms of how much information is available for asylum-seekers and or irregular migrants when they enter the country. IOM very much supports the principle that information should be available as early as possible in the process in each EU Member State.

Q335 Earl of Listowel: I wonder whether you ever find that, when you are trying to resettle returnees, it is more difficult if they are in a very traumatised state, having had poor experiences in their home state. Is that an issue for you when trying to make a successful resettlement, do you ever find?

Mr de Wilde: The key difference here between enforced returns and voluntary returns, and the fact that we only deal with voluntary returns, means that we do not deal with perhaps the most traumatised of the forced removals. In fact, to cite a current example of Iraqis, we have almost the reverse problem: we have people wanting to go home tomorrow. Because

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they do not have the appropriate travel documents or because there are some other administrative procedures to get out of the way, we cannot take them back tomorrow; we have to wait until next week. So I think that it is a very different caseload that we are dealing with and a much more enthusiastic and co-operative one—in general.

Chairman: We may want to return later to the question of the British Government's financial proposals for helping voluntary return.

Q336 Lord Marlesford: Just before we leave this very interesting international dimension, My Lord Chairman, I would find it fascinating—and I do not know whether you could give us a note on it or tell us where to find it—to know how voluntary return is dealt with in the three most obvious European states that have problems, *ie* France, Italy and Spain. Is there any information about that?

Ms Fonseca: I will answer in terms of Italy and Spain, and probably my Chief of Mission can refer to France. Both Italy and Spain are EU Member States with voluntary return programmes. Within the voluntary return option, they both follow the key elements of IOM's assisted voluntary return programmes. These are pre-departure information, departure assistance and post-arrival assistance. In the UK we are assisting returnees after the phase of post-arrival. We are providing reintegration assistance and we are facilitating the provision of training, education and self-employment. In the case of these two Member States, there is not such provision. So if we want to compare the UK approach with these two other countries, I would say that we are following a much more comprehensive approach, which can lead us to a more sustainable return and therefore at the same time tackle the roots of irregular migration.

Lord Corbett of Castle Vale: I wonder if you could put some numbers on—

Lord Marlesford: Are we to have an answer on France?

Q337 Chairman: I beg your pardon. I did not mean to cut you short.

Mr de Wilde: One always hesitates, My Lord Chairman, to slight France!

Q338 Chairman: Please do not hesitate.

Mr de Wilde: France is a country where we have been working closely with Her Majesty's Government on the problem in the Pas de Calais sub-prefecture. France has a much more cautious and much less well-established policy on voluntary return. It seems almost counter-intuitive that they should be much more hesitant and sensitive about this under what passes for a government of the Right than the UK is, in what passes for a government of the Left; but this

is perhaps just to be noted in passing. I think they return voluntarily about a quarter of the numbers that we return, in co-operation with the Home Office, voluntarily from the United Kingdom.

Q339 Chairman: Do you happen to know—and there is no reason why you should—what the French Government's attitude is towards this Directive?

Mr de Wilde: I do not.

Q340 Lord Avebury: Can I pick up that point? Obviously it is of great interest to us to know how British and French policy dovetail with one another in the juxtaposed controls. It is a matter that has been debated extensively, particularly downstairs on the Immigration, Asylum and Nationality Bill. Is there a policy which the French and British have agreed on the voluntary returns of people who are detected in the juxtaposed controls, or are all the returns of those people on a compulsory basis?

Mr de Wilde: All of those returns are done under French jurisdiction and not under British jurisdiction. Whatever other procedures may be laid down by the juxtaposed controls, return is something that is French. As far as I am aware, the British Government does not return anybody from Calais—or at least has not since the territory reverted to the French crown!

Q341 Lord Avebury: But you do not enter into it?

Mr de Wilde: We have been involved twice: once in 2001, or was it 2002?

Ms Fonseca: Yes, 2001.

Mr de Wilde: When we did an information campaign there to apprise UK-bound irregular migrants of their condition and what a way out of their predicament might be. Very recently, I went down to Calais with Home Office and French Interior Ministry colleagues on 22 December, looking at perhaps doing something similar again; because even though the Sangatte camp was closed, the problem still exists and there are still many would-be irregular migrants to the UK that are building up in the Pas de Calais/Dunkirk region.

Q342 Lord Corbett of Castle Vale: Could you say a little more about the voluntary returns from Iraqis? Can you put numbers on that? Secondly, does it make any material difference to voluntary returns if there are bilateral agreements? I am aware that Italy has several countries from where migrants may come.

Ms Fonseca: In terms of the numbers to Iraq, we have assisted more than 600 individuals going back to Iraq since the safe routes were opened, to operate this return. In terms of bilateral agreements, my Chief of Mission may want to add more on that, but there is not a proved link between bilateral agreements and voluntary return. It is important within the process of

migration management, but research at this stage does not indicate that there is a direct link.

Mr de Wilde: There is also a very different approach on the part of different states to the need for readmission agreements. I assume you are talking about readmission agreements particularly for forced returns. My own country for instance—I am an American, by the way—does not do readmission agreements, on the grounds that they are too time-consuming and you can do it anyway. I think that most European countries have generally gone down the road of establishing readmission agreements as a basis for forced returns but, as Ms Fonseca points out, there is no hard and fast relationship between the level of voluntary return and whether or not a readmission agreement exists and is implemented.

Q343 Viscount Ullswater: Turning to a fundamental point, the basic premise stated in the Directive is that the return of illegally staying third-country nationals should be mandatory. Do you agree with that concept?

Mr de Wilde: A very short answer is yes, we do. Our institutional position is that, in order for migration to work well, it needs to be perceived as being well managed in the interests of migrants at the sending stage or the receiving stage. Large numbers of people who are in a country with no legal right to be there obviously undermine public trust in the ability of migration management to function properly. In that sense, I would answer yes.

Q344 Viscount Ullswater: Getting back to the draft proposals, do you think that the draft provides for sufficiently high minimum standards in its return procedures?

Ms Fonseca: I would refer back to my answer to the first question, which is that IOM cannot pronounce in terms of the procedures for forced removals and deportations; but, in terms of voluntary returns, if there is something that we could add to the elements that are already there, it is that there probably could be more references to some incentives for Member States to implement activities that can contribute towards the sustainable return of these people who are going back. We think that it is an important element, as it is important to tackle the roots of illegal migration. It is important to have a Directive; it is important to have co-ordinated efforts by Member States; but we can be effective in tackling irregular migration only if we tackle the roots of migration within the process of return.

Q345 Viscount Ullswater: Perhaps I should have asked this in the first question. If you accept that a draft Directive is mandatory, do you then accept that a return policy will not be efficient and that you will have to have some form of compulsory end to it for

the removal of people who are illegally in any one country? There are two sides of it. You are dealing with the voluntary side. Do you accept that there must be a compulsory end in some cases?

Mr de Wilde: Yes, we do.

Q346 Lord Avebury: When you are referring to incentives for Member States to have effective procedures for voluntary return, do you have in mind some kind of European pooling arrangement for the funding? In the sense that, if every state in Europe contributed to the cost of voluntary returns and then each state took out of it what was necessary to pay for its own particular migrants, including the resettlement, would that be the sort of scheme you would have in mind?

Mr de Wilde: Our experience in working with the Commission—and we do a lot of work with the Commission—is that it is more effective when you are dealing with something that is more on the policy level and longer term, and less effective if you are dealing with something that has to work on a day-to-day basis. In that respect what we do here may in some way answer your question, in that the assisted voluntary return programme that we run in co-operation with the British Government is funded 50 per cent by the Home Office and 50 per cent by the European Refugee Fund. So there is a Brussels' contribution to this under existing mechanisms. There is a lot of exchange among Member States of the EU on different approaches to voluntary return, but that has not—and I think largely for political reasons—yet resulted in a common standard or a common programme across the EU.

Q347 Baroness D'Souza: In your written evidence, and indeed as we have heard, your major concern is on assisted voluntary returns. I wonder whether you think that the Directive could help implementation of assisted voluntary return, in the UK first of all and then in other European countries.

Ms Fonseca: I would say that, yes, it is a positive policy instrument you have there, which can give the incentive for all EU Member States to have a framework for voluntary returns. In that sense, yes, it is important.

Mr de Wilde: Perhaps I may add that I think the programme which exists now in the UK is one that should and does recommend itself to other European governments. It is one of the more successful ones and has a number of aspects to it that are, so far, unique in the EU.

Q348 Baroness D'Souza: Would you just say what you think are the most important elements of that?

Mr de Wilde: One is that there is a very good and co-operative relationship between IOM and the British authorities on the programme, and that is a very

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difficult thing to arrive at because either you become a captive, if you will, of the Government or you work at cross-purposes with the Government. I think that we have been reasonably successful—although some NGOs might take issue with me—in maintaining our own independence and our own approach and at the same time working within the British system. The second aspect that I think is unique to the programme we run here is the reintegration assistance, which is given not in a lump cash payment but is given on a very individual, tailored basis, in which people who return sit down with our offices and get specific advice. Over 90 per cent of them want to go into small businesses on return, so they get specific advice in business planning, in elementary accounting, in where a business might best be started; and that is something, as I say, that is unique. Other European countries tend to give a lump cash payment of one sort or another, and that is it. It is not, in our opinion, as sustainable an approach as the one we use here, nor is it as beneficial to the migrant himself.

Q349 Lord Dubs: The Directive has a four-week time limit proposed for voluntary returns. Our Government says that such a time limit would undermine any effective return policy. Do you agree with that? Would you set any time limit at all?

Mr de Wilde: Yes to the first, no to the second. This is just voluntary return we are talking about here, of course. We cannot underline that too much. We think that there has to be a forced return at the end of the process if voluntary return does not work. Our inclination is to provide as much information as early on in the process as possible, so that people are aware that this option exists. Even if at the beginning they are completely uninterested in it, at least they have heard about it; it may plant some seed and, as they go through the process, they may at one point or another develop an interest in it, which we are only too happy to gratify. Whether or not there should be a limit on the amount of time available to opt for a voluntary return before you are chucked out, however, is something that we are very content not to comment on and to leave to national authorities, noting only that we think the best possible incentive and opportunity should be given to people to opt for a voluntary return.

Q350 Lord Avebury: In the current proposals in the Immigration, Asylum and Nationality Bill for a single-stop appeal, where somebody can have one right of appeal against the refusal of his leave to enter or remain and against removal, the applicant is given 10 days in which either to lodge an appeal or leave the country. Do you think that it would be a good idea, if 10 days is going to be the sort of limit that people adopt throughout Europe, for notice to be given to a person in this situation, that the IOM could assist

him within the 10 days and would you be able to cope with that sort of timescale?

Mr de Wilde: I think that the 10 days is very brief. We can and have returned people the next day after they apply to us, but that is not the most common experience. The most common experience is that it takes several weeks. If travel documents are not available, if we cannot use EU letters, we need to go to embassies or high commissions and get travel documents. In those cases it can take longer. It can take a month in some countries; in some particular instances it can take even longer. To the extent that you limit the period to a week or two, you will at the same time limit the number of people who can take advantage of a voluntary return. I would not want to set a limit on it in terms of weeks or days, but my feeling, from our practical experience, is that—just to pick a number out of the hat—we might return 60 per cent of people who applied to us within 10 days, but 40 per cent we would not. So what would happen to those 40 per cent? Presumably they would be here then in an irregular status; we could not offer voluntary return to them; and it would simply add to the burden on the Government for forced returns, which is an infinitely more—perhaps not infinitely, but a 10 times more expensive procedure than voluntary return, and certainly not as humane.

Q351 Earl of Listowel: A witness from Bail for Immigration Detainees told us that the International Organization for Migration is going to assist voluntary departures from detention centres. Would you like to comment on this? Is this something which ought to be allowed under the Directive? There is a particular concern about families and that there is an over-enthusiasm to detain families, for administrative convenience rather than because of a concern that they may abscond. Going back to an earlier question, are you concerned that the resettlement may be less successful in these circumstances?

Mr de Wilde: If I may clarify, you mean returning people voluntarily from detention?

Q352 Earl of Listowel: Yes.

Mr de Wilde: And whether or not they would have more difficulty reintegrating in their home country?

Q353 Earl of Listowel: That is correct.

Mr de Wilde: Ana may have the exact numbers here. When I came here, I began to talk to the Home Office about making voluntary returns available to people in immigration detention, which we were unable to do before. About a year ago we began to be able to do this. The Home Office permitted us to offer that. I am unaware of the breakdown of detainees in terms of families or single men. I am quite confident that the overwhelming majority continues to be young single

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men. To the extent that it is families, however, I do not think that we would really have enough basis on which to answer your question at this point. I know that the number of people who are coming to us, or who are getting in touch with us from detention and asking for voluntary return, is growing quite significantly. It is something that takes a lot of time and effort on our part, but that is a management problem. We do like, as a matter of policy, to offer voluntary return to people who are in detention.

Q354 Chairman: Do you think that you would be able to send us any information on that?

Ms Fonseca: Perhaps I may clarify. All these individuals we assist who are in the detention centre have not received any removal order; so they are still in the same situation as any other individual who is outside the detention centre. The objective of the programme was to include these individuals, following letters we received from these people saying, "We want to go back. We need your help. We don't want to be forcibly removed". So this is in response to a demand from people who are in this situation.

Q355 Chairman: If you were able to give us any statistics on that, it would be very helpful.

Ms Fonseca: We would be happy to provide you with a breakdown. Again, I would confirm that there are probably no families going back who were in detention; but I would like to confirm this at a later stage.

Q356 Baroness D'Souza: Do you think that the Directive should allow those who have been subject to removal orders to be assisted?

Mr de Wilde: Yes.

Q357 Baroness D'Souza: You do?

Mr de Wilde: Yes, I do. In fact, in some continental countries we are able to. Because the window in some continental countries between receiving the equivalent of a removal order and the removal is much wider than it is here, we have more of a chance. In fact, there is considerable interest in giving us more of a chance to offer voluntary return even to somebody who is under a deportation order.

Q358 Viscount Ullswater: Following up on that, do you feel that a removal order should be suspended if you get the agreement of what in that case could be a detainee that he or she would be prepared to go back voluntarily?

Mr de Wilde: Yes, it would be useful for everybody, including the migrant, to be able to have that option, and that option does not exist now.

Q359 Lord Avebury: You know about the particular controversy that has arisen here with regard to families with children who have exhausted their rights of appeal and who are having benefits withdrawn from them in a number of pilots up and down the country, on which we are told there will be a report very shortly. Have you been involved in any programme to ask those families whether they would like to accept assistance?

Mr de Wilde: Yes, we certainly have. In our own outreach, we try to emphasise that. I believe that in Home Office letters and publications they also tell people that our voluntary return programme exists, if people want to take advantage of that. It is a very sad and difficult situation, in the sense that we know, in a sort of abstract way, that assistance cannot continue forever and at some point or other it will be cut off; but there is absolutely no doubt that it results in some very difficult situations for people when it is. The only thing we can do as an international organisation is to do our best to make sure they know that they can avail themselves of this programme.

Q360 Lord Avebury: Should the Directive contain special measures for accessing those people, not simply by means of written notices—which you say the Home Office can already distribute—but by personal contact, perhaps by some representative of the IOM who would explain carefully to them what sort of facilities—

Mr de Wilde: I think so.

Ms Fonseca: Perhaps I may add that, in respect to families, this is a group of individuals where we have special concerns in terms of voluntary return. The issue of having information available as early as possible is even more important for these groups of people. IOM is conducting, in conjunction with Safe Haven in Yorkshire, a pilot programme whereby representatives of this agency talk to families directly, make them aware of the situation in the UK and make them aware of voluntary return. This, I think, is the moral duty of IOM and partners: to make the target group of the programme aware that the option is there.

Lord Avebury: It would be interesting if we could have details of that.

Q361 Chairman: Yes, it would be very helpful for us to have details of that, particularly because we are hoping as a Committee to visit a detention centre. Are any of your representatives based on detention centres, or do you simply send them as and when needed?

Mr de Wilde: We send them out, My Lord Chairman. Our main office in the UK is in London but we also have sub-offices in Liverpool and in Glasgow. We work with five NGO partners for our outreach to other parts of the country. We do work with the

Detention Advisory Service, for instance, on reaching detainees, and in fact the Detention Advisory Service was very encouraging of our efforts to provide voluntary return for detainees. I think that Lord Avebury's idea of having greater human contact with people whose benefits are being cut off is a very good one, because they are often in a very confused and understandably distraught state.

Q362 Baroness D'Souza: What mechanisms does IOM have for evaluating conditions in countries before assisting asylum-seekers and irregular migrants to return to them?

Mr de Wilde: Evaluating in what way?

Q363 Baroness D'Souza: Conditions in countries. I was thinking in terms of basic human rights conditions, but others as well.

Mr de Wilde: We do not have a remit to formally do protection. That resides with UNHCR on an international level and with the 1951 Convention and the 1967 Protocol; but we do have some 180 offices around the world now and, when people go back with our voluntary return programme, we are able to give them a certain amount of advice before they do it. Our general experience is that migrants are, almost without exception, much better informed about conditions in their country, from relatives, from cell phones, letters, whatever, than we are or than we could be, and are in a much better position to make that judgment whether or not they want to go back. It is very odd to see to which countries people want to go back and with what degrees of enthusiasm. It is almost counter-intuitive. For instance, among our top countries of return now are places like Iraq, Zimbabwe, Sri Lanka, Iran. You might think that nobody in their right mind would want to go back to some of these places, but in fact they do—for a whole variety of very personal reasons that have nothing to do with politics. Their mother has died; they have had to go back to protect their property—very concrete, personal reasons.

Q364 Baroness D'Souza: I imagine that you rely on a number of different sources for gathering information—your own offices, UNHCR, whatever it might be—but there must be occasions when you feel that the assisted voluntary return is not quite voluntary and that the conditions in the country are certainly less than ideal. Does that involve you in dilemmas about whether or not you should, or do you rely entirely on government directives, as it were?

Mr de Wilde: In a country such as the UK, we certainly do not have any interest or any brief in commenting on the status determination system for refugee status, for instance. In other countries we might be more sceptical. Even there, we have no constitutional responsibility for assessing status

determination or for commenting on status determination procedures. On a national level it is up to the national government; internationally, it is up to UNHCR. So it is not something that we would generally get involved in. We tend generally to respect the migrant's ability and right to make those decisions and not to have a terribly paternalistic attitude toward that, on our part at least.

Q365 Chairman: Do you find in practice that very often the reason why the migrant wants to go back to his or her country is not so much the pull factor, because their mother has died or something, but because they are destitute in this country?

Mr de Wilde: I am sorry, My Lord Chairman, I did not answer the question, which is a philosophical not to say theological one, about whether or not the return is voluntary. Our position—and we tend to be convulsed by an internal debate on this every three or four years at IOM—at least as long as I have been with the organisation, the upshot has tended to be that there is always an alternative. People can, particularly in this country, go underground. There is a huge underground economy. By most estimates, there are maybe half a million, at least, irregular migrants in the country. It is not as if it is a voluntary return or perpetual imprisonment. As long as there is that, even if there are only two choices, as long as there are two choices we are happy if they choose voluntary return.

Ms Fonseca: I would just add in relation to your question that I have worked in the past in operations, meaning that I saw applicants myself and I did help them to go back myself. It is our procedure that if people raise issues of safety we do not encourage people to go back; we would ask them to step back and check further about their decision on voluntary return. So we are responding to people's decisions, as my Chief of Mission stated.

Q366 Lord Dubs: How often do you do that? How often do you actually say to people, "It's not safe for you to go back"? Is it frequent?

Ms Fonseca: How often we ask . . . ?

Q367 Lord Dubs: How often do you say to a person who has opted for voluntary return that in your judgment it is not safe for them to go back?

Ms Fonseca: We are not supposed to judge on migrants' judgments about voluntary return. We are supposed to interview them, to ask about their needs for return, and to ask if they have any special needs for transportation. We do not ask the question of every returnee, "Are you sure you want to go back to this country?" because of the safety situation. It is not appropriate and the programme is about helping individuals going back who wish to go back, and

whereby we have a safe route and we can ensure that people arrive home safely.

Q368 Lord Corbett of Castle Vale: It would follow from what you have both said, would it not, that you do not do any kind of monitoring of what happens to people when they have gone back to their countries?
Mr de Wilde: We do. We monitor in a *de facto* rather than a *de jure* way, and it is through the reintegration programme. In that reintegration programme, because it is a very hands-on programme, we follow people for up to a year; so we are in touch with them to see how their business is developing, to see what they need.

Q369 Lord Corbett of Castle Vale: Does the IOM do this itself or do you sometimes work through agencies?

Mr de Wilde: We do it in large part ourselves but, in countries where we do not have an office or where the number of returnees does not make it economically worthwhile, we would work through partners. Somalia is perhaps the best example of a country where there is no international presence anywhere and so everybody has to work through agencies of one sort or another. However, it is through the reintegration programme, and the fact that we are in touch with people in that programme at least once a quarter, that we are able to do a certain amount of monitoring. The fact that more and more returnees now opt for reintegration—about three-quarters of them now, and going up, are opting for reintegration—means that we will be increasingly in a position to monitor. There are some people, however, who do not want to get this reintegration, simply because they do not want somebody fetching up at their front door.

Q370 Lord Corbett of Castle Vale: Do you come across many horror stories? Somebody has said yes, they want to go back; they are assisted; the promise of a better life; and things then go dreadfully wrong, say, on the human rights front. Does that happen?

Mr de Wilde: Again, we do not systematically monitor the human rights issue, although we are made aware. For instance in our returns to Zimbabwe, we had one case last year of a woman who went back and who was interviewed by the CIO and was given a bit of an unpleasant time. She was not detained or anything, but it was clear that she was frightened. We made an official protest to the government; we got what we thought was a satisfactory reply; and we have not had any further incidents of that type. When they do happen, we are very much aware of them. What we are able to do about them is another question.

Ms Fonseca: Perhaps I may add to this issue of monitoring returnees in the countries of origin. It is important to understand that people usually do not want to be visited by an IOM officer, unless there is a reason for that. The reason we have encountered since we started operating voluntary return is when we offer reintegration. Then there is a reason for people to welcome IOM to come and see them. As we mentioned, we do regular monitoring after three months, after six months, and after one year. IOM stipulates that one year may be a useful timeframe for people to reintegrate and feel that they are reintegrated into their countries.

Q371 Chairman: I do not know whether you are aware of the detail of the Memoranda of Understanding that the British Government have reached with Libya, Lebanon and other countries. If you are aware of them, does your experience give you confidence that that will work and that people returned to countries, including Libya and Lebanon, will actually be safe?

Mr de Wilde: I do not know if we have returned anybody to Libya or—

Chairman: No, I do not think anything has happened yet, but there is an agreement with the Government of Libya and the Government of Lebanon, and there are other agreements being negotiated at the moment.

Q372 Lord Corbett of Castle Vale: Jordan as well.

Mr de Wilde: I believe this is on forced return though, is it not?

Chairman: Yes, it is. So it would not involve you anyway.

Q373 Lord Marlesford: I wonder if I could ask you about the new pilot scheme which HMG has announced, giving £2,000 to encourage people to go back—which the Home Office minister has told us that you have been asked to comment on. Could you give us your preliminary views on it?

Mr de Wilde: Again, sometimes things work almost too fast for us. The Home Office asked us to do this; we discussed it with them; we agreed on the procedure just before Christmas, and then we started implementing it on 1 January. So it is a rather short lead time. It is an additional £2,000 over and above the average £1,000 reintegration assistance that we have been giving before 1 January, so that is now a total of £3,000. The response to it has been dramatic. I think that is a safe word to use. The number of phone calls we have had has been absolutely overwhelming. In this month, February, we are likely to be over 400 voluntary returnees for the first time, and I would not be surprised if in March and April it was over 500. So it is a very positive response. We are just about keeping our head above water in terms of

being able to respond to this administratively, but it is certainly working.

Q374 Chairman: Can I say that I am very struck by the contrast of what you have said about 400 this month, when your written evidence said “to date”—which is 12 December—“318 individuals have been assisted to return”. As you said, I do not think the word “dramatic” is an overstatement.

Ms Fonseca: May I clarify, My Lord Chairman? The written evidence gave much emphasis on our voluntary return programme to irregular migrants, which at present is just about pre-departure information, departure, and arrival assistance. We are running a parallel programme, which is the voluntary assisted return and reintegration for asylum-seekers who have applied for asylum, who have received a negative decision or who have temporary status. I am afraid that I was probably not comprehensive enough in our written statement, but these figures are related to our major programme, which is a voluntary assisted return and reintegration programme.

Chairman: Thank you. That is useful clarification.

Q375 Viscount Ullswater: Do you think that this scheme, which is dealing purely with failed asylum-seekers, should be broadened to other illegally resident people in this country?

Mr de Wilde: Yes.

Q376 Viscount Ullswater: That is a very good, short answer! If that is so, do you think it would bring a lot of people out of the woodwork that the state did not know about at all?

Mr de Wilde: My colleague referred to the two programmes that we run now. The one which has the higher numbers is for people who have entered, at one point or another, the asylum system; that is the VARRP, the Voluntary Assisted Return and Reintegration Programme. A little over a year ago we started a programme to return people who were here without any legal status, who had never gone into the asylum programme. That is picking up quite nicely, although it does not offer, as you point out, anything except a bit of counselling, travel arrangements, a ticket back, and help with travel documents to return. It does not offer any reintegration assistance, therefore. My understanding to date is that the Home Office has been reluctant to extend reintegration benefits to people who are here illegally and who have never entered the asylum system. Of course, the number of people who fall into that category is anybody’s guess. I think University College London

came out with an estimate last year of roughly about half a million people who might fall in that category. There is certainly very little doubt in our mind that if some kind of reintegration assistance were provided to these people, maybe not as much as is provided to asylum-seekers, we would, as you say, see some activity in the woodwork.

Q377 Lord Dubs: Are there any elements in the proposed Directive that you would like to see changed, or any matters that you would like to see added to it?

Mr de Wilde: I hesitate to get into a textual or an editorial mode here but, to the extent that people can be given—and I think this has been implicit in our answers—as long and as well-informed a time to consider and opt for voluntary return, that would be better; because the more people we do get to return voluntarily means the fewer will need to be deported; the fewer will go underground, in a position where they are potentially quite vulnerable to exploitation. That would be our general approach to the Directive: just to maximise the opportunities for people to opt for voluntary return.

Q378 Lord Avebury: Do you think on balance that the Government was sensible not to opt in to the Directive, or would you say more generally that states are better off determining their voluntary returns policy in the manner that you have suggested—by looking at best practice and gradually extending to the rest of Europe the procedures which have been found to work in particular countries on a voluntary basis?

Mr de Wilde: I would certainly agree with that, although I think it betrays a more pragmatic and perhaps common-law approach than the more Napoleonic approach that is often seen on the Continent. Yes, I think that the increased exchange of views, examination of best practices, is something that is very useful to everybody. In our experience, even when best practices are laid out, it can take a long time for other countries to adopt them. As I suggested earlier, the whole migration issue is one that is very embedded in national political structures and in national political interests of various sorts. It is not easy, therefore, to rule by fiat across the 25 EU Member States. My own personal view would be that would not be a wise way to go, but I certainly think that the examination of practices and drawing lessons from it is a useful way to proceed.

Chairman: Can I thank you very much indeed for an extremely helpful response to our questions, and I wish you good luck in your very important work.

Examination of Witness

Witness: PROFESSOR ELSPETH GUILD, Partner, Kingsley Napley, Solicitors, examined.

Q379 Chairman: Professor Guild, welcome. You are a longstanding friend of this Committee. We are more used to having you help us to prepare the questions, but now it is your turn to give the answers. As you know, because you were already here when we started, this is on the record and you will be sent a transcript in due course, and it is being broadcast. Thank you very much for coming. Incidentally, I should mention that we have all been given and have had an opportunity to read with interest the joint study which you and Anneliese produced in the European Parliament publication last year. Many of these questions will be familiar to you from having sat in on the last session, but can I first of all ask this. Do you see a real need for common EU standards and procedures on return? Is it right to try to encapsulate these in a Directive, or should it be left to Member States? It is really reverting to the last question that we asked our previous witnesses.

Professor Guild: Thank you very much, My Lord Chairman. It is a pleasure to be back here. I am very pleased that you are having this inquiry into a particularly important proposal for legislation. I am sure the questions are much better than any I ever assisted in preparing! Leaving that there and turning to the question of whether there is a need for this particular measure, it seems to me that there are three ways of looking at the problem, or the question. First, there is the answer which the logic of the internal market gives us. If we are part of an internal market and we regulate the circumstances under which people are present on the territory, and this is a common territory, then that logic will lead us to the answer to the question: yes, we need a common mechanism, therefore, by which those who are present on the territory but who ought not to be present on the territory are removed from the territory. I think that is the first logic. The internal market logic will always bring us to the conclusion, yes, we need more legislation in the field. The second perspective is the displacement logic. If we do not have a measure of this kind, if we do not have a common set of standards and procedures, will this result in the displacement of persons who are irregularly present on the territory of the EU, shopping around for the place where they are least likely to be removed? If I can use the expression, the politics of fear is the argument, “If we don’t do something then they’re all going to come to us”. We have heard that argument many times in many other spheres, but there is a logic there which also brings us to an answer which is, yes, we do need a measure in this regard. The third logic which I think gives us the same answer is the human rights logic. That is, if we are a common territory which shares the same fundamental values and principles—which we have set out in our preambles to the treaties which govern

the European Union—then we need to have a common set of standards on the basis on which people are treated if we are to say that they are no longer regularly here; they are irregularly present. We have to have a common set of standards which comply with our human rights standards, but perhaps we also need to be thinking about our fundamental rights standards—those standards which are the amalgam of the constitutional traditions of the Member States, which may or may not reflect the same standard as the Strasbourg European Convention on Human Rights standard. So I think that there are three logics which lead us in favour of a common measure in this field. Against those three logics is the logic of Member State sovereignty. If we control our own borders, why do we have to participate in a common project on returns? If we decide who is regularly and irregularly present, what does it matter? Is this really an EU argument? I think that logic is also one which needs to be taken into account.

Q380 Chairman: In your experience, is there a wide variation between the standards and procedures being adopted by the EU Member States?

Professor Guild: Certainly what I have seen would indicate that. We have done a number of studies in the Odysseus Network of experts, academics, in the field of immigration and asylum on various aspects of procedural law in the Member States. I am constantly astonished at what seems to me utterly self-evident from my experience in the UK and in the Netherlands, which is seen as absolutely extraordinary from the perspective of Sweden or Greece. The differences are at least as big as the number of the Member States. So, yes, we do have substantial differences.

Q381 Lord Corbett of Castle Vale: The Joint Council for the Welfare of Immigrants criticises the attempt to try to get a common EU policy on returns, because they say there is no common policy on migration. Do you go along with that?

Professor Guild: There is definitely some merit in that argument. Are we really serious about a common EU migration policy or are we picking and choosing among measures which we think might be expedient at this particular moment or another? Therefore, the argument would be are we looking for a coherent whole, or have we picked out return, expulsion procedures, as a politically sellable idea at the moment, which we are going to use as a bit of a flagship to convince Member States that we are doing a jolly good job and that Member States are perhaps interested in promoting, in light of concerns about populations, about the flows and stocks of irregular migrants? So I think that from that perspective, yes.

If we are serious about a common EU migration policy, if this is part of a larger project, then sooner or later one will have to come round to the question of the common policy of returns. However, I think that certainly the JCWI's argument has some merit. Can we start from the end or do you have to start from the beginning? It is a bit like Schengen. Would you have started from the Schengen abolition of border controls when your end objective was a common EU immigration and asylum policy?

Q382 Lord Corbett of Castle Vale: Let me put this to you then. Everybody knows, all the Member States know, who is legally or illegally on their territories. If we go to the other side, the migration end of it, the labour markets in the 25 countries, for example, are totally different one from the other; therefore the needs for migration of the people who can contribute to that economy are different. I hear what you say, that it is more sexy politically to deal with the illegal end of the market, but I think that it is an easier problem to deal with. Most go through the process, and the answer is yes or no; whereas the differences between the labour markets in the Member States are absolutely huge, and therefore the needs for migration are different surely?

Professor Guild: The first difficulty I have is that I am not convinced that the Member States do know who is regularly and irregularly present on their territory. I think that we would like to believe that we are in control. We know that there is a mismatch between who is present and what the laws say about them at any particular given moment in time; but I am not sure that it is as self-evident that we do actually know as much about who is regularly and irregularly present as is commonly put forward by public officials. If we go back to look at the position of, for instance, new Member State nationals on 1 May 2004, how many of those were regularly present and how many of those were irregularly present? That came down to a question as to whether or not they were genuinely self-employed or they were actually in employment. If they were genuinely self-employed, they were regularly present. If they were in employment, then they were irregularly present. Making that differentiation was one which led to a wide margin of appreciation as to whether somebody was regularly present or irregularly present. That is just taking a very common-or-garden EU position in mind. It is not the question about whether or not somebody is genuinely a refugee, or there is a serious risk of torture if they are returned to their country of origin—all of which raise questions about are they regularly on the territory or if they meet those requirements there. If they do not, they will not be. So it is perhaps not as easy a decision: is someone regularly on the territory or not? As regards the labour markets, certainly your Lordships have

produced a very interesting report, in which I had the honour of participating, on exactly this question and how best the EU can assist Member States, can interact with Member States, as regards economic migration. I think that we looked at many of these questions very deeply at that time.

Q383 Earl of Listowel: In our previous evidence this morning we heard a view that we should not legislate across the EU on these matters, but rather we should, very importantly, share best practice as far as possible. In your view, is there more room for improvement in terms of institutions? For instance, in this country we have the National Institute for Clinical Excellence for the health service. Institutions can have credibility with all the nation states, can provide models of best practice and develop relationships which are seen to be helpful and seen to be a source of expertise, and thereby get away to some extent from the need to produce EU legislation or directives in this area.

Professor Guild: I was very pleased to hear, My Lord Chairman, that you have received evidence from Her Majesty's Chief Inspector of Prisons. There is a very good example of an institution which is vital to the maintenance of standards in a particular field, which of course also covers irregular persons who are being detained, and brings to the attention of yourselves, of the Government and of the public, problems and questions of standards. If one follows the development of that particular institution over the period when the current incumbent has been in place, one has seen very much the development of a set of standards against which practices of prisons—or in this case we could talk about detention—are then gauged. One could certainly imagine that kind of an office and process being beneficial in this field of return, but of course we would need to invest resources in it. The institution and the individuals who would be appointed would have to have the power to raise questions and assist in the development of policy.

Q384 Viscount Ullswater: I would like to return if I may to a question that was started off by Lord Corbett, because the JCWI also says that there has to be much more clarity on the definition of what constitutes an illegal third-country national—which again you have touched on. Do you feel that ought to be part of the Directive, perhaps coming into the scope of Article 2, that there should be some sort of common ground, acceptable throughout the EU, as to what constitutes an illegal third-country national? *Professor Guild:* I think that this is vital. This is at the heart of the problem. What we are trying to regulate in this Directive are standards and procedures over an unknown subject. Who is this illegal? If, as the Government suggested last year, they will reduce the

period of time for a visit from six months to three months for third-country nationals in the UK, they will create a whole bunch of people who, the day before, were entitled to be here six months and who, the day after, are only entitled to be here three months but who might stay six months. So we will have another mismatch between who is legal, who is illegal, who is falling into illegality and who is not. The entry into force last week of the long-term residence Directive will further complicate this question of how do we determine who is legally and who is illegally present. If third-country nationals who have completed five years of regular residence in one Member State have the right to move and reside in another Member State, and when one takes into account the fact that the majority of the Member States have not passed their implementing legislation—which had to be transposed by last week—then we will have a whole bunch of people who have acquired rights to move, reside and enter into economic activities, but who will not have that evidenced in one way or another. How are we going to determine exactly who is regular and who is irregular? Until we have a definition which is independent of the vagaries of national law, which can determine EU status of regularity and irregularity, we will have a terrible problem determining who should be subject to the procedures and conditions.

Q385 Viscount Ullswater: You would not like to come up with that definition?

Professor Guild: I would need a bit of time to work on it, but I am sure that one can provide a bit of assistance in due course!

Q386 Baroness D'Souza: Providing that you have sufficient time and when you have come up with a definition, I wonder if you could give us your view on the basic premise of the Directive, which is that illegally staying third-country nationals should be returned and that should be mandatory?

Professor Guild: I think that what we are getting at here is a tremendously important principle in this Directive. I am not happy with the way in which it has been turned into a negative: "Member States shall expel". I think that perhaps we might do better to phrase this in the positive: Member States are obliged to provide documents; are obliged to—"regularise" is not exactly the right word—but to acknowledge the regularity of residence of persons on their territory. Then perhaps we will be able more clearly to understand who is not regularly present. There is a tendency and a great temptation, particularly in a system of the control of migration as the UK's, where the use of discretion has been an important tempering mechanism to prevent the harshness of the rules applying to persons to whom they ought not to apply,

or to whom there is a social sense of, "That's jolly unfair to treat that person that way". We have certainly very much incorporated into our way of thinking about immigration control that we need this discretion, to prevent people being squashed by the harshness of the rules. Perhaps we need to think a bit further about what this means. Perhaps it is the rules that are wrong. Perhaps the rules should not be so harsh. Perhaps instead of it being, "We will be nice to that poor family because they have young children who are disabled", we should say, "Perhaps they ought to have a right to regularity in those circumstances". Perhaps we should therefore be a bit more cautious about how widely we want to use discretion as the mechanism for regulating injustice within the system, or is it not the law itself which ought to exclude injustice? I think that I have given you two different bits of an answer at once. The first is that we ought to be focusing on ensuring that people who ought to be regular have the documents; that they are not left in limbo; that their rights are specified in documents that they can produce, should they be asked; that they know what they are entitled to do; the second is that we should try and incorporate into the rules those circumstances where our social settlement, the way in which our society feels—who ought to be here or ought not to be here, that these people ought to be allowed to remain—that should be in the law; it should not be left to the discretion of a particular government official. Then we should look at who is left.

Q387 Baroness D'Souza: Taking that one step further, looking at who is left, you would agree that it would be okay to have a mandatory ruling that they should be returned?

Professor Guild: If one makes the comparison with free movement of citizens of the European Union, which most of us feel works more or less satisfactorily; if we look at the measure which was adopted—this goes back to 1964, and it is about to be replaced—a Directive on expulsion of citizens of the Union who were at that time nationals of the Member States from one Member State to another, we see that the principle exists in EU law. It was carefully specified as to on what basis it should apply; the specification was narrowly interpreted by the Court of Justice, and we have procedural requirements set out. What am I seeking to say? I am seeking to say that, even in respect of citizens of the Union, we accept that the principle of expulsion exists, and there may well be circumstances in which we want to exercise it. If we accept that as a principle for citizens of the Union, I think that we have to accept it also as a principle in respect of third-country nationals.

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Professor Elspeth Guild

Q388 Lord Dubs: The Government opposes the concept of an EU-wide re-entry ban on the ground that it is impractical. What do you think?

Professor Guild: It is a very interesting argument that it is impractical, and I have some difficulty imagining why it would be impractical. Would it be impractical for the UK because the UK is, as I understand it, in some difficulties in participating in the Visa Information System—the system which has been set up among the other Member States but in which, as it builds on the Schengen *acquis*, the UK is not participating and, under the rules of the game, is not allowed to participate? It would seem to me that your re-entry ban would be exactly the kind of information that would be stuck in the Visa Information System, or in the Schengen system—in which again the UK does not participate—both of which anyone, either a visa officer or border guard, is required to consult before issuing a visa and admitting someone to the EU. So I am not quite sure how it would be impractical. It might be impractical for the UK, but I do not see that it would be impractical for anybody else in terms of putting it into a system. Would it be a bad idea? We will assume that it is not going to cause the Schengen Information System or the Visa Information System to crash if it has a supplementary piece of information in it; therefore, is it impractical to have that information in it? It does not seem to me to be impractical as such. Would it be improper to have it in, or would there be legal or political arguments why it would be a bad idea to have a re-entry ban and to put that information in? I think that goes back to the question of who you are expelling and why you are putting on a re-entry ban. If your re-entry ban is consistent with a view that this person is a serious risk to public policy, public security or public health, then it seems to me that that may well be a legitimate argument, and certainly the UK uses re-entry bans for those purposes itself.

Q389 Lord Avebury: There are certain people who are excluded from the United Kingdom under section 3, and one other provision also of the 1971 Act. Is there any way in which information is exchanged with other European countries, or would those persons be perfectly free to enter Belgium or Italy? Conversely, if the Belgians or the Italians have similar systems to our Immigration Act 1971, would we know that they had excluded certain people and what steps would we take to exclude them from the UK?

Professor Guild: This is the Schengen Information System.

Q390 Lord Avebury: Is it?

Professor Guild: Yes. The people who are banned from entry to the UK under section 3 of the 1971 Act are on a national register of sorts which applies to the UK only. We have certain agreements with Ireland, but I understand that they are not formalised. Leaving that aside, everyone else—barring us and Ireland, and the new Member States are in the process of coming in—participates in the Schengen Information System. Every time a third country national is expelled with a re-entry ban, that information is entered into the Schengen Information System, or ought to be entered into the Schengen Information System, assuming that the circumstances come within the parameters of Article 96 of the Schengen Implementing Agreement, which sets out the grounds: criminal conviction or serious threat. Everybody else, *ie* the rest of the Member States, all have access to the Schengen Information System and, before somebody is admitted or given a visa, there is supposed to be a check on the Schengen Information System to see whether there is an alert for them to be excluded. The other Member States have no idea who is on the UK national register, and we do not have any idea who is on their register because we have decided not to participate. At least, in theory that is the case. There certainly are CD-ROMs of the Article 96 Schengen alerts floating around, because some Member State Consulates abroad do not have access to the SIS on-line. One never knows whether Her Majesty's Government has a copy of the CD-ROMs—but, at least in principle, nobody knows what anybody else is doing. This does not mean that this is causing us problems, because an Achilles heel of the Schengen Information System has been exactly these alerts under Article 96. For instance, Germany has and continues to put into the Schengen Information System persons who apply for asylum in Germany whose applications are rejected and who have not notified the German Government that they have left. So if you apply for asylum in Germany and then you leave, you go somewhere else for some reason, and you do not tell the German Government you have left, they proceed to refuse your application and then they put you in the Schengen Information System. It might be that you have left because you married a French national; so you became a third-country national family member of a citizen of the EU, perhaps resident in Belgium, and therefore were entitled to legality. But you would be in the Schengen Information System. How do you get out of it? You cannot be issued a resident's permit, and so it goes on and on. This problem has come up before the courts of a number of Member States, in particular in France and Germany, from about 1999. It still has not been resolved. Last week, the European Court of Justice handed down a judgment on entry of third-country nationals who are family members of citizens of the EU in the

Schengen Information System, and held that Community rules have to apply not Article 96. However, this problem is by no means resolved.

Q391 Earl of Listowel: Do you think the Directive adequately addresses the rights of particularly vulnerable groups, and especially children? In previous evidence we have heard that the principles in the Directive were adequate in regard to children and families, children specifically, and that standards would flow from that; but advice from our special adviser has pointed out that in some areas of European law there are very specific, detailed and explicit descriptions of what needs to be done. There is a concern that, if one is not quite explicit in this matter here, those protections may not be implemented. Very specifically, in the question of removing all support to families once they have exhausted the asylum appeals process, is that something which could explicitly be made clear, or more clear, in the Directive?

Professor Guild: I think that this is a very important question. If one looks at the legislation in different Member States, one finds that there are a substantial number of continental Member States where the expulsion of minors is prohibited—completely, utterly and totally. The state may not expel minors. You have other Member States where the expulsion of minors is considered perfectly normal and part of the daily routines. What has happened in this Directive? It seems to me that there has been an attempt to paper over a very fundamental difference about how we treat children by saying, “The best interests of the child shall prevail”, and that is it—do your own thing. I do not think that will be adequate, when one looks at the very fundamental nature of the protection of children which is inherent in the constitutional traditions of some Member States as opposed to other Member States (as this one), where children are first and foremost foreigners and then children, and only children subsidiary to their status as foreigners. So we have a very different perspective from those Member States where children are first and foremost children and entitled to protection, and subsequently foreigners. It is not possible just to say, “We won’t deal with that. That’s a political issue. We’ll try and turn it into a technical issue”, and borrow some wording from the UN Convention on the Rights of the Child. I think that we have to deal with that difference, and this is indeed the place where it ought to be dealt with.

Q392 Chairman: Can you tell us which EU Member States prohibit the expulsion of minors?

Professor Guild: If I am not mistaken, France is certainly one. I think Belgium also prohibits the expulsion of children. I would have to do a check, because I am going to lead you astray.

Chairman: It would be very helpful if you could let us know that.

Lord Corbett of Castle Vale: I assume that you mean lone children, unaccompanied?

Chairman: Yes.

Q393 Lord Marlesford: When people say “children”, who are technically children, that is not necessarily what many people would have in mind when you say “minors” or whatever. In other words, somebody of, say, under 15 or 16 probably needs much greater protection than somebody of 17 or 18. Is the age of the child the same throughout the EU at the moment?

Professor Guild: Unfortunately, we have huge differences about who is a child, depending on what field of law you are looking at. For instance, if you are looking at responsibility of parents for contributing to the post-secondary education of their children, children can actually be quite old—into their twenties and further. You have other circumstances in which children are considered no longer entitled to the full protection as children from the age of 12. So you have a tremendous disparity, depending on what field of activity you are talking about and which Member State. Certainly even in the field of immigration we have tremendous differences among the Member States in who is a child and what the migration rights are of children. In EU law—for instance under the EU Directive on third-country national children of migrant citizens of the Union—for immigration purposes, a child is anyone under 21.

Q394 Lord Marlesford: For that to follow, it seems to me that in any EU law it is for the EU to define within that law as to what “a child” means. I find it hard to believe that the French, for example, would hesitate to send somebody out who was 20 or 21.

Professor Guild: Certainly the issue was dealt with in the family reunification Directive by placing a framework—between “x” age and “y” age—so that “children” will mean “children within this age group”, and the Member States can specify. That is certainly one option which has been used.

Q395 Lord Marlesford: Therefore you get a very uneven practice, even with a Directive—which seems to me a pretty strong argument against the Directive.

Professor Guild: That Directive has been adopted and challenged by the European Parliament before the Court of Justice. So we will wait and see what its future is—but not on that particular point though, on the exclusion of children at very similar ages.

Q396 Lord Avebury: Can you identify any provisions in the draft Directive which in your view are incompatible with international law?

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Professor Elspeth Guild

Professor Guild: If I were to specify international human rights law, what international law is relevant, I would want to have reference first and foremost to the European Convention on Human Rights, because that is not only international law but also international law which must be complied with at the EU level. In my view, we would need to look at four particular provisions. We need to look at Article 3. Does this provision properly reflect Article 3, the prohibition on torture, inhuman and degrading treatment, as interpreted by the Court of Human Rights as including the return to torture, inhuman or degrading treatment? One would wish to see much more clearly spelled out that particular obligation, rather than it left uncertainly, as in a reference to international obligations. The second is Article 8, the right to a family and private life. There has been a very recent decision of the European Court of Human Rights on Article 8, requiring the admission of a child of a family member to a Member State; that Member State is not entitled to exclude that child from the State where the parents were resident. So we are seeing a development of Article 8, where I would like to see this much more clearly spelled out in the Directive. The third is Article 13, the right to an effective remedy in respect of a potential breach of any right in the Convention. Article 3 and Article 8 are the ones which I see as particularly important, though perhaps I should also mention Article 5, the right to liberty and the right not to be detained. In view of the fact that the Directive covers the question of detention, I would want to see a specific reference to Article 5(1)(f) of the Convention, which specifies in what circumstances a foreigner may be detained, for the purposes of preventing an irregular entry on to the territory of the State or for the purposes of expulsion. There is also Article 4 of the Fourth Protocol, which has been very important in respect of the expulsions of third-country nationals from Lampedusa by Italy and which is, as I understand it, the subject of a petition before the Court of Human Rights on collective expulsion of foreigners. In view of the fact that one Member State's actions have given rise to questions and a petition before the Court of Human Rights on Article 4 of the Protocol, we may well wish to see that more clearly specified in this Directive.

Q397 Lord Marlesford: Can I ask you about the judicial oversight provided for in the Directive? Is it adequate? Will it be an unjustified burden on the courts and the taxpayer?

Professor Guild: This is a very interesting question, because it poses the possibility that the necessary instruments of the rule of law are in fact an unreasonable burden on the taxpayer. It seems to me that, if we enter into that logic, we enter into a logic where the reason for which we collect taxes—which is

in order to regulate how the state operates within the framework of rule of law—is posed against exactly that same principle, which is the principle on the basis of which we are entitled to collect taxes, which is for the best regulation of the state. So I think that it is important to look at what the underlying assumption is about burdens. If we have systems of law which affect fundamental interests of the individual—and expulsion must be considered to be a fundamental interest of the individual who is subject to a state's decision on expulsion—then we need to accept that that must take place within the rule of law. To be within the rule of law, there must be a mechanism to challenge the decision of the authority and to test whether or not that decision was correct.

Q398 Lord Marlesford: On the question of the burden, therefore, what you are really saying is there can be no limit to the resources which are made available to meet the requirements in this particular respect.

Professor Guild: If I may slightly change the perspective of the way in which you have set that out, it would seem to me that if we decide to pass laws which interfere with the liberty of the individual, Article 5 of the European Convention on Human Rights—to place them in detention and to expel them—if we want to pass laws which do that, the corollary obligation is to ensure that those laws are carried out in conformity with the rule of law. We do not have to adopt laws providing for expulsion. This is a political choice which we make. If we make that political choice within a system which is bound by rule of law in order to respect fundamental freedoms and human rights, then we need to take into account the fact that that objective must come within that same structure, and should not be able to slide around the edges of it and escape the basis on which rule of law exists.

Q399 Lord Marlesford: So you are saying what I said, but in a different way. You are saying if you have a framework, then you must provide the resources to administer that framework judicially.

Professor Guild: Indeed.

Q400 Lord Marlesford: And there must be no limit to resources available for so doing.

Professor Guild: Indeed, there must be, in the terminology of the European Convention on Human Rights, Article 13, an effective remedy. We may enter into a discussion of what is an effective remedy, but an effective remedy certainly appears to be a judicial remedy. How many levels of appeal is one entitled to is a question which we argue about on a very regular basis in democratic societies across the European Union. These are questions of degree and proportionality, but the principle must be that these

measures fall within the spirit of the rule of law and must be bounded by the rules of rule of law.

Q401 Viscount Ullswater: Perhaps I could go back to the judicial oversight and whether or not it is adequate. The Directive moves the balance that is currently in force in this country from a more administrative decision-making process to an administrative plus judicial process, particularly when we come to temporary custody. I suppose it is always a question of balance. Do you think the Directive has the correct balance of administrative function and judicial oversight?

Professor Guild: My complaint about the Directive is the lack of suspensive effect for the appeal rights. I think that is a pretty poor idea on an expulsion decision, because then you institute a status quo—particularly if the individual is claiming a risk of torture in the country to which he or she is being returned—against which it will be extraordinarily difficult for the individual to establish his or her rights. If one goes back to the predecessor of the 1971 Act and the Commission's report—and I have forgotten the exact name of it—on the question of deportation, one sees that, in this country at least, the idea of suspensive effect of appeal rights has been at the heart of the deportation procedure. The individual should get a chance to make their claim. If they are here, they should have a chance to test the state's decision that they should not be here before they are sent back, not after they are sent back. So in that respect I think that the proposal has got it wrong. In respect of whether the balance in respect of detention, administrative decisions and judicial oversight, correct or not, it seems to me that any decision on detention of an individual is *prima facie* an interference with the liberty of the individual. There is no greater interference with the liberty of the individual permitted in EU Member States than detention. The worst punishment the state can mete out to the individual is detention. We do not permit corporate punishment or capital punishment any longer. Therefore, in view of the seriousness of detention, it seems to me to be self-evident that in such a hierarchy detention has to be subject to judicial control; there has to be the opportunity for

the individual to test whether or not the administration's decision of detention is correct. With good decision-making, if the decisions on expulsion are solid, well-argued and sustainable, then the administration has nothing to fear from judicial oversight. Judicial oversight is only repellent to poor administrators making bad decisions.

Q402 Lord Avebury: What is your opinion about the merits of the Government's decision not to opt in to this Directive? Do you have any prognosis to offer us on the long-term effects of the thinking behind this Directive, both on the UK and on the European Union as a whole?

Professor Guild: The big problem of the UK's decision, whether the decision is to opt in or to opt out, is the difficulty of there being a decision at all. The longer we go into the post-Amsterdam Treaty period, when the UK has had the option of opting in or opting out of measures taken within Title IV of the EC Treaty, the more unsustainable this becomes; the more difficult it is to see how it will be possible to maintain this position in the longer term. If we look at how things have developed so far, the UK has opted in to virtually all measures on asylum, out of most of the legal migration measures, and has been caught pretty much in a cleft stick where it has wanted to opt in to a number of decisions on border control—for instance, participation in a European border guard and the proposal on biometrics in passports—has been excluded by the other Member States, and has now taken the other Member States and the Council to the Court of Justice to seek to get in. We see that the decision to have the opting in or out is giving rise to an incoherence, which will be very difficult to maintain in the longer term. It seems to me that we will need to bite the bullet sooner or later: either we are in or we are out. If we are out, then we can trail along with Switzerland and Norway, with our own policies and see what we want to do. If we are in, we will have to choose to abide by the rules of the game and then to argue those positions which we do not like in the negotiations, and to be proper negotiators at the table.

Chairman: Professor Guild, thank you very much indeed again for extremely helpful advice to this Committee.

WEDNESDAY 1 MARCH 2006

Present	Avebury, L Caithness, E Corbett of Castle Vale, L D'Souza, B Dubs, L	Henig, B Listowel, E Marlesford, L Ullswater, V Wright of Richmond, L (Chairman)
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Examination of Witnesses

Witnesses: MR TONY McNULTY, a Member of the House of Commons, Minister of State for Immigration, Citizenship and Nationality, Home Office, MR TOM DODD, Director, International Delivery Directorate, and MRS SUSANNAH SIMON, Director, European Policy Directorate, Immigration and Nationality Directorate, Home Office, examined.

Q403 Chairman: Minister, may I welcome you back and also your colleagues. All of you have been before this sub-committee before. It is very good of you to be here. Minister, may I thank you for the Home Office written evidence, which is extremely useful, and on which our questions are largely based. May I remind you all that this meeting is on the record. A transcript will be made and will be sent to you for your approval in due course. The Government has so far seemed broadly supportive of common EU measures in asylum matters, and has opted into most of the measures agreed. Does the opt-out in this case from this Directive indicate a change in policy?

Mr McNulty: I do not think so. Our policy has been throughout that where it is appropriate to do so, we would welcome being able to opt into these things, but, as and where we need to use the protocols to opt out because we think our national interest goes above and beyond any advantages of a collective approach, we opt out. I think the policy has always been very pragmatic. You are entirely right that up to now we have managed to opt in to most things, and we are quite happy to do so, but we think there are some quite serious road blocks in terms of this Directive that preclude us opting in.

Q404 Chairman: In principle, are you in favour of the idea, the concept, of getting common standards across the EU?

Mr McNulty: I think as and where appropriate and as and where they do not clash with what we see as our national interests, we are, of course.

Q405 Earl of Caithness: Minister, are you happy with the legal base of this Directive?

Mr McNulty: I think we are. I was in Brussels just last week and we had this wonderfully obtuse debate about whether something should be on this legal base or that legal base. I do not profess to be as expert as some of those who contributed to that particular debate on another issue, but certainly the notion of the legal base being challengeable in any way has not crossed my desk. I think we are fairly happy.

Q406 Earl of Caithness: Surely this is a matter of subsidiary and therefore we should have challenged the legal base?

Mr McNulty: We have not done, and so clearly I think we have no objection to it.

Q407 Chairman: Minister, I should remind you, and you probably know, that your colleague from the Department of Constitutional Affairs is coming to give evidence.

Mr McNulty: She follows me everywhere, my Lord Chairman!

Chairman: I dare say. I daresay that Lord Caithness will have another opportunity to ask that question.

Q408 Baroness Henig: It seems to be the case that standards in return procedures continue to vary widely between EU countries. Is it not desirable to have an EU legal instrument which ensures that, particularly in the case of vulnerable groups like children, certain minimum standards are applied everywhere in the EU?

Mr McNulty: I do not think I disagree with that. My point today is simply that I do not think, for our purposes, this Directive written in this form is appropriate to what we seek in terms of those common standards. It is not, as I said at the start, an objection to common standards. I think I would share your starting premise that there is sufficient in this Directive for us not to opt into it. That is not an aversion to common standards. As you know, we have opted into most other elements in this area, but the nature and shape of this Directive at this very early stage means that we eschew the invitation to join common standards on this basis.

Q409 Baroness Henig: May I follow up on unaccompanied children? I wondered what plans there would be to return unaccompanied children and what safeguards there would be in place to ensure that those who have been trafficked into the country are returned to their families and are not re-trafficked.

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Mr McNulty: That sounded like a very gentle and short question that covers a huge area, much of which goes beyond the Directive, but it is an entirely fair question. We are trying, principally at the moment on a bilateral basis with other countries, to do more and more to address especially those concerns. You will know from the background material that at the moment at least Vietnam and Albania are the two principal sources of unaccompanied children. We are looking, with various states and progress, to whether those states do precisely that, either restore the children where possible to their families or, in some other instances, where they are clearly orphaned or have no families to talk of, to reach some arrangement on a bilateral basis to ensure that the welfare of those children is protected when they do return and they are not passed in some loop that simply comes back again. That is certainly an issue in terms of trafficking, not just for those who come to us but beyond. We do all we can to manage that on a bilateral basis. If we can in the future step up from that, within or without this Directive, to work on a more European-wide basis in terms of unaccompanied children, I am sure we would look at that with some interest.

Q410 Chairman: Minister, can I ask you in that context and really throughout this session if, when you and your colleagues look at the transcript, you consider that there is something that it would be useful for you to send us in writing, and I am really referring to that question, it would be very helpful.

Mr McNulty: I am very happy to do that. I am clear, I think probably more so than the last time I popped in for a visit, that much of our deliberations goes beyond the document immediately in front of us but will be of some interest to the committee. We will certainly go through that.

Q411 Chairman: I will try not to let the questions go as far from the subject as they did last time.

Mr McNulty: I was not remonstrating or thinking that last time in any way, shape or form, my Lord Chairman.

Q412 Lord Avebury: There may be certain things which are not in the document but on which we would like to see great collaboration with Europe. Could you say something about the existing mechanics of collaboration with other European countries, in particular about the arrangements for returns to countries of origin? Why do we have separate bilateral arrangements—you mentioned Vietnam, which is one of the countries covered—when the European Union already has negotiations under way and more or less complete, according to the NAO Report, with nine countries of origin? Why do we not concentrate on getting European

agreements on returns and also on documentation because only 22 per cent of the returns dealt with in the NAO Report were covered by the European Union letters. Is that not the best way of ensuring that there is a common procedure throughout the whole of the European Union?

Mr McNulty: It is one way but I would not say it is necessarily the best way. Like a lot of things that we deal with in a European context, we are not dealing or starting with a blank sheet of paper or from a year zero, as it were. Just in terms of the patterns of people applying for asylum, in part at least that is reflective of each individual state's history, links with other countries, and the past in general. As and when we move towards greater communality in terms of our approaches, all that baggage comes with us. There are many ways over the years where we have been well in advance of many of our European colleagues in terms of bilateral arrangements of returns, memorandums of understanding, et cetera, with particular countries. We are happy to explore, and do, how to bring other European countries, or indeed the Union, along with us in that regard. There will be other countries that are further ahead of the game, if I can use that phrase, in terms of their bilateral relations. As and when we can step up to a European Union-wide approach with those individual countries through returns agreements and things, that is not something we will eschew, that is something we would positively welcome, but I do not think it would be appropriate somehow to suppress progress in areas where we are purely because of our geography, history and other reasons way ahead of our colleague nations simply to defer to a European Union-wide basis.

Q413 Lord Avebury: So that we could see why it is necessary to pursue bilateral arrangements in parallel with those that are being engaged in within the European Union, perhaps you could let us have copies of the documents where there are countries that are covered by both lists. I think that is on both bilateral lists and the European Union list. I may be wrong but there is certainly one country which is covered by both. If we could have a look at those two agreements, it might help.

Mr McNulty: I will certainly look at that. What I am not sure of as well is whether that particular agreement covers exactly the same areas or whether indeed, as I suspect, the UK one rather than the EU one goes beyond that. We will certainly explore that as suggested by the Chairman at the start of the meeting.

Q414 Lord Avebury: You also mentioned a memorandum of understanding on which I think we are leading the rest of Europe. What efforts have we made to persuade other Member States within the

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system that the MOUs and monitoring arrangements we are entering into with Jordan and other countries in respect of people who may be Article 3 ECHR cases would be best applied over the whole of Europe instead of just by the UK?

Mr McNulty: I suspect, to be perfectly honest, it is early days, even though the UK as you imply leads the field, in that regard for us as well. I know that there is sufficient interest from other Member States to see how those things develop. Again, it goes to my point about background and history. Some other Member States will have particular arrangements based on their own, principally administrative, legal base with some of the countries in the Magreb that we could not possibly have, given our legal framework. I do know that there is considerable interest across the Union about how we progress with the MOUs, but I suspect no-one is about to jump in with us in that regard because it is very early days, even in terms of one with Jordan and others. It is quite early in the piece. In terms of our bilateral relations, in terms of MOUs, all those things that we do on a country-to-country basis, it is broadly regarded across the Union that we are at the cutting edge in those terms and people are watching with considerable interest, for good reason.

Q415 Lord Avebury: We may be at the cutting edge on country of origin information services as well. Is there any discussion with the rest of Europe in trying to develop a Europe-wide, country of origin information service?

Mr McNulty: Not that I know of.

Q416 Lord Avebury: Why not?

Mr McNulty: That might be a question to ask the commissioners of other countries. Exploring areas like that as well as those covered by the Directive is an entirely fair point. I know there is at the very least an enthusiasm to start to discuss all these areas. It is not precluded. No-one has said that is a silly idea and we are not going to go down that route. I think slowly, notwithstanding the Directives that come into agreements on understandings, there is a lot of discussion and talk around these issues throughout the Union and with other Member States.

Q417 Baroness Henig: How great do you think is the risk that cooperation with other EU partners in the area of returns, which already exists, might be adversely affected by the decision not to opt in?

Mr McNulty: On one level it is too early to say because we are very early in this process. Deciding not to opt in does not preclude our contribution to the working groups and having a seat at the table and having full discussions in that way. Given that, although you appreciate that I cannot go down to the details in terms of individual Member States, there is

considerable disquiet and some agreement with us about our feelings about the shape of the Directive by other Member States. We do of course have discussions and negotiations. I think it would be foolish to say that opting out rather than in does not impact on our influence; clearly in some sense it does. I am comfortable that we are sufficiently early in the process and there is sufficient concern amongst other Member States for that to be minimised rather than absolute or clearly said.

Q418 Lord Marlesford: To be absolutely clear, are you saying, Minister, that a decision not to opt in means that we are nonetheless able to take a full part with all the other countries in the discussions on the Directive?

Mr McNulty: As I understand it, at the working group level that is certainly the case, yes, not least because there is not a finality to it. You will know that as and when there is a final Directive adopted, we still then have the opportunity and option to opt-in at that stage, so we remain participant in but, as I have said, I think it would be wrong—you cannot quantify it—to say that absolutely there is no impact or influence because we are opting out rather than opting in. Clearly, I think there is.

Q419 Lord Marlesford: The working level you describe, is this at the permanent representative level or is this the department's concern for a different country level? What is it?

Mr McNulty: It is essentially, as I understand it (and the people either side of me who work in this murky world know far better than I as I am just the front man) it is at the official level of the working party, which I think is the rep that leads up to the permanent reps.

Q420 Lord Marlesford: You are able to take an absolutely full part and there are no meetings from which you are excluded or anything else and there is no disadvantage whatsoever in terms of influencing the eventual shape of the Directive for our decision so far not to opt in?

Mr McNulty: That is how I understand the working groups. I am merely being honest in saying that. It may well be that our decision at this stage to opt out rather than in colours the views of some of those participants to the seriousness or whatever of their contribution.

Mr Dodd: Clearly, because we have decided to opt out at this stage, there is delicacy in the way that we can deal with Member States in relation to this particular instrument. Obviously we engage in debate with Member States within the working group but it is difficult for us, in a sense, to wave a banner over our particular positions. We discuss the issues of the debate. Actually in the working group it is hard for us

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to take a leading role in specific elements in that particular context because we have said that we do not want to opt in.

Q421 Chairman: To ask a hypothetical question, can you conceive of a situation where we have been able to influence the discussion to such an extent that we might later decide to opt in after all?

Mr Dodd: Clearly, we are party to these discussions. As the Minister made clear, a number of other Member States have serious concerns about this Directive. We share comments and concerns together. We would imagine in the course of early negotiations that the Directive will change, and then we go into the process of reviewing our position and seeing whether we should opt in at that stage.

Q422 Baroness D'Souza: The Commission takes the view that the principle of mandatory removal is essential to any returns policy. Why does the Government not agree with this?

Mr McNulty: I think in the end because it would impinge our flexibility, and it is not reflective of reality and practicability in the sense that however efficient our asylum system is, however efficient our returns policy is, there are two issues. Firstly, mandatory returns within a particular period is not always possible; it simply is not for a whole range of reasons—documentation, the nature of the third country or the country of return, and all those elements. Secondly, at least in part, it could perversely mean that people get to a stage where they play the system all the more to be forced into one category or other. I think the key element of flexibility is absent. It goes to a world that is clearly black and white. If someone disclosed refugee status, they stay in; if they do not, there is a mandatory return. The practicability of that mandatory return is such that we would see that, you can call it mandatory if you like, that is not what will prevail. It just seems a rather foolish aspiration in that context.

Q423 Baroness D'Souza: In that context, if I may ask a supplementary: do you think that the Directive should promote excellence or best possible practice or simply define minimum standards?

Mr McNulty: That is a perennial in terms of many of these Directives, is it not? Part of our underlying concern is that many of the boxes they would seek to put us in prevent us from giving a far better service all round in terms of applicants and the minimum common standards to which they refer. I suppose in the general context I would say the Directive should, in generality, at least offer common standards that go to both those elements: set a minimum to drag some of the Member States up but also allude at least to a statement of excellence and best practice as to where the norm should be. I think implied in your question

is an entirely a fair point that in many instances they drive down to common standards, yes, but it is a lower common standard than perhaps we would aspire to.

Q424 Baroness D'Souza: There is a third question, if I may. One of the arguments advanced by the Home Office against the proposed four-week voluntary return period is that the risk of absconding might be very great and it might undermine the EU return measures. Is not this risk exaggerated, leaving aside the section 9 pilot? Is there really a risk that whole families would abscond?

Mr McNulty: There are a couple of points there. I genuinely do not think that is the case. Increasingly in terms of at least some of the debate people are trying to characterise absconding, people disappearing, as almost a myth and people do not do that. That simply flies in the face of reality. I think it partly goes to flexibility and practicalities too. If there is a compelling reason for someone to be removed and they can be removed, they should be removed. There is no compelling reason why that should be within a four-week period, whether they seek to go on a voluntary basis or indeed subsequently on an enforced basis. It smacks of a degree of arbitrariness that flies in the face of practicalities and flexibilities. We are keen to get to a stage, I certainly am, where the more and more voluntary returns there are, the better. Within that context, we can be incredibly flexible and have been. We have delayed removals so that children can finish their exams or if there is some compelling reason in their particular life history for it to be delayed by a couple of months, and that is perfectly fine, but the notion of an arbitrary four-week cooling off period, the person might go voluntarily on a wing and a prayer, again, I do not think reflects the practicalities and realities of the position.

Q425 Lord Avebury: I am not sure there is anything in the Directive on encouragement of voluntary returns, but your recent policy of offering an extra grant to people who are prepared to take it up to resettle in their country of origin has apparently been a howling success. The lines have been jammed at the IOM and they have a full subscription to this scheme. You have said that you would be willing, wherever possible, to allow somebody opting for voluntary return to have a chance of doing that, instead of enforced removal. Does that apply to people who are in detention and will somebody who is in detention and who applies to see the IOM be granted facilities to do that rather than being removed?

Mr McNulty: There is nothing in the way we operate the current system that would preclude that but again, which is why I resisted that it imposed arbitrary time limits, it would go to the experience of

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the particular individual. If this person is someone who has bobbed in and out of the official side of the system, reported for a while and disappeared and come back again, and has a chequered history to say the least in terms of managed contact with the authorities, then I would suspect they would be treated entirely differently from someone who was removable, was picked up and detained as a prelude to removal and had an absolutely pristine history up to then and it was decided just before enforced removal that actually, if you let them put their affairs in order for a couple of weeks, they will absolutely go on a voluntary basis. I think that could be looked at; I would encourage that to be looked at. It must again go to the history and background of each particular individual. The only currency we have in terms of the veracity of someone's suggestion that they will go voluntarily now is our previous experience of them within the system. I would not preclude that at all. There is no notion by which you are locked into an enforced removal path that precludes skipping over to a voluntary if previous history and experience determines that there is some veracity to the claim that they will indeed go on a voluntary basis.

Q426 Lord Avebury: On the other hand, if it is at the absolute discretion of the immigration officer, then the practitioners and the detainee himself cannot know what rules are going to be applied. You say if the history is not a favourable one, then obviously the application to go voluntarily would be treated with some scepticism. Since certainty is lacking in so much of the procedures for immigration, would it not be an idea if there were at least some rules which the detainee and his advisers could look at to say whether voluntary return was an option in a particular case?

Mr McNulty: I think we impress on people at most stages in the process that the voluntary route is there and available to them should they choose to use it.

Mr Dodd: The AVR (Assisted Voluntary Return) scheme is actively marketed in removal centres. Obviously the main interest of the managers of those centres is in putting people through the beds quickly. If somebody wants to go on an AVR scheme and clearly he has a good previous record, as the Minister says, then that person could go on the AVR scheme and that is what happens.

Q427 Earl of Listowel: Minister, may I thank you for clarification regarding families absconding. In the evidence to us in the Immigration Nationality Directive, I understood you to be emphasising the essential necessity, in order effectively to process families who have had instructions to return, to detain them in many cases. It would be helpful I think for the committee to have a bit more detail of why it is essential to have families detained to process their returns and why it cannot be done often effectively in

the community. Perhaps you might care to write to us if you do not have information at hand on the detail of that at the present time.

Mr McNulty: I certainly shall in terms of detail but I do not want to give the impression that it is now the norm that every family about to be removed is detained as a prelude to that removal. That is not the case. Again, as I was suggesting to the Lord Avebury, it very much depends on the individual personal circumstances. As someone said to me from within the IND operation, at the very early stage when I started this role, it is entirely different from any other aspect of what the Home Office does in the sense that the denouement is a negative one for the individuals concerned in terms of removal, whereas in the prison estate, for example, as you get closer and closer to your particular denouement, it is release. That might bring its own problems and difficulties, but it is clearly a positive thing rather than otherwise. It certainly is not the case that every single family in every single circumstance as a prelude to finalising their removal is detained. I know people think otherwise but we do try to keep detention to an absolute minimum. It does go to the individual's circumstances or those of the family and is used principally as a prelude to removal or for some other compelling reason it goes to the history and experience of the individuals. As a matter of routine, as they get close to the end of the process in terms of a family that needs to be returned to their country of origin, we do not detain them for our own convenience while we process that final stage and then we remove them. If that is the impression, then it is a false one.

Q428 Viscount Ullswater: Minister, we understand that an EU-wide re-entry ban would impose difficulties for the UK because it has no access to the relevant SIS information. Is that why the Government opposes the re-entry ban and is that a big factor in the Government's thinking? Also, perhaps you could just explain another reason which I note you put in your written evidence that you would not want people to be able to buy their way back in: having been served with a removal order, then if they pay the cost of the removal, they can really be free to come back in.

Mr McNulty: I thought, at the risk of being intemperate, that that was probably one of the most outrageous suggestions in the whole Directive, that somehow if you paid for your own return, you would be treated in a different way to if you did not. I just cannot see the public policy call of that at all. In terms of access to the SIS, yes, that is an element of our objection to it, but we do not start from the premise that someone who is removed either for being an illegal over-stayer or someone who happened to fail in their application in the asylum system should for

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ever be banished from our shores. It may well be in many cases that people who transgressed or have failed in their asylum application, at some stage in the future, perfectly reasonably and totally within the rules, can return on an entirely legitimate basis. Again, I do not see the substance of, or the public policy claim for, a re-entry ban. I can in the specific cases of things like deportation for serious crime and things, but we already have those for displaced people who invariably are banned, if you like, from re-entry for five years, and more would depend on the severity of the crime. In this particular case I always look initially to what are the practicalities and pragmatic reasons for a re-entry ban. Is it anything other than entirely arbitrary? I cannot answer that in terms of this particular aspect. Again, it goes to a kind of black and white world where people who transgress or fail for whatever reason in the system are banished from our shores and that is the end of it, and do not even think of coming back. In many cases people have taken the wrong path; they are in the wrong network, whatever, and so they have gone for asylum when actually they have no substantive case for asylum and they are returned, but they have something to offer this country in terms of their skills, whatever. Once that return is out of the way, they can come back through legal processes and settle here entirely legitimately and play full and constructive roles in our society. I do not know what the compelling public policy reason is why that should not be an offer, so long as the second element is entirely rooted in legality and through our rules. It is not just the access to SIS that is part of our reason for objecting to the re-entry process.

Q429 Viscount Ullswater: I must thank you for expanding that answer because I think what you said has been extremely helpful to know where the UK stands on re-entry, not just on the ban but on re-entry itself. Minister, if I may turn your attention to detention, the detention of persons subject to a return decision not only causes hardship—and I think we would all appreciate that—but it is also a considerable burden to the taxpayer. The NAO document suggested that it costs £1,400 per week. Is it not therefore sensible that the Directive aims at the limitation of detention times? Also, it runs through a whole series of things that you should be able to offer somebody before detention is the result.

Mr McNulty: Some of the latter points you refer to I think do have something to commend them. The general notion that there should be a limit on detention, again we are not terribly happy with for a number of reasons. Firstly, as I say, we seek to use detention only in the most sparing of circumstances, but there will be circumstances where we have to go beyond six months. It is fairly rare actually in the detention estate. I think we would prefer,

notwithstanding what we say about the cost to the public purse, to keep that flexibility there. A more compelling reason I think is with people who for whatever reason are detained for safety reasons or whatever else or as a prelude to departure; if they know that as soon as they are detained, the clock is ticking and that if they can, through a range of legal devices and other devices, delay, delay, delay, get to the six months and then because of this arbitrarily imposed limit on detention they are out in six months and a day, we think perversely that will not be conducive to the system operating in perhaps the most efficient and effective way. In some of these elements, and I do not want to knock entirely the Directive, there is a range of perverse consequences to some of what apparently look like good, rigid, public policy matters that go to aiding inefficiencies in the system rather than otherwise. In our new asylum model we are trying to turn round decisions very swiftly and to get to a stage where detention is used in an even more minimal fashion than it is now. We are looking very seriously at non-custodial, non-detention alternatives between the initial decision for an applicant (family or individual) and the final position in terms of removal, refugee status or whatever else. I think doing that well, using detention sparingly, and all the other elements that we are engaged in is better than setting these arbitrary cut-off points and time periods that again I do not think are terrible useful or efficient once you get under the sort of banner headline that says “Isn’t it good that no-one is going to be detained for more than six months?” It does not go to reality.

Q430 Viscount Ullswater: Would it not be beneficial to the position of the United Kingdom if they were to look carefully at the judicial oversight of detention decisions which were administrative decisions, which is suggested by the Directive? Is that something which again makes you feel uncomfortable with the approach that the Directive takes to detention?

Mr McNulty: Not uncomfortable but we have constantly rejected calls for such judicial involvement, largely because we see it as unnecessary and again unlikely to assist in the operation of an effective immigration control. I do not see the added value of that. All that we do is within the context of ECHR, particularly Article 5, and I do not know what judicial authorisation and oversight would add to that process that we are not already doing. Again, I would say it is something that sounds nice but when you look at the substance of it, I do not now what it adds to the process that we are not already doing within the framework that we already have. Of course this should be better and improved and I am working to that all the time, but I do not know what that extra tier and layer above the system would add. I do emphasise too that we are seeking to use

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detention as sparingly as we can and increasingly as sparingly as we can. If I can digress momentarily, my Lord Chairman—and this is only a mini rant—when we do that and when we try to do things like in some circumstances tagging people rather than having them detained and have a stronger reporting management process, it rather annoys me when the Refugee Council—and I get on terribly well with them—says, “This is terrible. It is outrageous and inhuman. What the hell are you doing?” Actually, we are trying to keep people out of the detention estate but still, entirely properly, keeping contact and management of them while their decisions are being processed. I can slap them on the wrist just gently, using this opportunity.

Q431 Lord Corbett of Castle Vale: Some of my colleagues have enticed you on to the ground with this question, quite improperly, Minister. Can I just get into the two different aspects of this? Is it the case that we can opt in at any stage to this Directive, persuaded in those circumstances that there has been a lot of changes there to overcome your difficulties with it? Is that the way the process works?

Mr McNulty: I will try to answer that and then Susannah will correct me, no doubt. I suspect not at any stage; we have opted out now, but at the end of the process, once there is a negotiation and final Directive, we have an opportunity to opt-in then, should we choose, so it is not at any stage in the process.

Q432 Lord Corbett of Castle Vale: That leads me to the second question, and I know this is not your responsibility, but it does strike me as rather perverse that the Commission produces a draft Directive; you are asked to put your hand in the air or not. Why do they not take that decision about whether you want to sign up to it after the detailed discussions because you are now a back-seat driver in a sense? It just seems to do the process the wrong way round. I leave the thought with you.

Mr McNulty: It is not for me to challenge the processes and structures of the Union. The only thing I would gently contest in terms of what we were talking about earlier is this: if we were in a position where, yes, we are at an early stage in the Directive, yes, we decided at this stage to opt out, and it was very clear that every other Member State were one hundred per cent behind every aspect of the draft Directive, then I think I would concur with the notion of back-seat driving. As I say, there is any number of Member States that, while not going the whole way of opting out (many of them cannot in terms of protocols) at least they share our perspective. A number have said, without breaking any confidences, to us that they would far rather be in our position of opting out because we have the protocol and having

a look and seeing how it develops rather than being in and trying to change the whole thing from within. I do not think “back-seat driver” is entirely fair, given particular circumstances and response to the Directive as it is now.

Q433 Earl of Listowel: Minister, may I follow on from that point? What is the prospect of the Government with its track record in terms of investment in children and in relation to vulnerable children in this country influencing the negotiations you have been speaking about in favour of strengthening the current vague provisions on protection of the interests and rights of children? I expect, Minister, you will be aware of the concerns expressed about Yarl’s Wood by the Chief Inspector of Prisons and the Commissioner for Children for England. Perhaps I could encourage the Minister, if he has not had the opportunity already, to go and speak to some of the parents there; it is a very helpful experience. Given the Government’s record as I say of investing in vulnerable children and the difficulties that even such a government has faced in this particular area for instance of detaining families, given those difficulties and challenges of balancing the interests of an effective immigration policy and the welfare interests of children, would the Minister agree that perhaps there might be an opportunity here to introduce a common standard so that we would all sleep better at night afterwards if it were in place?

Mr McNulty: I think certainly it is something that is worth looking at. In terms of the absolute technical position, we are signatories to the UNCRC; it has not been incorporated into UK law; and the UK courts have held that it is not directly applicable to immigration cases. That is the technical starting point. We have reservations to it in relation to the immigration reforms. That is purely a technical point. I do concur with much of what you have said. By pure coincidence, I saw the Children’s Commissioner yesterday, not least to discuss our response to his comments on Yarl’s Wood. It was a very productive meeting and I think there is much that we can do in terms of the circumstances, once you are in that particular part of Yarl’s Wood, to aid and assist in terms of the welfare of children and just the feeling and sensitivities of children. It is not for me to characterise it as a meeting of minds. We had some disputes in some areas and that is right and proper as we are coming from a different perspective. I think he was pleasantly surprised maybe or surprised certainly at the measure of our response to the concerns that he had raised. Remember, his concerns I think were prompted by the inspector’s report prior to that. We are trying, but I have said absolutely that it must be my role under the new asylum model more generally, as the Minister

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responsible for asylum, to get to the stage, to repeat, where most returns are voluntary and by definition there are less and less detention cases involving families in the first place. That must be the way to go forward. I do accept that I live in this sort of twin world, bipolar world for want of a better phrase, where looking forward with 100 new cases being processed and dealt with is very good and getting better, but there is still a number of historic and legacy cases behind, including families, that need to be dealt with far more readily. So I do take the point about children in detention. We are trying to focus that more and more around Yarl's Wood so that we can sensitise things appropriately in that fashion. I said to our ladies in green, "What I cannot do is much about how you get into Yarl's Wood". It struck me when I was there, because I have visited and spoken to people, that it is a bit like the start of *Get Smart*, if you remember that programme; when you go through one door, that shuts and then another door and that shuts. By definition, it is a secure facility. That does not mean that once you get into the core heart of the areas where families and children are you cannot be far more sensitive. A social worker has been appointed specifically with the children in mind. There is a whole range of things that we can do and have done and will do to ameliorate things, which I think is entirely right. Whilst returns remains part of a robust, progressive asylum policy, then that will mean in some instances families with children are detained as a prelude to return. That does not mean that we cannot make that, I was going to say as comfortable but as least uncomfortable as it possibly can be. It is not a nice experience. You have to be very sensitive to the trauma involved and everything else. We do try to do that. To the extent that we can get common standards in that regard across the Union, I think that is something worth exploring.

Chairman: Minister, that is very helpful. We have had evidence, both written and oral, from the Children's Commissioner. We will as a committee be visiting Yarl's Wood next week through the kind offices of your department.

Q434 Lord Marlesford: Could you tell us what specific changes in the proposed Directive would be needed to enable Britain to opt in? Following on from what Lord Avebury was saying when he was asking you about the assisted return initiative, that is obviously an imaginative and innovative idea and seems to have been a great success. To what extent would the Directive as it is at the present drafted limit flexibility of countries to take such new ideas without having to go to the Commission and see that it did not conflict?

Mr McNulty: The second point is interesting. Let me start with that, if I may. I do not know is the answer because I do not know what the final Directive is

going to look like. As instructed now, I do not think there will be an impediment to initiatives like what we are wanting to do on the AVRs, nor would we have to go to the Commission for approval or otherwise of it as it stands now. It is not the case, and I would not characterise it as such, that everything in the Directive will constrain us in anything we want to do in terms of returns policy or otherwise above and beyond what is already in the Directive. It is seeking. I think in a not terribly useful way, for reasons I will come on to in a moment, to set common standards and a common framework. As I understand it, it would not preclude us continuing or enhancing what we are doing on AVRs. In terms of the first point, as I have tried to suggest, there is a whole range of particular things that we have some concerns with that mostly go to practicability and flexibility. We are not happy with the following: a grant of a four-week reflection period in terms of voluntary returns; harmonised and judicial arrangements; the judicial remedy generally, as I have already alluded to; the re-entry ban; and no upper limit of detention. I am sure that leaves something in the Directive! It does in the sense that the Article 8 provisions allowing or requiring postponement of removals we already are doing or will do. It suggests a two-step process. We have what is more accurately described as a three-step process in terms of informing people about the likelihood of removal, informing them of imminent removal, and then setting removal directions. There is a three-step process. I think it is fair to say, not least given those concerns but also the concerns we know about of other Member States, that to answer the question directly, the proposed Directive would have to change fairly considerably for us to reflect on opting in by the time the draft Directive becomes a national Directive.

Q435 Lord Marlesford: I have obviously read carefully your comments yesterday on the figures you released yesterday. You seem to be fairly upbeat in the comments that related to the question. Is it actually true that the number of failed asylum seekers in the UK is continuing to grow, which is what MigrationWatch has said? Is it in fact true?

Mr McNulty: The short answer to that is it may be. The perennial difficulty I have with these absolutes that MigrationWatch come out with is that they do not know, and neither do I, how many people are captured through other application processes. In some cases, the lead applicant will apply on their own and circumstances will change. There may be a family application they are attached to, and so they are not added to the pool of failed asylum seekers. They have no idea, however authoritatively they might say it, about how many failed asylum seekers return of their own volition and without any notice or due record to the authorities. In absolute terms, Sir Andrew Green

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cannot say that any more than I can say that. In terms of yesterday's figures, the tipping point is but a trend indicator of where we are at. I said last November—I got my retaliation in early—that we would not meet the target by December. Yesterday's figures confirm that we did not but were closer than we have ever been. I still remain hopeful and confident that by the time February and March figures come out in a couple of months' time (there is naturally this lag) there will indeed be more people removed than new applications. The underlying point where I am loath to agree with MigrationWatch but where they do have a point is the point I was making earlier about living in this bipolar world almost, if that is not a crude or offensive way of putting it, of being more and more comfortable about what we have done over the last year or two in terms of new applicants and new processes and rolling things forward. I am still mindful that there is a legacy of older cases that does need addressing.

Q436 Lord Marlesford: Did you say a moment ago that it is possible for failed asylum seekers to leave the UK without the Home Office knowing they have left?
Mr McNulty: Yes.

Q437 Lord Marlesford: Why?

Mr McNulty: They can have extant travel documents, passports and everything else. It is entirely feasible.

Q438 Lord Marlesford: Is it not desirable that you should know? If you are trying to handle the problem, surely you want to know where he has gone?

Mr McNulty: Yes, but if you think through the policy consequences of that, how can I force someone to tell me if they are leaving the country voluntarily if they have suitable, appropriate, legitimate travel documents to do so?

Q439 Lord Marlesford: Only by recording at the points of departure.

Mr McNulty: Which we are doing through things like Operation Semaphore and will do within the next year or two in terms of a full intention to leave forecast but none of those prevail in the context of Sir Andrew Green's latest prognosis of certitude, which is not based on anything. EU borders will eventually have us get to the stage where for anyone that needs visas to move in and out of this country, they will be counted in and out. We are moving towards that stage but it would be wrong of me and remiss of me to say that we can get from where we are now to there simply overnight. We can and will use technology to go along those ways.

Q440 Lord Dubs: Minister, you did mention the Refugee Council. In my declaration of interests I stated I used to work for the Refugee Council. Having listened to your comments about the Refugee Council earlier, I think you are more persuasive than they are. I shall read what you have said with interest in case I have lost all my friends there.

Mr McNulty: They are still my friends, too.

Q441 Lord Dubs: I think you have largely answered the question I was going to ask which is: even if the opt-out is maintained, as you have indicated it most likely, are there any respects in which we might adapt our own procedures to pick up those parts of the Directive which have higher protection standards particularly for vulnerable people? In other words, without wishing to damage your career, I think you have given a very healthy, liberal perspective on this. I personally am delighted with what you have been saying. I have never said that to any Home Office Minister before. Maybe there is not any respect in which the Directive would be more liberal than our policy. Do you think that is right?

Mr McNulty: At the risk of sounding facetious, my liberalism is a relative term compared to the Commission's Directive rather than otherwise. I leave it there. I think in all seriousness much of what we already do would supersede the comments about the minimum common standards alluded to in the Directive in terms of welfare, care and protection. Clearly, some of the other elements, like some of these time limits, are different. I do not think that is what you are asking me. I cannot think of anything in there that goes to care, welfare, attention and protection—even that supersedes the levels that we are already at or getting to. If by the end of the final Directive that is the case, if your question is, despite the opt-out are there elements that we may well pick from it that go to what we would see as improvements to our own system, then I am sure we will be able at least to look at that, certainly.

Q442 Chairman: At the risk of pre-empting a question which I think Lord Caithness is about to ask you, is that true of other EU countries, do you know? In other words, do they have more liberal policies than the minimum standards that there are in the Directive?

Mr McNulty: Probably, I think. I was just going through my knowledge of Estonian immigration law or asylum law! I think probably, but, if I could turn that round and again probably pre-empt the question, many of the concerns that we have are reflected by other Member States. Those go more to some of the process points rather than the care and welfare and liberal points, if you like: the re-entry bans, the four-week voluntary returns and those sorts of things. I do not think there is any other Member

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State from our discussions that is saying that they already do things considerably better on the care and welfare side than the Directive implies.

Chairman: Perhaps I should ask Lord Caithness to ask a more precise question. We will be visiting Brussels tomorrow as a committee. No doubt we will be able to pick up a little more information about the attitude of other countries. Lord Caithness, I apologise; I have shot your fox.

Q443 Earl of Caithness: No, you have not, my Lord Chairman. I was going to turn my question round. Minister, given you have said that most countries have sympathy with the UK position and the UK position as you have described it is that you do not like very much what is in the Directive, is there anything in the Directive that other countries like?

Mr McNulty: I cannot really speak for other countries in terms of what they like. You will know that I have spoken liberally in terms of what they do not like as and when it conforms to what we do not like. If I could turn around the question that you turned round yourself, my Lord, the principal objections that people have are not dissimilar to ours. Some have concerns actually with the two-step process, which we do not. We only do a three-step process but beyond that, it is the maximum length of detention, the re-entry bans, four-week voluntary returns, those elements, for which people have some disregard. You will know quite naturally that as and when there have been these informal discussions thus far since the Directive has come out, people have not liberally shared and talked at length about the bits they agree with. By definition, they dwell on the elements that they disagree with. It would not be for me to say that any other Member State loved this bit or that bit where we do not.

Q444 Earl of Caithness: Within the working groups, it would emerge where there was a consensus among the other Member States for something that they like. Can you give us some information on that? Can you also tell us how the Commission is reacting to this presumably fairly hostile reception that it has had from not only the UK but everybody else?

Mr McNulty: I think I would characterise it as a robust debate rather than a hostile reaction. Given, as I say, that it is more the murky world of the people either side of me, I will ask them to respond, if they choose. In relative terms, I think it is still early days in terms of the working groups and how they are going through the substance of the detail. Certainly many of the things that I have characterised as reflective of other Member States' views are about the general reception to the Directive since it was published.

Q445 Chairman: Has the Directive been discussed at ministerial level yet?

Mr McNulty: Not that I am aware; it certainly was not at the last Council I was at.

Mrs Simon: I think it was presented by the Commission at an early stage last week.

Q446 Chairman: It was presented to ministers but there was no real discussion?

Mrs Simon: There was no real discussion.

Mr McNulty: Just by the by, because I know it is of interest to you too, there was some discussion but muted last Tuesday in Brussels on the wider Green Paper on immigration. They have started that process, too. That again is fairly early days.

Q447 Earl of Caithness: Does Mr McNulty want to say anything about the working group?

Mr McNulty: I cannot enforce that. I gave them the opportunity should they choose to make use of it.

Mr Dodd: As I recall, we are at an early stage of the debate of the Directive. The experts are sitting behind me rather than at the table. We have not yet got to discussion on the particular articles that we have concerns with. As I made the point earlier, because we have opted out, it is difficult for the UK to be vocal in the working group, apart from discussion. Clearly, as other states have opted in, they are likely to lead debate on the particular article.

Q448 Lord Avebury: Could you give us any idea of what the timetable is for the remainder of the discussions and also could you say if, at the end of the process, the majority of states do not like what is in the Directive, will it simply lie on the table? Will it be allowed to remain as a document in the background or what happens to it in the end if the majority of states do not like it?

Mr McNulty: The second process point is an interesting one, but again I would defer to my colleagues on this. I do not know the answer to that myself, to be perfectly frank, in terms of the political veto. It is complex and there are sensitivities. I think that has been clear from the response, as I have suggested, from Member States in the wake of publication of the draft. At a guess, I would say certainly it will take the rest of 2006 and the back of 2007 before we move into finality in terms of the actual Directive. Clearly, that is not quite finger up in the air but a guess rather than otherwise. I know the way these processes work. The parties themselves do seek to have at least a guiding timetable on how long these things are going to take. I do not think anyone is expecting much in terms of finality until the end of 2007 at the earliest.

Q449 Chairman: Minister, it would be very helpful if Mr Dodd were able to send us minutes of the working groups as and when they discuss this Directive.

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Mr Tony McNulty, Mr Tom Dodd and Mrs Susannah Simon

Mr Dodd: I will check to see whether we can do that, my Lord Chairman.

Mr McNulty: If he is able to, he shall. May I make ask, on Lord Avebury's last point about process, is it likely to be agreed by the end?

Mrs Simon: That is quite possible. I think we have to remember that it is not just the Council and the Commission that are involved in the negotiations on the Directive but also the European Parliament. The European Parliament quite likes the Directive as far as I understand, so it is quite conceivable that you could get to a stage where Council, Commission and European Parliament do not agree and it dies.

Q450 Viscount Ullswater: Something you said in answer to me about re-entry sparked something in my mind. If the removal order has to be postponed for any of a number of reasons, and some of those reasons you gave us, is there any action taken to examine the case to see whether the other routes of entry that you were talking about can be considered about an individual before actually the removal process has to take place? It is only that category who, for one reason or another, may be held in this country for a number of months because their own circumstances would not allow them to be returned?

Mr McNulty: It is an interesting point and one that goes beyond simply returns of those in the asylum seeking system. I think we are trying rightly to get to a stage where we do not muddy the waters in terms of processes, and so there must be finality on the asylum process which involves return and only then are the other options opened up again in terms of coming

back to this country through a more legitimate, managed migration process or other process. There are some cases *in extremis* where, for whatever reason, part of that equation is not possible, where we can at least look at those options, but I do emphasise it is outside the rules and *in extremis*. Just taking an example off the top of my head, it may be that someone who is clearly very highly skilled, a doctor or whatever else, is about to be removed back to their country of origin and for whatever reason there is an immediate conflagration in that country that looks far more complex than could be immediately resolved. In any circumstance, that individual cannot be removed in the immediate future but there is an acceptance that, given the exceptional nature of their skills or whatever else, were they able, even for a day, a week or however long it took, to put in a managed migration application, then they would of course be allowed back in. In those extreme circumstances there are provisions outside the rules to say, "Let us do that some other way". I would not offer that up as a norm. You do need that flexibility around the edges. The absolute norm must be that one part of one process comes to an end and, yes, there would be a willingness to look at an individual in a different circumstance through managed migration. That goes to emphasise what I was saying about an objection to re-entry.

Chairman: Minister, unless you want to say anything more in conclusion, may I thank you and your colleagues very much indeed for the way in which you have dealt with our questions and may I wish you good luck.

Supplementary evidence from Tony McNulty MP, Minister of State, Home Office

Thank you for the opportunity to give evidence before the Committee last week. I agreed at the time to write to you on a number of issues which I set out below.

UNACCOMPANIED ASYLUM SEEKING CHILDREN AND TRAFFICKING

We are determined to tackle the unacceptable practice of unaccompanied children and young people being abandoned in the UK, separated from their families and communities. We believe that young people with no basis of stay in the UK can be returned in a way that is safe, sustainable, and in their best interests. We are currently exploring the possibility of pilot programmes for the safe return of unaccompanied children to Albania and Vietnam and continue to explore options for returns to various other countries.

Maintaining a firm immigration control is essential, but the "best interests" and wishes of the child will always be a key consideration in any decision to remove a child/young person. Voluntary return is our preferred option. We will ensure that this is fully explored throughout the process.

Only those young people whose asylum or humanitarian protection claims have been refused, and where their care and support needs have been matched to a tailored package of reception, care and reintegration support, will be returned. We are confident that the measures we are putting in place meet, and supersede, our international obligations to provide access to food, water, shelter, healthcare and basic safety.

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We recognise there are concerns about trafficking from both Albania and Vietnam and have developed the process so that any welfare issues, such as trafficking, will be fully considered and addressed prior to return. Any young person deemed to be at risk from traffickers would not be returned

ALBANIA

Albania is one of a number of non-suspensive appeal (NSA) countries designated by the UK as, in general, safe to return to. We have worked with agencies in Albania to establish arrangements that we are satisfied do not breach our international obligations. We also wish to build on, and develop further, the existing good relations between the governments of the UK and Albania.

We are establishing the pilot initially in Albania because we are satisfied that an adequate network of reception, care and support arrangements has been established. We have identified two international NGOs in Tirana to work with. Their role is to establish reception, care and support arrangements in Albania. Arrangements include being met at the airport, transferred to accommodation, allocation of a key worker, 24 hour support, a welcome pack, reorientation and an individually planned reintegration package.

Plans to commence returns to Albania were unavoidably delayed by the general election in Albania in mid-2005, which resulted in a change of government. We hope to be able to take forward further work on returns to Albania in the near future following discussions with FCO on the best way to proceed.

VIETNAM

Vietnam is a high-UASC producing country (500 new asylum applications in the last three years) and UASCs form approximately 25 per cent of all Vietnamese asylum applications.

Officials travelled to Hanoi in October 2005 to meet Government of Vietnam officials, NGOs and local action groups to explore possible options for the safe and sustainable return of Vietnamese UASCs with no further basis of stay in the UK to Vietnam. These discussions are continuing, both in the UK and in Vietnam. A follow-up visit to Hanoi is planned for April 2006.

We have kept members of the Refugee Children's Consortium (including the Refugee Council, The Children's Society, Save The Children and the Medical Foundation) fully briefed on our plans to return UASCs as they have developed, and will continue to do so through both formal and informal channels.

UN CONVENTION ON THE RIGHTS OF CHILDREN (UNCRC)

The UK is a signatory to the UNCRC but has a reservation to it in relation to immigration control. It has not been incorporated into UK law and UK courts have so far decreed that it is not directly applicable in immigration cases. We are committed to the welfare of children as evidenced by our domestic legislation. We do not believe that the reservation leads to neglect of their care and welfare.

Whilst the UNCRC does not prevent the UK from removing a child or young person it does place general obligations on the UK to act in their best interests. The UK has taken the view that, in the development of the returns programme, we should seek standards in the country of return that are higher than required by the ECHR and reflect the key care and support standards, including access to education, as set out in the UNCRC.

We have no plans to review our decision to maintain our Reservation in respect of Immigration & Nationality matters in the immediate future unless further information suggests this would be advisable.

AGREEMENTS WITH THIRD COUNTRIES, AT EU AND BILATERAL LEVEL

The UK negotiates and participates in formal readmission agreements both at bilateral and EU level, as well as continuing to negotiate informal arrangements to address pressing operational issues such as those concerning re-documentation. Where bilateral co-operation is good, we prefer to maintain that relationship, and possibly reinforce it with bilateral Memoranda of Understanding (MoU) rather than formalising arrangements in treaty.

The UK has so far opted into all negotiations for readmission agreements at EU level and the final agreements that have been concluded whilst continuing its work on bilateral agreements. UK bilateral Readmission Agreements will be superseded by EC agreements when they come into force.

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EC READMISSION AGREEMENTS

The Commission has completed negotiations with Hong Kong and Macau. Both of these agreements are in force. Agreements have been signed with Sri Lanka and Albania, but are not yet in force. Negotiations on an agreement with Russia have been concluded but the agreement has not yet been signed. Negotiations are ongoing with Morocco, Pakistan, Ukraine, Turkey, China and Algeria.

The only agreement which has been concluded with a third country with which the UK also has a bilateral Readmission Agreement is Albania. Although the EU Agreement is not yet in force it will, of course supplant the UK bilateral agreement. I enclose the texts of both of these agreements for your information.

UK BILATERAL AGREEMENTS

The first UK bilateral readmission agreements were signed with Romania and Bulgaria in February 2003 and came into force on 6 June 2004. A bilateral readmission agreement was also signed with Albania on 14 October 2003, which came into force in July 2005. The UK has concluded negotiations with Switzerland and that Agreement has been signed, but not yet ratified. We have opened negotiations with Serbia & Montenegro, and expect to finalise these shortly.

UK BILATERAL MEMORANDA OF UNDERSTANDING

In addition to formal (Treaty) readmission agreements, the UK negotiates informal arrangements to address operational issues, often involving re-documentation issues.

COUNTRY OF ORIGIN INFORMATION (COI)

The European Commission has recently published a *Communication to the Council and the European Parliament on strengthened Practical Cooperation between Member States in the realm of asylum policy and practice*. An Explanatory Memorandum (EM) on the Communication was submitted to the Scrutiny Committees in both Houses on 6 March.

The Communication is a response to the Hague Programme's call for the establishment of appropriate structures involving the national asylum services of the Member States with a view to facilitating practical and collaborative cooperation towards three main objectives:

- the joint compilation, assessment and application of Country of Origin Information (COI);
- achieving an EU wide Single Procedure; and
- how Member States can better work together to address particular pressures on asylum systems or reception capacities resulting from factors such as geographic location.

On COI, the Communication suggests the creation of a Common Portal through which all Member States authorities could access, through one stop, all official COI databases, and domestic and EU legislation. It is so far unclear as to who might oversee the portal.

The UK has been supportive of the practical cooperation agenda from the start. It provides us with a good opportunity to understand other Member States' asylum systems better, to learn from best practice across the EU, and to help other Member States, in particular the New Member States, in improving their asylum procedures, which should in turn have an impact on reducing "asylum shopping" across the EU.

The Government is less supportive of moves to harmonise COI collation, unless this can be done without compromising the standards we apply and without undue cost. Working practices on COI collation currently vary considerably between Member States. Some other Member States may be reluctant to make their COI publicly available, which they consider to be classified information. But, in the UK country information used as the basis for decision-making in asylum claims is drawn from a wide variety of sources and is disclosable. We would look to preserve this approach should any EU common principles emerge.

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DETENTION AND REMOVAL OF FAMILIES

Families with children are not detained for our administrative convenience, nor are they detained simply whilst their return is “processed”. It is our firm position that individuals and families who have no lawful basis of stay in the UK should make arrangements to leave voluntarily. However, where they fail to do so, or they are assessed as being unlikely to do so, their departure must be enforced.

In some cases, families in particular may be assessed as likely to comply voluntarily with removal directions and may thus, as a result, be allowed to do so on the basis of self check-in; that is to say that instructions will be given to the family to present themselves at the airport at a specified time and date in order to be removed on a particular flight. However, such action will not be appropriate or practicable in all cases or circumstances, or a family may well either fail to comply with self check-in instructions or be assessed as likely to do so.

In such circumstances, detention is a necessary prelude to enforced removal. Detention in such circumstances removes the opportunity for a family to fail to comply and is aimed at ensuring that their enforced removal will take place under our control, if necessary to the extent of escorting the family to the destination country.

MINUTES OF THE MIGRATION AND EXPULSION WORKING GROUP

I regret, that as negotiations in EU working groups are confidential, I am not able to provide copies of the working group’s minutes.

14 March 2006

Memorandum by the Department for Constitutional Affairs

The proposal aims to establish common rules and procedures across Member States for the return of illegally staying third country nationals.

The call for evidence sets out a number of areas that the Sub-Committee would particularly welcome comments on. My comments will focus on two specific areas:

- The conditions and duration of detention, in particular judicial oversight of detention.
- The provisions on judicial remedies and the effects of delays.

CONDITIONS AND JUDICIAL OVERSIGHT OF DETENTION

Article 14 of the Directive requires temporary custody orders to be issued by Judicial Authorities except in urgent cases where they can be issued by administrative authorities and confirmed by Judiciary within 72 hours. It calls for orders to be reviewed at least once a month and to be extended to a maximum of six months only.

Article 15 requires that upon request third-country nationals under temporary custody are allowed to establish contact with legal representatives.

Whilst the decision to detain in the UK is an administrative one, there is provision for any detained person to challenge the lawfulness of their detention before the courts. The way in which the challenge may be made will depend on whether there is currently an appeal before the Asylum and Immigration Tribunal. Where there is an appeal, an application for bail can be made to the tribunal. In other instances a challenge may be made to the High Court through the process of judicial review and habeas corpus.

Where this does occur, access to legal representatives is given, and provision of legal aid is available, to ensure fair and just access to justice is given in line within the requirements of international law. The remedies provided for challenging the lawfulness of a detention decision, and the availability of free legal assistance, where necessary for the detainee to make an effective application for release, must be operated in compliance with Article 5(4) of the ECHR.

The evidence provided by Tony McNulty has stated the position of the UK Government in relation to the restrictions the directive would impose on the use of detention. I would echo those remarks and note that I am satisfied that existing provisions provide a robust system that ensures fairness and judicial oversight of detention decisions where requested.

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PROVISIONS ON JUDICIAL REMEDIES AND THE EFFECTS OF DELAYS

Article 12 of the Directive requires an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision and/or removal order. The Article requires the remedy to be either suspensive or include the right to apply for suspension, and for legal aid to be available insofar as such aid is necessary to ensure effective access to justice. Article 11(1) of the proposed Directive requires that the notice of the return decision or removal order must inform the person of the available legal remedies.

The evidence provided by Tony McNulty has outlined the circumstances where rights of appeal to the Asylum and Immigration Tribunal are available, and where these appeal rights may or may not be exercised from within the United Kingdom. Where there is a right of appeal, the Immigration Notices Regulations require that these details must be provided when decisions are issued.

The Asylum and Immigration Tribunal was established in April 2005 as a single-tier Tribunal and replaced the previous two-tier Immigration Appellate Authority. Appeals determined by the AIT may be challenged by way of application for reconsideration to the High Court or Court of Session under Section 103A of the Nationality, Immigration and Asylum Act 2002. Under filter arrangements introduced by the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (the AITC Act), these applications are considered in the first instance by a member of the Asylum and Immigration Tribunal, with a right to opt-in to consideration by the High Court or Court of Session where an application is refused by the Tribunal.

Where an appeal is reconsidered by the Tribunal, or where the initial appeal was decided by a legal panel of three or more persons, the onward right of appeal is, with permission, to the Court of Appeal or Court of Session. These provisions apply to all appeals irrespective of whether the right of appeal can be exercised from inside the United Kingdom.

The AITC Act and the Asylum and Immigration Tribunal (Procedure) Rules 2005 set time limits for the exercise of rights under Section 103A and for decisions on applications made by the Tribunal under the filter arrangements. Applications for reconsideration must be brought within five days from the date an appellant is treated as receiving notice of the Tribunal's decision in cases where the appellant is inside the United Kingdom. Where the appellant is outside the United Kingdom 28 days are allowed to bring an application. The Tribunal is required to make a decision on the application not later than 10 days after it receives the application notice.

The provisions limiting time in this way provide an effective means to challenge a decision of the Tribunal but limit the potential for delaying removal by pursuing unmeritorious applications where an appellant is within the UK.

In instances where there are no appeal rights, or an appeal right may only be exercised from outside of the United Kingdom a person subject to return decision or removal order may challenge that decision or order by way of Judicial Review to the appropriate court. There is no legal requirement to give written notification of the right to apply for Judicial Review. Where Judicial Review is sought, there is a right to apply for an injunction to suspend removal, and that application is made as an application for interim relief within the judicial review proceedings. Where an injunction is granted removal will be suspended pending resolution of the proceedings.

It is not clear from current wording of Articles 11 and 12 whether the requirement to provide written notification extends only as far as statutory rights of appeal or whether notification of generally available legal procedures such as Judicial Review must also be provided. As such it is not possible to establish how far current UK practices comply with the Directive in this area.

Legal aid is available for proceedings before the Tribunal and the appropriate court, subject to statutory tests. It is noted that Article 12(3) refers to legal aid being required "insofar as such aid is necessary to ensure effective access to justice." The Article does not specify the extent to which this covers all stages of any proceedings irrespective of merit, or whether, for example, in cases where the grounds for challenging removal are weak, the requirement may be met by providing legal aid to obtain advice on the merits of a claim without providing further funding to bring proceedings.

Whilst we do not contest the need for legal aid to be available for those who lack sufficient resources, we would not accept that this should extend as far as providing funding to pursue claims where statutory tests have been applied and the claim has not satisfied these tests.

Bridget Prentice

7 January 2006

Examination of Witness

Witness: BRIDGET PRENTICE, a Member of the House of Commons, Parliamentary Under-Secretary of State for the Department for Constitutional Affairs, examined.

Chairman: Minister, can we welcome you very warmly to this Committee. I think you mentioned to me that this is the first time you have appeared before a Committee. I assure you that the process is entirely friendly and welcoming.

Q451 Lord Dubs: Mostly!

Bridget Prentice: I was about to say I look forward to it but perhaps I will wait until the end to decide that!

Q452 Chairman: May I also thank you for your written evidence which we have read with great interest and on which our questions will be at least partly based. As you probably know, this session is on the record. A transcript is taken of it and your officials will have the opportunity to see the transcript for your approval or for amendment. I do not know if you want to open with any sort of statement or shall we go straight into questions?

Bridget Prentice: I think probably it is best if we go straight into questions.

Q453 Chairman: Good. Can I first of all ask you how many judicial review cases there are in the United Kingdom currently regarding return and detention decisions? By how much would this be likely to increase if the provisions similar to those of the Directive were in force?

Bridget Prentice: In 2005 we had 3,135 judicial review cases, of which in 2,889 the respondent was the Secretary of State at the Home Office, so just over 3,000 on asylum and immigration and just under 3,000 that directly specified the Secretary of State as the respondent. That figure is not broken down to show the actual grounds on which the judicial review has been given, but it is not really possible to give that kind of information without going through every application individually. Whether or not the Directive would increase the number of applications, I think on a practical basis you must assume that it probably would. I would not be able to say to you by exactly how much but you would assume that if you make that available in that way that more people would take it up.

Q454 Chairman: It has been suggested to us by some of our witnesses that nervousness about the increase in judicial reviews cases is really one of the main reasons why the Government decided not to opt into this Directive. Is that a fair comment?

Bridget Prentice: No, I do not think it is. I think you are referring perhaps to the evidence given by Tim Baster when he was before you.

Q455 Chairman: Yes, I think that is right.

Bridget Prentice: What I think he was saying was he was really referring to judicial control of detention rather than the remedy of judicial review, and he was, I think, saying that it was the provisions on judicial control that were of concern. It is true we do not think that judicial control as envisaged by the Directive is necessary because we already have a very robust system. The decision in this country on detention is an administrative one and there is already provision for anyone who is detained to challenge the lawfulness of that detention before the courts. Now, it depends really on whether the challenge is made while there is an appeal before the Asylum and Immigration Tribunal, in which case they may make a bail application to the Tribunal. In other cases, they can make the challenge through the High Court by way of judicial review or *habeas corpus*.

Chairman: Thank you very much. Lord Dubs?

Q456 Lord Dubs: I wonder if I could ask a supplementary question to an earlier point you made. The figure you quoted about the number of judicial review applications; how many of those actually were successful? That is to say, in how many instances did the applicant win their point?

Bridget Prentice: Again I am sorry that I cannot give you that information. That would require the Tribunal to know the reason for the application and then to have some method of recording it. At the moment we do not have that. What I could say to you is that of the 3,135 applications last year, 126 were for asylum support issues, 2,267 were for asylum issues and 742 were for non-asylum issues. We do not have that and again it would be a matter of going through every single case.

Q457 Chairman: Minister, can I just say that is very helpful. If when your officials look at the transcript you conclude that there is any specific information which you could send us, that would be very helpful, but thank you for that.

Bridget Prentice: Absolutely. We will certainly do that particularly in terms of any statistics that we have that would be useful to the Committee; we shall do whatever we can to put those together for you.

Q458 Lord Dubs: When UNHCR gave evidence they suggested that a judicial remedy against a removal decision was ineffective if the third country national was not allowed to await the outcome of his appeal in the UK. What is your comment on that?

Bridget Prentice: The Asylum and Immigration Tribunal deals on a pretty regular basis with applications that come from outside the United

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Kingdom, so I do not accept that because an application has to be made outside the United Kingdom that it cannot be made in as fair and as robust a way as any within the country. Where an application raises issues under the Refugee Convention or the ECHR, then that would be dealt with differently, but, as I say, the AIT deals with appeals from outside the UK on a daily basis—and in my own advice surgeries week in week out I see supporters of the applicants very often who are making applications from outside the United Kingdom—so I do not think that the process is any different because you have to make your application from outside the country.

Q459 Lord Dubs: But it must be more difficult to make an application when one is not in the country. If one is removed from the people who are going to speak for one before the Tribunal, just in human terms, it must be hard to do if one is several thousand miles away.

Bridget Prentice: People do that every day. If the applicant has been detained and makes an application for judicial review at the point of removal, there is a three-day period in which that removal will be stopped in order that that application can be processed. So there is already a protection there, if you like, that the application can be made in that instance. But I think in every other case then it is perfectly reasonable for people to make the application in the way that others would have to do.

Q460 Lord Corbett of Castle Vale: I wonder if I just might ask you a question about the issue that Lord Dubs raised there. The Home Office told us in some supplementary evidence that a total of only four persons had been successful in their out-of-country appeal and one Jamaican, one Albanian and two Rumanians had returned to the UK. I am not sure whether that supports Lord Dubs' point about the difficulty of doing this through somebody else that you have never met probably or whether people who have been all through the process and failed and been removed think, "Well, there is no point in doing it." I do not suppose you know either, do you?

Bridget Prentice: I probably do not but you can only guess as to what goes through people's minds in that situation. I heard some of the evidence that my honourable friend, the Minister from the Home Office, gave in terms of some other of the questions, and it is difficult to be able to assess exactly what reasons people have for making some of the decisions that they make. He was talking about people who leave voluntarily. Some people decide—and again I speak partly from the experience of a constituency MP—that they have been through the whole process, their claim has been not upheld, and they voluntarily go back. In fact, I had someone at my advice surgery

just the other week who came to see me to say they had returned because they went back voluntarily, applied from the country of origin, and were accepted, possibly on different circumstances, I do not know the details, but they came to tell me that they had come back through a legitimate means. So there are a variety of reasons why people do what they do.

Q461 Lord Corbett of Castle Vale: I have had experience of exactly that.

Bridget Prentice: In a sense, I think that actually underlines the fact that the system works, that people, if they follow the correct procedures, will be welcome to the country in that way.

Q462 Lord Corbett of Castle Vale: To get to the question which I really should have done, my Lord Chairman, earlier on the evidence we had from Professor Elspeth Guild, and others actually which says that given the seriousness of detention that the Government surely must have a duty, subject to a means test, to provide legal advice to make people aware of what legal advice is available and to assist detainees, whatever the cost, to make this fair? It is a very draconian step to take. We can all understand the reasons why in certain circumstances it has to be done but nonetheless, as I say, we have had some evidence that people involved in this process claim they have never been made aware of their legal rights in this matter. They are told if they ask but they are not offered the advice. That is the point.

Bridget Prentice: Well, we provide legal advice and assistance to detainees to challenge the detention decision absolutely in accordance with the requirements of Article 5. That legal aid is available to ensure fair access to justice and it is given in line with the requirements of international law. The remedies provided for challenging the lawfulness of a detention decision and the availability of free legal assistance so that a detainee can make an effective application are operated and must be operated in compliance with Article 5(4). The idea that it is draconian—and we do recognise that people who are detained under the fast-track process may have some more difficulties simply because the process is meant to be more speedy and in order for them to secure representation under that accelerated timetable. To deal with that concern, the Legal Services Commission, the LSC, contract with suppliers to provide support to detainees, subject obviously to their eligibility, and they provide on-site legal advice and assistance and they have a duty rota scheme, so we are aware of that problem and the LSC is attempting to address that. There are schemes in most of our detention centres—in Harmondsworth and at Yarl's Wood and there is also on-site advice from the Refugee Legal Centre and the Immigration

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Advisory Service at Oakington. So we are aware that there is a problem for the fast track but of course I think we all agree—I hope we all agree—that having a fast-track process is in general a more positive thing for detainees. We are aware of some of the problems that arise from that and there are now measures in place to alleviate those problems.

Q463 Lord Corbett of Castle Vale: Can I just make clear please, the point I finished on, is this advice about the availability of legal advice and assistance offered to people in those circumstances or do you simply respond if they ask?

Bridget Prentice: It is offered and it is offered in a number of ways. As I say, the Legal Services Commission already has a rota system of suppliers but also they are running more than two pilots providing on-site legal advice surgeries which are open to any individual who is detained in a removal centre, and they are available twice a week in Campsfield, at Colnbrook, at Dover, at Harmondsworth, at Tinsley House, and at Yarl's Wood. Admittedly, that has only been on-going for the last two and a half months but those pilots are working so there are actually on-site advice surgeries available to people.

Chairman: Lord Avebury, I think possibly that dealt with most of your question. Would you like to ask a supplementary?

Q464 Lord Avebury: I would like to pursue what you have just said because surely the implementation of these pilots is an acceptance of the fact that people were not able to access legal advice prior to these surgeries? The institution of this scheme seems to me to supply a deficiency that existed prior to that and which had to be made up, for example, in BID's attempt to train people by the issue of self-help guides to application for bail, under which a number of people did apply in their own right and were successful. Would you accept that up until the point where these pilots were introduced you were not providing adequate legal advice to people who were in detention?

Bridget Prentice: I would not accept that we were not providing adequate legal advice. I think the pilots are an attempt to enhance the provision that was there before and to make it better. We do spend a lot of time listening, as does the Home Office, to a variety of agencies who are advocating on behalf of detainees about what might be best. I have visited Harmondsworth myself and I have seen the information that is available in a variety of languages to people. I am also aware of course that once an advocate is there, they have the responsibility for ensuring that the individual, the client, is given all the proper advice that they need about all the possible remedies that are available to them. We are always

looking to make the system better, fairer, swifter, as far as we can, so I would say that the pilots are a good thing. We will see in May whether it is something that should become permanent or whether it is something that should be extended further and I will certainly be happy to let the Committee have details of the results of that when we get to them.

Chairman: Thank you very much.

Q465 Lord Avebury: Is it possible that we could have some preliminary information on the number of people who are making applications to the surgeries and the number of cases in which as a result of their encounters with these peripatetic advisers they are able to submit bail applications?

Bridget Prentice: I think this is what Tony McNulty said earlier. If the information is available, if we keep that on record, then I will certainly ensure if possible that you can get it. Whether we will be able to tell you those that have submitted bail applications and whether or not they have been successful, I am not sure, but we will certainly get you as much of that information as is currently on record.

Q466 Viscount Ullswater: Minister, I think you have been very helpful in explaining in some detail the amount of legal assistance that is available and the various routes through which it can be accessed but is it not really the case that if your command of English is not very strong, ie you cannot speak a word of it, that access to legal assistance is going to be pretty difficult, and that if you turned the coin over on its other side and you implemented some form of judicial supervision—I do not want to call it judicial review because that has another connotation—of the process, then the person who is being detained by administrative decision will have his case looked at by either a magistrate or a tribunal which can ask the question of whether they have gone down all this route of whether you can go to reporting or handing over documents or passports, or an obligation to reside in a certain place, which are all actually in Article 14, before detention is ever considered, but having got into detention, a judge or a tribunal might say, “Has this person been asked all these things which would allow him to remain out of detention?” because I suspect that a lot of people who are in detention have a very poor command of English.

Bridget Prentice: In the system at the moment we have these opportunities for people to receive advice through not just the legal advice surgeries but the other ways I have just described. There is also of course the fact that within IND there is a step-by-step more senior review of people in detention on a regular basis, and perhaps I should have made it clearer that when I said that legal advice and assistance was available, there will always be an interpreter available at every stage as well, so even

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within those areas there should be an interpreter available to help people in that way, so I hope we have that aspect covered.

Q467 Viscount Ullswater: Forgive me, Minister, but what you are suggesting is that however many steps of the process the detainee goes through, it is all still on an administrative basis, and we have got the impression, I think, from some of the answers that we have had from other people whom we have seen that it may be for convenience that people are detained rather than because of this high risk of absconding. We know where they are, we can deal with that process, but, on the other hand, you are taking their liberty away.

Bridget Prentice: I think to some extent that is a question that may be better answered by my colleagues in the Home Office. However, I would say that it has always been the case in this country that the policy of detention is an administrative decision but we do have in place a number of legal opportunities for people if they wish to challenge that decision. It can be challenged, as I say, by the bail application, it can be challenged in the High Court by judicial review or by *habeas corpus*, so I think in the tradition of the way that our court process works we have suitable and robust contingencies for people should they feel that they should challenge the decision that has been made.

Q468 Chairman: Minister, is there a halfway house to judicial review by the High Court, from the Asylum and Immigration Tribunal for instance?

Bridget Prentice: People can make an application to the Tribunal itself. Judicial review, of course, is available for a wide variety of reasons, not just within asylum; it covers a multitude of areas of public authority that people may wish to challenge, so there are certainly a variety of halfway houses that people could use before turning to judicial review.

Chairman: Thank you. Baroness D'Souza?

Q469 Baroness D'Souza: In spite of the opt-out government officials will be present at all levels of the negotiations in the proposed Directive. Will you try to influence the outcome of negotiations on judicial remedies, and if so, in what particular ways?

Bridget Prentice: Yes, I think we very much will try to continue to influence the decisions. I think it has been the case that it is part of our policy to engage in what goes on in these decisions in Europe and so we will continue to do that in terms of shaping this Directive. I think I heard my colleague Tony McNulty give almost a shopping list of the problems that we might find with the Directive, and so I think I can probably leave it there in that sense as to some of the areas that need to be looked at more closely, but we will take up, as we do in every other sphere, a very positive attitude

in trying to influence the Directive in a way that will meet our requirements of having a robust but fair asylum and immigration system.

Q470 Baroness D'Souza: Thank you. Would you think that the experience that you have had about having judicial review would be helpful in influencing the Member States who are considering this Directive?

Bridget Prentice: I think we have to be very careful. This is perhaps one of the problems with this Directive in that it does not really take into account the different legal systems and different legal structures within each Member State. I do not think it would be our place to influence the way the judicial process within other Member States has developed in the way that they go through their processes, any more than I think that that should happen to us. I think we have got a very good judicial process in this country and we would want to see that reflected in any Directive to give us the flexibility to continue to work within our own judicial system.

Q471 Chairman: Is your Department represented on the working groups that are looking into the Directive?

Bridget Prentice: They are in constant contact with our colleagues within the Home Office who are involved, and where issues are of a direct nature to do with the courts, then of course we would have a very important role to play in determining the way forward on that.

Chairman: Thank you very much. Lord Caithness?

Q472 Earl of Caithness: Minister, are you happy with the legal base of this Directive?

Bridget Prentice: I think the short answer to that is no in that we think that we have got a system that works reasonably effectively and we are constantly monitoring it to try to make it more effective. We are not convinced, for the variety of reasons that Tony McNulty has already expressed, that this Directive actually makes it any better either for the detainee, who is the person presumably that they are hoping to give some protection to, or to the process of continuing to have a good and fair asylum system. We do not think that it really addresses either of those questions adequately. We think that it goes beyond what Article 5 would expect a Member State to provide.

Q473 Earl of Caithness: And would you not be happier if this was a matter for subsidiarity and that this should not be something that the Commission should be involved in and that we should do our own immigration and that is a matter for Britain, or every other country?

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Bridget Prentice: Again, I think that is probably a question best answered by the Home Office who lead on.

Q474 Earl of Caithness: They passed it to you.

Bridget Prentice: Have they indeed! I should have been in earlier then to have heard that! Obviously our asylum and immigration policies are ones that we develop in this country, but we do work closely with our colleagues in Europe on a number of issues and there are a variety of ways in which we are working together in terms of dealing with removals and dealing with having a certain level of consistency of approach, but I would be loath to go too far down the road of saying that it can only be done in the way that we do it or it can only be done in a way that is collective right across Europe. I think there has to be that flexibility available to us.

Q475 Earl of Caithness: Can I ask you one final question, Minister, which is what needs to be changed in the Directive to make it acceptable to you?

Bridget Prentice: We have got problems with the upper limit on detention. We have got problems with the re-entry ban. I have just talked about it going further than Article 5 suggests, so we would have problems with that aspect of the judicial remedy. We do not think—and again I hope I have said in a previous answer—that the Directive should be seeking to harmonise judicial arrangements, and I think we have a problem because it does not take into account the different legal systems across Europe and so again, as Tony McNulty said, he has raised a number of other issues that my colleagues in the Home Office have.

Q476 Chairman: I should make it clear, Minister, that we are asking you in terms of your Department.

Bridget Prentice: I think those ones in particular are the ones. The upper limit on detention, the re-entry ban, the one-size-fits-all approach in terms of judicial arrangements, and going beyond the provisions of Article 5, I think, are probably ones that we would find within the Constitutional Affairs Department to be the most contentious.

Q477 Baroness D'Souza: Minister, from what you say it seems that maybe you feel there is not a need for Directives such as the one that is proposed. Would that be fair?

Bridget Prentice: At the moment I think it probably is fair to say that. We do not see the need. Of course, it is at a very, very early stage. There are lots of discussions still to be had, but at the moment it does not appear to be providing anything that will actually make our system any fairer, any more robust, any

swifter than it presently is, but we are open to discussion.

Q478 Earl of Listowel: Just a quick question. Even if the opt-out is maintained, might the Government adapt UK law and procedures to conform with those parts of the Directive aimed at improving access to legal remedies?

Bridget Prentice: We have no intention of adapting the UK law and procedures in respect of access to legal remedies at the moment, and I hope I have already said in the course of my evidence today, and certainly in my written evidence, that in those areas and practices that do not already conform with the Directive (and in fact in many ways we do conform with aspects of the Directive which we have had implemented for some time) we do not believe that the remedies suggested in the Directive actually enhance effective access to justice. In fact, in some ways it is arguable that they could be harmful to our interests if they were implemented, so I think it would not make any sense to adapt procedures to conform to those aspects of the Directive.

Earl of Listowel: Thank you, Minister.

Chairman: Lord Avebury?

Q479 Lord Avebury: I was wondering whether you could help resolve a paradox that is mystifying me. If you compare the end of 2003 with the end of 2005, you find that the number of asylum applications has halved, that you have got a higher proportion of non-suspensive appeals, you have got the appeal system reduced to a single tier, and you have spoken about improvements to access to bail, and yet you have 20 per cent more people in detention. Can you explain that?

Bridget Prentice: I cannot, in the sense that I asked a very similar question myself when I looked at some of those figures. There are a variety of reasons why the figures can be read in that way, one of which is that it is actually because there are more people making those applications in a different way. I will try and get you the actual details of how we analyse those particular figures so that you can see that despite all the good things we have done over the past few years things appear to have increased. In fact, you can actually look at it from the other side, but I will try and get you the details of that.

Chairman: Thank you very much, Minister. Lord Marlesford?

Q480 Lord Marlesford: Minister, if, as I understand it, the Government's policy is to contain and if possible reduce the volume of Brussels legislation to that which is necessary and if one of the tests of necessity is subsidiarity, can you not give us an *ex cathedra* statement as to whether or not your Department does or does not believe that this

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Directive has passed the test of subsidiarity? And if you cannot give it now could you please write to us? It is a very important point.

Bridget Prentice: I have never been asked to give an *ex cathedra* statement before and that is quite a frightening prospect.

Q481 Chairman: Now you know what happens when you appear before a Select Committee!

Bridget Prentice: I did not realise I had quite that power! It is quite challenging. We certainly do not feel at the moment that it does comply with subsidiarity but I will write to you in detail with the Department's view on that subject.

Q482 Lord Marlesford: That is very helpful. The other point I wanted to raise with you is your five-year strategy for reducing the scope of appeals; how is that going?

Bridget Prentice: It is going quite well, I think.

Q483 Lord Marlesford: What has actually happened?

Bridget Prentice: We keep a constant monitoring of the way these things have gone. The Asylum and Immigration Tribunal itself keeps a very close eye on the number of appeals and the way that they have been dealt with. I have set up, with colleagues in UKvisas, a group to look at the way we can actually make the appeal process swifter and to try to remove some of the delays that are involved, partly because of the length of time that is involved in sending bundles of paper from one place to another and so on. So there are a number of things that are happening that I think will help make it better and, of course, some of the changes in legislation that the Home Office is bringing through at the moment will make a considerable difference to the way that some of that will work in the future. It is constantly under our beady eye.

Chairman: I will allow two very short questions from Lord Listowel and Lord Corbett.

Q484 Earl of Listowel: Following up from Lord Ullswater's question earlier, your response about reviewing at ever higher levels detention, looking particularly at children and families, the Chief Inspector of Prisons expressed concern about how robust those processes were when it comes to children at Yarl's Wood. Can you say how that has developed

since that report in the summer of last year so we can be more confident that that review is really thorough, recognising that most children are kept there for a short time but some are kept for more than two months? That would be helpful and perhaps you would write to me if you do not know the detail.

Bridget Prentice: I do not know the answer to that offhand but I will certainly write to you. I have not been to Yarl's Wood myself but I have seen what was available at Harmondsworth, but I will certainly write to you with details of how that is progressing.

Q485 Lord Corbett of Castle Vale: The Home Office told us that 75 per cent of initial refusals of applications made in 2004 resulted in appeals. Do you think that is saying something about the poor quality of the initial decision or the determination of the applicant or a bit of each? It is a very high number.

Bridget Prentice: It is a very high number. It is probably a mixture of a number of things and I know that colleagues both in IND and in the ECOs are looking constantly at how to make the quality of the initial decision better and also, pre the decision making, making sure that applicants know what is likely to be asked of them so that they can bring to their application all the details that they need, and that process is a continuous one. I think also people realise that we do have a pretty robust system in place and that we will treat people fairly but justly. I think the quality of the legal advice is getting better, too. In fact, if you remember, some years ago there were, quite frankly, some charlatans out there giving people pretty ropey, to say the least, advice as to what they could or could not expect, and now the Legal Services Commission has removed many of those people from the opportunity to give that advice, so I think that is an important aspect of it as well.

Q486 Chairman: Minister, thank you very much indeed. You have given us very frank and helpful answers to our questions. I hope you did not find your *cathedra* too uncomfortable!

Bridget Prentice: The *cathedra* was fine. I may become almost apostolic in my discussions later on today! Thank you. I would not go so far as to say it was an enjoyable experience but it was certainly not unenjoyable, if that is possible.

Chairman: If you are going to be apostolic we shall certainly want to invite you back!

Supplementary evidence from Bridget Prentice MP, Parliamentary Under Secretary of State, DCA

Further to the oral evidence I gave to the committee in the above inquiry on Tuesday 1 March 2006, I am writing to provide additional information as indicated during the session and to clarify some of the answers I gave.

BAIL APPLICATIONS AND JUDICIAL REVIEW

In my answer to Q455 I made reference to immigration detainees being able to make bail applications to the Asylum and Immigration Tribunal where there is a pending appeal before it. I would like to clarify that such applications can be made irrespective of whether there is a pending appeal before the Tribunal.

At Q 456 Lord Dubs requested the number of successful applicants in judicial review applications. The figures quoted in my reply were a breakdown of asylum and immigration judicial review applications received during the course of 2005 and not a breakdown of those that were successful.

I undertook to provide additional information on statistics that were available in response to the Chairman's request at Q457. In 2005, 1,743 asylum and immigration judicial review applications were received. Permission for substantive hearing was granted in 185 of these.

REMOVAL OF 3RD COUNTRY NATIONALS BEFORE THE OUTCOME OF APPEALS

In relation to my answer to question Q459 I would like to clarify that the three day period I referred to applies to cases certified as clearly unfounded under Section 94 of the NIAA Act 2002. In such cases removal is suspended for three days where a threat of judicial review is made. If a judicial review challenging the certification is lodged during this time, removal will be deferred whilst the application is pending.

LEGAL ADVICE AND BAIL

For Q465, I undertook to provide the committee with available information on the arrangements I described for providing legal advice.

A pilot scheme to provide legal advice surgeries at immigration removal centres has been in operation since December 2005. The scheme is being monitored but at this stage we do not have sufficient levels of information about its operation. As I said in my evidence, there will be a full evaluation of the scheme after six months and I am content to write to the committee with details of the evaluation.

In addition there is a duty rota scheme to provide advice for people who are detained and whose application for asylum is being dealt with under the fast track process. People are informed about this legal advice scheme as part of the induction process at the detention centre. This is done in a language that they can understand.

An individual who indicates that they wish to consult a duty adviser will normally be seen the next day. Of course some people may not wish to see an adviser and others may already have an adviser, for example those privately funding a representative.

The level of use of the scheme is linked to the number of people received at the centre. Information is readily available about the take up of the scheme at the Harmondsworth centre. Over four recent typical months at Harmondsworth (October & November 2005 and January & February 2006) an average of 95 people received legal advice each month under the scheme. There is no record of whether the consultation resulted in an application for bail as, under the arrangements for the scheme, advisers do not have to inform the Legal Services Commission when a bail application is made.

During the period from February 2005 to January 2006 provisional figures show there were 3,982 bail applications received by the AIT and there were 8,383 bail decisions. It should be noted that a bail application may have more than one hearing, which is the reason for the larger number of decisions compared to applications. Of the decisions 33% were granted, and 27% withdrawn.

LEGAL BASE OF THE DIRECTIVE

At Q472 and Q474 the Committee asked whether I was happy with the legal base of the directive and whether the Commission has the power to issue the directive in this format. The answers I gave were set in the context of the need for the UK to be opting into the directive and not its legal base and subsidiarity. Responsibility for commenting on these issues is a matter for the Home Department. I am therefore copying this letter to my ministerial colleague Tony McNulty.

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DCA CONCERNS IN RELATION TO THE DIRECTIVE

I would like to clarify my answer to Q475. Issues around the re-entry ban and the time limit on detention are government concerns and not specific concerns for DCA. The specific concern for DCA in relation to detention is the level of judicial oversight of detention as specified in the directive.

ANALYSIS OF DETENTION STATISTICS

In my reply to Q479 I undertook to try to provide further details explaining the reasons for a 20 per cent increase in detention numbers at the same time as the volume of asylum applications has halved, especially as other measures have been introduced to shorten the appeals process and improve access to representation by detainees.

As I have previously indicated the policy responsibility for detention rests with the Home Office. Reasons for the increases in detention numbers whilst asylum applications and NSAs are decreasing, is more accurately one for that department to provide.

I also undertook to write to the Committee in response to Q484 in relation to the detention of children at Yarl's Wood following on from the concerns expressed by the Chief inspector of Prisons. Again this is a matter where the Home Office are better placed to reply in terms of policy responsibility.

FIVE YEAR STRATEGY

The answer given in relation to Q482 on appeals was set in the context of the AIT recovery plan which was established to address the issue of backlogged entry clearance appeals and was not specifically related to measures within the five year strategy.

I hope you will be able to annex this additional information alongside the evidence that has already been submitted to the Committee. May I also take this opportunity to thank the Committee for allowing me to present my evidence on 1 March and for making me feel welcome.

15 March 2006

THURSDAY 2 MARCH 2006

Present	Avebury, L Bonham-Carter of Yarnbury, B Caithness, E Corbett of Castle Vale, L D’Souza, B Dubs, L	Henig, B Listowel, E Marlesford, L Ullswater, V Wright of Richmond, L. (Chairman)
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Memorandum by the European Commission, Directorate General, Justice, Freedom and Security

1. THE LEGAL BASIS OF THE DRAFT DIRECTIVE AND THE PREMISES ON WHICH IT IS BASED

Comment: The proposal aims—as a measure on illegal immigration based on Article 63(3)(h) of the Treaty—to establish a horizontal set of rules, applicable to any illegally staying third-country national, whatever the reason of the illegality of the stay (eg expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit, negative final decision on an asylum application, withdrawal of refugee status, illegal entrance). This proposal for a Directive does not address the reasons or procedures for ending legal residence.

This Directive applies to third-country nationals staying illegally in the territory of a Member State, ie:

- (a) who do not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement, (to this extent it is a development of the Schengen *acquis*) or
- (b) who are otherwise illegally staying in the territory of a Member State (to this extent the UK may opt-in under the Protocol on the position of UK and IRL).

For the UK (which does not apply Schengen law) all cases of illegally staying third country nationals are to be considered as “otherwise illegally staying” and the UK can therefore fully opt-in/participate (except for Article 16 which was made expressly only Schengen relevant):

- whether the standards proposed comply with human rights law.

Comment: The proposal was the subject of an in-depth scrutiny to make sure that its provisions are fully compatible with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations derived from the European Convention of Human Rights. As a result, a particular emphasis was put on the provisions dealing with procedural safeguards, family unity, temporary custody and coercive measures.

2. THE MERITS OF THE PROCEDURAL RULES, PARTICULARLY OF A TWO-STEP PROCESS—RETURN DECISION FOLLOWED BY REMOVAL ORDER

Comment: The proposal provides for a two-step procedure, leading to the ending of illegal stay: A return decision (step 1) must be issued to any third-country national staying illegally. Priority must be given to voluntary return. If the third-country national concerned does not return voluntarily, Member States shall execute the obligation to return by means of a removal order (step 2). In [advance] consultations, many Member States expressed concern that the two-step procedure could lead to procedural delays. In response to this concern, the proposal expressly clarifies that Member States are free to issue both the return decision and the removal order within one act or decision (this may particularly take place if there is a risk of absconding).

- and whether they allow for an informed choice of voluntary return.

Comment: Yes. Article 6(2) seeks to reinforce the principle that priority should be given to voluntary compliance with the obligation to return. Unless there is a “counter indication” (the risk of absconding), Member States should always grant a period of voluntary departure to the person concerned. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.

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3. THE PROVISIONS FOR INDIVIDUALS WHO CANNOT BE REMOVED, WHETHER TEMPORARILY OR INDEFINITELY

Comment: The Commission takes the position that it is not acceptable to leave the situation of persons who are staying illegally, but who cannot (as yet) be removed, in a complete legal vacuum.

Article 8 therefore provides for a basic minimum level of conditions of stay for those illegally staying third-country nationals for whom the enforcement of the return decision has been postponed or who cannot be removed. For this purpose, reference is made to the substance of a set of conditions already laid down in an existing instrument of Community law: Articles 7 to 10, Article 15 and Articles 17 to 20 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. (Article 7: Residence and freedom of movement Article 8: Families, Article 9: Medical screening, Article 10: Schooling and education of minors, Article 15: Health care, Article 17–20: Persons with special needs; NOT covered: Article 11—Employment, Article 12—vocational training, Articles 13 and 14—material reception conditions).

This Article also provides that the persons covered by it receive a written confirmation, in order to enable these persons to demonstrate their particular situation in cases of—eg—administrative controls or checks.

4. THE CONDITIONS AND DURATION OF DETENTION

Comment: A balance had to be found between the right to personal liberty of the illegal resident and the right of the Member States to control admission to their territories. The need to balance these rights is recognised by the ECHR which states that one possible exception to the right to liberty is “the detention of a person against whom action is being taken with a view to deportation or extradition” (Art. 5(1) (f) ECHR). The safeguards in the proposal (detention as the last resort, preference for non-coercive measures, regular judicial oversight of the detention decision and maximum periods of temporary custody) strike this balance—in our view—correctly.

5. THE SAFEGUARDS FOR INDIVIDUALS TO BE REMOVED (SUCH AS CONCERNING THEIR ARREST AND ESCORT), PARTICULARLY WHERE REMOVAL ACTION IS SUB-CONTRACTED TO PRIVATE COMPANIES

Comment: The proposal (Article 10) expressly binds the use of coercive force to the principle of proportionality and obliges Member States to respect the fundamental rights and the dignity of the third-country national concerned whilst avoiding overly prescriptive rules which would be inappropriate within the framework of a Directive.

Instead a general reference is made, obliging Member States to take into account already agreed principles contained in the common Guidelines on security provisions for joint removal by air, attached to Council Decision 2004/573/EC on joint flights for removals of 29 April 2004.

6. PROVISIONS ALLOWING OR REQUIRING POSTPONEMENT OF REMOVAL

Comment: The proposal (Article 8 (2)) aims at providing a clear steer concerning those cases in which a removal order shall not be executed, whilst avoiding an overly prescriptive list which would be inappropriate within the framework of a Directive. The cases highlighted in this paragraph concern circumstances linked to the physical or mental state of the person concerned (lit. a); technical reasons, such as lack of availability of appropriate transport facilities (lit.b) and—as far as the removal of minors is concerned—the need of safeguarding the best interests of the child (lit.c).

7. THE PROPOSALS FOR A RE-ENTRY BAN, INCLUDING RELIANCE ON THE SCHENGEN INFORMATION SYSTEM IN THE APPLICATION OF THE BAN

Comment: The proposal (Article 9) obliges Member States to issue a “re-entry ban”, preventing re-entry into the territory of all the Member States, when issuing removal orders. Member States are also allowed to issue a “re-entry ban” at the same time as they issue a return decision. Adding this European dimension to the effects of national return measures is intended to have preventive effects and to foster the credibility of a truly European return policy. The length of the re-entry ban will have to be determined with due regard to all relevant circumstances of the individual case. Normally it should not exceed five years. Only in cases of serious threat to public policy or public security, may the re-entry ban be issued for a longer period.

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Information sharing with other Member States will be vital for the effective and swift implementation of the provisions contained in this proposal. Member States need to have rapid access to information on return decisions, removal orders and re-entry bans issued by other Member States. The proposal itself makes no express link to reliance on the Schengen Information System in the application of the re-entry ban. The recitals clarify, however, that this information sharing should take place in accordance with the provisions which will govern the establishment, operation and use of the Second Generation Schengen Information System (SIS II). Those MS which do not participate in SIS, will have to look for other forms of information sharing, such as bilateral administrative co-operation between competent authorities.

8. THE PROVISIONS ON JUDICIAL REMEDIES AND THE EFFECT OF DELAYS

Comment: The proposal (Article 12) provides for a right to an effective judicial remedy against return decisions and removal orders. Given that the seriousness of reasons which may lead to the issuing of return decisions and removal orders may diverge substantially (risk to public policy and security, illegal entrance, overstaying of a visa or residence permit, etc) and given that one of the main objectives of the proposal is to support effective national return efforts, it is left to Member States to determine whether an appeal should be given suspensive effect. Article 12(2) provides that in those cases in which the appeal has no suspensive effect, the third country national shall be permitted to apply for special leave to remain in the territory of the Member State.

9. THE IMPACT OF THIS PROPOSAL ON MEMBER STATES' OPERATIONAL COOPERATION, AS FOR EXAMPLE IN THE CONTEXT OF THE EUROPEAN BORDER AGENCY

Comment: The Directive will fix common rules to be respected and followed by Member States. This will enhance mutual trust between Member States on return measures taken by other Member States. This increase in mutual trust will create a favourable climate for Member States' operational cooperation.

In particular, this will positively impact the European Agency for the Management of Operational Cooperation at the External Borders in the fulfilment of its task of providing, subject to the Community return policy—and in particular subject to this upcoming Directive—assistance for organising joint return operations of Member States and identifying best practices on the acquisition of travel documents and the removal of third-country nationals illegally present in the territories of the Member States.

The Directive will also provide for a flexible set of rules, applicable if a third-country national who is the subject of a removal order or return decision issued in a Member State ("the first Member State") is apprehended in the territory of another Member State ("the second Member State"). Member States may select different options, depending on the circumstances of the particular case.

On the one hand, the second Member State may recognise the return decision or removal order issued by the first Member State. The financial compensation mechanism agreed upon in Decision 2004/191/EC is made applicable to these cases.

Alternatively, a second Member State may ask the first Member State to take back an illegally staying third-country national or decide to launch a new/autonomous return procedure under its national legislation.

Jonathan Faull
Director General

14 December 2005

Examination of Witnesses

Witnesses: MR JONATHAN FAULL, Director General, DG JLS, MR FABIAN LUTZ, Immigration Unit, and MS CHIARA ADAMO, Assistant to Mr Faull, European Commission, examined.

Q487 Chairman: Thank you very much indeed for receiving us. It is very good to see you again. We are not strangers to you. Some of us may be but I think most of us have had the pleasure of meeting you before. Can I first of all ask you, please, to convey my warmest regards to Commissioner Frattini.

Mr Faull: I will indeed, thank you.

Q488 Chairman: Thank you very much for receiving us. You know what we are at. Unless you want to say anything to us to open, if we could start straight away putting some questions to you.

Mr Faull: Please do.

Q489 Chairman: Thank you very much for the preparatory comments which you have let us have in writing. As you know, we are having a record of the meeting taken but if at any point you want to make points off the record you are very welcome and we will ask Susan to lay down her pen at that point. I am not saying that we will not remember what you have said! Director General, we have had a very large number of witnesses before our Committee now, we are nearly at the end of witness hearings, we shall have the Foreign Office Minister next week, but our timetable is we are working up to a draft of our report in a few weeks and after the Easter recess we hope to be in a position to prepare our full report. Some of our witnesses have questioned the need for EU legislation on return procedures. I would like to ask you the simple question what really lies behind the thinking of this Directive? Why do you think it is necessary? In particular, why do you think its mandatory nature is necessary? Perhaps combined with that, in your view what is the main added value of the Directive?

Mr Faull: Thank you. Of course, those are the fundamental questions and I shall try my best to answer them. Our starting point is that the Member States of the European Union currently have very different rules on this issue, different procedures, different terminology and different definitions, as one would expect, of course. In our view, this does lead to difficulties in situations in which more than one country is involved. For example, if a person found to be illegally in country A is apprehended in country B, should that person be given an opportunity to challenge his return in country B with the legal remedies available there with, of course, all the attendant risks of what one could call shopping for legal remedies, choosing the country where the most favourable regime applies? This could have, does have we believe, a distorting effect on the movement of illegal immigrants across Europe. They would be likely to move towards countries with the most

flexible rules. We think that sends a rather unfortunate signal out to the rest of the world and, in circumstances in which we are saying all the time that the European Union has a united strong policy against illegal immigration, it suggests that our policy has holes in it and can be exploited, not only by illegal immigrants but by the often wicked people who organise illegal immigration to our territory. We believe this also makes it difficult for our Member States to work together. Co-operation between them, particularly operational co-operation, requires some common understanding of the principles at stake and some common standards or common definitions. We believe that agreement to common standards will provide a platform for similar treatment of third country foreign nationals present illegally in the European Union when return procedures are carried out. Finally, we have a political mandate from the European Council, the heads of state and government, in The Hague Programme which was adopted, confusingly, in Brussels by the European Council on 4 and 5 November 2004 but under the Dutch Presidency, which is why it carries the name The Hague. This called for the establishment of common standards for persons to be returned and asked the Commission to make a proposal in 2005. We are responding to that call and we are seeking to create a set of clear, transparent and fair common rules which take into account, of course, the need to respect fully the human rights and fundamental freedoms of the people concerned.

Q490 Chairman: Thank you very much. We will probably want to ask a few questions about the British opt-out in the course of this session. I wonder if I can ask you now, or in the course of this, if there is anything you can tell us either on or off the record about the reaction of other governments to the Directive. If you would prefer to leave that for the moment I am happy to move on to other questions.

Mr Faull: No, I am happy to answer that. We are still at a fairly early stage in discussions with the Member States. I turn to my colleagues who have been involved in the day-to-day working through of the proposal in the Council working groups. Do you have any initial indications?

Mr Lutz: My name is Fabian Lutz. I am following the negotiations in the Council working groups. We have had four sessions of the relevant Council working group dealing with these proposals and progress is extremely slow and it is very difficult to find agreement. Most Member States consider that this proposal is too protection oriented, some even say this is a Directive on protecting illegals and not returning illegals. We can say progress in Council is

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slow at this stage and many Member States are reluctant to accept the principles whilst others see value added in them. Discussions are ongoing.

Q491 Chairman: Thank you very much indeed.

Mr Faull: We can come back to this later. The political and decision making process in this field is a particularly complicated one because we are in co-decision between the European Parliament and the Council. We expect, and it would not be the first time, the majority opinion in the Council to be as Fabian Lutz has said, that we are erring on the side of protection. The European Parliament, or at least the Civil Liberties Committee, which is where the main initial work will be done, may say the contrary.

Q492 Chairman: You say “will be done”, has the consultation started with the Parliament or not?

Mr Lutz: There was a first exchange of thoughts in the Civil Liberties Committee and now the rapporteur, Mr Manfred Weber, the Chairman, a Conservative, is drawing up a first report amendment. This first draft has not yet been distributed.

Chairman: We shall be taking evidence from Mr Weber next week. Can I ask Lord Avebury to come in next.

Q493 Lord Avebury: I wonder if I could start with a supplementary on your rationale for the Directive where you said, if I may paraphrase, one of the consequences of not having sets of procedures is that it distorts the movement of illegal immigrants and they tend to gravitate towards countries that have the most flexible rules. I thought Dublin II had cured that.

Mr Faull: Not fully. There are many factors in the movement of illegal immigrants. Part of the problem is that they are hard to find and it is hard to find reliable data about their motives for being in one place rather than another. I am afraid we cannot claim that Dublin II has solved the problem entirely.

Q494 Lord Avebury: My main question is could you tell us how the financial resources that are allocated to the return of illegal immigrants compares with the resources set aside for the integration of legal migrants and what is the rationale for the division of resources between these two headings?

Mr Faull: Certainly. If I may add to my answer to your previous question, Fabian reminds me that the Dublin system applies to asylum seekers only and all illegal immigrants are not necessarily asylum seekers. Money: we have €30 million for so-called preparatory actions in the field of return management, 15 in 2005 and 15 in 2006, and 21 million from 2003–06 for preparatory actions for integration under the so-called Inti Programme.

Under the new Financial Perspectives for the period 2007–13 we have proposed reference amounts for the whole period of €1,771 million for the integration fund and 759 million for the return fund. The return fund would be operational from 1 January 2008. The target group for the integration fund is a wider one than for the return fund. The integration fund would cover not only recently arrived immigrants, newcomers, but essentially all foreign nationals resident in the European Union, sometimes called the stock of immigrants. In fact, the objectives of the integration fund go beyond simply supporting the improvement of national administration of admission programmes and introduction schemes for newcomers: they also include the enhancement of civic, cultural and political participation in the host society, capacity building of public and private service providers to interact with the foreign nationals concerned and the strengthening of the host society’s ability to adjust to the diversity brought about by immigration. You will be aware, of course, that the European Council, which agreed the EU’s future financing in December, did the deal by reducing the amounts available across the board. The reduction in comparison with the original proposals is some 28 per cent. We have been revising our work on all of this, of course, and will be making a proposal for revised reference amounts in the draft preliminary budget for 2007. We expect the general proportions to remain the same.

Q495 Chairman: Does this very considerable increase in your proposal reflect the result of enlargement? Does it reflect a judgment that returns are going to be much more frequent in the future, which is not our experience so far in Britain? What is the basis for your proposal?

Mr Faull: Yes to both questions. It does of course reflect enlargement, we have a larger European Union, and it reflects a very clear feeling, at least on the part of the Council, therefore the ministers of the interior, the Home Secretary and his colleagues, that a far greater effort should be made to organise returns and that effort should be a collective one where necessary and possible.

Q496 Lord Avebury: I think there is considerable emphasis in the Directive on the need to encourage voluntary returns wherever possible. What is the relationship between this budget and the amounts that we are told have been spent by the International Organisation for Migration? Do you pay them money to assist with the programme of voluntary return? What relationship is there between the amounts that you are allocating in your budget and the amounts which are available from the IOM?

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Mr Lutz: The IOM and other international organisations, or non-governmental organisations, may apply to have their projects financed by Community funds. That is currently happening within the preparatory actions where a lot of the proposals have been submitted by organisations such as the one you have mentioned.

Q497 Baroness Bonham-Carter of Yarnbury: You said at the beginning that the situation at present is very different across Europe and your colleague said that negotiations are slow and it is difficult to find agreement. Some of the people we have spoken to in non-governmental organisations have commented favourably on the provisions, that the Directive is setting high standards. Is there a risk that these standards might be watered down during negotiations and that, as the Refugee Council said to us, we might end up with common standards for the sake of common standards?

Mr Faull: Of course there is a risk, I cannot deny that. We are not legislating, of course, the Council and the Parliament are legislating. They are the ones who will have to decide precisely what the terms of the final legislation are. We will negotiate as best we can using all the influence we have in both institutions and in the attempts that are made to bring them together towards the end of the process to make sure that we do not end up with an empty shell. I cannot hide from you that some of the legislation in this area—there may be others too but it is certainly true in this area—tends to be adopted only once a common principle has been agreed together with a great number of exceptions whereby Member States seek to preserve what they conceive of, as their essential interests and sometimes the procedures to which they are most accustomed. We draw the line, of course, at value added. There is no point in legislating for the sake of legislating. We remind everybody that the Commission's role in this process, once we have made the proposal, is to seek to achieve most of our proposal in the final legislation, but also to make sure that whatever other ideas come up in the legislative process remain true to the fundamental objective of the legislation, to whatever Treaty rules underlie it, and to make sure at the end of the day there is a useful, workable piece of legislation. Member States will then be able to write national law in a sensible way and judges can apply in a sensible way and the people for whose benefit it is created can understand it and benefit from it. That is what this organisation does all the time and I think most of the time we achieve it, but there is no doubt we are going to have a very difficult legislative process.

Q498 Baroness Bonham-Carter of Yarnbury: It sounds like finding this agreement might be very difficult indeed from what you are both saying.

Mr Faull: It is a big challenge. It is a controversial area. The starting point is that Member States have very different legislation on the subject but they all realise it is something they have to work on together. We are confident that the fundamental political basis for agreement is there. Interior ministers have identified this as a very serious issue, one on which they want to work together. I think the European Parliament understands that as well. I hope the final arguments will be about detail, not about principles.

Q499 Earl of Caithness: Thank you for that helpful guide. Can I ask, given that the Commission has the right to withdraw legislation at any time, what are the sacred cows in this Directive that you will not budge from and at what stage would you turn around to the interior ministers and say, "Sorry, there is no agreement"?

Mr Faull: There are bedrock principles, of course. They are that we have to respect fundamental rights, they are not negotiable, and that the Directive at the end of the day has to be something which is useful and workable, that brings about what we intended when we proposed it, a workable system of returns in full respect of the dignity and rights of the people concerned, in full respect of the rule of law, one which is effective and efficient and adds to the national procedures which already exist.

Q500 Earl of Caithness: What timescale have you set yourself to achieve this?

Mr Faull: (The answer was given off the record)

Q501 Chairman: I hope that our report when it comes out will add positively to your discussions.

Mr Faull: The timing is not very much in our hands, it is mainly in the hands of the Presidency. As the Home Secretary showed during the British Presidency at the end of last year with the Data Retention Directive, if a President of the Council is really determined to succeed, legislation can be adopted in the Council and in the Parliament rather quickly.

Q502 Baroness D'Souza: Many member States have various toleration, postponing, delaying practices which they employ on humanitarian or other grounds and I wonder whether you feel there might be a risk that these will be put to an end if the obligation to have a return decision goes through.

Mr Faull: We propose that Member States should be obliged to issue a return decision to any foreign national staying illegally in their territory and that the decision should contain a statement that the stay of the foreign national is illegal and the obligation to return. It is also expressly recognised in the proposal that Member States may at any time decide to grant a foreign national staying illegally on their territory a

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residence permit or other authorisation provided for in their legal system to give a right to remain on compassionate, humanitarian or other relevant grounds and then the illegal foreign national is no longer illegal.

Q503 Baroness D'Souza: I suppose what the Committee has expressed a great deal of concern about is the imposition of hard and fast rules which may be misinterpreted by many Member States to the detriment of an individual, say on humanitarian grounds. The problem is to introduce some flexibility into the Directive while at the same time having firm boundaries and that is a huge challenge.

Mr Faull: That is indeed the huge challenge. We need to have rules which are clear and where Member States retain a discretion of that sort is clear so that not only the Member State is aware of it but also the individuals concerned and their advisers.

Chairman: Can I just go back to your remarks about the Home Secretary and the priority that he put on getting through the legislation. Can you tell us, either on or off the record, do you get the impression that the Austrian Presidency regards this as a high priority? I think there was a shaking of the head. Thank you very much.

Q504 Lord Dubs: May I turn to the question of appeals. Many of the organisations that have given us evidence as part of this inquiry believe that an appeal which does not have a suspensive effect does not provide an effective remedy and yet I understand the Commission wants to leave it to Member States to decide whether or not appeals should have suspensive effect. Would you like to comment?

Mr Faull: First of all, I think we should say that in our view at least we made very sure the proposal complies with fundamental rights and general principles of European Community law and international law, including refugee protection and obligations derived from the European Convention on Human Rights. The procedural safeguards were very much an issue in our internal deliberations. Given that the reasons which may lead to the issuing of return decisions and removal orders are varied—illegal entry, risk to public policy and security, overstaying of a visa or a residence permit, and others—and that the main objective, or certainly one of the main objectives, of the proposal is to support effective national return policies, we thought it best to leave the question whether an appeal should have suspensive effect to Member States. We do provide in the proposal that in cases where the appeal does not have suspensive effect the foreign national concerned should have a right to apply for special leave to remain in the territory of the Member State. We believe that is the appropriate balance to strike but I

am quite sure that this will be a controversial point in the legislative process.

Q505 Baroness Henig: In proposing a six month maximum period for temporary custody the Commission seems to have opted for a middle ground between Member States' current rules and practices. I would like to ask why the Commission has not gone for a shorter period, as has been suggested by many organisations.

Mr Faull: I think there are two reasons. One is quite simply that the middle ground is an obvious place to start in a legislative process of this sort but that would not be legitimate if there were fundamental concerns about it. Of course, we have to consider the right to personal liberty of the illegal foreign national and the right of Member States to control admission to their territories. This need to strike a balance is recognised by the European Human Rights Convention in Article 5(1)(f) which provides that one possible exception to the right to liberty is the detention of a person against whom action is being taken with a view to deportation or extradition. The safeguards in the proposal, such as detention as a last resort, preference for non-coercive measures, judicial review of detention decisions and maximum periods of temporary custody help us strike this balance correctly. We looked at the situation in the Member States. Have you received that information? I can go through them one by one if that would help.

Q506 Baroness Henig: I am not sure that we have. No, we have not.

Mr Faull: I can read them out and we can give them to you in writing if that is fastidious. There are unlimited periods in the United Kingdom, Denmark, Estonia, Finland, Greece, Ireland, Malta, the Netherlands and Sweden. There are 20 months in Latvia, 18 months in Germany, 12 months in Hungary, Lithuania and Poland, eight months with a possible extension in Belgium, six months in Austria, the Czech Republic, the Slovak Republic and Slovenia, three months in Luxembourg and Portugal, two months in Italy, 40 days in Spain and one month in France and Cyprus.

Q507 Chairman: I am sure our shorthand writer has got all of that down but it would be very helpful if you could let us have a note.

Mr Faull: Of course. Those data are from the IOM, January 2004. They show that we are in the middle somewhere.

Q508 Baroness Henig: I was going to say the concept of middle ground seems a more complex one now you have mentioned that range.

Mr Faull: Being in the middle of 25 Member States is not always easy.

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Q509 Viscount Ullswater: What is the risk of re-arrest if you are in France and you have completed your month? Not re-arrest but re-detention. I am sorry, I used the wrong terminology.

Mr Faull: I understand. Do you mean how often does it happen now in fact?

Q510 Viscount Ullswater: Can it roll for month after month?

Mr Lutz: Under the proposal it would be up to a maximum of six months if it is necessary. France would be obliged to keep the person for six months in detention if it is not possible to return the person in this time or find less coercive measures which make sure that the person does not abscond. After six months there would be an obligation to let this person go. What would happen under a second additional procedure some years after, would depend on the concrete circumstances and require more a case-by-case examination taking into account the individual circumstances.

Q511 Chairman: When you say “let the person go”, without any constraints or reporting conditions?

Mr Lutz: Currently what happens in France is after 30 days when it is not possible to return the person, the person is set free under an obligation to leave the territory.

Lord Corbett of Castle Vale: Sans papiers.

Q512 Viscount Ullswater: Also in the Directive it says that people should not be left stateless. I am just wondering how you deal with the fact that if you are released from detention, what status do you have? You may be under an obligation to leave but you cannot be detained, how can a removal order be enforced? Is there an answer that I can find in the Directive?

Mr Faull: I am not sure there is.

Mr Lutz: One important thing to bear in mind is the Directive is a measure in the fight against illegal immigration, so the Directive cannot deal with the aspect of granting a right to stay, this would be another legal basis in another form of decision making procedure. If it is about granting legal status to persons who have been illegal for three or four years and whom you cannot deport, this would have to be based on another legal basis, conditions of entry say, and would have to be adopted under unanimity in Council, whereas here it is a measure concerning illegal entry and we are in co-decision. This is the reason why in this Directive we cannot address this aspect of granting a right to stay.

Q513 Lord Avebury: There are two reasons we are given why detention has to be prolonged in certain cases. One is that we do not have agreements with the

country to which the person is being sent. Is there an incompatibility between the attempt by the European Union to reach comprehensive agreements with these third parties and the bilateral attempts of individual states, such as the UK, to do that in parallel? Why should all the agreements not be between the EU and the third countries? The second part is on the documentation there is a problem with certain countries not accepting the European Union letter and we find that the number of countries that are prepared to accept that as an alternative to their own passports has actually diminished. What efforts can be made, either under the Directive or otherwise, to reach more agreements which will enable us to use the EU letter?

Mr Faull: We would prefer a situation in which we had a wide range of EU foreign country readmission agreements which would come into play immediately and the person would be returned under the conditions set in the agreement. The hard reality is that we have some such agreements and we are negotiating others. They are very hard to agree because they are not obviously in the interest of the foreign country but in our interest, so carrots and sticks come into play. The main carrot which is increasingly identified is a visa facilitation agreement. Whenever we approach a foreign country and say, “We would like to have a readmission agreement with you”, they say, “Well, we are not sure we really want that but let’s talk about a visa facilitation agreement” and we have to persuade our reluctant Member States to give us a mandate to negotiate both in parallel. Increasingly that is the case. Everybody says there is no automatic linkage, it does not necessarily obtain that you get one with the other, but that is what is happening. We have concluded such agreements with Russia recently, they are now being ratified. We are close to agreeing with the Ukraine. The Western Balkan countries are interested. We are gradually concluding them with a wide variety of neighbouring countries and countries further afield. There is one in negotiation with Pakistan, for example. Meanwhile, we know that individual Member States have their own readmission agreements. Without going into the legal niceties about whether that should still be happening, that is a situation which is *de facto* tolerated and as long as we do not have Community-wide readmission agreements in place, the national bilateral readmission agreements with foreign countries remain in force and are used and, quite frankly, we need them as well because they are an essential part of making this policy work.

Mr Lutz: The EU letter is an issue which has been on the agenda, and is still on the agenda, of the Council and the Commission and work is going on in this field. The main obstacle is that we, as the EU, cannot create an obligation on third countries to recognise

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these documents. As Jonathan Faull just said, the most straightforward way forward is to have EU readmission agreements in which this issue is comprehensively covered.

Mr Faull: But they take time.

Q514 Viscount Ullswater: It is a question of whether you can issue a removal order on somebody if you know that he cannot be returned to his country. If it is a question of he might abscond and that sort of thing and you have to detain him, in your evidence you have a comment at the top of page three: "The Commission takes the position that it is not acceptable to leave the situation of persons who are staying illegally but who cannot (as yet) be removed in a complete legal vacuum". What I am trying to get at is what is the status of somebody who in France can only be held in detention for a month, for instance? Are they stateless when they are released? There may be an obligation on them to return to their country but it cannot be enforced because it is not safe to return them to that country. That is what I am trying to get at. In the UK we have a different system because we can keep them longer. I am just wondering how you can resolve this. These are human beings rather than parcels. I just wondered how the Commission was looking at that particular problem.

Mr Faull: I am afraid I have a question rather than an answer. In the countries with very short periods, like France, what do they do in practice? Do they re-detain? That was your initial question and I do not think we answered it.

Mr Lutz: After being released, the migrant is obliged to leave the country promptly. After seven days from the date of release, if found to be still in France he would again be detained.

Q515 Lord Corbett of Castle Vale: There used to be the position in France, and this arose around the Sangatte issue, I do not know whether it is still the case, that they had in their bureaucracy what would strike some of us as a particularly idiotic classification of *personnes sans papiers*. They were there and—

Mr Faull:—paperless. It sounds daft as a classification, I agree, but it is a reality for the human beings concerned. Illegal immigrants are likely not to have papers. If they cannot be returned under some bilateral or Community-wide agreement the question of the legal vacuum arises and has to be settled. We have Article 13 in the proposal, which Fabian Lutz is showing me: "Member States shall ensure that the conditions of stay of third country nationals for whom the enforcement of a return decision has been postponed or cannot be removed for reasons set out elsewhere are not less favourable than those set out in something else".

Mr Lutz: That is the Directive on reception conditions for asylum seekers. For the asylum seekers we already have harmonised minimum standards on health care, taking care of the situation of vulnerable groups, so we are assimilating the situation for illegal persons to those of asylum seekers.

Mr Faull: There is a status at least by reference and a status which assumes they are staying in the country. We hope they are not being removed. People in that situation are given a written confirmation that the return decision has been postponed, if that is the case, or that the removal order will temporarily not be executed, presumably because it cannot be. They will be told what their situation is and they have certain basic rights granted by reference from another Directive. We will look further into this, it is obviously a very important point.

Chairman: Thank you very much.

Q516 Earl of Listowel: Are the provisions for a re-entry ban not disproportionate and inflexible? Conditions in the country of origin of an asylum seeker may change. The Home Office have pointed out that the removal of an illegally staying person does not at present prevent him from applying to re-enter legally.

Mr Faull: One of the novelties of the proposal is that Member States issuing a re-entry ban impose the ban for the whole of the European Union. The re-entry ban applies under a removal order to the whole territory of the Union. That is for a removal order. When a return decision is taken the Member State may issue an entry ban with the same effect. We believe that adding this European-wide dimension to the effects of national return measures will promote prevention, ie will send discouraging signals to would-be illegal immigrants and those who exploit their vulnerable positions, and make European return policy more credible. The length of the re-entry ban will have to be determined with due regard to all relevant circumstances. Normally it should not exceed five years, only in cases of serious threat to public policy or public security may the re-entry ban be issued for a longer period. We believe, as you would expect us to of course, that these are proportionate and flexible rules which allow for sufficient discretion on the part of the national authorities to take account of the specific characteristics of individual cases and, of course, the re-entry ban applies without prejudice to the right to seek asylum.

Q517 Chairman: Before I ask Lord Marlesford to ask the next question can I ask a question which I think is probably of interest to him and he may want to follow up with a supplementary. Have any governments argued that this is a matter for

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subsidiarity? I know that the British Government have not, rather to our surprise.

Mr Faull: No, I do not think anybody has yet. It is always not very far from the surface of discussions on initiatives of this sort. When we talk about how much added value there is, in a way that is another expression of the concern about subsidiarity: if there is no added value we should not be doing it; if there is no useful European dimension then Member States should be left free to do their own thing, of course. It has not yet become an issue in its own right.

Q518 Lord Avebury: Have you considered the possibility that a re-entry ban would be contrary to the European Convention on Human Rights in cases where a person subject to that ban marries a European Union citizen and brings proceedings under the right to family life?

Mr Faull: That is a very good point.

Mr Lutz: In such a case Member States might be obliged to withdraw their existing re-entry ban.

Q519 Lord Avebury: So it would not be an absolute ban.

Mr Lutz: It is clear in the text that it is not an absolute ban and Member States are free to withdraw it at any point in time and they give some examples.

Mr Faull: The freedom to withdraw can become an obligation in cases like that. Is that the way it is done?

Mr Lutz: Yes.

Chairman: Lord Marlesford, I am sorry if I have shot your fox.

Q520 Lord Marlesford: No, you have not at all because I do not think the fox is dead. Listening to your evidence, it does seem to me that what you have been emphasising is that every country has its own method of dealing with these matters, secondly that they are very variable and, thirdly, they are applied within the countries with greater or less degrees of flexibility. Obviously these different regimes, if one may use that word, will be a function of cultural differences in the countries, different political pressures which may depend upon the economic situation or, indeed, on demographic variations, unemployment, age balances and all the rest of it. It does seem to me that you have been making a very strong case for saying that it is desirable to have a certain amount of co-ordination and agreement on some common rules but that the case for subsidiarity that you have been making is a very strong one and I am very surprised that it has not been argued. How would you reply to it if it were?

Mr Faull: The fox is still alive and kicking! It is a question of balance. For all the reasons to which you have referred, this is a matter in which national choices as reflected in legislation and other regulatory measures are very important and reflect the variety of

situations—political, economic, legal—in which Member States find themselves and we accept that and that is the basis for our work. Nevertheless, the same people who manage these systems in the interior ministries, in the Home Office in the case of the UK, in the Member States have said to us and have persuaded even their supreme bosses, the heads of state and government, to say in the European Council that they understand there is a need for a European dimension to this work. We have a fairly open territory amongst ourselves between the Schengen countries, to a slightly lesser extent only between the Schengen countries and the other Member States. We have a single market in economic terms amongst ourselves and we are slowly developing a set of common rules on immigration and asylum. The need for a collective return policy as part of that slowly developing general policy has therefore been recognised. We are very far from saying that there are all these different national rules, let us harmonise them and have one European rule, that would really set the subsidiarity argument going. We are saying that the politicians have identified and asked us to give effect to the need for a European co-ordination system for the organisation of return of illegal immigrants and that system needs to be worked out in legislation which will require a certain number of common standards and definitions so that people know from one place to another what they are dealing with. Coming to subsidiarity itself, we carried out, as we must of course, an impact assessment for the proposal when we made it which includes an analysis of the application of the subsidiarity principle and it clearly applies because it is very far from being an exclusively European Community competence, but we believe the objective of the proposal to provide for some common rules on return/removal, the use of coercive measures, temporary custody and re-entry, are necessary and can be agreed only at Community level and, in particular, only Community rules can deal with a situation in which a third country national subject to a return decision and removal order or re-entry ban issued in one Member State is found in another one or tries to enter another one. For that specific issue only Community legislation can do the trick. This is a rather modest proposal because we realise that the bulk of the work and the bulk of the legal and political responsibility lies with the Member State. We are providing a top level of European co-ordination where it is necessary.

Q521 Lord Dubs: I wonder if I can go back to something you said a moment ago. You talked about a five year limit on re-entry but where does the five years come from or is that part of the middle ground?

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Mr Faull: I am told that it is indeed part of the middle ground. I do not have the figures here on the situation in different Member States, and no doubt there will be a lot of argument about that five year period in the legislation. If we have those figures we will provide them.

Chairman: That would be very helpful. We are taking up too much of your time, we must move on rather fast. Lord Marlesford?

Lord Marlesford: I think we have dealt with that. Not subsidiarity but the answer.

Q522 Viscount Ullswater: This is really a question about how the re-entry ban would affect the UK. Because we are not party to the Schengen Information System, would it not be very cumbersome for us to be able to have bilateral agreements through the competent authorities to administer an EU-wide re-entry ban and make it impossible perhaps for us to opt into the Directive?

Mr Faull: That is clearly an important issue. We do believe that the Schengen Information System in the second generation that we are now developing of that system will play an important role in collecting and disseminating information which will be very important for these purposes. Information sharing is essential, of course, for the effective implementation of many of the provisions contained in the proposed Directive and the Schengen Information System will contain very useful information about entry through the external borders of the European Union. Ways will be found, I hope, should all this come to fruition, to allow for other means to share information between the Schengen Member States and the United Kingdom and Ireland. It is a problem but it is not one that has not been faced before and the United Kingdom will have to weigh up its own arguments for and against the decision it will have to make. What I can say is that generally there is a great deal of goodwill on the part of the Schengen Member States in devising ways in which the United Kingdom can participate in other parts of justice and home affairs policies while remaining outside the Schengen system.

Q523 Chairman: Does Ireland face identical problems to us?

Mr Faull: In legal terms more or less identical, yes. They are outside Schengen but interested in the development of all these other policies as well. Ireland in recent years has become a country of immigration reversing many decades, indeed centuries, of its history.

Q524 Lord Corbett of Castle Vale: Mr Faull, you mentioned you have done an impact assessment which includes some comments on subsidiarity. Is that published?

Mr Faull: Yes.

Q525 Lord Corbett of Castle Vale: Do you see adverse consequences from the UK decision at this stage not to sign up either for the EU as a whole or for the UK?

Mr Faull: For the EU as a whole first of all, yes, even though it is terribly complicated and I am not sure how many people outside our borders, perhaps outside this room, really understand the legal niceties. It undermines a little bit our presentation to the rest of the world of a coherent, joint policy to combat illegal immigration. It could lead to difficulties in operational co-operation between the British authorities and the others because for the others the operation of the Directive would form a common understanding of the way it works, the mechanisms, the case law to which it will give rise, the definitions from one language to another. Personal networks of relationships with the people involved in administering this will be encouraged by its very existence and the UK will have to work very hard outside to keep up with that. As I said, it is not a new problem and I do not know what the British authorities say but so far, looked at from here, it works well more or less. This Directive may lead to other legislative developments and further harmonisation in this field. It is hard to say today precisely what might happen but that is perfectly possible and the United Kingdom would risk cutting itself off from those further developments. I suppose, although it is very hard to quantify, there is the risk that imperfections or incoherence between the British system developing independently and the European system developing under this Directive if it is adopted could lead to opportunities for legal remedy, shopping as I mentioned at the beginning, as divergences are exploited by illegal immigrants or, more probably, by those who organise illegal immigration.

Q526 Chairman: Reverting to my earlier question, has Ireland opted in?

Mr Faull: No.

Q527 Chairman: They have not?

Mr Lutz: No.

Q528 Lord Dubs: Are they going to the same as we do, whatever?

Mr Lutz: For the time being it appears so, yes.

Lord Dubs: As a common travel area it is difficult for them not to.

Q529 Lord Marlesford: Who else has opted out other than the UK and Ireland?

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Mr Faull: Nobody.

Mr Lutz: Twenty-two Member States are in the “normal system”. Denmark is out automatically, they cannot opt in even if they want to. UK and Ireland could opt in if they wanted but so far they have not.

Q530 Lord Dubs: Why cannot Denmark?

Mr Lutz: Due to its specific protocol Denmark is out completely.

Mr Faull: They have set it in constitutional concrete, not always without regret.

Chairman: Director General, we really must come to our last question.

Q531 Earl of Listowel: Do you believe that the British Government, despite its opt-out, may still be able to influence the outcome of the negotiations, for instance as regards higher standards for the protection of certain vulnerable groups, such as children? If I may, is there the prospect of making more specific the safeguards for children in the Directive even in the UK, which in many ways has high standards? There has been a lot of controversy on the treatment of children and families.

Mr Faull: On the second point, yes, I think that will play an important part in the negotiations and there will be strong arguments put forward for doing that. The United Kingdom’s influence depends, as it always does, on the quality and power of conviction of those putting forward arguments in the various Council groups, within the Parliament, in the Council itself. Perhaps somebody else should say this, not me, but usually that very high quality is present and the British representatives at various levels in the decision making process have sensible, useful things to say and are listened to because they are respected. All of that said, it is of course a handicap, which everybody will be aware of, they and their listeners, that they are not part of the final legislative process. Obviously those arguments would have greater impact if they were. There is influence because they are well organised and they present arguments cogently, but there could be a lot more.

Q532 Baroness Bonham-Carter of Yarnbury: This is just a point of clarification about the two-step process. In the report that you have given us, on page two in the final sentence you say: “Member States are free to issue both the return decision and the removal order within one act or decision . . .” Is that not against the two-step approach?

Mr Lutz: We had to find a middle way between systems in Member States. Some Member States have the one-step approach, other Member States have the two-step approach. The Commission was proposing a middle way as a matter of principle; two steps with substantive conditions provided for each of the steps but Member States are free to issue both acts together within one administrative act, however respecting the two sets of conditions laid down for return decisions and removal orders. The conditions for the two acts have to be complied with but it could be issued within one administrative act. We were asked in the Council working group what this will look like. It would amount to issuing on administrative act which states: Firstly you are illegal and are supposed to leave the country within the voluntary period of return of, let us say, 21 days, and secondly, in case you do not comply with this obligation to leave within 21 days the obligation to return will be executed, you will be the subject of removal measures.

Q533 Baroness Bonham-Carter of Yarnbury: So there is still the period of time?

Mr Lutz: Yes.

Mr Faull: The two steps are there but in one act.

Q534 Chairman: I think the Director General will understand when I say as a former member of the British Foreign Office I feel entirely comfortable with the concept of a middle way. You probably know the story that when Winston Churchill was offered a Foreign Office adviser he said he was happy to have anyone as long he only had one hand! Director General, thank you very much indeed for your patience and very helpful answers which you and your colleagues have given us.

Mr Faull: Thank you. We will provide in writing what we have promised you.

Chairman: If you could we would be very grateful. Thank you.

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Examination of Witnesses

Witnesses: MR NICOLA ANNECCHINO, Head of Unit B2 (Immigration & Asylum) DG JLS, MR MARTIN SCHIEFFER, Section Head, and MR FABIAN LUTZ, Immigration Unit, European Commission, examined.

Q535 Chairman: Mr Anzecchino, thank you very much for coming. I do not know if you want to introduce your colleagues. I am not going to spend the time introducing all my colleagues, our names are in front of us. Since we are on British territory, I can welcome you here. Thank you very much for coming to give evidence to us. Thank you for coming to give evidence to us for the second time in one day, which is almost beyond the call of duty, Mr Lutz. Would you like to introduce your colleagues?

Mr Anzecchino: Thank you very much for taking the time to discuss this with us. My name is Nicola Anzecchino, I am the head of the unit in charge of immigration and asylum. On my right is Martin Schieffer, head of the section on immigration and, on my left Mr Fabian Lutz, who you have already met, is my colleague particularly in charge of this Directive.

Q536 Chairman: Thank you very much. Can I open with our first question and that is to ask if you can give us some picture of the main differences between national return procedures and standards between the Member States? Can you give us some examples now, but in particular if you are able to give us more detailed examples in writing that would be very helpful.

Mr Anzecchino: According to our assessment there is a wide difference in the systems of the different Member States, difference in terminology, on substantive provisions applying to return, temporary custody, re-entry bans. I will give you three examples of that. On detention—referred to as temporary custody in the context of the proposal—the reasons and purpose are different in Member States. Sometimes it is facilitating the identification of an illegal resident, sometimes preventing the risk of absconding. The durations are also quite different. You can go from one month to no time limit fixed in different Member States. An illegal third country national staying in similar situations may be kept in temporary custody or not according to the different rules of the country. The terminology is different. There is the term “expulsion” which is sometimes used for illegal residents and also for people who stay legally who are expelled after some crime or other behaviour. There is agreement more or less that voluntary departure is to be preferred in the first stage but the condition and the time which is given for voluntary departure differs greatly from one Member State to another.

Q537 Chairman: Do you see any general difference between the practices until recently one would say of present Members of the European Union and the

new accession Members? Is there a difference in procedure between them?

Mr Anzecchino: I speak under the control of our expert. We have not seen a general trend, a general difference, between old and new Member States.

Q538 Chairman: The problem of difference in procedures, is that really what has driven your hope to see common standards or at least minimum standards?

Mr Anzecchino: That there were these differences was one of the reasons. We are not going to harmonise just to have similar rules. One other reason was to have some sort of unique reply and to show the willingness of the European Union to seriously fight illegal immigration, to have an obligation on Member States to issue return orders and to have some sort of general control that this is implemented.

Q539 Baroness Bonham-Carter of Yarnbury: If I can ask that question backwards in a way. Considering all these differences that we have heard all day exist between the different methods between different European countries, is it not a bit premature to introduce common standards on returns procedure when other areas are all so varied and unregulated?

Mr Anzecchino: In our view, we are trying to make some advance in different sectors and different areas. For asylum we have already had the first phase of harmonisation and now we are going to make an assessment to go towards a second phase of a more harmonised European asylum system. Last December we issued a policy plan on legal migration in which we announced that in the coming years we will propose concrete legislation on economic migration. This is one of the pieces of the puzzle. In fighting illegal migration we consider that this could be an important tool.

Q540 Earl of Caithness: I would like to turn to the return decision policy. We heard this morning that the obligation is not quite as obligatory as some of us were led to believe and there is a bit more flexibility. Do you honestly think, and what evidence have you got to believe, that this can be effected consistently and effectively by the Member States?

Mr Anzecchino: The obligation is there and it is a clear obligation. Inevitably in a sector where you have to strike a balance with human rights and fundamental rights there can be some exceptions in the sense you cannot issue an order if there are humanitarian or other reasons. The principle is there. It is the intention of the Commission, if the Directive is adopted, to monitor its implementation.

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Mr Lutz: One of the philosophies behind this proposal is that we want to reduce the grey areas and improve the legal certainty for all involved. We consider that it is very reasonable to propose as a common European rule the basic principle that anyone who is in an illegal situation should, as a matter of principle, be made the subject of a return decision and if Member States consider this should not be the case they should grant a residence permit or a permit to stay. We want to do away with these grey areas where illegals may be kept in unclear legal situations, making them vulnerable to exploitation.

Q541 Earl of Caithness: How many countries in the working group support this obligatory nature at the moment or have you not got as far as that?

Mr Lutz: We have just discussed Article 6(1) in the Working Group, so you are in luck. Compared to the opposition we get from Member States on other articles, I would say this basic principle does not seem to be too much of a problem to most of the Member States. There seem to be a majority of Member States who support this as a basic principle given that in Article 6(5) there are a lot of possibilities for granting permits to stay recognising Member States' discretion.

Q542 Baroness D'Souza: One of the arguments that the British Government has about the four week voluntary return period is that the risk of absconding would undermine UK policy on returns. We wonder whether the Commission has evaluated this risk in terms of what is happening in other Member States.

Mr Annecchino: As I said at the beginning, there is a certain agreement that you should always try in the first stage to have voluntary return, to give the chance of a voluntary return. We sought to put this principle in the Directive but at the same time with an exception. We say that you should try for the voluntary return unless there are reasons to believe that the person concerned might abscond during such a period, so there is some safeguard, and if there is this risk you do not have to give the chance for a voluntary return.

Q543 Baroness D'Souza: So in fact it is flexible because the person who decides whether or not the risk of absconding is high is the Member State?

Mr Annecchino: Yes, but it has to be decided in each case on a case-by-case basis.

Q544 Baroness D'Souza: But you do not set forth any criteria for evaluating that risk, do you?

Mr Annecchino: No, just the "risk of absconding" referred to above.

Q545 Lord Dubs: I think in answer to the first question you indicated, or confirmed to us, that the length of time that detention is permitted at present ranges from 18 months to one month across the Member States and you are settling for a period of six months. Do you think there is not some loss of flexibility in doing that in that there might be particular circumstances affecting an individual person which would suggest that six months might be too short for that case? That is certainly what the British Government says to us, that it is exceptional for anybody to be held longer than six months but there are certain exceptional cases.

Mr Annecchino: The problem is that in this case if you give exceptions you should also try to give criteria to apply these exceptions. In most Member States there are time limits. Most of the Member States have time limits, so the number of cases where the period is unlimited is not the majority.

Mr Lutz: It is a political choice to be made. We know that some Member States have some qualifying elements. If the individual is not co-operating at all in the return procedure, hiding his identity, not helping in getting there, in these cases the period of detention could be longer. We know that and see there are some arguments behind it. There was a political decision taken at Commission level to propose this six month deadline.

Q546 Baroness Henig: The British Government is arguing that any maximum period of detention may well have the effect of encouraging un-cooperative behaviour from those who have exhausted their appeal rights. I just wondered whether you believed that was a valid consideration and it is something you should be looking at more seriously?

Mr Annecchino: Certainly it is a serious consideration but at the same time we have to strike a balance between personal liberty and the right of the Member State who is controlling illegal migration. This is a difficult exercise to have a balance between efficiency and respect of fundamental rights. We thought that we should not allow an unlimited period of detention.

Q547 Baroness Henig: In fact, we were hearing this morning very varying periods of detention with a lot of countries at the upper end, much to my surprise. In a sense, although "middle ground" was a phrase that was used this morning, I was not sure that it was necessarily where I would have placed the middle, if I can put it in those terms.

Mr Annecchino: This was done on the basis that we thought this was the right balance. This is one of the points on which we will hear Member States and the European Parliament and there could be changes. This proposal made in the Directive is a reasonable basis for discussion.

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Q548 Baroness Henig: A good starting point.*Mr Annecchino:* Yes.**Q549 Earl of Listowel:** Articles 5 and 15 deal with family relationships, the best interests of children and the protection of vulnerable groups in custody. Some of our witnesses have suggested that these provisions are vague and could be strengthened. Would you agree with that?*Mr Annecchino:* In fact, we consider that this principle is already an established principle in international law. Our intention was not to harmonise on this point but to remind that when applying the Directive Member States should take into account this principle of international law which is in different Treaties.**Q550 Earl of Listowel:** In the UK, even with a government which has demonstrated its interest in the welfare of vulnerable children by investment in legislation, much legislation, with the Children Act in 2004 there has still been a lot of concern about the treatment of children, for instance in detention and removal centres. In your negotiations will you be thinking about whether perhaps it would be helpful in terms of these vulnerable groups and children to be somewhat more explicit beyond what is already there in terms of international agreements?*Mr Annecchino:* This is a subject on which one could expect the European Parliament to have some arguments. We will be ready to hear those and find solutions if there is room for improvement to be more precise. It is something we will think about.**Q551 Chairman:** It is not only the European Parliament, is it, but also the Council of Europe, the guidelines laid down by the Council of Europe?*Mr Annecchino:* Yes.*Mr Lutz:* May I add one sentence on this issue. It is important to bear in mind that this Directive is the very first step. It is a Directive which covers a lot of issues within a very short text, of 22 Articles. On each of the articles we could draw up an entire directive. For instance, on conditions of detention we could think of 60 articles taking into account the guidelines of the Council of Europe.**Q552 Chairman:** I hope you will not!*Mr Annecchino:* Exactly. That is an explanation as to why we have not gone into so much detail.**Q553 Lord Marlesford:** I would like to ask about information. We have found it difficult to get accurate figures on periods of detention of persons and categories of persons subject to return decisions. I do not think the Directive at the moment requires Member States to collect these data and report them.

Would it be a good idea if it did? In the same heading, can I raise a broader category which is that in the whole of this area of migration and asylum and returns policy, all these matters, the exchange of information seems to me absolutely crucial and yet I understand there is a distinction made between members of the Schengen and those who are not in Schengen as to whether or not they have access to each other's information. Regardless of Schengen or whether this Directive goes ahead I cannot see why it is not to the advantage of all members of the Community, including the British, for there to be a free exchange of information on all the statistics and the data available on individuals coming into this area.

Mr Schieffer: You have raised several different issues in one question.**Q554 Chairman:** I am afraid that is our habit.*Mr Schieffer:* I have noticed that! I would strongly recommend not mixing the different issues, access to the Schengen Information System, exchange of statistical data, because they are not directly linked. Particularly on statistics, we have proposed in parallel to this draft Return Directive a regulation on Community statistics in the area of migration and international protection, asylum in other words. This draft regulation, like the Return Directive, is currently being discussed in Council and Parliament. It is also in co-decision.**Q555 Chairman:** Outside Schengen?*Mr Schieffer:* No, covering all Member States including the UK. I can tell you from the discussions that the UK is actively participating. One of the articles in this draft regulation on Community statistics is dealing specifically with data on returns, all the aspects of returns, first of all return decisions, that is to say decisions issued by authorities. This is difficult in terms of finding accurate definitions. But this Article is also trying to look into the actual implementation rate of how many of these decisions are implemented by Member States, that is to say how many illegally residing third country nationals who have received their return orders are physically removed from the territory of Member States. That is a tricky and complicated process. It is one of the most controversially discussed articles of the whole draft regulation because there are problems with how to compare the different systems of Member States. Not all Member States issue a return decision before they remove persons. In some of them persons who have illegally entered the country are under an obligation to immediately leave the territory even without having received an explicit return decision to that end. They are already under an obligation to leave laid down in the immigration laws of that Member

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State, so the authorities do not need to take any administrative action before they can proceed to the removal of that person. That makes it difficult in terms of counting the return decisions and comparing the implementing actions taken by different Member States. Moreover some of them count as returns refusal of leave to enter the country, that is to say refusals at the border are counted as returns which is not really correct looking at the realities in Member States. All of these differences need to be harmonised and brought into line before we have reliable statistics. Arising from all of this, if all goes well we are hoping that this regulation could be adopted by the end of this year and it would become effective with the first reference year being 2008–09, so we would have reliable figures as of 2010 available to the public and to all national and European institutions.

Q556 Lord Marlesford: What about data on individuals? I think we have been given to understand that the Schengen countries do exchange data on individuals, travel arrangements or arrivals, which are not exchanged with non-Schengen countries. Is that true?

Mr Schieffer: That is true. That is the Article 96 database of people who have absconded but, as you know, this database is part of the Schengen Information System. It was created as compensation for the removal of the controls at the Schengen countries' internal borders and, therefore, any EU country which is not part of Schengen and which has not removed its internal borders has no access to this information.

Q557 Lord Marlesford: When you say “therefore”, I can see there may be the desire that we should all be part of Schengen but surely to make available that information is to everybody's advantage because the British, for example, would make it available to the Schengen countries. What is the thinking other than we do not happen to be in Schengen and it was arranged for Schengen purposes? What is the actual reason why you are so reluctant to allow the information to be exchanged between all countries whether or not they are members of Schengen?

Mr Schieffer: I have explained the technical aspects.

Q558 Lord Marlesford: Is it a political problem?

Mr Schieffer: It is a political decision.

Q559 Lord Marlesford: Made at Council level? At what level?

Mr Schieffer: Certainly I should say so.

Q560 Lord Marlesford: It was made, was it?

Mr Schieffer: Yes.

Q561 Lord Marlesford: When was it made?

Mr Schieffer: That I cannot answer.

Lord Marlesford: I think it is quite an important point because it seems to me all of us are losing out, Schengen and non-Schengen.

Q562 Lord Avebury: I wonder whether you could tell us whether the statistics we have from the Home Office Research Development and Statistics Division published on a quarterly basis of persons refused leave to enter or remain, persons removed compulsorily and persons who make a voluntary departure, already satisfies the provisions of this new Regulation that you were talking about which may be implemented by the end of the year?

Mr Schieffer: I am not sure I have understood the question correctly. First of all, the data collected under the regulation I have mentioned will be statistical data only, no personal data will be exchanged for this purpose. That is the first important statement. Secondly, there will be primarily annual data, not quarterly data. We are still in the middle of discussing the details of what should be collected on the issue of returns. In the discussions in the relevant Council working party we have repeatedly referred to the need that one should not ask too much of Member States' administrations in statistical terms but, if feasible, we should go for as detailed information as possible because it is in the interests of the Member States themselves. We have to say that some Member States at this stage of the discussions are not particularly keen on being too detailed and too ambitious in this area because in the end it could become visible that, on the execution side, there are clear deficits and shortcomings.

Q563 Lord Avebury: Could you have a look at the RDS statistical data on the Home Office website and let us know in due course whether or not it satisfies the requirements of the proposed Regulation?

Mr Schieffer: RDS meaning?

Lord Avebury: The Research Development and Statistics branch of the Home Office and the Immigration and Nationality Department.

Q564 Chairman: We will let you have a note on that.

Mr Schieffer: I would prefer that, thank you.

Q565 Lord Dubs: I appreciate that you are not in a position to answer on the political aspect of the question but let me see if I can come back to this on technical grounds. Is there a difficulty that because of the British opt-out there will be certain information which will not be made available either to Britain or by Britain which works against the interests of the

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Returns Directive? In other words, is not the lack of exchange of information on this on technical grounds detrimental to the effective working of the Directive given that within the countries that are in it you will have this exchange of information and yet some of it must surely be relevant in terms of the British position and movements of people from Britain to the Continent and so on?

Mr Annecchino: Should the United Kingdom decide to opt into this Directive we should reflect on how to make this participation as effective as we can and what kind of information is needed and how the Schengen Member States can share information with the United Kingdom. That is the purpose of this Directive.

Q566 Lord Dubs: That would require a new initiative to do that.

Mr Annecchino: Yes, this could require some new legislative initiative.

Q567 Viscount Ullswater: I would like to return to some practical bits of the Directive. It seems relatively simple to decide whether a return decision is required and it is made mandatory by the Directive that after the voluntary period has elapsed a removal order is made but there may be circumstances, and it is dealt with under Article 8 about postponement, where postponement may be granted, but I cannot see in Article 8 that it may not be safe to return an individual to a particular country either because of their circumstances or their family. If this goes on for a long period of time should there come a point in time, and should the Directive mention it, when such a decision lapses? I suspect that during that time the individual with a removal order hanging over them is probably unable to get a work permit or whatever it is, I do not know, possibly it may affect their status withdrawing money from the state, and some form of temporary residential status given them. If it is quite clear they cannot return to the country to which their removal order specifies they should go should there not be some better treatment given them after a period of time?

Mr Annecchino: In a way this situation is foreseen by the Directive in Article 6(5) which clarifies that Member States at any moment may decide to grant an autonomous residence permit or an authorisation offering the right to stay for compassionate, humanitarian or other reasons to a third country national staying illegally in their territory and in this event a return decision should not be issued or where a return decision has already been issued it should be withdrawn. If it becomes apparent that the return of a person would be impossible for a long period Member States should make use of this possibility. Why have we not seen it as an obligation in the

Directive? I think there are two reasons. One is opportunity and the other a more legal reason. As a matter of opportunity, it is quite delicate to harmonise Member States on when there should be a permit to stay in the Member States concerned. The legal reason is our legal basis for this is the article dealing with illegal migration. In this framework we could not say something and impose an obligation which deals more with the legal stay, which is a different basis which needs unanimity among Member States. For legal reasons and for reasons of opportunity we decided to underline this aspect to say that Member States may but not to make it an obligation.

Q568 Lord Avebury: Can we turn to the question of mandatory judicial review of both return decisions and detention decisions. Would you first of all confirm, as we heard this morning but I did not understand from the Directive, that the two decisions can be taken in parallel and the judicial remedy similarly applied in parallel, that is to say the removal order and the return decision can be issued by the authorities simultaneously and be heard at one single judicial appeal?

Mr Lutz: That is an example we spoke about this morning in the scenario where a Member State would decide to issue a return decision and removal order within one administrative act stating that person X, Y, Z is obliged to leave the territory within 21 days and in case the person has not left he/she shall be removed immediately. There are the two statements within one legal act. As I understand it, your question is: is this administrative act challengeable now with one or two appeals? The important issue is that both statements could be appealed in accordance with chapter III. . How this happens in concrete terms will have to be decided at national level when transposing the Directive

Q569 Lord Avebury: So the single tier system that we have in the United Kingdom of the Immigration Appeal Tribunal which replaced the old two tier system would not satisfy the requirements of the Directive.

Mr Lutz: This is difficult to assess.

Q570 Lord Avebury: We have non-suspensive appeals, as you know. That is to say, there are certain categories of applicant who must only appeal from abroad. For example, we have a list of countries that are assumed not to generate refugees to which a person may be returned and who has then only to appeal against the order once he is back in his country of origin. That would not be lawful under this Directive as I understand it.

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Mr Lutz: Article 12(2) foresees that the legal remedy should either have suspensive effect or comprise the right of the third country national to apply for a suspension of enforcement of return. In other words, it shall ever either have suspensive effect or not, it is up to Member States to decide. If Member States decide not to give suspensive effect then at least it should include this possibility of asking for special leave to remain. In effect, Member States' practices which foresee there should be no suspensive effect could be complying with the Directive if the Member States foresee the possibility to apply for special leave to remain.

Q571 Lord Avebury: You think the Directive should not cover the idea that there are certain countries which are intrinsically safe and, therefore, a person does not need to have an in-country right of appeal but can exercise it from abroad? You do not accept that?

Mr Lutz: We have remained silent on this issue. The choice whether legal remedy should be given suspensive effect or not, and in which cases, is left with Member States. If a Member State decides to give suspensive effect in certain cases and to give no suspensive effect in other cases, this would be compatible, it is up to Member States to decide.

Chairman: Lord Corbett, I do not know whether you feel that the answer to Lord Dubs was an adequate answer to your question.

Q572 Lord Corbett of Castle Vale: I think it is worth trying again. Do you think that the UK opt-out is going to make it difficult for us to co-operate with other EU Members on returns? Will it erect obstacles?

Mr Annecchino: I would say perhaps. I would not say difficult but, in a way, less easy.

Q573 Chairman: Do you want to repeat that in Italian!

Mr Annecchino: Of course, the fact of having common standards, common terminology, and a common approach makes co-operation easier. I am not saying you cannot have any co-operation with the others but it will work less smoothly.

Q574 Lord Corbett of Castle Vale: You said right at the beginning that the 22 countries were, in a slightly different context, looking for ways of expanding co-operation with the UK in some of these areas.

Mr Annecchino: Sorry?

Q575 Lord Corbett of Castle Vale: You said right at the beginning, I think in a slightly different context actually, on something to which we are not signed up that nonetheless the rest of the EU is looking for ways

of continuing to enhance that co-operation. I am trying to work out how pragmatic this can be.

Mr Annecchino: In pragmatic terms, other Member States should not refrain from improving co-operation with the UK in this field. Should the UK be on board it would make things easier. In no way should we consider that other countries and Member States should refrain from trying to improve the co-operation. This is clearly a common interest.

Mr Schieffer: I would like to give an example of how this Directive would increase and improve practical co-operation. This may be an additional reply to a previous question on the prematurity of us coming forward with such a proposal. Apart from it having been asked for by the European Council, in practical terms it is a necessity to present it because at the time when we discussed another initiative from 2001—an initiative which in the meantime has been adopted as a Directive on the mutual recognition of expulsion orders—quite a number of Member States said that for the time being they would not make use of this possibility offered by Directive 2001/40 on mutual recognition of expulsion orders because there are no common standards on how Member States arrive at their expulsion orders. This is an important element for us. We need to have this common platform to make use of other accelerating instruments and elements already available and adopted at the European level. This is a good illustration of the usefulness of how co-operation can be improved by means of this Directive.

Q576 Earl of Caithness: I would like to change the subject and ask how you are going to prevent this Directive becoming an agreement of the lowest common denominator of standards which will allow best practice in the countries to slip backwards.

Mr Annecchino: We consider that this proposal as it is now is going to fix a good standard which will improve the overall situation. In what sense do you mean that it could deteriorate the situation?

Q577 Earl of Caithness: In your working groups you have got 26 countries, everybody arguing, you have to find a bottom baseline and lots of countries are at a higher level and will ratchet down because that is going to be the law, that is all they have to comply with. At the moment they are using a higher standard.

Mr Annecchino: The procedure to adopt this Directive is co-decision so there should be qualified majority in Council, majority in the European Parliament, and it will be difficult to decide without some agreement of the Commission in modifying the Directive. I cannot see the Commission modifying the Directive in a sense that would be the opposite of the purpose that we are trying to achieve. In this sense I have to say that I am quite sure that the majority of

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Mr Nicola Annecchino, Mr Martin Schieffer and Mr Fabian Lutz

Member States who want this as a tool to fight against illegal immigration have no interest in having something which will not reach the standard that they require.

Chairman: Can I ask you a rather general question to conclude, unless there is something you want to say.

Q578 Lord Avebury: Before you conclude, my Lord Chairman, could I just ask a supplementary. Is there not already an incentive for the countries that have shorter maximum periods of detention, like France, for instance, which only allows one month, to bend its rules upwards to the mean, as Lord Caithness was suggesting, and say, "Here is a hint in the Directive that six months is perfectly satisfactory so we will now increase our period of detention from one month to six irrespective of whether the Directive is adopted or not"?

Mr Annecchino: This is a possibility but I would say that we do not see a problem. As we consider six months would be appropriate we do not see a problem if some Member States even without the Directive align themselves to this standard.

Mr Schieffer: The 30 day deadline in France is also causing us quite a problem in our readmission negotiations. As you know, the Community is engaged in negotiating with a series of third countries on the conclusion of such agreements in order to facilitate the physical transfer of persons subject to return decisions from our territories. Usually you have to submit a readmission application to the

consulates or competent authorities of third countries and wait for the green light from their side before you can send a person back to the country and quite often the replies from the third countries take more than 30 days. Because of France and one or two other Member States we have to remain very tough on very short deadlines which the other Member States would not need but which delay negotiations considerably. The most striking example is the recently concluded negotiations with Russia where France, Spain and Portugal will now have specific arrangements with Russia just on the time limits because of the problem of not having sufficiently long detention periods available under their national immigration laws.

Q579 Chairman: Can I ask you a rather general question to conclude. Are the discussions and the negotiations so far, and I realise we are still at a fairly early stage, going as well as you expected or are they rather more difficult than you had hoped?

Mr Annecchino: I would say they are as difficult as we expected.

Chairman: I will not ask you again to translate that into Italian. Mr Annecchino, thank you very much indeed, you have been extremely helpful. It was very good of you to come and give evidence to us. We will be producing a report in due course. Thank you very much for coming this afternoon and for the very helpful way in which all three of you have dealt with our questions.

Examination of Witness

Witness: MR ILKKA LAITINEN, Executive Director, FRONTEX, examined.

Q580 Chairman: Mr Laitinen, thank you very much for coming this afternoon. As I said to our previous witness, since we are on British territory it is possible for me to welcome you. It is a great pleasure to welcome you as the first Director of FRONTEX. This is the first time our Committee has had a meeting with FRONTEX. It is a particular pleasure to welcome, if I may say so, a Finnish Director of FRONTEX, although I know you regard yourself as an international and not as a Finn because I am told, and I have frequently been told, that Finland has a very high reputation indeed in the management of its external borders and, if I may say, on historical terms you have had plenty of reason to do so.

Mr Laitinen: That is right.

Q581 Chairman: Would you like to say anything initially? As Lord Corbett has just reminded us, we have had a very useful description of FRONTEX and what it does but I wonder whether you would like to open with a brief statement of how you see your new organisation and, indeed, your new job.

Mr Laitinen: Thank you very much, my Lord Chairman, Members of the Committee. It is an honour for me to be here to discuss issues related to the European Agency for the Management of External Borders, which is called FRONTEX. Please do not try to make a search in Google because you may have hits which are rather far from external borders. Hopefully our ranking will go up in this regard. I am aware that you have received and read the study on the general issues on FRONTEX but perhaps if I could describe the role and the nature of the Agency very briefly. First and foremost, we are a co-ordinator, a promoter and a contributor. We are an Agency of 51 people working in Warsaw, I think that is the score today. We do not have executive powers as such but we organise and co-ordinate the operational co-operation between the Member States. We start with the risk analysis which is the inner core of the methodology of FRONTEX. We try to find out the deficiencies and loopholes of border security and by proposing appropriate measures, joint measures, we try to ask the Member States to

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bridge these gaps and remedy the situation. We have a tiny budget which for this year is about €12 million but hopefully it will be increased in the course of the next year. About one half is allocated to operational things given that we are a new Agency that requires a lot of administrative investment. The first and most important task is to co-ordinate the co-operation between the Member States. The other aspect is we are allowed to co-operate with third countries and in this regard there are two aspects. First, the headquarters is allowed to co-operate with third countries. The other aspect is we promote the co-operation between the Member States and third countries. For the time being we have started co-operation with third countries. One month ago we initialised some sort of terms of reference, not a high level instrument of international agreement, a working document with the Russian border guard.

Q582 Chairman: When you talk about third countries, are you talking about countries bordering on the EU only or others?

Mr Laitinen: In the sense that the EU talks about third countries, countries that are not members of the European Union. Priority will be given to those countries that are physically neighbouring the EU but not necessarily other countries which in terms of illegal immigration are source countries or countries of transit. We try to find an operational balance on that. There are a lot of other countries, the Ukraine and countries in the Mediterranean area, with whom we are going to try to sign such agreements. We are between the Member States and between the Member States and third countries. As a headquarters we co-operate with other EU institutions. The most important co-operative partner is Europol, Eurojust to a certain extent, OLAF, the Anti-Fraud Office, and the situation centre of the European Council with whom we exchange information. On the other side of this box are non-governmental or governmental international organisations. In a nutshell this is the role and the nature of FRONTEX.

Chairman: Thank you very much indeed, that is extremely helpful.

Q583 Lord Corbett of Castle Vale: In the memo we have here the six basic tasks of the Agency are set down, the last of which is “support in organising joint return operations”. Can you explain what priority you intend to give to that given the political priority which Member States attach to it?

Mr Laitinen: It is true that it is on the list of the tasks of FRONTEX. For the time being, given that it is a little bit of a different task and it is clearly stipulated that we only assist the Member States in that regard compiling best practice on documents and also the other issues related to that, it is not at the top of the priorities. That can be said at the beginning, it is not a

top priority. At the same time it is a very complicated task, a very sensitive task, and we have started to learn things. We have a tiny sub-unit within the headquarters and we are now at the stage where we are finding out what the practices are of the Member States in this regard. Nevertheless, when I say that it is not a priority it does not mean that it is not an important task, it is a very important task and we take it extremely seriously. Another issue which is also linked to this task is the history of how this task came into the functions of FRONTEX. It is set in the background memo of this regulation establishing the FRONTEX Agency that given that the task of return and removal operations are normally carried out by border guard authorities in the Member States by analogy it became a task of the FRONTEX Agency. The other issue which is also linked to this is perhaps it was the only sector of the regulation establishing the FRONTEX Agency which was not favoured by the European Parliament. They strongly criticised this task becoming a task of FRONTEX Agency. Nevertheless, in accordance with our work programme for 2006 it is foreseen that we will be involved in at least four joint return operations. More precisely, the first one will take place during the Austrian Presidency and the three others will take place during the Finnish Presidency. We have done a lot of preparatory work for that and for the time being it really seems feasible to achieve these goals.

Earl of Caithness: You have answered quite a lot of the questions I wanted to pose but I wonder if you could go a little bit further, if necessary off the record, on how you help in a joint operation. I understand the philosophy but how do you do it in practice? If he needs to go off the record, I hope that is acceptable.

Q584 Chairman: Please say if you would like to go off the record.

Mr Laitinen: Yes. There is nothing in my answers which would require me going off the record. First of all, we ask the Member States to inform headquarters about their needs, what their needs are when it comes to the persons to be repatriated or returned, what is the destination and so on. We are going to create a system for how this information will come to the headquarters. When we receive this information from various Member States then we will make the packages, so to speak, in the sense that these two or three countries could do it jointly and we try to find the most cost-effective way to carry out this task. In that sense we are like an expedition company, so to speak.

Q585 Lord Corbett of Castle Vale: A travel agency.

Mr Laitinen: Exactly, that is for sure when we are talking about what people. Then we make a proposal to the Member States that it seems feasible to perform these tasks like this and hopefully the

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Member States are in favour of our proposal. The other aspect is we try to find the financing from other Community instruments for that. This is something which is for the future. For the time being we do not have channels to use other Community instruments but in the near future, especially when the new fund for returns is available, we will do it. In a nutshell this is the *modus operandi* of how we are doing that.

Q586 Earl of Caithness: I understand that you have slightly different powers from Europol in that you have more executive powers that they do not have. When do you anticipate using those powers and how will you use them? Do you liaise with Interpol as well as Europol?

Mr Laitinen: It is true that we operate in this sense more than Europol but the Member States are very careful about the executive powers. It is explicitly stated in the regulation what our role is and we will take very great care that we do not cross the line, so to speak. We reserve our role as a co-ordinator instead of going into the field and doing things ourselves. When it comes to co-operation with Interpol, that is for the future perhaps. So far we have not planned to make systematic contacts with Interpol given that there is a long list of Community bodies first and foremost with whom we need to bind these partnerships. We have had some contacts with Interpol but this kind of systematic regulated co-operation is rather far in the future.

Q587 Lord Avebury: This bundling together the requirements of different countries which have returns to similar destinations presumably applies only to the destinations where there are no scheduled airlines, such as Afghanistan for instance. Could you be a bit more specific about the two operations that are planned during the current Presidency and the Finnish Presidency which you said have already been scheduled. Could you also say what is happening to the individuals who will be on those flights in the meanwhile bearing in mind that everybody agrees that the period of detention should be as short as possible. If the candidates for these flights have already been identified, where are they? Are they in detention or in temporary admission? How do they come to be passengers on the two flights that you have mentioned?

Mr Laitinen: Keeping in mind our role in this whole entity, that is far from our perspective about the situation in those Member States who are acting in these return operations and what the state of play is for the persons who will be removed from those countries. The three operations that are in the pipeline, I do not know in what order they will be done and what are the Member States. For the time being we are involved, but not as an active partner, in two operations, one from France and the other from

the Netherlands. Apparently Germany will be the partner for the next operation where we are involved during the Austrian Presidency.

Q588 Lord Avebury: Are they countries to which there are no scheduled airlines?

Mr Laitinen: That is not known yet. It might sound a little bit strange but the situation is such that these targets and plans may change even some days before the operation for reasons that might come up very suddenly.

Q589 Baroness Bonham-Carter of Yarnbury: What is the period of time for these operations? How long away are they?

Mr Laitinen: I do not know any details about how long away they are. When I say that it will be executed during the Austrian Presidency it means by June but I do not know exact dates or even weeks for that.

Q590 Lord Dubs: Just to understand some of the technicalities of this, am I right in thinking that you are talking about returns from one country only, you are not bringing people together from several countries as a way of returning them?

Mr Laitinen: The optimum situation is that we do it jointly, taking a chartered flight which collects persons going to the same destination. These first operations are more of a focus for one particular Member State. Some deliberations have been held in the working parties of the Council concerning the *modus operandi* as to what are the limits on these things.

Q591 Baroness D'Souza: Can I just clarify one issue first. As I understand it, you regard FRONTEX as a service organisation but which nevertheless has executive powers and you are operating now, that is before there is any Directive. How can you be sure, indeed is it your business to be sure, that the returns when you are working for joint returns are within the European Human Rights Convention and that you are not involved in taking people back to countries where it is likely they will be ill-treated, for instance?

Mr Laitinen: I can put it very briefly: it is up to the Member States.

Q592 Baroness D'Souza: Can you refuse the Member States?

Mr Laitinen: It is a little bit of a complicated question. If we see obvious violations we can say we are not going to carry out this operation but the starting point is all the Member States of the European Union respect the regulations and international law on human rights as such and we consider ourselves purely a technical actor in this.

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Q593 Baroness D'Souza: Do you think that the Directive, if and when it comes into being, is going to assist you in this particular aspect of your work?

Mr Laitinen: To be very honest, I see the Directive one step further to harmonising the practices of the Member States. From our point of view it is almost like that. I do not see any particular advantages or disadvantages.

Q594 Baroness D'Souza: No added advantages?

Mr Laitinen: Exactly. There is no particular added value from the Directive for our technical work regarding joint return operations.

Q595 Baroness Bonham-Carter of Yarnbury: Are you purely the travel agent or will you know the nationalities of the people you are taking to whatever country you are taking them to and be aware that this matches up in a pleasant and not an unpleasant way?

Mr Laitinen: Yes. Apparently it is one of the key things we have to be aware of when planning, what the nationalities of these persons are, what the destination is, whether it is possible to readmit these people and that kind of thing.

Q596 Baroness Bonham-Carter of Yarnbury: And the kind of reception they might get.

Mr Laitinen: Yes. It is something that the Member States who are asking for our technical assistance should already have found out, the needs and possibilities to launch these operations.

Q597 Baroness D'Souza: In this aspect of your work, the joint return operations, are you in contact with the police or security services of the countries to which you take people?

Mr Laitinen: Not directly, it is for the Member States who are in charge of conducting these operations. This is for the time being.

Q598 Baroness D'Souza: You anticipate that it might be the case?

Mr Laitinen: We do not know how things are going to develop, whether we are going to do these kinds of things more under the European flag. For the time being it is very much for the Member States to do it and we reserve our role as a technical co-ordinator.

Q599 Lord Dubs: You have talked quite a lot about the removal of third country nationals and we have spent quite a few minutes on that but you do a lot of other things as an agency. One of them is identifying the best practices for the acquisition of travel documents. It is a very wide range of activities. Is it a problem for your Agency to do so many different things? I have mentioned two but you have others.

Mr Laitinen: To a certain extent it is a problem. We have to share the human resources and financial resources among many fields and making priorities and focusing things is more complicated and difficult when there are a lot of options to be considered. From our organisational structure that can be seen as well which is now divided into six units and the operational unit is divided into four sub-units, one for land borders, sea borders, airport operations and one for return operations and co-ordinated operations. Each of these sub-units consists of two or three officers for the time being. The human resources are not that huge.

Q600 Lord Dubs: Could I just ask you about the travel document bit. I understand one of your tasks is to identify the best practices for the acquisition of travel documents. Is that not something that Member States can do? How can you link with Member States on that?

Mr Laitinen: I do not have a strong opinion whether they should do it or not. Very recently, two or three weeks ago, we launched a project where the Member States are involved doing the work, compiling best practices on this issue, and if I remember correctly it is a project which goes beyond 2006, so it is a long-term project. The experts who are doing this exercise know the complexity of this issue much more than I do.

Q601 Lord Marlesford: Can I just follow that up. Are we talking about the quality of the travel documents, in other words whether the passports are themselves secure documents and difficult to forge and fake, or are you talking about the arrangements that are made to issue them to the people who apply for them, or both?

Mr Laitinen: I am not that great an expert on these issues but it is more a question about providing those who are launching these operations and who are on board with such documents that facilitate the readmission in the target country.

Q602 Baroness Henig: Resources are quite clearly a problem. Very early on you mentioned the smallness of the budget relatively speaking and the need in the future to find finance from other EU heads. Are you satisfied thus far that you have got enough resources and co-operation from national authorities to carry out your functions effectively in relation to joint returns, travel documents, removals, all the things we have been talking about?

Mr Laitinen: When I speak about problems, I have given an order to my staff not to speak about problems but to speak about challenges instead—

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Q603 Chairman: Very good.

Mr Laitinen:—given that we have new Member States and many things are unsolved for the time being. The other issue is we should be very sure what we want before we start to cry for more resources. Instead of being in a situation where we have a lot of human and financial resources and then do not know what to do with them it is better to do it the other way round. For the time being we are still on honeymoon given that we started our operations on 1 October, which was only five months ago. Quite often it is forgotten that we have not been operating for years. We are in a very, very initial stage. There are some Member States that have indicated a strong will to expect good results very soon, successive operations. Some Member States are watching and saying, “Okay, let them do the preparatory work before and give them time for that”. Some countries are in the middle. What I can say from the Member States’ side is I am satisfied with the attitude and the momentum which the Member States are expressing towards FRONTEX. One reason why it is easy to say this is the Management Board which exercises the supreme command and control within the FRONTEX Agency consists of the heads of the border guard services which was a very, very good decision by the Council in terms of commitment and keeping the focus on operational things. When something is put to the agenda of the Management Board meeting and they adopt it, it can be said that it is zipped up and they are on board in the same exercise. We have had some difficulties with the host country—Poland—to be very honest. Given that we are a security based organisation we require clear regulation on our nature, our immunity, our privileges, the status of this Agency in the country. So far we do not have the headquarters agreement, which is an indispensable requirement, showing our immunity vis-à-vis the host country. Many co-operative partners, like Europol, and many Member States are looking at this issue and considering how deep the operational co-operation is and what kind of information and intelligence can be given to us if they are not 100 per cent sure about the safety of that. If we do not have the headquarters agreement it is not a good situation.

Q604 Baroness Henig: So the honeymoon is obviously successful but the destination perhaps has problems at the moment.

Mr Laitinen: Yes.

Chairman: It is interesting because the only border that this Committee has visited is the German-Polish border which we visited about two or three years ago.

Q605 Earl of Listowel: The Home Office in its evidence suggested that plans for the role of FRONTEX in relation to return operations should be in place by the end of 2006. You have already

spoken at some length on some of your progress but would you like to say a bit more about how realistic the expectations expressed by the Home Office are and a bit more about the stage that you have reached so far, or do you feel you have covered that area already in what you have said?

Mr Laitinen: I consider it realistic given that we have done a lot of preparatory work which is not visible at the time being. We have gained experience from many Member States how to do it. The plans for these four operations that I mentioned before are in the pipeline. We know roughly the timetable of how we are involved in these operations. It can be said that I could sign the deposition of the Home Office in this regard.

Q606 Chairman: Can I ask two supplementary questions arising from that. It would be very helpful if you were able to let us have your work programme for 2006. I do not know whether that is available for us. If you were able to let us have that it would be very useful. You referred to the differing attitudes towards FRONTEX by European Member States describing some in the middle, some one way, some the other. Where would you put the British Government?

Mr Laitinen: (The answer was given off the record)

Q607 Chairman: Thank you.

Mr Laitinen: Practical co-operation is very good. We have received a lot of support from the Home Office and the border control of the United Kingdom. I have contacts with Mr Tony Smith and John Fothergill who are the key players in this regard. The United Kingdom has provided us with excellent national experts.

Q608 Chairman: Good. I am very glad to hear that.

Mr Laitinen: At the next Management Board meeting, which takes place on 24 March, on the agenda there will be a decision which regulates the participation of the United Kingdom in the two operations of the FRONTEX Agency. We have handled this issue twice before at the Management Board meetings and so far the framework is already in place and next Tuesday I will receive a small delegation from London to Warsaw and we are going to finalise this decision. Honestly, I can say that I am very satisfied with the co-operation that we are getting.

Q609 Lord Corbett of Castle Vale: What about the poor Irish?

Mr Laitinen: (The answer was given off the record)

Q610 Lord Marlesford: The December European Council called for special measures in relation to African and Mediterranean countries. Would you like to say something about those special measures

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and how they affect your role in return operations? Perhaps you could describe the special measures first.

Mr Laitinen: Before I go to this particular geographical area linked to the joint return operation, more generally speaking the Mediterranean area is out of focus. When it comes to the overall external borders of the EU it is the most vulnerable area and, therefore, all the activities are focused in that region, starting from risk analysis, joint operations and so on. It was not by accident that the European Council stressed the importance of this region. Vice-President Frattini—he did it twice—called on FRONTEX to launch a feasibility study on creating a network of coastguards in the Mediterranean area. We have launched this project and apparently it will be accomplished in July when we are going to present a model which could be used in that region on how to co-ordinate on a day-to-day basis between the Member States, how to use the national resources in a synchronised way, surveillance systems, offshore vessels, things like that, patrol flights of aircraft, how to make sure that there is a systematic structure to exchange information. This also facilitates the FRONTEX managed joint operations on that. There are good references to this kind of system. One has been in place in the Baltic Sea region since 1997, if I remember correctly. It is a regional concept where all the coastal countries co-operate. There is a similar system in the northern Pacific and the Black Sea regions. We do not have to reinvent the wheel but we are trying to adapt these systems to the Mediterranean area. The next step will be how to integrate the third countries in that region to that system and it will be a much more difficult exercise given the situation in that area, the countries. It has proven that it can be solved. For instance, Russia acts in the Baltic Sea region in the same way as the EU Member States within the Baltic Sea region. When it comes to the joint return operations, to be honest I do not see very much advantage or disadvantage in raising this kind of political importance in that region. In some cases it can promote launching and exercising these operations. In some cases the result can be adverse if there is more political importance and it can be even more difficult to carry out these operations. This is an issue which has not yet been discussed thoroughly within FRONTEX. It is quite descriptive that sometimes we face difficulties in interpreting the political language which is more and more linked to our activities thinking about what this might mean in practice. Perhaps we will learn gradually.

Q611 Chairman: I am just going back to the British Government's attitude to this. I remember from a previous report which this Committee did on illegal immigration that at that time, long before the

foundation of FRONTEX, the Royal Navy were playing a very active part in exercises and training in the Mediterranean. Is that still the case? Are we still participating there?

Mr Laitinen: Yes.

Q612 Viscount Ullswater: I think a lot of my question has been answered about participation with the United Kingdom. You have given us a very helpful answer in that things look as if they are improving. Would you make a comment about whether the fact of the Directive as to whether it is adopted in its present state and whether we continue with our opt-out will have any effect on the relationship, and the improving relationship which I hope will continue, between the United Kingdom and FRONTEX?

Mr Laitinen: To be honest, I do not think so. It is not fair to say but when we disregard politics and legislation and we are solely focusing our minds on operational co-operation in whatever field we are the actor, I have a feeling that the UK would like to play a stronger role than the political or legislative framework allows. I have a feeling that it is a little bit of a frustrating situation to our colleagues in the UK. This is how the practitioners interpret the case in the court as well. It is not to annul the regulation but it is because they would like to participate more. As I said before, the Directive that we are speaking of now will not have a remarkable influence on the practical work of FRONTEX.

Q613 Lord Avebury: Can I ask a slightly different question about the collaboration between FRONTEX and the European Union which you have already described in a fair amount of detail. Do you think that we have something to contribute on the question of joint returns to Mediterranean countries, which you said was low on your list of priorities for political reasons? I take it what you were thinking of was the sensitivity of human rights affairs in the Maghreb generally and the need to ensure that anyone who is returned is not at risk of torture and thus raising Article 3 considerations. You are probably aware that we have entered into negotiations with a number of these countries, and Algeria is high on our list of priorities, that we are able to guarantee the safety of anyone returned by means of a Memorandum of Understanding which would be overseen by an independent monitor. Do you think there is something in that scheme which would be of more general application in terms of sending people back to the Maghreb countries and ought it to be considered on a European scale?

Mr Laitinen: What you say is an excellent description about the complexity of this issue and what is needed before a successful return operation can be carried out. If we take one step back and take a look, there

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are two parts to the return operation. There is the first option, which is the voluntary return, and that is the best solution for all of us when it comes to the persons in question, the countries, and the financial aspects on that, but unfortunately FRONTEX is much more about dealing with the forced return operation. Here I see some room for co-operation not only with the countries but also with international organisations which have experience especially related to voluntary returns. Perhaps in some cases some outsider—it could be a country or whosoever—could serve to act like a mediator, perhaps the European Union could play that role in some cases. In some cases, as I mentioned before, the result may be adverse.

Q614 Baroness Bonham-Carter of Yarnbury: We have heard quite a lot of scepticism from certain quarters about the need for the Directive on common returns procedure but in your view what would be the main added value of having such a Directive?

Mr Laitinen: Once again, if I take a look at the Directive from the practitioner's point of view, it gives us very, very limited added value. Given that it is a Directive, it is some sort of attempt to harmonise things, the rest will go to the national legislative systems and given the scope of the Directive, the articles there, it is defining the administrative procedures more on how to do it and what are the time limits for putting people into custody and things like that. These kinds of things are far from the role we are playing. That is the main reason why I said I

do not see much added value. At the same time, I have to say that it does not jeopardise our operations either.

Q615 Baroness Bonham-Carter of Yarnbury: Would you go so far as to welcome it?

Mr Laitinen: It is fine every time if the European Union can create new legislation.

Chairman: Really!

Baroness Bonham-Carter of Yarnbury: Did I see a wink there?

Q616 Chairman: This may be unfair but can I ask you for a moment to shed your international persona and return to your Finnish persona. This inquiry is into the Directive, of course, are there any special Finnish objections to the Directive that you are aware of?

Mr Laitinen: (The answer was given off the record)

Q617 Chairman: Thank you very much indeed, you have been extremely helpful. It is very nice to have welcomed you here. I wish you the warmest good luck in your very, very challenging job. It is always challenging to start a new job. I am delighted to hear that you have given instructions to your staff not to refer to problems but only to talk about challenges. I come from a diplomatic background where the word "challenge" was only used when they wanted to send you to Outer Mongolia!

Mr Laitinen: Thank you very much.

FRIDAY 3 MARCH 2006

Present	Avebury, L Bonham-Carter of Yarnbury, B Caithness, E Corbett of Castle Vale, L D'Souza, B Dubs, L	Henig, B Listowel, E Marlesford, L Ullswater, V Wright of Richmond, L. (Chairman)
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Examination of Witness

Witness: Ms CRISTINA CASTAGNOLI, LIBE Committee Secretariat, examined.

Q618 Chairman: Ms Castagnoli, thank you for coming. You are very welcome. I will not introduce my colleagues; we have our names in front of us. I am sure I do not need to explain to you the purpose of this meeting because we are working on a report on the Commission Directive on returns policy. If I could start, unless you want to say anything to start?
Ms Castagnoli: No, you can start, that is fine.

Q619 Chairman: I would like to ask if you could explain where you have got to in the scrutiny process of this Directive and anything you could tell us about your initial reactions to it.

Ms Castagnoli: Good morning, everybody. I know you met the Commission representative and the Vice-President yesterday.

Q620 Chairman: We did, that is right.

Ms Castagnoli: Unfortunately, we are not in a very advanced position at the moment. We started three or four months ago but rapporteur Mr Weber, who is a German representative of the EPP Party—

Q621 Chairman: Who we are seeing next week in London.

Ms Castagnoli: We started our work but we have discovered since the first meeting that the Council has not progressed very much on this. Apparently they spent four hours on the first article at the first meeting and they have had just two meetings. Considering the fact that for the first time Parliament has co-decision in this field, we are not used to this. We did not want to take a position too soon in advance compared to the Council. Normally our procedure is very quick: the rapporteur prepares the draft report and we open a deadline for amendments and a month after we would vote. Considering the Council is going so slowly we decided to go by a more informal procedure at the moment. There are ongoing discussions between the rapporteur and the shadow rapporteurs and we will have another meeting in two weeks with the NGOs and other persons interested in the Directive. Formally we do not have a draft report at the moment. We know the position of the different MEPs involved but we do not have a draft. We will

have the first draft on 19 April and then we will see what happens. The key point—this is where the Council and the Commission are not very happy with us—is we wanted to make a link between this Directive and the return fund. We are currently discussing the Financial Perspectives and there is a huge programme concerning the migration flows, including an integration fund, a return fund, a refugee fund and a border fund. This is a very important programme, this is to agree the money in the field of migration and asylum for the next seven years. We made an amendment on the return fund saying that it cannot be adopted until the Directive is adopted. We consider that we cannot grant European money without having European rules. We do not see added value to have Europe paying for the charters for repatriating people without having European rules to say how that should be done. This is very unlikely in the Council because they want to go quick on the funds but do not want to progress at all on the Directive. We have to see how far the Parliament can go on that. The positive thing from our side is that the European People's Party and European Socialist Party, the two main groups, agree on this strategy and also the little groups, so everybody agrees on that but for opposite reasons. The very left because they do not want a Directive so they think they can block the Directive and the money, and the right side because they consider there is not added value if we do not have some European rules. In this respect, the fact that we have two EPP rapporteurs, Mrs Kudrycka for the funds and Mr Weber for the Directive, is very important because they work together.

Q622 Chairman: What size of funds are we talking about?

Ms Castagnoli: The total amount the Commission proposed for the Justice and Home Affairs area is nine billion, although the final budget may change as negotiations on the financial perspectives 2007–13 are ongoing. Of this, around five billion is allocated to the Framework Programme on Solidarity and Management of Migration Flow, so the field of immigration and asylum get the biggest share.

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Parliament likes links to the budget normally because it is the only field where we have power. That is why we said we would consider all funds as a package. Even with the integration fund, where the Parliament has just consultation power, we will consider that as a package with all the other funds, where the Parliament has the co-decision power. There will also be funds on penal justice and the fight against terrorism. There are seven programmes, a really huge package, and we want it to go on together.

Q623 Chairman: You said that your first draft will be ready in April. Do you have any timescale in mind for producing a final report?

Ms Castagnoli: No. Once the Parliament has adopted the first reading, for the second reading we are very much linked to our amendments in the first reading. In the second reading you can table only the same amendments or new amendments if something new happens in-between, or compromise amendments. That is why we do not want to link ourselves too much before knowing what the Council is going to do. With all the funds this link is the maximum position. There will be something at the end, something in-between, I guess.

Chairman: That is a very, very helpful introduction for us. If you find that there are questions that you cannot answer, given the initial stage you are at, please do not worry about that. Also, this is on the record but if at any point you want to go off the record you are very, very welcome to do so.

Q624 Lord Avebury: Yesterday we were told about a budget of €759 million which would run from 2007–12, I think, for returns programmes. If you do not allow any of that money to be spent until the Directive is agreed, will not some of the very desirable programmes, such as expanding voluntary returns via the IOM, be put on hold until the Directive is issued? If the Directive is unfortunately delayed until 2008 then no-one will be able to get on with things that everybody agrees are desirable. Is that the position?

Ms Castagnoli: You are right. It is clear that we would like to have both things by the end of the year.

Q625 Lord Avebury: But you cannot separate out part of the programmes and say, “We agree with spending on those”?

Ms Castagnoli: In the refugee fund there is a programme on voluntary return. We are trying to find out the legal possibility of adopting the all funds but for the return fund say it will only enter into force when the Directive is adopted, so in this case it will not block the other funds and the voluntary return of refugees will go on. It is a political decision, that is clear. (The answer was continued off the record)

Q626 Chairman: That is something which we might pursue with Mr Weber next week.

Ms Castagnoli: If you see the example of the data retention, it is thanks to the fact that your Minister, Mr Clarke, gave some credit to the Parliament and said, “We will go on with the co-decision if you can assure us you can deliver in two months”. Everybody was sceptical in the Council saying, “The Parliament will never deliver something in such a short period”.

Q627 Chairman: But it happened.

Ms Castagnoli: It happened. Now we feel credible and very strong. We want to do the same with the Council and say, “Now we have an interest in the Return Directive, show your credibility” and we are trying to do the same. We do not think nevertheless that we have the same power as Mr Clarke!

Q628 Earl of Caithness: We have got to focus just on the Directive, so let us forget about the money for the time being. Would you agree with me that there is no added value in the Directive and if you disagree, where do you see the added value?

Ms Castagnoli: That is a good question. I do not see great added value as it is but as a final result there might be. As it is now, on the Commission proposal after the first discussion in the Parliament no-one was enthusiastic about the text. For example, the detention period will be worse for a lot of Member States and the same thing in terms of guarantees for children, for vulnerable people. I think as it is, it is not added value. If we just had to say yes or no to a text like that, I guess we would say no. Now we have the co-decision procedure going on we would like to have something different and in this case it would be added value, but as it is I agree that it is not.

Q629 Lord Corbett of Castle Vale: This may be one of those difficult questions that you cannot answer given the stage of where your consideration is at. Are you able to tell us anything about the views expressed so far on some of the most important aspects of the Directive which are listed here: the mandatory return decisions; the voluntary return period of four weeks; the mandatory judicial review of return decisions and so on; the maximum period of detention; and the proposed EU-wide re-entry ban? Are you able to get the feel of where the committee might be going on those, or some of them?

Ms Castagnoli: After the first discussion the most controversial point was the re-entry ban. As it is at the moment in the majority of the Member States if someone is asked to leave the country he can come back the day after as a legal migrant who has a contract and can work. The re-entry ban is something that is considered to be really controversial because for five years someone can not be back, even if his situation changed and he become an asylum seeker.

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Also, there is not an appeals procedure on the re-entry ban. That is one of our redlines that we are not accepting.

Q630 Lord Corbett of Castle Vale: Your feel is that there is agreement around the committee on that issue?

Ms Castagnoli: Yes.

Earl of Caithness: What about on some of the others?

Q631 Viscount Ullswater: Before we move off that, can I just interject. What is the feeling of the working group about being able to buy your way back in by being able to financially resolve the situation of your past removal that would allow you then to come back in, which is in the Directive?

Ms Castagnoli: I am sorry, I did not get your question. On the re-entry ban again?

Q632 Viscount Ullswater: Yes. This is 3(c): “The re-entry ban may be withdrawn if the individual has reimbursed all costs of his previous return procedure”. Have you touched on that one?

Ms Castagnoli: No, sorry, not yet.

Chairman: Do you want to go on with the other points?

Q633 Viscount Ullswater: I am so sorry I interrupted but I thought it was important.

Ms Castagnoli: The Draft Directive foresees only four weeks for the voluntary return. If someone has already received a return decision with a removal order pending, it is very unlikely to be considered that this return is voluntary. The four weeks is really a very short period of time. This is where it is very important to link the Directive to the fund because in the fund there is the possibility to help the returnees to reintegrate into their country of origin. There is nothing in this Directive on that. This is technically how you return people but what happens after is not taken into consideration here. We do not have a final decision but the fact the Member State can decide to link the two, the removal order and the return decision together, is not acceptable to all the committee.

Q634 Chairman: Do you have a view yet on a maximum detention period?

Ms Castagnoli: That is a really huge question. If you go to the Green and the GUE groups they say they do not want detention at all. With the Committee we have been visiting a lot of detention centres in Europe. We went to Lampedusa, Ceuta, and Melilla, we were in Paris last week and we are going to Malta in two weeks. We are visiting all of these centres to see if they respect the right reception conditions for asylum seekers and also to see how they are managed.

Q635 Chairman: We are going to Yarl’s Wood next week.

Ms Castagnoli: Good.

Q636 Lord Corbett of Castle Vale: There are other places we might visit.

Ms Castagnoli: Go to Malta. Go to Paris to see what happened under the *Palais de Justice* at the Ile de la Cité. It is like Marie Antoinette’s prison. Mr Sarkozy promised they will close it by June because it is really—

Lord Dubs: We had better go quickly!

Q637 Lord Marlesford: How many people are in Ile de la Cité?

Ms Castagnoli: Fifty-two men and 20 women. It is really awful.

Q638 Chairman: No children?

Ms Castagnoli: No children, no. It is a huge prison with thick doors, no air, and no light.

Q639 Lord Marlesford: Historic.

Ms Castagnoli: It is really awful. It is awful even for the police living there. The Green and the GUE groups do not want reception centres or detention centres at all. The other parties consider six months is too long. For example, we know in your country you do not have a limit but for France it was 12 days and now it is 32, Italy is 30, so six months is considered too much for someone breaching an administrative rule, eg by entering illegally a country..

Q640 Chairman: You have referred to several differences in detention centres and so on. Have you got the impression that there is a very wide variety of standards within Europe?

Ms Castagnoli: Absolutely. If you see Lampedusa, for example, it is a closed centre, controlled and managed by the police with awful conditions. Normally there are 180 places and there can be up to 1,000 people there. I can send you a document that we have had translated. There was a journalist who jumped into the sea and was recovered like a refugee from Morocco. He was put in the centre and he wrote a story of 50 pages of what happened there.

Q641 Chairman: Is it possible that the Directive, if adopted in an amended state, might reduce some of these differences and some of these appalling conditions?

Ms Castagnoli: For us that is the purpose of the Directive. For example, at Ceuta and Melilla you can enter and go out from the centre, there are no doors, you just have a badge. They consider that people prefer staying there than going and sleeping outside.

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Q642 Lord Dubs: Where is that one?

Ms Castagnoli: Ceuta and Melilla are the Spanish enclaves in Morocco. You can do it because it is an enclave and people can not run away from there. It is a very pleasant place with little houses and families together. NGOs organise things. It is a completely different story from Paris or Lampedusa.

Q643 Chairman: I think you are whetting the travel appetite of the Committee.

Ms Castagnoli: I am becoming a travel agent because I am organising the practical things also.

Q644 Baroness D'Souza: We have a particular concern about the protection of vulnerable groups, particularly children, and from what you have said I understand the committee does as well. I think that you feel the Directive does not provide sufficient safeguards and guarantees for children and vulnerable groups. I wonder whether there are any suggestions that have come from the Committee as to how one might strengthen those protections for these groups, especially young children.

Ms Castagnoli: In the fund we excluded the possibility of financing the return of these people with European money. For the moment Europe cannot say that a Member State cannot return these people but at least we have said do not use European money for doing so. In the Directive we will try to add more guarantees and everybody agrees on this. For example, the detention of children and the return of vulnerable people will not be allowed.

Q645 Baroness D'Souza: You are defining children as under 18 or under 16?

Ms Castagnoli: Eighteen. We adopted our opinion on the minimum guarantees for asylum seekers and there was 16 because Germany has the possibility of considering 16 years old as not minor, but we have put 18.

Q646 Lord Dubs: The question I am about to ask you have partly answered. Let me ask it again and then spell it out in a bit more detail. Are there any major differences of view among members of the committee on the important provisions of the Directive? You have referred to a few, you talked about the left and the right and you mentioned the Greens and one other group. I wonder if you could develop that a little bit about the members of your committee.

Ms Castagnoli: The point here is since the beginning of this sector at European level we have not had co-decision, so every time there was a big fight. In the committee the centre left has a majority of one vote, so everything that is voted in the committee has a centre left position. It means that the Committee Members hardly tried to find a compromise. The

Parliament position was not binding and Members felt free to fight for their own ideas.. With co-decision things are completely different. Our members are now starting to understand that they cannot go on with this fight always winning with one or two votes. When Commissioner Buttiglione failed the exam in our committee, it was by one vote. They have to start working together now, especially the Socialists and EPP, and that is why Mr Weber in the first discussion was very open to what the Socialist members said and we will have a more balanced report. If Parliament and Council can reach an agreement on first reading, in the Parliament we need just a simple majority, but if we go to a second reading we need a qualified majority which means the majority of all the Members of the Parliament. For that the agreement of the two big groups is needed. That has changed the nature of the amendments and the atmosphere in the committee when we discuss co-decision issues. At the end the problem of detention and the re-entry ban should be agreed by the two big groups. There is another point we did not mention, very important, which is the fact the Draft Directive considered compulsory return of people who are illegal. That is not accepted by everybody, also some Member States would like to see it as an option.

Q647 Chairman: By any body or by everybody?

Ms Castagnoli: That is not clear so far. In the Council some Member States did not want to have that as compulsory. If we can name and shame, because the Parliament has been asking for more transparency in the Council for years and if we can we get the Council *compte rendu* by informal ways, they are never submitted directly to the Parliament, what we know we should not know. Some Member States especially from the south who normally regularise illegal migrants after a certain period of time, instead of having a quota, they opt for the regularisation of people who are already in the country. In the countries from the north they say it is not acceptable because a lot of illegals enter from Spain and Italy and they will want to go to the UK or to Germany.

Q648 Lord Corbett of Castle Vale: There are some exceptions to the mandatory position, are there not?

Ms Castagnoli: The discussion is ongoing in the Council. Some Member States asked for exceptions already in the first article of the Directive.

Q649 Baroness Henig: My question in a sense follows on from this. I can see there will be regional differences of the sort you are describing but on the issues that you have been talking about—detention, re-entry ban, the compulsory nature of provisions—are there any differences in the party positions, for example, in the Socialist Party or the EPP? That is one question. The second one is I think you said right

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at the start that the left did not want a Directive. I was not sure who constituted the left in that sense and why they did not want a Directive at all.

Ms Castagnoli: The left is the GUE, the Communist group, and the Greens.

Q650 Baroness Henig: The left officially is the Communists and the Greens, that is helpful.

Ms Castagnoli: No sorry, it is my way of calling them, but maybe that is not correct.

Q651 Baroness Henig: Why do they not want a Directive?

Ms Castagnoli: Because they consider Europe cannot start from saying who should be returned before saying who can enter legally. It is a good point because in Tampere there was a very comprehensive approach saying we will have a legal migration policy and then the fight against illegal migration. The Commission and the Council started with a fight against illegal migration and, as you may know, in 2004 the Dutch Presidency proposed the possibility for the Parliament to switch to co-decision. There was the possibility under the Treaty for the Council to decide if all of Title IV of the Treaty could pass into co-decision or only part, and the Council decided not to give the Parliament co-decision on legal migration. This means on legal migration the Parliament is only consulted. So the question is why Europe goes on just on the illegal part and not on the legal part. The position of GUE and Greens is that it would be better not to decide as the first European comprehensive measure how to return people before saying how they can enter.

Q652 Baroness Henig: A very purist position. As between the two main parties are there any clear differences that will have to be resolved? It would be helpful in advance of seeing the rapporteur next week.

Ms Castagnoli: I do not remember exactly what they said. I have here the *compte rendu* of our meeting.

Q653 Baroness Henig: In general terms.

Ms Castagnoli: Mrs Hazan is the Socialist shadow rapporteur and she said she will not accept a re-entry ban, she is not happy with this link between the return decision and removal. She considers it is too repressive. On the Council side, some Member States say there are too many "human rights" in the Directive and they want to switch the human rights part into the recitals and not in the articles but the Parliament I guess will have the opposite view.

Q654 Baroness Henig: There is going to be some interesting bargaining at some stage.

Ms Castagnoli: Yes.

Q655 Viscount Ullswater: Can I have a supplementary on this. What you have just said is very interesting because we were told yesterday when we saw the Commission that the comment from the working group was that it was protecting illegals rather than returning illegals. If anything, it seems that they want to toughen it up and you want to liberalise it. Is that a position that you recognise?

Ms Castagnoli: Of course, it is the reality. The first comments from the Council were saying, "It will be a bureaucratic burden to verify all these human rights conditions, why are you putting the Convention for children in the article but not the recital" and on the contrary a lot of Members of the Committee said it is repressive. Mr Sarkozy adopted a new strategy last year, the *Stratégie des chiffres*. He wanted to return so many every year. For example, this year it is 25,000 people. The Police just trap people in the streets. We talked with migrants in the centres in Paris and one had been living in France for 10 years and said, "I was working in a shop. I have my wife here and my child was born in France". He was driving and was stopped by the police. Another one was in a café. Because of this policy they have all these people to return. The Socialists said we have to make a difference between someone who can prove he has lived in a country for five or 10 years. For example, in France there was a law that if you could prove you illegally stayed in the country for 10 years you could become legal but Minister Sarkozy changed it. I do not know if they have put a shorter period of time on it or if it has just been abolished, I am not sure. That is another point, we do not consider if someone is living in Europe illegally and may be building the stadium for the Olympic Games and then they are just thrown out. At the end we are not sure that we will have a Directive if we go on like that.

Q656 Earl of Listowel: Ms Castagnoli, the European Parliament has full legislative co-decision powers in the area covered by the Directive, as you have been saying. What changes are the Committee likely to propose in the text of the Directive? You have already discussed this to some extent. For instance, might the protection for children and families be reinforced if a clause alluding to the Council of Europe's guidelines was inserted into the Directive? For instance, you referred to a minimum age of 18 but for children leaving the care of the state in England and Wales they have protections up to the age of 21 and for young people in custody in England and Wales they have a special regime up to the age of 21. Clearly there are important difficulties for asylum seeking children as they are moving past the age of 18. Might you think perhaps of moving beyond to the age of 21?

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Ms Castagnoli: I have not thought about that, it is very interesting that you mention it. What we would like is that the Directive does not make any worse a situation in a Member State that has more positive measures. I think there is a clause in the Directive already making clear that it cannot worsen the situation. Some Member States are already applying the Directive before its adoption and they are lowering the level of guarantees because of the Directive.

Q657 Chairman: This is clearly a worry throughout the Directive that instead of raising standards it may actually have the effect in some cases of lowering standards.

Ms Castagnoli: It has happened in the opposite way on the minimum standard for refugees and asylum seekers. There the minimum standard is so minimal it will be better just for Italy, which does not have asylum law, and for Greece; it is worse for all the others. Here there is a minimum Directive but some provisions are not minimal because they will oblige Member States to change their laws.

Q658 Baroness D'Souza: You said that some countries were already implementing some of the terms of the Directive before it has become a Directive.

Ms Castagnoli: Yes.

Q659 Baroness D'Souza: In order to lower their own standards they are quoting that as an authority?

Ms Castagnoli: Yes. In France it is said: "You see how good we are, we are better than the Directive, so maybe we will . . ."

Q660 Chairman: Get in line with the Directive.

Ms Castagnoli: Yes.

Q661 Chairman: That is very interesting.

Ms Castagnoli: There is a point I did not mention which is crucial, which is the fact that the transit zones are excluded. That is a very important point. There is not a European definition of what a transit zone is. In France we have been told if there is a problem with a ship coming to Marseilles with illegal migrants they create the transit zone on the spot at the harbour. For example, in France even in the transit zones there are rights and rules to be followed but if we exclude transit zones from the Directive it means that Member States can do what they want to do there.

Q662 Lord Corbett of Castle Vale: Can you just say a bit more about the legal status of those. It is not part of the country for a period?

Ms Castagnoli: There is a case of the Court of Human Rights, *Amuur v France*, where the European Court of Human Rights explained that because a transit zone does not exist—

Q663 Chairman: They are not a Guantanamo Bay?

Ms Castagnoli: No. There is not a definition. We have to consider that they are the territory of the Member State. The fact that there is not a definition and they are the territory means it is very difficult to say that they are excluded.

Q664 Lord Corbett of Castle Vale: They get less legal protection in the transit zone than they would in the country proper?

Ms Castagnoli: Yes.

Q665 Chairman: The French Government does not regard the transit zone as fully French?

Ms Castagnoli: No. We saw a very interesting case in Ceuta and Melilla and we have asked the Spanish Minister to answer on that. There is a fence with two walls and the first wall is on the Moroccan side, but in Spanish territory already, then you have two metres and there is a road where you can go by motorway to control the borders, and then there is the second wall. In the wall on the Moroccan side there are doors. It means when people jump the first fence, they arrive in this corridor and they are just pushed back by the doors by the Spanish authorities saying, "This is part of the barrier", so they do not enter Spanish territory until they get past the second fence. We asked do they mean that this is a no man's land, and they said they consider it is one barrier, the two fences as one barrier, if you are in the middle you are nowhere. The point is the NGOs said the *Guardia Civil* is throwing people out through the back door. We asked this question of the Minister after our visit and we are waiting for an answer. It is crucial because when you are in-between you cannot ask for asylum.

Q666 Lord Dubs: How many transit zones are there? This is quite a new one on me.

Ms Castagnoli: We do not know. The problem the Parliament has is we do not really have power of inquiry and if we ask a question of a Member State they can answer or not.

Q667 Lord Dubs: Really.

Ms Castagnoli: We asked the Commission to see how many transit zones exist in the Member States.

Q668 Chairman: So in preparing your report you are not asking for evidence from government representatives?

Ms Castagnoli: Not really. With all these visits we are trying but it is not something we normally do.

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Q669 Earl of Listowel: Can I just follow up on this. I was a little surprised you had not thought of extending it beyond the age of 18. I think it is very well recognised that where children have had a lot of disruption in their development they need extra protection and in Germany and Denmark, for instance, children cared for by the state are cared for well into their twenties, sometimes their late twenties. I wonder if you would not perhaps encourage your colleagues to look at that point a little bit further.

Ms Castagnoli: I will.

Q670 Baroness Bonham-Carter of Yarnbury: Are these transit zones all in North Africa?

Ms Castagnoli: No. Transit zones can mean airports. For example, the biggest transit zone in France is Roissy, Charles de Gaulle airport, and you have transit zones in the harbours. One Member State asked to consider all the borders as transit zones so they can just reject people from the borders without applying the Directive.

Q671 Chairman: I should not ask you this question but do we regard Heathrow as a transit zone, do you know?

Ms Castagnoli: I do not know. Not all the airports are transit zones. In every airport there is an area. In Amsterdam airport you will remember that there was this fire when all those people died and this was a transit zone.

Chairman: Perhaps Lord Avebury can answer the question. Do you know, do we treat Heathrow as a transit zone?

Q672 Lord Avebury: No. We have centres where people are detained pending deportation and on the airport we have places of temporary deportation where people are held for a few hours pending their removal.

Ms Castagnoli: That is going to be considered as a transit zone.

Lord Avebury: They are not called transit zones and the law of the country applies *pari passu* in those places as it does everywhere else in the territory.

Q673 Baroness Bonham-Carter of Yarnbury: Does the Member State define the transit zone?

Ms Castagnoli: The concept of a transit zone is not accepted by international law. That is why the Parliament is considering the possibility of deleting this sentence on transit zones.

Lord Avebury: With respect, you are absolutely right, there is no such thing as a transit zone in international law.

Q674 Lord Dubs: I find it a bit astonishing to learn so much, I did not know about that. I have two questions. One is, has the concept of a transit zone

been challenged through the European Court? Secondly, what happens to asylum seekers in transit zones? Are they fully covered by the Geneva Convention or can the country say, "You are not in the territory, therefore it does not apply"?

Ms Castagnoli: That is a good question. The only challenge was through the Court of Human Rights, we do not have anything on our side. We do not know what happens in transit zones because there is not a European definition.

Q675 Lord Dubs: But the Geneva Convention—

Ms Castagnoli: Of course that should apply and also all the other human rights principles. We do not consider that the concept of a transit zone is acceptable. For example, in France, at Roissy, not only there is a big transit zone where people are moved there from somewhere else before being rejected but at every terminal when you arrive off your flight the police are there and you can be stopped and kept there and if you do not have a transit visa going into another country you can be pushed back.

Q676 Chairman: Our specialist adviser has reminded me that this is not confined to the European Union because Australia has declared its territorial waters to be a transit zone.

Ms Castagnoli: We will try to see if we can go to court on that.

Q677 Lord Marlesford: I wonder if you can help us to identify some of the main differences of view on the Directive within the Council at the moment. With your co-decision procedure it is clear that the main differences of view in the Parliament are on party political lines and, therefore, they do not necessarily reflect national views. Could you help us to get a feeling for that? (The answer was given off the record) You mentioned derogation. Are you saying that part of the negotiations in the Council is we might go ahead with a Directive but a condition would be we would have derogation from certain articles, that some countries are saying they would support the Directive provided they got a derogation from particular issues that they did not like? Is that being discussed?

Ms Castagnoli: I do not know, they have not got that far. At the moment there has just been scrutiny of six articles and two meetings.

Q678 Lord Marlesford: Is that a possibility? Is that something that can happen with the Directive that in the process of negotiating it you can get a derogation as part of your negotiation? Perhaps our specialist adviser would know. In this concept of *ex ante* derogation in the process of negotiating on a Directive in the Council, can countries say, "Well, we

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might sign up to it providing we get a derogation from article so and so”?

Ms Castagnoli: Transitory derogation, yes. Permanent ones, no.

Q679 Lord Marlesford: So this may be part of the ballgame at the moment.

Ms Castagnoli: For example, on the European arrest warrant Italy asked for a derogation because the Government wanted to check the constitutional involvement. Not on permanent ones, no, that is not possible.

Q680 Viscount Ullswater: When you get to the decision-making process, if the Council on the one hand are producing rather a tough mandatory system which the European Parliament does not like, can you resolve this position through your committee or do the Council always have the opportunity of saying, “No, we are going to withdraw it”? Can you insist on putting it through and putting the amendments to it through saying, “This is the way it has got to be done in co-decision”, or do the Council always have that ability to pull the rug away?

Ms Castagnoli: In the co-decision procedure we have the same level of power. We have the first reading, then a second reading, and if the two institutions do not agree there is a conciliation committee. The Committee, composed of Members of Parliament and Council, have up to three months to agree. Once the Committee has agreed, its Members go back to their own institution and the two institutions accept or reject the agreement. If one of the two chambers refuses then it is over.

Q681 Chairman: In your contact so far with the Commission, have you received the impression that the Commission are ready to consider amendments to the Directive?

Ms Castagnoli: The problem with the Commission is they are used to working just with the Council. There are differences with the Commission officials in the environmental field or in the internal market field where they are used to working with the two institutions and have different sensibilities. The officials of the JLS, the Directorate-General are not so used to working with the Parliament. I have to say I am very happy with the official who is working on that because he is really open with us. Normally we do not get these kinds of documents from other officials, they say “No, it is the Council’s”. When we are in co-decision our meetings are open and we consider if the Council knows what is going on in the Parliament we have the right to know what is going on there. It is the Commission that has to be the link between us but that is not always the case. The Commission want the Directive very much and it fears the fact that the Council may say “No

Directive” if it is too much of a burden. The Member States will go on with their charter flights and they are happy with that. In a way, it is more interesting for the Parliament to have a Directive in this sector than for the Council. I remember there was an Italian proposal to organise joint flights and now there is a decision on that but the Parliament rejected it and at that time we did not have co-decision. It is in their interests to have joint flights, not to have common rules.

Q682 Lord Avebury: From what you have said so far, am I right in thinking that the question of procedural safeguards is not controversial and that there will be no problem in reaching agreement between the organs that have to agree and there is unlikely to be any watering down of procedural safeguards in the course of these negotiations? If there was an attempt to reduce the judicial remedies that were available, for example, would the Parliament in the ultimate be able to block those changes?

Ms Castagnoli: At the end we will have our redlines and we will see how far we want to go, whether it is better to have a Directive with less safeguards or not have a Directive at all. We are not at that stage at the moment. I think members are very clear on their priorities. I am not sure we will deliver this Directive at the end.

Q683 Lord Avebury: On the question of judicial remedies, have you done the same sort of exercise as you were talking about on detention, that is to say examining the different systems that operate in the various countries which we know from the little knowledge that we have of other countries’ systems vary enormously in terms of procedures, terminology and the rights that are accorded to people who are likely to be removed? Is it possible to cover all of those systems in a document of this kind or has there to be some flexibility?

Ms Castagnoli: It is true that the systems are so different that it will be difficult to cover them with a document of seven or 10 pages. We have had the experience of the minimum standards for asylum seekers where one of the main points was the fact that in the Directive the appeal does not have a suspensive effect. That was why we considered that Directive was unacceptable but we did not have the power to say no there. Here the appeal will be one of the key points. I am not sure that we will be able to cover all of the different aspects but it is clear an appeal is an appeal and maybe there could be a difference between administrative and judicial. I do not know if it will go into this detail or will leave more discretion to Member States.

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Q684 Lord Avebury: You said earlier that you did not normally ask governments to submit written evidence but is this not a case where each of the states could describe their own appeal systems and you could make such a comparison which might be very useful?

Ms Castagnoli: Normally when we want something like that we are obliged to ask the Commission to do that. We do not have the ability to ask Member States directly to provide us with information. It is always via the Commission.

Q685 Lord Avebury: Would you consider that? As far as we know there is not any comparative study of the legal systems that operate for asylum seekers and refugees in each of the European countries.

Ms Castagnoli: What we can do, and we are doing now, is we have money every year for asking for studies and we asked for a study on the return system in Europe and on administrative detention centres.

Chairman: What you say is very interesting about working through the Commission because I think Lord Dubs wanted to ask a question on that.

Q686 Lord Dubs: Could I ask you a quick question before the main question I want to ask you. You said you ask for money, from whom do you get money for the work you are doing? Who gives you money? Is it Parliament?

Ms Castagnoli: It is the Parliament. There is a new system that was created last year for helping the committee work. A thematic unit has been created with experts and they can call for tenders for studies in the field linked to the work of the committee.

Q687 Lord Dubs: The more general question I want to ask you is this, and it goes a bit wider than some of the things you have been talking about. You are doing a very thorough job in terms of scrutinising the Directive and we are doing it, but we are doing it differently, and I am sure many other Member States may be doing it also.

Ms Castagnoli: I do not think so. I think you are the best in these things.

Q688 Lord Dubs: Thank you. The day before yesterday we had two Government Ministers talking about aspects of British government policy in relation to all of this. Is it working well that there are two processes, that there is a national process, of which we are a part, and there is a European parliamentary process, of which you are a part? Is there a proper relationship between the two? Are we doing the same thing? Are we duplicating? Is it best to leave it as it is because there is no way of making it more systematic?

Ms Castagnoli: That is a huge question. It is clear that there is a lot of duplication. There is not enough contact between the national parliaments and the European Parliament. Every three months we organise a hearing with the national parliaments on big issues. For example, in April we will have something on integration. We do not have contact like this with you and I think that would be very important.

Q689 Lord Dubs: We had two Government Ministers and we could ask them all the questions you might want to ask of the Member States. In one sense we can do it vis-à-vis the British Government—
Ms Castagnoli: We did it for data retention. (The answer was continued off the record)

Q690 Baroness Bonham-Carter of Yarnbury: You talked earlier about the differences of opinion between the Member States over this Directive and mentioned the UK's attitude to a couple of things but, of course, the British Government has decided not to opt in. I am wondering what the views are of the committee about Britain opting out of the Directive.

Ms Castagnoli: We are so used to it! The strange thing is they comment on the Directive in the Council even though they do not participate.

Q691 Baroness Bonham-Carter of Yarnbury: And they are being listened to?

Ms Castagnoli: Yes, that is the problem!

Q692 Chairman: You have been extremely helpful, thank you very much. Just on the relationship between your work and our work, it does occur to me from this conversation today that there might be scope, I do not know, perhaps Neil Bradley from UKREP can comment on this, for more exchange of information between us. You have been extremely helpful today in terms of telling us what you do and what your views are and the views of your colleagues. I do not know whether, for instance, the transcripts of our meetings go to the European Parliament but there is absolutely no reason why they should not. They are on the website.

Ms Castagnoli: We already receive something. You are the only Parliament that is really active and in good time because other parliaments arrive too late sometimes.

Chairman: I am not trying to strike a bargain with you but on several points you have mentioned today it would be extremely helpful for us if you were able

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to give us a little more detail in writing, for instance the records of your visits to various detention centres. We will be visiting a British detention centre next week. I think I shall have to suppress the desire of my Committee to travel all the way around Europe! We will pursue that argument later. Would you consider in the light of this conversation whether you have anything that it would be helpful to let us have.

Q693 Lord Dubs: You do not fancy a trip to London every few weeks, do you?

Ms Castagnoli: Why not?

Chairman: That apart, can I thank you very much indeed. You have given us extremely helpful answers to our questions. If I may say so, I am deeply impressed since you started off by giving us the impression that you are so early on in your inquiry that you were not going to be able to answer any of our questions and you have answered them all very fully and very frankly. We will respect the points that you made off the record, of course. Thank you very much indeed.

Examination of Witnesses

Witnesses: DR ALAN HICK, Head of Unit, Section for Employment, Social Affairs and Citizenship, and MR PIERLUIGI BROMBO, Administrator, Section for Employment, Social Affairs and Citizenship, European and Economic Social Committee, European Commission, examined.

Q694 Chairman: Dr Hick, Mr Brombo, thank you for coming. You are very welcome. You know the purpose of this meeting. We are engaged in the scrutiny of the Directive on returns policy. Against the background of the fact that the British Government has decided not to opt into this, we are nevertheless engaged in a full House of Lords scrutiny, as is our wont. It is very good of you to agree to come and give evidence to us. I wonder if you could start by explaining to us what your scrutiny process is and if you want to ask any questions about our scrutiny process obviously I would be very happy to answer your questions. Could you start by explaining how the Economic and Social Committee operates in this area?

Dr Hick: Thank you very much for the invitation. Pierluigi and I are very pleased to be here with you. I have been at the Economic and Social Committee for 23 years working especially on social policy. Pierluigi is our specialist on immigration and asylum issues, so he will be speaking more than I. The Economic and Social Committee is a consultative assembly of the European Union. There are obligatory consultations and non-obligatory consultations of the committee on Commission proposals on draft legislation, on communications, Green Papers, et cetera. On immigration and asylum the procedure is not normally obligatory, so the Council does not have to refer a proposal to the Economic and Social Committee, it is only to the Parliament under Article 262. However, on a lot of issues the Commission certainly does refer proposals or Green Papers to us.

Q695 Chairman: That is their initiative, is it?

Dr Hick: That is their initiative, it is their right. When it comes to actual Directives the procedure does not explicitly foresee a consultation of the Economic and Social Committee. In fact, on the Returns Policy Directive we were not consulted but

we came back to it—Pierluigi will describe that in more detail—and we have given our views on that policy. In general on immigration and asylum I think the Committee has a very credible reputation. We have had a lot of own initiative opinions and we have the ability in the Treaty to propose policies without having referrals from the Council or Commission. I have a big portfolio of documents and opinions and conferences on that issue. We have had an impact certainly vis-à-vis the Commission on immigration and integration policy. It is something that we feel quite proud of. On this particular policy area I think the position of the committee was a little bit critical of the way the Directive was drafted and possibly in the process of being implemented. Especially there were fears of collective returns and how that would be seen and administered.

Q696 Chairman: When you say you have given your views on the Directive, does that mean that you have completed your scrutiny?

Mr Brombo: As you may know, the Directive was prepared at Commission level by a Green Paper and by a communication which was issued in 2002 by the Commission. On these documents, which were preparatory to the Directive itself, the committee issued two opinions that you have in your files. Our presentation and the position of the committee would be more on the Green Paper and the communication, although most of the elements which are in the Directive, as they were preparatory documents, you will find here already. There may be some more specific points in the Directive now that we did not talk about because they were not foreseen in the communication or in the Green Paper. We may give you a more political view instead of a very technical one on very specific points, although we did mention some of those points but not in so much detail.

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Q697 Chairman: Perhaps we have this but your comments to the Commission were in writing, were they?

Mr Brombo: Yes.

Q698 Chairman: Is that available to us?

Mr Brombo: You have it in your files.

Chairman: I beg your pardon.

Q699 Baroness D'Souza: Does the committee generally support the idea of a return procedure or are there members who feel that it should be left to Member States?

Mr Brombo: As a general rule we think there is the need for an EU co-ordination policy on immigration and asylum matters. We feel there is the need for a framework and although there is always room for subsidiarity we think that more aspects should be left to Member States. On this specific issue we think there is a need for a European framework not least because some NGOs, like the Red Cross and others, pointed out that there were some problems in respect of human rights in some specific Member States. We do feel that there is the need for a European framework which would establish some limits on the policies of Member States. In this field we thought it would be good to have a framework like the Directive which is a minimum standard. We do feel there is a need for at least a minimum standard Directive.

Q700 Lord Dubs: Given that your committee has representatives from both sides of industry, are there any differences in views on the employers' side or the employees' side?

Mr Brombo: Yes. In immigration and asylum matters it is difficult to see the difference sometimes between what we call group one, which is employers' associations, and group two, which is employees' associations. The committee is a tripartite committee, there are various interests. Between groups one and two sometimes it is difficult to see the differences and the divisions are more national than group-wise. For example, you might have a trade unionist from Germany or Austria who is more closed on some aspects of immigration than an employer from Italy or Spain or Belgium. Sometimes that is the nice thing in working at the European level, the divisions cross each other but it is up to a single member to have a stance which is more or less open. It is not so clear between groups one and two.

Dr Hick: If I may say, in general on our policies on immigration and asylum there has been a broad consensus in the committee, not to say unanimity. There is not that division between employers or workers that you might imagine on that policy area.

Q701 Baroness Henig: Article 3 of the Directive defines "illegal stay". I wondered whether there was a uniform understanding in Member States of what constitutes an "illegal" third country national. If there is not such a uniform understanding this would have significant implications presumably.

Dr Hick: To be honest, it is not a point that we addressed specifically.

Mr Brombo: As a general rule on the term "illegal", as a committee we would prefer the term "irregular". We think the term "illegal" gives the impression that there is a criminal in front of you. We think there is a lot of work to do in this field in the mass media. We think the words have their own importance, which is why we prefer the term "irregular".

Baroness Henig: That is very interesting, thank you.

Earl of Listowel: Can you tell us the committee's views on some of the most important features of the proposal, such as the mandatory issue of return decisions; the voluntary return period of four weeks; the mandatory judicial review of return decisions and temporary custody orders; the maximum period of detention of six months; and the proposed EU-wide re-entry ban?

Q702 Chairman: Can I suggest in answering this, if you want to draw attention to your written evidence we will take it as read.

Mr Brombo: Some of those were not addressed in our opinion so we could tell you our position but not the committee's position. I will try to stick to the positions we have adopted. The first general view is we can say the committee would give priority to voluntary returns and think forced return should be seen as a last resort. To give meaning to that and not to leave it as words we think there should be adequate resources because of the work that needs to be put in practice. Both at European and national level there should be adequate resources in order to make voluntary return possible. That means we can have the involvement of international organisations like the IOM, the UNHCR, which are very expert in this field, and should be used as much as possible because they always follow the humanitarian approach which is very important for us. We thought in the communication from the Commission that there was too much space for forced return and not enough on voluntary return which should be given priority. On the period of how long should we try with voluntary returns, we did not say specifically on that but as a principle we said it should be long enough to make it possible, not just theoretically. On the forced returns, our main point is this should be made in respect of human rights and fundamental freedoms; that goes without saying. That is referenced in the European Convention on Protection of Human Rights and the Charter of Fundamental Rights. For example, as Alan was saying, there should not be collective

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expulsions. Another point in this field is there should be nothing which threatens the physical integrity of the people being returned. There should be some principles which should be respected, for example the returns should never separate the person from their family members. That is quite important for us. That makes a referral to the Family Reunification Directive that has been adopted by the EU. Another point which is very important to us concerns minors. The return should never be harmful for minors, which means you cannot chase a parent into leaving the son or the daughter in the country. Another point which is important is the person concerned should never suffer from physical or mental illness and in a way that makes things quite difficult. Safety of life and the freedom of the person concerned should never be threatened either in the transit country or in the country of origin to which he is sent back. For us there is a humanitarian side that should never be forgotten. On detention, which was mentioned, for us detention pending expulsion should never exceed 30 days. That is a limit that is quite different from what is foreseen in the Directive. Moreover, it should never be in ordinary prisons. As Alan said before, we do think that illegal residents or irregular residents are not criminals so they should not be mixed up with people in prisons. It should be by judicial authority with the facility of an appeal and the appeal should have suspensive effect otherwise if you send him or her back, even if they win an appeal, they will never be able to come back. It should always have suspensive effect. I hope I have answered most of your points.

Dr Hick: There was a bit of a disagreement between the committee and the Commission on the collective individual expulsions. The Commission said that they had no intention of sending people away collectively but we argued that in practice that is what happens and we have to be very, very careful about how that Directive is implemented. Even if the intention is not collective expulsions the practice is.

Q703 *Baroness D'Souza:* That is exactly what I was going to ask you about, but I want to go one step further and ask why you are particularly critical of collective returns expulsions?

Dr Hick: Because it gives a terrible image to the Member States, to the European Union. It is a throwback to the situation before the war, if you like, where people were not allowed into countries collectively. We did not think it was an appropriate way of dealing with it.

Q704 *Baroness D'Souza:* I do not quite understand what "collective" in that sense means? Is it more than two people to the same country?

Dr Hick: It means a plane full of people forcibly ejected from a country.

Q705 *Lord Avebury:* Was it not the point that it was in Lampedusa that people were collectively expelled without the right of an application for asylum? It was not that people should not be bundled on to the same flight when their individual applications had failed. Presumably you do not object to the idea that a number of people should be placed on a charter flight by the state performing the expulsion but only that those people should have had an individual right of application prior to the expulsion.

Dr Hick: That is clear.

Mr Brombo: That is the point.

Q706 *Lord Avebury:* Is Lampedusa the only case of collective expulsion that you are looking at?

Mr Brombo: We set the principle, we did not analyse each individual case. As a principle we do think it is very important in the way it is foreseen in Article 19 of the Charter of Fundamental Rights that it should not be collective expulsion. When you say "collective expulsion" it is not an individual examination of each case. It may be a technical meaning if you put more than two people on a plane but it is very important to have an individual examination of the dossier of each person. Lampedusa was really on the border, let us say.

Q707 *Chairman:* This is not a point covered in the Directive at all.

Dr Hick: No.

Q708 *Viscount Ullswater:* You have mentioned particularly that you would like the period of detention to be reduced to 30 days. I wonder how practical that is when the issue of documentation very often takes longer than that. What are your views about the status of the person at the end of the 30 days? Does he have to be released into the community with some temporary status until documentation can come through? I am thinking of the risk of absconding. How would you deal with that in practical terms?

Mr Brombo: We think that human rights should come before laws and resources. Thirty days may not be enough if you do not put in enough resources to examine the cases. In order to have 30 days there should be enough resources. It is the same for asylum. The examination of requests for asylum take too long often and that is not the fault of the people asking for asylum but it is the fault of Member States who do not put in enough resources in order to examine it properly.

Q709 *Chairman:* It would not necessarily only affect EU resources. The issue of passports or visas or whatever it is by third countries could very easily, in fact I suspect very often, take more than 30 days.

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Mr Brombo: Yes.

Q710 Chairman: There are real practical problems.

Mr Brombo: Yes. We want to underline that it is important to give resources to the policy and to human rights.

Q711 Lord Marlesford: As a Committee we are particularly concerned with vulnerable groups and children. A moment ago you referred to that but would you like to expand on defects you find specifically in the case of children? You used the word “minors”, I think. What is the age limit you envisage for minors because there seem to be somewhat different views throughout the EU on this?

Mr Brombo: We did not go into the detail of defining minors. We know there are problems in the Family Reunification Directive and it has been referred to the Court of Justice because it foresaw that persons over 12 should pass an examination to see if they were integrated into the country. It makes a difference if it is 18 years or 12 years but here we did not specify, we just said “minors” as a general rule.

Q712 Lord Marlesford: Are there particular problems in the Directive as it now is which you want to draw to our attention in respect of vulnerable groups or children or minors?

Dr Hick: As we said, it is minors.

Q713 Viscount Ullswater: I think you have given us the view that in most of the areas of justice and home affairs the committee comes to an almost unanimous view. Is that so in this case? Now you have seen the particular wording of the draft Directive do you think, although maybe you have not examined it in detail, there will be any differences in the committee now that the full wording is in front of you?

Mr Brombo: As we have not been consulted by the Council, and it was up to the Council to decide whether to consult with us or not and they decided not to, we have not examined the Directive itself. We will not say anything on it as we have not been consulted.

Q714 Viscount Ullswater: You do not feel obliged to put in another opinion?

Dr Hick: It is possible, with an own initiative opinion, but unlikely.

Q715 Viscount Ullswater: You feel that the committee would be in agreement and produce a unanimous decision?

Mr Brombo: I would think so but I do not think we will because our own initiative opinions, for example, are on European citizenship and integration. At the moment we are doing our own initiative opinion on the integration of immigrants. In the framework of

this opinion we had a conference in Dunblane under the UK Presidency. In this specific field I do not think we will do our own initiative opinion as we did the two opinions on the Green Book and the communication. We feel we have said what we want to say to fix the limit on these two documents.

Q716 Chairman: Is it your impression that there are so many worries, problems about the Directive from the national parliaments and the European Parliament, that at the end of the day it is likely not to issue? That may be a rather leading question.

Dr Hick: I think we were concerned certainly from the contacts we had with humanitarian organisations rather than organisations in the Member States as such. On the consensual nature of this, our opinions were adopted without any votes against, one vote against, but on the opinion itself, which was to a degree critical of the Directive—

Q717 Viscount Ullswater: I understand that. It was a unanimous opinion of your committee. I do not mean to say that it was not critical but you were not divided in your committee.

Dr Hick: No.

Q718 Lord Avebury: You said earlier on that the committee would continue to work on the draft Directive. What is the end product of that? If you are not going to submit an opinion, if you have not been asked to submit an opinion and you do not do so voluntarily, then there will not be such a thing as a revised text or even revisions to particular articles. What will be the end product of the additional work that you are now conducting?

Dr Hick: In my opinion it will be an additional own initiative opinion. Since the council is highly unlikely to refer this back to us we could get a referral if we wish from Parliament, that is a possibility which could be discussed with the European Parliament. My own guess is that we will come back to the issue, along with other issues of immigration and asylum, in a new own initiative opinion. We do lots of own initiative opinions in this area. We are busy doing one now on integration and the role of local authorities. My own feeling is that in the new mandate from October this year we will come back and review the situation with an own initiative opinion.

Q719 Chairman: Your initiative opinions go to the Commission, do they?

Dr Hick: Our initiative opinions go to all institutions: the Council, the Parliament, the Commission and interested groups.

Q720 Lord Avebury: You are obviously not in any hurry over this. If you are not going to start considering it until October this year you do not

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think that the Directive is going to make very much progress within that timescale, do you?

Dr Hick: Possibly not.

Q721 Chairman: Another leading question for you.

Dr Hick: We gave our two opinions a couple of years ago. We are continually addressing the big problems of immigration integration, and this is one of them. I think we are in a hurry in general on the whole policy area.

Q722 Chairman: Do you really see this as a part of your opinion on the Green Paper and all that followed?

Dr Hick: Yes.

Mr Brombo: As a general rule the consultation of the committee is not mandatory. In this area we feel it is important to intervene as early as possible before the Directive is drawn up and that was why we did opinions on the Green Paper and on the communication because as the Commission is not obliged to follow what we say we think it is very important to give an opinion at an early stage. The Commission consults us on an exploratory basis, which means before even having a text in mind, which is why we try to bring political pressure as early as possible.

Chairman: If you want to go off the record at any point, you are very welcome.

Q723 Baroness Bonham-Carter of Yarnbury: You talked about the admirable ability of your committee to achieve agreement. What we have gathered over the last couple of days is this is not something that the Council seems to be managing. I was wondering, in your view, what are the main differences of opinion within the Council and is this going to complicate co-decision with Parliament?

Mr Brombo: As you may know, in most of the proposals tabled by the Commission there was no agreement at Council level or it took so long the proposal was watered down. You may remember the Directive which was presented in 2001 on legal channels for economic migrants and was never adopted. Now the Commission is coming back with a much less ambitious proposal for a programme for legal migration. It was difficult for the Council to find agreement, not least because there was not unanimity which was needed for legal immigration. Maybe in this field it will be a bit easier as it answers the needs of Member States to put controls on the borders. This is a Directive which goes in the direction of closing rather than opening so they may find agreement more easily but still it will take time.

Q724 Baroness Bonham-Carter of Yarnbury: What we have been picking up is that there is great difficulty in finding agreement. You are not aware of specific areas where problems are occurring?

Mr Brombo: Not in this specific Directive. As a general rule we know that often there is disagreement between some Member States, for example Germany and Austria who felt that they were put under pressure on the theme of new Member States and the transitory period set up for new Member States. That was felt mainly by Germany and Austria because they felt they would receive a lot of people from the new Member States. It depends on the fears of each Member State. For example, the UK pays quite a lot of attention to asylum while Spain, Italy and Greece pay more attention to illegal immigration because they are the first countries to receive the flow of immigrants. Sometimes it depends on the political side or the situation in each of the Member States.

Dr Hick: Certainly the Committee has been consistently critical of the Council's failure to deliver in the whole policy area.

Q725 Earl of Caithness: In reply to Lady D'Souza's question at the beginning you said that there ought to be a framework with minimum standards. Is not the great danger of that that you get a framework with minimum standards and the countries that have much better practices all ratchet down to the minimum standards because that is the legal requirement and they can hide behind Brussels?

Dr Hick: May I answer that going back to social policy, which is something I know a bit more about. The same things were said 10 or 20 years ago when we discussed the European Social Charter and minimum standards and the platform of minimum rights and so on. The Scandinavians were particularly concerned that it would drive down their working condition standards and it did not happen because minimum standards are not necessarily the lowest common denominator and they do keep the momentum going. There is nothing obliging Member States to ratchet down. The fact is if you have minimum standards, some standards, it enables them to keep the standards they have already achieved but if you have no standards at all in some Member States then that might be a worse scenario still.

Q726 Earl of Caithness: But you have international standards.

Dr Hick: Yes, but the implementation of international standards is not always as clear as the implementation of European standards.

Q727 Earl of Caithness: Two more quick questions. Firstly, do you think there is any added value in this Directive other than just plain harmonisation? My supplementary is will not your requirement for

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maximum detention of 30 days just encourage third countries to prevaricate?

Dr Hick: The added value comes from having some sense of uniformity for a common challenge. If each Member State goes its own separate way that could create problems for a Europe of free movement which is still aiming at close integration. On the 30 day issue, as Pierluigi said, essentially it was seen more from a humanitarian aspect than an administrative one.

Mr Brombo: That could be the same with three months or four months. There will always be the risk that third countries will try to use it as a limit.

Q728 Earl of Caithness: We had evidence yesterday that this was the problem, in fact, that some countries that have got 30 days were finding great difficulty in getting agreement with a third country and were very happy to start using six months because that is in the Directive.

Mr Brombo: It is a balance between human rights and the 30 days. We said 30 days because we thought it was a good period of time. In practice it may be a bit shorter but six months is definitely too long. It is a matter of resources and people. Sometimes we hide behind the fact that it is the fault of a third country but one has to see if it is that or a lack of will and resources on the European side. It is a matter of balance and on the one side of the balance you have human rights, which is not something you can just put behind you.

Q729 Earl of Listowel: We have had very little discussion on vulnerable children and families and I would like to ask a couple more questions on that. In your own initiative reports have you looked specifically at the treatment of children and families? Perhaps if you are continuing work on this area, are you considering looking at the age issue of children and in particular whether there might be a psychological assessment at the age of 18 to see whether there has been an impact on the developmental growth of the children because in many cases in many countries it is recognised that if there has been severe disruption additional legislative protection should go on to the age of 21 and sometimes beyond? For instance, the Children's Commissioner for England is responsible for children and young people in care until the age of 21 because it is recognised that many of them have had disruptions in their childhoods. Perhaps you would like to think about those rather than respond now.

Mr Brombo: We did not go into the details, we just set up the principle that it was very important for us that the more vulnerable groups, such as physically and mentally disabled people, minors, should be taken care of, or families, but we did not go into the detail. It is a problem and that is why we pointed it out but without going into the details so much.

Dr Hick: There were some problems we looked at concerning older children once they become adults and they do not have the right to stay with their parents any more in the country where they have arrived and that is a question we have addressed.

Q730 Lord Corbett of Castle Vale: Does the committee have a view on the British Government's decision to opt out of this Directive? Do you see it making difficulties?

Mr Brombo: Not in this specific field but as a general rule we do think that it is important that all Member States comply with all EU legislation. That is a general rule and it applies to that as well.

Q731 Lord Dubs: Why?

Mr Brombo: We do contribute to the setting up of new legislation and we do think it is important. Not always, there is legislation we do not like. We do think in this field when it sets out some minimum standards, keeping in mind what some NGOs told us that in some Member States they were not complying with human rights international legislation, it is important to respect this Directive. We do feel that it is not perfect, as I said before. I do not know the UK legislation in this field, so I am not judging it, but in general in some Member States there are some problems. I am not saying that is the case in the UK, I do not know the details. We do think this should be a matter of balance. Maybe the UK legislation guarantees more rights to people who return but I do not know, it is up to you. I answer that as a general rule.

Q732 Chairman: Can I thank you both very much indeed. It has been very, very useful to us and very helpful in terms of our inquiry. We will send you a transcript of this meeting. Have a good look to make sure that we not have put into the record things that you did not want put into the record and check on the accuracy. I should say that with Susan taking notes I have no doubts about the accuracy. Thank you very much for coming, it has been very helpful. I wish you both good luck.

Dr Hick: Thank you very much again for the invitation, it is a privilege and a pleasure to speak with you. I hope to see you again.

Chairman: Thank you.

WEDNESDAY 8 MARCH 2006

Present	Avebury, L Bonham-Carter of Yarnbury, B Caithness, E Corbett of Castle Vale, L D'Souza, B	Dubs, L Henig, B Listowel, E Marlesford, L Wright of Richmond, L
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Examination of Witnesses

Witnesses: LORD TRIESMAN, a Member of the House, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, and MR TOM DODD, Director of International Delivery, Immigration and Nationality Department, Home Office, examined.

Q733 Chairman: Thank you very much indeed, Minister, for coming to give evidence. As you know, this is an inquiry into a Commission Directive into returns policy, and this session is on the record and is being taped for broadcast. Can I also say that I find, but perhaps I am going deaf, that the acoustics are not perfect in these rooms, so can I please ask everybody to raise their voices when they are talking. It is very good also to welcome Tom Dodd, who is now becoming quite a familiar visitor! Minister, can I start off by asking whether you would agree that the Commission's premise that common standards for return procedures are an essential element of a common approach to problems with asylum and illegal immigration? Can I couple that with the question of which parts of this Directive are of particular interest or concern to the FCO?

Lord Triesman: Thank you very much, and let me say I welcome the opportunity to come this afternoon. The draft Directive as I, and we all, know was issued as part of the Community's returns policy on illegal residents. It was an issue focused on facilitating operational co-operation between Member States and that is something that we welcome. Like all Member States, certainly like a number of other Member States, however, we were not convinced of the need for common standards in this area particularly as we feel that they could add some considerable bureaucracy to what is already a pretty complex process. We believe that as part of the package of measures on illegal immigration the draft Directive has not yet struck the right balance between safeguards and facilitating Member States' returns. The Government considers that a common approach to the return of illegally staying third country nationals, particularly in the area of facilitating operational co-operation between Member States, is an integral part of the fight against illegal immigration at European level, but we believe that in some respects the Directive goes too far. It is possible to have effective co-operation in our view without restrictive standards such as these, and we believe that in many cases it will be likely to hinder returns rather than to facilitate them. Practice, policy and

legislation on removal differ widely among Member States. Those differences have not proved so far a bar to effective co-operation at an operational level as shown by the joint removals operations. The draft Directive will impose unnecessary burdens in our view that would have the effect of reducing the effectiveness of our returns efforts and would undermine much of the good work being done in EU countries. The parts of the proposed Directive that are of particular concern to the FCO are these, and there is some detail here and I will be guided by you, if I may, Lord Wright, as to how much of the detail you would find helpful because I can either do it in headlines or with the detail, whichever you prefer.

Q734 Chairman: Can I say, Minister, that if you think your proposed reply is too detailed it would be very helpful if you could let us have a note in writing afterwards, so I leave it to your judgment.

Lord Triesman: I am very willing to do that. Let me start with what I think are the headlines because that will, I hope, help the Committee to make that judgment. We are concerned with the proposed Directive for very much the same reasons that the Home Office is concerned with it, and all of our work as evidenced before you today has been done very closely together. The proposed Directive will require the United Kingdom to amend various aspects of law and policies in relation to the returns process. We think it might render non-suspensive appeals, that is where the Home Office has certified a claim as clearly unfounded and therefore an appeal is an out-of-the-country one, as producing incompatibilities, and there is a wealth of detail here about the various kinds of appeal mechanisms which we believe serve the purposes very thoroughly and fully, and I would be very happy if that is helpful, and I suspect the Home Office may well have done it, to provide that detail. We think it could well hinder our ability to detain third country nationals by subjecting detention to judicial supervision, and that would produce some quite considerable difficulties in some cases where the time limits would be significant. It could constrain our ability to expel third country nationals on

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security grounds, a matter now of very, very considerable importance to this country, and it could lead to an increase, as I have said before, in the administrative burden resulting in cost and time implications. Let me say that when I describe the desirability of not getting into excessive administrative burden, that is not because I am trying to convey the view that we should take simple but unsatisfactory ways through problems but rather that we should not become so regulated that it, in fact, becomes an art to just simply go through the regulatory system rather than produce the right result.

Q735 Earl of Caithness: Minister, in view of what you said at the beginning why did you not object to the legal base and say that this was a matter of subsidiarity? If we can get all our agreements by common agreement with our partners in Europe, why the heck do we need this Directive? Why should we not use subsidiarity?

Lord Triesman: Well, we have started from a position where, as I am sure you know, we have opted out but by various routes can opt in. I think we have tried to find the best basis we can where we can for levels of co-operation, and for those reasons I think we have tried not to be unnecessarily abrupt with our European partners. That is sometimes tempting, but does not always produce precisely the result that we would seek. I think that this is very much a matter of saying that we can see certainly among some European countries a desire to make progress on this front: we can see areas on which we are concerned to have a good level of co-operation and to demonstrate that where we feel it is desirable and where we can do it we will do it, but not feel bound by reasons I have given. Now some may say there are other ways of viewing that balance and perhaps the question implies another way of viewing that balance, but that is how we view the balance.

Q736 Baroness Bonham-Carter of Yarnbury: You have spoken about your concerns over this Directive but are there areas where it might be helpful, for instance, co-operation with third parties is essential for any policy on returns, and could the proposed Directive actually facilitate such co-operation?

Lord Triesman: We certainly considered that very point with a good deal of care before we responded to the Home Office's request for us to provide a considered view. The main instruments we feel that have been designed which should facilitate co-operation on returns are the EC and the bilateral readmissions agreements, not the measures like the Returns Directive. It may be possible that when adopted the Returns Fund will provide money to build further ground for good work, practical relations I think between Member States on returns,

for example, to facilitate the process of redocumentation—all of those may be important areas of further work. But the draft Directive is, we think, primarily concerned with providing, as it puts it, clear, transparent and fair common rules concerning return, removal, use of coercive measures, temporary custody and re-entry which take into full account the respect of human rights and fundamental freedoms of the persons concerned, and for those reasons it does not seem to us to be primarily designed to facilitate co-operation with third countries on returns; we have had to do some other work in other ways to achieve that.

Q737 Baroness Bonham-Carter of Yarnbury: Do you think it should be?

Lord Triesman: Well, there is always the possibility of more work being done on the Directive: indeed, that option is open and it is not inconceivable. I think it would take a while to get to that point but I do not think anybody has ruled out that further discussion is a possibility.

Mr Dodd: If I may say so I do think that element is outside the scope of the Directive and something we would wish to take forward either through the EC readmission agreement approach or through other contacts.

Q738 Lord Marlesford: Lord Triesman, to what extent, in what practical way, is there co-operation between HMG and other EU governments on finding third countries to which people can be returned? We have all heard a lot about the various bilateral agreements of certain countries. It would be helpful if you could tell us which countries you have got firm acceptable bilateral agreements as far as HMG is concerned and if there are any other countries that other EU Members have agreements with which we can follow or build upon.

Lord Triesman: Thank you for the question. There is a good deal of detail in this but I certainly I think I can give what I hope will be a helpful picture of it all. Firstly, the G5 and the EU countries, the Member States, have been working for some time, as I think is implied in your question, on bilateral and trilateral joint removals operations involving charter flights, and we have worked in these areas, and this is the most practical demonstration of it, with France, the Netherlands and Spain, and we are making case-by-case decisions on whether proposed joint operations for the future might also be satisfactory where arrangements, in our view, are appropriate and are likely to work without infringement of human rights. We are very supportive of the work on co-operation; it has certainly been a very big part of a number of discussions that I have had in this area of work. The overall pattern is reflected in the Seville conclusions and that has been the basis for the returns action

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programme. Firstly, then, let me go through some of the bilateral arrangements that we have against that background. We have negotiated bilateral arrangements with Romania, Bulgaria and Albania and all of those agreements are in force. We have completed negotiations with Switzerland, and we are in the process of ratifying that agreement. Negotiations have been opened and are now under way with Serbia and Montenegro. In the case of the EU we have completed negotiations with Hong Kong and Macau, and both of those agreements are in force. Agreements have been signed with Sri Lanka and Albania but are not yet in force. I do not know if we have details and likely timetables?

Mr Dodd: Not at the moment, no.

Lord Triesman: Negotiations on the agreement with Russia have been concluded but the agreement has not yet been signed; there is a conclusion. Negotiations are currently on-going with Morocco, Pakistan, Ukraine, Turkey, China and Algeria. We only negotiate agreements where we believe there is a specific need, we have not just tried to do it in a blanket way, and where we do do it as bilateral agreements we try to tailor them to suit our own bilateral relationships and, of course, the needs of the country involved. Bilateral agreements tend to take very much less time to conclude than EU agreements—that does tend to take a little longer—and concerns third countries may have regarding the number of returns involved generally are increased when you try to seek an EU-wide agreement. For obvious reasons more people are gathered into the process.

Q739 Chairman: Are any returns going on pending negotiations?

Lord Triesman: There are a number of returns going on to all sorts—

Q740 Chairman: I mean to the countries with whom we are negotiating?

Mr Dodd: If I may, Minister, I think there is a distinction here between bilateral readmission agreements and the returns MOUs we have with a number of countries. For example, in the case of Pakistan we have a returns MOU with Pakistan; there are also negotiations continuing on an EU readmission agreement in parallel to that returns MOU.

The Committee suspended from 4.13 pm to 4.21 pm for a division in the House.

Q741 Lord Avebury: Before moving on to the next question could I ask a supplementary, first, on the re-admission agreements and inquire whether you think we should be making greater efforts on a European scale to ensure that EU letters will be accepted by the

countries of origin considering the enormous difficulties that we are experiencing, and presumably others as well, when somebody comes to the end of the road on asylum and then we find they are not acceptable in countries of origin because we cannot get passports or an equivalent document? Is there not a lot to be said for the EU letter which bypasses the necessity for reissuing a document belonging to the country of origin?

Lord Triesman: I wholly agree with that and many of the discussions with High Commissions and Embassies where we are facing the problem of there being no documentation and very long time periods in issuing new documentation, if it is issued at all, does draw us I think inexorably to the prospect of using EU letters, and we do urge that.

Q742 Lord Avebury: My second question relates to what you were saying about the constraints on our ability to return people on security grounds and may we thank, through you, Mr Alexander for the letter he wrote last week to this Committee. I wonder if you could tell us a little bit more about this and whether you think they should be implemented on a Europe-wide scale? In other words, that the memorandum of understanding and the monitoring arrangements which we are aiming at, first with Jordan but then a number of other countries of the region, should be expanded so they cover the whole of Europe instead of applying exclusively to the United Kingdom in other countries concerned?

Lord Triesman: In an earlier answer, Lord Avebury, I was making a point which I think is sustained empirically that it takes a very great deal longer to negotiate an arrangement if we do it through the EU for a variety of reasons than it does if we do it bilaterally. Now, I am not averse to getting a good agreement through the EU if we can do it, inwith a reasonable period of time and reasonably effectively, but we have made some agreements and we are pressing ahead with others, subject to the conditions that Douglas Alexander has set out in his letter. For those reasons I think that there is a very good reason to try and proceed bilaterally where we conclude we can meet the conditions that we have to meet in order to proceed. Is it worth it in the middle term to see if we can get a wider buy-in from the EU? Well, my own instinct is that it is worth the effort but it is a very considerable effort and I think that that is something that we would need to discuss with the Home Office who have to negotiate the MOUs, because I suspect they will not thank me if I commit their resources to the extent I am just about to do.

Chairman: Now is your opportunity!

Q743 Lord Avebury: In this context we are obviously considering the applicability of such an arrangement to the Directive and whether or not the Directive

could be extended so as to include some provision of this kind, but if we did that could you say how you will satisfy other European countries that the monitoring arrangements that exist with Jordan at the Adaleh Centre would render us immune from proceedings under Article 3 in respect of anybody who might be returned?

Lord Triesman: I think we are confident that the requirements that we have of any NGO that would be in that position, in this case the Adaleh Centre, do meet the requirements and we have absolutely no evidence of anything that would make us distrust that conclusion. I do not think there is a difficulty in sharing that information with the home departments of other European countries, or them drawing their own conclusions from their own bilateral links, because I would candidly be extremely surprised if anybody came up with something that would make them distrustful in an area where we are fairly confident, or perhaps very, that we have got what we said we would get.

Q744 Lord Avebury: If you said these arrangements were satisfactory it would obviously reinforce the assertion, if you got the other 25 to agree to it?

Lord Triesman: I hope I have put the point as fairly and in terms as I can. I do know, although I do not specialise in Europe but from the bits of Europe I do do, that getting the 25 to agree to anything is one of the more time-consuming things one does in life, and I have learned not to hold my breath.

Chairman: We will not consume more time on that point!

Q745 Baroness D'Souza: Are there any elements of the Directive which you feel might be particularly counter productive in view of the United Kingdom's current policy on returns?

Lord Triesman: Yes, I do. I think I have probably touched on them when I was talking about the broad disadvantages before and I do not think I can add greatly to that list, but the whole of the issue of non non-suspensive appeals I think would fall into the category that you have asked about. I think that the ability to detain third country nationals in a way that is appropriate by subjecting detention to judicial supervision would be a problem for us, would be a disadvantage for us. The constraints on the expulsion of third country nationals on security grounds, as I said earlier, would be a significant issue, and we also, as I said, think that there are very considerable administrative burdens. Now, I do not draw from that conclusion that these things can never be overcome but I wonder if I could just add this thought? When talking to other European Member States they describe the tasks that would be involved in either changing their administrative systems or, in some cases, introducing the legislation at primary

level that would be needed to take this forward as being itself so burdensome that they are not at all certain whether or when they would do it. That is just an honest description of the things that come back when talking to colleagues from other countries, so I think that although a number of people will have the same reservations about it that we do other Member States have still more reservations, not least how they are going to apportion legislative time. For those reasons I have not got a strong sense that the Directive is at the top of anybody's agenda very much.

Chairman: One of the problems to which your European colleagues refer is legislating to improve their standards. One of our concerns is that if you set very firm limits people may use that as an opportunity to reduce their standards.

Q746 Earl of Caithness: Minister, would you agree that this Directive will just be viewed as the basic common standards of the EU with precious little value added? If that is the case, is it not going to be much harder to get agreements with third countries for returns in the future, and will not our present international obligations with those third countries be weakened?

Lord Triesman: Our position is that when we look at the Returns Directive we do not think it will in any material way affect our ability to negotiate bilateral returns arrangements with third countries, which has been the route that I have emphasised we have taken. We do not think it will affect our ability to opt into EC re-admission agreements should we wish to do so, which are negotiated by the Commission in a way which accommodates different practices across Member States including the more flexible arrangements—when compared with the draft Returns Directive—that we operate in the United Kingdom. We have participated in the United Kingdom, and we continue to participate in, a number of operational things on a co-operative basis, including joint operations like charter removals, and it comes back to Lord Marlesford's question earlier—we are doing that, and we do that with European partners. These ventures continue, in my judgment, to be effective and to be successful, and I expect and we would welcome further growth in those areas of co-operation. It is possible to continue to have effective co-operation, in other words, on the bases that we are currently working, and that I think means that irrespective of the Directive we will have an effective operation. I do not think there will be any detrimental impact on us.

Q747 Earl of Caithness: Do you not think the situation will come, as it has in the transport field, that where we have had bilateral agreements, once we get a policy agreed in Europe, the Commission will

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say: "We are the only people that can deal with this; you cannot do your bilaterals?" We used to have air bilaterals with various countries and now it is all taken over by the Commission. Exactly the same thing will happen here—in five to 10 years' time the United Kingdom is out of it?

Mr Dodd: With the EC readmission agreements what happens is, when those have been concluded, then states have to negotiate individual bilateral protocols with the state concerned within the framework of that agreement. When that has been completed that bilateral protocol will supplant any bilateral national arrangement we have at that stage. Because there are only 11 mandates so far of EC readmission agreements and because only four or five have now been completed, we have yet to get to the point where we have an implementing protocol supplanting a bilateral arrangement, and in any case that implementing protocol can be quite broad and therefore incorporate elements of our national bilateral practice.

Q748 Earl of Caithness: But it will happen?

Mr Dodd: Yes. Obviously the Commission takes the lead on negotiating the readmission agreement but obviously we are indirectly involved in that negotiation, so we would wish to see a readmission agreement agreed which broadly is compatible with our policy priorities.

Q749 Earl of Listowel: Minister, given the Government's concern for social exclusion and, for instance, the Children's Act 2004, the concern for children with Aids in Africa, the Government's commitment to welfare of children and vulnerable groups, do you consider the Directive offers a chance for the European Union to set an international example of high standards for the fair treatment of vulnerable groups, especially children? Do you agree from this point of view it is regrettable that HMG has decided not to opt in at this stage?

Lord Triesman: I do not think so and my reasons for saying that are that the European Convention on Human Rights sets a very good and fundamental standard, and our stance is that everybody should be bound by that standard right across the EU, bound by it not just in the case of children but, you are quite right, also other vulnerable groups. That is our starting point. I do not think that not opting in in any sense will alter the United Kingdom's obligations to meet that standard and to meet it well; indeed, other international obligations to which we are signatories as well—there is quite a list of them actually but I hope I have encapsulated them in the way I have described it. The people who it is intended would be caught by the Directive are either those who have failed in a claim for asylum or those illegally present who have not sought access to the asylum protection

system but have entered the United Kingdom illegally or have overstayed their right to remain in the United Kingdom. The Government's view is that in all of these cases the ECHR is a means of providing a sufficient and very robust and internationally respected set of standards, and that set of standards, if I can emphasise it, include those illegally remaining in the United Kingdom. I just make that point. These rights are very distinct from those provided under other bits of international legislation, the obligations we have under that legislation, so I would hope that we would meet all of those obligations that we feel bound to, not just as a formal matter of international obligations but because it is our policy and our desire to meet those obligations.

Q750 Baroness Henig: Can I ask whether there is any amendment you think should be made to the Directive for the Government to consider then opting in at a later stage?

Lord Triesman: Were we to feel there was a fruitful outcome from such a negotiation—and I enter that caveat, Lord Wright, if I may, before I start!—first, I would hope that we would seek no upper limit on detention. Provisions on judicial scrutiny of detention decisions and the conditions of detention are equally problematic and we think that it would be more appropriate to deal with those matters in domestic legislation. We would probably want to seek a re-entry ban. We are not, as everybody here will know, a part of the Schengen arrangements and therefore the EU-wide entry ban would pose very considerable difficulties for the United Kingdom because we have not got access to the relevant data from the Schengen information Information Systemsystem. These would pose some very sharp operational difficulties in reality. Also individual Member States, we feel, should hold absolute discretion on allowing re-entry issues coming up under Article 9. Those would all be changes we would want to see.

Q751 Lord Avebury: We have been looking at the upper limit on detention in certain other countries which are much shorter than ours. For example, France I think is 32 days, and without having ascertained what happens at the end of the 32 days we believe that there must be some procedure for renewal because we know that even the mechanical procedures in the fast track system take longer than 32 days to be completed, and if the French had an equivalent system they would not have exhausted those by the time the detention limit has been reached. Would an upper limit on detention be acceptable to the Government providing that at the end of the period there was some mechanism for renewing it by application to a court of law?

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Lord Triesman: Some of these discussions have come up in recent discussions in general on legislation, about the amount of time that is needed in order to make sure that you have gone through the proper processes, that you have exhausted the inquiries you have to make, often in very difficult circumstances. I wonder if I can illustrate it in this way because this is an issue that comes up when talking to Ambassadors and High Commissioners about returns policy generally. Where you have an explicit limit—, whether the French policy or the view that I have just taken on six months—, and that is known to people, they tend not to co-operate for that period. There is absolutely no way of getting any co-operation from a high proportion of people during that period. The documents vanish, their capacity to speak the language vanishes, they turn out to be coming from a different country from the country they first said they came from—there are any number of reasons why you cannot get the job done in that time limit. I do not think any of us should tie our hands if we are really serious about doing the job, and that is not because I have a desire to see people languishing in custody—quite the contrary. I do not like to see it, but we do not have a completely free hand to play in this. It is also what happens to us because the people in the spotlight choose to adopt the tactics they choose.

Chairman: Lord Corbett?

Q752 Lord Corbett of Castle Vale: I think the Minister with enormous foresight has answered the question before I asked it!

Lord Triesman: I am sorry about that but I am very willing to do it again!

Chairman: Minister, I know you must be watching the clock but I will ask Lord Avebury to ask our last question.

Q753 Lord Avebury: Member States have their own arrangements for gathering and evaluating information about countries of origin. Do you think there would be advantages in having a single Country of Origin Information Service as suggested in the Hague programme and, if so, would the Department favour this being run from a central EU office so that you would not all have to duplicate reinventing the wheel?

Lord Triesman: It is a very telling question. The Commission has, you are quite right, reached and proposed the idea of a Country of Origin Information System which would draw it all together, and an explanatory memorandum on communications was I think submitted to the Scrutiny Committee of both Houses on 6 March, very recently. The United Kingdom has been very supportive of trying to find practical co-ordination agendas in this area right from the start. Not least it

would give us a much better understanding about how other countries collect their information, how they store it, what sort of detail is in there. We would know more about these systems and we would probably learn a lot more about practice across the EU. All of that would be beneficial. Although the sharing of Country of Origin information arrangement has not been proposed in the context of returns, the United Kingdom would certainly be interested in exploring the sharing of Country of Origin information in this way. We are unsure about the idea of a central office; we are not certain that it needs to be established. We are more in favour of trying to see if we can get a shared web-based system. I am pretty loathe to see the invention of any sort of major bureaucracy across an area of this complexity because I fear that it would become quite a big bureaucracy and would not necessarily yield the value that we would all wish. What I also fear is that in a curious way it harks back to an older method of doing these things. The ability that we now have to share information and try and get good codified information using more modern electronic means may be a more effective, more efficient method of doing it as well—not just the time and the pain and the cost of setting up another bureaucracy but it might not be a very efficient way of doing it when we had gone through all the work. So the general theme is right, finding the right modality is very important but I hope I am indicating quite a supportive attitude to the core proposition.

Q754 Lord Avebury: I like what you say but who do you think should design and host the web-based system?

Lord Triesman: I am sure we would design the best one possible in the world! Hosting is a curious notion, is it not, because in a funny way, although there are locations where the hosts are, the nature of the web is that they are almost in a sense intergalactically hosted. I am not sure when that comes out in the printed version of what I said it will sound less than fanciful, that was not really my aim, but I do think that those are all issues where we probably could get quite a lot of good discussion, good agreement, because there is quite a healthy respect, I think, for where expertise really lies and people do not tend to pretend to an expertise in these kind of areas that they do not really have.

Q755 Lord Marlesford: Not on an intergalactic level but when we were in Brussels we were told pretty clearly that the basic Schengen information which was available cannot be made available to non non-Schengen countries, and for that to change it would need a political initiative. Is it not quite sensible that there should be such a political initiative?

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Lord Triesman: It is probably sensible to look at all of that; I do not really disagree. I think my colleagues in the Home Office would need to feel that it is the appropriate way to go, without appearing to buy into Schengen in a way that we are not prepared to do. The conditions under which such a discussion would be held, in my view, would be a very important set of initial propositions. We have made decisions on Schengen for very good reasons, in my view, to do with the security of our own borders and so on. Were there to be a demand that that in any sense should be reduced as a level of security I think we would be in some difficulty, but it may be that people would be more open in such a discussion. I do not know.

Mr Dodd: I have to say I am not an expert in this particular area but we are routinely excluded from Schengen building measures in the immigration field.

There is a grey area and we have been to the ECJ on a number of occasions to try and get English Schengen data. Were we to have a more comprehensive access I suspect we are going back to a Treaty base which would require a whole long agenda to achieve, but we can go away and think about your question and perhaps come back in writing, if we may.

Q756 Chairman: Minister, I think we must release you there but thank you for coming to give evidence; it has been extremely helpful. Perhaps I could ask Tom Dodd if, on looking at the transcript, you think there is additional information it would be helpful for us to have, you could please send it to us.

Mr Dodd: Certainly.

Lord Triesman: Thank you very much.

Supplementary evidence from Lord Triesman, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office

Thank you for the opportunity to give evidence before the Committee on 8 March. I agreed at the time to write to you on two points.

The first was on the detail of those areas which were of particular interest to the Foreign and Commonwealth Office. As I said at the time, our concerns with the draft Directive are very much the same as those expressed on previous occasions by our colleagues at the Home Office. In particular, Tony McNulty's letter to the Committee of 8 December 2005⁷² sets out substantially the Government's concerns with the Directive. I hope you will permit me to refer the Committee to that earlier response, which I enclose here for ease of reference.

The second point on which I agreed to write concerns the UK's relationship to Schengen and, in particular, the Schengen Information System.

The Schengen Information System is a data system containing alerts issued by Member States on persons and property for the purposes of applying the immigration and law enforcement provisions of the Schengen acquis. As you know, the UK has opted not to participate in the immigration and borders control measures of Schengen and will therefore have no access to entry refusal data.

In June 2005, the Commission published three draft legal texts detailing the objective and scope of the second generation Schengen Information System (SIS II). The Commission proposal (document 9943/05) was deposited on 1 July 2005 and considered by the House of Lords Scrutiny Committee on 26 October 2005. The Home Office submitted an Explanatory Memorandum (doc 5709/06) this month containing an update on negotiations.

The UK has an interest in the text because of the possibility of access to SIS II data for asylum purposes and because there are a number of horizontal provisions that will be identical for the Council Decision, in which we will participate.

We think that revision of the legal texts presents a good opportunity to introduce greater legal clarity as to which authorities have access to what types of data for what purposes and to provide additional, but transparent, flexibility in the system. If the data on the system is to be used for non-Schengen purposes then this should be clearly defined. We consider that there are good grounds for arguing for UK access for non-Schengen purposes, such as asylum or law enforcement, as we participate in the asylum acquis and in the police and judicial co-operation provisions of Schengen.

I hope this is helpful for the Committee's inquiry.

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⁷² Printed with transcript of oral evidence taken on Wednesday 18 January 2006.

Examination of Witness

Witness: MR MANFRED WEBER, a Member of the European Parliament, examined.

Q757 Chairman: Minister, I apologise on behalf of the London Electricity Department for your delay and I hope it has not disrupted your evening too much, but you are very welcome. I think that the European Parliament and my Committee are the only two people undertaking an inquiry into the Directive at this point. You told me in private that your attempts to get the German Parliament interested did not bear very much fruit. Could I open by asking you to tell us what stage in the LIBE Committee your scrutiny has reached? Do you call witnesses, can you give us some idea? And when do you expect to publish your report? It is only fair in asking you that question that I tell you that we hope to publish our report, you are as I think you know our last witness, some time after Easter.

Mr Weber: Thank you very much for the invitation. It is a great honour for me to be here and to talk to you as a member of the European Parliament. I would like to say to the Committee, as I have already said to your Chairman, how laudable it is that you actually deal with this matter because this is a matter that is not usually being dealt with in Europe. It is the same in my country—usually what happens is that we wait for the EU to take a decision and then we start getting angry about it and thinking about what effect it all will have, and we do not think about it early enough. With this Directive we have a premier because it is for the first time that the European Parliament is a co-initiator of legislation. As Parliamentarians we now have this proposal of the Commission and we now have the task to make sure that this proposal is being dealt with in a sensible way and will actually be something that is feasible. I would like to say first that the proposal is now a Commission proposal and in our Committee we are also now talking about the pros and cons of it all, so it is not our task at the moment to actually defend the proposal but to find ways and means of making it a sensible and feasible proposal.

Q758 Chairman: Can I interrupt and ask whether that means you have actually put proposals to the Commission for ways in which you could improve the Directive?

Mr Weber: Yes, of course. The Commission is the body that comes up with the initiative and then it is the task of the European Parliament and the European Council to actually make a decision so, of course, during our discussions we will come up with amendments. We are also waiting to see what your report will contain because, of course, in the European Parliament we will take into consideration what the various Member States are saying.

Q759 Chairman: I shall make sure you are sent a very early copy of the report!

Mr Weber: Thank you very much. Now I would like to answer your first question as to the situation of the discussions in our Committee. Last year we had the first discussion among the various parties. You know the European Parliament system: we have a main rapporteur, this is myself, and then we have the so-called shadow rapporteurs for the various political groups, and it is within those political groups that internal discussions are taking place at the moment. The first draft report which I will produce, which will probably come out in April or May, and then during the summer the discussions will take place in the Committee.

Q760 Chairman: Do you expect to have a consensus? You referred to the different political groups. Are you already noticing a strong difference of approach between the political groups?

Mr Weber: The European Parliament has most influence if it manages to come up with a broad consensus and I as the rapporteur am a member of the European People's Party, and at the moment we are having discussions with the European Socialists, which is the second biggest party, because if we come up with a consensus that is when people listen to us.

Chairman: Thank you.

Q761 Baroness Henig: Given that you come from Germany, can you tell us anything about the German Government's view about the proposed Directive? We would be interested to know what their view of it is at the moment.

Mr Weber: In the Council we have noticed a lot of scepticism about this whole proposal, and this also goes for my country, Germany, and lots of discussions are taking place. You know that we have a new Government in Germany and the new Government is being very constructive, and despite its scepticism is trying to hold constructive discussions.

Q762 Chairman: Is this scepticism about the idea of a common standard or about the particular wording of the Directive?

Mr Weber: Basically I think this is a matter that is in many countries still seen as an internal matter and there is still a lot of fear about EU agreements in this area. My country as well, until now, has gone down the path of bilateral agreements and this asylum policy is new for everybody, and the co decision procedure is new for everybody, so we now all have to practise, so to speak, and see what comes out of it.

Q763 Lord Avebury: There seem to be five main stumbling blocks to the agreement of the proposed Directive. Could you tell us something about your own opinions on these? Those are 1, the mandatory

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issue of return decisions; 2, the voluntary period of four weeks; 3, mandatory judicial review of return decisions and temporary custody orders; 4, the maximum period of detention of six months, and 5, the EU wide re-entry ban.

Mr Weber: Thank you very much for the question, Sir. I would like to start with the last point, the re-entry. As far as I am concerned that is the core of the whole system and it is where we find the actual added value that Europe can give to this whole area, and it is why Europe is taking care of this matter. In the end it is a question of illegals who have to be deported, and that is the core of the legislation, and it seems to me that these are people who have applied for asylum and have not received it, and if we do not have a ban on re-entry they will go round and apply again and again and again in different places. That is the first answer, perhaps. On your second question, the six month limit, I wonder whether we do need a maximum limit for detention. I personally think we do not need to harmonise this within Europe. I think each country should be able to do as it pleases, but this is something that we are still discussing and which we have not got the final position on. The Commission always comes up with the argument in favour of six months that the illegals will look for that country where the time limit is the shortest and we have heard that France has a one month limit, but I as a German have to say that I do not think it is necessary to co-ordinate this. Countries should be able to do as they please. On the next question, the judicial review, I think that it is necessary to have a judicial review of detention because in the end these people are not criminals, they are illegals and they have not committed a crime, and if we wanted to detain them then I think it is necessary to do that under judicial supervision.

Chairman: Lady Bonham-Carter, did you have a supplementary on a point?

Q764 Baroness Bonham-Carter of Yarnbury: On the re-entry ban, could I have your response to the idea that if you could pay you would be allowed back in as part of the Directive, so there would be two levels?

Mr Weber: Yes. I think that is another point that we still need to discuss. I do not think people should be able to pay for their re-entry. We should not allow this by giving them back the costs of removal. That cannot be the reason. In the end we have to ask ourselves: "Is this person dangerous? Is this a person who can earn his own livelihood? Are there good reasons for letting him back in?" I do not think it should be whether he has the money to buy.

Q765 Earl of Listowel: I am particularly concerned about the protection of the rights and interests of vulnerable groups, especially children, in return procedures. Do you feel that the proposed Directive

provides for adequate guarantees in this respect, or should those be more extensive and explicit?

Mr Weber: I think that this is a point where the Directive will give an added European value. For instance we have a minimum standard which says that families should not be separated and children should not be taken away from their families, that is something that we find in Article 4.6, so this is something that is a better standard in the Directive than in the Human Rights Convention. I was listening to the discussion with the Minister and he seemed to say that the Human Rights Convention gives a good enough standard, but I think that would be too general a standard and with the Directive we would increase the standards of protection for the children which are concerned by this in Europe. We do not have the same standards everywhere in Europe and therefore this minimum in the Directive would provide us with an added value.

Q766 Chairman: This Committee yesterday visited a detention centre in this country. Has your group made any visits to detention centres elsewhere in Europe?

Mr Weber: Yes, we have visited the sort of detention centre, for instance, that is very much a focal point in European discussions, Melilla in the north of Morocco, the Spanish enclave, and I have also visited this sort of detention centre in my own country.

Q767 Lord Marlesford: Given that the European Parliament now has complete co decision powers with the European Commission in the matter of this Directive, what do you think the amendments to the Directive are which you will insist upon as a Committee?

Mr Weber: Thank you for your question. We are trying to find a middle way, so to speak, because we have people here who, as I have said, are not criminals and we have decided that we want to make life better for them but, on the other hand, we have a second pole, and we are working within those two, poles and the second thing is that these have to be practicable for the enforcement authorities, so we are working between these two lines. On the one hand we want to improve the human rights and, on the other hand, we want to improve the practicability, how things are handled. We want to include, for instance, that we can detain a person if there is a danger of absconding, or if this person is a danger for public security. This is something not yet in the proposal of the Commission but which we want to get in.

Q768 Earl of Caithness: Just to add to that point of Lord Marlesford's and also to come back to the point that the Chairman raised at the beginning, do you think it is going to be possible for your Committee to get agreement on all your points of concern, given the

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party political differences, in order to influence the Council?

Mr Weber: Can I ask you the question? Is it very easy for you to find the golden middle way in your deliberations?

Q769 Earl of Caithness: I think we are less political than your Committee!

Mr Weber: Yes. So far in our Committee I think we have mainly concentrated on how we can help people, and on the positive aspects.

The Committee suspended from 5.16 pm to 5.24 pm for a division in the House.

Q770 Chairman: Can I now ask you about your impression of the views of the Council so far? I do not know whether you received enough information or indications of how the Council are viewing this Directive, but could it be a problem when it comes to co decision with the European Parliament? And, as we know, the British Government, and I think the Irish Government, have both decided to opt out.

Mr Weber: As to the discussions in the Council, I have already hinted at them being difficult and that there was a lot of scepticism there, but in the European Parliament we have a second instrument, so to speak, that we are discussing at the moment. Parallel to the discussions on the Returns Directive we are also discussing the creation of a return fund, in other words, money that will be given to the countries to deal with this area. In our decisions on the return fund we have said very clearly that the money will only be available if and when the Returns Directive has been approved because it cannot be right to give out money for this sort of thing as long as the basic principles have not been adopted.

Q771 Chairman: That is very helpful because I really wanted to ask how far you regarded those two issues as connected, and you have made it very clear that you do regard them as connected.

Mr Weber: In the legal text it has been made very clear, and we are also in co decision process for this return fund, so in the legal text it has been made very clear that no money will be made available as long as the Directive has not been adopted.

Q772 Chairman: Can you also explain the procedures for your Committee? Do you take oral evidence, like this?

Mr Weber: No, we do not do it this way. With us each rapporteur and each shadow rapporteur has to think about how he wants to deal with the subject. I, for instance, put my ideas on paper, then we discuss it and amendments are presented, and at the end we vote.

Q773 Lord Dubs: In answer to an earlier question you emphasised how much you were seeking the agreement of the two main party groups on your Committee. Do you think there is still a chance that the European Parliament might reject the Directive? I am thinking, for example, if the procedural guarantees in the Directive were significantly weakened.

Mr Weber: I cannot give you a definite answer because that would be reading a crystal ball, but I am fairly sure that the large majority is on my side because, as I have said, we want to improve conditions for human beings and also because we see added value in the procedure. For instance, if we get this re-entry ban then I think there are advantages for both sides, and therefore they will probably agree.

Q774 Earl of Caithness: I have two questions for you. The first is do you think that return should be mandatory?

Mr Weber: I can tell you that we have forecasts on our table which seem to indicate that in Europe we have 5-6 million illegal people, who are the ones washing dishes in restaurants and things like that and have no rights. The Directive says that these illegal people have to be deported and this is something I agree with, and there is also a European added value, but of course every Member State will have the possibility to give these people a specific status. Our aim is to take them out of illegality and either return them to their home countries or give them papers to make them legal.

Q775 Earl of Caithness: Thank you. My second question is what do you think of the British Government decision not to opt in, and does this affect how your Committee is going to work or how you see the procedure working?

Mr Weber: A European parliamentarian has no right to interfere in British politics but from your earlier discussion I gather that apparently there is information within the Schengen system which might be of use to the British state so Great Britain has to make a decision either to be part of it, in which case you have all the advantages but also the disadvantages, or not to take part in it.

Q776 Chairman: Perhaps I could ask the question in a slightly different form which I think will relieve you of any guilt that you are interfering in British politics! Does the British opt-out complicate the work of your British parliamentarians on your Committee?

Mr Weber: I cannot really tell because all my colleagues in the Committee have the same rights; they can all give their opinion; they can all take part in the discussion, and we do not distinguish according to where they come from, so I think at the moment there is no effect on their work.

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Q777 Chairman: Mr Weber, you have been extremely helpful and, again, I regret—I suppose it is not for me to apologise for it but I regret—the disruption to your afternoon programme. It was very good of you to wait and appear rather later than we intended, and to spare your interpreter any more work may I say a very warm “danke schoen”! May I also wish you good luck and perhaps I could also say that it would be very helpful for us if we continue to keep in contact as fellow parliamentarians, and if

there is anything at any point you want to communicate with us you would be extremely welcome because it would be of great interest to us to know how your inquiry is going, and we will try to keep you informed too.

Mr Weber: Thank you very much. I will report back in Europe and say that I have been here and found open ears on this subject, that you are very interested in it, and that you are asking very competent questions.

Written Evidence

TAKEN BEFORE THE EUROPEAN UNION COMMITTEE (SUB-COMMITTEE F)

Memorandum by the Law Reform Committee of The Bar Council

1. The Law Reform Committee of the Bar Council welcomes the opportunity to comment on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.
2. We deal only with aspects of the draft directive that in our view raise legal (as opposed to policy) issues because this is the area of our expertise.

THE PREMISES ON WHICH THE DRAFT DIRECTIVE IS BASED (ARTICLES 1 AND 3)

3. Article 1 of the draft directive makes clear that it sets out common standards and procedures to be applied in Member States “returning” illegally staying third-country nationals. It could reasonably be supposed that removals which are not “returns” are excluded from the safeguards of the directive. The question therefore arises: what is a “return”?
4. The term “return” is defined in Article 3(c) as meaning the process of going *back* to one’s country of origin, transit or another third country. “Return decision” is defined in Article 3(d) as meaning an administrative or judicial decision stating or declaring the stay of a third-country national to be illegal and imposing an obligation “to return”. Hence the terms “return” and “return decision” are inapposite to cover a situation where a person will be subject to voluntary or enforced removal to a country which he has never before entered.
5. We assume that the draft directive is intended to set down minimum safeguards for all expulsions from the Member States. If this is the case, the draft directive should refer to “expulsion” both in its title and in its text.

THE TWO STEP PROCESS—RETURN DECISION FOLLOWED BY REMOVAL ORDER (ARTICLE 6)

6. As mentioned, return can take place to a person’s country of origin, to a transit country or to a third country. We take the view that the expelling State should be under an obligation to inform the individual of the country to which he is to be expelled at the earliest possible stage in the removal procedure. Otherwise, an individual may be disadvantaged in raising issues about the legality of expulsion to a particular country (such as that he is not a citizen or otherwise admissible to that particular country, or that expulsion there will breach the Refugee Convention or the European Convention on Human Rights). The State should be under an obligation to set out in the return decision the country to which expulsion will take place. It is in our view too late to leave it until the removal order.
7. Given the potential gravity of the consequences of expulsion and the fact-sensitive approach which an expulsion decision requires, a new return decision should be made whenever the State decides to change the country to which a person would be expelled.

JUDICIAL REMEDIES (ARTICLE 12)

8. We welcome the provisions of Article 12 on effective legal remedies and on legal advice and representation. We take the view that the Inquiry should give consideration to whether the provision of an effective legal remedy ought to be extended to re-entry bans imposed under Article 9. Judicial remedies are an important means of guarding against arbitrary decision-making. They are particularly important in a sphere which may well involve human rights issues such as the right to respect for family life. This would tend to suggest that Article 12(1) should extend to re-entry bans.
9. The right to apply for the suspension of removal pending an appeal should in our view comprise the right to apply to a judicial rather than an administrative body.

Memorandum by Sergio Carrera (Research Fellow, Centre for European Policy Studies)

1. A “common return policy” of irregular migrants has been conceived as an essential part of the so-called “fight against illegal immigration” and a common immigration policy in the European Union agenda. In the last multi-annual programme setting up the objectives for the development of an “Area of Freedom, Security

and Justice” for the next five years—The Hague Programme—,¹ the European Council called for “the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect of their human rights and dignity”. The necessity for common return procedures has been reconfirmed by the European Commission’s Communication implementing the Hague Programme as one of the key strategic priorities.²

2. Following that call for action the European Commission presented in September 2005 a proposal for Directive 2005/391 on common standards and procedures for returning irregular migrants.

3. The juridical roots of the proposal are found in Article 63.3.b of EC Treaty (Title IV) which calls the Council to adopt measures on immigration policy as regards “illegal immigration and illegal residence, including repatriation of illegal residents”. The field of “irregular migration” falls in between the EC First Pillar and the EU Third Pillar—respectively Title IV EC Treaty and Title VI TEU. The negative effects that the current pillar division create in the progressive development of an “Area of Freedom, Security and Justice” have often been pointed out by the literature.³ In addition to the lack of transparency, efficacy and democratic/judicial accountability, there is also a high degree of inefficiency owing to the duality in the legal dimension,⁴ which hampers any comprehensive vision as regards their precise legal effects and scope.

4. As we have already experienced in the EU decision-making process in the field of “immigration” a security approach has overly taken predominance. Further, the few legal acts adopted in this policy area have suffered never-ending negotiations inside the Council of Ministers, and being substantially watered down and modified substantially and negatively the original (more open or rights based) nature of legislative initiatives proposed by the European Commission. The proposal for directive 2005/391 should not follow the same negative path. Instead, a common policy on return of irregular immigrants would need to prevent the weakening of the freedom dimension, and provide a comprehensive and solid framework of protection for the individual.

5. The proposal presents as series of vulnerabilities and concerns which put into question its compatibility with human rights commitments as provided by European and international law, as well as the latest case law of the European Court of Human Rights.

6. First, the key opening the door out the common EU territory is the categorization of “illegal stay”. The directive defines this term as “the presence on the territory of a Member State, of a third country national who does not fulfil, or no longer fulfils the conditions for stay or residence in the Member State”. One of the main difficulties that this categorization involves is the lack of a common shared definition of “illegal immigration” in the European Union. There are deep conceptual and juridical problems inherent to the framing of this status.⁵ Further, the reasons of the “illegality” are presented following a flexible approach inside the proposal, including for example expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit, negative final decision on an asylum application, withdrawal of refugee status, illegal entrance, etc.

7. The proposal also offers some critical aspects and “exceptions” to the set of guarantees provided to the immigrant under an irregular status. It is striking to see how article 2.2 offers the Member States the discretion not to apply the proposal for Directive to those migrants who have been refused entry in a “transit zone”. The only condition included in the text would be that they do not practice a lower level of protection than the one set out in articles 8, 10, 13 and 15 of the initiative. These provisions deal respectively with the postponement of execution of a removal order (Article 8), coercive measures to carry out the removal (Article 10), safeguards pending return (Article 13) and conditions of temporary custody (Article 15). Consequently it will be opt to Member States to apply “lower level of protection” concerning the rest of safeguards inserted in the Directive do not apply, which are in our opinion of crucial importance for the protection of the migrant. These guarantees include reference to “procedural safeguards” (Article 12—judicial remedies), the Member States

¹ European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C53/01, OJ C53/1, 3.3.2005, point 1.6.4.

² Communication from the Commission to the Council and the European Parliament—The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice, COM/2005/0184 final, Brussels, 10.5.2005.

³ See E Guild and S Carrera, A failing Constitutional Treaty? Implications for an Area of Freedom, Security and Justice, CEPS Working Document, 2005.

⁴ According to Art 34 of the TEU, “Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.” On the other hand, Art 249 EC Treaty establishes that “A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Directives may be addressed to any one Member State and do not have to be addressed to all. Even though this article implies that the provisions contained in a directive are not directly applicable, the ECJ has ruled otherwise: an individual can rely on the provisions of a directive against a defaulting state after the time limit for implementation has expired. For an in-depth study of the legal instruments that are being used to develop EU policy, see P Craig and G de Búrca, *EU Law: Text, cases and materials*, Oxford: Oxford University Press, 2000.

⁵ See the “Memorandum of Written Evidence” by E Guild in *The Hague Programme: A Five-year Agenda for EU Justice and Home Affairs, Report with Evidence, 10th Report*, UK Parliament House of Lords Select Committee on the European Union, HL Paper 84, Session 2004–05, London, 23 March 2005.

freedom to grant a residence permit (Article 6.5), return decisions and removal orders to be in writing (Article 11.1), and the provisions on temporary custody (Article 14). The decision not to apply the Directive to these particular cases is very unfortunate, and may lead to situations where human rights violations may arise, and being even “justified” by the use of “the exception”. It is our opinion that all the common standards and protection should equally apply to all the territorial areas of the Member States, including transit zones, as well as airport and border zones. The “legal status” of the territory should not constitute a factor to limit or apply a lower level of protection of the individual. The responsibility of the State over “transit zones” under the European Convention of Human Rights has been recognized by the European Court of Human Rights the judgment *Amuur v France* of June 1996.

8. The Proposal for Directive advocates for a two-step procedure, leading to the ending of “illegal stay”, and the consequent “expulsion” of the irregular migrant: First, a return decision, and second a removal order.

9. *First Step.* A return decision must be issued to any third country national staying illegally. A “return decision” is defined under Article 6 of the Directive as “an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing an obligation to return”. The exact criteria for issuing a return decision are not expressly included in the initiative. It then leaves to the Member States the complete discretion to determine the grounds of the decisions. The proposal intends to put forward a prioritization of “voluntary return” over a “forced” one. Article 6 continues by stating that “the return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period”.

10. Voluntary character of return should become the first rule to apply in the event of any potential expulsion of an irregular migrant from the common EU territory. “Forced removal” or “forcible expulsion” should exclusively take place after consuming every single mean to reach a consensus with the person concerned (ie the irregular migrant). Article 6 also makes reference to the contested issue of “absconding”, and stipulates that in order to prevent the latter certain requirements may be applied to the “irregular migrant” during the waiting period. The requirements might include for instance a financial guarantee or a deposit, regular reporting to the authorities, obligation to stay in a certain place or submitting “certain documents”. Once more, the possibility and large room for discretion kindly offered to the Member States to “avoid the risk of absconding” is critical in the light of human rights considerations, and reinforces the vulnerable position of the migrant. In particular, the Member States’ discretion to require the migrant to stay in a “place” may easily become an unlawful “detention” of the person involved. Article 6.5 seems to be of a more positive nature as it allows the Member States to grant an “autonomous residence permit”, or another sort of authorization which would confer a right of stay for humanitarian or other reasons, to an irregular migrant. In the light of this, expulsion would be prevented. Paragraph 8 of the same article stipulates that if an irregular migrant is subject to a pending procedure for being granted a residence permit “that Member State may refrain from issuing a return decision, until the pending procedure is finished”. The facultative character of this article by the use of “may” is however unfortunate.

11. *Second Step.* In those cases where there is no voluntary return, or if there is a risk of “absconding”, the proposal states that a removal order will be executed by the Member State obliging the person to return. By removal order the initiative means “an administrative or judicial decision or act ordering the removal”. An interesting point present in Article 7.3 is that the initiative allows the Member States to issue both the return decision and the removal order with in one act or decision. Further, the same Article 7.2 provides that the removal order shall specify the delay within which the removal will be enforced and the country where the migrant will be returned.

12. It also provides the possibility for a “re-entry ban” to accompany removal orders. It is “an administrative or judicial decision or act preventing re-entry into the territory of the Member States for a specified period”. Following the lines of the proposal, the ban should not exceed of five years, but in case of public policy and public security. It would prevent re-entry into the territory of all the Member States. See Article 9 of the measure.

13. Another innovative element presented in the act is the set of rules applicable if a third-country national who is the subject of a removal order or return decision issued in an Member State (“the first Member State”) is apprehended in the territory of another Member States (“the second Member State”). Chapter V of the proposal for Directive states that the second Member State may select four different options where an irregular migrant is apprehended inside its territory:

- A. It may recognize the return decision or removal order of the first one and execute the expulsion decision while receiving the financial compensation. As regards “mutual recognition of expulsion decisions” we may highlight the existence of two legal acts dealing respectively with the mutual recognition of decision on the expulsion of third-country nationals—Council Directive 2001/40/EC—and the setting up of criteria and practical arrangements for the compensation of the financial

imbalances—Council Decision 2004/191/EC. By applying the regime presented under the proposal 2005/391 the Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country nationals OJ L149, 2.6.2001 would be superseded.⁶ The principle of “mutual recognition of decision on expulsion” seems to be henceforth abandoned. In my view, the mutual recognition of “expulsion decision” might give raise to a series of critical elements not least on human rights grounds. In particular, the impact of “information sharing” about expulsion between Member States is of special concern. The proposal acknowledges that this would take place under the Second Generation of the Schengen Information System (SIS II). In response to the increased concerns about security in the aftermath of 11 September 2001 in the US, 11 March 2004 in Madrid and July events in London there has been an over-zealous application of security measures and initiatives in relation to mobility, immigration and asylum policies.⁷ One of the most relevant initiatives in the table continues being the SIS II and its “operability” with other EU databases as the Visa Information System (VIS) and Eurodac.

- B. It may ask the first State to take back the migrant “without delay”. The first Member States will be required to comply with the request unless it can demonstrate that the third country national left its territory by a return decision or a removal order.
- C. It may launch a new/autonomous return procedure under its national law.
- D. Maintain or issue a residence permit or another authorization offering a right to stay for humanitarian, compassionate or other reasons.

14. The draft Directive presents some positive elements as regards “rights and procedural safeguards” for the irregular migrant. The watering down of the proposal during the decision-making procedure as regards this particular dimension needs to be prevented at all costs. The involvement of the European Parliament in the decision-making procedure of this legislative initiative brings some light in the way onwards and ensures its legitimacy, democratic accountability and human rights compliance.

15. An EU framework on “irregular migration” and “expulsion” needs not to become the platform for strengthening or widening the Member States’ discretion and “room for action” at time of expulsion of migrant in an irregular status in their own territory. We have been witnesses of similar outputs in the decision-making process that other migration-related EU laws have negatively suffered. An EU framework needs to provide a common ground for the respect of the set of human right legal obligations (freedom) upon which the European Union is itself founded. It needs to foster the protection of the individual, irrespective of the nationality and “administrative status” of the latter.

16. In any event “forcible expulsion” must not become the general rule under the EU framework on return of those individuals negatively qualified as “illegal”. The voluntary character should take effectively priority, becoming “the norm”, in any circumstance. The protection of the rights of the immigrant and her/his family members, minors as well as other vulnerable groups should be at the heart of any policy response in the European Union.

17. A human-rights rationale has to be the featuring element of any EU response to the phenomenon commonly known as “irregular immigration”. The application of the European Convention of Human Rights and other European and International commitments (such as the 1951 Geneva Convention on Refugees and the 1967 Protocol relating to the Status of Refugees) has to represent the very pillars for the progressive building of a common policy on immigration, and particularly the one of a common return policy of irregular immigrants. In addition to offering a stronger set of safeguards against refoulement,⁸ the right to an effective remedy and of appeal before the judiciary should be also at the heart of the set of rights conferred to the any “irregular migrant”.⁹

18. Looking at the EU action in the field of “migration”, it appears that the EU is more willing and concerned to regulate, or rather “manage”, the conditions and procedure to expel those qualified as “illegal migrants”—removal and return (security), than starting from providing a common framework to include migrants—admission, stay, residence and access to the multidimensional sectors of the receiving society (liberty)—by reaching consensus in a common policy on regular migration and social inclusion. In fact, this securitarian

⁶ See Article 20 of the proposal for Directive.

⁷ See Carrera, S and D Bigo (2004), From New York to Madrid: Technology as the ultra-solution to the permanent state of fear and emergency in the EU, CEPS Commentary, CEPS, Brussels, April; with regard to how the legal status of immigrants and asylum-seekers has been modified on the grounds of anti-terrorism measures, see Brouwer, E, P Catz and E Guild (2003), Immigration, Asylum and Terrorism: A Changing Dynamic in European Law, Instituut voor Rechtsociologie/Centrum voor Migratierecht, University of Nijmegen.

⁸ Art 33 of the Convention relating to the status of refugees, entitled “Prohibition of expulsion or return (*refoulement*)”, stipulates that “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”.

⁹ See S Carrera and T Balzacq, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy*, CEPS, Brussels, 2005.

tendency inherent to a majority of immigration-related policies in the EU weakens substantially the position of the individual as well as the overall goal of establishing a common EU immigration policy based on the fair and equal treatment paradigm as rightly emphasized in the Tampere European Council Conclusions of 1999.

19. Temporary custody for the purpose of removal has been inserted in Chapter IV of the proposal. Articles 14 and 15 establish “the conditions” under which “detention of irregular migrants” will be done. As a starting point, “detention” is intrinsically, and legally, negatively linked to criminal offence. As stated above, we need to fight against any attempt to bring closer the position of the migrants with criminality. “Illegality” only refers to an irregular administrative status, whose non-compliance should not be linked with “temporary custody” or “detention”. The increasing use of “detention” to deter migrants has been critically raised by a group of human rights organizations.¹⁰ The non-compatibility with the right to liberty as provided in Article 5 of the ECHR is very much at stake. This is even more acute taking in the light of the numbers and vulnerability of the population currently in immigration detention across the EU.

Sergio Carrera

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Centre for European Policy Studies, CEPS (evidence presented on a personal basis and not to be attributed to CEPS)

12 December 2005

Memorandum by Church Pressure Groups

Caritas Europa

4, Rue de Pascale, B-1040 Bruxelles

CCME—Churches’ Commission for Migrants in Europe

174, Rue Joseph II, B-1000 Bruxelles

COMECE—Commission of the Bishops’ Conferences of the European Community - Secretariat -

42, Rue Stévin, B-1000 Bruxelles

ICMC—International Catholic Migration Commission

43, Rue de la Charité, B-1210 Bruxelles

JRS-Europe—Jesuit Refugee Service Europe

333, Rue du Progrès B-1030 Bruxelles

QCEA—Quaker Council for European Affairs

50, Square Ambiorix, B-1000 Bruxelles

1. Our organisations represent churches throughout Europe—Roman Catholic, Orthodox, Anglican, and Protestant—as well as Christian agencies particularly concerned with migrants and refugees. As Christian organisations, we are deeply committed to the dignity of the human individual, the concept of global solidarity and the promotion of a society which welcomes strangers.

2. Churches and their agencies in Europe are active partners in providing services for migrants, trying to improve their living conditions, and accompanying them in places of detention when they are facing removal. In this context we welcome the proposal for a directive on return procedure in Europe presented by the EU Commission on Thursday 1 September 2005 as a further step towards a common EU policy on immigration.

3. We welcome particularly Article 1 (Reference to fundamental rights), Article 5 (Family relation ship and best interest of the child), Article 6-4 (Obligations derived from fundamental rights), Article 6-5 (Grant of an autonomous residence permit), Article 6-7 (No return decision pending request for renewal of residence permit), Article 10-1 (Coercive measures in respect of fundamental rights) of the Directive proposal as guarantees to respect migrants’ human rights.

4. However, we express our deep concerns about the following provisions of the Directive proposal:

¹⁰ See “Common principles on removal of irregular migrants and rejected asylum seekers”, by Amnesty International, Caritas Europa, Churches’ Commission for Migrants of Europe, European Council for Refugees and Exiles, Human Rights Watch, Jesuit Refugee Service-Europe, Platform for International Cooperation on Undocumented Migrants, Quaker Council for European Affairs, Save the Children, Cimade, Iglesia Evangelica Española, Federazione delle Chiese Evangeliche in Italia, SENSOA, August 2005.

ARTICLE 2-2

“Member States may decide not to apply this Directive to third-country nationals who have been refused entry in a transit zone of a Member State. However, they shall ensure that the treatment and the level of protection of such third-country nationals is not less favourable than set out in Articles 8, 10, 13 and 15.”

5. We regret that the proposal allows Member States not to apply to transit zones all the guarantees that it provides. It is worth recalling that the ECtHR stated in the *Amuur v France* Judgment¹¹ that transit zones are places of detention in the same way as closed centres for immigrants (named as “temporary custody facilities” by the Directive proposal). Consequently, all human rights guarantees provided by the Directive proposal as well as by European and international standards should also apply to transit zones.

ARTICLE 6-2

“The return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.”

6. We believe that a delay of four weeks is not enough to organise a voluntary return in a fair and proper way. To be voluntary, the return requires that migrants be sufficiently informed about the situation and the living conditions in the country of return and also that they can start to organise their reintegration in the society of the country of return. These are as well the conditions for an effective return, meaning that migrants will not try to immigrate again once returned.

7. We express also doubt about the voluntary character of return when the freedom of migrants may be restricted when there is a “risk of absconding”. In this respect, the interpretation of the risk of absconding is left to the discretion of Member States. In practice, this may lead to the systematic restriction of liberty of migrants even though they have expressed the will to be returned voluntarily. To this extent, the possibility to oblige migrants to “stay at a certain place” will allow Member States to detain them automatically. Detention centres or “temporary custody facilities”—whatever they are called—are certainly not the proper places to consider voluntary return.

ARTICLE 6-3

“The return decision shall be issued as a separate act or decision or together with a removal order.”

8. This provision substantially limits the voluntary principle of return as well as the “two-step procedure” as promoted by the directive proposal.¹² Concerning the “two-step procedure” principle, it is paradoxical to promote this principle on one hand and, on the other hand, to leave its application to the entire discretion of Member States which can decide to issue the return decision together with the removal order. In practice, this will lead to the non-application of the principle and consequently to its disappearance.

9. Moreover, the possibility to issue the return decision together with the removal order will put such pressure on migrants that they will not be able to properly consider voluntary return. In this case, migrants will be left without any real capacity to choose so that the voluntary character of return will have no meaning anymore.

ARTICLE 8-3

“If enforcement of a return decision or execution of a removal order is postponed as provided for in paragraphs 1 and 2, certain obligations may be imposed on the third country national concerned, with a view to avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place.”

10. This provision does not provide any sustainable solution for migrants that are not or cannot be removed because of their vulnerability (migrants with physical or mental disabilities or unaccompanied minors who cannot be handed over by a family member or a representative) or for technical reasons. On the contrary, if Member States consider that there is a “risk of absconding”, they may impose “certain obligations” on these persons, among them “to stay at a certain place” which means to be detained.

¹¹ See ECtHR, *Amuur v France*, Judgment of 25 June 1996.

¹² Third consideration of the preamble: “As a general principle, a harmonized two-step procedure should be applied, involving a return decision as a first step, and where necessary, the issuing of a removal order as second step (...)”.

11. Again, the evaluation of the risk to abscond is left to the entire discretion of Member States, which will lead in practice to a systematic use of detention. In the case of people who cannot be removed, this may lead to long and unjustified detention.¹³ Regarding minors, this is contrary to the 1989 UN Convention on the Rights of the Child, especially the principle of the “best interest of the child” as recalled in Article 5 of the Directive proposal.

ARTICLE 9

“1. Removal orders shall include a re-entry ban of a maximum of five years.

Return decisions may include such a re-entry ban.

2. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case, and in particular if the third-country national concerned:

- (a) is the subject of a removal order for the first time;
- (b) has already been the subject of more than one removal order;
- (c) entered the Member State during a re-entry ban;
- (d) constitutes a threat to public policy or public security.

The re-entry ban may be issued for a period exceeding five years where the third country national concerned constitutes a serious threat to public policy or public security.

3. The re-entry ban may be withdrawn, in particular in cases in which the third-country national concerned:

- (a) is the subject of a return decision or a removal order for the first time;
- (b) has reported back to a consular post of a Member State;
- (c) has reimbursed all costs of his previous return procedure.

4. The re-entry ban may be suspended on an exceptional and temporary basis in appropriate individual cases.

5. Paragraphs 1–4 apply without prejudice to the right to seek asylum in one of the Member States.”

12. We regret that the proposal provides the institution of a re-entry ban of five years following the execution of the removal. Besides the fact that a five years ban is too long, the re-entry ban is in itself a matter of criticism it could first amount to a double penalty. It may also have far-reaching consequences for the principle of non-refoulement as guaranteed by the 1951 Refugee Convention.¹⁴ The situation of returnees may indeed change after they have been removed. They may become eligible for the status of refugee. In this case, the re-entry ban may be contrary to the principle of non-refoulement.

13. The fact that the re-entry ban may be issued for a period exceeding five years when the returnee constitutes a “serious threat to public policy or public security” is also a matter of concern (Article 9-2). Firstly, the appreciation of the threat is left to the entire discretion of Member States and the Directive proposal does not provide any mechanism to challenge such an appreciation. This may be a source of abuse. Secondly, the notion of “public policy” seems too vague and covers so many domains that in practice every migrant may be considered as a threat to public policy. For example, every migrant facing removal may be considered as a threat of Member States’ policy to fight against irregular immigration and consequently be systematically removed.

14. We are also worried about the fact that the withdrawal of the re-entry ban may be conditioned upon the reimbursement by returnees of the cost of the return procedure (Article 9-3 c.). This measure will add a supplementary weight on people that are already facing financial difficulties and, to this extent, the measure may be seen as inhumane.

¹³ In the *Amuur v France* Judgment, the ECtHR has judged that an excessive prolongation of detention may lead to a “deprivation of liberty” contrary to Article 5 of the ECHR.

¹⁴ Article 33 of the 1951 Refugee Convention: “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.”

ARTICLE 11-2

“Member States shall provide, upon request, a written or oral translation of the main elements of the return decision and/or removal order in a language the third-country national may reasonably be supposed to understand.”

15. The right of migrants facing removal to be informed in a language which they understand is guaranteed by Article 5(2) of the ECHR.¹⁵ It is essential that, in the process of return, migrants are fully informed about their rights; procedures; and, most of all, about possibilities to challenge the return decision as well as the removal order.

16. In this respect, we regret that only the “main elements of the return and/or removal order” shall be translated. This leaves too much freedom to the authorities in charge of the translation to appreciate what needs to be translated. Moreover, the translation, according to the ECHR, shall be made in a language that migrants understand and not that they “may reasonably be supposed to understand”. Finally, the translation of the return and the removal order shall be systematic and not “upon request” to respect the obligation laid down in the ECHR.

ARTICLE 12- 1 AND 2

“1. Member States shall ensure that the third-country national concerned has the right to an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision and/or removal order.

2. The judicial remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order in which case the return decision or removal order shall be postponed until it is confirmed or is no longer subject to a remedy which has suspensive effects.”

17. We are worried about the wording of the first paragraph which provides that the “return decision and/or [the] removal order” shall be subject to a judicial remedy. Both the return decision and the removal order shall be challenged before a Court.

18. Paragraph 2 of the Article does not impose upon Member States the obligation to guarantee an automatic suspensive effect of appeals against return and removal orders. Migrants facing removal may have to “apply for the suspension of the enforcement of the return decision or removal order”. In practice, the lack of information or the short delay between the issuing of the removal order and its application may lead to a situation in which migrants are removed before reaching the end of the appeal procedure. The suspensive effect of appeal against return or removal order should be automatic in order to allow migrants to stay in the territory of Member States before a final decision about their removal is taken.

ARTICLE 13-1

“Member States shall ensure that the conditions of stay of third-country nationals for whom the enforcement of a return decision has been postponed or who cannot be removed for the reasons referred to in Article 8 of this Directive are not less favourable than those set out in Articles 7–10, Article 15 and Articles 17-20 of Directive 2003/9/EC.”

19. The Directive referred to in the Article is the EU Directive “laying down the minimum standards for the reception of asylum seekers”. We welcome the reference to Article 8 (right to family unity), 9 (right to medical screening), 10 (schooling and education of minors), 15 (right to health care), and 17 to 20 (protection of vulnerable persons: minors, unaccompanied minors and victims of torture and violence) of this Directive when dealing with migrants that cannot be removed or for whom the enforcement of a return decision has been postponed.

20. However, we regret the reference made to Article 7 of the same Directive. Paragraph 3 of this Article states: “When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.” This provision gives legal grounds for detention. In the case of people that cannot be removed, detention is not a solution. It may moreover create a risk of indefinite detention contrary to human rights standards. We repeat our worry that, in practice, such provision may lead to the systematic use of detention against migrants by Member States.

¹⁵ “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons of his arrest and the charge against him.”

ARTICLE 14

“1. Where there are serious grounds to believe that there is a risk of absconding and where it would not be sufficient to apply less coercive measures, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents, an obligation to stay at a certain place or other measures, Member States shall keep under temporary custody a third country national, who is or will be subject of a removal order.

2. Temporary custody orders shall be issued judicial authorities. In urgent cases they may be issued by administrative authorities, in which case the temporary custody order shall be confirmed by judicial authorities within 72 hours from the beginning of the temporary custody.

3. Temporary custody orders shall be subject to review by judicial authorities at least once a month.

4. Temporary custody may be extended by judicial authorities for a maximum of six months.”

21. We welcome the reference to alternative measures to detention in the first paragraph. However, we regret that the evaluation of the “risk of absconding” is left to the discretion of Member States. It will lead in practice to a free and automatic use of detention by national authorities. It is important to re-iterate that detention should be a measure of last resort that can only be used when it is proved to be necessary.

22. We regret again that migrants may be detained before the removal order is issued. In case of voluntary return, it does not leave migrants the possibility to organise properly their return.

23. We also welcome the pre-eminence given to judicial authorities which represent better guarantees of impartiality than administrative authorities. However, when the detention order is taken by a judicial body, it is important that the judicial body in charge of the review is different from the one which has issued the order.

24. Paragraph 4 is for us a deep matter of concern. Six months as a maximum duration of detention is too long for an administrative measure which applies to persons who are not criminals. Because of its gravity, detention should be as short as possible. We would like to recall that the provisions of the proposal are only minimum standards so that Member States which provide a shorter maximum duration for detention than six months should not change their legislation if the proposed EU directive passes.¹⁶

ARTICLE 15

“1. Member States shall ensure that third country nationals under temporary custody are treated in human and dignified manner with respect for their fundamental rights and in compliance with international and national law. Upon request, they shall be allowed without delay to establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations.

2. Temporary custody shall be carried out in specialised temporary custody facilities. Where a Member State cannot provide accommodation in a specialised detention facility and has to resort to prison accommodation, it shall ensure that third country nationals under temporary custody are permanently physically separated from ordinary prisoners.

3. Particular attention shall be paid to the situation of vulnerable persons. Member States shall ensure that minors are not kept in temporary custody in common prison accommodation. Unaccompanied minors shall be separated from adults unless it is considered in the child’s best interest not to do so.

4. Member States shall ensure that international and non-governmental organisations have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary conditions. Such visits may be subjected to authorisation.”

25. We welcome the first paragraph, especially the right to access without delay to legal assistance, family members, competent consular authorities and NGOs. However, these rights are only some among others and the reference to international law means that detention in EU Member States should also be in accordance with international human rights standards which guarantee the right of the detainee to be informed of the grounds of their detention,¹⁷ as well as their right to health care.¹⁸ It is also worth recalling again that the

¹⁶ See Article 4(3) of the EU Commission proposal: “*This Directive shall be without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to the persons to whom it applies, insofar as these provisions are compatible with this directive.*”

¹⁷ See in particular Article 5(2) of the European Convention on Human Rights (ECHR): “*Everyone who is arrested shall be informed promptly, in a language which he understands of the reasons of his arrest and the charge against him.*”

¹⁸ See in particular Article 3 of the ECHR, which prohibits “torture” and “inhuman and degrading treatment or punishment”. In the *Cyprus v Turkey* case (Commission report of 10 July 1976), the European Commission for Human Rights ruled that not providing medical assistance in detention centres constitutes inhuman treatment contrary to Article 3 of the ECHR.

provisions of the EU Commission proposal are minimum standards. EU Member States which provide better conditions of detention should not change their legislation when the directive is adopted.¹⁹

26. Concerning the right to be visited in general (by NGOs, lawyers, family members, etc), we ask that EU Member States provide legal grounds for the refusal or the withdrawal of permission to receive visits, and make sure that the person concerned is entitled to take proceedings by which the lawfulness of the decision shall be decided by a court.

27. We welcome the emphasis laid on the necessity to detain irregular migrants in specialised facilities, even though we regret that the proposal does not make the carrying out of detention in specialised facilities an obligation to Member States. The possibility to accommodate migrants facing removal in normal prisons is left to the discretion of national authorities.

28. Our deepest worry concerns the third paragraph. The proposal does not forbid the detention of minors. This is contrary to international human rights standards.²⁰ We also regret that the directive proposal does not exclude vulnerable persons from its scope.

29. We welcome the role attributed to international organisations and NGOs. However, we once again ask the EU to set up a EU body which would monitor and periodically report on the development of national legislation on detention practices in the EU Member States.²¹

December 2005

Memorandum by the Commission for Racial Equality

1. INTRODUCTION

The Commission for Racial Equality (“the Commission”) was established through the Race Relations Act 1976, as amended (“the RRA”), and has duties²² to:

- Work towards the elimination of racial discrimination and harassment.
- Promote equality of opportunity, and good relations, between persons of different racial groups generally.
- Keep under review the working of the Act and, when they are so required by the Secretary of State or otherwise think it necessary, draw up and submit to the Secretary of State proposals for amending it.

The CRE welcomes the opportunity to comment on the Draft directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third country nationals COM (2005) 391 (the “Proposed Directive”) and would like to thank the House of Lords EU Home Affairs Sub-Committee.

1.1 *Position of the CRE on the Proposed Directive*

The Proposed Directive outlines a proposal for “clear, transparent and fair common rules” on return, removal, coercive measures, temporary custody and re-entry. The CRE broadly welcomes that the Proposed Directive and believes the UK government should opt into it as it aims to create consistency of treatment of illegally staying third country nationals across all Member States. The CRE particularly welcomes:

- the specific reference is made in the preamble that the directive should be implemented without discrimination and in particular that:
 - “Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.”²³
- the fact that the Proposed Directive seeks to ensure compliance with other relevant international human rights instruments, such as the United Nations Convention on the Rights of the Child 1989 and the European Convention on Human Rights,²⁴ as well as the Charter of Fundamental Rights of the European Union;²⁵

¹⁹ See Article 4(2) of the EU Commission proposal.

²⁰ See in particular Article 5(1)d of the ECHR, which only allows “*the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent authority.*”

²¹ See “Common principles on removal of irregular migrants and rejected asylum seekers”; Amnesty International, Caritas Europa, ECRE, Human Rights Watch, JRS-Europe, CCME, PICUM, Quaker Council for European Affairs, Save the Children, Cimade, Iglesia Evangelica Espanola, Federazione delle Chiese Evangeliche in Italia, SENSOA; 1 September 2005.

²² s43(1) of the RRA.

²³ Paragraph 17 of the preamble to the Proposed Directive.

²⁴ Paragraph 18 of the preamble to the Proposed Directive.

²⁵ Paragraph 20 of the preamble to the Proposed Directive.

- the statement in article 6(4) that no return decision shall be issued where Member States are subject to fundamental rights such as the right to non-refoulement, the right to education and to family unity;
- the judicial remedy provision in article 12 that a person shall have the right to appeal or review a removal order and that the remedy will have suspensive effect or the enforcement of the removal order;
- article 14 as it limits temporary custody only being used where there are serious grounds to believe that there is a risk of a person absconding, requires reviews to be taken every month and limits custody to a maximum of six months;
- article 15 in specifying that persons detained in temporary custody must be treated in a humane manner with a respect for their fundamental rights and in compliance with international law. The CRE also welcomes the provision in article 15(2) that where third country nationals need to be placed in prisons they must be permanently physically separated from ordinary prisoners.

The CRE does however have a number of concerns relating to race equality with the Proposed Directive and whether, if the UK decides to opt into the Proposed Directive, it will implement it in a manner which fulfils its obligations under the Proposed Directive, international instruments, and the RRA to prevent racial discrimination and promote good race relations.

The responses below have been grouped under the particular headings for which information has been requested by the Committee and where the CRE considers it is able to provide information from a race equality perspective.

2. THE LEGAL BASIS OF THE DRAFT DIRECTIVE AND THE PREMISE ON WHICH IT IS BASED

2.1 *Non-discrimination principle*

Paragraph 17 of the preamble to the Proposed Directive provides that Member States should give effect to the directive without discrimination, including on grounds of race, colour, or ethnic origin. Although this does not in itself impose a legal obligation on Member States it does indicate the underlying principles of the directive and would be able to be referred to in any legal proceedings.

The CRE recommends that this provision be extended to cover harassment and victimisation by inserting the words “harassment or victimisation” after the word “discrimination”. This would make it clear that not only direct and indirect discrimination would be prohibited. The CRE considers that this is necessary as there is evidence in the UK of racial abuse and harassment in detention centres (see sections 4.1 and 4.2 on process of removals and detention below).

The CRE also recommends that the preamble should make specific reference to procurement arrangements entered into by Member State public bodies and that all contracts entered into should make specific reference to the need to carry out the contract without discrimination, harassment or victimisation. For example, a new paragraph under paragraph 17 could be inserted which reads:

“Member States should ensure that all public bodies that operate the procedures and policies relating to the directive, have a provision within any contract with contractors that the contract be carried out without any discrimination, harassment or victimisation on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.”

2.2 *The Impact of the Proposed Directive on The Race Relations Act 1976*

There are several provisions under the Race Relations Act relevant to immigration and nationality functions which include removals.

Section 19B: Public authorities

Section 19B(1) makes it unlawful for a public authority in carrying out any functions to do an act which constitutes discrimination. This includes discrimination on grounds of race, colour, nationality, ethnic or national origins. The Home Office which has immigration and asylum functions is a public authority that must, subject to the exception discussed below, comply with this provision.

Section 19D: exception for certain immigration functions

Section 19D provides that it is not unlawful for a public authority to discriminate on grounds of “nationality or ethnic or national origins in carrying out immigration functions”. where a person is acting pursuant to an authorisation by a Minister or an enactment.²⁶ Under section 19E a monitor must be appointed to review the likely effect on the operation of the exception of any authorisation and must prepare an annual report of findings. The provision relating to a monitor was introduced because of strong opposition to the exception.

The House of Lords in the case of *R v Immigration Officer at Prague Airport & Another* [2004] UKHL 55 recently found that UK immigration officials at Prague airport had unlawfully directly discriminated against Czech citizens of Roma ethnic origin under the RRA in the manner in which they examined them to decide whether they could enter the UK. Although there was in fact an authorisation made pursuant to the section 19D exception (see below) to allow such discrimination based on ethnic origin, the UK government did not rely on that authorisation.

If the UK government decides to opt into the Proposed Directive, subject to the section 19D exception, it should ensure that the Home Office complies with its obligations under the RRA and the non-discrimination principle in the Proposed Directive by not operating any aspect of the removals system (for example detention, or the removal itself) in a racially discriminatory manner.

In relation to the use of the authorisations under section 19D, one such current authorisation relates specifically to removals²⁷ and allows priority to be given to persons of a particular nationality in terms of removal directions where there is evidence that persons of that nationality have or will be likely to breach immigration laws.

Although that authorisation permits discrimination on grounds of nationality which would be allowed under the proposed Directive, it would equally be lawful to permit discrimination on grounds of ethnic or national origin. The CRE is concerned that if the UK government decides to opt into the Proposed Directive, it may implement it but provide that some or all aspects of removals provided for in the Proposed Directive are made subject to the section 19D exception, allowing discrimination in immigration functions on grounds of ethnic and national origins, contrary to the non discrimination principle set out in paragraph 17 of the Preamble. The CRE is particularly concerned at this possibility for a number of reasons.

Recently, both the United Nations Committee on the Elimination of all forms of Racial Discrimination (CERD) and the UK parliament Joint Committee on Human Rights have recommended that the exception be repealed. In its Concluding Observations on the UK, CERD commented:

“The Committee is concerned about the application of section 19D of the Race Relations Amendment Act of 2000, which makes it lawful for immigration officers to ‘discriminate’ on the basis of nationality or ethnic origin provided that it is authorised by a minister. This would be incompatible with the very principle of non-discrimination.

The Committee recommends that the State party consider re-formulating or repealing section 19D of the Race Relations Amendment Act in order to ensure full compliance.”²⁸

The Joint Committee on Human Rights considered the UK’s implementation of the International Convention on the Elimination of all forms of Racial Discrimination in light of the Concluding Observations of CERD and their recommendations reinforced those of the UN Committee:

“In our view there is a real concern that the use of section 19D will erode the equal treatment of certain national and ethnic groups both in the immigration service and more widely. We consider that authorisations under section 19D are likely to breach the UK’s obligations under CERD. We therefore recommend that the Government should consider the repeal of the section, in accordance with the UN Committee’s recommendation.”²⁹

In addition the monitor of section 19D in her latest annual report has expressed concern that the use of information based on past adverse decisions or abuse of the system can be self-fulfilling and that some immigration officers accepted that knowing that a person was from a high risk nationality could adversely affect that decision.³⁰

²⁶ There were nine authorisations in operation during the year 2004–05. The most far-reaching of these is the authorisation which permits prioritisation in the examination of arriving passengers. Other authorisations relate to language analysis of three nationals where nationality is disputed, asylum work streaming, directions for removal, and to narrower activities such as translation of documents, work schemes benefiting certain nationals, and additional checks of document of specified nationals: see Annual Report 2004–05 of the Independent Race Monitor, Mary Coussey, 5 July 2005.

²⁷ Race Relations Act 1976 Section 19D Ministerial Authorisation of 23 May 2003.

²⁸ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland 10/12/2003 CERD/C/63/CO/11 at para 16.

²⁹ The Convention on the Elimination of Racial Discrimination, 14th Report of Session 2004–05, para 83.

³⁰ Annual Report 2004–05 of the Independent Race Monitor, Mary Coussey, 5 July 2005, paras 2.31–2.32.

The position of the CRE is that the UK government should not utilise the section 19D exception to permit discrimination in the implementation of any aspect of the Proposed Directive. Alternatively, if it does, in order to be consistent with the non-discrimination principle in the Proposed Directive and other international instruments such as CERD, the UK government should amend section 19D to remove the exception for discrimination on grounds of ethnic and national origins. The main justification advanced by the UK government for the exception is that operating immigration controls inevitably involves differential treatment on the basis of nationality and less frequently ethnic or national origin (for example visa regimes on certain countries; free movement rights of EU citizens; and immigration rules giving preferential treatment to Commonwealth citizens).³¹ The CRE does not consider that this justification is valid in terms of ethnic and national origins. For example, differences in treatment of White and Black Zimbabweans seeking to enter the UK should not be justified on the basis of their different ethnic origins. That would be similar to the Prague airport case as Czech nationals were treated differently based on whether they were of Roma ethnic origin.

Section 71: Race equality duty

Under section 71(1) of the RRA listed³² public authorities when carrying out their functions have a general duty to have “due regard” to the need to:

- Eliminate unlawful racial discrimination.
- Promote equality of opportunity and good relations between persons of racial groups.

Under section 71(2) of the RRA the Home Office, amongst others, is also required to publish a Race Equality Scheme (“the Scheme”), which indicates its policies and functions that are relevant to fulfilling its general duty and its arrangements for, amongst other things, consulting on and conducting race equality impact assessments of proposed relevant policies and monitoring of policies for adverse impact on the promotion of race equality.

The Immigration and Nationality Directorate (IND) of the Home Office has produced an Associate Race Equality Scheme separate from the Home Office overarching Race Equality Scheme. There is little relating to its functions and policies concerning removal: a relevant function is stated as “taking enforcement action against immigration offenders, including employers who contravene the law on illegal migrant working” and a relevant policy is stated as “to ensure people leave when they are no longer entitled to be here”.³³ Nothing is said of the IND’s particular policies on removal and detention of persons pending removal. Further in the section headed “Key Challenges” although a stated challenge is that “Ministerial authorisations under RRA section 19D are properly justified, evidence-based, legally robust, and kept in force for only so long as necessary”³⁴ there is no specific reference to removal and detention policies.

The CRE considers that the IND should review its Race Equality Scheme in order that more detailed reference is made to relevant functions and policies which include policies on removal and detention of illegally staying third country nationals. If the UK government decides to opt into the Proposed Directive then such a review would be even more important, and in such case the IND should contact a race equality impact assessment of any proposed policies relating to the directive as well as monitor the impact of such policies on race equality once they are in place.

2.3 *References to persons staying “illegally” and impact on good race relations*

Throughout the text of the Proposed Directive the term “illegally” staying third country nationals is used which covers both situations where someone enters a Member State illegally, and where a person entered legally but is no longer staying legally. In the UK the second category of persons would not normally be termed an illegal. In addition, the use of the term “illegal” had strongly negative connotations associated with criminal activity. The use of such terminology could reinforce negative stereotypes of asylum seekers and ethnic minorities entering the UK. The CRE therefore recommends that the word “unlawful” or “unlawfully” be substituted in all relevant part of the Proposed Directive.

³¹ Comments by the UK government, Appendix to the ECRI Third Report on the United Kingdom, 17 December 2004, pages 54–55.

³² As listed in Schedule 1A to the Act.

³³ IND Associate Race Equality Scheme, page 7.

³⁴ IND Associate Race Equality Scheme, page 8.

3. MERITS OF THE PROCEDURAL RULES

Article 11(2) states that upon request, Member States shall provide a written or oral translation of the main elements of the return decision and/or removal order. The CRE recommends that after the word “translation” the words “from an accredited and independent translator”.

4. THE CONDITIONS AND DURATION OF DETENTION

There is evidence that aspects of the current UK government’s removal process may affect race relations. This includes:

- The process of removal.
- The treatment of detainees in detention centres.
- The consequences of removals.

This may also impact on whether or not the Home Office is fulfilling its race equality duty under section 71 of the RRA to have due regard to the need to eliminate unlawful discrimination and promote good race relations.

4.1 *Process of removals: article 10*

A number of aspects of the current removal process may impact on race equality, and which may perpetuate or encourage stereotypes of ethnic minority persons as criminals. They include the timing of removal (cases where families are removed from communities in the middle of the night and with no notice to collect belongings), entering into places of worship, the involvement of children (including removing children from school) and the treatment of people in transit.

There are anecdotal reports of racism during transit but little concrete evidence. However, there is evidence of mistreatment. A number of reports indicate that high levels of abuse, potentially racist, are taking place.³⁵

Refugee Community Organisations (RCO) and other community organisations have indicated to us that the problem may lie less with the high level policy than with the implementation of that policy and the accountability mechanisms in place.

The Proposed Directive states that coercive measures must be proportional and “shall not exceed reasonable force” and that they shall be implemented “in accordance with fundamental rights and with due respect for the dignity of the third country nationals concerned”.³⁶ The CRE welcomes this but wishes to emphasize that coercive measures in removals at night, from schools and from places of worship should only be used as a last resort where other reasonable methods have failed.

Further, the CRE recommends that a new provision be inserted in article 10 which states that:

“Member States shall ensure that all incidents of physical or mental abuse during removals, are monitored by type, investigated and that appropriate action is taken where necessary.”

4.2 *Detention: article 14*

The CRE welcomes article 14 in the UK detention is currently an administrative decision with no judicial oversight save in relation to certain types of applications for bail. Article 15 provides for judicial approval, time limits and bail.

The Proposed Directive states that the use of temporary custody should be limited, proportional, only used if necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient.³⁷ The evidence of the current UK practice indicates that significant numbers of people are being detained. The number of detention places in the UK has increased significantly over recent years. In 1998, 741 asylum seekers were detained. As of December 2004, there were 1,950 people in detention of which 78 per cent were asylum seekers. Furthermore, Tony Blair personally announced in an article for the *Times* newspaper in September 2004 that the Government would fund an additional 1,000 detention spaces. The current target capacity is therefore 4,000. The numbers seem at odds with a concept of “proportionality”.

³⁵ The Medical Foundation (2004) *Harm on Removal: Excessive Force Against Failed Asylum Seekers*; BID (2005) *Submission to the Home Affairs Select Committee inquiry into immigration control*.

³⁶ Article 10(1) of the Proposed Directive.

³⁷ Paragraph 11 of the preamble and article 12 of the Proposed Directive.

The length of stay in detention centres varies but it seems unlikely that this would constitute “temporary” in any objective view. Government statistics from September 2005 indicate that 55 people have been held for more than 12 months, 140 for more than six months, and 955 for more than one month.³⁸

A number of foreign nationals who have been convicted, imprisoned and served their sentence remain incarcerated until deportation. The period of their detention is technically indefinite. It is unclear how many foreign nationals remain imprisoned after their sentence as we only have the net number of foreign nationals in prison, some of whom may be detained for other reasons. The most recent figures show the number of foreign nationals detained under Immigration Act powers in prisons totals 170.³⁹ It is also clear that this has an impact on good race relations in prisons and in the local area.⁴⁰

The problem is not only one of numbers and length of stay but also of treatment in detention centres. This includes inappropriate conditions (for example in prisons) and growing evidence that widespread racial abuse may be taking place in detention facilities. Two undercover media stories found evidence of racism at Oakington (2005) and Yarl’s Wood detention centre (2003). These stories prompted a number of investigations by HM Prison Inspectors and the Prison Ombudsman. There have also been a number of critical reports from Non-Governmental Organisations (NGO). The findings of these reports have major implications for racial equality.⁴¹

Some of the reports⁴² focus specifically on racist incidents. However, the other reports, while covering a range of issues, have clear findings that indicate safeguards against racial bias are not in place. For example, the HM Inspectorate reports into the four short term holding facilities and four short term non-residential holding facilities found no evidence of a system of recording complaints of racism in any of the centres.

The CRE submitted evidence to the recent Stephen Shaw enquiry into Oakington.⁴³ A key point made in the enquiry was that victims were unlikely to complain because, amongst other things, they (typically asylum seekers) did not know racist and possibly violent behaviour was unacceptable, nor did they understand the complaints system or have sufficient trust in authority.

The CRE therefore recommends that a new provision in article 15 be inserted which states:

“Member States shall ensure that all third country nationals detained under temporary custody are made aware of their rights, including the right to complain and that the information is available in a language the third country national may reasonably be supposed to understand. All complaints should be monitored by type, investigated and appropriate action taken.”

The CRE also recommends in relation to article 15(4) and visits by NGOs that after the last sentence “Such visits may be subject to authorisation” the words “but should not be denied unless reasons are provided in writing as to why it would be unreasonable to grant an authorisation to visit the facilities”.

4.3 *Detention and treatment of children*

The CRE has particular concern regarding the detention of children. There is regular reference in the Proposed Directive to safeguarding the child and to ensuring the “best interests” of the child are paramount, in accordance with the United Nations Convention on the Rights of the Child (“CRC”).

Article 22 of the CRC guarantees the protection of children seeking refugee status. More generally, the rights protected by the CRC apply to all children within the jurisdiction, irrespective of nationality. The UK has entered a general reservation to the CRC as regards the entry, stay in and departure from the UK, of those children subject to immigration control, and the acquisition and possession of citizenship.

³⁸ Home Office (2005) Quarterly Asylum Statistics, as of 24 September 2005, TABLE 11, <http://www.homeoffice.gov.uk/rds/pdfs05/asylumq305.pdf>; BID (2005) Submission to the Home Affairs Select Committee inquiry into immigration control.

³⁹ Home Office (2005) Quarterly Asylum Statistics, as of 24 September 2005, TABLE 11, <http://www.homeoffice.gov.uk/rds/pdfs05/asylumq305.pdf>

⁴⁰ Reports of adverse impacts on Good Race Relations have been reported by the CRE’s funded network of local race bodies. For example, Ipswich and Suffolk Race Equality Council (ISCRE) have raised the issues directly with IND in 2004 and most recently in November 2005. ISCRE point to the particular difficulties caused by few of the prisoners having English as a first language.

⁴¹ Key reports include Report by the Prisons and Probation Ombudsman for England and Wales (2005) Inquiry into allegations of racism and mistreatment of detainees at Oakington immigration reception centre and while under escort; Report by the Prisons and Probation Ombudsman for England and Wales (2004) Investigation into Allegations of Racism, Abuse and Violence at Yarl’s Wood Removal Centre; HM Chief Inspector of Prisons (2004) Report on the unannounced inspections of four short-term holding facilities: Communications House, London; Lunar House, Croydon; Electric House, Croydon; Dallas Court, Manchester; HM Chief Inspector of Prisons (2005) Report on the unannounced inspections of four short-term non-residential holding facilities: Gatwick Airport, North Terminal; Gatwick Airport, South Terminal; London City Airport; Dover Asylum Screening Centre.

⁴² For example, Report by the Prisons and Probation Ombudsman for England and Wales (2005) Inquiry into allegations of racism and mistreatment of detainees at Oakington immigration reception centre and while under escort.

⁴³ Report by the Prisons and Probation Ombudsman for England and Wales (2005) Inquiry into allegations of racism and mistreatment of detainees at Oakington immigration reception centre and while under escort.

The UK government justifies this reservation as necessary in the interests of effective immigration control, but states that the reservation does not prevent the UK from having regard to the CRC in its care and treatment of children.⁴⁴ It states that, in practice “the interests of asylum seeking children and young people are fully respected” in particular under the Human Rights Act 1998 and that “notwithstanding the Reservation, there are sufficient social and legal mechanisms in place to ensure that children receive a generous level of protection and care whilst they are in the UK”.

The reservation is justified by the Government as necessary to prevent the CRC affecting immigration status. The UK parliament Joint Committee on Human Rights (JCHR) has made clear that it considers the government’s anxiety on this point to be unfounded. Their principal concern is that the practical impact of the reservation goes far beyond the determination of immigration status, and leaves children subject to immigration control with a lower level of protection in relation to a range of rights which are unrelated to their immigration status. Evidence to the JCHR inquiry into the UK government’s review of its international human rights obligations,⁴⁵ and to previous inquiries it has undertaken, testifies to the unequal protection of the rights of asylum seeking children under domestic law and practice. In the JCHR recent report on the Children Bill⁴⁶ the JCHR expressed particular concern at the exclusion of agencies dealing with asylum seeking children from the duty under the Bill to promote the welfare of children⁴⁷ and concluded that this exclusion amounted to unjustified discrimination against asylum-seeking children on the grounds of nationality. Such unequal treatment is legitimised by the continuance in force of the reservation to the CRC.

There is evidence that asylum seeking and refugee children receive inferior treatment and are detained.⁴⁸ This year, for example, there have been recorded stays in Tinsley House by children in excess of five weeks.⁴⁹

The CRE recommends that in article 15(3) a further sentence be added stating “Minors should also be provided with appropriate facilities for their education and health” in order that the rights of the children are made express rather than mere reference to their rights under the CRC. The CRE also believes that the UK government should withdraw its reservation to article 22 of the CRC in order to be consistent with the obligations under the Proposed Directive towards children.

4.4 *Consequences of removals*

The effect of removals on race relations cannot be underestimated. It may have led to a lack of trust in the immigration authorities, undermining customer service levels, and reduce trust in other authorities. We have particular concerns, for example, that there may be an underreporting of crime, including hate crime, to the police.

There is clear evidence that public attitudes are hostile and negative towards new immigrants and asylum seekers. The CRE commissioned or jointly commissioned several research reports into public attitudes that have contributed to a growing evidence base.⁵⁰ In terms of action, the evidence indicates political leadership is important. There is also significant potential for producing information that may counter myths, rumours and stereotypes. Similarly, funding of local projects aimed at informing the debate is important.

Given the likelihood of reinforcing negative attitudes and cementing stereotypes with a well-publicised removals policy, the CRE therefore recommends that if the UK government opts into the directive, it should regularly monitor the effect of the policies in terms perceptions of immigrants and asylum seekers and race relations.

⁴⁴ Government evidence to the JCHR inquiry into the UN Convention on the Rights of the Child, and the Home Office response to JCHR questions on the Nationality, Immigration and Asylum Bill, was to similar effect: Tenth Report of Session 2002–03, op cit., HL Paper 117, HC 81, paras 81–87; Seventeenth Report of Session 2001–02, Nationality, Immigration and Asylum Bill, HL Paper 132, HC 961, Ev 1.

⁴⁵ Seventeenth Report of Session 2004–05.

⁴⁶ Nineteenth Report of Session 2003–04, *Children Bill*, HL paper 161, HC 537, paras 86–97.

⁴⁷ Children’s Rights Alliance for England expressed particular concern that asylum seeking children, identified by the government in its Green Paper *Every Child Matters* as amongst the children “in greatest need” were being actively excluded from the new duty. See Ev 15.

⁴⁸ Nandy, L (2005) The impact of government policy on asylum-seeking and refugee children, *Children & Society*, Volume 19, pp 1–4.

⁴⁹ Children’s Rights Alliance for England press release, 21 November 2005.

⁵⁰ The three pieces commissioned by the CRE were: ICAR (2005) *Attitudes toward asylum seekers, refugees and other immigrants*, by Nissa Finney and Esme Peach; Coe, J *et al* (2005) *Public Attitudes Campaigning and ippr* (2005) *Asylum: Understanding public attitudes* by Miranda Lewis.

Other research includes: Cohen, S (2002) *Folk Devils and Moral Panics*, Third Edition; Halman (2001) *The European Values Study: A Third Wave Source Book of the 1999/2000, European Values Study Surveys*; Kaye, R (1998) “Redefining the Refugee: The UK Media Portrayal of Asylum Seekers”, in Koser, K & Lutz, H (eds) *The New Migration in Europe: Social Constructions and Social Realities*, Basingstoke: MacMillan; McLaren, L & Johnson, M (2005) *Understanding the rising tide of anti-immigrant sentiment*, British Social Attitudes 21st Report, pp169–200.

5. THE SAFEGUARDS FOR INDIVIDUALS TO BE REMOVED (SUCH AS CONCERNING THEIR ARREST AND ESCORT), PARTICULARLY WHERE REMOVAL ACTION IS SUB-CONTRACTED TO PRIVATE COMPANIES

The race equality duty under section 71 of the RRA to have due regard to the need to eliminate unlawful discrimination and promote equality of opportunity and good race relations applies to procurement functions of a public authority.

Where one or more of the Home Office functions is carried out by an external supplier, the Home Office remains responsible for meeting the race equality duty. Contractors themselves must not discriminate, but they do not have the same legal obligation to promote equality of opportunity. The Home Office must therefore build relevant race equality considerations into the procurement process to ensure each function meets RRA requirements.

In addition, for the purposes of section 19B of the RRA which makes it unlawful for public authorities to discriminate in the carrying out of their functions, a private company carrying out public functions (see section 19B(2)) such as a contractor would also be subject to that section.

The Home Office operates several privately-run detention facilities. The CRE recommends that if the UK government opts into the Proposed Directive, non-discrimination and human rights safeguards and monitoring must therefore be written into any relevant contracts with private companies. The contracts could also refer to (where appropriate such as detention by private security firms as proposed in the current Immigration, Asylum, and Nationality (IAN) Bill) aspects discussed above such as providing access to legal representatives, NGOs and appropriate standards of education and healthcare.

As mentioned above, the CRE also recommends that there be a specific paragraph in the preamble relating to procurement and non-discrimination (page 3).

6. THE PROPOSALS FOR A RE-ENTRY BAN: ARTICLE 9

Article 9(2)(d) states that the length of a re-entry ban shall be determined by factors including whether the person constitutes a threat to “public policy” or public security.

There is no definition of what constitutes public policy in such circumstances and the CRE believes that the particular provision is currently due vague and requires further clarification with the body of the Proposed Directive. For example, would criticism of a Member State foreign policy on the war in Iraq constitute a threat to public policy and be a valid circumstance. The CRE considers that a threat to public policy should be construed where there is a legitimate expression of political opinion in accordance with the right to freedom of expression and belief.

7. REPORTING

The CRE recommends that the reporting period in article 17 should be two years not four years as four years is too long in order to be able to assess the impact of the directive.

22 December 2005

Memorandum by the Immigration Advisory Service (IAS)

SUBMISSION OF EVIDENCE BY IAS TO THE HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION INQUIRY INTO THE DRAFT DIRECTIVE ON COMMON PROCEDURES FOR THE RETURN OF ILLEGALLY STAYING THIRD COUNTRY NATIONALS

IAS

The Immigration Advisory Service is the largest national charity with over 30 years' experience and more than 350 staff members giving free legal advice and representation to immigrants and asylum seekers. It has 20 offices located throughout the UK, one in Bangladesh and one in Pakistan with other overseas offices planned. IAS participates in the Community Legal Service scheme. It is publicly funded through grant and the Legal Services Commission and quality is assured through the Specialist Quality Mark and compliance with the requirements of the Office of the Immigration Services Commissioner. All its caseworkers are professionals specialising in immigration, nationality and asylum. See the website (www.iasuk.org) under News “Publications” and Press Office for all IAS' previous responses to consultation papers, briefings and proposed amendments to legislation. Contact the Chief Executive Keith Best (keith.best@iasuk.org) for any further material or information.

COMMENTARY

1. IAS accepts that return policy is an integral and crucial part of the fight against illegal immigration as set out in the Commission's Communication of 15 November 2001 on a Common Policy on Illegal Immigration and that return policy needs to be based on three elements: common principles, common standards and common measures. The Green Paper on a Community Return Policy of 10 April 2002 elaborated in more detail on the issue of return as an integral part of a comprehensive Community Immigration and Asylum Policy. It highlighted the need for approximation and improved co-operation on return among Member States and put on the table a number of possible elements for a future legislative proposal on common standards in order to trigger a broad debate among relevant stakeholders. The ensuing Commission Communication on a Community Return Policy on Illegal Residents of 14 October 2002 took into account the results of this public consultation process. It is important to see how the proposed Directive measures up against the Communication.

2. The Communication from the Commission to the Council and the European Parliament on a Community Return Policy on Illegal Residents (Brussels, 14.10.2002 COM(2002) 564 final) states, *inter alia*, that "common standards should be set in the medium-term in order to facilitate the work of the services involved and to allow enhanced co-operation among Member States. In the long term such standards should establish rules for adequate and similar treatment of illegal residents, who are the subject of measures terminating a residence, regardless of the Member State which enforces the removal." (paragraph 2.3). At paragraph 2.3.1 the Communications states "The Commission therefore reiterates its step-by-step-approach, proposed in its Communication of November 2000,⁵¹ emphasising the link between mutual recognition and harmonisation on asylum." We are concerned that the adoption of the proposed Returns Directive would not reflect this step-by-step approach.

3. On removal (paragraph 2.3.2 the Communication states "As long as Member States have different asylum systems in place, a final safeguard for non-refoulement appears necessary to enable Member States to comply with their international obligations, if the risk for refoulement has not been examined before. Such a final safeguard should refer to the asylum procedure in place, which includes an effective remedy." IAS fears that the proposed Directive does not provide a final safeguard against the risk of refoulement. This is manifested especially in the capacity to remove to a third country rather than the country of origin which could involve indirect refoulement to a country in which there is a real risk of persecution. The conclusion and recommendation is that "Minimum standards on removal should be set at EU level, setting a final safeguard for non-refoulement requirements in a future Directive on Minimum Standards for Return Procedures, defining common guidelines for removal on the physical state and mental capacity of the returnee as well as on the returnee's integrity during the removal operation. Moreover, an assessment mechanism should be established, which would allow assessment of the actual situation in certain countries as to whether removals are feasible or not."

4. In paragraph 2.3.3 the Communications states "Special considerations should also apply in the case of third-country nationals who are born in a Member State and have never lived in their country of nationality. The expulsion of refugees as well as other persons under other forms of international protection requires special attention, for they can only be removed in accordance with international obligations such as the 1951 Geneva Convention and the European Convention on Human Rights. In general, a decision for expulsion should in all cases be based on the individual situation. The human rights of the person concerned and whether the measure is proportionate must be adequately considered. A judicial remedy should be available, including the possibility to ask for suspensive effect."

5. IAS has seen the joint submission of the Refugee Council and Amnesty International and supports its argument and conclusions.

6. IAS endorses the principles set out in the paper of June 2005 by the European Council on Refugees and Exiles entitled *The Way Forward, Europe's role in the global refugee protection system: The Return of Asylum Seekers whose Applications have been Rejected in Europe*. The drive to return has led to an increased use of detention in the case of asylum seekers whose cases have been rejected for unreasonably long and even indefinite periods of time to prevent absconding. It has also led to destitution for many asylum seekers whose cases have been rejected, from whom all types of support are withdrawn as an incentive to return. Even where it is recognised by the host country that an individual cannot be returned many of those whose applications have been rejected do not receive a legal status and find themselves in a limbo situation without the right to work to earn a living and without state support. The result is that asylum seekers whose applications have been rejected form a growing segment of vulnerable, poor and marginalised people in European societies. The failure to return is widely seen as a serious problem undermining asylum systems, yet there are no

⁵¹ COM (2000) 755 final.

comprehensive, accurate and comparable statistics that could establish, for example, the extent to which asylum seekers whose claims have been rejected leave of their own accord, before steps are taken to remove them. The credibility of a removal system and an asylum system is fundamentally undermined if it fails to protect those in need of international protection.

7. Fair and efficient asylum systems are a pre-requisite to return. With the adoption of the Asylum Procedures Directive by the Justice and Home Affairs Council in Brussels on 1–2 December, the EU has completed the first phase of the Common European Asylum System. The official text of the Directive is not yet available. The Directive approved introduces minimum standards on procedures in Member States for granting and withdrawing refugee status but we are concerned that these minimum standards do not guarantee sufficient protection when set against the proposed Directive on returns. States must not enforce returns prematurely. International cooperation with countries of origin in a spirit of solidarity at all stages of the return process is a pre-requisite to achieving sustainable return. States should also resist penalising individuals for matters that are very often beyond their control where return is not possible. Instead, developing alternatives to return will often constitute a better solution for certain individuals as well as for the state that has considered and rejected their asylum application. European states should not enforce removals and should grant a legal status to certain categories of persons, especially those who cannot be returned for reasons beyond their control. In undertaking returns European states must ensure their actions do not breach any of their human rights obligations under international and European law. Detention should only be used as a last resort, and should be in full compliance with international human rights law. The denial of human rights and the withdrawal of support as a means of forcing asylum seekers whose applications have been rejected to cooperate with return procedures or compel them to leave of their own accord is unacceptable. Sending states should set procedures in place to check that returnees have reached their destination safely. There should also be follow-up and monitoring of returns to identify whether return policies are safe, effective and sustainable.

8. IAS endorses the Summary of the proposed action, especially that illegal stay should be ended through a fair and transparent procedure and that voluntary return should be encouraged by having a “period for departure” so long as this is sufficient for it to be capable realistically of it being effected before other enforcement action is taken. We support a harmonised two-step procedure involving a return decision as a first step and—if necessary—the issuing of a removal order as a second step as well as addressing the situation of persons who are staying illegally but who cannot (as yet) be removed.

9. Limiting the use of coercive measures, binding it to the principle of proportionality and establishing minimum safeguards for the conduct of forced return are essential. Coercive measures are expensive and, in a democracy, often counter-productive as they can lead to public sympathy as well as danger of physical harm to those affected. The principle of proportionality should balance the harm of coercive measures against the benefit of voluntary return so long as these truly are voluntary. IAS regards the measures adopted by the British Government to persuade those whose stay has become illegal to avail themselves of voluntary return through deterrence as repugnant and ineffective and likely to be overturned judicially as not leading to voluntary participation in return. Denial of benefits and support leading to challenges under Article 3 of ECHR and provision of “hard case” support dependent on “voluntary” return co-operation have been challenged already. We are troubled that, as the proposed Directive lays down general principles but leaves it to the Member States to choose the most appropriate form and methods for giving effect to these principles, there may be considerable disparity between Member States which could lead to unfairness and third country nationals seeking to go to particular states. It is for this reason that IAS feels that a Regulation rather than a Directive would have been more appropriate: the return of a third country national outside the jurisdiction of the Member States potentially has graver consequences than the treatment afforded within the EU States.

10. IAS is concerned, also, that the proposed ban on re-entry may not take account of subsequent changed circumstances for those subject to it. Moreover, the ban will apply to all Member States even though there may be considerable disparity in the way in which different Member States apply the proposed Directive (see our concern above about a proposed Directive as against a Regulation).

11. IAS welcomes the statement that the proposal provides for a right to an effective judicial remedy against return decisions and removal orders but is concerned that this then postulates circumstances in which it may not have suspensive effect. IAS is of the firm view that an effective remedy against unfair removal, especially to a country where there may be treatment giving rise to Refugee Convention or ECHR issues, is only to an independent tribunal, for which free legal advice and representation should be available to all appellants, is only one which has suspensive effect. In most cases the most cogent evidence will be that of the appellant and that evidence, and testing it through questioning whether in an inquisitorial or accusatorial system, is lost in non-suspensive appeals.

12. IAS welcomes the attempt to limit the use of temporary custody and to bind it to the principle of proportionality. We opine that this principle can be effected only by a provision whereby the continued detention of an individual is tested at regular intervals before an independent tribunal in which the individual has publicly funded legal representation.

Keith Best

Chief Executive IAS

December 2005

Memorandum by the Joint Council for the Welfare of Immigrants (JCWI)

The JCWI (Joint Council for the Welfare of Immigrants) is an independent national organisation which has been providing legal representation to individuals and families affected by immigration, nationality and refugee law and policy since 1967. JCWI actively lobbies and campaigns for changes in law and practice and its mission are to eliminate discrimination in this sphere. JCWI works to influence debates on immigration and asylum issues in both the UK and at European level.

SUMMARY OF CONCERNS

As an initial concern, prior to discussing the detail of this draft Directive, we would ask whether it is appropriate for the EU to be adopting common policies on the enforcement of return of irregular migrants when it has, as yet, failed to provide common policies on regular migration into the Member States. This is particularly problematic if we are discussing the implementation of EU-wide powers when the grounds for removal arose originally in the context of the national laws of just one Member State. There is currently no effective restraint on any Member State adopting rules and regulations with respect to the admission and exclusion of foreign nationals which in the national laws of other Member States might be regarded as, for example, racially discriminatory or in breach of its obligations under international agreements and conventions as determined by its own national courts.

In what follows we discuss the details of the provisions set out in the draft Directive without prejudice to our position on the inappropriateness of adopting common policy on returns in the absence of common policy on the admission and residence of migrants. Until this pressing issue is settled and agreement has been reached on the wider issues of EU migration law and policy, the Commission should be called upon to withdraw the current draft from the law-making process.

Notwithstanding the absence of common policies on migration, JCWI would hope that the proposed Directive would lead to an improvement on existing return procedures and practices, and although this will be the case in some Member States there is concern that in countries currently operating higher standards the Directive will be used as an opportunity to level down. In some respects, this Directive is incomplete, failing to credibly acknowledge the rights of migrants themselves. We believe that this is because the Directive is vague in a number of areas. There is a danger that this lack of clarity will permit a more restrictive approach than may have been originally intended.

KEY OBSERVATIONS

Before addressing the main points as part of this Inquiry, JCWI makes the following observations.

Language: the term “illegal” is used throughout in this Directive. JCWI believes that using that term as part of the Directive is unhelpful, and negatively influences public discourse and attitudes in relation to the plight of migrants. It is also contrary to the recommendations of the International Labour Organisation which has called upon all participating states to avoid this terminology. We urge the use of the terms “undocumented migrant” to indicate the position of a foreign national worker who has not been granted permission to enter employment, and “irregular migration” to describe migration which takes place outside officially-sanctioned routes for entry and residence.

Vagueness: The Directive is vague and lacks definition. In particular we refer to Articles 2, 5, 6(4), 6(5) 10, 12(3)—see below.

In addition, the Directive fails to properly set out who would be an illegal third country national for the purposes of this Directive. This would of course be an impossible task considering the great differences in migration law and policy that exists between Member States. Should the UK choose to opt in to this Directive, transposition should be clearer in this respect. For instance, it is unclear at what point in time a third country national would fall within the remit of this Directive, and how those will be treated who have (possibly

inadvertently and/or temporarily) become “illegal” for the purposes of this Directive. UK law allows for persons to make applications outside the rules, including overstayers who may wish to regularise their leave to remain. There has to be much more clarity on the definition of what constitutes an “illegal” third country national.

Voluntary return: Although the Directive recognises that the emphasis should be on voluntary return, appear to focus on enforced return. There is no detail on what constitutes a voluntary return or what it means. Rather the Directive discourages any notion of a voluntary return. In particular we refer to Articles 6 and 7 (safeguards pending return)—there is no explicit reference to the provision of support and housing for those whose removal cannot be carried out. To leave a person in effective destitution without any means of support and access to employment actually erodes the concept of “voluntary” return (see below).

Regularisation: Although JCWI understands that a returns policy is vital in terms of the formulation of a common policy on migration in general, it is our concern that, the focus being so much on control and deterrence, policy fails to acknowledge the realities of irregular migration. This Directive does not imply that an “illegal” migrant is either removed or granted status if removal is not possible. JCWI believes that the Directive is lacking in this respect. In reality, however, European Governments seem to be happy to “ignore” and therefore tolerate undocumented migrants living within their territories, possibly because they may well constitute a contributory work force to Member States’ economies.

JCWI believes that the cost of any return policy (combined with the cost of apprehension, detention and removal itself) would be outweighed by the benefits of a regularisation scheme for migrant workers. Current policy fails to address the reality of people who are in the EU illegally, whose situation will be problematised by this Directive and who it will neither be cost effective nor practical to remove. Government policy, both in the UK and at an EU level should urgently address the question of a regularisation scheme which would carry the benefits of bringing more individuals within the scope of effective immigration control as well as according them basic social rights.

Human Rights: Human rights law already provides for safeguards and guarantees covering return. This Directive poses a real opportunity to build in safeguards to protect fundamental human rights, and JCWI acknowledges the attempts that have been made in this regard. However, JCWI still considers them to be incomplete and until there is a complete assurance that removal procedures fully accord with human rights requirements, we believe that the provisions here-in will ultimately prove to be unsuccessful and open to legal challenge.

The Directive should be considered in the context of other developments relating to removals and immigration control. Both at EU and domestic level so called re-admission agreements are forged with third countries to facilitate removal of their nationals. Currently the EU is considering such an agreement with Algeria and Libya, both are countries in which torture is practised. A recent UK example is the agreement or “memorandum of Understanding” with Jordan. A removals policy effected in the light of such an agreement can under no circumstance be credibly human rights compliant. JCWI would encourage any initiative to improve the human rights records of other countries. It is our belief that to secure freedom from torture for potential deportees, more is needed than a “memorandum”. We would point out that years of systematic dialogue and monitoring by UN agencies have not produced any improvements according to leading human rights NGOs in many such countries.

In order for removal to be truly compliant with international human rights standards JCWI is of the opinion that there should be a monitoring mechanism in place in the migrant’s country of origin to ensure the safety and well-being of the individual. This is particularly important in respect of failed asylum seekers.

KEY CONCERNS

With reference to the Articles of the Directive in particular, our comments are divided into three principal categories, which are:

1. Areas where the Directive comparatively contains provisions generating higher standards governing removal; (Articles 6, 7, 12, 14, 15)
2. Areas where the Directive reflects a set of minimum standards which, if adopted in this form, will reduce current UK standards; (Article 9)
3. Areas where the Directive may potentially breach international law and thereby be open to legal challenge. (Articles 5, 8, 10, 11, 13)

1. *Areas where the Directive comparatively contains provisions generating higher standards governing removal;* (Articles 6, 7, 12, 14, 15)

Articles 6 & 7—Return Decision/Removal Order—“the two-step process”

JCWI welcomes a two-step approach where first of all a person is served with a decision followed by a removal order, combined with rights of appeal against any such action and the emphasis on voluntary return. However, we are concerned that the Directive in Articles 6(3) and 7(3) erodes the concept of voluntary return allowing a return decision to be served at the same time as a removal order. We are also concerned that this provision may be used as an administrative convenience rather than in exceptional cases only. If the purpose of the Directive was to genuinely encourage the policy of a voluntary departure, Articles 6(3) and 7(3) should not be included in the Directive, or alternatively contain a provision that this approach is only taken in exceptional circumstances.

We further welcome the provision within Article 6(2) which allows for a period to be granted facilitating voluntary departure. We believe, however, that this period of up to four weeks would in the majority of cases be too short. Again, for the Directive to positively encourage voluntary departure, it should be more flexible, and any period facilitating voluntary return should be determined according to individual circumstances. People who are long-term residents and who have become subject to a return decision would inevitably need more time to prepare and arrange for departure. Aside from this, there are undeniably delays involved in the processes of obtaining travel documents to allow someone to leave in the first place.

Furthermore, in context of Article 6(2), in order for persons subject to a return decision to be genuinely given the opportunity to depart voluntarily, they should not be hampered from doing so by excessive reporting restrictions, or a strict interpretation of being obliged to stay in one place which because of its vagueness could easily be construed as a justification for detention. Currently in the UK there exists a culture where anyone who falls foul of the immigration laws is viewed upon as an “absconding risk”, usually resulting in detention. Since detention is such an integral part of controlling immigration in the UK, and since anyone subject to immigration control can potentially be detained if they are regarded as an absconding risk, it would be very easy for UK practice to continue as is, ie the use of detention as an administrative convenience rather than genuinely giving people the opportunity to leave the UK voluntarily.

Although we welcome the intention behind Article 6(4) and 6(5) for withdrawal of a return decision on human rights grounds or compassionate and humanitarian reasons and grant an autonomous residence permit offering a right of stay, we are disappointed that it enforces no obligation on Member States to do so. It is JCWI’s view that the Directive should contain a specific provision that if removal is not appropriate or is not possible, a Member State shall grant leave to stay.

Article 12—Judicial Remedies

We welcome a right of appeal for all who are served with a removal order. In the UK currently there exists such a right of appeal, however, that right is only exercisable if human rights are engaged. As the Directive proposes an effective remedy it is JCWI’s opinion that any review should also include any other reason falling outside the scope of the European Convention on Human Rights. Furthermore, in order for any such remedy to be effective, these reviews should not be overburdened with procedural considerations, rather the appeal should focus on tackling the actual merits of removal balanced against factors in favour of granting leave to the person concerned. At present removal procedures are only subject to this form of detailed appeal in “deportation” as opposed to “administrative removal” cases.

We also welcome the provision in Article 12(2) that the actual removal will be suspended until after such an appeal has been determined. However, we are concerned about the wording in Article 12(3): “Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice”. We are unclear in practical terms what this means. Persons who are subject to removal, and who wish to challenge that removal, and who meet the financial eligibility test should not be prevented from accessing legal aid considering the importance of a review and the possible human rights implications of a removal.

Articles 14 & 15—Temporary custody/conditions of temporary custody

JCWI welcomes the maximum time limit on detention; this would certainly mean an improvement on UK law and practice. Nevertheless, we still believe that six months is too long to deprive someone of their liberty. It is JCWI's view that a maximum time limit such as that imposed in France (32 days) is more appropriate.

We further welcome the provision that detention will be automatically reviewed after 72 hours and on a regular basis thereafter by a judicial authority. These provisions constitute a levelling up in terms of current British law and practice.

With reference to Article 15 it is JCWI's view that no migrant should ever be detained in prison accommodation, even where they are physically separated from ordinary prisoners. This type of accommodation is not suitable in this respect. Furthermore, it is JCWI's view that children should under no circumstance be detained, be it as part of a family unit or on their own. Detention of children can never be in their best interest. Although Article 15(3) makes reference to vulnerable persons, there is no definition of what constitutes a vulnerable person. In combination with the provision that "particular attention" shall be paid to their situation, the provision is too weak to ensure that vulnerable persons are protected from detention.

2. *Areas where the Directive reflects a set of minimum standards which, if adopted in this form, will reduce current UK standards; (Article 9)*

Article 9—Re-entry ban

Currently, under UK law, "re-entry bans" are only in effect for those who have been deported under the Immigration Act 1971. Deportation is considered appropriate in two scenarios: firstly in cases where a person has been convicted of a criminal offence and the criminal court itself recommends deportation as part of the sentence and where deportation is considered to be conducive to the public good. There is a right of appeal against deportation which has a wider ambit than considering human rights breaches—age, length of residence and links to the UK, amongst other factors are considered.

Furthermore, under UK immigration law, the entry clearance system has always been regarded as an integral element of an effective immigration control. For instance, the spouse of someone settled in the UK who may be an illegal entrant or overstayer is usually expected to leave the UK and apply for entry clearance in their capacity as a spouse. To introduce entry bans other than in the context of the circumstances described above would seriously jeopardise the integrity of that system and would serve no useful purpose. JCWI therefore wholly opposes the imposition of re-entry bans other than where it is considered to be conducive to the public good. If implemented into domestic legislation this would constitute a levelling down of current legal principles.

JCWI considers further that the re-entry ban is quite unsafe in the absence of EU-wide jurisdiction on the application of human rights standards to immigration issues. For instance, what would be the likelihood of an individual having been removed from one Member State, successfully applying for entry for family reunification in a second Member State? There is a grave danger that he or she would be refused.

3. *Areas where the Directive may potentially breach international law and thereby be open to legal challenge. (Articles 5, 8, 10, 11, 13)*

Article 5—Family relationships and best interest of the child

Article 5 is another example of the vague nature of this Directive. We are concerned with the wording in the Directive, requiring Member States only to "take into account", rather than explicitly enforcing the obligation on Member States to respect to the right to family and private life (Article 8, ECHR). The same applies to obligations arising from the 1989 United Nations Convention on the Rights of the Child, which requires that the interest of the child should be a primary consideration in any removal action. These principles are imperative, and the proposed Directive presents a real opportunity for them to be upheld. The Directive would then be a useful tool in changing certain aspects of UK practice governing removal. For instance, section 9 of the 2004 Asylum and Immigration (treatment of Claimants) Act permits parents to become destitute thus raising the prospect of their children being taken into care. Current UK removals procedures also separate families in detention (where either one parent is detained as a measure to enforce compliance with immigration control, or where families are detained separately). We certainly hope that these practices will no longer be tolerated as a result of this Directive, however, the vagueness in framing the article concerning family unity and the interest of the child are too weak to encourage best practice in this sense.

Article 8—Postponement

We are concerned about Article 8(2) which provides that removal shall be postponed for as long as circumstances preventing removal prevail. This may sanction current practice whereby many failed asylum seekers, for example from countries like the Democratic Republic of Congo, Iraq or Somalia, are left in limbo *ad infinitum*. The practical problems that are associated with the process of removal has frequently lead to long-term detention, or people being left destitute without the right to work and without access to other forms of support such as healthcare. If a person is not able to return or to be removed, this should certainly not lead to purposely leaving a person in limbo (without any support) in the hope that they will leave of their own accord, a kind of “forced voluntary removal” which we so often come across in the UK. If a person cannot be removed be it for practical or health reasons, then s/he should be granted leave to remain. With regards to Article 2(c) JCWI wholly opposes the removal of unaccompanied minors, whatever the circumstances in the host country. In our view this practice is not in line with Article 5 of the Directive which provides that the best interests of a child should be considered.

Article 13—Safeguards pending return

The Directive provides that where a person’s removal is postponed the conditions of their stay should not be less favourable than those set out in some of the Articles in Directive 2003/9/EC (minimum reception standards). JCWI believes that Articles 13 and 14 (Directive 2003/9/EC) should also be included in this provision. Articles 13 and 14 explicitly provide that housing and support shall be provided. To omit provisions guaranteeing housing and support would lead a person subject to (postponed) removal to be destitute and could well be challenged under the European Convention on Human Rights.

With regard to Article 13(2) we believe that with the written information on postponement of removal, ideally the Directive should provide for a grant of stay if postponement exceeds a certain time limit.

Article 10—Removal

We welcome Article 10 which provides for safeguards during the process of removal, and the fact that the use of any coercive measures should be proportional. However, JCWI believes that “coercive” measures should only be used where necessary and as a last resort. JCWI is concerned furthermore that there is a lack of definition as to what “coercive” means. Article 10(1) contains a reference to “reasonable force” indicating therefore that force may be used. In the UK, the powers of immigration officers have been progressively widened by successive pieces of legislation. The concept of reasonable force is one that applies to the police who are subject to explicit codes of conduct and practices and are publicly monitored through bodies such as the Police Complaints Committee, an essential element to promote race relations and public confidence. JCWI believes that immigration officers should become subject to equally stringent monitoring methods given that they have wide-ranging powers of enforcement including the entry and search of premises, and will invariably be dealing with members of ethnic minorities. Such safeguards have to be provided for in terms of monitoring the process of removal. Furthermore, the persons subject to removal should have an avenue to complain if they believe excessive force was used.

The matter is further complicated in the UK with the process of removal being contracted out to private companies who lack the training and understanding in dealing sensitively with people from different cultures and backgrounds, and negative attitudes to migrants.

Article 11—Form

In relation to Article 11(2) we believe that any information communicated to a person subject to removal should be in a language that they actually understand. It is not good enough merely to provide information in a language that they “may reasonably supposed to understand”, especially in the context of removal decisions and orders that carry rights of appeal. A person can only be fully aware of such rights and have access to justice if informed properly and appropriately.

JCWI

December 2005

Memorandum by Refugee Action

Refugee Action thanks the House of Lords for this invitation to submit evidence for the Sub-Committee’s consideration as part of their inquiry into the Commission’s draft directive on return procedures for third country nationals who are illegally staying in the EU. Refugee Action is an independent national charity that, as part of its role, provides frontline advice and information for asylum seekers and refugees, particularly around NASS support. Approximately 470 individuals seek advice from us each week, of which approximately 40 per cent (180 people) have been fully refused asylum. Our “Choices” project provides impartial advice, information and support to approximately 70 additional refugee and asylum seekers per week who are considering returning voluntarily to their country of origin. We therefore take an interest in two specific areas of the draft directive, upon which this response focuses:

1. Provisions for individuals who cannot be removed.
2. Merits of a two-step process—and whether this allows for an informed choice of voluntary return.

OVERVIEW

We commend many aspects of the directive, particularly in its efforts to ensure a basic minimum set of procedural safeguards for removal, and for addressing the difficult situation of persons who have no continuing leave to remain in the UK but cannot yet be removed. We are pleased that the directive recognises and seeks to address the use of coercive measures, and hope that the final directive will build on this principle, so as to set safeguards against the use of coercive methods in voluntary return as well as in forcible removal. We are concerned by an increase in government policies which aim to use the threat of destitution in the UK as a means of coercing people into returning voluntarily.

We believe that these provisions set a very good basis on which to expand, and suggest that the directive includes a more explicit focus on the availability of support and accommodation for persons not yet able to be removed. This would ensure basic safeguards are set in place not only for the removal itself, but also for individuals’ standards of living up to that point. We are concerned that the increasing level of desperation we perceive amongst our client group may stem from a lack of minimum standards for those refused asylum who cannot yet be removed, and see this directive as a useful opportunity to address this very current issue across Europe.

We have primarily looked at specific issues within the draft directive which reflect our areas of expertise—support for those refused asylum and voluntary return. These are reflected in Articles 5, 10 and 13 (relating to provisions for individuals who cannot be removed) and Article 6 (relating to merits of a two-step process and an informed voluntary return choice). Please see below for more detailed evidence on the above topics.

1. *Provisions for individuals who cannot be removed*

(a) Article 5—Family relationships and best interests of the child

Reading Article 5 in conjunction with point 18 of the proposal, it is clear that the 1989 UN Convention on the Rights of the Child imposes a duty on governments to put the “best interests of the child” at the forefront of their policies. We were saddened by the impact of the recent UK policy—S9 of the Asylum and Immigration Act 2004—which has led to high levels of distress amongst many of the 116 families who were part of the S9 pilot. Concern escalated amongst families, voluntary organizations and Local Authorities who feared that children would be separated from their parents and taken into care despite there being no evidence of parental neglect or mistreatment. Social Workers explained the likely harmful effect of this separation on a child’s mental wellbeing, and Social Service’s approach which is, wherever possible, to ensure that children can be cared for by their parents since it is usually in the child’s best interests to do so. We hope that Article 5 will seek to remind governments that the child’s best interests must take precedence, and wonder whether the directive could be strengthened to leave no room for ambiguity, replacing the phrase “They shall take account of the best interests of the child” with “They shall prioritise the best interests of the child”.

We are also concerned that an effect of Section 9 is to divert the attention of the families involved away from the importance of their having been refused asylum, and towards a concern for their children and for food and shelter in the UK. Section 9 may therefore result in the often painful decision making process of the family concerned being less focused rather than more so.

(b) Article 13—Safeguards pending return

We commend the inclusion of this Article in the Directive, and are pleased to note that governments will have the power to provide safeguards above those minimum standards laid out in Directive 2003/9/EC. It is a legal right to claim asylum, and as such there must be provisions to safeguard the welfare of those who have exercised this right, up to the point at which they leave the UK. Many people are refused asylum simply because the persecution they experienced and fled is deemed to be unlikely to reoccur if they return. They have not exploited the system, and have followed the government's processes throughout their claim. It is right that these individuals be protected and supported while they prepare for their return to their country of origin, whether voluntary or forcible. The Directive provides a good basis for governments to build on this principle.

However, we strongly urge that the Directive is expanded to ensure that the safeguards also refer to support for those who cannot currently be removed. The evidence to demonstrate the need for this amendment is, we believe, strong. Over the last two years we have noted a significant increase in the number of individuals expressing desperation and displaying a deterioration of mental or physical health once they have been refused asylum. The majority tell us that this is largely due to the predicament into which they are placed—a choice between destitution in the UK or stating that they voluntarily choose to return to their country of origin. Many people tell us that although they understand that the Home Office will remove them, they do not believe it is safe to return and so would not choose the voluntary route. As a result, they are unable to access any form of government support—they are expected to return voluntarily even in cases where the government would not forcibly remove them to their country of origin, possibly as a result of safety concerns (for example female headed households from Afghanistan). For this reason, we suggest that the directive is clarified to ensure that support and accommodation is available for those who are not currently able to be removed, irrelevant of whether there is a route of voluntary return available. This should also help to diminish the current level of coercion implicit in the government policy to withdraw support unless an individual applies to return voluntarily—an issue which could be included in the discussion around coercion in Article 10 on “Removal”.

CURRENT LEVELS OF SUPPORT

The evidence demonstrating the need to set minimum standards, similar to the reception directive, is clear. The current levels of support available to those at the end of the process—Section 4 support—are variable and minimal. Although we commend the Home Office for introducing contracts with accommodation providers to address this issue, we still hear numerous reports of accommodation which does not meet the standards—people asked to share beds, given rooms with no locks, no mattresses on the beds, no cooker or fridge. Others are not given the food vouchers to which they are entitled and one was told by an accommodation provider that, as a refused asylum seeker, she did not deserve any better treatment.

Even where the minimum standards are met, individuals are given vouchers which can only be spent on food—many people have to travel three miles with small children to spend their vouchers but are not given money for the bus, some talk of the stigma and reduced choice associated with spending vouchers, others are unable to buy nappies, toiletries or to pay for travel to their medical appointments or home office reporting conditions. The Home Office's stance is that clothes should not be provided, as S4 support was originally intended to be short-term. However, as winter approaches, we are increasingly concerned by peoples' reports that they cannot buy warm coats, shoes, or clothes for their children. If a baby is born in Section 4 accommodation, there is no provision for them to access any form of clothing at all.

In order to access this basic form of support, an individual must apply to the Home Office, outlining why they are not able to leave the UK (for example because they are too ill to travel or because they are waiting for travel documents to come through). There are currently two systems for assessing such applications—one for people who are street homeless and/or have serious mental or physical health problems, and one for those who are facing destitution in the near future. Those who are street homeless currently have to wait for approximately two to six days for a decision; the second group have to wait approximately one to two months. This results in individuals who are entitled to support facing nights on the streets simply as a result of an administrative delay. We recommend that the directive includes a reference to timescales for decisions, and the necessity to provide interim support should the governments experience an administrative delay in decision making.

PERMISSION TO WORK

We believe that a sensible solution to the human rights concerns that such a situation induces, alongside the budgetary constraints under which the Government operates, is to grant individuals who cannot be removed, some form of temporary status, and to allow them to work and therefore support themselves and pay tax. It might be worth considering incentives for an eventual return to the country of origin, for example by arrangements which would refund part or all of National Insurance tax, which would be paid only upon return. As with the benefits system, there would of course need to be a method of accessing support for individuals who were unable to work, regulated by a set of minimum standards for accommodation and the provision of other essential items. Such a system might allow not only a smaller expenditure for the Home Office, but also and more importantly, a sense of self-esteem for the individuals concerned, and an opportunity to support themselves whilst ensuring they do not become deskilled in the sometimes lengthy process of returning to their country of origin. Such a scheme should also be beneficial for the country of origin—people returning with relevant skills and without such a loss of motivation could have a more positive effect on the reconstruction of the country.

2. Merits of a two-step process—and whether this allows for an informed choice of voluntary return

(a) Article 6—Return decision

One of the principles of voluntary return is that individuals have enough time and information to make an informed choice about whether to return voluntarily, and that they receive the support required to explore options for them both prior to and following their departure from the host country. There are many reasons behind this—the importance of returning with hope for a future in the country of origin, the scale of such a decision for an individual who has fled persecution in their country, and the long-term sustainability of return, to name but a few. We support the principle that individuals should have time to make this decision, evident in point 2 of Article 6—“The return decision shall provide for an appropriate period for voluntary departure of up to four weeks”. However, we ask whether the four weeks mentioned refer to the time allowed before deciding whether to apply to return voluntarily, or the time allowed before an individual is expected to leave the host country. Evidence has shown that it frequently takes longer than four weeks for an individual to access the support, information and documents necessary to return to the country from which they fled.

The International Organisation for Migration, which is responsible for co-ordinating the voluntary return of asylum seekers and refugees around the globe, sets a timescale of three months for the majority of individuals returning voluntarily from the UK, and six months for those returning to countries with more complex situations (for example Iraq). We recommend that the Directive requires governments to seek advice from relevant organizations, such as the IOM, when setting timescales for a postponement of removal directions pending a voluntary return decision, and that the current phrase “up to four weeks” is replaced by the timescale currently in operation by IOM—either “approximately three months” or “up to six months”.

FLEXIBILITY

In addition, we note the importance of the flexibility of voluntary return, which reflects the range of needs of those returning. Those in a more complex situation often need additional time and resources, so as to ensure their safe return, for example unaccompanied minors turning 18, families and women. We very much welcome the creativity with which voluntary return has been approached recently through the explore and prepare programmes, and hope that the Directive will encourage governments to continue to think creatively about methods of return, both for those who have been refused asylum, but also for other categories of people—those with status for example. It would be helpful if governments were assisted to approach returns from a broader governmental perspective—for example creating links between the voluntary return department and other sections of the government concerned with migration, international development and country reconstruction.

Governments should be encouraged to consult with Refugee Community Organisations, who are well placed to offer expert opinions on voluntary return processes, as part of a wider debate on other issues affecting RCOs. We believe that monitoring of the situation for individuals who have returned (both the route itself and circumstances in the country of origin) is vital both for individuals to make an informed choice about their return, and also for governments to ensure they are not sending people back to an unsafe situation. We strongly advocate that monitoring should be included within the Directive as a necessity in the returns process—both voluntary and forcible.

The UK's responsibility to ensure that people are not returned to face inhuman or degrading treatment should be evident within the voluntary returns process—we suggest that the coercion section of the directive is expanded to ensure that those who are not ready to return voluntarily are not coerced into doing so by a government policy which removes their support in the UK if they do not. There are well documented concerns relating to trafficking and exploitation of individuals, including children, who have returned to their country of origin without having had the time or resources to have ensured themselves a safe life upon return. It is not acceptable that individuals should be forced by government policy to choose between destitution and volunteering to return to a possibly unsafe situation. In our experience, this coercive approach does not result in an increased number of people returning, but in an increased number of adults and children disappearing in the UK, often into an illegal method of survival, which again may involve trafficking or other exploitative work. Once support is removed, it is very difficult for individuals to be linked in with other statutory services—the police, the health service, Social Services. As such, people are unlikely to be able to access the support mechanisms available in the UK to stop trafficking, child prostitution and other exploitative practices.

TWO STEP PROCESS—VOLUNTARY RETURN AND FORCIBLE REMOVAL

We have been actively involved in voluntary return programmes for over seven years. In our experience, the success of voluntary return depends on the belief of the returning communities in its independence and integrity. We are very pleased that the directive refers to voluntary return, as it has been proven to be a much more humane and sustainable method of returning to countries of origin. However, we caution against the link inferred by the directive between voluntary return and forcible removal.

We understand that the two processes exist side by side, and fully support the time allowance during which an individual would not be forcibly removed, to give them an opportunity to consider voluntary return. However, in the past, we have found that the process has worked best, as in the Kosovan programme, when there has been a period of eighteen months to two years which has acted as a window for voluntary return, and which has been supported by intensive advice, information and financial assistance. This allows a momentum of return to be built up alongside a growing source of information from people who have already returned home, and from those who monitor them. It is possible to clarify that a substantial period of voluntary return will be followed by forcible removals but it is important that enforced removals do not begin prematurely and are clearly separated from the voluntary return period. Flexibility is vital as each country is different—the above approach worked well for Kosovo. However, returns to Iraq for example are at a very early stage—we believe that there should be clear direction to ensure they are currently purely voluntary.

As stated above, voluntary return has been shown to be more sustainable when individuals have received the necessary support and had enough time to prepare themselves for their return. We wonder whether a similar principle could be applied to forcible removals, to ensure that people are prepared for their removal. As such, we recommend that the Directive includes a provision for independent advice prior to removal. We strongly advocate that the directive should include a reference to the UNHCR's guidelines on method of removal, ensuring that all removals are carried out in a humane and respectful way.

CONDITIONS IN THE COUNTRY OF ORIGIN

In our experience, for a successful voluntary return, individuals must genuinely want to return. Coercion does not appear to be effective, as stated above. However, even once an individual has made a decision to return, a consistent barrier to return, both voluntary and forcible, is the conditions in the country of origin to which individuals return. The most frequent reason we are given to explain why an individual does not want to return is that they do not believe they will be safe upon arrival. Statements by the Government confirming the safety of a country (recently Iraq) are often contradicted by media reports and by personal accounts of recent events from clients' friends and family who are in the country of origin. In order to create a more robust system, we wonder whether the Directive could advocate the introduction of an independent decision making body, not bound by political concerns or media pressure and similar to the Canadian asylum claim system, where a panel independent of the government decide asylum claims. The independent panel could consider the point at which a country, or parts of a country, can be deemed safe and ready for return. We believe such a system would lend credibility to the process of returns from within the EU.

Similarly, a more resourced and focused investigation into methods of assisting stability in countries of origin, would likely lead to a more positive impression of conditions for each individual upon return, and a higher rate of return. We suggest that the directive refer to skills training and resources for individuals returning, whether

forcibly or voluntarily—and, as previously discussed, enough time and independent support necessary to allow people to adjust to the concept of returning and to foster some hope for their future in their country of origin.

December 2005

Memorandum by the Refugee Children's Consortium

Members of the Refugee Children's Consortium are: The Asphaelia Project, The Association of London Somali Organisations, AVID (Association of Visitors to Immigration Detainees), Bail for Immigration Detainees, Barnardo's, BASW (British Association of Social Workers), British Associations for Adoption and Fostering (BAAF), Children's Legal Centre, Child Poverty Action Group, Children's Rights Alliance for England, The Children's Society, FSU (Family Service Units), The Immigration Law Practitioners' Association (ILPA), The Medical Foundation for the Care of Victims of Torture, NCB, NCH, NSPCC, Redbridge Refugee Forum, Refugee Council, Refugee Arrivals Project, Scottish Refugee Council, Save The Children UK and Voice for Child in Care (VCC). The British Red Cross, UNICEF UK and UNHCR all have observer status.

We work collaboratively to ensure that the rights and needs of refugee children are promoted, respected and met in accordance with the relevant domestic, regional and international standards.

Firstly we would like to set out the following principles regarding return:

- Return should only be carried out after fair and full consideration of a claim. We have serious concerns about whether this is the case for all applicants at present given the high number of cases that are overturned on appeal,⁵² restrictions on in-country appeal rights and ongoing support whilst it takes place, and restrictions on legal aid which has made it very difficult for applicants to get legal advice, particularly unaccompanied children.⁵³
- Returns, where carried out, must be carried out in a dignified and humane manner. We would welcome common standards for this as we believe this is not always the case.
- Where children are involved returns must be planned and meet the best interests of the child in accordance with standards set out in the United Nations Convention on the Rights of the Child (which the UK government ratified in 1991), the Children Act 1989 and 2004 and the Every Child Matters framework. This is in addition to the 1951 Convention and the Human Rights Act.

We would like to make the following points:

1. "FULL RESPECT FOR HUMAN RIGHTS AND DIGNITY"—THE HAGUE PROGRAMME

Treatment during the returns process must take into account the traumatic experiences of many of those involved. This is particularly important where children are concerned. We believe voluntary return is always most effective. We have serious concerns about policies which seek to coerce failed applicants into returning.

In particular we are concerned about Section 9 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which removes support from failed asylum seeking families. It has been singularly ineffective. Tony McNulty conceded in Commons Committee that "no one has returned yet on a voluntary basis" and this remains the case.⁵⁴ In addition it relies on fear of destitution and separation of families to achieve compliance. We believe this approach is inappropriate and undermines Articles 3 and 8 of the Human Rights Act. It runs counter to the duty set out in the Children Act 1989 to promote the upbringing of children within families where possible, and a core ethos of social work to promote the best interests of children. Research by RCC member, Barnardos, gives further information about this provision.⁵⁵

Improving voluntary returns packages and promoting incentivised compliance is more appropriate and likely to be more effective.

⁵² 19 per cent of appeals were allowed in 2004. Home Office, Asylum Statistics, 2004.

⁵³ For more information see Asylum Aid and BID, Justice Denied, 2005.

⁵⁴ Hansard, 25 October 2005.

⁵⁵ Barnardos, End of the Line, 2005.

2. UNACCOMPANIED CHILDREN

We have particular concerns about returning unaccompanied children because of their age and circumstances. We would like to see more robust procedures applied to any returns procedures where they involve these children.

Returns should only take place where it is assessed to be in the best interests of the child. This should only be decided after a full needs assessment carried out by social services and where children have an opportunity to put forward their case. This may necessitate an advocate to help children articulate their position adequately.

Secondly children's safety and welfare must be ensured as part of the returns programme. We have concerns about existing returns under the Dublin II Convention that welfare is not always guaranteed. The planning process is a crucial element in achieving this. Adequate safeguards must be in place to prevent trafficking, and children should never be returned where this is a risk.

3. DETENTION AS PART OF THE RETURNS PROCESS

The use of detention is inappropriate for children, whether they are in families or age-disputed. Successive reports from Her Majesty's Chief Inspector of Prisons have pointed out shortcomings in the use and conditions within detention centres where children are concerned. The detention of asylum-seeking families was also criticised strongly in a report on the UK from the Council of Europe's Human Rights Commissioner.⁵⁶ In addition the Children's Commissioner for England has recently highlighted particular concerns about their inappropriateness.

Detention centres cannot afford children the protection and care they need, nor uphold their rights under human rights law and international instruments; including rights to freedom, to a normal social life, and to education. Detention facilities are never the best environment for children and can badly affect their physical, and emotional, health and wellbeing.

We recommend that:

- detention is only used where absolutely necessary;
- children are not detained;
- children are never held with adults;
- when children are detained they are detained for a maximum of seven days prior to removal.⁵⁷

4. STAFF INVOLVED IN RETURNS

We have concerns about the use of private contractors for the purposes of removals where children are concerned. The RCC shares the concerns of ILPA and others about the dangers of what is in effect the further privatising of immigration functions and powers through Clause 40 of the current Immigration, Asylum and Nationality Bill. Powers to search, use reasonable force and to detain are best situated only within a fully accountable, trained statutory authority.

In light of our significant concerns in relation to safeguarding of children we recommend that at a minimum, anybody who comes into contact with children as part of the process should be CRB checked to enhanced levels and have appropriate training, particularly regarding control and restraint procedures.

This is especially the case in light of the fact that the Government resisted any statutory requirement being placed upon the immigration authorities by virtue of s11 of the Children Act 2004.

Lisa Nandy,
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⁵⁶ Office of the Commissioner for Human Rights (2005) Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom 4–12 November 2004, for the attention of the Committee of Ministers and the Parliamentary Assembly.

⁵⁷ See for example, Save the Children Fund UK (2005) No Place for a Child: Children in UK immigration detention: Impacts, alternatives and safeguards.