GOVERNMENT RESPONSE TO THE HOUSE OF LORDS EUROPEAN UNION COMMITTEE REPORT ON ILLEGAL MIGRANTS: PROPOSAL FOR A COMMON EU RETURNS POLICY.

Introduction

The Government welcomes the above Report issued on 9 May 2006 on the Community proposal for a Directive on common standards for the return of illegally staying third country nationals. We commend the hard work of your Committee in producing this Report, and also thank the Committee for the various opportunities afforded both Ministers and Officials of Her Majesty's Government to provide evidence. The Government is also very grateful for the opportunity to participate in the 11 May 2006 House of Lords Debate on the report, attended by Baroness Scotland on the Government's behalf.

We have set out in turn below, our response in relations to the conclusions and recommendations contained in your Report.

General Conclusions

1. I am pleased that the Committee shares the Government's general assessment of the Draft Directive and endorses our decision to exercise our option not to opt-in at this stage.

2. We agree that the current draft directive is deeply flawed in a number of respects and may result in the lowering of standards in a number of Member States. Furthermore, we consider that the Draft directive does not strike the right balance between safeguards and assistance to Member States on return. We believe that it would impose unnecessary burdens that would reduce the effectiveness of our returns and undermine much of the good work done by EU governments.

3. Negotiating the Draft Directive within a process that involves co-decision between the Council and Parliament is challenging. The UK Government intends to continue to participate actively in negotiations as far as possible, and will seek to bring about the changes that are required to make the Draft Directive viable. I thank the Committee for its recommendations. We will seek to incorporate them in our policy where possible.

Scope

4. The Directive describes the categories to which it applies as "illegally staying third-country nationals'. The Committee in its report emphasised that this Directive deals with widely differing categories of persons, some of whom will have entered the EU legally or resided there legally. It also stated that the definition must in any case clarify the position of those with pending appeals, and those whose rights of appeal have not been exhausted.

5. The Government acknowledge the fact that the term "illegally staying" in the description of third-country nationals covers a range of persons including those who may have initially entered and resided in a Member State legally. We agree that grouping these persons together with others who have entered and resided in a Member State illegally is unfortunate.

6. Following clarification of the Commission, it is the Governments understanding that persons subject to the Directive, as currently drafted, would have already exercised or exhausted all their rights of appeal and would therefore be subject to removal.

Readmission Agreements

7. The UK has opted into all Commission mandates for the negotiation of EC Readmission Agreements, whilst continuing to pursue bilateral resolutions to returns issues, with Readmission Agreements, Memoranda of Understanding and other informal arrangements to address pressing operational issues such as those concerning re-documentation. In general, 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.

8. Formal agreements do not necessarily guarantee the acceptance of EU Letters as alternatives to passports. The promotion of the use of EU Letters as alternatives to official passports is and remains a feature of both EU and bilateral policy. We actively seek to persuade third countries to recognise EU Letters as viable alternatives to official passports, and we support and encourage the Commission in its efforts to this end. We will continue to follow the Commission's handling of Community Readmission Agreement closely and constructively.

Country of Origin Information

9. Accurate and accessible Country of Origin Information (COI) is essential for taking decisions on asylum claims. The UK recognises the value of close cooperation between Member States in determining the conditions prevailing in countries to which irregular migrants and failed asylum seekers are to be returned.

10. The Government intends to ensure that the UK is able to continue to collate its own COI, but is happy to work with other states. The Government supports allowing other EU states access to our existing COI as part of a Common Portal and indeed all COI reports are publicly disclosable and accessible on the internet. The British system is open and public. Any COI from other countries that might be used in determining claims would have to conform to British standards including openness.

11. However, we have concerns about the value of setting up a potentially expensive electronic repository, particularly if parts of the information contained in it cannot be used by the UK and other countries that operate open to scrutiny systems, or which might not allow for absolute transparency. We would however support plans for a feasibility study to be carried out, before any further consideration is given to establishing an EU COI database as proposed by the Commission.

Period for voluntary departure

12. The Committee stated that it agrees with the requirement of Article 6(2) that a return decision should "provide for an appropriate period for voluntary departure". The Home Office already has provisions in place to allow an individual to depart voluntarily where it is appropriate to do so. These provisions are available throughout the asylum process. We do not agree that a separate period for voluntary return should generally be provided for at the end of the process when the decision to return is made as this would provide people with additional scope to frustrate the removal process.

Detention

13. The UK Government acknowledges the seriousness of a decision to detain. Detention is used sparingly and for the shortest period necessary. Where an individual has not made arrangements to leave the country voluntarily, or is assessed as unlikely to do so, detention may be considered as appropriate action to enforce removal. The power to detain must be retained to preserve the integrity of immigration control and detention is usually appropriate:

    - initially to establish the basis of a person's claim or identity;
    - where there are grounds for believing that the person will not abide by any conditions attached to the grant of temporary admission or release;
    - to effect removal; and
    - as part of a fast track asylum process.

14. Whilst detention is kept under continual review and will not be longer than necessarily there are exceptional cases where a prolonged period of detention is required.

15. We are pleased that the Committee agrees with our view that an absolute and non-extendable maximum to the period of detention will give Member States insufficient flexibility. Our assessment is that a fixed upper limit would significantly diminish the possibilities of effecting removal in a number of cases.

16. The Committee stated that 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. We agree with this point and regret the unfortunate but rare incidents highlighted in the report.

17. Before a family is due to be removed the Immigration Service will undertake a pastoral visit. The visiting officers will aim to assess the family's circumstances and identify whether there are any special needs which must be catered for when it comes to the removal process. The fact that a mother is breast-feeding is one such factor to be taken into account.

18. The officers will also aim to establish an appropriate time to effect the removal of the family in order to cause the least possible disruption and to safeguard the wellbeing of all those concerned.

19. An individual risk assessment is conducted in each case in order to determine the risk of absconding. The risk may vary according to the stage in the process and a reporting centre may be the best location for detention to take place if it is considered that, for instance, service of a negative decision may prompt a family to sever contact with IND.

20. Other than in exceptional cases where it would be in the best interests of an individual to remove them more quickly, there is a minimum period of 48 hours between the service of removal directions and removal, during which time an individual/family may arrange for property to be delivered to a detention centre/point of embarkation.

21. Immigration officers are required to allow the family sufficient time to prepare when they arrive to effect removal.

22. One of our main priorities is to ensure the safety and welfare of those we are attempting to remove and it is of course preferable that a child remains with a parent during the detention and removal process. If a child is not present at the time of the visit, our aim is to reunite the child with his/her parent as soon as possible.

23. Families do of course have the option of departing the United Kingdom voluntarily once their application has been refused and all of their appeal rights exhausted. This option would negate the risk of family members being separated at the point where the Immigration Service are required to enforce their removal.

24. If a family has demonstrated a willingness to depart voluntarily, discretion can be exercised as to the precise timing of removal in order to allow for example, a family member to complete examinations leading to a significant qualification for which he or she has already undertaken a substantial amount of study.

25. We must balance these considerations with the need to maintain the integrity of the immigration control and enforce the removal of those people who no longer have any lawful basis to remain in the United Kingdom.

26. The United Kingdom's published asylum statistics contained data on the periods of detention on a snapshot basis. The latest Quarterly Asylum Statistics now include information about the length of time individuals stay in detention. The Committee stated that the Directive provides a good opportunity to make the systematic collection of comparable data on detention a mandatory EU-wide requirement. We agree and will aim to pursue this during negotiations.

27. Whilst we recognise the Committee's recommendation to incorporate into the Directive's substantive provisions, the Council of Europe Guidelines on Forced Returns, the Committee will of course be aware that when these guidelines were adopted the UK indicated a reservation with regard to a number of those guidelines, notably 2,4,6,7,8,11 and 16. The UK has no intention of lifting its reservations to those guidelines. The guidelines mirror the proposed provisions of the Directive in many areas and our reservations reflect the serious concerns we have to those issues raised by both documents.

Children

28. We agree with the Committee's recommendation that the Directive should define a child, and minor, as a person under the age of 18.

29. We agree that children should only be detained as a measure of last resort, only where necessary and for the shortest period of time. As the most recently published statistics demonstrate, the vast majority of families with children spend 7 days or less in detention. Each case is considered on its merits and the presumption is always in favour of granting temporary admission or release wherever possible.

30. It was also the Committee's view that children should be removed to their country of origin only in the company of a family member or other responsible adult. The Committee also stated that where unaccompanied removal is unavoidable, the child should be handed over only to a person with proven parental responsibility, and that the legal guardian in the Member State in question must be informed of the identity of the person. We agree that unaccompanied children should be returned only where appropriate arrangements exist in their country of origin.

31. There is a long-standing Ministerial commitment that unaccompanied minors will only be returned if we can either trace their families or establish adequate reception and care arrangements in the proposed country of return. In the latter case, the arrangements would not necessarily require the presence of a person with parental responsibility. But they would involve a package of reception, care and reintegration support, an appropriate escort on the flight home and collection by a suitable partner organisation at the airport.

Status of those not removed

32. It is a matter of policy that leave, or equivalent provisions for protected persons, are not granted on the basis that there is, for the time being, no practical way of removing a person.

33. Once the appeal process has been exhausted, unless they have been granted some form of leave on non-asylum grounds, failed asylum seekers and other persons subject to removal no longer have a right to remain in the UK and there is a reasonable expectation that they should return to their country of origin voluntarily. As already stated asylum applicants and irregular migrants may opt for voluntary return at any point of the respective process.

34. To provide leave or other status equivalent to that provided for protected persons to those who cannot be immediately removed from the UK would undermine the immigration process. It is important for the integrity of our asylum and migration system that we do not create additional barriers to the removal of an individual who lacks any lawful basis of stay in the UK, even if there are (for example) practical difficulties which, for the time being, are impeding or delaying the making of arrangements for his removal.

35. IND carefully considers all asylum and human rights claims on their individual merits in accordance with our obligations under the 1951 UN Refugee

Convention and the European Convention on Human Rights (ECHR) against the background of the latest available country information. If an applicant demonstrates a need for international protection and they meet the definition of a refugee under the terms of the 1951 Convention, asylum is granted. If they are otherwise vulnerable they may engage our obligations under the ECHR, in which case they will be granted Humanitarian Protection or Discretionary Leave. If their application is refused, they have a right of appeal to the Asylum Immigration Tribunal against the consequent immigration decision. In this way we ensure that we provide protection to those asylum seekers who need it.

Appeals against return decisions and return orders

36. The Committee stated that it thought that the drafting in Article 12(2) is defective. It recommended that it be amended so that in all Member States, appeals which are not rejected at a preliminary stage as clearly unfounded should result in suspension of the return decision or removal order until the appeal is disposed of. We do not agree with this view.

37. All decisions that require the departure/removal of a person unlawfully in the United Kingdom or a member of the family of such a person attract a statutory right to appeal to the independent Asylum and Immigration Tribunal (AIT), and that the persons are aware of this right. Unless the appellant claims that his removal would breach the ECHR, the Refugee Convention or the Community Treaties, our position is that an out-of-country right of appeal is an effective remedy. While judicial review is available in relation to any act of a public body we would argue that permission to apply for judicial review should be refused where there is a statutory right of appeal to the AIT against the same decision.

38. Judicial review provides a route for an effective remedy in those cases where an asylum and/or human rights claim is made, such that the statutory appeal to the AIT would normally be required to be an in-country appeal, but we decide to certify the claim as clearly unfounded under s94 of the Nationality, Immigration and Asylum Act 2002, denying an in-country appeal. Judicial review is not, in law, a suspensive remedy but removal action will always be suspended in this type of case.

39. We do not therefore agree that all appeals – except where asylum or human rights claims certified as clearly unfounded - should result in the suspension of the return decision or return order pending the decision on a substantive appeal.

40. It is possible to pursue effectively an appeal from outside the UK. At paragraph 93 of your report, you quoted the Government as informing you that between 2003 and 2005 only 4 persons had successfully brought an out-of-country appeal. We would like to clarify that these figures relate to appeals brought under s94 of the Nationality, Immigration and Asylum Act 2002 following a denial of an in-country appeal for claims certified as clearly unfounded. The AIT deals with numerous appeals brought by people outside of the United Kingdom where the appellant has never been present in the United Kingdom. It also deals with a number of appeals brought by persons previously in the UK. Whilst the issues in an appeal may be different where

the appellant has previously been in the UK, the access to the appeal system is the same and is effective.

Judicial oversight of detention

41. We agree that detention is a serious matter and there should be an effective opportunity to test whether or not the administrative decision to detain is correct. Detained persons may apply to the Asylum and Immigration Tribunal (AIT) for bail irrespective of whether there is a pending substantive appeal before it. This right to apply for bail is notified to the detainee. Applications for bail can be made as many times as a detainee wishes and, in most cases, at any point of their detention. Bridget Prentice clarified this point in a letter to the committee so the statement in paragraph 103 that judicial review (or habeas corpus) is the sole possibility of judicial oversight is in fact not the case. The Quarterly Statistical bulletins for the last two quarters of 2005 show that 395 (quarter 3) and 415 (quarter 4) individuals were bailed from detention.

42. The Committee has commented on information and answers given about the substantive appeals and judicial review process. It is important to distinguish these against opinions given on detention and legal remedies for this. The Committee refer to the information quoted in paragraph 111 as a statement on availability for legal assistance to make a bail application whereas actually it refers to the availability of legal aid for substantive appeals and judicial review proceedings.

43. Legal aid is available for an individual to challenge the lawfulness of the detention decision before the courts. This ensures proper access to justice. Legal aid is also available, subject to the statutory tests, for proceedings to appeal against, or seek a review of, a return and/or removal order. We do not however accept that funding should be provided in cases that fail to satisfy the statutory tests. It is important that resources are focused on cases that have merit.

44. As stated in the evidence given to the Committee, the decision to detain is administrative and detention decisions are also kept under review at successively higher levels within the Home Office. We do not agree that the decision to detain should be subject to automatic or direct judicial supervision. There already exists provision for any detained person to challenge the lawfulness of their detention before the courts. That is still the position and automatic judicial oversight of detention where no application is made is not something we would advocate.

45. The current available remedies, together with legal assistance provisions and our administrative structure, comply fully with Article 5(4) of the ECHR.

The re-entry ban

46. The Committee raised a legal base point in relation to Article 9 of the Directive (re-entry ban). As the Committee says, the test is whether the re-entry ban provision is incidental to the returns component of the proposal – in which case Article 63(3)(b) of the EC Treaty may be used as the single legal base – or whether it should be regarded as pursuing a separate objective

requiring Article 63(3)(a) as an additional legal base. This test can be difficult to apply in practice. In this case we consider that the predominant purpose of this proposal is to set standards and procedures relating to the return of illegally resident third country nationals. We regard the provisions in Article 9 providing for removal orders and return decisions to include re-entry bans as being incidental to this predominant purpose. We can confirm, therefore, that it is our view that this proposal can be adopted on the basis of Article 63(3)(b) alone.

47. We nevertheless consider that EU instruments should not be made if there is a real question of Subsidiarity, which we consider exists. The fact that some of the matters provided for by the Draft Directive, including the re-entry ban are best left to Member States to deal with internally, forms part of our argument for not opting into the Draft Directive. Among other things, the time limits would be arbitrary in nature and involve considerable administration in monitoring the bans.

48. At paragraph 170, the Committee stated that it believed that the re-entry ban should be imposed only on those persons who represent a serious risk or have been convicted of a serious crime. We think that Member States should have the flexibility to decide how long a ban should be, considering the different circumstances in each case.

49. Like the Committee, 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.

50. Additional difficulties would arise for the UK in the implementation of re-entry bans as we have no access to the relevant areas of the Schengen Information System. Lack of access to the relevant SIS data is one part of the reason the Government opposes the EU-wide re-entry ban.

51. Whilst we note the Committee’s concern regarding the lack of equivalence of the immigration data entered onto the SIS, the UK does not itself enter immigration data onto Article 96 of the SIS as a consequence of the Commission and other Member State’s interpretation of our non-participation in the border-related elements of the Schengen acquis. We therefore cannot influence negotiations on how Member States enter data onto this part of the system.

52. The UK has made clear on several previous occasions that it would be beneficial for the UK and Schengen States to share immigration data. Our proposals to do so, however, have been refused. It has been made explicit that the UK will not be permitted to access SIS immigration data unless we first join the immigration parts of the Schengen acquis, and consequently give up our current frontier controls.

53. As you are aware, the UK participates in the judicial and police co-operation elements of the Schengen acquis but has chosen not to take part in the visa and border related provisions.

54. We have no plans to become a full member of Schengen. The Government remains convinced that as a result of our geographic position and the threat

posed to the UK by irregular migration and cross border organised-crime, maintaining the UK’s frontier controls is the most effective way for us to manage our borders. We are working to deliver stronger, more secure UK borders through, for example, our e-Borders programme and the Border Management Programme. We will of course, where possible, continue to seek arrangements for sharing of immigration data.