MEMORANDUM OF EVIDENCE TO
PUBLIC BILL COMMITTEE

CRIMINAL JUSTICE AND IMMIGRATION BILL

Introduction:

1. ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups. ILPA regularly provides briefings on immigration Bills; and gave written and oral evidence to the Public Bill Committee scrutinising the UK Borders Bill (now the UK Borders Act 2007).

2. This Memorandum specifically addresses the special immigration status contained in clauses 115-122 of the Criminal Justice and Immigration Bill. As stated in our Briefing of 3 October 2007 before Second Reading, we consider that:

> "…*the new status is wholly unnecessary and highly undesirable.*"[1]

3. The new status is indefinite yet is intended to deny individuals and families, to whom it is given, any opportunity to work or access mainstream support, restricting them to a level of support similar to that provided to asylum seekers but delivered by means of vouchers and other non-cash means, and allows for the imposition of stringent conditions relating to residence and reporting, including electronic tagging.

4. The remainder of this Memorandum is in two parts. The first part provides background and a general commentary upon the new status which clauses 115-122 would introduce. The second part provides a detailed analysis of how the clauses operate and the status that would be created.

[1] ILPA's Briefing of 3 October 2007 is available at http://www.ilpa.org.uk/briefings.html. However, the contents of this Memorandum largely incorporate and expand upon that Briefing.

Comment on the new status:

5. On the eve of publication of this Bill, the Government issued its consultation on a project to simplify UK immigration law[2]. In his short foreword, the Minister pointed out that currently our immigration laws are "*very complex*"; and that this led to lack of public confidence, contributed to administrative inefficiency and led to protracted legal challenges. The creation of a completely new immigration status, established by detailed and taxing provisions comprising eight clauses in this Bill, and including several and wide areas of discretion to be exercised by the Secretary of State, is objectionable in adding complexity and uncertainty where there is too much of both already.

6. The Explanatory Notes are remarkable for providing no reasoned explanation as to why the creation of this status is necessary or desirable. The Court of Appeal judgment in 2006[3] referred to at paragraph 65 of the Explanatory Notes, concerned those Afghans prosecuted for hijacking a plane, by which they had fled the Taleban in 2000. The Court rejected the Government's appeal against a judgment of the High Court[4] – a judgment which had been inevitable given the persistent failure on the part of the Home Office to implement the decision of an independent tribunal that the appellants were at serious risk of harm in Afghanistan; and the fact that the Home Office had elected not to fully pursue appeal rights open to it. On the day of the High Court judgment, the then Prime Minister had said at a press conference:

> "*We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this.*"[5]

The following day, the then Home Secretary was reported by BBC as saying:

> "*When decisions are taken which appear inexplicable or bizarre to the general public, it only reinforces the perception that the system is not*

[2] The simplification consultation was published on 6 June 2007. A copy of the consultation document is available at http://www.ind.homeoffice.gov.uk/6353/6356/17715/immigrationlawconsultation
[3] http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/1157.html
[4] http://www.bailii.org/ew/cases/EWHC/Admin/2006/1111.html
[5] Press Conference with the French Prime Minister, 10 May 2006, www.number10.gov.uk/output/page9443.asp

working to protect or in favour of the vast majority of ordinary decent hard-working citizens in this country."[6]

7. As the Lord Chancellor unequivocally accepted before the Joint Committee on Human Rights, the Court's judgment was undoubtedly correct and there was no basis for considering that any of the appellants pose a risk to the UK or the public. Indeed the Government had, as long ago as 2004, conceded before the independent tribunal considering the cases of the appellants that none of them posed any risk:

"*In the context of the reasoning of the Court of Appeal, I do not think their reasoning can be faulted. I think the bigger issue in relation to the Afghani hijackers was the proposition whether people who hijack should be allowed to stay here, and I think the answer to that is that if they face death or torture or something similar abroad then the law is that they should remain. The question of a balance does not arise because, as you rightly say, Mr Dismore, it was held that they posed no threat to this country.*"[7]

8. Those prosecuted for hijacking were not ultimately convicted. There had been two jury trials, at which the appellants argued the defence of duress. At the first trial, the jury could not agree. Although the jury at the second trial found the appellants guilty, the Court of Appeal subsequently quashed those convictions because the trial judge had misdirected the jury on the duress defence. No retrial was ordered in view of the length of time the appellants had already spent in prison.

9. In its response to the Joint Committee on Human Rights' Thirty-Second Report for the Session 2005-06, the Government stated:

"*The Government is pleased that the Committee agrees with the findings of the Home Office and DCA Reviews that the Human Rights Act has not significantly impeded the Government's objectives on crime, terrorism or immigration.*"[8]

10. The current position, and the one prevailing since before the time of the Court of Appeal judgment, is that individuals, who cannot be removed from the UK because of

[6] *Government Appeal over Hijackers*, BBC News Online, 11 May 2006.
[7] Evidence given by the then Lord Chancellor on 30 October 2006: see the Joint Committee on Human Rights' Thirty-Second Report for the Session 2005-06, Ev 1-2, available at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27802.htm
[8] See paragraph 3 of the Government's response, which response is available at: http://www.dca.gov.uk/publications/reports_reviews/human_rights_act_reviews.pdf

the Article 3 prohibition concerning persons who face serious harm in the country to which they would otherwise be removed, receive only six months discretionary leave. They may seek to renew that leave for periods not exceeding six months. During the course of discretionary leave, they will be entitled to take paid work and access the ordinary welfare services. On each occasion that they apply to renew their discretionary leave, the Home Office ought to actively review their circumstances to consider whether it may now be safe to remove them. They are precluded from any more substantial leave unless and until they have been in the UK with leave for at least 10 years; and even at this time it may be decided that only further periods of six months discretionary leave should be allowed.[9]

11. The UK Borders Act 2007 introduces new powers that could be applied (and indeed that the Government has expressly said are intended to apply) to those persons who would be subject to this new status. Section 16 of the Act, when it is brought into force, will allow for restrictions on residence and reporting. During the Second Reading of the Bill in the Lords, the Baroness Scotland said of these powers:

> "*For those who have committed serious crimes in the United Kingdom but whose removal would breach international obligations, we are introducing reporting and/or residency restrictions.*"[10]

12. There are powers to impose other restrictions (e.g. relating to access to public funds and restriction on employment or occupation) under existing legislation[11]. There is, therefore, no need to introduce a new status to achieve the aim of maintaining close contact with those who have committed serious crimes or people posing a danger to the UK.

13. The Explanatory Notes estimate the cost of this new status to be £1.1 million per annum. This will be money spent for no better reason than satisfying the knee-jerk statements made by the then Prime Minister and then Home Secretary in 2006 in response to the High Court and Court of Appeal judgments in the Afghans' case.

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[9] The Asylum Policy Instructions on Discretionary Leave give full details; and these are available at: http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/apis/discretionaryleave.pdf?view=Binary

[10] Hansard HL, 13 Jun 2007 : col 1710

[11] section 3(1)(c) of the Immigration Act 1971

14. The genesis of the special immigration status, therefore, is as unconvincing as is its timing. Things do not improve on examination of the particular provisions (see below). The Government – in agreement with the Joint Committee on Human Rights – accepts that the Human Rights Act 1998 does not involve any significant impeding of immigration policy; and agrees to this expressly in the context of the Afghans' case. In any event, the Government has legislated for further contact powers in respect of individuals to whom the special immigration status might apply. Now – despite the stated intention to simplify immigration law – the Government seek to introduce an additional and complex immigration status with substantial welfare, family, human rights and administrative implications.

An explanation of the new status:

15. Fuller detail regarding the relevant clauses is given under separate heading below. In brief, however, the relevant clauses can be broken down as follows:
    - Clauses 115 and 116 define who may be subjected to the new status.
    - Clause 117 defines what the new status is, by distinguishing it from other types of status as recognised in UK immigration law.
    - Clauses 118 to 120 set out various conditions that will apply to a person subjected to the new status.
    - Clause 121 concerns how a person may cease to be subject to the new status.
    - Clause 122 provides some interpretation for the purposes of these clauses.

Clauses 115 and 116

16. These provide that the new status may be applied to a person, who cannot be deported for human rights reasons but who otherwise would face deportation either because of behaviour that excluded the person from the Refugee Convention by reason of Article 1F or because of criminal conviction.

17. The decision whether to subject a person to this status is left entirely to the discretion of the Secretary of State – see clause 115(1). This is all the more remarkable given (as is explained further below) that:

- The status may be applied to individuals who pose no risk to the UK or the public and have been convicted of relatively minor offences.
- The status may also be applied to individuals who have no convictions, pose no risk and have been wrongly denied refugee status in the UK by operation of UK law.
- The powers to attach highly restrictive conditions to this status are left extraordinarily broad; and in certain respects mirror aspects of the control orders regime under the Prevention of Terrorism Act 2005. In one respect the special immigration status goes further by prohibiting access to ordinary welfare services.
- Family members, including children, whose conduct may be entirely blameless may be subject to this status and these conditions.

18. As regards human rights reasons, this status could be applied whatever the particular article of the European Convention on Human Rights (incorporated into UK law by the Human Rights Act 1998) prohibiting the person's deportation. This could include Article 3 (which prohibits removing a person to a place where he or she faces a real risk of torture or other very serious mistreatment) or Article 8 (which prohibits removing a person where to do so would cause a disproportionate interference with the person's private and/or family life) – see clause 115(2)(b). The inclusion of Article 8 cases is a major extension of the current powers to severely restrict a grant of discretionary leave. No justification is given for this in the Explanatory Notes. The extension is not justified because a finding on Article 8 will necessarily have balanced any concerns regarding the individual's continued presence in the UK against the private and family life he or she has established. In such circumstances, it may be all the more likely that imposing such severe restrictions upon an individual's capacity to engage in normal activities and conduct a normal life would itself be a violation of Article 8.

19. The spouse or civil partner and/or dependent children of someone subjected to this status may also be subjected to it – see clauses 115(3) and 122(3). Even if the spouse and any children of the individual are not made subject to this status, the mere fact that a member of the family may be excluded from employment and ordinary welfare

services would have a serious impact upon the welfare of the other family members. This impact may arise because of the financial burden caused to the family; particularly in view of the indefinite nature of the status. It may arise out of stigmatisation of the family – particularly given the intention that any welfare support to a person subjected to this status may be provided by way of vouchers (see below). It may arise because the dehumanising effect of excluding the individual indefinitely from ordinary social activities such as employment or educational opportunities itself puts considerable strain upon the family unit.

20. The Secretary of State's discretion whether to subject a person to this status is expressly subject to compliance with obligations under the Refugee Convention and EC law (though not human rights law) – see clause 115(5). However, section 3 of the Human Rights Act 1998 means that the clauses 115 to 122 would have to be read "*so far as is possible*" so as to be compatible with the articles of the European Convention on Human Rights, which that Act incorporates into UK law. Section 6 of the same Act would make it unlawful for the Secretary of State to impose the special immigration status if to do so was incompatible with those articles.

21. The criminal behaviour that will empower the Secretary of State to subject a person to this status is set out in section 72 of the Nationality, Immigration and Asylum Act 2002 – see clauses 116(1) to (3). This will include:
    - Persons sentenced to imprisonment for at least 2 years on conviction in the UK.
    - Persons sentenced to imprisonment for at least 2 years on conviction outside the UK (providing a sentence of 2 years could have been applied if convicted in the UK of such an offence).
    - Persons convicted in the UK of an offence listed by the Particularly Serious Crimes Order SI 2004/1910 and sentenced to any term of imprisonment.
    - Persons convicted and sentenced to any term of imprisonment outside the UK if the Secretary of State certifies that in his opinion the offence is similar to one listed by the Particularly Serious Crimes Order SI 2004/1910.

22. The Particularly Serious Crimes Order contains a very long list of offences, which include theft and criminal damage. Thus a person convicted of shoplifting or graffiti could be subjected to this status, and thereby (as explained below) subjected to extraordinary powers severely restricting their daily life, if imprisoned to any term of imprisonment however short.

23. The purpose of the Order, when introduced in 2004, was to exclude certain individuals from the full protection of the Refugee Convention. It operates alongside section 72 of the Nationality, Immigration and Asylum Act 2002, which implements an interpretation in UK law of Article 33(2) of the Refugee Convention. Article 33(2) removes the usual protection given to refugees against being returned to places where they face persecution in certain circumstances where the refugee poses a danger to the host country. UNHCR has made clear its view that the Order and section 72 do not properly interpret or implement the Convention and it regards the wide extent of the list of offences contained in the Order as "*alarming*"[12]. The Joint Committee on Human Rights has similarly expressed a clear view that the extent of the list is inappropriate, and indeed unlawful:

> "*We conclude that, on a proper interpretation of Article 33(2) of the Refugee Convention, the Order as drafted is incompatible with that provision because it includes within its scope a number of offences which do not amount to 'particularly serious crimes' within the meaning of Article 33(2). In our view the Order is therefore ultra vires the order-making power.*"[13]

24. A person may be subjected to this status during any period during which he or she is appealing against the conviction or sentence that has empowered the Secretary of State to impose the status – see clause 116(6).

25. The Secretary of State will also be empowered to impose this status upon persons to whom the Article 1F exclusion from the Refugee Convention applies – see clause 116(1) and (4). That exclusion applies to a person where there are serious reasons to consider he or she has committed a crime against peace, a war crime, a crime against

[12] UNHCR: The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 – UNHCR Comments, November 2004
[13] see the Committee's Twenty-second Report of Session 2003-04, HL Paper 190 HC 1212, 3 November 2004: http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/190/190.pdf

humanity, a serious non-political crime outside the UK or an act contrary to the purposes and principles of the UN. The last part of this aspect of the Refugee Convention is now interpreted in UK law. Section 54(1) of the Immigration, Asylum and Nationality Act 2006 provides that the following will be taken to be acts contrary to the purposes and principles of the UN:

> "*(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and*
> *(b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).*"

26. Section 54(2) of that same Act adopts the meaning of terrorism given by section 1 of the Terrorism Act 2000. That definition includes the act or threat of serious damage to property for the purpose of influencing any government for a political cause, whether or not that involves the risk of harm to anyone. A person, therefore, who has threatened, or caused, serious damage to property (even if this excluded any threat or harm to people) in the cause of their political opposition to a repressive regime may under the UK interpretation be excluded from the protection of the Refugee Convention. This may exclude many individuals, whose protection was plainly envisaged when the Convention was drafted; and such individuals may then also be subjected to the special immigration status.

27. Section 54(1)(b), when referring to "*acts of encouraging*" terrorism, does not expressly adopt the offences of encouraging terrorism set out in sections 1-4 of the Terrorism Act 2006. However, since the 2006 Act incorporates the same 2000 Act definition of terrorism, which is adopted by section 54, the potential for exclusion from the Refugee Convention now extends to those who have published statements (including the statements of another) if by doing so any third party may themselves be induced to threaten or commit an act that the UK has defined as terrorism (again including an act of serious damage to property which risks no harm to any person).

28. During the passage of the Bill that was to become the Immigration, Asylum and Nationality Act 2006, UNHCR expressed its concerns that what became section 54 "*may result in an overly broad application*" of the Article 1F exclusion; and that it

was generally inappropriate for the UK government to provide a further gloss upon the Refugee Convention by introducing interpretation of the Convention in domestic legislation[14].

29. The Joint Committee on Human Rights expressly found the effect of what became section 54 was to "*significantly widen the scope of the exclusion from protection in Article 1(F) in two important ways*". These related to the very wide range of actions, which were brought into the UK's interpretation of the exclusion by adopting the 2000 Act definition of terrorism; and the inclusion of inchoate offences within the ambit of this interpretation[15].

30. As is made clear by clause 116(5), a person (and his or her family) may be subjected to this status regardless of the fact that he or she constitutes no danger to the UK or the public.

Clause 117

31. This clause for the most part defines the new status by distinguishing it from all other forms of status. This effectively denies the individual access to ordinary state welfare, including social security support and other benefits such as student loans and other educational support. Beyond this, a person subjected to this status remains "a person subject to immigration control" and is lawfully in the UK – see clause 117(2). The exclusion from "asylum-seeker" or "former asylum-seeker" status will exclude the person from forms of support, to which those who have claimed asylum may be entitled[16].

Clause 118

32. This clause allows various conditions to be imposed for an indefinite period upon a person subjected to the new status.

[14] UNHCR comments on Clause 52 of the Immigration Asylum and Nationality Bill 2005, December 2005
[15] see Committee's Third Report of Session 2006-06 HL Paper 75-I HC 561-I, 28 November 2005: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf
[16] e.g. support under section 95 (asylum-seekers) or section 4 (former asylum-seekers) of the Immigration and Asylum Act 1999

33. Conditions may be applied which relate to residence, employment, occupation or reporting – see clause 118(2). The use of the term "relate to" means the powers are exceptionally wide, and would allow for several of the conditions that may be attached to control orders under counter-terrorism legislation[17]. For instance, control orders may require a person to allow officials to enter and search his or her residence at any time and may include restrictions in respect of the person's residence and upon whom he or she allows to enter that residence. The use of so vague a term as "relate to" appears to leave open the extent to which conditions under the special immigration status may come close to these highly intrusive conditions under control orders.

34. Clause 118(3) expressly provides for the use of electronic monitoring (including tagging).

35. Failure to comply with any condition may result in a criminal conviction and sentence of up to 51 weeks – see clause 118(5), (6). In Scotland or Northern Ireland, the maximum sentence would be 6 months – see clause 118(8).

36. Various powers of arrest (including without warrant), search and entry set out in the Immigration Act 1971 will apply in connection with this offence – see clause 118(7).

Clauses 119-120

37. The Government intention is to exclude persons subjected to the new status from working or receiving social security for an indefinite period. Instead, clauses 119-120 empower the Secretary of State to support the person in ways, very similar to that provided to asylum seekers by NASS since 2000. However, there are notable differences.

38. The effect of clause 119(2), (3) is to provide less detail as to the type of support the Secretary of State may provide. However, in certain respects these clauses mirror (though do not precisely replicate) the language used in section 96 of the Immigration and Asylum Act 1999.

[17] section 1(4) of the Prevention of Terrorism Act 2005.

39. By clause 119(4) support may not be provided wholly or mainly by way of cash. Support may be provided by way of vouchers – see clause 122(7).

40. The clauses create a whole new area of support appeals by adopting the sections in the 1999 Act establishing what is now the Asylum Support Tribunal.

41. To add to complexity, the Secretary if State is empowered, and does from time to time, by order bring in new provisions relating to NASS support. However, these clauses enable such changes to apply or not, or in the same or different ways, in respect of this status – see clause 120(4).

Clause 121

42. This simply provides for circumstances where a person will cease to be subject to this new status. As can be seen from clause 121(1)(a), it may be that in an individual case a decision is made to grant leave to enter or remain. One situation in which this could be expected to happen would be where a person had successfully appealed against the conviction or sentence, for which the Secretary of State had originally imposed this status. Another situation may be where the person successfully challenges the imposition of this status on human rights grounds or by relying directly upon entitlements under the Refugee Convention. If so, the special immigration status and the conditions that were attached to it will immediately lapse.

Clause 122

43. This provides interpretations of certain aspects of the preceding provisions. Observations made in respect of the individual preceding clauses are not repeated here.

Conclusion:

44. The special immigration status regime that would be introduced by these provisions would allow highly intrusive and severely restrictive conditions to be imposed upon an individual and his or her family for an indefinite period. The regime, as these provisions are currently drafted, would leave very wide discretion to officials of the Border and Immigration Agency in subjecting a person to this status. The persons

who may be subjected to this status may pose no risk whatsoever to the UK or the public. The individuals who would fall within the scope of the regime include individuals who may have been wrongly excluded from the Refugee Convention due to inappropriate and unlawful interpretations of that Convention introduced by UK domestic law; and include individuals who have been convicted of relatively minor offences (e.g. shoplifting or graffiti) whether or not there is any reason to think they may reoffend.

45. Section 16 of the UK Borders Act 2007 will, when in force, allow for residence and reporting restrictions to be imposed upon those who would be subject the special immigration regime. The discretionary leave policy already allows for close monitoring of the length of stay of individuals who are considered to be a risk to the UK or the public by granting leave to remain for no more than 6 months at a time. Where there are national security risks, the control orders regime may be applied. There is, therefore, no need to introduce this regime, which would add further complexity in the area of immigration law.

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