ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

**5th June 2007**

**BRIEFING:** Second Reading of UK Borders Bill in the House of Lords on Wednesday, 13th June

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ILPA is a professional association with some 1100 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 teaching, provision of resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

This briefing addresses discrete and key aspects of the Bill with which we have concerns. Specific clauses of the Bill are identified in bold.

**Immigration Officer Powers:**
There are several new powers for immigration officers (and others). Of particular concern are powers to:

- detain anyone (British or not) at a port of entry on suspicion of an offence (related to immigration or not) [**clauses 1-4**];
- seize cash on suspicion that it relates to illegal working [**clause 23**]; and
- enter and search premises for a nationality document when a person is arrested (if it is suspected the person may not be British, whether the arrest relates to immigration or not) [**clauses 43-45**]

Regulation and oversight
Concerns were rightly raised in committee about training, regulation and oversight of immigration officers exercising these powers. In relation to detention, the Minister said to the Public Bill Committee that:

> "*detention facilities… are subject to oversight by three organisations… the independent monitoring boards, which are extremely important… the prisons and probation ombudsman…* [and] *Her Majesty's chief inspector of prisons* [on whose reports] *the immigration service and I often rely… to get many of our arrangements correct.*"

He also then noted section 41 of the Police and Justice Act 2006 and the planned extension of the Independent Police Complaints Commission's role to examine serious complaints against immigration officers. However, the new chief inspector for the Border and Immigration Agency [**clauses 45-53**] will be empowered to refuse to cooperate with these bodies and may prohibit inspections [**clauses 48-50**]. Given the acknowledged importance of the oversight provided by these bodies, it is of grave concern that the chief inspector may effectively exclude that oversight.

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Welfare of children

At the Public Bill Committee, both Conservative and Liberal Democrat Members of Parliament urged the Government to bring immigration operations within the scope of section 11 of the Children Act 2004 so that the welfare of children is properly accounted for in the exercise of immigration powers. The Minister's response at the Report and Third Reading stages in the House of Commons was that he was concerned such a step would fetter removals and increase judicial review challenges to removals.

As was put to the Minister in Committee, the case for the application of section 11 is "*extremely strong*". We agree with that and are wholly unconvinced by the Minister's response, which was lacking in either evidence or analysis for the assertion that expanding the reach of section 11 in this way would increase the number of such challenges. Challenges are brought in children's cases, sometimes on human rights grounds such as relating to the child's private and/or family life (Article 8) in the UK. It remains unclear why the Minister should think expanding the reach of section 11 would lead to a judicial review challenge in circumstances where such a challenge would not otherwise have been brought. We strongly support the position of the Refugee Children's Consortium in calling for the ambit of section 11 to be extended to this area.

Destitution

At Second Reading in the House of Commons, several Members of Parliament raised legitimate concerns at the enforced destitution of many thousands of people in the UK and exploitation of those made vulnerable by destitution. We support the Still Human Still Here campaign (see www.stillhuman.org.uk) and the amendment to **clause 17** promoted by that campaign. A further concern, however, is that if the powers to seize cash contained in **clause 23** are directed at individuals forced into exploitative and unsafe working to overcome destitution, this will greatly exacerbate the vulnerability of many and likely add to the number now suffering an inhuman and degrading existence[1].

Community relations

It seems inevitable that conducting searches for nationality documents where no immigration issue has materialised beyond a suspicion that someone may not be British will provide further example of how immigration practices and concerns can substantially and regressively affect wider community relations. No explanation has been given as to how such suspicion will be formed. If, as seems likely, factors such as a person's name, language or colour are used, British people (their homes and premises) wrongly subjected to such searches will in all likelihood be from black and minority ethnic communities.

**Biometric Identity Documents:**

To date, we have largely left briefing on these provisions [**clauses 5-15**] to others with greater technical expertise in biometrics or in the wider civil liberties issues concerning identity cards and data protection. However, we have noted the evidence

[1] The Joint Committee on Human Rights March 2007 Report on Treatment of Asylum Seekers concluded that in a number of cases the destitution caused by Government policy reached the threshold of inhuman and degrading treatment prohibited by Article 3 of the European Convention on Human Rights.

that was given to the Public Bill Committee of the significant scope for errors in systems seeking to match biometric data. The more we have learned of biometrics the more we have become concerned that the claims made by Ministers regarding the security of biometric systems are not justified.

This must be considered alongside what seems certain to be the substantial cost of biometrics. We note that large increases have recently been made to many immigration applications. We and others have pointed to the potentially prohibitive size of some of these increased charges. The prospect that charges connected with biometric registration cause new and very large increases to the cost of immigration applications is a serious concern.

Moreover, we note the power to refuse or disregard an application as a penalty for non-compliance with biometric registration [**clause 7**]. A refusal of an asylum claim for non-compliance may result in an asylum-seeker being returned to a country where he or she is at risk of persecution. Even if not removed, if an asylum-seeker who was at risk of persecution was not recognised as a refugee for reason of non-compliance with these provisions, this would effectively exclude the individual from employment opportunities and mainstream welfare systems. The Refugee Convention requires that a Contracting State grant equal access to welfare to recognised refugees as nationals; and equal rights to work as most favoured foreigners (in this instance EEA nationals). It, therefore, appears that the requirement of biometric registration as envisaged by the Government (at least while British nationals and EEA nationals are exempted from such requirements) is contrary to the Convention.

We have further concerns as to the data (including non-biometric) that may be held under these provisions, the purposes for which it may be used, the length of time over which it may be held and the breadth and variety of places to which it may be passed. Liberty has provided more extensive briefings on such concerns.

**Reporting and Residence Conditions for those with Limited Leave to Enter/Remain:**

The Bill would allow for these conditions to be imposed on anyone with limited leave (which could include refugees, work permit holders, highly skilled migrants and family members of those settled in the UK) [**clause 16**]; and there is no restriction on the extent of conditions that may be imposed. Reporting and residence conditions (which could include daily reporting to an immigration officer and curfews) are far more intrusive than the conditions (prohibition from working, no recourse to public funds and registration with the police) now available under section 3(1)(c) of the Immigration Act 1971.

At the Public Bill Committee, the Minister stated particular and limited circumstances for which these powers are wanted. However, this clause provides no commensurate limitation on the purpose for, or circumstances in, which these powers may be exercised. We are firmly of the view that the clause ought to be amended, if it is to remain at all, setting out clear limitations so that these powers are only exercised where there is a clearly identified need and only to the extent that is necessary in the individual case. We note that, as currently drafted, this clause also appears to allow for restrictions on refugees' rights (free movement), which may be contrary to the Refugee Convention.

**Restriction of Evidence in certain Appeals:**
By **clause 19**, on an appeal by a person refused leave to enter or remain following an application under the 'points based system', the Tribunal could only consider evidence about the points based application that was submitted at the time of the application. It could not look at relevant evidence that was not given to the original decision-maker or came into existence after the original decision was made. Generally, we oppose such restrictions on evidence that may be submitted to the Tribunal because we believe this may hinder the proper resolution of the application in respect of which the appeal is brought. This should be considered in the context of the cost and complexity of applications, and administrative inefficiency with which they are all too frequently handled.

The inevitable consequence of this clause would be for matters that cannot be raised before the Tribunal to be pursued by additional representations to the Home Office, applications for judicial review and requests for the help of others, e.g. by way of correspondence with Ministers.

**Deportation:**
The deportation provisions in this Bill [**clauses 31-38**] constitute an abrogation of responsibility on the part of the Secretary of State. It came to light last year that in a number of cases the Secretary of State's officials had simply failed to consider or make decisions in respect of several foreign criminals as to whether they should be deported. Calling these provisions "automatic deportation" suggests that this will not be possible in the future – but this is not true. There is no such thing as automatic deportation, and if officials fail to consider or make decisions, the same risks remain. However, by providing for circumstances in which the law will mandate that a deportation order be made, the Secretary of State seeks to abrogate his responsibility to consider cases on their individual facts so as to make the right decision.

The reach of these provisions was considerably extended by amendments brought by the Secretary of State at the Report and Third Reading stages in the House of Commons. A person sentenced to any term of imprisonment (even a matter of days) for an offence of graffiti or shoplifting falls within their scope[2]. With the Secretary of State's amendments, a person receiving even a suspended sentence for such offences (or indeed someone who has already received such a sentence) would fall within the scope of these deportation provisions if any part of that sentence is given effect at any time in the future. These provisions apply regardless of the particular circumstances of the offence or the individual, including what may be his or her very long residence in the UK and an absence of connection to his or her country of origin[3].

The proposed deportations of Sakchai Makao and Ernesto Leal (see Appendix) were opposed by 113 and 60 Members of Parliament in respective EDMs last year. Their

[2] The offences fall within Condition 2 [**clause 31(3)**] as these are specified by SI 2004/1910 under section 72 of the Nationality, Immigration and Asylum Act 2002.
[3] In addition, condition 1 [**clause 31(2)**] means that any offender may be caught be these provisions, even where convicted of an offence that is not specified, if the sentence is of 12 months or more imprisonment. The amendment to catch those whose suspended sentences are later activated in whole or in part also applies in relation to these cases.

appeals were successful on ordinary immigration law principles (i.e. principles that would be effectively abandoned in future cases), yet their offences were plainly more serious than graffiti or shoplifting. The provisions in this Bill greatly accentuate the risk of deportation where a sensible assessment of the individual's circumstances and crime would show it to be neither fair nor rational.

By effectively empowering indefinite detention following completion of criminal sentence [**clause 35**] and removing any appeal right before deportation [**clause 34**], these provisions provide a package of deportation powers that will have harmful and arbitrary effects. Much of the debate on these provisions has focussed on the most serious offences – yet there is no credible suggestion that the current powers, if officials act competently, are insufficient to deal with such cases. And while the Article 3 (prohibition on torture) bar on removal does create real problems in respect of some plainly dangerous individuals[4], such cases are not and cannot be addressed through these provisions.

The Secretary of State tightened the Immigration Rules in favour of deportation last year. Rather than abrogating responsibility, he ought to be ensuring his officials are now performing their duties. If so, the current deportation powers are more than sufficient to deal with any mischief to which this Bill relates; and these new provisions are neither necessary nor desirable. They should be removed from the Bill. Our position as to that remains firm. Nevertheless, we have also provided a separate briefing on amendments to these provisions, which would address some of the worst aspects of the proposed 'automatic' deportation.

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[4] ILPA has consistently made plain our belief in the propriety of an absolute bar against deportations that place persons at risk of torture of other serious ill-treatment within the ambit of Article 3 of the European Convention on Human Rights.

## APPENDIX

Sakchai Makao

Sakchai Makao was born in Thailand on 10 December 1982. When he was a few months old, his father died; and when he was still at a young age his mother married a British citizen and moved to the UK. In September 1993, he and his sister were granted indefinite leave to enter to join his mother (he was 10 years old). In 1994, the family moved to Shetland. After school, he became a lifeguard at the community sports complex. He obtained a number of qualifications in relation to this; and remained in employment in an increasingly senior capacity until his imprisonment in January 2004. His offence was of culpable and reckless fire raising to which he pleaded guilty and for which he received a 15 month sentence [we note that this would bring him within both categories to which the provisions in this Bill apply]. On his release, he returned to his former employment.

The decision to deport him precipitated mass protest amongst his community in Shetland. A petition was signed by over 8,000 Shetlanders, with a further 3,000 names on-line; and a determined campaign against the deportation was led by church leaders and other high profile members of the community, with witnesses ultimately travelling to North Shields to give evidence at his appeal. His appeal was successful.

His offence occurred after he had become seriously drunk on learning of the news that his stepfather (the British man his mother had married, but in effect the only stepfather he had ever had) had been diagnosed with cancer – his father subsequently died. It was accepted that so far as the offence was concerned he had been led astray by another who took the leading part in the events. He pleaded guilty; and it was accepted he was very remorseful and posed no serious risk of re-offending. As regards the prospect of return to Thailand, whereas he was no longer dependent upon his mother (being an adult at the time of the offence, let alone decision to deport), he did not speak Thai and had no subsisting knowledge or connection to that country.

Ernesto Leal

Ernesto Leal was born in Chile. In 1977, he fled to the UK as a refugee with other family. He was then 13 years old. More than 25 years later, having established a business (as an arts and music promoter) and settled in the UK with two children of his own, he became involved in a pub brawl. He was sentenced to three years for assault occasioning grievous bodily harm. Much of that was served in an open prison, and he was released after serving 18 months.

He faced deportation despite his family being settled here – including his elderly mother and father, for whom he cared (his father had heart and diabetes problems). The decision to deport him precipitated a sizeable campaign, and ultimately on appeal an immigration judge overturned the decision.