MEMORANDUM OF EVIDENCE TO
PUBLIC BILL COMMITTEE

UK BORDERS BILL

Introduction:

1. Appended to this Memorandum is a copy of ILPA's briefing for Second Reading (Appendix A), which gives an indication of our concerns about the UK Borders Bill.

2. The purpose of this Memorandum is to highlight those areas which we would wish our evidence to focus upon: (i) the deportation provisions [clauses 28-35; also clause 44(4)(d)]; (ii) the reporting and residence conditions [clause 16]; and (iii) immigration officer powers [particularly clauses 1-4 and 40-41] and regulation/training regarding their exercise.

3. The focus we suggest is not intended to indicate a lack of position on other provisions in this Bill. Rather, it reflects the oral evidence that will generally be available to the Committee. We have considered the schedule of evidence; and, in liaison with others, considered which provisions are likely to be, or may better be, addressed by others. We give some brief comments on these provisions at the end of this Memorandum.

Deportation of criminals [clauses 28-35; clause 44(4)(d)]

ILPA's position: These clauses should be deleted. They do not remedy what have been administrative failings. So far as providing legislative armour to the Home Office, these clauses are simply unnecessary as the Home Office has sufficient power to enforce deportation of foreign criminals. On the other hand, these clauses would cause substantial injustice in the exceptional case.

General

4. ILPA is fully aware of the breakdown in IND administration last year concerning foreign national prisoners. As Research Paper 07/11 of 31 January 2007 of the House of Commons Library (*The* UK Borders Bill – *Bill 53 of 2006*-07) put it at page 36:

"*In April 2006 it emerged that over a thousand foreign national prisoners had been released from prison over the past seven years (and probably more before that) without the IND* ***considering*** *whether or not to deport them.*" (emphasis added)

5. A truly "*automatic deportation*" provision would solve such problems, but this is not what the Bill provides and no provisions could do so. **It is impossible to have automatic deportation since some official or officials must administer a deportation. The misnomer 'automatic' here is a serious one, since it gives the impression that the Government is addressing a problem (last year's administrative failings) when it is not.** By providing here for what is mandatory deportation, the Government cannot solve an administrative failing by legislative fiat. This is why we described these provisions in our briefing for Second Reading as "*wrong-headed*".

6. However, what the Government has done is to remove the Secretary of State's discretion to do the sensible thing in any exceptional case. **Essentially, this is a provision whereby the Government seeks to absolve itself from the responsibility of decision-making. Yet there is no evidence to suggest that but for administrative failure anyone who the Government thinks should have been made subject to deportation has not been.** This is why in our briefing for Second Reading we described these provisions as "*unnecessary*".

7. This is all the more troubling when one considers the very wide group of persons to whom these provisions may apply.

8. There are essentially two categories of non-EEA national, convicted in the UK of a criminal offence, to which these provisions would apply. Firstly, any such person who is sentenced to 12 months or more (though disregarding aggregation or suspended sentences). Secondly, any such person sentenced for any period for a specified offence – this refers to the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious

Crimes) Order 2004, No. 1910. The Research Paper refers to the latter, which lists offences to be regarded as particularly serious, and states at page 49:

> *"The list includes crimes of violence, sexual offences, crimes against children, drugs offences and terrorism offences."*

9. That statement is entirely accurate, yet wholly inadequate. The list also includes offences of theft and criminal damage. Essentially, a person sentenced for however short a term of imprisonment, for however minor an offence of theft or criminal damage, would regardless of their length of residence in the UK and other personal circumstances (including any mitigation concerning the offence; absence of risk of re-offending; value to the community; and any compassionate circumstances) be subject to these provisions – unless they could rely upon European Convention on Human Rights or Refugee Convention grounds.

10. In our briefing for Second Reading, we referred to the case of Sakchai Makao; and his circumstances were also referred to in debate by Paul Rowan. Details of this case are set out in Appendix B to this Memorandum.

 This case highlights a number of serious flaws in the proposed provisions on deportation:

 a. It might be supposed that Sakchai Makao would have the benefit of Exception 1 [clause 29(2)(a)] in that his deportation would be contrary to Article 8 of the European Convention on Human Rights (right to private and family life). Yet the fact that Mr Makao was no longer a dependent on any family member would raise a real possibility that his case would not been seen as one engaging Article 8, having regard to the limited way in which the right is approached in matters concerning immigration.

 b. In any case, the provisions here would mean that Mr Makao's deportation was mandated in law as "*conducive to the public good*"

[clause 29(7)], yet that is in essence what a panel of three immigration judges found was not so.

c. Moreover, as was accepted by the immigration judges, Mr Makao's offence was a serious one. Yet, a lesser offence, which should not reasonably be so described, would under these provisions have mandated his deportation. If his drunkenness, precipitated by plainly compassionate circumstances, had led him to commit a minor theft or criminal damage offence (as opposed to fire raising), he would still be subjected to mandatory deportation if sentenced for any term of imprisonment, however short.

12. What this case demonstrates is the serious injustice that removal of all discretion of the Secretary of State will achieve in the exceptional case – even where a relatively serious crime is concerned, let alone one that is plainly of a lesser order.

13. We note that these provisions would not only take away the Secretary of State's discretion, but prevent an immigration judge considering an appeal before the individual was deported [clause 31] unless human rights or asylum issues are raised. In every case, therefore, including the exceptional case highlighted, the Government would by these provisions remove the executive's discretion to consider exceptional circumstances (a basic abrogation of duty); and also remove ordinary judicial oversight of the mandated decision to deport. This would be for no better reason, so far as we can understand, than to give the appearance of having remedied the administrative failings of last year, which in fact cannot be so remedied but need administrative reform not legislative action. In short we oppose these provisions as unjust and unjustified.

Specific

14. However, we note three further concerns in the detail – albeit that we regard the provisions as objectionable in their entirety for the reasons explained.

Children – Exception 2

15. Firstly, we note Exception 2 [clause 29(3)] exempting children from the mandatory deportation provisions. However, we see no discernable reason to focus on age "*on the date of conviction*" rather than age on the date of commission of the offence. We believe, and are unaware of any satisfactory explanation to the contrary, that it is the age on the date of commission of (rather than conviction for) the offence that is relevant to any consideration as to how seriously to view the matter of deportation. Hence it should be that earlier date that should be the subject of any such exception. We do not understand why a child, convicted of an offence that would on its face fall within Condition 1 or Condition 2 [clause 28(2) and (3)], should be caught by these provisions for no better reason than that the delay (whether reasonable or otherwise) in the matter progressing to conviction had meant the child had turned 18.

Indefinite or Prolonged Detention

16. Secondly, we note the extraordinary breadth of the power of detention under clause 32. This relates to the situation of a person, who has completed their term of imprisonment and either the Secretary of State is considering whether to make a mandatory deportation order or thinks that he should do so. It is quite unacceptable, when concerned with as fundamental a right as a person's liberty that prolonged incarceration should arise because the Secretary of State is at this stage still mulling over what he should do (given he has had every opportunity before completion of sentence to work this out). As drafted, that detention is effectively indefinite – indeed, the general laxity allowed to the Secretary of State while detention is maintained is a feature of sub-clause (2) where detention is presumed indefinitely while the Secretary of State acts or fails to act on implementing a mandatory deportation order. Moreover, as drafted, it may transpire that the Secretary of State neither makes a deportation order nor had any good reason to think mandatory deportation was applicable, yet on its face the clause authorises the detention.

Commencement

17. Thirdly, we note the commencement provisions and, in particular, the power to give retrospective effect to these deportation provisions [clause 44(4)(d)]. If Clause 44(4)(d)(i) is intended to relate (and it surely should) to a person in custody for the particular offence that triggers the mandatory deportation, it should expressly say so. Moreover, anyone who has had a decision on the question of deportation (perhaps a successful appeal), should not become subject to mandatory deportation when there is no change of circumstances but for a change in the law.

Conclusion

18. Generally, whereas it is readily understandable why these provisions should excite such interest, the debate at Second Reading shows that those speakers supporting these provisions generally concerned themselves with offences of an extremely serious nature or repeat offenders apparently committed to a life of crime. This approach simply fails to engage with precisely what these provisions would entail. Nor is it founded on any identifiable need so far as decision-making at the Home Office or Asylum and Immigration Tribunal is concerned; and indeed there is no such need.

Conditional leave to enter or remain [clause 16]:

ILPA's position: Unless the Government is able to demonstrate a need, of which we are unaware, for this clause, it should be deleted. Failing that, amendment is necessary so that it is limited to those purposes for which the Government can demonstrate a need; and to restrict the conditions that may be applied so they impose no greater burden than is necessary.

19. This clause would enable the imposition of reporting and residence conditions upon any person, who has limited leave to enter or remain. It is important to consider both the breadth of the category of persons to whom these conditions may apply; and the breadth of the conditions envisaged, as these provisions are currently drafted.

20. We understand that the Government wishes, at least initially, to target serious criminals who cannot be removed by reason of Article 3 of the European Convention on Human Rights and unaccompanied asylum-seeker children on discretionary leave because of a lack of adequate reception available on removal. However, it has been indicated that these are only initial targets; and, in response to concerns as to how these provisions may be regulated, it has been said that this will be done by departmental policy instruction.

21. The group of persons to whom these provisions potentially apply include business people (under the highly skilled migrants programme), international students, refugees (with 5 years refugee leave to remain) and others at risk of torture if removed (with 5 years humanitarian protection). **There is no explanation why these, or other, people should be subject to these conditions. Moreover, the clause itself provides no legitimate purpose by which the exercise of the power to set such conditions may be restrained.**

22. **Conditions of reporting or residence may constitute a serious interference with a person's day-to-day activities.** In particular, it may interfere with their work, business or education. For refugees and those on humanitarian protection, particularly those with histories of torture and serious mental health conditions, the prospect of having to maintain such contact with authorities long after establishing entitlement to asylum may be greatly debilitating. It may interfere with their capacity to excise ongoing trauma regarding torture at the hands of authorities elsewhere, and exacerbate or prolong mental health conditions. For those with health conditions it may constitute a heavy burden, which their physical or mental capacity does not allow them to meet.

23. **As regards reporting, it is left entirely open-ended as to what distance the person may be required to travel, how frequently and at what cost, or for what purpose.** Such a provision is ripe for abuse, whether by intention or carelessness. Yet the Government has not established why it is necessary.

24. **As regards residence, the current drafting is remarkably wide and would allow for curfews.** Essentially, this would allow for control orders for any immigrant, who is not settled in the UK. Such an exercise of power would be grossly intolerable. Yet, even more modest conditions of residence are not established as necessary.

25. These concerns highlight the absurdly complacent presentation of this clause in the Explanatory Notes to the Bill, which merely commented at paragraph 47 that:

> *"This clause simply adds two new conditions*

26. Any serious reflection on the nature of the conditions proposed, as compared to those currently available, immediately demonstrates the naivety of that description. Restrictions on employment and on recourse to pubic funds are by their nature inherent to the particular leave that is granted to any individual, so impose no burden on the individual beyond that necessitated by the particular application to enter or remain in the UK, which he or she has made. A one-off requirement to register with the police is not comparable to the potential requirement to travel to report monthly, weekly or daily; or to be at a stated place of residence at particular times.

Immigration Officer Powers:

ILPA's position: Immigration Officers' powers have been greatly extended in recent years without commensurate provision for training, guidance and oversight in respect of the exercise of these powers. It is high time that this widening gap was addressed.

General

27. This Bill includes far-ranging new powers, predominantly for immigration officers, in relation to such matters as detaining, searching, entering and searching, seizing of property and taking, holding and passing on of information. We have several concerns with such measures, some of which are general concerns and others particular to certain provisions.

28. While it is plain that executive agencies, such as the immigration service, require powers to perform their duties, it is axiomatic that the wider the powers given, the greater the scope for abuse of powers whether by intention or carelessness. Moreover, particularly in an area as sensitive and potentially intrusive as immigration, there is a critical need for executive agencies to act responsibly and competently otherwise trust in them is diminished or destroyed, which in turn leads to lack of cooperation and an inability for agencies such as the immigration service to perform their duties.

29. We suggest that the Committee begins its consideration of the various powers proposed in this Bill by reflecting on the level of competence shown by the Home Office to date. **We recall the Home Secretary's description of his own department as "*not fit for purpose*", from which we conclude that the passing of more powers to the officers charged with implementing the department's business should be approached with extreme caution.** In most spheres, a person who has demonstrated a lack of competence should ordinarily expect to have their influence reduced, restricted or even removed (at least until he or she had demonstrated a capacity to deal adequately with his or her current responsibilities); and it would be thought unwise or even intolerable that such a person simply be given more authority and power. As a general point of principle, we see no reason why such an approach should not hold good for a Government department.

Codes of Practice

30. We also note that when the immigration service were given several new powers by the Immigration and Asylum Act 1999, included within that Act was section 145, which provided that an immigration officer exercising powers of arrest, questioning, search, fingerprinting, entry and search or seizure of property:

must have regard to such provisions of a code as may be specified."

31. Those provisions came into force on the passing of the Act on 8 November 1999. We are now more than seven years on. More powers have been passed

to the immigration service by subsequent legislation, and this Bill provides again for increased powers. Yet there is still no sign of code of practices as Parliament plainly, and rightly, envisaged appropriate all those years ago.

32. The trend over recent years has been that immigration officers are becoming police officers by another name. However, **police officers are subject to clear guidance, oversight and statutory responsibilities, whereas this is not the case for immigration officers. It is simply inconsistent and unacceptable that immigration officers should be exercising police powers yet not be subject to the same training, oversight and guidance as police officers** (e.g. PACE codes of practice). This is all the more pressing given that many of those who may find themselves subjected to these powers are likely to be unfamiliar with their rights and protections under UK domestic law, be disadvantaged by being unable to communicate directly in English with the immigration officer, have very recently suffered the traumatic experience of being smuggled (or worse, trafficked) into the UK and have a history of abuse at the hands of authorities elsewhere, which in the worst cases has led to their suffering from trauma and with serious mental health conditions. Essentially the 'client-group' of the immigration service is likely to be disproportionately vulnerable, and disproportionately in need of the protection of proper regulation and oversight of the exercise of immigration officer powers.

Children

33. A critical, but by no means sole, instance where the immigration service ought to be subject to like statutory responsibility as the police and other agencies concerns children. **It is high time that the immigration service, and indeed others at the Home Office, are included within those agencies listed at section 11 of the Children Act 2004 such that "*their functions are discharged having regard to the need to safeguard and promote the welfare of children*".**

Complaints

34. We welcome the recent news that the Secretary of State is to act on his powers to make Regulations under section 41 of the Police and Justice Act 2006 such that the Independent Police Complaints Commission will have power to investigate complaints in relation to specified functions of the immigration service. That is an important step in the right direction, but of itself far from a complete answer to our concerns.

Specific

35. As regards the specific new powers proposed in this Bill, we would draw particular attention to clauses 1-4, 20 and 40-41. We have previously in this Memorandum (paragraphs 44 & 45) indicated our concerns regarding clause 20.

Detention at Port

36. Clauses 1-4 concern the power for an immigration officer to detain any person at a port of entry for up to three hours pending the arrival of a police officer. **This power will be reserved for designated immigration officers, but clause 1(2) is, as it stands, hopelessly vague as to the criteria that may be applied for such designation.** With the power to detain, comes a power to search and retain property. The power is operable when the designated immigration officer "*thinks*" an individual (foreign or British national) may be liable to arrest by the police for any offence (whether related to immigration or otherwise). This is the clearest example of immigration officers becoming police officers by another name, since it is merely incidental that the power is exercisable at the port of entry – in effect the immigration officer may exercise powers in respect of ordinary police business.

37. We note that those detained may be children, women, mentally ill or vulnerable in any number of other ways. We are concerned, as the clause stands, as to what may happen in the three hours of any detention. **We are concerned that there is no provision for the individual to be informed of the purpose of the detention or the grounds for suspicion; and there is no check on the immigration officer taking the opportunity to question the**

individual. All of this is against a backdrop of recent serious concerns at the lack of adequate facilities for detaining at certain ports of entry following inspections by HM Chief Inspector of Prisons.

Search and Seizure of Nationality Documents

38. Clauses 40-41 empower an immigration officer or police officer to enter and search, without warrant, premises of a person arrested for any offence (whether related to immigration or otherwise) for the purpose of finding and seizing a nationality document. This is a new power. Currently, a police officer might exercise search and entry powers where he or she had reason to believe that search would locate evidence in connection with the offence for which the individual had been arrested. However, in this instance, a nationality document may have no connection to the offence.

39. There has long been concern among black and minority ethnic communities that police powers (e.g. stop and search) have been used disproportionately against members of their communities. This new power seems likely to lead to the same concerns. **There is no justification provided in the provision, as drafted, giving reason for the search; nor does the clause give any assistance as to how a suspicion that a person is not British may be formed.** Bearing in mind Britain's ethnic, racial, cultural and linguistic diversity it is almost certain that such a power would be used disproportionately against members of black and ethnic minorities and, we fear, in an unjustifiably discriminatory manner.

Biometric registration [clauses 5-15]:

40. We have had the advantage of discussions with Liberty; and considered their Second Reading briefing. We are extremely concerned at the current presentation of these provisions, allowing for Regulations to be laid for implementation of biometric documentation and information storage in the widest possible terms. The failure to make clear limitations on the purpose for which such Regulations may be introduced is a highly inappropriate means of legislating on provisions of this kind. Generally, we support Liberty's position in relation to these provisions.

41. We wish to highlight three particular concerns, which we share with Liberty and others. Firstly, if these provisions are enacted in so open-ended a fashion, Parliament must be given the opportunity to amend any Regulations made in due course. Secondly, as regards the penalty provisions [clause 7] there should now be made express in the provisions limitations on the exercise of a penalty to: (i) disregard or refuse a claim; or (ii) cancel or vary leave to enter or remain such that no such penalty will be introduced in respect of human rights or asylum claims or leave granted on the basis that removal would be in breach of the UK's international obligations under the 1950 European Convention on Human Rights, the 1951 Refugee Convention or EC Community law. Thirdly, much has been made of the advantage of what will be identity cards for immigrants seeking to demonstrate entitlement to, for example, work. However, we remain concerned as to what happens when a person has legitimately applied for an extension of leave (and whose entitlements should remain until that application is decided). Will provisions ensure that this person's ongoing entitlement will be demonstrated by the card?

No new evidence on appeal [clause 19]:

42. The new effect of this provision relates to points-based applications. However, we have a general objection to the application of this principle in certain other immigration appeals as is the current position. We understand that the Government's concern is to prevent abuse of the process by claimants who present manifestly inadequate or false evidence seeking to remedy such failings on appeal by introducing new evidence – e.g. by getting themselves properly invited onto a course of education after the initial refusal.

43. Historically, the position had long been that Adjudicators of what was the Immigration Appellate Authority did not consider new evidence or circumstances in immigration (as opposed to asylum) appeals unless these threw light on the situation at the time of the decision appealed against. This was a perfectly adequate approach to meet the Government's concern. However, the stricture of the approach in clause 19 means that someone who

may have made a simple mistake in submitting an application for extension of leave (e.g. forgetting to include a document; or miscalculating the points and thinking they need not rely on a further document) is heavily penalised by losing their existing leave to enter or remain in the country, and thereby any employment or education opportunity on which their application depends. We have had the advantage of discussing this clause with the Immigration Advisory Service; and we share their concerns.

Seizure of cash [clause 20]:

44. We understand that it is the Government intention to use these powers to seize cash from individuals, where it is suspected that they have earned the cash through working illegally – either because the individual is in the country unlawfully (whether as an illegal entrant or overstayer); or where the individual is prohibited from working as a condition of his or her presence (whether with leave or on temporary admission).

45. We believe the exercise of such powers in this manner would constitute a wholly disproportionate and severe penalty upon individuals, many of whom will have been seriously exploited on very low wages, working very long hours and in very poor and dangerous conditions. The prospect of the UK authorities, who have essentially failed to protect the basic rights and interests of these individuals, seizing their hard-earned cash would be swingeing to say the least. We are aware that the TUC and TGWU, both of whom have been invited to give evidence to the Committee, have made very clear their concern for the situation of exploited migrant workers in circumstances as we describe here, and we share their concerns.

Conclusion:

46. We hope that this Memorandum may be of help to the Committee generally, and as background to the oral evidence it has invited from ILPA. We are grateful for the opportunity to provide this, and for the invitation to give oral evidence.

Any questions arising out of this Memorandum, whether before or after the oral evidence session, may be directed to:-

Steve Symonds
Legal Officer
Immigration Law Practitioners' Association
Lindsey House
40/42 Charterhouse Street
London EC1M 6JN

Direct line: 020 7490 1553
ILPA Office 020 7251 8383
Fax: 020 7251 8384

steve.symonds@ilpa.org.uk
www.ilpa.org.uk

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