ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

MEMORANDUM OF EVIDENCE TO
JOINT COMMITTEE ON HUMAN RIGHTS

DRAFT (PARTIAL) IMMIGRATION AND CITIZENSHIP 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.

2. This Memorandum is provided in response to the Committee's Call for Evidence of 31 July 2008.

Executive Summary and Overview:

3. The Government has subtitled the simplification project as "*making change stick*"[1]. The draft Bill indicates this subtitle is inaccurate. The provisions in the draft Bill are drawn excessively widely. If changes are made in the way proposed by this draft Bill, they will not 'stick' because:

    a. At a minimum, powers drawn as widely as in this draft Bill will require extensive provision in subordinate law (whether in the Immigration Rules, regulations or in policy instructions), without which the powers will on their face be arbitrary and their exercise unforeseeable.

[1] *Making Change Stick: an introduction to the Immigration and Citizenship Bill* is available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/makingchangestick.pdf?view=Binary

b. However, the breadth of the powers proposed in the draft Bill may simply prove insufficiently precise – such powers and any subordinate law made under them could expect to be subject to legal challenge. This imprecision may require amending legislation, which would undermine a key aim of the simplification project in addressing the complexity arising from longstanding failure to consolidate immigration law.

4. If the need for amending legislation were avoided, this could only be at the expense of leaving very wide scope for Government to change policy and increase or redirect powers through subordinate law – Immigration Rules, regulations and policy instructions. Far from establishing a lasting legacy of settled immigration law, this would merely invite future Governments to chop and change immigration law at will without effective parliamentary scrutiny. It would also raise a burden on the UK Border Agency which it, as its predecessors[2], has consistently failed to meet: ensuring transparency and accessibility of law by making relevant policy instructions and guidance, including an archive of such policy, fully and publicly available[3].

5. This has substantial constitutional implications because increasing the power of the executive in this way, while reducing the influence of Parliament, would need a greater controlling influence from the judiciary. In important respects, the provisions in the draft Bill and other developments proposed within the simplification project seek to reduce the judicial role, which it is said is already under strain. Home Office proposals for the future of the appeals system are to reduce the role for judicial review and scrutiny of the tribunal by the higher courts[4].

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[2] both the Border and Immigration Agency and Immigration and Nationality Directorate
[3] the starkest failure by IND in this respect was to fail to make available its policy on Iraqi asylum claims and refusing, and contesting on appeal, large numbers of asylum claims which its policy required to be accepted, see e.g. *R (Rashid) v SSHD* [2005] EWCA Civ 744; but it remains the case that relevant and current policy is not consistently made available and is on occasion withdrawn pending revision for long periods of time without any interim policy being introduced or at the least made available, while no comprehensive archive of policy instructions and guidance is maintained
[4] *Immigration Appeals: fair decisions, faster justice* is available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/immigrationappeals/

6. In addition to the foregoing overarching concerns, this Memorandum highlights provisions of the draft Bill, which would:

   a. provide powers that on their face are without any or any sufficient constraint;

      These include ***powers to stop, examine and detain*** people (paragraphs 8-10), powers related to ***biometric registration, identity cards and data protection*** (paragraphs 11-13), powers to impose ***conditions on temporary permission and cancellation of permission*** (paragraphs 14-20) and powers of ***expulsion and exclusion from the UK*** (paragraphs 21-24).

   b. extend barriers and penalties facing refugees and others fleeing serious harm;

      These include provisions relating to ***carriers' liability, authority-to-carry schemes and immigration offences*** (paragraphs 25-31) and ***exclusion from refugee status, humanitarian protection and permission*** (paragraphs 32-36).

   c. reduce judicial oversight and access to judicial remedy;

      These include provisions relating to ***detention and immigration bail*** (paragraphs 37-40) and ***appeals*** (paragraphs 41-44).

   d. establish new injustices and marginalisation, and fail to remedy longstanding injustices.

      These include provisions relating to the ***removal of the right of abode*** (paragraphs 45), ***British nationality, citizenship and naturalisation*** (paragraphs 46-48), ***access to state benefits***

and services, and immigration fees (paragraphs 49-53) and ***children and trafficking victims*** (paragraphs 54-55).

7. The concluding section, ***conclusions and general observations***, highlights misuse of "*plain English*"[5] throughout the draft Bill.

Powers to stop, examine and detain:

8. The draft Bill contains very broad powers to stop individuals to examine them in order to establish their nationality and/or whether they have permission to be in the UK[6]. The exercise of these powers would not be restricted to at immigration controls, but would include any place in the UK. The powers are not discriminatory in that any person, British or otherwise, may be subjected to them[7].

9. The Committee has previously raised concerns regarding racial profiling[8]. The draft Bill specifies no grounds, reasonable or otherwise, on which these powers may be exercised leaving wide scope for arbitrary and discriminatory exercise of the powers. This is all the more concerning given that the initial interference with private life, which may result from a person being required to submit to an examination, is attended by a power to detain the person until such time as the "*examination has been completed, and all relevant matters have been determined*"[9] (e.g. the Secretary of State is satisfied of the person's

[5] maximising the use of plain English is said to be one of the key 'principles' of the simplification project, see the June 2007 *Simplifiying Immigration Law: an initial consultation* at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/consultationdocument.pdf?view=Binary
and more recently, the February 2008 *The Path to Citizenship: next steps in reformining the immigration system* at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/pathtocitizenship?view=Binary

[6] clauses 25 & 26

[7] with the exception of British citizens who have never left (and hence never entered) the UK; but it is impossible to envisage how such a distinction can be given effect in practice

[8] e.g. Oral Evidence from Rt Hon Lord Falconer of Thoroton QC and Rt Hon Baroness Scotland of Asthal QC on Monday 30 October 2006, published with the Joint Committee's Thirty-second report for the Session 2005-06 *The Human Rights Act: the DCA and Home Office Reviews*, 14 November 2006 HL 278/HC 1716, Q101-Q104

[9] clause 53(1)

British citizenship, EEA free movement rights or immigration status[10] and the person has provided such information and documentation in respect of these matters as may be required by the Secretary of State[11]). These powers carry criminal sanctions[12].

10. ***These provisions would increase concerns regarding racial profiling; and their exercise would engage Articles 5 and 8, ECHR.***

Biometric registration, identity cards and data protection:

11. The Committee has stated that it "*fundamentally disagrees with the Government's approach to data sharing legislation, which is to include very broad enabling provisions in primary legislation and to leave the data protection safeguards to be set out later in secondary legislation*"[13].

12. It is intended that the full Bill will contain provisions in this area, which are not yet included in the draft Bill. However, the approach most recently adopted in the UK Borders Act 2007 is precisely that with which the Committee has fundamentally disagreed. Indeed, the Committee concluded that provisions in that Act were too widely drawn to allow assessment of their Article 8 compatibility and raised concerns as to racial profiling[14]. The Committee also expressed concern at the prospect that production of an identity card becomes necessary in order to access state benefits. If access becomes linked to immigration control in this way, some immigrants may simply be discouraged from accessing services to which they may be entitled or to which there is a clear public interest that access is maintained (e.g. to avoid public health risks or so that crime is reported to the police). These concerns are born out by the Committee's findings following the

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[10] clause 25(2)
[11] clause 28
[12] clauses 101, 102 & 121
[13] the Joint Committee's Fourteenth Report for the Session 2007-08 *Data Protection and Human Rights*, 14 March 2008 HL 72/HC 132, Conclusions and recomendations, paragraph 2
[14] the Joint Committee's Thirteenth Report for the Session 2006-07 *Legislative Scrutiny: Sixth Progress Report*, 21 May 2007 HL 105/HC 538, paragraphs 1.20 *et seq*

inquiry into *The Treatment of Asylum-Seekers*, which demonstrated that confusion following the introduction of the 2004 Charging Regulations[15] has led asylum-seekers to fail to seek treatment for "*life-threatening illnesses or disturbing mental health conditions*" [16]. Linking access to immigration control would be likely to compound confusion with suspicion.

13. ***These provisions may increase the potential for discrimination, whether directly by way of racial profiling or indirectly by inhibiting vulnerable or marginalized groups from accessing benefits and services.***

<u>Conditions on temporary permission and cancellation of permission:</u>

14. The power of the Secretary of State to interfere with the private and family lives of those subject to immigration control would be considerably extended by the draft Bill.

15. Any person granted temporary permission could be subjected to conditions, including reporting and residence conditions[17]. The draft Bill would also allow for conditions "*restricting the person's work, occupation or studies*"[18]. That relating to studies is new, albeit the Explanatory Notes are silent as to the condition. Given that any suspicion that a person's entry or stay in the UK is for ulterior motives may be examined and dealt with under current immigration powers it is not understood why this addition should be necessary.

16. No limit or purpose is specified for the application of these conditions; and they may be applied at any time from arrival in the UK[19]. The current Immigration Rules do not comprehensively set out what

[15] National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2004, SI 2004/614
[16] the Joint Committee's Tenth Report for the Session 2006-07 *The Treatment of Asylum Seekers*, 30 March 2007 HL 81-I/HC 60-I, paragraph 17 of the conclusions and recommendations
[17] clause 10(d) & (e)
[18] clause 10(a)
[19] clause 11

conditions will be attached to which categories of entrant or in which circumstances and for what purposes they may be attached. The Rules ought to clearly establish what applicants can expect under each category.

17. For those on routes to citizenship or settlement, the time, for which conditions may last or during which they may be imposed, may be several years[20]. Failing to comply with any condition may have such disastrous effects as expulsion[21] without right of appeal[22], exclusion from the UK "*for a limited or unlimited period*"[23] and criminal prosecution[24]. These consequences may result immediately or at any time during which the person continues to have temporary permission; and regardless of the minor, inadvertent or unavoidable nature of any failure to comply (e.g. failing to report at a specified time because of hospitalisation or illness).

18. Despite the several circumstances in which permission would be automatically cancelled[25], the draft Bill also includes power, which is wholly unconstrained, for the Secretary of State to cancel permission[26]. Although the Explanatory Notes state that criteria for cancellation will be set out in the Immigration Rules[27], if there are circumstances where power to simply cancel a person's permission is needed, beyond when permission will be automatically cancelled, such circumstances should be set out in statute.

19. The power to cancel permission includes both temporary and permanent permission[28]. Existing powers to withdraw indefinite leave

[20] with the changes to naturalisation and settlement, these periods are extended by several years
[21] clause 37(2)(a) & (4)(d)
[22] clause 171
[23] clause 37(6)
[24] clause 99
[25] clauses 12(3), 13(1), 13(2), 15(3), 42(1) and 47(2)
[26] clause 14
[27] paragraph 64
[28] clause 6(4)(b) & 6(3)(b) respectively

are carefully circumscribed in legislation[29] and there is no good reason to extend these powers.

20. ***These provisions would raise the prospect of interference with Article 8, ECHR rights of all immigrants in the UK and many seeking to return to the UK, e.g. to join family members. In the case of both cancellation powers and conditions on temporary permission, such interference may be arbitrary and unforeseeable.***

Expulsion and exclusion from the UK:

21. The elision of deportation and administrative removal by the expulsion provisions in the draft Bill would subject individuals, who do not currently face continuing exclusion from the UK, to that fate. The draft Bill would go further than mere return to the position first introduced by changes to the Immigration Rules from 30 April 2008[30], a position from which the Government in significant part resiled by introducing concessions in respect of entry clearance applications to join family members, those who had entered the UK as children and those who had been trafficked to the UK[31]. The draft Bill would impose a mandatory re-entry ban on anyone subject to expulsion regardless of any circumstances; and on the face of the provisions such exclusion may be permanent[32] or, if the exclusion is temporary or lifted, the

[29] these relate to persons who are liable for deportation, obtained indefinite leave by deception, fall within the cessation clauses of the Refugee Convention and where there is reason to review the person's leave on his or her arrival in the UK (see section 5(1), Immigration Act 1971, section 76, Nationality Immigration and Asylum Act 2002 and paragraph 2A of Schedule 2, Immigration Act 1971)

[30] paragraphs 320(7B) introduced by HC 321 Statement of Changes in the Immigration Rules

[31] these concessions were first announced by the Minister in Parliament on 13 May 2008 (*Hansard HC, 13 May 2008 : Column 1353*) and the first two were incorporated into the Immigration Rules from 30 June 2008 (paragraph 320(7C) introduced by HC 607 Statement of Changes in the Immigration Rules); the third concession (on trafficking victims) is to be adopted on the UK's ratification of the Council of Europe Convention on Action against Trafficking in Human Beings – the Minister had initially indicated the possibility of the second and third of these concessions when questioned by the Committee (see the Minister's answer to Q16, Uncorrected Oral Evidence given by Liam Byrne MP, Minister of State, Home Office and Lin Homer, Chief Executive, Border and Immigration Agency on 19 February 2008 to the Joint Committee, HC 357-i)

[32] clause 37(6)

individual may nonetheless be required to pay any costs of the expulsion if he or she wishes to return to the UK[33].

22. The current "*automatic deportation*" regime[34] is retained by the draft Bill[35] except that the draft Bill explicitly reverses the presumption of liberty[36]. Whereas this regime makes exception for those whose removal would be contrary to the ECHR or Refugee Convention, these exceptions merely suspend (rather than cancel) the mandatory deportation for an indeterminate period for so long as the exceptions may continue to apply[37]. As such, the provisions introduce a permanent uncertainty which of itself undermines the individual's rehabilitation and reintegration and thereby interferes with his or her Article 8, ECHR rights.

23. The regime also fails to protect all child offenders from "*automatic deportation*" by the focus on age at the date of conviction rather than commission of the offence[38]. The draft Bill erroneously limits the effect of the exception for trafficking victims to this regime, rather than to expulsion generally[39]. This regime may also lead to prolonged detention because of the vague provision for expulsion orders to be made "*at a time chosen by the Secretary of State*"[40], and the wide power to detain where it is thought "*a person is someone on relation to whom an expulsion order may be made*"[41].

24. ***The continuing nature of the expulsion provisions relating to those treated as "foreign criminals" constitutes an Article 8, ECHR interference; and these provisions risk breaches of Article***

[33] clause 46(4)
[34] sections 32 to 39, UK Borders Act 2007
[35] in particular, clauses 37(2)(b), 32(9), 38, 39, 55 and 171(1), (2) & (3)(b)
[36] clause 55(4)
[37] this follows because once the individual falls within the statutory meaning of "*foreign criminal*" he or she can never escape statutory label, and the mandatory requirement to deport (or expel) will take effect at any time that any exception ceases to apply
[38] clause 39(2)
[39] clause 39(4); this exception ought to be included with those in clause 38
[40] clause 37(9)
[41] clause 55(1)

5, ECHR. The arbitrary focus on age at date of conviction is not compatible with the UN Convention on the Rights of the Child, in particular Article 40[42]. The draft Bill is not compliant with the UK's obligations to be adopted under the Council of Europe Convention on Action against Trafficking in Human Beings.

Carriers' liability, authority-to-carry schemes and immigration offences:

25. The extension of visa regimes, introduction of juxtaposed controls and a civil penalty regime for carriers have each created substantial barriers to those seeking sanctuary in the UK. Consequently the power of smugglers and traffickers over asylum-seekers has been extended. The authority-to-carry provisions[43] in the draft Bill would further extend this.

26. The proliferation of immigration offences on the statute book should be curtailed and the refugee defence[44] improved both to meet the UK's international obligations[45] and to prevent the criminalisation and imprisonment of asylum-seekers on account of the exploitative and harmful circumstances into which immigration controls have forced them.

27. The provisions in the draft Bill are inadequate. Firstly, the proliferation of offences would continue. If any sanction were attached to the superfluous duty at clause 7[46], this would immediately expose an asylum-seeker smuggled into the UK to prosecution for three separate offences[47]. Prosecutions would also be extended to include resisting or obstructing any person exercising any immigration function[48].

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[42] relied upon by the Grand Chamber of the European Court of Human Rights in finding a violation of Article 8 in *Case of Maslov v Austria* (Application No. 1638/03)
[43] clause 149
[44] section 31, Immigration and Asylum Act 1999
[45] Article 31, 1951 Convention relating to the Status of Refugees
[46] clause 7 merely imposes a duty to do something (obtain immigration permission) which a person would be required to do in any case by reason of clause 2
[47] entering without permission (clause 97), being in the UK without permission (clause 98) and the breach of clause 7
[48] clause 121(1)

28. Secondly, the provision for the refugee defence[49] remains inadequate. Restricting the defence to specified immigration offences[50] necessarily reduces the proper scope of the defence leaving open prosecution for non-immigration offences that in the instant case relate directly to immigration control[51]. Requiring the defendant to show that he or she "*could not reasonably have expected to be given protection under the Refugee Convention*" in another country through which he or she passed[52] restricts the reach of the defence by imposing an obligation not to be found in the Convention; and in focusing on whether the country would have provided sanctuary rather than whether the asylum-seeker could reasonably have been expected to seek it from that country further penalises those forced into the hands of smugglers or traffickers.

29. Thirdly, despite amendments to the current version of the refugee defence[53], the draft Bill continues the failure to require the asylum determination process to be concluded prior to any prosecution, which is necessary if the defence is be effective. The criminal justice system is not the place for determining complex issues of fact and law relating to asylum. It is currently the case that many individuals prosecuted before their asylum claims are determined plead guilty despite the potential application of the refugee defence. In many case, this is because the uncertainty of prosecution and the likelihood that the individual will be refused bail, and hence be held on remand for longer than any sentence, militate in favour of the plea.

30. Although not required by the Refugee Convention, a defence ought to be open to those whose asylum claims are genuinely made whether or not successful. This might include those granted some alternative form

[49] clause 193
[50] clause 193(1)
[51] see e.g. *R v Asfaw* [2008] UKHL 31
[52] clause 193(4)
[53] in particular, cf. clause 193(6) and section 31(7), Immigration and Asylum Act 1999

of protection, or indeed those found not to be able to meet the high thresholds required before refugee or humanitarian statuses are recognised or granted, but whose claims for asylum were based upon real fears.

31. ***The provisions in the draft Bill will continue the current incompatibility in UK domestic law with Article 31, Refugee Convention. In addition, individuals fleeing Article 3, ECHR harms or genuinely in fear should not be subjected to prosecution simply because they have been forced into the control or influence of smugglers or traffickers in their attempt to seek sanctuary.***

Exclusion from refugee status, humanitarian protection and permission:

32. The Committee has previously observed upon the incompatibility of the UK's interpretative statutory provisions regarding Articles 1F(c)[54] and 33.2[55] of the Refugee Convention[56].

33. The Government informed the Committee that the Article 1F(c) construction is no more than declaratory in nature and that Parliament endorsed the Government's view of when a person is "*rightly excluded from the protection* [of]*… the Refugee Convention*"[57]. This reasoning is incoherent. If the construction does no more than declare what is already provided by the Convention, the construction is otiose. If no more than declaratory, there is no need for either Government or Parliament to express any view on when a person should be excluded;

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[54] section 54, Immigration, Asylum and Nationality Act 2006

[55] section 72, Nationality, Immigration and Asylum Act 2002, and the Particularly Serious Crimes Order 2004, SI 2004/1910

[56] e.g. the Joint Committee's Third Report for the Session 2005-06 *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, 5 December 2005 HL 75-I/HC 561-I and Twenty-second Report for the Session 2003-04 *The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004*, 3 November 2004 HL 190/HC 1212

[57] letter from the Rt Hon David Hanson MP, Minister of State, Ministry of Justice of 29 April 2008, published as Appendix 2 to the Committee's Twenty-third Report for the Session 2007-08 *Legislative Scrutiny: Government Replies*, 26 June 2008 HL 126/HC 755

and the task of construing the Convention can and should be left to the judiciary.

34. The draft Immigration Rules[58] would retain the current incompatible construction of Article 1F(c) and create new incompatibilities by constructions of the other constituent parts of Article 1F and of Articles 1C and 1D[59]. These further incompatibilities include:

a. The construction of Article 1D, which by the adoption in the Rules of the term "*at present*" abandons the temporal focus of the Article upon the situation at 28 July 1951[60].

b. The parenthesis in the provision relating to Article 1F(b) that challenges its "*non-political*" element[61].

c. The extension of Articles 1F(a) and (b) to include persons said to be responsible for instigating or participating in exclusory acts but not themselves guilty of those acts[62].

d. The extension of Article 1F(b) to include acts committed after the refugee has been admitted to the UK albeit before his or her recognition as a refugee[63].

e. The provision for cancelling refugee status on grounds relating to "*misrepresentation or omission of facts*" despite such grounds appearing nowhere in the Convention[64].

[58] at the time of publishing the draft (partial) Immigration and Citizenship Bill, the Government also published the draft illustrative Immigration Rules on protection
[59] paragraphs 39 & 41, draft illustrative Immigration Rules on Protection
[60] paragraph 39(b)(i), and see *El-Ali & Anor v SSHD* [2002] EWCA Civ 1103
[61] paragraph 39(b)(iii)(2)
[62] paragraph 39(c)
[63] paragraph 39(d)
[64] paragraph 41(b)(viii)

These erroneous constructions of the Convention would be applied retrospectively[65].

35. The draft Rules also retain the current erroneous construction of Article 33.2[66]. Whereas the draft Rules on their face recognise that Article 33.2 does not exclude a person from refugee status, the exclusion of a refugee from immigration permission under those Rules would wrongly lead to his or her exclusion from benefits, such as entitlement to work[67], receive housing[68] and other social assistance[69], naturalise[70] and other benefits to which he or she would be entitled under the Convention.

36. ***These provisions are not compatible with the Refugee Convention. Moreover, those who may be excluded from a grant of permission but who cannot be removed because of a risk of serious harm may be left in an indefinite limbo***[71] ***which of itself would be an interference with Article 8, ECHR.***

Detention and immigration bail:

37. Provisions in the draft Bill envisage the detention of people in places that are not suitable for detention and by persons who are not suitable to exercise powers of detention, including the detention by captains on board ships, aircraft and trains[72] or at any other place under the direction of the Secretary of State and by anyone under the authority of the Secretary of State[73]. Where detained persons are mentally ill,

[65] paragraph 41(b)(vii)
[66] paragraph 45(f)
[67] Articles 17-19, Refugee Convention
[68] Article 21, Refugee Convention
[69] Article 20 *et seq*, Refugee Convention
[70] Article 34, Refugee Convention
[71] although not addressed in the draft (partial) Immigration and Citizenship Bill, such individuals may face the prospect of being subjected to the special immigration status provided for by section 130 *et seq*, Criminal Justice and Immigration Act 2008
[72] clauses 54 & 56
[73] clause 59

suicidal or otherwise seriously vulnerable, such detention may also be contrary to Articles 2, 3 or 8[74].

38. The powers of the Asylum and Immigration Tribunal (AIT) to grant bail would be made subordinate in key respects to the Secretary of State. The AIT would require the consent of the Secretary of State to grant bail where a person's removal was "*imminent*"[75], and no appeal was outstanding[76]. The Secretary of State would be empowered to unilaterally vary the conditions on which the AIT granted bail, including by imposing conditions the AIT had expressly rejected as unnecessary[77]. The AIT would be powerless to remove an unnecessary condition imposed by the Secretary of State[78]. The draft Bill would interfere with judicial independence by requiring certain factors to be considered by the AIT before granting bail[79], including factors which ought not to be part of any consideration of immigration bail[80]. Poignantly, factors in favour of bail are absent from the list.

39. The availability of bail for those detained would be restricted by the draft Bill because of the requirement to deposit any recognizance (whether by the individual or any surety) with the Secretary of State[81]. This may require an individual or surety to deposit a significant sum of money for an uncertain and lengthy period. Moreover, the proposed merging of what is now temporary admission, temporary release and bail into the single concept of 'immigration bail' would mean that several thousands of individuals, particularly asylum-seekers, who have not been detained nor would be detained, become subject to the

[74] it must be foreseeable that those seeking asylum may include those who suffer from mental illness, self-harming and suicide risks and other vulnerabilities, and detention in unsuitable places by unsuitable persons would preclude the provision of necessary care and attention – cf. *Savage v South East Essex Partnerships NHS Foundation Trust* [2007] EWCA Civ 1375 and *Case of Keenan v UK* (Application No. 27229/95)
[75] in *A and Ors v SSHD* [2008] EWHC 142 (Admin) the Secretary of State appeared to consider the removal of 4 Algerians to be imminent throughout periods in excess of 12 months
[76] clause 62(2)(c)
[77] clause 68(1)
[78] clause 68(2)
[79] clause 62(6)
[80] e.g. clause 62(6)(e)
[81] clause 64

same immigration bail powers and may be required to deposit money. Apart from the obvious difficulty in expecting money to be deposited for an indefinite term, the holding by the Home Office of myriad sums of money in respect of thousands or indeed tens of thousands of individuals for lengthy but varying periods is a recipe for disaster. Where the individual had deposited money, his or her departure (voluntary or enforced) may be delayed if the money is not returned. If asylum-seekers were to be routinely required to deposit money, the return of cash to individuals prior to their returning to certain countries could lead to returnees being subjected to routine attempts at extortion.

40. ***The prospect of interferences with individuals' Article 5, ECHR rights would be greatly extended by these measures, which would also create risks of violation of Articles 2, 3 or 8. In addition, the detention of asylum-seekers for the purpose of fast track decision-making and appeals, which it is understood is to be extended to more individuals, remains contrary to Article 26, Refugee Convention and may be contrary to Article 5[82]. Any regime that involves returning cash to refused asylum-seekers immediately before their return to their home country risks exposing them to harm contrary to Article 3, ECHR.***

Appeals:

41. The provision for a right of appeal against the refusal of refugee status where any permission, of whatever length, is granted is welcome[83].

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[82] on 19 May 2008, the UK Border Agency announced a '*large scale expansion of Britian's detention estate*' including to '*allow even more fast track cases to be heard*', see http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2008/largescaleexpansionofbritainsdet whereas the Grand Chamber of the European Court of Human Rights in *Case of Saadi v UK* (Application No. 13229/03) held that the fastr track process at Oakington in 2001 was not contrary to Article 5, the fast track processes at Yarl's Wood and Harmondsworth do not lead to free legal advice throughout the process, operate much faster at the initial stage but (but unlike that at Oakington) extend beyond the initial decision and through the appeal process, and lead to individuals being detained for far longer periods; moreover asylum numbers are not at anything like the number in 2001, which the court considered material to the lawfulness of use of fast track, and whereas Oakington was to deal with so-called manifestly unfounded claims, the current intake to the fast track may include almost any case

[83] clause 166; cf. section 83, Nationality, Immigration and Asylum Act 2002

42. However, the draft Bill extends the circumstances in which appeal rights are denied. Refugees who travel abroad after recognition of their status risk cancellation of permission with no appeal right[84]. Asylum-seekers, whose claims are certified as "*clearly unfounded*"[85], would be denied any appeal right[86]. In certain circumstances individuals subject to expulsion orders would be denied any appeal right, including those treated as "*foreign criminals*"[87] and those who have breached a condition of their permission, howsoever minor, inadvertent or unavoidable the breach[88]. Family members of these individuals would also be denied any appeal right against expulsion.

43. Currently, the Government is consulting on proposals to bring immigration appeals within the scope of the Tribunal Service established by the Tribunal, Courts and Enforcement Act 2007; and to transfer substantial judicial oversight of immigration control from the higher courts (e.g. the Administrative Court in England and Wales) to the Tribunal Service, including powers of judicial review[89]. Further details of our position regarding these proposals will be set out in our response to the consultation[90].

44. ***The provisions in the draft Bill and proposals for the future of the tribunal raise the potential of a failure to provide adequate judicial remedy for human rights breaches as required by Article 13, ECHR. Insofar as the reach of Article 6, ECHR remains unsettled***[91]***, the influence of the Home Office over the tribunal's procedure rules may breach that Article.***

[84] clause 170
[85] clause 177
[86] clause 177(2) & clauses 165(2)(b), 166(2)(b) and 167(2)(b)
[87] clause 51
[88] clause 171
[89] see fn. 4
[90] which will be made available in the 'Submissions' section on the website at www.ilpa.org.uk
[91] dissenting judgments of the Grand Chamber of the European Court of Human Rights in *Case of Maaouia v France* (Application No. 39652/98) indicate that the current jurisprudence on Article 6, which excludes its application to many immigration-related matters, may be wrong and demonstrate how the court has extended the reach of Article 6 over the years

Removal of the right of abode:

45. We have recently provided the Committee with a briefing regarding this matter, which would engage Articles 3, 5 and 8, ECHR[92].

British nationality, citizenship and naturalisation:

46. The draft Bill leaves unresolved longstanding injustices and complexities created in British nationality law; and in withdrawing the right of abode its provisions would introduce new injustice. In December 2007, we provided a detailed analysis of injustice and complexity in British nationality law in our submission to Lord Goldsmith QC for his review on citizenship[93], which remains unaddressed by the simplification project to date.

47. The naturalisation provisions in the draft Bill lay the foundation for the adoption of the citizenship proposals that we addressed in detail in our response to the Green Paper[94].

48. We further note that for refugees, the proposals conflict with Article 34 of the Refugee Convention in delaying the opportunity for refugees to naturalise and imposing an additional burden of re-establishing refugee status along the route to citizenship[95].

Access to state benefits and services, and immigration fees:

49. The draft Bill does not provide for asylum support or provisions that will "*limit access to services*"[96].

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[92] this briefing, dated 27 October 2008, is available in the 'Briefings' section on the website at www.ilpa.org.uk

[93] the submission is available in the 'Submissions' section of the ILPA website at www.ilpa.org.uk

[94] see ILPA response to the Path to Citizenship Green Paper, May 2008 available in the 'Submissions' section of the ILPA website *op cit*

[95] see the flowchart at page 14 of *The Path to Citizenship: next steps in reforming the immigration system – Government response to consultation*, July 2008, available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/governmentreponsetoconsultation?view=Binary

[96] Annex A to Making Change Stick – an introduction to the Immigration and Citizenship Bill indicates that this is intended (see fn. 1)

50. The Committee has rightly concluded that the current use of destitution as a tool to discourage asylum-seekers and encourage refused asylum-seekers to return home is inhumane; and we have previously provided oral and written evidence to the Committee on this subject[97].

51. The intention to further limit access to services will increase marginalisation and vulnerability among immigrants in the UK. This may have particularly harsh results for the most vulnerable, including those caught in abusive relationships, who may be unable to escape relationships without access to services.

52. The draft Bill would considerably extend charges that could be made upon lawful migration to the UK[98]. Such charges may restrict lawful migration to the UK to those with significant means, with the prospect of indirect discrimination and that respect for family and private life is withheld because of an individual's inability to pay a fee[99].

53. ***Restrictions on access to benefits and services may, as the Committee has found in relation to current policy on asylum support, reduce individuals to circumstances in which their Article 3, ECHR rights are engaged. This could arise where individuals are made destitute or homeless, unable to access vital healthcare or forced to remain in abusive relationships. The provisions on fees may introduce indirect race discrimination and interfere with Article 8, ECHR rights.***

Children and trafficking victims:

54. ILPA endorses the submissions made by the Refugee Children's Consortium.

[97] e.g. see the Joint Committee's Tenth Report for the Session 2006-07 *op cit*
[98] clause 190
[99] e.g. in *R (Baiai) & Anor v SSHD* [2008] UKHL 53, the House of Lords concluded *inter alia* that the substantial fee for a certificate of approval for marriage could, depending on the means of the individuals, constitute an unlawful interference with Article 12

55. In relation to trafficking, we are particularly concerned at the repetition in the draft Bill of the inadequate UK definition of trafficking for the purpose of criminal prosecution[100]. The reference to "*requested or induced*"[101] is not in accordance with the Palermo Protocol[102] in failing to adequately deal with trafficking in babies or toddlers[103]. The Government had insisted that the current offence would cover such cases[104], so it is profoundly discouraging that the draft Bill adopts the same drafting of the offence that has been shown to be defective.

Concluding and general observations:

56. The draft Bill would require extensive provision in subordinate law to constrain the purpose for which powers may be exercised and the extent to and way in which they may be exercised. Otherwise these powers would be arbitrary and their exercise unforeseeable. However, the pace by which immigration law may change under such provisions may be increased rather than reduced because of the relative ease by which subordinate law may be amended or replaced.

57. This highlights the increasing significance of concerns previously expressed by the Committee – e.g. when considering retrospective changes made to the criteria by which highly skilled migrants could obtain indefinite leave[105], the Committee concluded this "*may be symptomatic of a deeper problem about the way in which changes are made to the Immigration Rules which affect fundamental rights*". More recently, the Committee was presented with a failure to consider the human rights implications or general impact of measures to introduce

[100] clauses 108-109 would place section 4, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

[101] clause 109(5) replicating section 4(4)(d), Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

[102] 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

[103] as stated in the presentation by DI Gordon Valentine to the 'Tackling the Trafficking of Women and Children' conference in London on 14 July 2008 in relation to the prosecution of Ms Peace Sandberg, see: http://news.bbc.co.uk/1/hi/uk/7404090.stm

[104] see *Hansard* HL report 5 April 2004 : Columns 1645-1648 and 6 July 2004 : Columns 670-671

[105] the Joint Committee's Twentieth Report for the Session 2006-07 *Highly Skilled Migrants: Changes ot the Immigration Rules*, 9 August 2007 HL 173/HC 993

mandatory re-entry bans in respect of which the Government had offered no consultation[106].

58. We also note that the Government has previously indicated an intention to "*maximise the use of plain English*"[107]. However, the references to "*the Secretary of State thinks*" throughout the draft Bill contradict that intention. In many instances, the reference should be replaced by 'the Secretary of State has reasonable grounds for believing' or some similar phrase. In plain English 'thinks' does not mean 'has reasonable grounds for believing', and the Secretary of State ought to have reasonable grounds before exercising such powers as the power to detain under clause 55(1). In other instances, the reference should simply be deleted – e.g. if a person's removal from the UK would contravene international obligations, an expulsion order should be precluded whatever the Secretary of State may think[108].

59. Nor is the use of plain English advanced by new terms introduced in the draft Bill, including "*permission*", "*probationary citizenship*", "*immigration bail*" and "*expulsion*". These terms appear to be designed less to promote plain English than to promote a tough image.

    a. There would continue to be many immigrants lawfully permitted to be in the UK but without 'permission' – e.g. those on immigration bail.

    b. There would be nothing probationary about 'probationary citizenship', which would be no more than a further period of temporary permission.

[106] Q5 *et seq* of Uncorrected Oral Evidence given by Liam Byrne MP, Minister of State, Home Office and Lin Homer, Chief Executive, Border and Immigration Agency on 19 February 2008 *op cit* in relation to HC 321 Statement of Changes in the Immigration Rules
[107] see fn. 5
[108] cf. clauses 38 & 39

c. ‘Immigration bail’ would include many people who had not been and were not to be detained.

d. ‘Expulsion’ under the draft Bill elides two distinct notions – requiring a person to leave the UK and re-establish an entitlement to enter; and banning a person from the UK as dangerous or undesirable.

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