ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

MEMORANDUM OF EVIDENCE TO HOME AFFAIRS COMMITTEE

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 22 July 2008.

General Observations:

3. The draft (partial) Immigration and Citizenship Bill confirms concerns consistently expressed by ILPA in response to the initial consultation on simplification of June 2007[1] and in several briefings and submissions made since that time[2]. The simplification project, and this draft Bill, is not underpinned by points of real principle; and the objectives of simplification, expressed as "*key principles*" are now

[1] ILPA response to Consultation on Simplifying Immigration Law, August 2007; available in the 'Submissions' section at www.ilpa.org.uk

[2] e.g. ILPA's responses and submissions to the Home Affairs Committee Enquiry into Managed Migration: the Points Based System, July 2008; Consultation on Path to Citizenship Green Paper, May 2008; Visitors Consultation Paper, March 2008; Changes to the General Grounds for Refusal in the Immigration Rules, February 2008; Equality Impact Assessment: Points Based System Highly Skilled Tier, January 2008; Lord Goldsmith QC Citizenship Review: The Different Categories of British Nationality, December 2007; Points Based System Fees Consultation, November 2007 – these and others are available in the 'Submissions' section *op cit*

clearly revealed as an inadequate and unsafe foundation for a project that seeks "*to replace almost all our current immigration laws*".

4. Particular concerns, which underpin the submissions made below on areas upon which the Committee has invited comment, are set out in the bullet points which follow. These relate to specific objectives that from the start have been said to be at the heart of the simplification project. The later submissions provide example of these concerns[3].

    - the objective of promoting plain English has resulted in widespread use of terms whose common meaning does not correspond to the terms' usage in the draft Bill;
    - the objective of minimising gaps in powers is achieved only by providing broad and unconfined powers to the Secretary of State, significantly increasing the prospects of arbitrary exercise of power and of interference with human rights and civil liberties;
    - the objective of efficiency is only met to the extent of seeking to free the executive from limitation or judicial scrutiny, which does nothing to promote real efficiency on the part of the Secretary of State but rather gives license for inefficiency;
    - the absence of underlying principle on which to found the simplification project[4] has meant that the objectives relating to increased transparency and clarity have essentially lost out in the final reckoning to the foregoing; and
    - wherever else it may be intended to minimise discretion, the draft Bill significantly extends the discretion of the Secretary of State and her officials to exercise considerable powers in relation to the general public (both migrants and British citizens).

[3] The objectives of simplification referred to in these bullet points were first identified by the UK Border Agency in its consultation paper, *Simplifying Immigration Law: an Initial Consultation*, June 2007; and again referred to by the Agency in the *Path to Citizenship Green Paper*, February 2008. The full list of objectives are stated to be maximising transparency, efficiency, clarity and predictability, plain English and public confidence; and minimising further legislation, concessions, exercise of discretion, inconsistencies, duplication and gaps in powers.
[4] As ILPA argued in its response to *Simplifying Immigration Law* (paragraphs 4-9 *op cit*), the objectives of simplification do not provide any principled foundation on which to assess discrete proposals for change.

5. This project may have profound consequences far beyond the immediate scope of the UK's immigration system, including consequences for community relations[5], the UK's economic prospects[6] and global relations[7]. If the Government remains determined to introduce a Bill to Parliament that goes significantly beyond the consolidation of our immigration laws, which consolidation is much needed, the provisions in this draft Bill are in urgent need of reconsideration by reference to clear principles as articulated by ILPA in its response to the initial consultation:

> "*Immigration law, which encompasses the control of borders and the consequences of such controls, should meet the UK's international and human rights obligations, provide for equality and avoid discrimination, be proportionate and avoid arbitrariness, ease the lawful entry and stay of those entitled to be in the UK and provide access to justice and judicial remedy. These are key principles, against which any simplification can and should be assessed.*"[8]

This draft Bill falls short.

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[5] The Communities and Local Government Committee has recently reported on the impact of migration on local communities. While noting significant public concerns, the Committee's conclusions also identity the degree to which public health and social care rely upon migrant labour, and how migration has helped to raise educational attainment levels in schools and been necessary for growth of local economies: *Community Cohesion and Migration*, Tenth Report of Session 2007-08, HC 369-1, 16 July 2008.

[6] In his oral evidence before the Home Affairs Committee, Liam Byrne MP, Minister for Borders and Immigration highlighted the substantial contribution towards the UK economy arsing from migration to the UK: Home Affairs – Minutes of Evidence, 27 November 2007, Q34, Q57-58; see also *The Economic and Fiscal Impact of Migration: A Cross-Departmental Submission to the House of Lords Select Committee on Economic Affairs*, October 2007, Cm 7327.

[7] The Home Affairs Committee has recently received evidence from the Acting Romanian Ambassador to the UK, who gave the view of the Romanian Government that the maintenance of restrictions on Romanian migrants to the UK was discriminatory and disappointing in view of '*the expectations* [the UK] *places on its Romanian ally*': *Bulgarian and Romanian Accession to the EU: Twelve months on*, Second Report of Session 2007-08, HC 59, 17 January 2008, paragraphs 13-14. In its response to the Treasury Committee's *Globalisation: prospects and policy responses* Fourteenth Report of Session 2006-07, the Government accepted the economic need for engagement with developing economies, in particular China and India; and in so doing highlighted the strong links between the UK and India on account of matters including '*…the large population of Indian expatriates and British nationals of Indian descent*': Treasury Committee's Fourth Special Report of 2007-08, HC 201, 11 January 2008.

[8] ILPA response to *Simplifying Immigration Law*, paragraph 9 *op cit*

Areas highlighted by the Committee:

6. Particular provisions are addressed in relation to the areas highlighted by the Committee in its Call for Evidence. However, the Committee's request concerning the length of submissions precludes full consideration of the draft Bill. Accordingly, so that the Committee may have the benefit of further reflections upon the draft Bill's full provisions, the Appendix to this Memorandum provides a clause-by-clause analysis of key areas of concern.

"Strong borders" (including modernising border powers and carriers' liability and powers to cancel visas abroad)

7. The breadth of the powers contained in the draft Bill invite arbitrary and discriminatory practice, impede ease of lawful entry and stay for those entitled to be here and seek to restrict judicial oversight. These results would affect both migrants and British citizens. Examples are given below.

8. The draft Bill includes wide powers, which are far from limited to border powers. Key powers include those contained at clauses 25 to 28. These include power to examine people[9] for purposes, which include to determine whether the person is "*a British citizen*"[10]. Those who may be examined include anyone who "*has entered the UK*"[11]. No reasonable cause is required before this power may be exercised. It applies anywhere and to anyone (whether British citizen or otherwise) in the UK, unless the person was born here and has never left the country. The difference between this power and 'Sus' laws is that the latter require some suspicion. The drafting of these provisions provides powers the Government has previously disavowed to require the production of an identity card simply on being stopped on the

[9] clause 25(1)
[10] clause 25(2)(a)
[11] clause 25(1)(b)

street[12]. The person may be stopped howsoever many times it may please the Secretary of State[13]. Failure to produce the identity card, or otherwise satisfy the Secretary of State, is on pain of detention until such time as she is satisfied[14].

9. Clause 26 also applies to migrants and British citizens. It includes power for the Secretary of State to undertake a policing role in conducting criminal investigations[15].

10. Powers to detain are extended in unsafe and unregulated ways beyond the control of the Secretary of State and with implications for British citizens and others. Under clauses 54 and 56 captains of ships, aircraft or trains may be required (on pain of prosecution[16]) to detain a person on board. Clause 58 allows someone to forcibly remove a person from a ship, aircraft or train "*under the authority of the Secretary of State*", whether or not that person is an official. The extension of powers by these clauses is unnecessary; and the harm they may cause is compounded by the fact that substantial powers are passed to individuals whose training, resources and circumstances are wholly unsuitable for the exercise of any such powers; whereas the provisions demand that the powers be exercised. This it not safe for captains, crews, the individuals detained or other passengers.

11. Any detention (of migrants and British citizens alike) may be at any place (whether established and equipped for that purpose or not)

[12] Clause 28(3) provides the power. During the passage of the UK Borders Bill, Liam Bryne MP, Minister for Borders and Immigration, expressly acknowledged such powers to be arbitrary in disavowing any intention to stop people on the street to ask them to produce an identity card, or other documentation, so as to prove their nationality: *Hansard HC* Second Reading, 5 February 2007 : Columns 595-596. During the passage of the Identity Cards Bill, Charles Clarke MP, Home Secretary, assured the House that there would be no requirement to carry an identity card. He also stated that the introduction of identity cards would not increase police powers to stop people in the street; albeit he made no mention of the powers of immigration officers in this respect: *Hansard HC* Second Reading, 28 June 2005 : Columns 1156-1157.

[13] clause 27(1)

[14] clause 53

[15] clause 26(2)(b)(iv)

[16] clause 115

directed by the Secretary of State and is mandated to be lawful[17]. This provision offends civil liberties, health and safety and commonsense.

12. Immigration control continues to be extended far beyond the role of the Secretary of State's officials. The authority-to-carry scheme[18] would add to the already significant obstacles which force refugees into the hands of smugglers and traffickers. It would also create substantial potential for disruption and delay to other passengers' travel arrangements.

13. The power to cancel permission is unconstrained[19], despite the breadth of circumstances in which permission will be cancelled automatically[20]. The circumstances in which a person's permission may be automatically cancelled by way of clause 42(1) include any breach of a condition of permission or obtaining permission by deception or that a person's presence is considered not conducive to the public good. Nevertheless, the cancellation power at clause 14 remains at large.

"Selective migration" (including the introduction of 'permission' for migrants, replacing notions of leave to enter, leave to remain and entry clearance, and a single power of expulsion)

14. The introduction of permission is an example of a plain English term, whose meaning does not correspond to the term's plain meaning. Many people in the UK who are permitted to be in the UK will not have 'permission'. Asylum-seekers and others on immigration bail[21] (currently temporary admission) and those subjected to the special immigration status[22] (to date ignored in the draft Bill) would be in this position. This problem (misuse or confusing use of plain English) runs

[17] clause 59
[18] clause 149
[19] clause 14
[20] Clauses 12(3), 13(1), 13(2), 15(3), 42(1) and 47(2) provide for various circumstances in which permission is automatically cancelled.
[21] clause 62
[22] section 130 *et seq*, Criminal Justice and Immigration Act 2008

through the draft Bill; and is reflected elsewhere in developing immigration law and policy – e.g. in the Points-Based System, a system not based on points and for which points have for the most part no meaning at all[23].

15. Instead of references to entry clearance, leave to enter and leave to remain, the draft Bill provides for immigration permission, transit permission, temporary permission, permanent permission, probationary citizenship permission, protection permission and refugee permission[24]. Whereas these distinctions in nomenclature do reflect distinctions in substance (with the exception of probationary citizenship – see below), it is clear that complexity remains.

16. Moreover, permission does more than replace entry clearance, leave to enter and leave to remain. Most significantly, it replaces the right of abode as currently enjoyed by certain Commonwealth citizens. Whereas the Explanatory Notes indicate an intention to confer permission on these individuals by way of order[25]; nevertheless they will become subject to all the general immigration powers from which they are currently exempt, rendering their current freedom to enter or stay insecure and jeopardising their current access to services.

17. The introduction of expulsion[26] elides two distinct notions – requiring an individual to leave the UK and re-establish an entitlement to enter (now administrative removal); and banning an individual from the UK as dangerous or undesirable (now deportation). The changes to the

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[23] Under the Points-Based System, points are awarded for meeting maintenance, language and sponsorship requirements. However, the requirements must be met, so the attributing of a fixed number of points adds nothing. The Statements of Intent on Tiers 4 & 5 reveal that there are no further requirements, so for these Tiers the points are entirely irrelevant. For certain categories under Tier 2, the position is the same. Even under Tier 1 and the remainder of Tier 2, the significance of points is negligible.

[24] These categories of permission can be found in various clauses including clause 2(1)(a), clause 2(1)(b), clause 4(1)(a), clause 4(1)(b), clause 31, clause 164(2)(a) and clause 164(2)(b).

[25] Explanatory Notes, paragraphs 47 & 57

[26] clause 37

Immigration Rules introduced in April 2008[27] went some way towards this, resulting in widespread criticism and a series of Ministerial concessions[28] (something simplification had intended to avoid) to ameliorate some of the injustice and inefficiency the changes would otherwise have caused[29]. Expulsion in the draft Bill merely extends the risk of injustice and inefficiency. Under the provisions, a person who does not need permission (a non-visa national) to travel to the UK and mistakenly but genuinely believes he or she meets the criteria for entry (e.g. thinking he or she may enter as a business or student visitor, but the period for which entry is sought requires a Points-Based application) will be subject to an expulsion order. This despite promptly and honestly presenting at the immigration desk on arrival.

18. Further observations upon the arbitrariness of the expulsion regime are provided below.

"Earning the right to stay" (including new requirements for citizenship and an automatic ban on returns with new powers to exclude criminals and immigration offenders)

19. The citizenship requirements[30] in the draft Bill provide a further example of misuse of English. Probationary citizenship is neither a form of citizenship nor probation. It is nothing more than a further period of temporary permission. The inclusion of algebraic equations in the draft Bill[31] (complete with functions, fixed and variable integers) does not advance plain English.

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[27] Statement of Changes in Immigration Rules HC 321, paragraph 47 introducing new paragraph 320(7B) into the Immigration Rules

[28] In March 2008, Lord Bassam of Brighton, Minister of State, announced the first of these concessions: *Hansard HL*, 17 March 2008 : Columns 96-97. Two months later, Liam Byrne MP, Minister for Borders and Immigration, announced further concessions: *Hansard HC*, 13 May 2008 : Columns 1352-1353. Certain of these concessions were later introduced into the Immigration Rules as new paragraph 320(7C) by Statement of Changes in Immigration Rules HC 607, paragraphs 37-38.

[29] See the debates referred to in fn. 27; and ILPA's briefing of May 2008 *op cit*.

[30] Part 3

[31] clause 34

20. ILPA's position on these citizenship proposals is explained in detail in our response to the Green Paper[32]. The requirements add complexity and increase the potential for arbitrary decision-making. The Government's acceptance, in response to consultation, that "*there are considerable practical issues to resolve*"[33] constitutes a couched acknowledgement of the risks of discrimination and exploitation inherent in the active citizenship proposal. The relegation of permanent permission (currently indefinite leave to remain) to a residual status is itself discriminatory against migrants whose nationality precludes dual citizenship; and does nothing to promote the value of British citizenship. The general aims of demanding knowledge of English language, requiring an initial period of temporary permission and taking account of criminality are already part of the route to citizenship. The extension of periods during which migrants whose long-term future is accepted to be in the UK may be excluded from services, and the extension of services from which they may be excluded, promotes marginalisation rather than integration.

21. The provisions for exclusion and automatic bans on return go far beyond immigration offenders and other criminality – see the above discussion on the eliding of administrative review and deportation. The scope for arbitrary use of power without adequate judicial scrutiny and with profoundly unjust results is greatly extended by the expulsion powers. For example, a one-off failure to report (however inadvertent or unavoidable) provides a power to expel an otherwise lawful migrant, against which any appeal right is excluded and which may result in a lengthy ban[34]. The potential arbitrariness is compounded in that the expulsion may be ordered immediately or later[35], leaving someone under the Damoclean sword for what may be months or years.

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[32] *op cit*
[33] *The Path to Citizenship: Next Steps in Reforming the Imigration System, Government Response to Consultation*, July 2008, page 18
[34] clause 37(4)(d) & (6), and clause 171(3)(a)
[35] clause 37(9)

"Playing by the rules" (including the introduction of 'bail bonds' for those awaiting detention or expulsion, 'immigration bail' as an alternative to detention, revised sanctions for breaches of immigration law, and a simplified appeals system)

22. Immigration bail[36] is a further example of misuse of plain English. It applies to many individuals who have never been and will never be detained, still less bailed from detention.

23. The introduction of bail bonds[37] relates to many more people than those who are pending expulsion or have been detained. It relates to many people whose recognition of entitlement to permission (including refugee or other protection permission) is pending: i.e. all currently on temporary admission. That bail bonds should be deposited[38] is not workable – it requires the holding of many thousands of individual sums, of varying quantity, for many months or possibly years. It raises questions about arrangements for repayment and the payment of interest. It would deter many sureties, who could not be satisfied as to how long substantial sums of their money would in effect be frozen; and would promote repeat applications to the Asylum and Immigration Tribunal in order to vary conditions of bail by cancelling or reducing the bail bond[39].

24. The draft Bill is incomplete in relation to the appeals system[40]. The provisions on appeal rights in respect of expulsion and cancellation exclude appeals in arbitrary and unjust circumstances while the provisions themselves do not provide for simplification. That could be achieved by reducing the several caveats to the basic provision of an appeal right, which would itself promote efficiency, transparency and

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[36] clause 62
[37] clause 64
[38] clause 64(1)
[39] clause 68
[40] Clause 188 provides for no onward appeal system. Currently, the UK Border Agency is consulting on this: *Immigration Appeals: fair decisions, faster justice*, 21 August 2008.

good decision-making by subjecting decision-makers to judicial oversight.

"Managing any local impacts" (including simplification of legislation on access to benefits and services)

25. This aspect of the simplification project is missing from the draft Bill[41]. However, the provisions on citizenship and on cancellation of permission will have profound effects on migrants if the current intention to further exclude migrants from benefits and services is realised in the full Bill. This may include migrants, whose permission is wrongly cancelled – whether automatically or by executive decision. Excluding individuals from benefits and services is itself likely to have profound local impacts, as can be seen from the current policies in respect of asylum support and the widespread destitution these have caused[42].

26. The intention to impose further charges upon migrants is a serious concern, given the recent substantial increases in immigration fees; and the provisions on fees in the draft Bill[43] constitute an extraordinary and wholly unreasonable extension of the Secretary of State's powers to raise revenue by charging migrants – including for providing "*services*" whether or not these were requested or beneficial[44].

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[41] See fn. 43.

[42] Over the last two years several organisations have reported upon profound and growing levels of destitution among the aslyum-seeking population including: Joseph Rowntree Charitable Trust *More Destitution in Leeds*, June 2008; The Children's Society *Living on the Edge of Despair*, February 2008; Joseph Rowntree Charitable Trust *Destitution in Leeds*, 2007; Amnesty International *Down and out in London*, November 2006; Citizen's Advice *Shaming Destitution*, June 2006; Refugee Action *The Destitution Trap*, 2006. The Joint Committee on Human Rights highlighted this issue: *The Treatment of Asylum Seekers* Tenth Report of Session 2006-07, HC 60-1, HL 81-1, 30 March 2007; and see ILPA's Memorandum to the Joint Committee on Human Rights following the publication of the Government's response to the Committee's Tenth Report, September 2007 available in the 'Submissions' section *op cit*.

[43] clause 190

[44] The reference in clause 190(4) to providing services and undertaking processes may be contrasted with section 42, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which refers to fees for applications; and section 51, Immigration, Asylum and Nationality Act 2006 which refers to requests for services.

Conclusion:

27. In general the draft Bill gravely extends the scope for unconstrained and unsupervised exercise of powers, which may be exercised against migrants and British citizens. In these circumstances, it is all the more extraordinary that the Bill contains none of the regulation of powers currently contained in Part 3 of the Immigration Act 1971 and the *Making Change Stick* document[45] is at best opaque as to whether such powers are to be set out in primary legislation. In any event, it may be anticipated that powers of such breadth as are currently contained in this draft Bill will attract judicial review challenges; and may simply necessitate further legislation to provide an adequate legal basis for the powers that are sought here – producing neither simplification nor consolidation.

28. Related to these concerns is the widespread use of phrases such as "*if the Secretary of State thinks*"[46] in the draft Bill. This appears to be another misplaced example of plain English usage. The phrase 'if the Secretary of State has reason to believe' is not difficult to understand, and would be commonly understood to mean something different and safer than the references to 'thinks'. Moreover, there are several examples where the phrase should simply be deleted altogether[47].

29. This Memorandum provides an overview, with some examples, of several concerns. Further detail is available to the Committee by way of the Appendix.

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[45] The UK Border Agency *Making Change Stick: An introduction to the Immigration and Citizenship Bill* provides a table identifying measures that are currently included within the draft Bill and those that are expected to be included in the full Bill, see page 9.

[46] e.g. clause 55(1)

[47] For example, clause 39(5) creates an exception to the Secretary of State's obligations to make an expulsion order in circumstances where she thinks that deportation would breach obligations under the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. Not only is the exception in the wrong clause – it should be included in clause 38, as if deportation is not lawful any deportation ought to be excluded – the words '*the Secretary of State thinks*' should be deleted. Deportation should be excluded if to do so would in fact be contrary to the Convention, whatever the view or thoughts of the Secretary of State or her officials.

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