APPENDIX TO

MEMORANDUM OF EVIDENCE TO HOME AFFAIRS COMMITTEE

DRAFT (PARTIAL) IMMIGRATION AND CITIZENSHIP BILL

This Appendix provides commentary on each Part of the draft Bill and the accompanying Explanatory Notes; highlighting particular clauses and paragraphs of the Explanatory Notes, which are a cause for concern or raise outstanding issues. It is a working document, provided as an Appendix here so that the Committee may have a wider benefit in relation to a range of matters in this draft Bill that cannot be addressed in the more restricted Memorandum.

However, the draft Bill is partial – i.e. it is incomplete. There remains potential, therefore, for what is currently missing from the draft Bill to significantly affect the provisions currently available. Moreover, it is also intended that the Immigration Rules and current guidance and instructions to the UK Border Agency will be overhauled. Without sight of the Rules and guidance/instructions, any comments on the draft Bill must also come with the caveat that these may need to be reconsidered and revised in the light of Rules and guidance/instructions when made available.

Part 1 – Regulation of Entry Into and Stay in the UK:

Part 1 is unnecessarily long and complex. A number of clauses here merely repeat each other – see discussion under clause 9 (below); whereas clause 7 (see below) is superfluous.

Part 1 also withdraws substantial benefits currently enjoyed by those non-British citizens who have the right of abode.

Clauses 1 to 3

The key change introduced here is that noted at paragraph 47 of the Explanatory Notes. Section 1(1), Immigration Act 1971 currently provides that anyone with the right of abode "*shall be free to live in and come and go into and from*" the United Kingdom. Significantly, that Act provides that those with the right of abode include Commonwealth citizens who had that right immediately prior to the commencement of the British Nationality Act 1981 – see section 2(1); and provides that these Commonwealth citizens are to be treated in the same way as British citizens for the purpose of immigration control as regulated by that Act – see section 2(2). These Commonwealth citizens would be fundamentally disadvantaged by the provisions here – see further the discussion under clause 8 (below).

Although clause 1(3) and (4) effectively reproduces section 3(8) and (9) of the Immigration Act 1971, it remains questionable why proof of British citizenship for the purposes of entry to the UK should be restricted to producing a UK passport or ID card. For instance, producing a certificate of naturalisation (see section 42(5), British Nationality Act 1981) or establishing that a person's name is on the register (see *R v SSHD ex parte Ejaz* [1994] QBD 496) ought to be satisfactory to establish the citizenship of those who have naturalised or registered as British.

Clause 2(2) highlights a problem with the renaming of leave to enter, leave to remain and entry clearance. "*Permission*" has been chosen because the Government believe that the name constitutes a simplification – i.e. it is what it says it is. The problem, as highlighted by clause 2(2), is that there will be groups of individuals who on the face of the legislation need permission to be in the UK (i.e. they do not fall within clause 1 or clause 3), who do not have permission and yet are, in ordinary language, permitted to be here. In the case of asylum-seekers, this situation may last for several months or even years. Another such group will be those subjected to the special immigration status established by sections 130 *et seq* of the Criminal Justice and Immigration Act 2008. However, the draft Bill is particularly deficient in failing to address this group at all. On the face of clause 2, this group would be in the UK illegally – albeit, on this point clause 2 is in direct conflict with section 132(2)(c) of that Act.

Clause 4

This clause and those following establish the new (or renamed) status of "*permission*". As indicated in the discussion (above) concerning clauses 1 to 3, this title has been chosen on the basis that it is in itself a simplification because it easy to understand. However, this is a fallacy. The permission status will not be granted to all those who are permitted to be in the UK. Rather than making the situation or status of immigrants to the UK clear, this sows the seeds for confusion.

There may be further potential for confusion arising from the range of types of permission referred to in the draft Bill. This refers to "*temporary permission*" (e.g. clause 4(1)(a)), "*permanent permission*" (e.g. clause 4(1)(b)), "*immigration permission*" (e.g. clause 2(1)(a)), "*transit permission*" (e.g. clause 2(1)(b)), "*probationary citizenship permission*" (e.g. clause 31), "*protection permission*" (e.g. clause 164(2)(a)) and "*refugee permission*" (e.g. clause 164(2)(a)). These various types of permission do not relate to each other in the same way – e.g. some are distinct from each other, some are subsets of others. Further distinctions are between permission "*granted by an individual grant*" (e.g. clause 13(2)) and "*permission by order*" (clause 8); and "*old permission*" and "*new permission*" (clause 13(2)).

Clause 5(3)

This subclause allows for permission to be granted before a person has arrived in or entered the UK. There may be good reason for granting permission at such a time: indeed, with the abandonment of a formal status of possessing entry clearance (see discussion on clause 1 to 3, above), this will be necessary in many cases. However, it raises questions for how routes to settlement or citizenship will work in future. If

grants of permission are made for periods, equivalent to current periods of leave to enter or remain, there may be problems.

For example, the provisions for naturalisation continue to require that a person was in the UK "*at the beginning of the qualifying period*" (see clause 32). If (as is currently the practice) grants of permission are made for a period to match the relevant qualifying period, this will cause a problem if the permission period starts before the person has or could have arrived in the UK. Permission grants could be made for longer periods so as to allow for some leeway (e.g. grants now made in marriage cases) – but for how long? By requiring the person to be in the UK at the start of the relevant qualifying period, the proposal to grant permission before a person arrives may cause complication and/or require applications to extend permission for short periods of time for no better reason than the change in regime. This would add to administrative complexity. It would also, in several cases, add significantly to the fees individuals would be required to pay (see further discussion on clauses 190 to 191, below). The Explanatory Notes simply ignore this problem – see paragraph 53. An alternative would be to change the requirement that a person be in the UK at the beginning of the qualifying period.

Clause 7

As explained at paragraph 56 of the Explanatory Notes, the duty contained in clause 7 is new. The Explanatory Notes give no explanation for the creation of this duty. It appears to be wholly superfluous, since the requirements of clause 2 and the offences contained in Part 7 (e.g. clauses 97 and 98) make clear the need to have permission; and the consequences of not having permission. Clause 7 on its face has no consequences for any failure to meet the duty; and were any consequences introduced this would create a double jeopardy or double punishment in respect of a person who was liable for the offences in clause 97 and 98.

Clause 8

The Explanatory Notes (paragraphs 47 and 57) indicate that this power may be used to grant permission by order to those Commonwealth citizens who currently have the right of abode – see clause 8(2)(a). As highlighted in the discussion on clauses 1 to 3 (above), under the Immigration Act 1971 these citizens currently are free to enter and stay in the UK just as British citizens. By relegating their status to requiring permission, the Secretary of State proposes to take powers to grant or cancel permission for these individuals to come to or stay in the UK – whether doing so in respect of the whole group or particular individuals within the group. This would introduce insecurity into the situation of these citizens, whose entitlement to come and stay in the UK could be taken away by the Secretary of State at any time. She could do this in respect of the group by declining to exercise her powers under clause 8(2)(a) or exercising her powers under clause 8(5)(b); and in respect of an individual within the group by exercising her powers under clause 8(5)(c) and clause 14. Whether or not the Secretary of State exercised powers to cancel permission, it might be cancelled by the person remaining outside of the UK for 2 years (clause 13(1)); or the making of an expulsion order (clause 42(1)) or a travel ban (clause 47(2)).

See also clause 203(1)(a).

Clause 9

This clause provides good example of over complication through over drafting. It is questionable whether any of this clause is needed. Clause 9(1) merely restates clause 2; whereas clause 9(2)(a) restates clause 10. Clause 9(2)(b) restates in advance what may be added by future legislation.

Generally, this Part of the draft Bill appears overly complex by virtue of over drafting; for example, see clauses 5, 16 and 17.

Clauses 10 and 11

Clause 10(1)(a) includes a change, which is not highlighted in the Explanatory Notes. Currently, section 3(1)(c)(i) of the Immigration Act 1971 allows for restrictions on "*employment or occupation*" whereas the clause allows for restrictions on "*work, occupation or studies*".

Clause 10(1)(d) and (e) effectively reproduce section 3(1)(c)(iv) and (v) of the Immigration Act 1971, as amended by section 16 of the UK Borders Act 2007. However, there have been significant changes in law since these conditions (of reporting and residence) were introduced by the 2007 Act; changes which were not highlighted in debate during the passage of the Bill. This draft Bill envisages further changes, which were not highlighted in those debates. The implications, therefore, of subjecting those permitted to be in the UK to residence and reporting conditions have become even more serious than when ILPA first opposed what became section 16 of the 2007 Act. A one-off failure to report or immediately update the Home Office with a change of address, however, inadvertent, minor or explicable would, under the provisions in the draft Bill, provide a ground for the person's expulsion with no right of appeal; and future exclusion from the UK for a period of time (as yet unspecified) – see clause 37(2)(a) and (4)(d) and clause 171(3)(a); may require that person to effectively restart his or her progress along the route (or 5 or 8 years) to citizenship from the beginning – see clause 36; and may constitute a criminal offence – see clause 99.

Clause 11 empowers the Secretary of State to vary the conditions of a person's permission by amending, cancelling or imposing any of the conditions specified in clause 10(1). This power is at large. This is not appropriate given that the power may be exercised at the motion of the Secretary of State (with or without forewarning to or the opportunity for representations from the individual) and the potential for intrusion on a person's day-to-day life – e.g. by imposing a condition that he or she report weekly to the Secretary of State, a failure to comply with which could result in prosecution (clause 99), expulsion and the denial of any appeal right and a re-entry ban (see discussion on clause 37, below).

Clause 12

This clause essentially reproduces current provisions, but with consequences that have become more serious following recent developments in immigration law. Clause 12(4) precludes any further application for permission during time in which an earlier

application to extend permission (and any subsequent appeal) remains pending. Clause 12(5)(a) allows the application to extend to be amended. The power to amend the application allows a person to submit further evidence that may strengthen or correct the application to extend. However compelling or significant that evidence, and however necessary or explicable its 'late' submission may be, the fact that it was not submitted immediately coupled with the exclusion of its founding a new application have serious and detrimental consequences for any appeal against a refusal of the application by precluding the Asylum and Immigration Tribunal (AIT) from considering the evidence – see discussion on clause 182 (below). Although the Explanatory Notes (paragraph 62) state that the purpose of clause 12(5) is to prevent misuse of the appeals system, there is no recognition (whether in paragraph 62 or 344) of the consequent impairment of the appeal right.

Clauses 13 to 15

These clauses, together with clauses 12(3), 42(1) and 47(2), provide for circumstances in which a person's permission is cancelled.

The Secretary of State's power to cancel permission is expressed in clause 14. The power is at large. The Explanatory Notes (paragraph 64) state that the grounds for cancelling permission will be set out in the Immigration Rules (for which see clause 21) – a draft of which is not currently available. However, the need for the power in clause 14 is not explained. As drafted, permission will be automatically cancelled if: (i) a person has remained outside the UK for a continuous period of 2 years or more (clause 13(1)); (ii) an expulsion order is made against the person (clause 42(1)); (iii) a person becomes subject to an international travel ban (clause 47(2)); (iv) a person's permission has been extended pending a decision on an appeal or application for further permission and that person leaves the UK (clauses 12(3) and 15(3)); (v) a person's permission has been extended pending a decision on an appeal or application for further permission and a final decision is reached (clauses 12 and 15); and (vi) a person is granted permission on a new basis or for a new period (clause 13(2)). Where no extension is applied for or granted, permission will cease when the period of permission ends (clause 4(2)).

Given the extent of the circumstances in which an expulsion order may be made (see clause 37(2), (4) and 51 – and in particular clause 37(4)(d), (e), (g) and (h)), what further circumstances produce any need for the Secretary of State to cancel permission?; and in any event such a wide power should not be left with the mere possibility of further elucidation by Immigration Rules – the clause does not itself require this. The provisions of automatic cancellation capture all the circumstances in which the leave to enter or remain is curtailed under current provisions.

Moreover, permission would be likely to be cancelled in many cases under the provisions in the draft Bill when an expulsion order is made. This includes cases where there has been a breach of the conditions on which permission had been granted (clause 37(4)(d)), it is said that the permission was obtained by means of deception (clause 37(4)(e)) and the Secretary of State decides to act on a sentencing court's recommendation for expulsion or otherwise concludes that a person's expulsion will be conducive to the public good (clause 37(4)(g) and (h)). Even where an appeal is provided for (there are significant inadequacies in the provision for

appeal rights – see discussion on clause 37, below) or some other remedy is found (e.g. by judicial review, or by representations to the Secretary of State), the consequences of the automatic cancellation of permission remain because mere reinstatement of permission under the provisions in the draft Bill will not close the break in permission that has been caused and any period during which a person's presence will have been in breach of immigration laws. Accordingly routes to settlement or citizenship (see Part 3) and other entitlements under the immigration Rules or in other areas of law will be prejudiced. This will be so even where an appeal right is available and exercised because permission cannot be continued during the course of any appeal – clause 15 only provides for continuation where the permission is cancelled under clause 14, not where it is automatically cancelled (see clause 13).

Fuller discussion of the problem of breaking the continuity of permission is provided in relation to clause 29 (below).

Clauses 16 to 20

These clauses set out provisions for transit permission; and in several respects mirror the provisions for immigration permission (discussed above). As with those earlier provisions, clause 16 provides powers at large to the Secretary of State to grant, cancel, impose conditions, amend or impose further conditions etc. in respect of transit permission. As with those earlier provisions, the breadth of such power is a matter for concern.

Clause 21

This clause must be read with clause 204. Together clauses 21 and 204 replace what is now section 3(2), Immigration Act 1971 – with clause 204 providing the means whereby the Rules may be disapproved by either House of Parliament. The Explanatory Notes (paragraphs 69 and 307) do not identify, still less comment upon, the removal of the words "*as appear to him to be required in all the circumstances*" in the new provisions which would appear to reduce the link between the disapproval of either House to the particular changes that the Secretary of State must introduce in response.

Clauses 22 to 23

These clauses allow for designated control areas to be established (clause 22), and provide that on arrival by ship, aircraft or train a person shall not enter the UK until disembarking and leaving any designated control area (clause 23).

Any regime for designated control areas must not interfere with or preclude a person's capacity to seek asylum; and the protections against refoulement, including appeal rights that are attendant on this. So far as the legislation and Immigration Rules are concerned, these would need to ensure that entitlements and protections are consequent upon a person's arrival and not that person's entry. As regards the draft Bill (and subject to the comments on disembarkation), this may be satisfactory. However, the need for practical safeguards so that a person is not prevented from making a claim will remain.

Failure to comply with certain of the measures here constitutes a criminal offence – see clause 103.

Concerns relating to disembarkation, and requirements and powers in respect of captains of ships or aircraft, are discussed below (viz. clauses 54, 56 and 58).

Clause 24

The Explanatory Notes (paragraphs 74 to 76) provide little by way of elucidation of this clause. Essentially, clause 24 is expressly designed to reduce the oversight by Parliament of choices made by the Secretary of State in respect of whom is suitable and whom may be empowered to carry out the very wide powers set out in the draft Bill. Clause 24 may be contrasted with sections 1 to 4, UK Borders Act 2007. In that Act, new powers (to detain British and non-British citizens in respect of any suspected offence whether related to immigration or not) were introduced. The section stipulated that only designated immigration officers were to carry out these powers, and certain conditions as to their suitability and training were to be met before their designation by the Secretary of State. By contrast, under clause 24 the Secretary of State may or may not choose to designate officials in respect of the equivalent powers set out in clause 57.

Part 2 – Powers to Examine etc.:

Part 2 establishes wide-ranging powers for the Secretary of State and her officials to interfere in the lives of British and non-British citizens.

The effect of Part 2 extends to the matters dealt with in Part 5 (detention) and, possibly, to matters dealt with in Part 3 (naturalisation); and other areas beyond the scope of the draft Bill.

Clauses 25 to 28

These clauses give very wide powers to the Secretary of State, and accordingly to officials acting on her behalf, to examine individuals to determine whether the person is a British citizen, an EEA entrant (see clause 3) or has permission to enter, stay or transit the UK.

Clause 25(1)(b) applies to anyone at anytime after he or she has entered the UK. The Secretary of State is thereby empowered to examine anyone who has entered the UK (including British citizens) in order to establish their citizenship or immigration status; and may do so without the need for any suspicion, reasonable or otherwise, regarding the person's citizenship or nationality. A person (including a British citizen) may simply be stopped in the street and required to demonstrate his or her nationality; and by virtue of having been stopped may by clause 25(3) be required to submit to medical examination. In the exercise of this power, that same person may be detained for such time as it takes to satisfy the detaining official – see clause 53. Since a British citizen stopped or detained under these powers must prove his or her citizenship (see clause 1(2)), the draft Bill effectively provides a power to

immigration officials to stop the citizen on the street (and elsewhere) and demand the production of an identity card (once introduced) on pain of indefinite detention. Although proof could notionally be established by other means, it is entirely speculative that an official exercising these powers would be satisfied with the production of anything less than a passport or identity card. Moreover, clause 28(3) makes explicit that production of "*a valid identity document*" may be required; and cause 28(2) that any information in a person's possession must be provided on demand.

Whereas clause 25(1)(b) requires that the person has entered the UK (although how the Secretary of State will know which British citizens she is stopping and detaining have remained in the UK throughout their lives, and which have at any time left and returned to the UK, is unclear), clause 26(1) allows her to examine anyone, anywhere in the UK – "*at a port, international railway or other place in the United Kingdom*" (underlining added). If she is to exercise her powers under clause 26(1), she must hold a reasonable suspicion that the person has gone to the place in order to embark to leave the UK – cf. clause 25 where no suspicions of any sort are required.

Any person stopped under the powers in clause 25 may be required to submit to a medical examination – the type of and purpose for which is not specified in the draft Bill (clause 25(3)).

Clause 27 means that an examination under clauses 25 or 26 may be repeated any number of times.

Compliance with all of these measures is on pain of prosecution – see clauses 101 and 102.

Clause 29

This clause must be read with clauses 53 and 63(3). These provisions are incoherent.

Clause 29 empowers the Secretary of State to suspend the permission of anyone who is examined under clause 25 (discussed above). Whereas clause 29(3) provides that at the end of the examination the person reverts to having permission (unless it has expired or been cancelled). However, whereas clause 29 empowers but does not require the Secretary of State to suspend permission, if she exercises her power under clause 53 to detain a person who is examined under clause 25 that person's permission will necessarily be suspended if he or she is granted bail (clause 63(3)).

The suspension of permission may have a number of knock-on effects – subject to other provisions in immigration legislation, Immigration Rules, policy guidance and instructions, and legislation and regulation in other areas of law. The naturalisation provisions in Part 3 of the draft Bill would not on their face be affected by a suspension of permission, which was reinstated after an examination under clause 25, provided the period of suspension did not constitute a period during which the person was present "*in breach of the immigration laws*". Where the suspension is caused by the grant of bail to a person detained, clause 63(5) will protect the person's position. However, currently the draft Bill provides no similar protection if the Secretary of State suspends the permission under clause 29 but does not grant immigration bail

under clause 63. It is not clear what is the purpose of the power of clause 29. It would seem that circumstances where the Secretary of State may regard suspension to be necessary are all covered by clause 63, in which case clause 29 should be deleted.

More generally, the extent to which suspension of permission may adversely affect an individual will further depend on the Immigration Rules or policy guidance and instructions (all of which are as yet not available, and may be amended from time to time without Parliamentary scrutiny – subject to clause 204 in respect of the Rules). Any element of the Rules or policy guidance and instructions, which is made dependent on continuity of permission, would be affected by a suspension under clause 29 (or clause 63(3)) – whether this relates to naturalisation or any other entitlement (e.g. to apply to extend permission). Moreover, welfare, housing, educational and employment opportunities etc. may all be adversely affected by a suspension of permission.

These problems are not addressed in the Explanatory Notes (paragraphs 85, 171 and 200). Given that the Secretary of State is empowered to detain a person who is being examined under clause 25, it is not clear why there is a need in clause 29 to suspend permission in any event. That power would enable the Secretary of State to deal with cases where there was any significant and immediate concern regarding the person's continued presence in the UK with immigration permission. In all other cases, the better and least disruptive approach would be to leave the person's permission intact pending resolution of the Secretary of State's examination. Accordingly, clause 29 ought to be deleted.

Clause 30

This clause would empower the Secretary of State to introduce a regime where hoteliers and others with responsibility for premises where lodging or sleeping accommodation is provided (boarding schools and hostels may be included; as to how much further "*premises*" in these circumstances may stretch, that is not clear) must maintain records of all (British or otherwise) who stay there. The Explanatory Notes (paragraph 86) do not provide any further clarification, and it is not made clear why this power is thought necessary.

However, the power is plainly a significant one since any failure to maintain such a record is on pain of prosecution.

Part 3 – Citizenship:

These provisions adopt proposals set out in the Path to Citizenship Green Paper. ILPA responded to that consultation, and our position remains as set out in that response. These provisions would introduce complexity and injustice. The full impact of what is being proposed is not registered by the provisions in Part 3, since there is an intention to further reduce access to any State provision to migrants on route to citizenship, and at the same time to tax them (for a migration fund). The extension of the time a migrant must spend before reaching citizenship (or its possibility) is recognised by these provisions; but the greater extension of time before a migrant may seek what is here called "*permanent permission*" is not set out in the

provisions. The "*probationary citizenship permission*" status is identified here. It is no more than "*temporary permission*" by another name – the antipathy of simplification, the creation of a whole new status, which is no different to a pre-existing and continuing status. The draft Bill also raises a range of potentially complex questions regarding transitional provisions that may be necessary for those already on a route to citizenship.

Clauses 31 to 34

Clause 31 introduces two new categories of person who may qualify to naturalise as British citizens. However, the first of these – those "*having an association with a British citizen*" (new section 6(5)(b) and (7)) – excludes relationships that have broken down for reasons other than the British partner's death or in circumstances where the British partner has harmed the other. The second new category – "*dependant relative*" of a British citizen is not defined here.

The requirement in clauses 32 and 33 that a person be present in the UK "*at the beginning of the qualifying period*", which appears in the amendments to Schedule 1 of the British Nationality Act 1981 (clauses 32 and 33), is not new. However, in the revised permission regime it may cause new problems – see discussion on clause 5(3) (above).

Clause 34 may be a first for a simplification project – adding algebra and equations into statute (perhaps clause 32 and 33 should be amended to include sufficient knowledge of mathematics within the fourth and fifth requirements respectively?). The "*activity condition*" (referred to as "*active citizenship*" in the earlier Green Paper) remains a license for discrimination, exploitation and confusion. In its response to consultation, the Government stated: "*We accept there are considerable practical issues to resolve to ensure the proposal can operate effectively. But we remain of the view that this is a very positive reward for migrants who integrate into British life. It is not compulsory. It is simply incentivising an outlook and attitude which we think is positive for Britain. Just as we do today encourage our young people to become active citizens, so too we should encourage our migrants.*"[1] This is disingenuous – particularly in the light of the proposals to prolong and extend the period of time in which migrants are to be excluded from various State provision; and from seeking "*permanent permission*". Encouraging active participation in society could be done perfectly well (indeed better) by making opportunities available, including by providing rather than taking away State support, just as it is done for "*our young people*". What is proposed here is a penalty for not doing something.

The provisions relating to "*prescribed offences*" are a further cause for concern. It is left unclear just what impact this may have because the only information given as to Z is that it is a variable. As for when it will take effect, it is significant to note new paragraph 4A(6) meaning that some people (to be prescribed) will suffer the effect of Z by reason of their "*connection*" to an offender.

Clause 36

[1] See *The Path to Citizenship: Next Steps in Reforming the Immigration System – Government Response to Consultation*, July 2008 at p18.

Clause 36 on its face excludes any time spent on immigration bail (currently known as temporary admission) from the period of time towards citizenship or permanent permission (new section 50A(2)) – for the purposes of naturalisation and registration (of British overseas territories citizens, British Overseas citizen, British subjects or British protected persons – see new section 50A(1)(a)). It also potentially excludes time in which a person is in breach of a condition of immigration permission, however minor or inadvertent that breach may be (see discussion on clause 10, above).

Moreover, by new section 50A(1)(b), clause 36 removes all persons on immigration bail (temporary admission) from the meaning of "*ordinarily resident in the United Kingdom*" for the purposes of the British Nationality Act 1981 – this appears to relate to section 50(4) of that Act (concerning a child born to a person currently exempt from immigration control under section 8(3), Immigration Act 1971).

Part 4 – Expulsion Orders & Removal etc. from the UK:

Part 4 makes two fundamental changes to current provisions.

Firstly, it replaces two distinct regimes with one. Currently administrative removal is used for most removals from the UK; whereas deportation is used in cases where the person's presence is considered to be not conducive to the public good. The importance of the distinction has been the consequences for the individual which flow – with the latter facing exclusion from the UK unless and until the deportation order is revoked. This distinction has been significantly blurred following the introduction without consultation of changes to the Immigration Rules in April 2008. Part 4 abandons the distinction altogether.

Secondly, it replaces the regime whereby notice is given of a decision to remove or make a deportation order (prompting the opportunity to make representations or bring an appeal) and the removal directions or deportation order are made later. The new regime would mean that the expulsion order is made without any earlier notice of a decision to make the order. This has important consequences for the individual whose permission may be cancelled unexpectedly and without adequate redress – see discussion on clauses 13 to 15 (above).

Further fundamental inadequacies of the provisions of Part 4 are the failure to remedy misapplications of the 1951 Refugee Convention in respect of Art 1F and Article 33.2 currently adopted by section 54, Immigration, Asylum and Nationality Act 2006 and section 72, Nationality, Immigration and Asylum Act 2002 respectively. These failures render the draft Bill's protections in respect of the non-refoulement of refugees inadequate for the Convention's purposes; and also contribute to the unlawfulness of the special immigration status provisions (also not addressed in the draft Bill) set out in sections 130 *et seq*, Criminal Justice and Immigration Act 2008.

Clause 37

Clause 37 introduces the "*expulsion order*" regime which is to conjoin and replace administrative removal and deportation. It raises several concerns.

One of the consequences of the introduction of the expulsion order regime is that a series of administrative applications and decisions will be introduced for a much larger group of people. A person who is made subject to an expulsion order, who wishes to return to the UK, will now need to apply to have the order cancelled [first stage], if that is refused appeal against the refusal [second stage] and if either the application or appeal is granted make an application for permission [third stage]. This introduces a two or three-stage process for what is currently a one-stage process for all those who are simply made subject to administrative removal.

Clause 37(1) and (6) mean that anyone required to leave the UK will also receive a ban on his or her return to the UK for an unspecified period of time, but a period which may be unlimited.

Clause 37(2) empowers the Secretary of State to make an expulsion order in certain circumstances (clause 37(2)(a) and (c)), and requires her to do so in other circumstances (clause 37(2)(b)). The only express time limit on the power or duty is that provided by clause 41(5). This applies to non-British citizen family members of individuals in respect of which an expulsion order is made. However, even that time limit is defective where the expulsion order made against the individual is made at a time when he or she is outside of the UK (see clause 37(5)). In these circumstances, there is no time limit on when his or her family members may be subject to an expulsion order.

As regards expulsion orders made under clause 37(2)(a), certain of the circumstances listed at clause 37(4) for when the power may be exercised may in practice produce a time limit. However, even this is unsatisfactory. For example, clause 37(4)(d) would empower the Secretary of State to make a deportation order at any time during the period of a person's permission if that person had breached a condition of that permission. Where someone has been granted permission for four years, and breached a condition of that permission during the first few weeks of its duration, the Secretary of State would remain empowered to order the person's expulsion throughout the remainder of those four years – it would not matter that the Secretary of State was made aware of the breach at the time or immediately after it was made. A wholly explicable failure to report (e.g. because of illness, hospitalisation or serious transport problems) would leave the individual under a Damoclean sword. This is made all the more serious by virtue of clause 171 (discussed below) which would preclude any appeal right if the order was made, however unreasonably; and clause 15 (discussed above) which would mean that any remedy obtained (whether or not an appeal right is reinstated) would be inadequate even if it was concluded that the expulsion order was wrongly made.

The requirement to make an expulsion order under clause 37(2)(b) is similarly without time limit. Quite apart from the inelegance of clause 37(9) (which appears to be a statement of the obvious – an order is made when it is made), this would lead to serious administrative difficulty and injustice. A person whose expulsion is exempted by reasons set out in clause 38 (e.g. the person's removal from the UK is contrary to human rights or European Communities law) would nevertheless remain under a

'sword of Damocles' for the remaining years or decades of his or her time in the UK (which might be his or her lifetime). The Secretary of State would be required to keep this person's circumstances under constant review pending a time when the relevant exception in clause 38 no longer applies – this could be many years into the future. A similar problem exists in respect of those within certain of the exceptions in clause 39 (e.g. the mental health orders – Exception 3).

As regards clause 37(2)(b), a mandatory requirement to make an expulsion order is unnecessary and inappropriate – see further the discussion on clause 51 (below).

Clause 37(4)(a) would result in an expulsion order being made in respect of a person who is refused permission to enter the UK, albeit having travelled to the UK in good faith in the belief that he or she would be granted entry – e.g. where the person mistakenly thinks that he or she may be granted entry as a student or business visitor, but on examination it is decided that he or she can only gain entry for the intended study or business under the Points-Based System.

As the Explanatory Notes explain (paragraphs 119 and 122) clause 37(1)(b), read with (6) and (7), introduces a scheme of mandatory re-entry bans in respect of any person in respect of whom an expulsion order is made. This will catch any person who is required to leave the UK – including where that person is turned around at port (clause 37(4)(a)), has committed a minor or inadvertent breach of conditions on his or her leave (clause 37(4)(d)) or is refused asylum (clause 37(4)(a)). The Explanatory Notes indicate that the length of the bans will be subject to "*guidelines*" in the Immigration Rules. The introduction of such bans was first made by HC 321 Statement of Changes in Immigration Rules in April 2008, in respect of which ILPA set out several objections in briefings; and the Government introduced a series of concessions[2]. The Home Office has also previously raised objections to such bans[3]. Although the details of the proposed regime remain unknown since the guidelines are not available, the regime in principle retains the same flaws identified in previous ILPA briefings and Home Office objections.

In any event, in clause 37(6) the words "*or an unlimited period*" should be deleted.

The aim of clause 37(11) could more simply be achieved by amending clause 37(2) to include the words "*Subject to section 38 and section 41,*" before "*the Secretary of State*".

Clause 38

In clause 38(1), the words "*the Secretary of State thinks that*" should be deleted (cf. clause 39(3) and (4)).

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[2] Concessions were announced during debates in the House of Lords on 17 March 2008 and in the House of Commons on 13 May 2008. These concessions effectively introduce some limited transitional arrangements, and exempt certain individuals from the effect of the re-entry bans including those who had come to the UK as victims of trafficking or children, those whose immigration status was regularised after they had breached immigration laws and those who were seeking to return to join family in the UK.

[3] In evidence to the House of Lords Select Committee on the European Union (see the Committee's Thirty Second Report of the Session 2005-06, paragraphs 127-128), the Home Office indicated that it considered re-entry bans (which had been proposed by the EU) to be arbitrary.

In clause 38(6)(a) the words "*or amend existing exceptions*" should be deleted. The Explanatory Notes (paragraph 124) provide no reason for this provision. Where the Secretary of State wished to expand any exception, this could be achieved by adding an exception. Hence, the power to amend can only be needed if it is intended to restrict an exception. Given that these exceptions are all expressed as arising only where to fail to apply the exception would result in a breach of the UK's international law obligations, there is no justification for allowing the Secretary of State to restrict an exception (i.e. allow for breach of those obligations) by mere order.

See also clause 203(1)(b).

Clause 39

In clause 39(2) the words "*the Secretary of State thinks that*" should be deleted (cf. clause 39(3) and (4)). The words "*commission of the offence*" should be substituted for "*conviction*".

The exception in clause 39(5) should be amended and moved to clause 38, with consequential amendments for clauses 39(6) and 43(3). It should read: "*Exception E applies where removal of P from the United Kingdom in pursuance of an expulsion order would contravene the United Kingdom's obligations under the Council of Europe Convention on Trafficking in Human Beings*".

Clause 39(6)(b) is superfluous and should be deleted.

Clause 40

If the power of a sentencing court to make a recommendation for a person's expulsion is to be retained, the power ought to be given some meaning. Currently, the Secretary of State is free to decline to follow a recommendation and free to order deportation where a recommendation has not been made. If the power to make a recommendation is to be given meaning: where a court chooses not to exercise the power, this ought to be a relevant factor against the making of an expulsion order. In any event, the stipulated age in clause 40(1)(c) should be raised to 18 years or over in recognition of the duty upon the State to seek to rehabilitate and reintegrate juvenile offenders – see the decision of the Grand Chamber of the European Court of Human Rights in *Case of Maslov v Austria* (1638/03), 23 June 2008 (paragraph 83); and Article 40 of the 1989 UN Convention on the Rights of the Child.

Clause 40(6) should simply be deleted. If the person is not of the requisite age, the sentencing court should have no power to make the recommendation. That it may do so in error as to the person's age ought to render the recommendation a nullity; and the recommendation ought not to be acted upon.

Clause 41

See the discussion on time limits in relation to clause 37 (above).

Clauses 42 and 43

Clause 42(1) means that the making of an expulsion order will cancel any permission the individual had. However, the expulsion order may be cancelled – clause 43(1). Where the order is cancelled, provision should be made for the cancellation of permission to be nullified – otherwise an inappropriate or wrong decision to make an expulsion order may prejudice the individual even after the Secretary of State has accepted that the order was inappropriately or unlawfully made. Fuller comment is provided in discussions on clause 15 and clause 29 (above).

In clause 43(3)(a), the words "*the Secretary of State thinks that*" should be deleted (cf. clause 43(3)(b)).

Clause 43(4) requires further consideration in relation to clause 52 – see below.

Clause 44

Clause 44(4) provides a similar list of potential destinations to that currently given in paragraph 8(1)(c), Schedule 2, Immigration Act 1971. Nevertheless, the list is not satisfactory. The Explanatory Notes (paragraphs 145 to 149), for instance, give no explanation as to why it is considered appropriate to direct a person's removal to a country where there is reason to believe he or she will not be admitted (or no reasonable grounds to believe he or she will be admitted) simply because the person has obtained some form of identification document in that country or he or she embarked in that country for the UK. In either situation, the provisions here run the risk that an individual is simply bounced between countries. That of itself is objectionable – when coupled with new powers and requirements that raise their own concerns (see discussion on clauses 54, 56 and 58, below) and the concerns raised in respect of clause 45 (below), there is good reason to think that it is unsafe for the individual concerned, any escort, crew and other passengers.

Clause 44 appears designed to retain the power to leave open the destination, route and timing of removal at the point the expulsion order is made. It does not provide for service of the removal directions on the individual; and thereby broadens considerably the current practice of removing unaccompanied children to EU countries under Dublin II arrangements and those said by the Secretary of State to pose a suicide risk without informing them or those representing them.

Clause 45

This clause begs the question – by whom may the person be placed on the ship, aircraft or train? This concern is made especially significant given the current controversy over the handling of removals as presented by the joint report of Birnberg Peirce & Partners, Medical Justice and NCADC: *Outsourcing Abuse*, July 2008.

Clause 46

As drafted, this clause empowers the Secretary of State to make a double recovery of the costs of complying with removal directions – against both a carrier (clause 46(2) and (3)) and the individual (clause 46(4)).

As regards the proposal inherent in clause 46(4) that individuals may be required to pay the costs of their removal in order to be able to re-enter the UK, it was less than three years ago that the Government described such a proposal as "*outrageous*"[4].

Clause 47

Clause 47 introduces provisions for automatic cancellation of a person's permission if he or she is "*subject to an international travel ban*". This may emanate from a resolution of the Security Council or instrument of the European Union; and is to take effect by the Secretary of State amending the Immigration Rules.

The general scheme would serve to exclude a Commonwealth citizen who currently has the right of abode – whether or not that person is currently in the UK or seeks to enter the UK.

Clause 47(3) provides an exception where to exclude a person from permission to be in the UK would contravene the Human Rights Act 1998. However, the clause does not provide a similar protection for a person whose removal from the UK would be contrary to the 1951 Refugee Convention – despite the fact that it does not follow that, because either Security Council or European Union had imposed or recommended a travel ban against the individual, a person would either be excluded from the general protection of that Convention (e.g. under Article 1F) or against refoulement (e.g. Article 31.2). As currently drafted, clause 47(3) is not compliant with the UK's international obligations under that Convention.

As regards the propriety of giving effect to a travel ban by way of Immigration Rules (clause 47(4)), it is noted that clause 204 means that the exclusion of the person would take effect prior to the possibility of Parliamentary scrutiny.

In clause 47(7), both "*(however that requirement is expressed)*" and "*(however that recommendation is expressed)*" should be deleted. Neither expression is necessary for the provision. The second, in particular, is an open invitation for misapplication or misinterpretation as to whether a resolution of the Security Council or instrument of the European Union does make any such recommendation.

Clause 48

In clause 48(a) the words "*an immigration decision (see section 164)*" should be substituted for "*the decision (see section 171)*". The current drafting only precludes removal where the person can bring or has pending an appeal against the making of the expulsion order. This must be read with clause 171; and the current drafting is not compliant with either the 1951 Refugee Convention or the Human Rights Act 1998. An in-country appeal can only be brought under clause 171 if the person had

[4] In evidence to the House of Lords Select Committee on the European Union, the then Minister for Immigration, Tony McNulty MP, gave the follow comment upon such a proposal made by the European Union: "*…at the risk of sounding intemperate, that was probably one of the most outrageous suggestions in the whole Directive, that somehow if you paid for your return, you would be treated in a different way to if you did not. I just cannot see the public policy call of that at all.*" See the Committee's Thirty Second Report for the Session 2005-06, paragraph 130; and Minutes of Evidence for 1 Match 2006, Q428.

permission at the time the order was made. Under the provisions of the draft Bill, the majority of asylum-seekers will likely be on immigration bail or in detention – hence the making of an expulsion order will not provide them with an in-country right of appeal. Although if the asylum-seeker is refused permission, he or she will usually have an in-country right of appeal, this will not of a type provided for by clause 171. Hence clause 48 does not currently provide the protection against refoulement that it ought.

Clauses 49 and 50

In many respects these provisions replicate sections 58 and 59, Nationality, Immigration and Asylum Act 2002. However, there are significant variances; and (with the exception of the inclusion for trafficking victims within the provisions for assisting a voluntary return within the EEA – clause 49(3)) these are not identified in the Explanatory Notes (paragraphs 156 to 159).

Section 58(1)(c) of the Act is here replaced by clause 49(1)(c), from which the phrase "*that it is in the person's interests to leave the United Kingdom and*" has been deleted following the words "*thinks*". That previous phrase may explain why "*thinks*" was considered suitable to be included; but whatever is the true explanation of that inclusion, "*thinks*" should be replaced either by an equivalent of reasonable grounds to believe or a requirement for the person to have formally expressed or registered his or her wish.

Reference to "*country*" or "*countries*" is made in clause 50(1)(c), 2(b) and 3(a). The former of these is a change from section 59(1)(c) of the Act, which refers to "*States*". The change significantly extends the Secretary of State's powers to participate in migration projects with territories which are not recognised as States – examples in recent years might have included Kosovo under the control of UNMIK or the area in northern Iraq under the control of the Kurdish Regional Government and its predecessors (including at times, depending on the particular part, the Kurdish Democratic Party and Patriotic Union of Kurdistan). Clause 208(1) provides the definition of "*country*". Whereas that definition has previously been used in the Immigration and Asylum Act 1999, it was not adopted by the Nationality, Immigration and Asylum Act 2002 whether for section 50 of that Act or otherwise.

Whereas the reference to "*hoping to settle*" in clause 50(3)(a) does reproduce what is in section 59(3)(c), "*hoping*" is not suitable statutory language and "*with the intention to settle*" should be substituted.

Clause 51

Clause 51, as stated by the Explanatory Notes (paragraph 160), does replicate provisions in the UK Borders Act 2007. As ILPA has previously expressed, the deportation regime introduced by that Act is unnecessary and inappropriate. Moreover, the regime is founded upon a fundamental misinterpretation of the 1951 Refugee Convention – currently set out in section 72, Nationality, Immigration and Asylum Act 2002 – in respect of what is under that Convention "*a particularly serious crime*".

Clause 52

Unless a definition is to be provided for the meaning of "*ceasing to be a member of the family*" in clause 43(4)(a), clause 52 requires further consideration. It is readily apparent that a spouse or civil partner can cease to be a family member by way of divorce or annulment of the partnership. An unmarried or same sex partner has no such choice since, according to clause 52(2)(b) and (c) the relationship becomes crystallised for all time if the relationship existed at the time when the other partner was detained.

The words "*may be treated as*" in clause 52(5) are not appropriate.

It is noted that the meaning of "*member of the family*" provided by this clause will have consequences for the provisions in clause 49 in addition to the provisions for expulsion in clauses 37(2)(c) and 43(4)(a).

Part 5 – Powers to Detain & Immigration Bail:

The imbalance in the draft Bill between the powers granted to the Secretary of State and the protections made available to individuals who may be subject to those powers is particularly marked in Part 5. This Part concerns powers to detain, yet there is no recognition of the presumption of liberty, which in clause 55(4) is expressly reversed and in other provisions is seriously undermined.

The provisions here on detention remain deficient for the continued failure to provide for an automatic bail hearing (e.g. the provisions for routine bail hearings provided by Part 3 of the Immigration and Asylum Act 1999 which were never commenced, and have since been repealed) and the continued power to detain children.

Clause 53

As noted in the discussion of clause 25 to 27 (above), this clause will empower the indefinite detention of a person, including a British citizen, pending production of a valid identity document.

Clauses 54, 56 and 58

Clause 54 empowers the Secretary of State to require the captain of a ship, aircraft or train to prevent a person from disembarking in the UK; and empowers the captain to detain the person on board. The exercise of these powers, however, risks violation of Article 33 of the 1951 Refugee Convention if a person, detained on board, is prevented from making his or her asylum claim.

It is unclear (and the Explanatory Notes) provide no explanation as to what steps the captain may take for the purpose of detaining the person "*in custody*". As such the provisions appear to abrogate the responsibility of the UK towards a person in its jurisdiction under Article 5, Human Rights Act 1998; and it may be questioned how the unsupervised and unregulated detention by the captain, in these circumstances, will be compatible with the right to liberty under that Act. It appears that the captain

will be in an invidious position – he or she will have powers to detain "*in custody*" on the ship, aircraft or train which, for various reasons, he or she may well feel unsuited to exercise (clause 54(3)); yet will be obliged to prevent disembarkation (clause 54(2)) on pain of prosecution (clause 115). It may be questioned how safe such arrangements may be for the detainee, the crew or other passengers.

Clause 56 raises similar concerns.

Clause 58 begs the question as to who will exercise such powers; and similar concerns as clauses 54 and 56 as to the suitability of the persons authorised to do so.

Clause 55

In clause 55(1), (2)(b) and (4), "*has reasonable grounds to believe*" should be substituted for "*thinks*" (cf. clauses 49(3)(b) and 57(1)). When exercising powers in relation to expulsion and detention it is vital that the Secretary of State should act on the basis of reasonable grounds, and the statutory provisions must reflect that.

Clause 55(2)(a) and (b) empowers the Secretary of State to detain a person indefinitely while considering whether there is a duty to make an expulsion order under clause 37(2)(b) and, if she concludes that there is, pending her making that order. Some limitation of time ought to be included – whether by including a fixed time limit or a term such as "…*for a reasonable time in order to*…".

Clause 55(4) reverses the ordinary presumption in favour of liberty. It is inappropriate; and ought to be deleted. Detention should never be continued unless the Secretary of State has satisfied herself that there are reasonable grounds for it to be continued.

Clause 56

See discussion on clauses 54 (above).

Clause 57

This clause, which reproduces the powers in sections 1 to 4, UK Borders Act 2007, is a policing power. Those who may be detained under the powers in this clause may be British citizens; and the reasons for their detention may have nothing to do with immigration or immigration offences. The reach of these powers stretches far beyond ports – see clause 57(5); yet there is no explanation as to why immigration officials rather than police officers should need to be exercising such powers, particularly at places other than ports.

Clause 58

See discussion on clause 54 (above).

Clause 59

Clause 59(2) and (4) should be deleted. Immigration Removal Centres and short term holding facilities have been established as places of detention; and the safety and welfare of detainees is intrinsically connected to the proper establishment of places of detention. That a person should be "*detained in such places as the Secretary of State may direct*" (clause 59(2)) is merely an unnecessary invitation to detain individuals in unsuitable places leading to risks for the individual, officials and staff at the place of detention and members of the public. A person's detention is either lawful or it is not – the proposition that a person's detention may be deemed lawful is absurd (clause 59(4)).

Clause 60

In clause 60(2) the words "*or as soon as is reasonably practicable after that*" should be deleted. The Explanatory Notes give no reason why written reasons should not be provided at the commencement of detention. These additional words merely add to problems elsewhere in these provisions (see discussion above on clause 55) whereby the Secretary of State is encouraged to adopt the position that she may tarry at will while a person is or remains detained.

Monthly review of detention under immigration powers (clause 60(3) and (4)) is grossly inadequate.

Clause 62

Clause 62(2)(b) means that a person, including a British citizen, detained on arrival in the UK (see discussion on clauses 25 to 29 above) may not seek immigration bail from the Asylum and Immigration Tribunal (AIT) for at least 7 days. Moreover, clause 60(3) and (4) mean that the Secretary of State will be under no obligation to review the detention during that time.

Clause 62(2)(c) requires the AIT to obtain the consent of the Secretary of State before granting bail in circumstances which are vague – "*the person's removal from the United Kingdom is imminent*". It is objectionable *per se* that the AIT should require the Secretary of State's consent in order to grant bail. In the UK Border Agency's current consultation on "*Immigration appeals: Fairer decisions, faster justice*" respect for the AIT is identified as one of three key aims of the proposals there made (see paragraph v of the Foreword). If the AIT is to have respect, it needs to be and be seen to be independent of the Secretary of State; and a provision such as this will undermine that.

The meaning given by clause 62(3) to "*relevant pending appeal*" is inadequate. Firstly, clause 188 (see below) is currently inadequate in failing to deal with onward appeal rights. Secondly, appeals under the British Nationality Act 1981 or under EEA regulations (currently, Immigration (European Economic Area) Regulations 2006) are excluded. Thirdly, provision will need to be made for whatever is to replace the Special Immigration Appeals Commission Act 1997.

As stated in the Explanatory Notes (paragraph 192), the provisions in clause 62(4) do largely replicate the conditions which may be imposed on immigration permission – see discussion on clause 10 (above).

Clause 62(6) lists factors that the Secretary of State or AIT must have regard to if considering a grant of bail. However, clause 62(6)(f) is a catch all. If this is to remain then (a) to (e) are superfluous. If (a) to (e) are to remain, (f) should be deleted. Moreover, there are plainly other factors that ought to be included in any list – e.g. age, health, pregnancy, history of torture or trafficking, dependent children, connections to the UK etc.. In any event, (e) should be deleted; and (d) is in need of amendment if it is to be retained. Immigration powers of detention are not suited for such matters as might fall within (e). The examples given in the Explanatory Notes (paragraph 194) do not demonstrate the need or propriety of this provision since there are other non-immigration powers that would be relevant, and which would be exercised by those specialist in making such decisions. It is inappropriate to be speculating on whether a person's presence is "*conducive to the public good*" as envisaged by the word "*likelihood*" in (d). However, if the conducive ground is amended, it is questionable as to why (b) is necessary (and see discussion on clause 62(7)(b), immediately below).

Clause 62(7)(b), when read with clause 62(6), means that convictions outside of the UK must be taken into account. This is regardless of their relevance or safety, regardless of how long ago they were committed and regardless of the fact that these convictions may constitute the past persecution that a refugee has suffered at the hands of the State from which he or she is fleeing.

Clause 62(8) and (9) begs the question – when will the notice be given in these circumstances?

Clause 63

As regards the clause 63(3) to (6), this raises concerns addressed in discussion on clause 29 (above).

More generally, clause 63 exposes the underlying failure to address the stated aim of plain English in relation to immigration bail. Many individuals currently on temporary admission have never been detained and never will be detained; and moreover the detention of some of these individuals may be unlawful. It is misleading, therefore, to describe these individuals as on immigration bail. Clause 63 also, in terms, provides that a person on immigration bail is not in the UK unlawfully, but is not here with permission and is not authorised to be here. The discussion on clause 1 to 3 (above) relates to this. If terms in the draft Bill are chosen to provide an ordinary English meaning, this ought to be done consistently. If it cannot be done consistently, the use of such terms ought to be reconsidered – in particular, where (as with permission and immigration bail) the scheme created is dependent on the meaning of more than one term and these terms when considered together can be seen not to provide a plain and accurate English meaning (even where on its face, one or other term appears to do so).

Clause 64

This clause requires that any recognisance of an individual on immigration bail, or any recognisance of a surety for that individual, be deposited with the Secretary of

State or the Asylum and Immigration Tribunal (AIT). Currently, a recognisance is given by the individual or surety signing the appropriate form and thereby promising that the recognisance may be forfeit if the conditions of bail are not complied with.

Since immigration bail is to apply to anyone who would under current arrangements be on temporary admission, this clause would introduce a regime whereby the Secretary of State (and/or the AIT) could be holding indefinitely a variety of sums of money in respect of tens or hundreds of thousands of individuals. This raises several questions. What administrative capacity does either the Secretary of State or the AIT have to manage these transactions and hold these monies? What would happen to interest earned on the money – money that could be held for months or years? When will money be returned? If money is not returned promptly, what compensation may be available from the Secretary of State or AIT in respect of any consequences to the individual of being wrongly deprived of his or her money? If money is not returned, can an individual be expected to leave the UK? If waiting for the return of money, what will be that individual's status in the UK? What steps will be taken to ensure that such a regime does not lead to individuals returning to certain countries being habitually stopped and demanded to hand over money on their return in the expectation that they will be holding cash? What will happen where someone has given a recognisance immediately prior to the commencement of this provision: will he or she be required to now deposit money?

In clause 64(2) "*it is necessary to ensure*" should be substituted for "*the Secretary of State or the Tribunal thinks it appropriate with a view to ensuring*".

Clauses 65 and 66

Clause 65 makes changes to the current provisions contained in section 36, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; and these changes are neither identified nor explained in the Explanatory Notes (paragraphs 205 to 209). Electronic monitoring is no longer tied to other conditions. It is merely the Asylum and Immigration Tribunal that the Secretary of State is required to notify of the availability of electronic monitoring arrangements in an area (clause 65(7) – and see clause 66(2)). The regulation making power (clause 65(3) to (5)) which is by reference to clause 202(2) empowers the Secretary of State to make "*supplementary,… transitory or saving provision*" in addition to the "*incidental, consequential or transitional provision*" she may currently make under section 36(8)(b).

Clause 67

Having regard to those who will be subject to immigration bail, "*must*" should be substituted for "*may*" in clause 67.

Clause 68

In contrast to its bland presentation in the Explanatory Notes (paragraphs 211 to 212), clause 68 provides for radical changes to the current arrangements for bail.

Clause 68(1) would allow the Secretary of State to amend or add to the conditions of immigration bail granted by the Asylum and Immigration Tribunal (AIT). The only limitation is in clause 68(2)(a) which means that the Secretary of State may not cancel a condition which the AIT has imposed. On the face of the provision, the Secretary of State would be free to impose (by variation) significantly harsher conditions of bail than the AIT had granted. Clause 68(1) and (2)(b) provides a similar power to the AIT in respect of conditions of immigration bail granted by the Secretary of State. However, given the AIT is meant to be the body providing independent judicial oversight, it is both curious that the AIT may not cancel conditions which it considers to be superfluous (the Secretary of State could presumably expect to have the opportunity of being heard by the AIT as to why she considered any condition to be necessary), and that the Secretary of State should have power over the conditions of immigration bail granted by the AIT (again the Secretary of State could presumably expect to have the AIT consider any representations she wished to make in respect of conditions).

The discussion on clause 62 (above), which refers to the current consultation, is relevant here.

Clause 70

As the Explanatory Notes (paragraph 214) state, this clause replaces section 67, Nationality, Immigration and Asylum Act 2002. However, on 16 June 2005, the House of Lords unanimously ruled that section 67 was otiose[5]. No explanation is given as to why, if section 67 is otiose, clause 70 is needed. It is not, and should be deleted.

Part 6 – Detained Persons and Removal Centres:

These provisions largely replicate provisions in the Immigration and Asylum Act 1999, though with some significant omissions and additions.

Existing provisions, which are here neither reproduced nor replaced, include (all provisions are from the Immigration and Asylum Act 1999):

- Section 158 (offence of official or private contractor's employee disclosing confidential information)
- Paragraph 3, Schedule 13 (insofar as it relates to delivery of a person to a removal centre – cf. clause 74)
- Paragraph 1(2)(d), Schedule 13 (requiring the escorts monitor to investigate individual allegations – cf. clause 72)
- Section 149(7)(b) (requiring contract monitors to investigate individual allegations – cf. clause 77)
- Paragraph 1, Schedule 12 (measuring and photographing detained persons)
- Paragraph 2, Schedule 12 (testing detained persons for drugs or alcohol)

Clauses 71 to 75

[5] See *R v SSHD ex parte Khadir* [2005] UKHL 39

"*Arrangements*" is the language used in the existing legislation. However, it appears a very woolly term.

Clause 71 replaces and largely replicates section 156, Immigration and Asylum Act 1999. Clause 71(4) adopts the provision currently in section 154(6) of that Act. In clause 71(5)(b), the words from "*who are certified*" to "*Northern Ireland),*" may be deleted in view of the following subclause. Clause 71(6) provides definitions for the purposes of "*this Act*" – if it is to have such a broad application, it ought not to be tucked away in clause 71 but should be included in clause 208(1).

Clause 71 empowers but does not require the Secretary of State to make certain arrangements. Whereas the provision envisages that escort functions under any such arrangements may be carried out by certain authorised persons, there is no requirement for these functions to be carried out by them.

Clause 72 replaces paragraph 1, Schedule 13 to the Immigration and Asylum Act 1999, but with the following omission from the list in clause 72(2): "*(d) investigate, and report to the Secretary of State, on any allegation made against a detainee custody officer or prisoner custody officer in respect of any act done, or failure to act, when carrying out functions under the arrangements*". The Explanatory Notes (paragraph 215) neither identify nor explain this omission, but the statement that these provisions provide "*a regulatory framework for the movement and escorting of detained persons which is designed to be transparent and to safeguard staff, detainees and members of the public*" is significantly devalued by the omission of a power to investigate and report on allegations. It may be (it is not said) that the intention here is that such matters will be dealt with by the Independent Police Complaints Commission, but this would require that the allegation was of a particular severity so may omit investigation of lesser complaints. A similar omission is made in respect of clause 77.

Clause 73 replaces paragraph 2, Schedule 13 to that Act. The power to search a detainee or another person is not restricted by the need to have any purpose or reasonable suspicion for the search (clause 73(1)), but is at large.

Clause 74 replaces paragraph 3, Schedule 13 to that Act – but only insofar as it applies to persons who are delivered to a prison.

Clause 75 allows a transfer of a detainee under mental health arrangements to be carried out by someone other than a person authorised to escort the detainee and otherwise than under "*escort arrangements*". This may be done provided "*all that is reasonable to secure that the function is exercised*" by an authorised person is/has been done. It is a new provision. The Explanatory Notes (paragraph 219) are wholly bland, explaining neither what the clause does nor why it is needed.

Clauses 76 to 78

These clauses largely replace sections 149 to 150, Immigration and Asylum Act 1999. A significant omission is section 149(7)(b), which currently requires a contract monitor to investigate and report upon allegations – see also discussion on clause 72 (above).

Clauses 86 to 90

These clauses essentially adopt provisions in paragraphs 3 to 8, Schedule 12 to the Immigration and Asylum Act 1999. There are some linguistic changes – "*assists*" is substituted for "*aids*" and "*brings*" for "*conveys*".

Clauses 93

Clause 93 replaces paragraphs 4 to 6, Schedule 11 to the Immigration and Asylum Act 1999. The word "*intentionally*" is substituted for "*wilfully*" – see clause 93(2).

Part 7 – Offences:

It must be noted that neither all provisions which relate to offences nor all offences in the draft Bill appear in Part 7. Clauses 90 and 193 to 198 relate to offences. Clauses 30, 86 to 89, 92, 93, 160 and 185 provide for offences.

The offences included here in certain respects add complexity and duplication. Section 24, Immigration Act 1971 is replaced by six clauses (clauses 97, 98, 99, 102, 113 and 116). There is significant overlap between clauses 110 and 97 and 98, 117 and 97.

Clause 97

This clause essentially replaces what is now section 24(1)(a), Immigration Act 1971. The need for clause 97(5) and (6) appears to be the location in the draft Bill of clauses 193 and 195 (see discussion on these clauses, below).

Clause 97(1)(b) criminalizes a person who seeks to enter the UK if at the time of doing so the person knows he or she does not have permission. However, many lawful migrants to the UK are not required to have permission before arrival. When approaching the immigration desk and requesting permission he or she seeks entry and would commit this offence. It is questionable why this offence is needed given clause 117 (below).

Clause 98

This clause essentially replaces what is now section 24(1)(b)(i), Immigration Act 1971.

Clause 98(2) is necessary because an expulsion order under clause 42(1) cancels permission with immediate effect. Thus a person may have no warning of the circumstances in which he or she would otherwise commit a criminal offence. However, similar provision needs to be made for clause 47. Similarly, while a person whose permission is cancelled by deemed notice (see clause 200(7)) is at that time protected by clause 98(1)(c), immediately that he or she is located (see clause 200(8)) the offence is committed.

Clause 99

This clause essentially replaces what is now section 24(1)(b)(ii), Immigration Act 1971.

The extension of conditions that may be imposed upon a person with permission (see discussion on clause 10, above) significantly extends the seriousness of this clause. The word "*knowingly*" may protect a person in the case of an inadvertent breach, but will not where a breach is minor or unavoidable – e.g. failing to report because required to remain at the scene of an accident, or illness or hospitalisation.

Clause 101

Although this is a replacement for much of section 26, Immigration Act 1971, it is significant because of the greatly extended powers of examination to which it relates – see discussion on clauses 25 to 28 (above). Non-compliance with those very wide powers is here made a criminal offence – e.g. refusing to produce an ID card.

Clause 102

This clause essentially replaces what is now section 24(1)(d), Immigration Act 1971, but the circumstances in which it may apply are greatly extended – see discussion on clauses 25 to 28 (above).

Clauses 104 and 105

This clause essentially replaces what is now section 2, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

For the meaning of "*travel document*" and "*current*" see clause 208(1) and (3), which also define "*identity document*" for these purposes. As with section 2 of that Act, the offence may be committed despite the person providing a document that satisfactorily establishes his or her identity and nationality.

The permission interview, for the purposes of these clauses, is one for which the Secretary of State must exercise her powers under clause 24 to designate officials – see clause 105(2).

Why should not the definition of "*child*" (clause 105(7)) appear in the general interpretation section – clause 208(1)?

Clauses 106 and 107

These clauses essentially replace what is now sections 25 and 25A, Immigration Act 1971. See also clause 194.

Clauses 108 and 109

Clause 108 effectively reproduces section 4(1), (2), (3) and (5) and 5(1), Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Clause 109 effectively reproduces section 4(4) of that Act. This continues to preclude prosecution under clause 108 for trafficking in babies since a baby cannot be said to be the subject of a request or inducement. Moreover, the juxtaposition of two that's in clause 109(5) is untidy.

Clause 110

This appears to be duplication. A person entering the UK in breach of an expulsion order will be a person who has committed the offence under clause 97(1)(a) because he or she will necessarily have entered without permission. A person staying in the UK in breach of an expulsion order will similarly be a person who has committed the offence under clause 98 because he or she will necessarily have stayed without permission. A person who arrives in the UK in breach of an expulsion order will ordinarily be a person who has committed the offence under clause 97(1)(b) because he or she will be seeking to enter the UK without permission.

Apart from British citizens (who cannot be subject to an expulsion order), only EEA entrants may enter the UK without permission. However, an EEA entrant is defined in clause 3 as someone who is entitled to enter by virtue of EU law – thus an EEA entrant cannot be a person subject to an expulsion order (or, at least, cannot lawfully be subject to such an order).

Clause 115

See discussion on clauses 54, 56 and 58 (above).

Clause 117

This clause effectively replaces section 24A; but – as is noted by the Explanatory Notes (paragraph 272) – with the addition of the offence in clause 117(2). It is not explained why it is thought necessary to criminalize someone who may or may not go on to commit the offence in clause 117(1). Given that the more obvious examples of preparatory acts are likely to be caught by other offences (e.g. obtaining false or falsifying travel documents – e.g. see clause 118), the risk that the offence is aimed at circumstances where it will be very difficult to establish the requisite intention (to go on to commit the offence in clause 117(1)) suggests that clause 117(2) should be deleted.

Clause 119

This clause effectively replaces section 26A, Immigration Act 1971. See also clause 203(1)(c).

Clause 121

As the Explanatory Notes (paragraph 277) state, this is a new offence. Although it is similar to the offences currently in section 3(b) and (c), UK Borders Act 2007 and

paragraph 5, Schedule 11 to the Immigration Act 1971, it is considerably broader than these provisions.

Clause 121(1) makes it an offence to resist or obstruct, without reasonable excuse, any person exercising a function conferred by or by virtue of the provisions in the draft Bill. The danger inherent in so broad a provision is starkly revealed by comparison with clause 93. That clause makes it an offence for a person to "*resist or intentionally obstruct*[] *a detainee custody officer…*" who is carrying out certain specified functions. However, that clause also provides a defence where the official "*is not readily identifiable as such an officer*". Thus, there are three significant distinctions between clause 121(1) and clause 93. Firstly, in the latter any obstruction must be intentional, whereas in the former it need not be. Secondly, in the latter there is a defence where the particular officer is not readily identifiable, whereas in the former there is no such defence. Thirdly, the latter refers to specific functions by specific officials, whereas the former is wholly at large. Despite the inclusion of "*without reasonable excuse*" in clause 121(1), this offence remains the wider drawn and easier to commit. Indeed, a person who is not caught by the offence in clause 93, or is entitled to the defence, nevertheless may be prosecuted and convicted of the offence in clause 121(1). Clause 121(1) is plainly inappropriate and should be deleted.

Clause 121(2) is unnecessary. Assaults can be prosecuted in common law; and inevitably, therefore, clause 121(2) constitutes duplication.

Part 8 – Carriers' Liability:

This part sets out provisions for a scheme of civil penalties for carriers. However, note should also be taken of the offences in clauses 103, 112 and 115.

Clauses 122 to 128

These clauses relate to penalties for carrying "*undocumented passengers*"; and effectively replace sections 40 to 41, Immigration and Asylum Act 1999. Certain matters are left to regulations, including matters relating to notices and the level of the penalty. The only ground that may be pursued on an appeal against the imposition of a penalty is that the person is not liable for the penalty – see clause 126(3) (cf. section 40B).

Clauses 129 to 140

These clauses relate to penalties for carrying "*clandestine entrants*"; and effectively replace sections 32 to 35A, Immigration and Asylum Act 1999. Although provisions are re-ordered there is little change of substance other than certain matters relating to notices are left to regulations and on an appeal against a penalty notice a court is empowered to increase the penalty.

Clauses 141 to 148

These clauses relate to the detention of "*transporters*"; and effectively replace sections 36 to 37, Immigration and Asylum Act 1999. However, there is power to detain a transporter (see definition in clause 151(2)) pending the giving of a penalty notice under clause 130, a court may not order release of the transporter on the ground that there is no significant risk that the penalty will not be paid (cf. section 37(3)(b) of that Act) and clauses 146 to 148 allow the Secretary of State to sell a transporter which she has detained.

Clause 149

This clause introduces a scheme whereby carriers may be required, on pain of a penalty, to obtain authorisation from the Secretary of State in order to bring a passenger to the UK. Some further explanation of what is envisaged is provided in the Explanatory Notes (paragraph 309). Such a scheme would be likely to significantly increase the hurdles facing refugees seeking to escape persecution by fleeing to the UK; and increase the incidence of and scope for exploitation by smugglers and traffickers.

Such a scheme may cause delays or disruption to any passenger to the UK, including the possibility of wrongful exclusion from a flight or missing a connection – including British citizens returning from abroad. Moreover, the wide scope of the fees powers may allow imposition of fees on carriers or travellers for the "*service*" provided by the Secretary of State in imposing such a scheme (see discussion on clauses 190 and 191, below).

See also clause 203(1)(d).

Part 9 – Illegal Workers:

The clauses in Part 9 relate to an offence and civil penalty regime for those who employ "*illegal workers*"; and effectively replace sections 15 to 26, Immigration, Asylum and Nationality Act 2006. There are no changes of substance save as to the provisions for an appeal against a penalty imposed under clause 153. These changes are twofold. On an appeal, the employer may only rely on grounds that he or she is not liable for the penalty or that the penalty is excessive – see clause 157(3) (cf, section 17(3) of that Act); and a court may increase the penalty – see clause 157(4)(c) (cf, section 17(2) of the Act).

See also clause 194.

Part 10 – Appeals (and Schedules 1 and 2)):

On 21 August 2008, the UK Border Agency launched a consultation on immigration appeals – "*Consultation: Immigration Appeals – fair decisions; faster justice*". That consultation closes on 16 October. There are currently wider changes underway relating to the administration of justice by tribunals in the UK, for which the Tribunals, Courts and Enforcement Act 2007 has paved the way. The consultation document indicates that the Asylum and Immigration Tribunal may be brought within

that structure. In any event, the provisions in the draft Bill so far as appeals are concerned are incomplete; and any commentary upon the provisions available in the draft Bill must come with the caveat that these may need to be reconsidered or revised when what is currently missing is made available.

Clause 164

This clause (with those following) replaces, but also fundamentally changes, the appeals structure currently provided by section 82 *et seq*, Nationality, Immigration and Asylum Act 2002. The decisions currently addressed by section 82(1)(a) to (c) and in part (d) and (e) of that Act are replaced by clause 164(2)(a) to (d). However, it is not a straight swap. Essentially, these decisions in section 82(1) are reduced to one decision – refusal of permission. However, clause 164(2) breaks down that refusal of permission by categories of application – i.e. refugee claim, other protection claim, family life claim/application, other application for permission, and provides for a separate appeal right for each. Thus a person making a claim for asylum, may do so on refugee grounds and other human rights grounds, and in doing so may raise a family life ground. Currently, this person could expect a single decision – refusal of leave to enter, against which he or she might appeal (and raise such grounds as are necessary to advance any or all of the grounds of the original application). Under clause 164(2), he or she would receive several (in this example – three) immigration decisions, each bringing an appeal right – see below. This approach may work perfectly well if each of these appeal rights are equally restricted or unrestricted (and the decisions are made at the same time), but if unequal restrictions are imposed the approach may lead to confusion if the appeals are conjoined and inefficiency if they are not or cannot be conjoined. It is noted that clause 182 continues to treat the appeals structure as if there is one appeal, but this appears to be at odds with clause 164 *et seq*.

The decisions currently addressed by section 82(1)(f) and the remainder of (d) and (e) of the Act are replaced by clause 164(2)(e) and (f). Again, it is not a straight swap. Clause 164(2) breaks down permission again by categories of application on which the permission has been granted, but here only distinguishes the refugee and others. This has significant consequences – see discussion on clauses 169 and 170 (below).

The decisions currently addressed by section 82(1)(g) to (j) of the Act are replaced by clause 164(2)(g) and (h). Again, this is not a straight swap. In part, the change reflects that the draft Bill makes no distinction between administrative removal and deportation – see discussion on Part 4 (above). However, there is also a fundamental change as to the timing of when a decision is made and an appeal right may arise. Under the current regime, the Secretary of State gives notice of her intention to remove a person (whether an administrative removal or by way of deportation), and the appeal arises against this notice. Clause 164(2)(g) means that no appeal will arise until the Secretary of State makes an expulsion order, which means that under the provisions of the draft Bill a person may find that his or her expulsion is ordered without any forewarning (consequently no opportunity to make any representations) and with disastrous consequences for him or her which cannot be fully remedied by the appeal – for further consideration, see discussion on clauses 13 to 15 (above).

Clause 164(4), which is undoubtedly necessary to the provisions, highlights how far these appeals provisions are removed from the aim of simplification. It states that (for the purposes of clauses 165 to 171) a person who has something (permission) is to be treated as not having it.

Clauses 165 and 166

By clauses 165(2)(b) and 166(2)(b), the current provision for an out-of-country appeal in circumstances where the Secretary of State certifies a refugee or human rights claim to be "*clearly unfounded*" (see clauses 177 and 178, and Schedule 2) is excluded (unless the human rights ground relates to family life, subject to the meaning that is given to "*family life application*" in the Immigration Rules – see clause 167). Whereas ILPA considers the clearly unfounded certification regime to be inappropriate (see discussion on clauses 177 and 178, below), if it is to be retained the current out-of-country appeal right should also be retained. ILPA is aware of out-of-country appeals that have been successful under this regime.

Clause 168

This clause preserves the current exclusion of appeal rights for those refused permission to come to the UK (except where the appeal is against refusal of a "*family life application*" – see clauses 167 and 206, which indicates that the meaning of such an application is ultimately to be left to the Immigration Rules). However, the current provision for a review of an entry clearance officer's decision by an entry clearance manager is an inadequate remedy; and a general appeal right ought to be reinstated.

Clauses 169 and 170

These clauses distinguish between those with permission on the grounds of their refugee status and every other person with permission.

In the case of the refugee, clause 170 precludes an appeal right if the refugee's permission is cancelled when he or she is outside the UK. This is inappropriate. A refugee is entitled to travel. If, for example, the Secretary of State were to cancel the refugee's permission while he or she was on holiday, he or she would be at risk of refoulement. In any event, the provision is an unreasonable interference with the refugee's right to travel given the precarious nature of his or her permission if he or she does so.

In other cases, an appeal is only provided in-country when the cancellation is on the person's arrival in the UK. If, therefore, a person's permission is cancelled after he or she has entered the UK, there would be no appeal right in-country. Given the very wide powers in relation to cancellation of permission (see discussion on clauses 13 to 15, above) this is a cause for considerable concern. In relation to those granted protection permission (other than as refugees), it is not at all clear why they should be excluded from the appeal right to which the refugee would be entitled – albeit, that (unlike the refugee) these would retain an appeal right if permission was cancelled while they were abroad.

These provisions need substantial amendment.

The Explanatory Notes (paragraphs 330 and 331) are misleading. It is there stated that clause 169 "*provides that where temporary permission is cancelled on arrival, an appeal may only be brought in country if…* [and where] *permanent permission is cancelled on arrival there is an in-country right of appeal against that decision.*" The Explanatory Notes imply that the stated restriction to the appeal right only applies where cancellation is on arrival, whereas the clause precludes an in-country appeal against any cancellation other than cancellation on arrival.

Clause 171

Clause 171 precludes any out-of-country right of appeal but provides for an in-country right of appeal when an expulsion order is made (clause 171(2)). However, this right of appeal is excluded if the order is made against someone who does not have permission or has permission but it was obtained by deception (clause 171(2)(a)(ii)), or the order is made against someone who has breached a condition of his or her permission (clause 171(3)(a)) or the order is a mandatory order against a "*foreign criminal*" (clause 171(3)(b)) or the order is made against a family member of someone who has received an order on the basis of his or her having breached a condition of permission or being a "*foreign criminal*" (clause 171(3)(c)).

This scheme is fundamentally unjust. Also, in excluding appeal rights in these cases, the clause merely encourages greater use of judicial review or asylum and human rights applications.

A breach of a condition may be of the most inadvertent or minor type, yet the Secretary of State has a discretion to make an expulsion order. If she exercises that discretion, however unreasonably or in ignorance of the full facts, an appeal is precluded – see further the discussion on clause 37 (above).

A "*foreign criminal*" here means someone who is subject to what is currently referred to as automatic deportation (see clause 51). There are exceptions to this regime (see clause 38), yet if the Secretary of State wrongly fails to apply an exception an appeal will still be excluded. This risks breaches of international obligations in respect of refugees, human rights, European Union law and victims of trafficking (as anticipated by current Government policy).

Even if it were right or rational to exclude the appeal of someone who has breached a condition of permission or is a "*foreign criminal*", it is wrong and irrational to exclude the appeal of his or her family member. The circumstances of family members may vary considerably, but it does not follow that because the principal falls to be excluded that the family member falls to be excluded; and the family member may have good grounds for staying in the UK despite the position of the principal.

Where there is an appeal right, there is a further problem in view of the limitation on the grounds permitted by clause 174 – see discussion (below).

Clause 172

This clause will not provide a remedy for those excluded from the right of appeal against the expulsion order (clause 171) since the appeal right here cannot be exercised in-country. As regards how this provision will work in practice, this is unclear as it is not known how an application to cancel an expulsion order is to be made and dealt with. However, whereas the clause is undoubtedly needed, the regime that has been created by the conjoining of administrative removal and deportation will create increased administrative and judicial work – see discussion on clause 37 (above).

Clause 174

This clause replaces section 84(1), Nationality, Immigration and Asylum Act 2002. The Explanatory Notes (paragraph 335) state that the reduction in the list of grounds reflects that the other grounds listed in section 84(1), with one exception, all fall within the "*not in accordance with the law*" ground. It seems the same applies to what remains, which appears to be recognised in the draft by the word "*otherwise*" in clause 174(1)(b) – in which case clause 174(1)(a) is also otiose.

The one exception, which is identified in the Explanatory Notes is the removal of what is currently section 84(1)(f): "*that the person taking the decision should have exercised differently a discretion conferred by immigration rules*". Without sight of the Immigration Rules, it is not possible to assess the full implication of this omission, but it is of immediate concern that the expanded reach, and consequences, of the expulsion order regime may be excluded from adequate or effective judicial oversight (except by way of judicial review) – see discussion on clause 37 (above). On the face of the expulsion order provisions, the making of an order (unless the condition precedent for the Secretary of State's discretion is not there, or it would contravene human rights/refugee/discrimination or EU law) is likely to be lawful; but that is far from saying that the expulsion order is appropriately made. The ground in section 84(1)(f) should be retained.

Clause 175

The word "*further*" in the Explanatory Notes (paragraph 336) is in error. Otherwise the Explanatory Notes are broadly correct in stating that this clause is similar to section 88, Nationality, Immigration and Asylum Act 2002. More accurately, the clause replaces sections 88 and 89 of that Act (section 88A is effectively replaced by clause 169).

The provisions mean that a person whose application for permission is refused, or has that permission cancelled, on any of the grounds listed in clause 175(3) will be precluded from an appeal right. If he or she is refused on the basis that one of these grounds applies, but contends that it does not, the remedy will be by judicial review.

Clause 175(1) incorporates an important distinction, but fails to apply the distinction consistently. Thus a person whose application for permission is on refugee grounds, cannot be excluded from appealing against a refusal on the basis of this clause. Consistently with that, a person who is granted permission as a refugee cannot be excluded by this clause from an appeal if that permission is cancelled. By contrast, a person whose application for permission is on human rights or family life grounds,

cannot be excluded by this clause from an appeal right against a refusal of the application. However, a person who is granted permission on human rights or family life grounds whose permission is cancelled may be excluded by this clause. This difference between the refugee and person granted permission on human rights/family life grounds is irrational.

Clause 176

Clause 176 essentially incorporates the fresh claim rule (cf. Immigration Rules, paragraph 353) into the draft Bill.

In clause 176(3) the words "*, having considered them, the Secretary of State thinks that*" should be deleted. Further, the focus in clause 176(3)(b) on the application needs amending – success may be achieved on the application or on the appeal. The Explanation Notes (paragraphs 337 and 501) would then provide a satisfactory description.

Clauses 177 and 178 (and Schedule 2)

Clause 177 incorporates a significant addition to the "*clearly unfounded*" regime is replaces, which is currently set out in section 94, Nationality, Immigration and Asylum Act 2002. The extent of the addition is not clear, because the meaning of "*family life application*" is left to the Rules (see clause 206).

Generally, ILPA is opposed to the clearly unfounded regime – see also the discussion on clause 165 and 166 (above).

Clause 178(3) provides a list (which mirrors that currently provided by section 94(5C) of the Act). However, there is no purpose to a list if a catch-all is to be provided by (h).

See also clause 203(1)(e).

Clause 179

Clause 179 effectively replaces section 96, Nationality, Immigration and Asylum Act 2002 with some relatively minor changes in the drafting. However, the clause could be improved by the deletion of the words "*the Secretary of State thinks that*" from subclauses (2)(c) and 3(c).

Clauses 180 and 181

In significant part these clauses replace section 97, Nationality, Immigration and Asylum Act 2002.

Clause 182

Clause 182(2) would be improved by the substitution of "*is*" for "*it thinks*".

Clause 182(3) and (4) adopt changes made by section 17, UK Borders Act 2007. There are significant problems with the changes made by that Act, and the provisions as they appear in clause 182(4). An application for further permission may be varied, and hence it is anticipated by the provisions in the draft Bill that further evidence may be submitted prior to a decision on that application – see also discussion on clause 12 (above). However, the words "*at the time of making*" would preclude the Asylum and Immigration Tribunal (AIT) from considering this evidence – despite the fact that it was before the initial decision-maker and he or she did take, or should have taken, it into account. A further inadequacy is that the clause 182(4)(b) is restricted to proving "*that a document is genuine or valid*". However, if the document merely includes a typographical, clerical or administrative error, the problem with the document will not require proof relating to whether the document is genuine or valid but rather proof that the error has been made and of a correction. Given that the error may be wholly outside the applicant's responsibility (it may be a document created by a representative, sponsor or other third party), there is no good reason to exclude a remedy.

Clause 183

Clause 164 sets out the immigration decisions against which an appeal may be brought. Clauses 165 to 173 further explain when and where an appeal may be brought. Clause 174 sets out the grounds on which an appeal may be brought. Clause 182 sets out what the Asylum and Immigration Tribunal (AIT) may consider on the appeal. Clause 183 sets out when the AIT may or must allow an appeal. This clause appears superfluous since the previous clauses have explained the AIT's jurisdiction in terms of when it may consider an appeal and on what grounds – it would naturally follow that the AIT must allow an appeal if properly before it and the grounds are made out. The one-stop nature of this appeals regime may be firmly achieved by amending clause 182(2) by substituting "*must*" for "*may*"; and deleting clause 183. The extent of clause 183(5) is also concerning, in that this may preclude consideration on an appeal of failures by the Secretary of State to follow her own policies. If so, this may require some matters to be brought by way of appeal and other matters to be brought by way of judicial review.

Clauses 184 to 187

Clause 184 replaces section 106, Nationality, Immigration and Asylum Act 2002. However it is significantly different in substance. Whereas section 106(2) of that Act establishes specific powers or duties which must or may be adopted by the Procedure Rules for the Asylum and Immigration Tribunal (AIT), clause 184(3) provides vague powers to adopt Procedure Rules. These include a power to "*include provision in the form of presumptions*" (clause 184(3)(d)). This would appear to enable the Procedure Rules to interfere with the ordinary burden or standard of proof and the independence of decision-making by the immigration judiciary. It is also unclear why the Procedure Rules should be capable of conferring discretion on anyone but the AIT (clause 184(3)(b)). The Explanatory Notes (paragraph 348) provides no assistance on these points.

Clause 185 receives a bland description in the Explanatory Notes (paragraph 349) but is a significant new departure in criminalizing failures to attend the AIT to give

evidence or produce a document. Without sight of the Procedure Rules to which it relates it is not possible to assess the impact of this clause; but as drafted it appears uneven as a failure to produce a document by the Secretary of State is unlikely (under current arrangements) to arise by virtue of a failure to attend.

Clause 186 provides for Practice Directions, and clause 186(2) appears designed to endorse the current practice on the part of the AIT of issuing reported, starred and country guidance determinations, which are distinguished from all other determinations. There are significant problems with this regime.

Clause 187 reproduces section 107, Nationality, Immigration and Asylum Act 2002.

Clause 188

As currently drafted, clause 188 envisages no onward appeal from the decision of the Asylum and Immigration Tribunal – see clause 188(3). It is expected that this merely reflects that the onward appeal provisions are under consideration, and that clause 188 will need amendment when the provisions are ready to be included. As it stands, clause 188 is plainly and seriously defective.

Part 11 – General Supplementary Provisions:

Simplification would be better furthered by avoiding a Part with such a general title and including such variety of provisions. Some of the provisions in Part 11 (e.g. those relating to offences) might be better moved to other Parts of the draft Bill. Other provisions might (as appears envisaged by Schedule 3 – see discussion, below) be best set out in distinct Parts, even if this is to mean that the draft Bill has Parts with only one or two provisions in them.

Clause 189

The Explanatory Notes (paragraph 361) indicate that this clause will replace what is currently the duty to issue a code of practice in section 21, UK Borders Act 2007. Whereas it constitutes a significant improvement on that section, it is to be noted that it is not the adoption of the section 11, Children Act 2004 duty by the UK Border Agency that had been called for by the House of Lords in amending the Children and Young Persons Bill[6]. This is significant – especially in view of the important guidance that has been established under section 11 from which guidance and learning the UK Border Agency would continue to be exempted.

In clause 189, the words "*, and any function in relation to immigration conferred by or by virtue of this Act on a designated official,*" are superfluous if, as is expected, a designated official would merely be carrying out functions of the Secretary of State. The words "*who are in the United Kingdom*" restrict the duty so that children who are subject to UK immigration procedures and powers while overseas (e.g. at juxtaposed controls and entry clearance posts) are not protected by the safeguarding duty here. These words should be deleted.

[6] *Hansard*, HL Report 17 Mar 2008 : Column 40

Clauses 190 and 191

Section 42, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, sections 51 to 52, Immigration, Asylum and Nationality Act 2006 and section 20, UK Borders Act 2007 have previously extended the powers of the Secretary of State to raise revenue by charging fees in relation to immigration and nationality matters. Clauses 190 and 191 replace these provisions, but extend them still further in several ways. As the Explanatory Notes state (paragraph 365) "*Subsections (3) to (6) replace section 42 of the AI(TC)A 2004, but are wider in application. Unlike section 42 of the AI(TC)A 2004, the power in this Bill to charge more than full cost is not limited to particular types of application, and does not necessarily have to reflect a benefit to the applicant*".

Clause 190(1) and (4) refer generally to "*applications, services or processes*" whereas previously section 51(2), Immigration, Asylum and Nationality Act had provided some limitation in respect of provision of services, advice or information in that a fee was only chargeable where these were provided "*on request*".

Clause 190(3)(b) allows a fee to be set by way of "*an hourly rate or other factors specified in the order*". A fee by way of hourly rate would appear to encourage the Secretary to tarry over applications – something for which the UK Border Agency and its predecessors have a reputation. The Explanatory Notes (paragraphs 362 to 368) offer no statement on this.

Clause 190(5)(d) and (6) are especially vague; and in clause 190(5) the inclusion of (d) renders the preceding list otiose.

Clause 190(7)(d) constitutes an addition to the power currently contained in section 51(3), Immigration, Asylum and Nationality Act 2006.

Clause 190(8) envisages charges being made against people who are removed from the UK (see also the discussion on clause 46, above). Whereas the clause allows ("*may*") the Secretary of State to choose only to seek recovery of costs or a fee in respect of removal if the person seeks to return to the UK, there is no requirement for the Secretary of State to choose to be so limited.

The Explanatory Notes (paragraph 368) state that clause 190(9) allows the Secretary of State to charge a fee when dealing with an application that is to be decided on behalf of a foreign jurisdiction (e.g. a Crown Dependency).

Clause 190(10) envisages the Secretary of State charging an individual for costs that she has not incurred or will not incur (costs "*of any other person*"). The Explanatory Notes (paragraphs 362 to 368) offer no statement on this.

On fees, see also clause 203(1)(f) and (g), (3) and (4).

Clause 192

This clause replaces what is currently section 120, Nationality, Immigration and Asylum Act 2002. However, it does not apply when permission is cancelled.

The purpose of the clause is its relation to the one-stop nature of appeals. It relates specifically to clause 179; and it would be best relocated with clause 179 in Part 10.

Clause 193

This clause replaces section 31, Immigration and Asylum Act 1999 in providing a defence to certain offences. The Explanatory Notes (paragraph 375) state that the defence "*is modelled on Article 31(1) of the Refugee Convention*". However, the clause remains incompatible with that Convention. Clause 193(4) or its equivalent is not to be found in Article 31(1), and the leading judgment of a UK court on this particular matter expressly found that such a requirement was not compatible with that Article[7]. Further, as the House of Lords has recently ruled[8], the current list of offences in section 31 of that Act, which is essentially replicated in clause 193(1) and (2), do not cover all offences for which the Article 31 defence ought to be available.

Clause 193 includes some significant changes from section 31 of the Act. In particular clause 193(6) will assist criminal courts where the defence is raised so that the court is not tasked with seeking to determine refugee status or required or invited to await a conclusion on the determination of refugee status by an appeal to the Asylum and Immigration Tribunal (AIT). However, this subclause may be improved by removing the focus on when the Secretary of State has refused to grant refugee permission. If a grant of refugee permission is made, that should be conclusive. If a decision has not been reached, the individual ought to be at least as well placed as another individual whose refugee claim has been refused by the Secretary of State.

Clause 193 could also be improved (though there is no international obligation so to do) by extending the protection to non-refugees with protection claims.

See also clause 203(1)(h).

Clauses 194 to 198

These clauses relate to offences. Some of these clauses relate exclusively to offences in Part 7. Others also relate to offences in Parts 2 (clause 30), 6 (clauses 86-89, 92, 93), 9 (clause 160) and 10 (clause 185). The draft Bill would be improved if these provisions were moved – either to Part 7 or to a new and distinct Part.

Clause 194 relates specifically to offences of employing illegal workers (clause 160) and assisting unlawful immigration to an EU State or other Schengen State (clause 106). It provides for circumstances in which an organisation and its officers or members (if these manage the organisation) or a partnership and its partners may be liable for these offences.

[7] see *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667, 678
[8] see *R v Asfaw* [2008] UKHL 31, paragraph 28

Clause 195 provides for extended periods within which certain immigration offences may be brought. The drafting is extraordinarily complex. Essentially it allows for prosecutions to be brought within 6 months of the offence being committed or the offence coming to the attention of a specified officer, but in the latter case the prosecution can only be brought if done so within a period of 42 months of the offence being committed. It would appear to allow an officer to authorise a prosecution despite a colleague knowing of the offence previously and not having taken action in time.

The Explanatory Notes (paragraph 397) merely state that clause 197 will ensure that immigration powers in the draft Bill take precedence over prosecutions for offences in the draft Bill. This would appear to mean that a foreign trafficker may be removed under immigration powers despite an ongoing police enquiry or prosecution against the trafficker. Moreover, the "*proceedings*" are not defined, in which case the clause may have a much wider consequence than is articulated in the Explanatory Notes. For example, a victim of trafficking seeking compensation (whether in a civil action against a trafficker; or in a claim brought before the Criminals Injuries Compensation Authority) might be removed despite those proceedings being ongoing.

Clauses 199 to 201

Clause 200 provides for deemed giving of notice by sending the notice to a last known address. Clause 200(7) and (8), however, provides some mitigation of the potential disastrous consequences of this by requiring a notice to be given "*as soon as is reasonably practicable*" to a person who has no such address or was not using that address at the time, but who is subsequently located. Clause 200(3) could be improved by requiring service on both the representative and individual, where there is a representative on record.

In clause 200(6), (c) should be deleted. Where a child is the principal in litigation and is not in the UK with his or her parent(s), or his or her parent(s) are not capable of or suitable for giving instructions, provision should be made for a guardian.

Part 12 – Definitions for the Purposes of the Act:

Clause 205

Clause 205(3) provides a definition of "*a refugee*". The definition given there is incompatible with the 1951 Refugee Convention. A person does not become a refugee at the time of his or her recognition by the Secretary of State (or anybody else); but is a refugee at the time when he or she leaves his or her country of origin in fear of persecution there; or at the time he or she becomes in fear of persecution (if he or she is already outside that country).

Clause 205(5) appears problematic insofar as this envisages restriction of the reach of human rights matters by provisions in the Immigration Rules. This may simply not be human rights compatible.

Clause 205(6) precludes the making of a "*protection application*" unless the person is in the UK. It will be necessary to consider the provision to be made in the Immigration Rules in respect of the Human Rights Convention (see clause 205(5)) and "*family life applications*" (clause 206) to ensure that protection-related and other human rights are properly delineated for these purposes. There is a further concern as to how this provision may interact with the cancellation provisions where a person's permission (on refugee or other protection-related grounds) is cancelled when he or she is outside of the UK – see also discussion on clauses 169 and 170 (above).

Clause 207

No commentary on the provisions on this draft Bill could be complete without noting the meaning of "*ship*" given in this clause as "*any floating structure*".

Part 13 – Final Provisions

Clause 209

If a sum received in connection with a provision of the draft Bill would include a deposit of money under clause 64 (see discussion, above), the requirement for sums to be paid into the Consolidated Fund needs reconsideration.

Schedules 1 and 2

These Schedules relate to the Asylum and Immigration Tribunal and appeals. For discussion of these matters see Part 10 (above).

Schedules 3 and 4:

Schedule 3 is helpful, though not entirely clear. It appears to envisage certain provisions in other immigration Acts being retained.

Curiously, Schedule 3 appears to envisage that what is Part 11 should be broken down further into separate Parts on Children, Fees, Procedure and Notices and Directions etc., in respect of which there appears to be some sense. Part 11 (see discussion, above) is currently a hotchpotch of various provisions – including provisions relating to offences which would seem better suited to Part 7; and which do not feature in the scheme envisaged by Schedule 3.

Schedule 4 is a very welcome and useful innovation.