



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Borders, Citizenship and Immigration Bill

Ninth Report of Session 2008-09

*Report, together with formal minutes and
written evidence*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Rebecca Neal (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), Emily Gregory and John Porter (Committee Assistants), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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Summary

In this report, we welcome the introduction of the new positive duty to safeguard and promote the welfare of children in the discharge of immigration, asylum, nationality and customs functions. This is a human rights enhancing measure which is a long overdue reversal of the Government's previous policy, which excluded children subject to immigration control from the protection of the UN Convention on the Rights of the Child. We will be looking carefully for evidence that this welcome change in policy will now make a practical difference to the many and well-documented human rights problems suffered by children in the UK who are subject to immigration control. We welcome the fact that the statutory guidance on the new duty will be joint guidance issued by the Home Office and the Department for Children Schools and Families and will closely follow the existing Children Act guidance.

We also welcome the application of the procedural safeguards in the Police and Criminal Evidence Act 1984 to investigations conducted by, and persons detained by, immigration officers and customs officials.

The Bill provides for judicial review applications relating to immigration or nationality decisions to be transferred from the High Court to the Upper Tribunal. We recommend that a means be devised for ensuring that judicial reviews which are of sufficient significance and complexity, including those in which important human rights are at stake, are heard by a High Court judge.

The Bill implements the Government's proposals on "earned citizenship" by tightening the requirements to be met for the acquisition of British citizenship by naturalisation, following the review of citizenship by Lord Goldsmith. Human rights law does not confer any free-standing right to be a citizen of any country, but we have a number of concerns about the proposals.

Firstly, a person who is given probationary citizenship leave will be ineligible for 15 different types of benefit that are available to those with indefinite leave to remain. We ask the Government to reconsider its position. Secondly, we are concerned that the proposed community activity requirement may have a discriminatory effect on groups who are unable to undertake such activity for various reasons, such as physical or mental disability, caring responsibilities, or being in full time work. We call on the Government to publish in draft the regulations on this issue for further scrutiny. We also have concerns about possible retrospectivity and the possible impact on refugees.

We also repeat our call for the repeal of section 9 of the Asylum and Immigration (Treatment of Claimants etc.) Act, which provides for welfare support to be withdrawn from families if they are considered to have failed to take reasonable steps to leave the UK voluntarily.

The current Bill is a more limited measure than the Immigration Simplification Bill which was initially expected to be introduced this session and which is now due to be published in draft later this year.

Government Bills

Bills drawn to the special attention of each House

1 Borders, Citizenship and Immigration Bill (HL)

Date introduced to first House	14 January 2009
Date introduced to second House	
Current Bill Number	HL Bill 29

Background

1.1 The Borders, Citizenship and Immigration Bill is a Government Bill introduced in the House of Lords on 14 January 2009. It had its Second Reading on 11 February 2009 and completed its Committee stage on 10 March 2009. It is scheduled to commence its Report stage on 25 March 2009.

1.2 The Government's Draft Legislative Programme announced the Government's intention to bring forward in this session an Immigration Simplification Bill, following publication of the partial draft Immigration and Citizenship Bill in July 2008. We issued a call for evidence on the Draft Legislative Programme, indicating that the Immigration Simplification Bill was likely to be one of the Committee's main priorities for legislative scrutiny this session, as it was likely to raise a number of significant human rights issues. We received a large number of submissions on the partial draft bill. We are grateful to those who sent us evidence.

1.3 In the event, the Bill brought forward by the Government is very much narrower in scope than was envisaged in the Government's Draft Legislative Programme because it no longer includes provisions for the simplification of immigration legislation. The Government's Summary of Consultation on the Draft Legislative Programme states that the Government is committed to the comprehensive reform of immigration law, but explains that this is a major undertaking which it is more important to do well than to do quickly.¹ The Government says that it will build on the pre-legislative scrutiny of the partial draft bill and will bring forward a full draft bill at a later date.

1.4 The main relevant purposes of the current Bill are to provide the legislative framework for immigration officers and officials of the Secretary of State to exercise revenue and customs functions exercised hitherto by Her Majesty's Revenue and Customs, including provision about the use and disclosure of customs information; to revise the qualifying criteria for naturalisation as a British citizen; to enable judicial review applications in asylum, immigration and nationality matters to be transferred into the Upper Tribunal of the unified tribunal system established under the Tribunals, Courts and Enforcement Act 2007; and to impose a duty on the Secretary of State to make arrangements to ensure that certain immigration, asylum and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children in the UK.

¹ *The Government's Draft Legislative Programme: Summary of Consultation*, Cm 7561 (December 2008) at p. 13.

1.5 Much of the evidence we received on the Government's simplification bill is not relevant to the much narrower issues raised by this Bill. We publish it nevertheless with this Report, in order to put it in the public domain and to help inform debate on the draft simplification Bill which the Government intends to publish later this session.

1.6 We wrote to the Minister on 12 February 2009 to ask a number of questions about the human rights compatibility of the Bill.² The Minister replied on 23 February.³ We are grateful for his prompt response.

Explanatory Notes

1.7 The Government considers the Bill to be compatible with human rights. The Explanatory Notes to the Bill explain the Government's view in some detail in relation to data use and sharing, but in very short form in relation to other provisions which engage human rights, and in some cases do not consider that certain provisions engage human rights at all when we would consider that they do.⁴

Significant human rights issues

(1) Positive duty to safeguard and promote the welfare of children

1.8 The Bill imposes a positive duty on the Secretary of State to make arrangements to ensure that immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.⁵ A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State.⁶ Children means anyone under 18.⁷

1.9 The Secretary of State is also required to make arrangements to ensure that any services provided by another person pursuant to arrangements made by the Secretary of State and relating to the discharge of immigration, asylum, nationality or customs functions are provided having regard to the need to safeguard and promote the welfare of children.⁸ The duty to safeguard and promote the welfare of children therefore also applies to private contractors performing immigration, asylum, nationality and customs functions.

1.10 In our report on the Bill which became the Children Act 2004, we criticised the exclusion of immigration and asylum agencies from the new duty introduced by that Act⁹ to have regard to the need to safeguard and promote the welfare of children.¹⁰ The Government justified that exclusion on the ground that such a duty may conflict with the

² Ev 1

³ Ev 3

⁴ EN paras 202-242.

⁵ Clause 53(1)(a). The Director of Border Revenue is placed under the same duty: Clause 53(4).

⁶ Clause 53(3).

⁷ Clause 53(6).

⁸ Clause 53(1)(b).

⁹ Section 11 Children Act 2004.

¹⁰ Nineteenth Report of 2003-04, *Children Bill*, HL HC, paras 93-97.

need to maintain an effective immigration control, relying on its immigration reservation to the UN Convention on the Rights of the Child.¹¹

1.11 In 2008, however, the Government announced that it was withdrawing its immigration reservation to the UN Convention on the Rights of the Child. Following the removal of the reservation the Committee asked the Home Secretary what guidance will be issued to the frontline decision-makers in the immigration and asylum field explaining the practical implications of removing the reservation.¹² The Home Secretary replied by letter dated 10 November 2008 that “no additional changes to legislation or significant amendments to guidance and practice are currently envisaged.” In view of that indication, we asked the Minister what arrangements the Government proposes to make to ensure that immigration and asylum functions are discharged having regard to the need to safeguard and promote the welfare of children.

1.12 The Minister replied that the new duty means that

- in enforcing immigration laws, the Home Office will have regard to the need to keep children safe from harm and promote their welfare (including making contact, on their behalf, with those who have a duty or role in ensuring their welfare where there are signs that a particular child is at risk of harm);
- throughout the immigration system, children will be treated with sensitivity and on the basis that every child does matter, regardless of his or her immigration status;
- the views of children will be taken into account where appropriate;
- UK Border Agency staff will be trained in specific children’s issues (including communicating with children, safeguarding children, and identifying trafficking, smuggling and exploitation of children).

1.13 The Minister also indicated that the statutory guidance which will underpin the new duty will be joint guidance issued by the Home Office and the Department for Children, Schools and Families. It will build on the existing UK Border Agency Code of Practice to Protect Children from Harm and follow as closely as possible the statutory guidance on making arrangements under s. 11 of the Children Act 2004.¹³

1.14 During the Bill’s Committee stage, the Minister said “we have no intention of treating children in the immigration system any differently from other children in the UK. Quite the opposite ... every child matters as much if they are subject to immigration control as if they are British citizens.”¹⁴ This is a most welcome change in policy. Both we and our predecessor Committee have highlighted serious human rights concerns about the treatment of children in the UK subject to immigration control, including, for example, the inappropriate use of detention,¹⁵ the effect on them of heavy handed enforcement methods such as dawn raids and forced removals, and the use of inappropriate methods for testing

¹¹ *Government’s Response to the Committee’s Nineteenth Report of Session 2003-04: Children Bill*

¹² Q103 28 October 2008, Second Report of 2008-09, Ev24.

¹³ See Immigration Law Practitioners Association Ev 60

¹⁴ Lord West, HL Deb 4 March 2009 col. 826.

¹⁵ See also Bail for Immigration Detainees Ev 14-15, British Red Cross Ev 18, Medical Justice Ev 99, Refugee Children’s Consortium Ev 132-4 and UNICEF UK Ev 156-8.

their age.¹⁶ We have consistently identified as one of the root problems the fact that children subject to immigration control are treated less favourably than UK national children because they have been excluded from the protection of the UN Convention on the Rights of the Child by the UK's immigration reservation. The provisions concerning child welfare in this Bill provide the opportunity to begin to address some of those deep-rooted human rights problems experienced by children who are subject to immigration control.

1.15 We welcome as a human rights enhancing measure the introduction of the new positive duty to safeguard and promote the welfare of children in the discharge of immigration, asylum, nationality and customs functions: it is a significant step in the better protection of children's rights following the removal of the UK's reservation to the Convention on the Rights of the Child. We welcome the Government's express acceptance that every child matters as much if they are subject to immigration control as if they are British citizens, which is a long overdue reversal of the Government's previous policy when it excluded children subject to immigration control from the protection of the UN Convention on the Rights of the Child. We will be looking carefully for evidence that this welcome change in policy will now make a practical difference to the many and well-documented human rights problems suffered by children in the UK who are subject to immigration control.

1.16 We also welcome the fact that the statutory guidance envisaged by the Bill will be joint guidance drawn up by both the Home Office and the Department for Children, Schools and Families and will follow as closely as possible the statutory guidance on making arrangements under s. 11 of the Children Act 2004. We accept that there should be full consultation of all relevant stakeholders before such guidance is finalised, but we recommend that it be published in draft before the Bill completes its passage through Parliament so that parliamentarians can subject it to scrutiny.

(2) Application of PACE safeguards to investigations and detention by immigration and customs officers

1.17 The Bill, in clause 23 states that the Secretary of State may by order provide for the application of Police and Criminal Evidence Act ("PACE") provisions (and their equivalent in Northern Ireland) to investigations conducted by, and persons detained by, immigration officers and customs officials, subject to such modifications as the order may specify.¹⁷

1.18 In our report on the Bill which became the UK Borders Act 2007, we recommended that the Bill be amended to provide that the relevant PACE Codes of Practice apply to the new powers of detention, search and seizure given to immigration officers by that Bill.¹⁸ The Government refused to do so, however.

1.19 The current Bill now appears to provide the Secretary of State with the power to do so in future. It does not, however, require the Secretary of State to do so. We asked the Secretary of State whether the intention behind this provision is that the safeguards

¹⁶ See e.g Treatment of Asylum Seekers Report 2006; UN Convention on the Rights of the Child Report, 2003.

¹⁷ Clause 23. Clause 24 makes equivalent provision for Scotland, where PACE does not apply.

¹⁸ Thirteenth Report of 2996-07, *Legislative Scrutiny: Sixth Progress Report*, HL 105/HC 538 at paras 1.6-1.16.

contained in the relevant PACE Codes will be made to apply to customs and immigration officers' powers to investigate and detain, and, if so, which Codes the Secretary of State has in mind and what sorts of modifications to those Codes are envisaged. We also asked why the Bill only gives the Secretary of State a power, rather than a duty, to do so.

1.20 The Government has amended the Bill so as to provide on its face for the application of relevant PACE safeguards to criminal investigations and persons detained by designated customs officials.¹⁹ The Government also states its commitment to make provision by order under clause 23 of the Bill for the application of those safeguards and protections in the Codes relevant to criminal investigations and detention by immigration officers.²⁰ **We welcome this provision and intended provision for the application of the relevant PACE safeguards.**

1.21 The Government maintains its previous position, however, that the application of the PACE Codes to the powers of detention, search and seizure given to immigration officers in support of the police by the UK Borders Act 2007 is neither appropriate nor necessary, because those functions are in support, not in place, of the police.

(3) Judicial review and access to court

1.22 The Bill provides for judicial review applications relating to immigration or nationality decisions to be transferred from the High Court to the Upper Tribunal.²¹ The Upper Tribunal is a superior court of record, whose President is a High Court Judge, but the other members are not High Court Judges. The Upper Tribunal will be comprised of judges and expert members sitting in a tribunal chaired by a judge. The judge members are made up of former legal chairs of appellate tribunals that have now been abolished, or county court judges. The effect of the provision in the Bill therefore is that in future decisions in matters as important as challenges to deportations and other cases where what is at stake might be liberty, torture or even death, will be decided by judges below the level of a High Court Judge.

1.23 The Tribunals, Courts and Enforcement Act 2007 provides for the transfer of judicial review applications to the Upper Tribunal of the new unified Tribunal Service, which came into being on 3 November 2008. However, judicial review applications relating to immigration or nationality were excluded from the power to transfer.

1.24 During the passage of the Tribunals, Courts and Enforcement Act 2007, concerns were expressed in Parliament about the transfer of immigration and nationality applications to the Upper Tribunal in view of the complex and contentious nature of many of those applications.²² The Tribunals, Courts and Enforcement Bill as introduced included power for the Executive to remove the exclusion by order, but concerns were expressed that Parliament should be able to review the performance and capacity of the new unified Tribunal regime before approving the transfer of such a contentious jurisdiction, and the Government amended the Bill so that the exclusion could not be

¹⁹ Clause 22.

²⁰ Ev 3

²¹ Clause 52.

²² In debate, these were described by Lord Lloyd of Berwick as "*at the most sensitive end of judicial review*"; and Baroness Ashton acknowledged that sensitivity in her response on behalf of the Government: HL Deb 13 December 2006 : Cols GC68-69.

removed other than by primary legislation. Baroness Ashton of Upholland, on behalf of the Government, accepted that the removal of the exclusion should not be contemplated prior to there being an opportunity to review how the Upper Tribunal was working in practice, and the clause was dropped from the bill.

1.25 We wrote to the Government asking how it proposes to ensure in practice that immigration and asylum cases involving the risk of serious human rights violations such as deportation to torture or death are decided by judges of sufficient seniority and with the opportunity of an oral hearing.

1.26 The Government, in response, points out that the President of the Upper Tribunal is a Lord Justice of Appeal; that High Court judges and judges of the Court of Session can be requested to sit in the Upper Tribunal; and that judicial review applications made to the Upper Tribunal must be presided over by a judge of the High Court or the Court of Appeal, or a judge of the Court of Session, or such other persons as may be agreed between from time to time between the lord chief justice and the Senior President of Tribunals.

1.27 The Minister also made additional arguments in defence of the clause during the Bill's Committee stage.²³ He pointed out that quite a lot of pressure for the clause has come from the judiciary, because the large volume of immigration judicial reviews is creating a huge, significant and increasing burden on the higher courts. The provision in the Bill does not remove access to the remedy of judicial review, because the Upper Tribunal has exactly the same jurisdiction in judicial review matters as the higher courts and may grant the same kinds of relief.

1.28 We accept that there may be good reason why many immigration judicial reviews that are currently heard by the High Court, and which do not raise issues of any great difficulty or complexity, should be transferred to the Upper Tribunal. We remain concerned, however, that immigration and asylum cases which raise complex issues of fact and law, or in which human rights such as life, liberty or freedom from torture are at stake, should continue to be decided by judges of the standing of a High Court Judge. The Bill's transfer of immigration and nationality cases to the Upper Tribunal does not guarantee this: a High Court judge *may* sit on the Upper Tribunal, but this is not guaranteed.

1.29 We recommend that a means be devised for ensuring that judicial reviews which are of sufficient significance and complexity, including those in which important human rights are at stake, are heard by a High Court judge, by, for example, developing a sifting mechanism and ensuring that the more significant and complex cases either remain in the High Court or are heard by a High Court judge in the Upper Tribunal.

1.30 The Joint Council for the Welfare of Immigrants (JCWI) has also drawn our attention to a further restriction on the right of access to court as a consequence of the Bill's provisions transferring judicial reviews relating to immigration or nationality from the High Court to the Upper Tribunal. Sir Richard Buxton, until recently a Lord Justice of Appeal in the Court of Appeal, has provided JCWI with a legal opinion in which he points out that if immigration and nationality judicial reviews are transferred to the Upper Tribunal, the Lord Chancellor will have the power, under a provision in the Tribunals,

²³ HL Deb 4 March 2009 col. 801.

Courts and Enforcement Act 2007,²⁴ to limit appeals from the Upper Tribunal to the Court of Appeal to cases where the Court of Appeal considers (a) that the proposed appeal would raise some important point of principle or practice, or (b) that there is some other compelling reason for the relevant appellate court to hear the appeal. This is a very restrictive test for leave to appeal, originally designed to limit “second appeals”, that is, appeals against decisions which are themselves made on appeal from the original decision.

1.31 As Sir Richard Buxton points out, immigration cases in the domestic courts almost always engage the UK’s obligations under international conventions, including the Refugee Convention and the ECHR. If the “second appeal” restriction is imposed on appeals from the Upper Tribunal to the Court of Appeal that the Upper Tribunal has misinterpreted or misapplied the UK’s human rights obligations.

1.32 We agree with the opinion of Sir Richard Buxton that in a case where there is a real prospect that the decision of the Upper Tribunal is in breach of the UK’s international human rights obligations, that issue demands the attention of a court of the stature of the Court of Appeal. We recommend a simple amendment to the Bill to ensure that the Lord Chancellor’s power to impose the restrictive “second appeal” test on appeals to the Court of Appeal is not available in immigration and nationality cases:

Page 44, line 19, insert new sub-clause (4) in clause 52: “(4) Section 13(6) of the Tribunals, Courts and Enforcement Act 2007 does not apply in relation to immigration and nationality appeals from the Upper Tribunal.”

(4) “Earned citizenship”

1.33 The Bill implements the Government’s proposals on “earned citizenship” by tightening the requirements to be met for the acquisition of British citizenship by naturalisation.²⁵ These provisions in the Bill follow the Government’s Green Paper, *The Path to Citizenship*, published in February 2008 following Lord Goldsmith’s review.²⁶ They make changes to nationality law to allow the introduction of “earned citizenship”. Ministers have explained that the Government’s “principal aim is to reform the path to citizenship by creating three clear routes to achieving it and to ensure that it is earned. The three routes are clear: work, family and the protection route. We require migrants to pass through successive stages on their journey to citizenship, and at each stage they will need to demonstrate that they have earned the right to progress.”²⁷

1.34 On Second Reading, the Minister said:²⁸

We will ensure that those who want to stay earn the right to do so, learn to speak English and play by the rules. Those who do not do so will not be allowed to become citizens. ... We want to encourage those with the right values to become citizens. With rights come responsibilities, and those responsibilities must first be demonstrated, ensuring that the benefits of British citizenship are earned.

²⁴ Section 13(6)

²⁵ Clauses 39-47.

²⁶ *The Path to Citizenship: Next Steps in Reforming the Immigration System*, (February 2008).

²⁷ Lord Brett, HL Deb 2 March 2009 col. 513.

²⁸ Lord West, HL Deb 11 February 2009 col. 1130.

1.35 With this aim in mind, the Bill sets out the requirements that must be met for naturalisation as a British citizen. Migrants will continue to have to demonstrate sufficient knowledge of the English language and of life in the UK. There will be minimum time periods during which those who are here as economic migrants will need to continue working and those here as family members will need to remain in a subsisting relationship. Those who have demonstrated “active citizenship” (meaning engagement in the wider community) will be able to speed up their path to citizenship.

1.36 The Explanatory Notes state that the Government does not believe that these provisions concerning citizenship raise any ECHR issues.²⁹ We therefore do not have the benefit of any human rights analysis by the Government concerning the impact of its proposals. It is correct to say that human rights law does not confer any free-standing right to be a citizen of any country. Nevertheless, the provisions in the Bill on earned citizenship do in our view raise a number of significant human rights issues.

Access to benefits

1.37 The Government’s publicity accompanying the Bill made clear that it is an important part of its citizenship proposals that non-citizens will not qualify for certain benefits: the Home Office press release issued on the day the Bill was published (15 January 2009) says, for example:

Under the new system full access to benefits and social housing will be reserved for citizens and permanent residents – which means if you are not a citizen full access to benefits will not be allowed.

1.38 This aspect of the Government’s earned citizenship proposals is not on the face of the Bill: it remains to be implemented by regulation. It does, however, potentially raise Convention compatibility issues: the denial of certain emergency benefits on the ground of nationality may require justification under Article 14 ECHR in conjunction with Article 1 Protocol 1.³⁰

1.39 We therefore asked the Government to provide us with more detail of precisely which benefits non-citizens will not be fully entitled to, and for its justification where it proposes differential treatment of non-nationals.

1.40 In response the Government states that it recognises that migrants make a significant contribution to this country, both economically and socially, but it has been a longstanding policy that those entering the UK on the “work” or “family” routes should be expected to support themselves without being able to access non-contributory social security benefits or local authority housing. The Government believes that this policy should be strengthened and clarified so that everyone is clear about which benefits can be accessed at each stage of the process and understands that full access will be withheld until a migrant completes the path to citizenship.³¹

²⁹ EN para. 222.

³⁰ See e.g. *Gaygusuz v Austria* (1997) 23 EHRR 364 (denial of emergency assistance to non-national in breach of Article 14 in conjunction with Article 1 Protocol 1).

³¹ Lord Brett, HL Deb 2 March 2009, col. 509.

1.41 The Bill itself, however, makes no change to the underlying legislation on access to benefits for migrants. Persons subject to immigration control are already subject to restrictions on the benefits to which they are entitled. The Government has provided a list of 15 benefits for which persons subject to immigration control are ineligible.³² These restrictions do not apply to those on the “protection route” to citizenship (including refugees), who have full access to benefits and services as soon as they are recognised as being entitled to protection. All migrants, including those on the family and work routes to citizenship, have full access to national insurance-contribution based benefits (e.g. maternity allowance) on the same basis as British citizens: they are eligible for them as soon as they have built up sufficient contributions.

1.42 A person who is granted limited leave to enter or remain in the UK will have a condition attached to their leave, that they do not have recourse to public funds. They are therefore subject to the benefit restrictions outlined above. However, persons with indefinite leave to enter or remain are not subject to those restrictions.

1.43 We accept that the Bill makes no change to the underlying position in relation to migrants’ eligibility for benefits. However, we are concerned about the fact that the effect of the Bill is to extend the time that it takes to get to applying for actual citizenship by a year and in the meantime restrictions on access to benefits and services apply that did not previously apply to those with indefinite leave to remain who were on the path to citizenship.³³ A person who is given probationary citizenship leave will therefore be ineligible for 15 different types of benefit that are available to those with indefinite leave to remain. This would mean, for example, that a woman who is on probationary citizenship who become homeless because she is forced by domestic violence to leave her home, would be ineligible for any homelessness assistance.³⁴ **We recommend that the Government reconsider its position that those with probationary citizenship leave are subject to the same restrictions on access to benefits and services as all others subject to immigration control except those with indefinite leave to remain. We await the Government’s response and may wish to return to this issue.**

Community activity requirement

1.44 The Bill provides that the qualifying period for naturalisation as a British citizen can be reduced by two years if the applicant for citizenship meets “the activity condition”.³⁵ The applicant meets the activity condition if the Secretary of State is satisfied that that he or she has “participated otherwise than for payment in prescribed activities”, or is to be treated as having so participated.³⁶

1.45 This part of the Bill contains very wide powers to make regulations which have the potential to interfere with the right to respect for private life, and the right not to be

³² Income-based jobseekers’ allowance; income related allowance under Part 1 of the Welfare Reform Act 2007; attendance allowance; state pension credit; severe disablement allowance; disability living allowance; carer’s allowance; income support; tax credits; a social fund payment; child benefit; housing benefit; council tax benefit; social housing; or homelessness assistance.

³³ Immigration Advisory Service Ev 28, Joint Council for the Welfare of Immigrants Ev 69, Migrants Rights Network Ev 105, and Northern Ireland Human Rights Commission Ev 120-122.

³⁴ Chartered Institute of Housing etc. Ev 19-21

³⁵ Clause 41(1), inserting new para. 4B into Schedule 1 of the British Nationality Act 1981.

³⁶ New para. 4B(5).

discriminated against in the enjoyment of that right. We have repeatedly made clear in our reports that where Bills confer wide powers capable of being exercised incompatibly with human rights, minimum safeguards such as basic criteria for the exercise of the power should be contained on the face of the Bill.

1.46 We asked the Government to provide more detail of how the community activity requirement will be implemented in practice in a non-discriminatory way.³⁷ We also asked whether the Government will provide more safeguards on the face of the Bill where regulation making powers can be exercised in ways which interfere with human rights.

1.47 The Government replied that it has been very careful to develop its “active citizenship” proposals in such a way as to ensure that they are not discriminatory to any person or group. Firstly, the Government argues that active citizenship will not be a compulsory requirement. Migrants can choose not to undertake any form of active citizenship, but it will take them two years longer to qualify for citizenship. Second, active citizenship will be designed so that migrants will be able to fulfil the requirements even where they have significant commitments. The Government has established a “design group” involving local authority and voluntary sector representatives to advise it on the practical operation of active citizenship, including the level of commitment migrants should be expected to demonstrate, and the Government will work with the design group to ensure that the active citizenship proposal is not implemented in a discriminatory manner.

1.48 It recognises that in certain circumstances, such as severe physical disability, a migrant will simply be unable to undertake any of the active citizenship activities, which is why the Bill allows regulations to be made which treat specified types of persons as having fulfilled the activity condition even though they have not. It does not therefore consider the proposals on active citizenship to be inherently discriminatory, nor does it believe that there is anything to suggest that the making of these regulations on earned citizenship would lead to a breach of the UK’s human rights obligations. It therefore considers it unnecessary to include express safeguards on the face of the Bill.

1.49 We are concerned that the proposed community activity requirement may have a discriminatory effect on groups who are unable to undertake such activity for various reasons, such as physical or mental disability, caring responsibilities, or being in full time work. We are not reassured by the power to make regulations which treat specified types of persons as having fulfilled the activity condition even though they have not. We recommend that the exemptions are included on the face of the bill. Failing that, we recommend that the Government publish the regulations in draft, during the passage of the Bill, to enable Parliament to scrutinise them properly for any possible discriminatory effect.

Retrospectivity

1.50 The Bill does not make clear what the effect of the new provisions will be on those whose applications for citizenship are pending on the date at which the Act comes into force, or on others further down the path to citizenship, such as those with limited leave to

³⁷ Immigration Advisory Service Ev 28 and Joint Council for the Welfare of Immigrants Ev 68

remain who have not yet qualified for indefinite leave to remain. There are no transitional arrangements.

1.51 We expressed our concern about the injustice done by retrospective changes to rules which affect migrants' eligibility to settle in the UK in our report on the Highly Skilled Migrants Programme.³⁸ Those concerns were subsequently upheld by the High Court and the Government was forced by court order to do what we had sought to persuade them to do in Parliament: honour the legitimate expectations of those who had planned their future lives in the UK on the basis of the law as it stood when they came to this country.

1.52 The Minister told the House of Lords that “we have yet to make a final decision on how our proposals will impact on people who are already in the immigration system.”³⁹ He promised to provide a note explaining to whom the transitional arrangements will apply. **We urge the Government not to repeat the unedifying spectacle of riding roughshod over migrants' legitimate expectations of settlement, which undermined many migrants' faith in the UK's commitment to basic fairness.**⁴⁰ **We recommend that clear transitional provisions are made which meet the legitimate expectations of those already in the system.**

Compatibility with Refugee Convention

1.53 Article 34 of the Refugee Convention requires that States “expedite naturalisation proceedings.” The UNHCR has expressed its concern that the tighter requirements for naturalisation contained in the Bill make it more difficult in practice for refugees and those with humanitarian protection to qualify for naturalisation and may in fact operate to impair their integration.⁴¹

1.54 The Bill would require all refugees and those with humanitarian protection to pass a qualifying period of five years plus an additional probationary citizenship period of three years prior to qualification for naturalisation. The introduction of the probationary citizenship period would therefore increase the total period of time before refugees become eligible for citizenship to eight years. This could be reduced to six years if the person concerned can demonstrate that they have satisfied the active citizenship requirement, but that is also a requirement which refugees may find it difficult to fulfil because of their particular circumstances of having faced persecution or ill-treatment in the past.

1.55 **We are concerned that the effect of certain of the earned citizenship requirements in the Bill is to make it more difficult for refugees and those with humanitarian protection to qualify for naturalisation as a British citizen, contrary to Article 34 of the Refugee Convention. We welcome the fact that the Government appears to have acknowledged that these concerns are legitimate and is considering bringing forward its own amendments.**⁴² **We intend to scrutinise any Government amendments with a**

³⁸ Highly Skilled Migrants Programme Report, 2007 or 08

³⁹ Lord Brett, HL Deb 2 March 2009, col. 540.

⁴⁰ HSMP Forum Ev 25-26 and Joint Council for the Welfare of Immigrants Ev 69

⁴¹ UNHCR Ev 153-154 and parliamentary briefings; see also Immigration Law Practitioners Association Ev 37, Joint Council for the Welfare of Immigrants Ev 67, and Law Centre (NI) Ev 82-3.

⁴² Lord Brett HL Deb 2 March 2009 col 532

view to ensuring that adequate exceptions are made for those qualifying for citizenship through the protection route.

1.56 Article 31 of the Refugee Convention prohibits States from imposing penalties on refugees on account of their illegal entry or presence. The Bill makes it a requirement of naturalisation that an applicant must not, at any time in the qualifying period, have been in the UK in breach of immigration laws, which is widely defined. The UNHCR is concerned that penalisation for illegal entry may operate to prolong the period in which refugees or those with humanitarian protection will be able to apply for naturalisation. We agree with this concern.

1.57 We recommend that the Bill be amended to ensure that penalisation for illegal entry does not affect the qualifying period for refugees and those with humanitarian protection.

Page 29, line 28, [clause 39] insert at the beginning of the line “subject to Article 31 of the UN Convention Relating to the Status of Refugees 1951,”

(5) Section 9 Asylum and Immigration (Treatment of Claimants etc.) Act 2004

1.58 In our report on the Treatment of Asylum Seekers, published in March 2006, we called for the repeal of section 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, which provides for welfare support to be withdrawn from families if they are considered to have failed to take reasonable steps to leave the UK voluntarily.⁴³

1.59 This provision was implemented on a trial basis in three areas in 2005. The Government published its evaluation of the trial in June 2007, which concluded that section 9 “did not significantly influence behaviour in favour of co-operating with removal”, but decided to retain the provision for use on a case-by-case basis. This was confirmed by the then Immigration Minister, Liam Byrne MP, when he gave oral evidence to the Committee on 19 February 2008. He said: “We know that as we go into the case work resolution programme there will be numbers of people who will fall to be removed so I think I would be reluctant to remove section 9 availability until that programme of work is done”.⁴⁴ He also confirmed that the power to withdraw support had not been used between June 2007 and February 2008.⁴⁵

1.60 We asked the Government on how many occasions the power under s. 9 to withdraw support from failed asylum seekers who it is judged have not taken reasonable steps to leave the UK voluntarily has been used since Liam Byrne MP, the then Immigration Minister, gave oral evidence to us on 19 February 2008; if the section 9 power has been used since February 2008, what evaluation has been made of its effectiveness; whether asylum caseworkers are trained to inform families that the section 9 power may be used against them, in order to encourage voluntary removal; whether the Government plans to repeal section 9 and, if not, what plans it has to review the necessity for section 9.

⁴³ HC 60-I, HL Paper 80-I, paras 93-97.

⁴⁴ Q63.

⁴⁵ Q59.

1.61 The Government replied that the s. 9 power has not been used since February 2008 and that a decision on the future implementation of the power is being considered within the wider context of proposals on the reform of asylum support which will be brought forward as part of the draft bill on immigration simplification later this session. The Government says that its objectives in reform are to ensure that those seeking asylum are effectively and comprehensively supported during the determination of their claim; that the system is as simple and efficient as possible; and that it works towards the return of those who have no protection needs and no right to be in the UK. A consultation paper will be published shortly.

1.62 We consider that the fact that the s. 9 power is still not being used lends weight to our earlier recommendation that it should be repealed. It is unacceptable that a power which is never used is maintained on the statute book in order to keep open the possibility of its arbitrary use in future. We therefore repeat our longstanding recommendation that s. 9 be repealed.

Conclusions and recommendations

1. We welcome as a human rights enhancing measure the introduction of the new positive duty to safeguard and promote the welfare of children in the discharge of immigration, asylum, nationality and customs functions: it is a significant step in the better protection of children's rights following the removal of the UK's reservation to the Convention on the Rights of the Child. We welcome the Government's express acceptance that every child matters as much if they are subject to immigration control as if they are British citizens, which is a long overdue reversal of the Government's previous policy when it excluded children subject to immigration control from the protection of the UN Convention on the Rights of the Child. We will be looking carefully for evidence that this welcome change in policy will now make a practical difference to the many and well-documented human rights problems suffered by children in the UK who are subject to immigration control. (Paragraph 1.15)
2. We also welcome the fact that the statutory guidance envisaged by the Bill will be joint guidance drawn up by both the Home Office and the Department for Children, Schools and Families and will follow as closely as possible the statutory guidance on making arrangements under s. 11 of the Children Act 2004. We accept that there should be full consultation of all relevant stakeholders before such guidance is finalised, but we recommend that it be published in draft before the Bill completes its passage through Parliament so that parliamentarians can subject it to scrutiny. (Paragraph 1.16)
3. We welcome this provision and intended provision for the application of the relevant PACE safeguards. (Paragraph 1.20)
4. We recommend that a means be devised for ensuring that judicial reviews which are of sufficient significance and complexity, including those in which important human rights are at stake, are heard by a High Court judge, by, for example, developing a sifting mechanism and ensuring that the more significant and complex cases either remain in the High Court or are heard by a High Court judge in the Upper Tribunal. (Paragraph 1.29)
5. We agree with the opinion of Sir Richard Buxton that in a case where there is a real prospect that the decision of the Upper Tribunal is in breach of the UK's international human rights obligations, that issue demands the attention of a court of the stature of the Court of Appeal. We recommend a simple amendment to the Bill to ensure that the Lord Chancellor's power to impose the restrictive "second appeal" test on appeals to the Court of Appeal is not available in immigration and nationality cases: (Paragraph 1.32)
6. We recommend that the Government reconsider its position that those with probationary citizenship leave are subject to the same restrictions on access to benefits and services as all others subject to immigration control except those with indefinite leave to remain. We await the Government's response and may wish to return to this issue. (Paragraph 1.43)

7. We are concerned that the proposed community activity requirement may have a discriminatory effect on groups who are unable to undertake such activity for various reasons, such as physical or mental disability, caring responsibilities, or being in full time work. We are not reassured by the power to make regulations which treat specified types of persons as having fulfilled the activity condition even though they have not. We recommend that the exemptions are included on the face of the bill. Failing that, we recommend that the Government publish the regulations in draft, during the passage of the Bill, to enable Parliament to scrutinise them properly for any possible discriminatory effect. (Paragraph 1.49)
8. We urge the Government not to repeat the unedifying spectacle of riding roughshod over migrants' legitimate expectations of settlement, which undermined many migrants' faith in the UK's commitment to basic fairness. (Paragraph 1.52)
9. We recommend that clear transitional provisions are made which meet the legitimate expectations of those already in the system. (Paragraph 1.52)
10. We are concerned that the effect of certain of the earned citizenship requirements in the Bill is to make it more difficult for refugees and those with humanitarian protection to qualify for naturalisation as a British citizen, contrary to Article 34 of the Refugee Convention. We welcome the fact that the Government appears to have acknowledged that these concerns are legitimate and is considering bringing forward its own amendments. (Paragraph 1.55)
11. We intend to scrutinise any Government amendments with a view to ensuring that adequate exceptions are made for those qualifying for citizenship through the protection route. (Paragraph 1.55)
12. We recommend that the Bill be amended to ensure that penalisation for illegal entry does not affect the qualifying period for refugees and those with humanitarian protection. (Paragraph 1.57)
13. We consider that the fact that the s. 9 power is still not being used lends weight to our earlier recommendation that it should be repealed. It is unacceptable that a power which is never used is maintained on the statute book in order to keep open the possibility of its arbitrary use in future. We therefore repeat our longstanding recommendation that s. 9 be repealed. (Paragraph 1.62)

Formal Minutes

Tuesday 24 March 2009

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness Lord Dubs Lord Lester of Herne Hill Lord Morris of Handsworth The Earl of Onslow Baroness Prashar	Dr Evan Harris MP
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Draft Report (*Legislative Scrutiny: Borders, Citizenship and Immigration Bill*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 1.62 read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Ninth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on

[Adjourned till Tuesday 31 March at 1.30pm.]

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Written Evidence

Memorandum submitted by Mr Timothy Choi

As a British National (Overseas) or BN (O), I am aware of the review on British Citizenship conducted by Lord Goldsmith, as requested by the Prime Minister in July 2007. One of the key points of Lord Goldsmith's review was "to consider the difference between the different categories of British nationality." However, it is apparent that the British Government has no intention to redefine the status of British National (Overseas).

The United Kingdom is one of the signatories to the European Convention of Human Rights and Lisbon Treaty. Protocol 4 of the Convention prohibits the expulsion of national and provides for the right of an individual to enter a country of his or her nationality. It is also stated very clear in Article 17 of the Lisbon Treaty that "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship." Therefore BN (O) should not be deprived of the right to full British citizenship.

British nationals who are not British citizens do not currently have the right to live and work in the United Kingdom indefinitely. It is a disappointing fact that the current Government appears to have no intention to take prompt and necessary steps to forward these rights in the new Immigration and Citizenship Bill. This is despite the fact that the British Government allows millions of European Union citizens to enter, live and work freely in the United Kingdom.

The Citizenship Review report prepared by Lord Goldsmith has recommended that all British nationals should be given an entitlement to register as full British Citizens. It also mentioned that British nationals are unlikely to move to the UK even if they are granted full British Citizenship, as most are well-settled overseas.

"The only option which would be characterized as fair would be to offer existing BN (O) holders the right to gain full British Citizenship. It is likely that many would not take this up as the prospects economic and fiscal of moving to the UK are not favourable to those well-established in Hong Kong." – Citizenship Review, Lord Goldsmith

I truly hope that you will take these issues into consideration when examining the Immigration and Citizenship Bill. I would be grateful to hear your kind response.

25 February 2009

Memorandum submitted by British Hong Kong

I am deeply concerned about the racial discrimination and current lack of human rights in the UK's nationality laws. I sincerely hope that you will consider the following points in the upcoming Borders, Citizenship and Immigration Bill and to take the necessary actions to uphold justice for British nationals who have been deprived of the unconditioned right to enter the UK and access to full British Citizenship.

1) Violation of the rights of British nationals

The right to enter one's country of nationality is a basic human right guaranteed under Article 12 of the International Convention of Civil and Political Rights (ICCPR) and Protocol 4 of the European Convention of Human Rights (ECHR). It is clear that HM Government is aware that the UK is currently in breach of these human rights instruments, as it has admitted the "in the absence of any change in the arrangements for issuing British passports and the relevant provisions of our immigration legislation, it is not possible to ratify"⁴⁶ Protocol 4 of the ECHR.

However, although the UK has signed these human rights instruments more than 30 years ago and HM Government is aware that legislative changes are necessary, it is appalling that HM Government is "not proposing to make any changes in relation to the status of British nationals"⁴⁷ and thus have decided to continue violating the human rights of its own nationals by denying them entry into the UK. To add insult to injury, more than 400 million European citizens are already guaranteed these very same rights to live and work in the UK under EU treaties, which have been present since the 1970's. Given that these rights are already enjoyed by hundreds of millions of foreign nationals, there is no justifiable reason for the UK to continue to deny these rights to British nationals, whose number is far less than the number of European citizens. Therefore, it would only seem logical to make immediate legislative changes to restore the rights for all British nationals to enter the UK.

2) Racial discrimination

Furthermore, all British nationals were previously able to enter the UK without subject to immigration control. But the British Nationality Act 1981 and its subsequent amendments, which separated British nationals into six categories, has forcibly removed the right of various British nationals to enter the UK, and have been heavily criticised as being racially discriminatory. As described by Anne Dummett, the overall "effect [of these categories] is to give full British citizenship to a group of whom at least 96% are white people, and the other four forms of nationality to groups who are at least 98% non-white."⁴⁸ This inherent race discrimination is also reiterated in Lord Goldsmith's recent Citizenship Review: "In the past the different categories [of British Nationality] have created much unhappiness particularly as the concepts of "partiality" were seen as a way of discriminating between the white and black members of overseas communities."⁴⁹ In addition, both the European Commission of Human Rights and the UN Committee on the Elimination of Racial Discrimination have criticised aspects of the UK's different categories of British nationality as containing elements of race discrimination.⁵⁰ Given this race discrimination in the UK's nationality laws, I strongly encourage you to include changes in the Bill to remove racial discrimination in the categories of British nationality.

3) No barriers to restoring human rights and removing racial discrimination

⁴⁶ House of Lords – Answer to Question HL 349

⁴⁷ House of Lords – Answer to Question HL 1301

⁴⁸ Anne Dummett, *The New British Nationality Act*, British Journal of Law and Society, Vol 8, No 2.

⁴⁹ Lord Goldsmith, *Citizenship: Our Common Bond*.

⁵⁰ *East Asian Africans v UK (1981) 3 EHRR 76*: "... the legislation applied in the present cases discriminated against applicants on the grounds of their colour or race" and *Concluding observations of the Committee on the Elimination of Racial Discrimination : United Kingdom of Great Britain and Northern Ireland. 28/03/96. CERD/C/304/Add.9*

In relation to a question on whether the Bill will redress any race discrimination in the UK's nationality laws, HM Government recently claimed that "there are particular legal reasons why we need to retain the category of British National (Overseas) with links to Hong Kong, because of our treaty commitments." However, this is factually incorrect and entirely misleading.

It has long been concluded by the parliamentary Foreign Affairs Committee in a report on Hong Kong in 1989 that "to grant full British Citizenship, however, would contradict the British memorandum on nationality attached to the Joint Declaration. This memorandum is not part of the Joint Declaration and to go against it would not constitute a breach of the Treaty."⁵¹ As testament to this, various laws since then have granted certain British Nationals (Overseas) an entitlement to register as full British citizens – the British Nationality (Hong Kong) Act 1990, British Nationality (Hong Kong) Act 1997 etc – none of which have breached the Joint Declaration on the future of Hong Kong. Thus, it is clear that granting full British citizenship to British Nationals (Overseas) will not breach any international treaty. In the review, Lord Goldsmith stated that: "The only option which would be characterised as fair would be to offer existing BN (O) holders the rights to gain full British citizenship. It is likely that many would not take this up as the prospects economic and fiscal of moving to the UK are not favourable to those well established in Hong Kong."⁵² In fact, given the UK has signed Protocol 4 of the ECHR and have ratified the ICCPR and various treaties on anti-discrimination, the UK would be in breach of its obligations under these international instruments by not granting equal citizenship rights i.e. full British Citizenship and the rights to enter the UK to all British nationals.

Therefore, I strongly urge the UK to make the necessary changes in the Borders, Citizenship and Immigration Bill to allow all British nationals an entitlement to be registered unconditionally as full British citizens, in order to restore these basic human rights to all British nationals and to remove the blatant racial discrimination in the UK's nationality and immigration legislation.

25 February 2009

⁵¹ Page xviii, Foreign Affairs Committee: Hong Kong, Second Report, 1988/1989 HC 281

⁵² Page 74, *Citizenship: Our Common Bond*

List of Reports from the Committee during the current Parliament

First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL PaperXX/HC XXX
Session 2007-08		
First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights	HL Paper 50/HC 199

	(Eighth Report): Counter-Terrorism Bill	
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501
Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077

Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I Report and Formal Minutes	HL Paper 81-I/HC 60-I
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056

Written evidence

Letter from the Chairman to Lord West of Spithead, dated 12 February 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL

The Joint Committee on Human Rights is considering the compatibility of the Borders, Citizenship and Immigration Bill with the requirements of human rights law. I would be grateful if you could provide me with the answers to the following questions to assist the Committee in its scrutiny of the Bill.

(1) Positive duty to safeguard and promote the welfare of children

The new positive duty in the Bill to make arrangements to safeguard and promote the welfare of children in the discharge of immigration, asylum, nationality and customs functions is a welcome and significant step in the better protection of children's rights following the removal of the UK's immigration reservation to the Convention on the Rights of the Child.

However, following the removal of the reservation we asked the Home Secretary what guidance will be issued to the frontline decision-makers in the immigration and asylum field explaining the practical implications of removing the reservation.¹ The Home Secretary replied by letter dated 10 November 2008 that "no additional changes to legislation or significant amendments to guidance and practice are currently envisaged."

In the light of the Home Secretary's comment that no changes to guidance and practice are envisaged to explain the practical implications of removing the UK's immigration reservation to the UN Convention on the Rights of the Child, what arrangements does the Government propose to make to fulfil its new duty to ensure that immigration, asylum and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children?

(2) Application of PACE safeguards to investigations and detention by immigration and customs officers

In our report on the Bill which became the UK Borders Act 2007, we recommended that the Bill be amended to provide that the relevant PACE Codes of Practice apply to the new powers of detention, search and seizure given to immigration officers by that Bill.² The Government refused to do so. We note that the current Bill now appears to provide the Secretary of State with the power to do so in future. It does not, however, require the Secretary of State to do so.

Is the intention behind this provision that the safeguards contained in the relevant PACE Codes will be made to apply to customs and immigration officers' powers to investigate and detain. If so, which Codes does the Secretary of State have in mind and what sorts of modifications to those Codes are envisaged?

Why does the Bill only give the Secretary of State a power, rather than impose a duty, to do so?

(3) Earned citizenship

The Explanatory Notes to the Bill state that the Government does not believe that these provisions concerning citizenship raise any ECHR issues.³ However, this part of the Bill contains very wide powers to make regulations which have the potential to interfere with Convention rights such as the right to respect for private life, the right to peaceful enjoyment of possessions, and the right not to be discriminated against in the enjoyment of those rights. The proposed community activity requirement, for example, may have a discriminatory effect on groups who are unable to undertake such activity for various reasons such as physical or mental disability, caring responsibilities, etc.. The proposed denial of certain benefits on the ground of nationality may also engage the right to peaceful enjoyment of possessions in Article 1 Protocol 1 and require justification under Article 14 ECHR.⁴ We have repeatedly made clear in our reports that where Bills confer wide powers capable of being exercised incompatibly with human rights, minimum safeguards such as basic criteria for the exercise of the power should be contained on the face of the Bill.

¹ Q103 28 October 2008, Second Report of 2008-09, Ev24.

² Thirteenth Report of 2996-07, Legislative Scrutiny: Sixth Progress Report, HL 105/HC 538 at paras 1.6-1.16.

³ EN para. 222.

⁴ See eg *Gaygusuz v Austria* (1997) 23 EHRR 364 (denial of emergency assistance to non-national in breach of Article 14 in conjunction with Article 1 Protocol 1).

Please provide more detail of how the community activity requirement will be implemented in practice in a non-discriminatory way; precisely which benefits non-citizens will not be fully entitled to; and the Government's justification where it proposes differential treatment of non-nationals.

Will the Government provide more safeguards on the face of the Bill where regulation making powers can be exercised in ways which interfere with human rights?

(4) Judicial review and access to court

The Bill provides for judicial review applications relating to immigration or nationality decisions to be transferred from the High Court to the Upper Tribunal.⁵ The Upper Tribunal is a superior court of record, whose President is a High Court Judge, but the other members are not High Court Judges. The Upper Tribunal will be comprised of judges and expert members sitting in a tribunal chaired by a judge. The judge members are made up of former legal chairs of appellate tribunals that have now been abolished, or county court judges. It is envisaged that many of the decisions of the Upper Tribunal will be taken on the papers. The effect of the provision in the Bill therefore is that in future decisions in matters as important as challenges to deportations where there is a real risk of torture will be decided by judges below the level of a High Court Judge and may be decided on the papers rather than after an oral hearing.

During the passage of the Tribunals, Courts and Enforcement Act 2007, concerns were expressed in Parliament about the transfer of immigration and nationality applications to the Upper Tribunal in view of the complex and contentious nature of many of those applications.⁶ The Bill as introduced included power for the Executive to remove the exclusion, but concerns were expressed that Parliament should be able to review the performance and capacity of the new unified Tribunal regime before approving the transfer of such a contentious jurisdiction, and the Government amended the Bill so that the exclusion could not be removed other than by primary legislation.

How does the Government propose to ensure in practice that immigration and asylum cases involving the risk of serious human rights violations such as deportation to torture or death are decided by judges of sufficient seniority and with the opportunity of an oral hearing?

(5) Section 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004

In its report on the Treatment of Asylum Seekers, published in March 2006, the Committee called for the repeal of section 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, which provides for welfare support to be withdrawn from families if they are considered to have failed to take reasonable steps to leave the UK voluntarily.⁷ This provision was implemented on a trial basis in three areas in 2005. The Government published its evaluation of the trial in June 2007, which concluded that section 9 "did not significantly influence behaviour in favour of co-operating with removal", but decided to retain the provision for use on a case-by-case basis. This was confirmed by the then Immigration Minister, Liam Byrne MP, when he gave oral evidence to the Committee on 19 February 2008. He said: "We know that as we go into the case work resolution programme there will be numbers of people who will fall to be removed so I think I would be reluctant to remove section 9 availability until that programme of work is done".⁸ He also confirmed that the power to withdraw support had not been used between June 2007 and February 2008.⁹

On how many occasions has the power to withdraw support from failed asylum seekers who it is judged have not taken reasonable steps to leave the UK voluntarily (section 9 of the Asylum and Immigration (Treatment of Claimants etc) Bill 2004) been used since Liam Byrne MP, the then Immigration Minister, gave oral evidence to us on 19 February 2008?

If the section 9 power has been used since February 2008, what evaluation has been made of its effectiveness?

Are asylum caseworkers trained to inform families that the section 9 power may be used against them, in order to encourage voluntary removal?

Does the Government plan to repeal section 9? If not, what plans do you have to review the necessity for section 9?

⁵ Clause 50.

⁶ In debate, these were described by Lord Lloyd of Berwick as "at the most sensitive end of judicial review"; and Baroness Ashton acknowledged that sensitivity in her response on behalf of the Government: Hansard Lords, Grand Committee 13 December 2006 : Columns GC68-69.

⁷ HC 60-I, HL Paper 80-I, paras 93-97.

⁸ Q63.

⁹ Q59.

Letter from Lord West of Spithead to the Chairman, dated 23 February 2009

Thank you for your letter of 12 February. You raised a number of points relating to the Borders, Citizenship and Immigration Bill's compatibility with the requirements of human rights law. I have answered the questions below and I hope this will assist the Committee in its scrutiny of the Bill.

(1) *Positive duty to safeguard and promote the welfare of children*

In enforcing immigration laws we will have regard to the need to keep children safe from harm and promote their welfare. This will include making contact, on their behalf, with those that have a duty or a role in ensuring their welfare where there are signs that a particular child is at risk of harm.

Throughout the immigration system it means that we will treat children with sensitivity and on the basis that every child does matter, regardless of his or her immigration status. It means that we will take account of the views of children where appropriate, and that UK Border Agency staff will be trained in specific children's issues, including communicating with children, safeguarding children, and identifying trafficking, smuggling and exploitation of children.

The guidance that will underpin the duty provided for in the Borders, Citizenship and Immigration Bill will be joint guidance issued together by the Home Office and the Department for Children, Schools and Families—and will build on the existing UK Border Agency Code of Practice to Protect Children from Harm to provide a blueprint for effective safeguarding practice and the promotion of child welfare within the immigration service.

The issuing of joint guidance should make it clear to all that there is a common safeguarding framework that applies to all children in the UK, albeit applied with differences depending on the functions of each agency.

The guidance will follow as closely as possible the statutory guidance on making arrangements under s 11 of the Children Act 2004 in identifying the components of those arrangements.

These are:

- A clear demonstration of senior management commitment to the importance of safeguarding and promoting children's welfare;
- A clear statement of the agency's responsibilities towards children;
- A clear line of accountability within the organisation for work on safeguarding and promoting the welfare of children;
- An approach to service development which takes account of the need to safeguard and promote welfare and is informed, where appropriate, by the views of children and families;
- Training on safeguarding and promoting the welfare of children for all staff working with or, depending on the agency's primary functions, in contact with children and families;
- A safer recruitment policy to ensure that unsuitable persons do not gain access to children or the vulnerable;
- Effective inter-agency working to safeguard and promote the welfare of children that is characterised by constructive working relationships and LSCB involvement;
- Information sharing arrangements with other agencies that have responsibilities to children.

We aim to issue the guidance in advance of the coming into force of the new provision and to liaise closely with key stakeholders, including the children's charities, in drawing it up.

(2) *Application of PACE safeguards to investigations and detention by immigration and customs officers*

Part 1 of the Bill permits the concurrent exercise of general customs functions by the Secretary of State and the Commissioners of HM Revenue and Customs ("the Commissioners") and the concurrent exercise of customs revenue functions by the Commissioners and the Director of Border Revenue.

Certain of these functions relate to the investigation of customs offences (whether general customs or customs revenue) and the detention of persons arrested for such offences.

APPLICATION OF PACE AND THE CODES TO CRIMINAL INVESTIGATIONS AND DETENTION

Designated customs officials

The Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 ("the 2007 PACE Order") provides for the application to "relevant investigations" conducted by officers of HM Revenue and Customs, and to persons detained by such officers, of important powers and safeguards set out in the Police and Criminal Evidence Act 1984 ("PACE"), and the associated Codes of Practice ("the Codes"). A "relevant investigation" is defined for this purpose as a criminal investigation conducted by officers of HM Revenue and Customs have functions apart from a former Inland Revenue matter.

The Police and Criminal Evidence (Application to Revenue and Customs) Order (Northern Ireland) 2007 (“the 2007 PACE NI Order”) applies equivalent provisions in corresponding circumstances in Northern Ireland.

It is our intention that the vast majority of the substantive provisions of the 2007 PACE Order and the 2007 PACE NI Order should apply in future to criminal investigations in relation to customs matters conducted by designated customs officials of the UK Border Agency, as well as to any persons detained by such officials. The Government has now tabled amendments designed to achieve that aim (copy attached for ease of reference) which, if accepted, will take effect on Royal Assent.

This will ensure that designated customs officials have the full range of powers necessary to exercise effective customs controls at the border, while requiring them to comply with all relevant safeguards in PACE and the Codes.

Immigration officers

Immigration officers do not, at present, use any powers in PACE when conducting criminal investigations. However, section 67(9) of PACE requires persons other than police officers who are charged with a duty to investigate offences to have regard to any relevant provision of the Codes.

Further, section 145 of the Immigration and Asylum Act 1999 (“the 1999 Act”) imposes a duty on immigration officers in England, Wales and Northern Ireland¹⁰ who exercise specified powers¹¹ in the course of such investigations to have regard to any provisions of the Codes specified by the Secretary of State in directions. The relevant provisions in this regard are currently set out in the Immigration (PACE Codes of Practice) Direction 2000 and the Immigration (PACE Codes of Practice No.2 and Amendment) Direction 2000 (“the Directions”).

We appreciate that the Directions are somewhat out of date and work is currently being undertaken to ensure that they reflect changes to our immigration legislation and to the Codes themselves eg where an arrested person is taken to a police station which has video recording equipment for interviews (Code F).

In addition, in practice, any person arrested by an immigration officer as part of a criminal investigation will be taken as soon as reasonably practicable thereafter to a police station and transferred into police detention, at which time all relevant protections and safeguards in PACE and the Codes will be engaged.

THE ORDER MAKING POWER IN CLAUSE 22

Clause 22 of the Bill establishes a power for the Secretary of State to provide, by order, for any provisions in PACE and the Police and Criminal Evidence (Northern Ireland) Order 1989 to apply, subject to modifications as may be specified, to investigations, and persons detained by, designated customs officials and immigration officers.

The Committee has asked why clause 22 only gives a power to apply the Codes, rather than imposing a duty to do so. We are content that this is the right approach, mirroring as it does the construction of similar enabling provisions within PACE itself (eg in sections 114 and 114a).

ADMINISTRATIVE IMMIGRATION PROCESSES

Most people detained by immigration officers are held in connection with administrative immigration processes, rather than as part of any criminal investigation. It would not be appropriate to apply the provisions of PACE and the Codes to those administrative processes, or to any persons detained in connection with them: nor is it intended that any order made in due course under clause 22 of the Bill should alter that position.

That is not to say that those detained for administrative purposes and held in the immigration detention estate have no rights or are not entitled to protection. However, it is not necessary to apply PACE and the Codes in order to secure those rights and protections.

The Detention Centre (DC) Rules 2001 (No 238), and the Operating Standards for Immigration Removal Centres that underpin the Rules, provide a high level of protection. For example, the operating standards that apply to our immigration removal centres make clear that those who are detained must be advised of their right to legal representation, and how they can obtain such representation, within 24 hours of their arrival at the centre. Detainees who are unable to read or write will be given assistance when needed. A copy of the DC Rules and the Operating Standards are available on the UK Border Agency website.

Moreover, detainees are able to make phone calls, send faxes or write to their legal representatives. Where a detainee does not have the funds to do so the relevant costs will be met on his/her behalf.

¹⁰ The position is different for immigration officers in Scotland, who are not required to have regard to PACE and the Codes, or any other equivalent statutory framework. In practice, though, those officers do apply the spirit of the protections and safeguards in PACE and the Codes which relate to the functions they discharge. They also comply, where appropriate, with the provisions of the Criminal Procedure (Scotland) Act 1995.

¹¹ Powers to arrest, question, search and fingerprint a person, enter and search premises, or seize property.

POWERS UNDER THE UK BORDERS ACT 2007

In asking its question on the application of PACE, the Committee referred to its previous recommendation that the relevant provisions of the Codes should apply to what were then new powers of detention, search and seizure given to immigration officers by sections 1 to 4 of the UK Borders Act 2007 (“the UKBA 2007”).

As we argued at the time of that recommendation, however, the nature of the detention effected by a designated immigration officer under sections 1 to 4 of the UKBA 2007 is key. In particular, such officers do not carry out any of the substantive functions of a police constable. They act in support, not in place of the police.

We do, however, recognise the need to ensure that the power of detention is exercised so as to ensure compliance with the European Convention on Human Rights.

We consider that the clearly defined and limited scope of the detention permitted under the UKBA 2007, and the publication of comprehensive standard operating procedures regarding the relevant powers under that Act, is sufficient to ensure that those powers are used in a legitimate and proportionate way and that the application of the Codes would be neither appropriate nor necessary.

I hope that—

(i) Our proposed amendment providing on the face of the Bill for the application of key safeguards under PACE and the Codes to criminal investigations, and persons detained, by designated customs officials; and

(ii) our commitment to make provision by order under clause 22 for the application of those safeguards and protections in the Codes relevant to criminal investigations, and detention, by immigration officers, provides the Committee with a satisfactory answer to its question.

(3) *Earned Citizenship*

The Committee asked for more detail of how the community activity requirement will be implemented in practice in a non-discriminatory way.

We consider that active citizenship is a positive way for migrants to earn citizenship more quickly and will assist with their integration into British society. Its purpose is to incentivise an outlook and attitude which we think is positive for Britain.

We have been very careful to develop our active citizenship proposals in such a way as to ensure that they are not discriminatory to any person or group.

Firstly our proposal is that active citizenship should not be a compulsory requirement. Migrants who are unwilling to undertake any form of active citizenship can simply choose not to do so. They are not prevented from qualifying for citizenship, but it will take them two years longer than those who so undertake active citizenship.

Secondly, we have made it clear that active citizenship will be designed so that migrants, even where they have significant commitments (eg work or family related), will be able to fulfil the requirements. That is why we believe it is right that people should be able to demonstrate active citizenship at any point in their journey. This will allow migrants to plan activities better in line with work and family commitments. We will also ensure that we permit a wide range of activities to ensure migrants can utilise their particular skills and interests. We have established a design group involving local authority and voluntary sector representatives to advise us on the practical operation of active citizenship, including the level of commitment we should expect migrants to demonstrate. We will work with the design group to ensure that the active citizenship proposal is not implemented in a discriminatory manner.

Many people seeking citizenship or permanent residence will already contribute in their area and are already engaged with UK society as active members of their local community by undertaking voluntary work, for example.

We want as many migrants as possible to undertake active citizenship. However, we recognise that in certain circumstances, for example in the case of severe physical disabilities, a migrant will simply be unable to undertake any of the active citizenship activities. That is why the Bill allows regulations to be made which treat specified types of persons as having fulfilled the activity condition, even though they have not.¹²

The Committee also asked for more detail on precisely which benefits non-citizens will not be fully entitled to; and the Government’s justification where it proposes differential treatment of non-nationals.

We recognise that migrants make a significant contribution to this country, both economically and in social terms. Nevertheless it has been a long standing policy that those entering the United Kingdom on the “work” or “family” routes should be expected to support themselves without being able to access non-contributory social security benefits or local authority housing. This supports the clear public view that

¹² See clause 39(1) which inserts paragraph 4B(5)(b) into Schedule 1 of the British Nationality Act 1981. and clause 39(2) which inserts section 41(1)(be) into the same Act.

migrants should be making an economic contribution and should not be a burden on the state. We believe that this policy should be strengthened and clarified so that everyone is clear about which benefits can be accessed by migrants at each stage of the process.

The benefits that migrants can access at each stage are not determined according to whether or not they are British nationals. Instead they are based on whether a person is a “person subject to immigration control” (PSIC). The restrictions on access to benefits apply to those who are PSIC.

Legislation¹³ provides that a PSIC is not entitled to the following benefits:¹⁴

- (a) income-based jobseeker’s allowance,
- (b) income related allowance under Part 1 of the Welfare Reform Act 2007,
- (c) attendance allowance,
- (d) state pension credit,
- (e) severe disablement allowance,
- (f) disability living allowance,
- (g) carer’s allowance,
- (h) income support,
- (i) tax credits,
- (j) a social fund payment,
- (k) child benefit
- (l) housing benefit,
- (m) council tax benefit,
- (n) social housing, or
- (o) homelessness assistance.

All migrants are eligible for contributory benefits (such as maternity allowance) as soon as they have built up sufficient contributions.

A PSIC¹⁵ is a person who is not a national of an EEA state and who:

- (a) requires leave to enter or remain in the United Kingdom but does not have it;
- (b) has leave to enter or remain in the United Kingdom which is subject to a condition that he does not have recourse to public funds;
- (c) has leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking; or
- (d) has leave to enter or remain in the United Kingdom only as a result of paragraph 17 of Schedule 4 (to the IAA 1999).

In practice, a person granted limited leave to enter/remain in the UK will have a condition as specified as (b) attached to their leave and a person granted indefinite leave to enter/remain will not. Therefore persons with either no leave or limited leave to enter/remain are subject to the benefit restrictions; and persons with indefinite leave to enter/remain are not.

Under the new system this will continue. The Borders, Citizenship and Immigration Bill makes no changes to the underlying legislation on access to benefits for migrants. Migrants in the Temporary Residence Category have limited leave to enter/remain. Therefore they will be subject to the benefit restrictions. Migrants in the Probationary Citizenship category will also have limited leave to enter/remain; therefore they will continue to be subject to the same restrictions.

This does not apply to those on the “protection route”¹⁶ who will continue to have full access to benefits immediately, subject to the normal eligibility criteria.

Migrants granted Permanent Residence, which is a form of leave without time restriction, will have full access to benefits and services (subject to the normal eligibility criteria) as, of course, will those who attain British Citizenship.

The Committee ask whether the Government will provide more safeguards on the face of the Bill where regulation making powers can be exercised in ways which interfere with human rights.

In respect of the regulation-making powers we believe that it is unnecessary to include express safeguards on the face of the Bill. Any regulations made must be compatible with the UK’s obligations on human rights.

We do not believe that there is anything to suggest that the making of these regulations on earned citizenship would lead to a breach of our human rights obligations. We have addressed above why we do not think the proposals on active citizenship are inherently discriminatory (Article 14 ECHR).

¹³ Section 115, 118 and 119 of the Immigration and Asylum Act 1999; Parts VI and VII of the Housing Act 1996; and regulation made under section 42 of the Tax Credits Act 2002.

¹⁴ Subject to certain exceptions, for example to meet international obligations/agreements.

¹⁵ Please note that for the purposes of the housing legislation a different definition of PSIC is used, but in practice the effect is broadly the same.

¹⁶ Those granted Refugee Status, Humanitarian Protection or Discretionary Leave.

(4) *Judicial review and access to court*

It is correct that the Upper Tribunal is a superior court of record, but it is important to note that its president (the Senior President of Tribunals) is a Lord Justice of Appeal. Also, section 6 of the Tribunals, Courts and Enforcement Act 2007 provides that High Court judges and judges of the Court of Session can, with the concurrence of the relevant chief justice, be requested to sit in the Upper Tribunal.

Under Section 18(8) of the Tribunals, Courts and Enforcement Act 2008, judicial review applications made to the Upper Tribunal must be heard by a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session. Other persons may preside at judicial review hearings in the Upper Tribunal, if agreed by the Senior President of Tribunals and the relevant chief justice.

The Tribunal Procedure (Upper Tribunal) Rules 2008 deal with proceedings in the Upper Tribunal and under rule 34 it is for the Upper Tribunal to decide whether to hold a hearing. Under rule 34(2), the Upper Tribunal must take into account any view expressed by a party when deciding whether or not to hold a hearing.

(5) *Section 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004*

The section 9 provision had not been used since oral evidence was provided to the JCHR Committee on 19 February 2008. A decision on future implementation of the section 9 provision is being considered within the wider context of proposals on asylum support reform under Simplification, for which a draft bill will be introduced in October 2009.

Our objectives in reform are to ensure those seeking asylum are effectively and comprehensively supported during the determination of their claim; that the system for achieving this is as simple and efficient as possible; and that it works towards the return of those who have no protection needs and who have no right to be in the United Kingdom. During the last six months, we have held discussions with our key stakeholders on asylum support. These discussions have informed proposals to be included in the consultation paper, to be published shortly.

Memorandum submitted by Asylum Support Appeals Projects

INTRODUCTION

1. Asylum Support Appeals Project (ASAP) is an advocacy organisation which aims to end destitution amongst asylum seekers in the UK by defending their legal rights to food and shelter. ASAP's primary work is provision of free legal advice and representation to asylum seekers in their asylum support appeals when their housing and financial support has been refused or terminated by the Home Office. ASAP's policy work and strategic litigation work aims to change inhumane asylum policies which are forcing many asylum seekers into long-term destitution.

2. This evidence is provided in response to the Committee's call for written evidence on 31 July 2008 regarding the draft Immigration and Citizenship Bill. ASAP's evidence focuses on the issues of asylum support, ie housing and welfare support for asylum seekers, as they relate to the issues of compatibility with human rights. This evidence will, in many parts, reiterate the recommendations the Committee made in 2007.¹⁷

3. ASAP believes that the new Bill has potential to enhance the protection of human rights of asylum seekers in relation to their access to housing and welfare support. This can be achieved by ending an unacceptable level of inhumane and degrading destitution among thousands of asylum seekers, which is a violation of Article 3 ECHR.

4. However, proposals concerning asylum support are yet to be included in the said draft Bill. It is therefore not clear what the Government's plans for asylum support are at this stage in time.

CURRENT ASYLUM SUPPORT SYSTEM

5. Currently UK Border Agency (UKBA) offers two forms of support to asylum seekers in the UK, Section 95 (s95) and Section 4 (s4).

6. S95 support is provided to asylum seekers whilst a claim for asylum remains under consideration. Support is terminated 21 days after the person receives a final negative decision on their asylum claim and at this stage the person is expected to return voluntarily to their country of origin.

¹⁷ "The treatment of Asylum Seekers, Tenth Report of Session 2006-07", Joint Committee on Human Rights, 30 March 2007

7. S4 support is provided to some groups of failed asylum seekers who can demonstrate that they are temporarily unable to leave the UK. However the criteria governing s4 support are extremely narrow which means that the majority of failed asylum seekers will not qualify for this support, despite many impediments they may face when trying to leave the UK.¹⁸

8. Due to these narrow eligibility criteria, only a very small proportion of failed asylum seekers actually get s4 support. While the National Audit Office's report in 2005 estimated that there were between 155,000 and 283,500 failed asylum seekers in the UK,¹⁹ only around 9,500 individuals were in receipt of s4 support as of March 2008.²⁰ With no recourse to any form of public funds and no right to work, most of these failed asylum seekers who remain in the UK are likely to be destitute.

DESTITUTION AS A TOOL OF IMMIGRATION CONTROL

9. ASAP is concerned that the Government is continuing to use destitution as a tool of immigration control. The same criticism was made by the Committee after an extensive inquiry into the treatment of asylum seekers in 2007,²¹ although the Government denies this.²²

10. The impact of such policy is particularly devastating on individuals who are vulnerable due to their physical/mental health problems and experience of rape / torture. Pregnant women as well as those with dependents are affected too. This is supported by many reports which have been published recently.²³ There is also evidence to show that the number of destitute people has in fact been increasing.²⁴

DESTITUTION AS A RESULT OF A DEFECTIVE ASYLUM SUPPORT SYSTEM

11. A defective asylum support system is also creating widespread destitution of failed asylum seekers who are unable to leave the UK. The Committee also noted in 2007 that "*The system of asylum seeker support is a confusing mess*"²⁵ and ASAP's experience at the Asylum Support Tribunal confirms this view.

12. The system has four defects as detailed below. They collectively contribute to increasing destitution.

- (a) Complexity and inefficiency of the system.
- (b) Inadequacy of support provision.
- (c) Quality of asylum support decision making.
- (d) Lack of access to legal representation for asylum support appeals.

(a) *Complexity and inefficiency of the system*

13. The administrative complexity created by these two parallel systems of support—s95 and s4—is contributing to an increasing number of destitute individuals in the UK.

14. Firstly, these two systems have different eligibility criteria and this causes a significant disruption to asylum seekers' access to support. As their immigration status change from asylum seekers to that of failed asylum seekers, their s95 support is terminated and they are made destitute. They, then, have to apply for s4 support.

15. Applying for s4 support is not a straightforward affair. Asylum seekers must find advisers who understand the s4 eligibility criteria, have time to help them collect evidence to prove their eligibility and fill in the application form and help them to appeal if such an application is refused. For destitute and already vulnerable asylum seekers who might not speak English, this process is unduly difficult and impractical. Also, often there is a delay in processing such an application, leaving the asylum seekers destitute in the meantime.

¹⁸ Prior to April 2005, s4 support was provided on a discretionary basis and was known as hard case support. Very few individuals were successful in obtaining it and yet there was no right of appeal apart from a Judicial Review. Introduction of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 set down the criteria under which support was to be provided and this led to a greater take up of s4 support.

¹⁹ "Returning failed asylum applicants", National Audit Office, July 2005

²⁰ <http://www.homeoffice.gov.uk/rds/pdfs08/coiq208.pdf>.

²¹ "Government Response to the Committee's Tenth Report on this Session: The Treatment of Asylum Seekers", Seventeenth Report of Session 2006-07, Joint Committee on Human Rights, 5th July 2007, p41

²² "Government Response to the Committee's Tenth Report on this Session: The Treatment of Asylum Seekers", Seventeenth Report of Session 2006-07, Joint Committee on Human Rights, 5th July 2007

²³ See for instance, "Down and Out in London", Amnesty International, 2006, "The Destitution Trap", Refugee Action, 2006, and "Destitution in Leeds", The Joseph Rowntree Charitable Trust, 2007

²⁴ For instance, a locally specific study shows that a number of destitute individuals tripled between 2007 and 2008. See, "More Destitution in Leeds: repeat survey of destitute asylum seekers and refugees approaching local agencies for support", The Joseph Rowntree Charitable Trust, June 2008. ASAP's second-tier users also commented on an increasing vulnerability of destitute asylum seekers who approach their agencies for help.

²⁵ "Government Response to the Committee's Tenth Report on this Session: The Treatment of Asylum Seekers, Seventeenth Report of Session 2006-07", Joint Committee on Human Rights, 5th July 2007, page 42.

16. Secondly, UKBA's regular reviews to check whether s4 recipients continue to be eligible for support creates a situation where asylum seekers continuously come in and out of the asylum support system, experiencing periods of destitution. Again, its impact is particularly severe on vulnerable individuals. UKBA, for instance, is to review 4,500 s4 cases by the end of this calendar year to check their continuing eligibility.²⁶

17. The inefficiency of the asylum support system also means that processing applications can take a long time²⁷ and provision of support is often delayed even when it has already been established that the person is entitled to support.

18. There are many cases where UKBA initially refused asylum seekers' applications for s4 support, the Asylum Support Tribunal then allowed asylum seekers' appeals and yet they were left illegally destitute for a number of weeks afterwards. Considering that the applicant should have been given support when they initially applied, such delays are unlawful and are a breach of the Government's duties under Article 3 of the ECHR. (See the case study 1 in the appendix.)

19. ASAP recommends that the new Bill abolishes the two-tier system of s4 and s95 and replaces it with a streamlined support system. The asylum support system must ensure that no asylum seeker is left destitute unnecessarily due to the administrative failures of the Government.

(b) *Inadequacy of support provisions*

20. The current asylum support provisions, particularly for failed asylum seekers, are inadequate. Firstly, they fail to provide support to those who need such support because their scope is too narrow. Secondly, the level of support offered is barely adequate for asylum seekers to survive.

21. S4 support is intended to provide support to those failed asylum seekers who can demonstrate that they are temporarily unable to leave the UK. Only strictly-defined circumstances are accepted as legitimate instances where individuals are unable to leave the UK.²⁸

22. The current s4 eligibility criteria disregard a number of other reasons why many failed asylum seekers are stranded in the UK. As a result many who are temporarily unable to leave the UK are left outside the scope of the s4 regime.²⁹

23. ASAP's recent report shows that there are some failed asylum seekers who are unable to leave the UK because of a lack of necessary travel documents.³⁰ This applies to those who are stateless, those whose nationalities are in dispute and those whose embassies are unwilling or unable to document them.³¹

24. Moreover, s4 support is so meagre that the recipients can barely sustain themselves, contravening Article 14 of the EU Reception Directive.³² A single person receives £35 a week in supermarket vouchers,³³ pushing individuals well below the poverty line. Research also suggests that vouchers are inflexible in meeting the needs of the individuals.³⁴ Unlike s95, which is set at 70% of Income Support and increases in line with the rise in cost of living, s4 has remained unchanged since April 2005.³⁵ If the same inflationary increase had been applied to s4, it would have been £37.50 in April 2008.

25. ASAP recommends that the new Bill abolishes s4 because it fails to meet the needs of individuals. Asylum support should be provided continuously until failed asylum seekers are able to leave the UK.

²⁶ UKBA briefing note for the AST User Group Meeting on 7th October 2008

²⁷ Despite UKBA having a target response time of between two and five days, there is a wealth of evidence showing that individuals are likely to wait up to three times that length of time before they receive a response. See for instance, Citizens Advice Bureau, Shaming destitution: NASS section 4 support for failed asylum seekers who are temporarily unable to leave the UK, June 2006 and Refugee Action, Section 4 delays—briefing, June 2008

²⁸ Apart from those whom the UKBA considers as having taken all reasonable steps to leave the UK, those who are physically unable to undertake international travel due to health reasons, those who have outstanding representations with the Home Office, such as a fresh asylum claim and those who have a pending judicial review at the High Court can, in theory, get s4 support.

²⁹ The Government's "one size fits all" policy on s4 support does not recognise the fact that there many different types of failed asylum seekers who are unable to leave the UK. See a detailed analysis of the current situation by Still Human Still Here <http://www.stillhuman.org.uk/downloads/evidence.doc>

³⁰ "Unreasonably Destitute: How UKBA is failing to support refused asylum seekers unable to leave the UK through no fault of their own", Asylum Support Appeals Project, June 2008

³¹ The absence of a document also makes forced removal difficult if not impossible.

³² Articles 13 of the directives states that member states should make provisions to "ensure a standard of living adequate for the health of applicants and capable of ensuring the subsistence" Council Directive 2003/09/EC of the 27 January 2003—laying down minimum standards for the reception of asylum seekers.

³³ The situation for pregnant women and those with children has improved slightly with the introduction in January 2008 of extra vouchers for these groups. See The Immigration and Asylum (Provision of Services or Facilities) Regulations 2007

³⁴ "More Token Gestures: A Refugee Council report into the use of vouchers for asylum seekers claiming Section 4 support", Refugee Council, October 2008

³⁵ The situation has become increasingly critical with the recent significant rises in the price of staples such as rice, bread, meat and vegetables.

See, for instance, http://business.timesonline.co.uk/tol/business/industry_sectors/consumer_goods/article4692905.ece

(c) *Quality of asylum support decision making*

26. There is a significant problem with the quality of decision making by UKBA. This leads to asylum seekers becoming unnecessarily destitute.

27. ASAP's research in 2008 showed over 80% of the decisions made by the Home Office to refuse applications for s4 support contained a misapplication or misinterpretation of the law or their own policies and procedures.³⁶

28. Moreover, a high proportion of decisions made by UKBA are found to be wrong or are remitted back for reconsideration by UKBA. In 2008, the Asylum Support Tribunal has so far allowed 28% and remitted 13% of appeals lodged by the asylum seekers whose support was refused or terminated by UKBA.³⁷

29. UKBA's asylum support decision making process must improve significantly. The new Bill must set the foundation on which a clear and fair decision making process can develop. UKBA must be attentive to the risk that a wrong asylum support decision can potentially leave an extremely vulnerable asylum seeker street homeless and hungry.

d. *Lack of access to legal representation for asylum support appeals*

30. A major flaw in the current asylum support system is that asylum seekers are unable to get publicly-funded legal representation for their asylum support appeals.³⁸ The Committee noted that this might interfere with asylum seekers' right to a fair trial and recommended that the Government make public funding available for asylum support appeals.³⁹

31. To fill this gap, ASAP provides free legal representation three days a week at the Asylum Support Tribunal. As a small charity, however, ASAP is unable to represent all asylum seekers who might benefit from our legal representation.

32. Many of those applying for support are destitute and will find it impossible to meet the three-day deadline because this would not provide sufficient time for individuals to contact advice agencies and prepare for their appeals. There are also language and cultural barriers, including a lack of knowledge on how the appeals system works. All the documents from the AST and UKBA are in English only, making it very difficult for asylum seekers to fully understand what is happening to them. ASAP's own statistics show that a high proportion of those we represent are suffering from physical or mental health problems. (See case study 2 in the appendix.)

33. Additionally, asylum seekers struggle to get advice about their appeals. Of the appeals determined by the Asylum Support Tribunal between July and September 2007, in 46% of the cases asylum seekers had received no advice or assistance at all from advisers or solicitors (242 out of 522 appeals). Only 0.7% of asylum seekers with oral appeals (3 out of 391 appeals) were represented during their appeals.

34. Also ASAP's evidence suggests that legal advice and representation at the Asylum Support Tribunal significantly increases asylum seekers' chances of getting support.⁴⁰

35. In response to the Committee's recommendation, the Government claimed that "*Tribunal hearings in most cases are intended to avoid being complex and legalistic. This means that Tribunal users should be able to present evidence by themselves*".⁴¹ This is strongly denied by the asylum seekers interviewed by ASAP:

"(Speaking about the legal language used in the system) When the Adjudicator spoke I didn't understand what she was saying: 'I am allowing the appeal'—I thought she was allowing me to speak at the appeal." (Female, in her 30s, HIV+ with a baby)

"There was not enough time for me to get help with the form.. I did the best I could with the help of my friend. I was surprised at how little time there was to appeal. Three days is very short. ... The terms 'respondent' and 'appellant': many people would not understand them. The legal terms can be confusing. People need time to find advice and get ideas on how to appeal." (Male, in his 30s)

³⁶ "Failing the Failed : How NASS Decision Making is Letting Down Destitute Rejected Asylum Seekers' Asylum Support Appeals Project 2007 http://www.asaproject.org/web/images/PDFs/news/asap_feb07_failingthefailed.pdf

³⁷ During the of period between Jan and Sep 2008, 1014 appeals were heard by the AST. Of those, 285 were allowed, 130 were remitted and 517 were dismissed. 83 were found to fall outside the jurisdiction of the AST. <http://www.asylum-support-tribunal.gov.uk/statistics.htm> accessed on 28th Oct 2008.

³⁸ The Immigration and Asylum Act 1999 provides a right of appeal to the Asylum Support Tribunal where support is refused or terminated. This right was extended to s4 support in 2005. Under the Asylum Support Appeals (Procedure) Rules 2000, the Tribunal must make a decision within 14 days from which the support was refused or terminated. Appellants have three days to lodge an appeal to the Tribunal.

³⁹ "Government Response to the Committee's Tenth Report on this Session: The Treatment of Asylum Seekers, Seventeenth Report of Session 2006-07", Joint Committee on Human Rights, 5th July 2007, page 34

⁴⁰ See ASAP's comment on the Government's response to the JCHR's tenth report, *The Treatment of Asylum Seekers at* http://www.asaproject.org/web/images/PDFs/news/asap_on_gov_response_to_jchrreportaug07.pdf
Also see "Asylum Support Tribunal: support for justice, justice for support", Citizens Advice, June 2007, http://www.council-on-tribunals.gov.uk/adjust/item/comment_astjustice.htm

⁴¹ "Government Response to the Committee's Tenth Report on this Session: The Treatment of Asylum Seekers, Seventeenth Report of Session 2006-07", Joint Committee on Human Rights, 5th July 2007

“(Asked about if there was enough time to complete the notice of appeal) I don’t think so. It isn’t enough time for anyone because you have to collect evidence. The problem also is that you need help with forms and organisations are busy. It is so difficult if you cannot speak English or their (legal) language so a solicitor helps a lot. If it is a court case type hearing like today, you need a solicitor to represent you.” (Female, in her 40s, HIV+)

6. Furthermore, UKBA has recently commented that:

“Although legal aid is not available through the UK Border Agency for asylum support hearings, the Asylum Support Appeals Project provides free legal advice for those who have an asylum support appeal hearing.”⁴²

37. As the Independent Asylum Commissioners noted in response to this, ASAP’s work is not a substitute for public funding. ASAP is a very small charity organisation whose funding mainly comes from grants and donations from charitable foundations and individual donors. In fact, under 10% of those with oral appeals were assisted by ASAP (38 out of 391 appeals) between July and September 2007. It is regrettable that UKBA fails to see the absurdity of their comment.

38. Other practical steps can also be taken to make asylum support appeals more user-friendly. For instance, asylum support appeals are currently “rushed” through the system because of a tight time limit to conclude appeals within 14 days. This timescale should be extended, allowing more time for asylum seekers to seek advice, collect evidence and prepare for their appeals.

39. At the same time, UKBA should be encouraged to take steps to improve the quality of their decision making. This can involve making further enquires before terminating or refusing support in order to avoid triggering unnecessary appeals and regular and up-to-date training on asylum support law.

40. ASAP recommends that the Government provides public funding for asylum support appeals when introducing the new Bill. ASAP also recommends that the timeframe for concluding an appeal be doubled to twenty-eight days, with a deadline for submitting Notices of Appeal extended to fourteen days.

CONCLUSION

41. In order to end inhumane and degrading destitution of asylum seekers, the new Bill must set a human-rights compatible framework for the asylum support system which takes into account these recommendations. Such a framework will prevent the Government from using destitution as a tool of immigration control and rectify the structural defects of the asylum support system described above.

Appendix:

CASE STUDY 1

ASAP represented a family (a mother and a young adult daughter) at the Asylum Support Tribunal.

They had applied for s4 support on the grounds that they were destitute and had made a fresh claim of asylum. It was refused.

Both had significant mental and physical health problems and were receiving support from a number of health professionals and from a specialist organisation working with survivors of human rights violations. The health problems stemmed from the torture and abuse they had suffered whilst detained in their country. The severity of their health problems meant that they needed help with day-to-day activities such as washing and dressing.

ASAP represented them in their appeal and they won the appeal. They had to wait further four weeks before they were provided with adequate accommodation which met their needs.

CASE STUDY 2

ASAP represented Mr A whose s4 support was terminated. Mr A was a torture survivor and had a number of serious physical and mental health problems which required intensive, ongoing, intervention and support from various medical professionals.

UKBA argued that Mr A absconded from his s4 accommodation and thus breached his condition of support. Mr A was, however, staying with his supporters elsewhere because the accommodation provider failed to give him vouchers on a pre-arranged day and Mr A had no money to survive.

⁴² “Deserving Dignity”, Independent Asylum Commission, July 2008

The Asylum Support Tribunal found that UKBA had wrongly terminated Mr A's support and allowed his appeal. However, Mr A had to wait for 11 more days before his s4 support was re-instated.

Date

Memorandum submitted by Bail for Immigration Detainees

BAIL FOR IMMIGRATION DETAINEES

1. Bail for Immigration Detainees (BID) works with asylum seekers and migrants detained under Immigration Act powers in removal centres and prisons in the UK. BID provides free legal advice and information to detainees to help them to exercise their right to liberty. BID also uses evidence from its casework and research to influence detention policy and practice and to campaign for an end to arbitrary detention.

EXECUTIVE SUMMARY

2. BID is concerned that a number of clauses in the draft Bill undermine the rights of detainees under the European Convention on Human Rights (ECHR).

3. In particular, the draft Bill:

- risks extending the use of arbitrary detention, as it does not require the Secretary of State (SSHD) to adhere to the principles that people should only be detained as a last resort, with reasonable grounds and where there is a clear timescale to progress their case
- infringes on the independence of the Asylum and Immigration Tribunal, by allowing the SSHD to overturn and alter its decisions on bail
- allows for people to be detained in unsuitable conditions, by people who are not state officials
- removes the duty on contract and escort monitors to investigate allegations of misconduct against detention centre staff

4. Furthermore BID believes that, in its current form, the draft Bill is a missed opportunity and that the following measures should be included:

- the right to an automatic bail hearing after seven and thirty five days in detention
- a requirement for weekly reviews of decisions to detain by the Home Office
- a statutory time limit on the length of detention
- an end to the detention of children and families for immigration purposes
- a statutory requirement in clause 62(6) for issues such as ill-health, torture, age and family life to be taken into consideration in decision-making on bail.

RIGHT TO LIBERTY

5. It is of serious concern to BID that the right to liberty enshrined in ECHR Article 5 is undermined in many parts of the draft Bill. BID is keen to see the Bill revised so that it is made congruent with the principles that the first presumption should always be of liberty and that detention should only ever be used as a last resort, for the shortest possible time, and where reasonable grounds to detain are clearly evidenced.

6. Existing Home Office policy states that detention must be used “sparingly, and for the shortest period necessary”.⁴³ In addition, the European Court of Human Rights has indicated that the SSHD is required to exercise “due diligence” when considering an expulsion case.⁴⁴ However, it is BID's experience that these duties are often not adhered to in practice. Significant numbers of people are held in long-term detention, with little prospect of imminent removal.⁴⁵ Evidence shows that the overwhelming majority of detainees who are bailed do meet their reporting conditions—thus raising questions about whether their detention was necessary.⁴⁶ The arbitrary exercise of the power to detain is evidenced by the fact that 32% of people who are detained are subsequently released.⁴⁷

⁴³ p3 Chapter 55 UKBA *Enforcement Instructions and Guidance* <http://ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement/>. This policy does not cover foreign national prisoners, “due to the clear imperative to protect the public from harm”.

⁴⁴ *Chahal v UK* 1996 ECtHR.

⁴⁵ Freedom of Information requests show that on 30 September 2006, 50 people had been detained for more than one year (Released by the Home Office on 7/03/08). The government has not produced any information about the length of time it keeps people in immigration detention since this date.

⁴⁶ A 2002 study found that over 90% of detainees who were bailed met their reporting requirements. Bruegel, I. and Natamba, E. *Maintaining Contact: What happens when detained asylum seekers get bail?* LSBU June 2002 Available at: http://www.biduk.org/pdf/res_reports/main_contact.pdf

⁴⁷ Home Office Statistical Bulletin, *Asylum Statistics United Kingdom 2006*, HOSB 14/07. <http://www.homeoffice.gov.uk/rds/pdfs07/hosb1407.pdf>

7. The draft Bill's explanatory notes argue that, in line with ECHR Article 5(1)(f), the powers to detain outlined in the Bill are "for the purpose of preventing unauthorised entry, or to taking action with a view to expulsion".⁴⁸ However, clause 55 of the Bill would in fact allow the SSHD to detain people who do not fall into these categories.

8. Under clause 55, the SSHD could detain people against whom she is taking no "action with a view to expulsion", but who she "thinks" she "may" make an expulsion order against at some unspecified point in the future. This would allow for people to be detained where no decision to deport has been made and no action is being taken to effect their removal. The powers outlined in clause 55 lack any effective procedural requirement for the SSHD to provide evidence of the reasons for detention. They also fail to impose any reasonable time limits on the period for which the SSHD can detain a person while arranging their removal. There is clear scope for these powers to facilitate the arbitrary use of detention.

9. *Lack of Remedy*

The explanatory notes to the draft Bill assert that arbitrary detention will be prevented because "the length of detention will be decided on a case-by-case basis", and the remedies of bail, judicial review and habeas corpus will be available to ensure that the lawfulness of detention can be "speedily decided".⁴⁹

10. However, it is clear that judicial review proceedings are neither speedy nor accessible to all detainees. In our experience "case-by-case" decision making is also problematic, and current bail arrangements do not always provide a sufficient remedy for breaches of detainees' human rights. For example, in January 2008, BID supported four Algerian men in a successful High Court claim, all of them having been held for between 14 and 18 months.⁵⁰ The court found there was no prospect of their removal within a reasonable time and so their detention was unlawful. However, one of the applicants had been refused bail eight times.

11. BID therefore recommends that safeguards be put in place to protect detainees' right to liberty, including a statutory time limit on the length of detention and automatic bail hearings after 7 and 35 days. Automatic bail hearings at these times were introduced in the Immigration and Asylum Act 1999 but were repealed before being brought into force.

12. *Grounds for detention*

Clause 62(6) allows for someone to be refused bail because it is thought likely that their presence in the UK is "not conducive to the public good" or that they may commit an offence; "for the protection of any other person"; or because they have been convicted of an offence in the past.

Under ECHR Article 5(1)(f), immigration detention is permitted *only* for the purpose of preventing unauthorised entry or taking action with a view to expulsion. We do not believe that an opinion that someone may commit an offence is sufficient justification for detention. At the very least, clause 62(6) should require evidence that the person is a danger, and that action is therefore being taken to expel them.

13. *Foreign national ex-prisoners*

Clause 55(4) of the draft Bill contradicts the principle of presumption in favour of liberty by requiring that foreign national ex-prisoners should be detained unless the SSHD "thinks it appropriate" to release them. Under this clause, the SSHD would assume that ex-prisoners should be held in detention regardless of the nature of their offence, the length of time it might take to remove them or whether they could actually be said to be a danger to the public.

Currently, 80% of foreign national prisoners are held after their sentence, under Immigration Act powers, for an average of 130 days each.⁵¹ In order to prevent this type of long-term detention, and safeguard Article 5 rights, there should be a requirement that the SSHD review decisions to detain foreign national ex-prisoners and only maintain detention where there are reasonable grounds to do so.

⁴⁸ Explanatory notes Paragraph 432.

⁴⁹ Explanatory notes Paragraphs 432 and 438.

⁵⁰ *A & Others v SSHD* 2008 EWHC 142.

⁵¹ *Hansard* Written Answers for 23 Oct 2008: Column 513W

<http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081023/text/81023w0011.htm#08102335000123>

⁵² Explanatory notes Paragraph 194.

⁵³ Steel, Z., Silvoe, D., Brooks, R., Momartin, S., Alzuhairi, B. and Susljik, I. "Impact of immigration detention and temporary protection on the mental health of refugees" *British Journal of Psychiatry* 2006, 188, pp58–64; Keller, A., Rosenfeld, B., Trinh-Shevrin, C., Meserve, C., Sachs, E., Leviss, J., Singer, E., Smith, H., Wilkinson, J., Kim, G., Allden, K., and Ford, D. "Mental Health of Detained Asylum Seekers" *The Lancet* 2003, 362, pp1721–1723.

14. Health

It is of serious concern that clause 62(6)(e) allows for someone to be detained “in that person’s interests’ on mental health grounds.⁵⁴ In such circumstances, it would be far more appropriate to take action through the routes already available under the Mental Health Act. A number of academic studies have found that detention has serious detrimental impacts on mental health.⁵⁵ Detention centres are not equipped to deal with people with serious mental health problems and Home Office policy recognises that detention of the seriously ill and survivors of torture will in the majority of cases be inappropriate.⁵⁶ We think it unlikely that detention centres would be able to provide seriously ill people with a standard of living adequate for their health, as is their right under the Universal Declaration of Human Rights (UDHR) Article 25.⁵⁷

15. Clause 62(6) lists a number of issues that the SSHD and the Tribunal “must” have regard to when deciding whether or not to grant bail. Worryingly, no reference is made here to detainees’ health or histories of torture.

ACCESS TO BAIL

16. Independence of the Asylum and Immigration Tribunal (AIT)

A number of proposals in the draft Bill would compromise the independence of the AIT, by allowing the SSHD to overturn and alter its decisions (for example clauses 62(2)(c), 62(6)(f) and 68(2)(b)). There is no other legal tribunal in the UK which has its independence compromised in the manner proposed for the AIT by this draft Bill.

17. In our view the proposed changes amount to an unprecedented attempt to circumvent judicial decision-making, contrary to the doctrine of separation of powers. We believe these changes would disadvantage detainees as a group and violate their Article 5 right to an impartial determination of the lawfulness of detention.

18. The draft Bill’s explanatory notes argue that the proposals are justified “to ensure that action can be swiftly taken to expel the person from the UK in cases where removal is imminent”.⁵⁸ This argument ignores the fact that decisions in bail hearings frequently turn on the judge’s finding as to whether removal is in fact imminent. One of the central purposes of such hearings is, therefore, to allow for independent judicial oversight on the SSHD’s decision to detain.

19. Bail Bonds

Clause 62(11) will further restrict detainees’ access to bail by requiring that a sum of money be paid upfront and deposited with the court as a condition of bail.⁵⁹ It is likely that this requirement will discourage sureties from supporting bail applicants. Targeting detainees in this way is particularly unfair as in many cases they will be destitute, and the chances of them knowing people who would be willing or able to pay these “bail bonds” are low.

DETENTION OF CHILDREN

20. BID is utterly opposed to the government’s policy of holding growing numbers of children in immigration detention, for increasingly long periods.⁶⁰ Evidence suggests that detention is linked to post-traumatic stress disorder, major depression, suicidal ideation, self-harm and developmental delay in children.⁶¹ Children of a number of BID clients have suffered serious health impacts from detention. In one case, a child lost a third of her body weight while in detention; in another, a ten year old with diabetes, whose

⁵⁴ Explanatory notes Paragraph 194.

⁵⁵ Steel, Z., Silvoe, D., Brooks, R., Momartin, S., Alzuhairi, B. and Susljik, I. “Impact of immigration detention and temporary protection on the mental health of refugees” *British Journal of Psychiatry* 2006, 188, pp58–64; Keller, A., Rosenfeld, B., Trinh-Shevrin, C., Meserve, C., Sachs, E., Leviss, J., Singer, E., Smith, H., Wilkinson, J., Kim, G., Allden, K., and Ford, D. “Mental Health of Detained Asylum Seekers” *The Lancet* 2003, 362, pp1721–1723.

⁵⁶ Chapter 55 UKBA *Enforcement Instructions and Guidance* <http://ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement/>

⁵⁷ The Universal Declaration of Human Rights is internationally accepted as customary International Law.

⁵⁸ Explanatory notes Paragraph 436.

⁵⁹ See Clause 62 (11).

⁶⁰ On 30 June 2007, 35 children were detained. Home Office *Asylum Statistics: 2nd Quarter 2007 United Kingdom*. At the end of June 2008, 55 children were in detention *Home Office Control of Immigration: Quarterly Statistical Summary—2nd Quarter 2008 United Kingdom*. In the last two years, the average length of time a child is held in detention for at Yarl’s Wood has increased from eight to fifteen days. Between May and October 2007, 83 children were held for more than 28 days—more than treble the number held in the same period in 2005. HMIP *Report on an announced inspection of Yarl’s Wood Immigration Removal Centre 4–8 February 2008*.

⁶¹ Mares, S., & Jureidini, J. “Psychiatric assessment of children and families in immigration detention—clinical, administrative and ethical issues” *Australian and New Zealand Journal of Public Health*, 2004, 28, 6, pp520–526. HMIP’s recent report on Yarl’s Wood found that children held there were having “difficulties eating and sleeping, becoming withdrawn ... bed wetting.. [and] appearing depressed” p32 HMIP *Report on an announced inspection of Yarl’s Wood Immigration Removal Centre 4–8 February 2008*.

condition was exacerbated by the stress of incarceration, was hospitalised twice during her family's detention. We believe such serious harm amounts to inhuman treatment in violation of ECHR Article 3. Alternatively and at the very least, it amounts to a violation of a child's Article 8 private life rights.

21. The government has recently withdrawn its immigration reservation to the UN Convention on the Rights of the Child (UNCRC). This means that within detention policy, the best interests of the child should always be a primary consideration, and the government has a duty to provide "protection and care" as necessary for every child's well-being.⁶² It also places a duty on the government to promote the psychological recovery of children who have experienced trauma, in an environment which fosters their health, self-respect and dignity.⁶³

22. It is inconceivable that detaining children could ever be said to serve their best interests, or promote psychological recovery. Furthermore, the detrimental impacts of detention on parents have been shown to negatively affect their ability to look after their children—thus interfering with ECHR Article 8, the right to respect for family life.⁶⁴

23. BID therefore recommends that the draft Bill should include a provision to end the detention of children and families for the purposes of immigration control.

24. *Safeguards*

Where children are detained, UNCRC Article 37 states this should be done as a last resort, and for the shortest appropriate time. However, HMIP's 2008 inspection of Yarl's Wood detention centre found that "there was no evidence that children's needs were systematically taken into account when decisions to detain were made".⁶⁵

25. Greater safeguards are needed to ensure that children's welfare is considered in decision-making on detention. We therefore welcome clause 189 of the draft Bill, which places a duty on the SSHD to ensure that children are safeguarded and their welfare is promoted in the implementation of this Bill.

26. However, we wish to ensure that the level of protection which clause 189 gives children will be equivalent to that in s.11 Children Act 2004 (and its accompanying guidance) which covers other statutory bodies, but excludes the immigration service.

27. We are concerned that currently there is no direct reference to guidance under clause 189. We would like to see guidance (or secondary legislation) jointly drafted by the Department for Children, Schools and Families and the Home Office to give effect to the intention behind clause 189, current s.11 guidance and any later advancements to the s.11 guidance.

28. The draft Bill would repeal s.21 UK Borders Act 2007, to be replaced with the provisions in clause 189. The Code of Practice shortly to be laid before Parliament under s.21 must pave the way for both the safeguarding and the welfare duty so that there is a smooth transition.

29. In addition, BID would like to see a requirement in clause 62(6) of the draft Bill for the SSHD and Tribunal to take into account considerations of the child's health, best interests, family life and access to psychological recovery when making decisions about whether to detain children, or to split families by detaining a parent.

30. *Split Families*

Considerable harm is caused to children by the practice of detaining a child's parent(s) while the child is outside detention.⁶⁶ Despite this, there is a dearth of policy or legislative guidance on this issue.

31. BID recommends that there should be a requirement for the SSHD to take account of the welfare of children where children are separated from parents who are in immigration detention. The harm caused to children in such circumstances should be a primary concern of the SSHD when deciding whether or not to detain a parent.

CONDITIONS OF DETENTION

32. Clause 54 allows for individuals to be detained by the captain of a ship, aircraft or train, pending a decision by the SSHD. ECHR Article 5(1) requires detention to take place "in accordance with a procedure prescribed by law". Given that captains are not state officials, it is unclear how the SSHD will in practice ensure that legal procedures are observed in such detention.

⁶² Article 3 UNCRC.

⁶³ Article 39 UNCRC.

⁶⁴ p18 Crawley, H. and Lester, T. *No Place for a Child* 2005 Save the Children.

⁶⁵ p31 HMIP *Report on an announced inspection of Yarl's Wood Immigration Removal Centre 4–8 February 2008*.

⁶⁶ BID knows of cases in which breastfeeding mothers have been separated from their children; see p40 Burnham, E. and Cutler, S. *Obstacles to Accountability* 2007 Bail for Immigration Detainees.

33. Clause 59 directs that people may be lawfully detained at any place directed by the SSHD. However, people should only be detained in places which are established, equipped and fit for this purpose. There is a risk that, under this clause, detainees could be held in conditions which would breach their rights under ECHR Article 3.

34. Clause 79 allows for detainees to be segregated and subject to control and restraint in “cases of urgency”. There are documented cases of abuse of such powers within detention centres.⁶⁷ This clause should specify time limits for segregation, and make it clear that these powers should only be used where absolutely necessary to maintain the safety of detainees and staff.

35. To safeguard the welfare of detainees, BID would like to see within this draft Bill a duty imposed on the relevant officers to ensure the well-being of detainees.

36. Monitoring

BID is concerned to note a significant omission in Part 6 of the draft Bill, which replaces provisions in the Immigration and Asylum Act 1999. The 1999 Act stipulated that contract and escort monitors have a duty to investigate, and report to the Home Office on, any allegations made against relevant staff performing custodial functions at detention centres.⁶⁸ The omission of these requirements in the current draft Bill is of particular concern given the findings of a recent report which documents nearly 300 cases of alleged assaults against detainees.⁶⁹

October 2008

Memorandum submitted by the British Red Cross

SUMMARY

1. In 2008 to date, nearly 8,000 asylum seekers have approached the BRCS in need of emergency relief from destitution. We also assist asylum seekers indirectly by supplying emergency relief to other agencies seeing destitute asylum seekers. Including those assisted indirectly we expect to have assisted over 20,000 asylum seekers by the end of the year.

2. The British Red Cross Society’s (BRCS) principle concern in this area is support for refugees, asylum seekers and other vulnerable migrants who find themselves destitute, either due to bureaucratic error, or a lack of entitlement to either work or access Government support. The BRCS believe that asylum seekers should be able to work or access support at all stages of the asylum process, until they are removed. However, clauses on this critically important aspect of the immigration system have yet to be included in the bill, so we would welcome the opportunity to submit further evidence when these clauses have been made public.

3. The BRCS agree that UK immigration law needs to be simplified, and welcome this piece of legislation. However, we believe that the bill currently emphasises border control, at the expense of protecting refugees and other vulnerable migrants.

4. The BRCS oppose the extensive powers of detention contained in the bill. We believe detention should be time limited, not used for children or vulnerable adults, and should be subject to regular review by an independent authority.

5. The BRCS wishes to emphasise the particular needs of children affected by the provisions of the bill. We welcome the UK Government’s recent announcement that they will withdraw their reservation to the UN Convention on the Rights of the Child. This will require the Government to provide equal protection to child asylum seekers and migrants irrespective of their immigration status, and we believe this should be more fully reflected in the new legislation.

BACKGROUND ON THE BRITISH RED CROSS SOCIETY

The British Red Cross Society (BRCS) helps people in crisis, whoever and wherever they are. We are part of a global network that responds to conflicts, natural disasters and individual emergencies. We enable vulnerable people in the UK and abroad to prepare for, and withstand emergencies in their own communities. And when the crisis is over, we help them to recover and move on with their lives.

⁶⁷ For example, HMIP’s 2008 report on Tinsley house found that two incidents had occurred in which detainees were sedated without their consent, without evidence that this was necessary and without exploration of alternative options. *HMIP Report on a full announced inspection of Tinsley House Immigration Removal Centre 10–14 March 2008*

⁶⁸ Immigration and Asylum Act 1999 Section 149(7)(b) and Paragraph 1(2)(d).

⁶⁹ Wistrich, H., Arnold, F. and Ginn, E. *Outsourcing abuse: The use and misuse of state-sanctioned force during the detention and removal of asylum seekers* 2008 Birnberg Peirce & Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns.

The BRCS is part of the International Red Cross and Red Crescent Movement (the RC/RC Movement), which comprises:

- The International Committee of the Red Cross (ICRC);
- The International Federation of Red Cross and Red Crescent Societies (the Federation); and
- 186 National Red Cross and Red Crescent Societies worldwide.

As a member of the Red Cross and Red Crescent Movement, the BRCS is committed to, and bound by, its Fundamental Principles. These include Humanity, Impartiality, Neutrality and Independence. The principle of humanity is “to prevent and alleviate human suffering wherever it may be found”. Destitute asylum seekers and other vulnerable migrants frequently approach the BRCS for assistance. As a humanitarian organisation, we are committed to helping those in need, particularly where there is no alternative means of assistance.

RESPONSE OF THE BRITISH RED CROSS TO THE DRAFT (PARTIAL) IMMIGRATION AND CITIZENSHIP BILL

The BRCS agree that UK immigration law needs to be simplified, and welcome this piece of legislation. However, we believe that the bill currently emphasises border control, at the expense of protecting refugees and other vulnerable migrants. Furthermore, the BRCS’s principle involvement in this field is in providing orientation and emergency support to destitute refugees, asylum seekers, and vulnerable migrants with no recourse to public funds, hence issues related to asylum support are of particular interest to the BRCS. However, clauses on asylum support have yet to be included in the bill so we would welcome an opportunity to comment on this important aspect of the bill at a later date.

Border Controls

The BRCS recognises the right of every country to control and regulate its own borders. However, border controls should be consistent with our obligations under international law. We are concerned that pre-entry controls (as described in part 2 of the bill), carriers’ liability (clause 149) and other pre-emptive measures contained in the bill prevent people with genuine protection needs from entering the UK to make a “protection claim”. This contravenes the spirit of our international obligations towards those fleeing persecution with protection needs under the 1951 UN Convention Relating to the Status of Refugees.

The BRCS is also concerned by the wide range of offences listed in part 7 of the bill, relating to entering the UK without documentation. These offences will have the effect of criminalising those protection applicants who have had to travel with false or no documentation. This is contrary to Article 31 of the 1951 UN Convention, which states that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.⁷⁰

Detention

The British Red Cross remains extremely concerned about the extensive powers of detention retained in the bill. Prolonged detention has serious consequences for the mental health and well being of the detainee. We believe that:

- There should be a maximum period of detention of 28 days, beyond which the Government must either grant temporary permission to enter the UK, or enforce removal.
- Children and vulnerable adults should never be detained.
- There should be an early review of the detention by an independent body.
- Clause 62 (6) of the bill places too much emphasis on factors mitigating against release, there needs to be a greater presumption in favour of release—especially where there is no immediate prospect of removal.
- Statistics on the duration of detention should be produced and published more systematically. The average duration of stay does not indicate more prolonged detention durations, the BRCS has come across three cases of detention lasting longer than a year over the past 18 months.

⁷⁰ 1951 UN Convention Relating to the Status of Refugees.

Children

The BRCS wishes to emphasise the particular needs of children affected by the provisions of the bill, and to draw the committee's attention to the recent recommendations by the UN committee on the Rights of the Child⁷¹, which are that the UK should:

- (a) intensify its efforts to ensure that detention of asylum-seeking and migrant children is always used as a measure of last resort and for the shortest appropriate period of time, in compliance with article 37 (b) of the Convention;
- (b) ensure that the United Kingdom Border Agency (UKBA) appoints specially-trained staff to conduct screening interviews of children;
- (c) consider the appointment of guardians to unaccompanied asylum-seekers and migrant children;
- (d) provide disaggregated statistical data in its next report on the number of children seeking asylum, including those whose age is disputed;
- (e) give the benefit of the doubt in age-disputed cases of unaccompanied minors seeking asylum, and seek experts guidance on how to determine age;
- (f) ensure that when return of children occurs, this happens with adequate safeguards, including an independent assessment of the conditions upon return, including family environment;
- (g) consider amending section 2 of the 2004 Asylum and Immigration (Treatment of Claimants etc.) Act to allow for an absolute defence for unaccompanied children who enter the UK without valid immigration documents.

The BRCS oppose the use of immigration detention for children, but would like to see the above recommendations implemented where the UK Government considers detention of minors to be a necessity. We also believe that the vulnerability of children should be included as a factor for consideration of bail in clause 62.

We welcome the UK Government's recent announcement that they will withdraw their reservation to the UN Convention on the Rights of the Child, this will require the Government to provide equal protection to child asylum seekers and migrants irrespective of their immigration status. We would welcome more detail on these issues in clause 189.

Expulsion

The BRCS are concerned by the far-reaching powers listed in Part 4 on expulsion orders. In particular we are concerned by the wide spread introduction of re-entry bans, which constitute a further pre-entry control that could adversely affect those that find themselves in need of protection subsequent to the expulsion order.

Destitution and Asylum Support

As mentioned previously, the BRCS's principle concern in this area is support for refugees, asylum seekers and other vulnerable migrants who find themselves destitute, either due to bureaucratic error, or a lack of entitlement to either work or access Government support.

In 2008 to date, nearly 8,000 asylum seekers have approached the BRCS in need of emergency relief from destitution. We also assist asylum seekers indirectly by supplying emergency relief to other agencies seeing destitute asylum seekers. Including those assisted indirectly we expect to have assisted over 20,000 asylum seekers by the end of the year.

Nearly 50% of asylum seekers approaching us for emergency relief need our support through periods of temporary destitution resulting from bureaucratic delays in accessing support. Examples of this include:

Delays getting benefits and accommodation upon getting leave to remain:

"E" was a single male asylum seeker who was granted leave. He approached the BRCS for advice and help after a period of rough sleeping. Although he was in receipt of benefits he had been unable to find accommodation and was not in "priority need" under the Housing Act 1996. The BRCS provided him with a sleeping bag and referred him to a day centre where he could register as street homeless and apply for hostel accommodation.

UKBA delays in processing Section 4 applications and in providing accommodation when applications are successful:

"R" was 18 years old and pregnant with a history of TB. She had been staying with friends but could no longer stay due to her pregnancy. Her Section 4 application took 7 days to process. During this period the BRCS provided emergency provisions.

Terminations of NASS support despite continuing entitlement:

⁷¹ Committee on the Rights of the Child, 49th Session.

“C” was a mother of twins and entitled to Government support. She sought help from the BRCS with clothing and vouchers pending a decision on her support application. She was subsequently asked for forms that had already been submitted, and then documents were sent to a post office that had closed down. Such administrative delays have meant that she and her children have had to survive without support for an additional 2 weeks.

The majority of asylum seekers we assist are at the end of the asylum process and are not accessing any form of support at all. They cannot access Section 4 support because they do not meet the criteria and are unwilling to sign up to voluntary return. We have been able to provide basic levels of assistance to people in this situation across the UK: the majority of our financial and material support is allocated to this group whose needs cannot be resolved through rectification of bureaucratic errors and delays. In some cases, we have provided travel tickets so that they can attend day centres to collect food parcels and toiletries. We have also provided shop vouchers so that they can purchase food, or have supplied donated items. We have allocated £350,000 to address these needs in 2008.

It should be understood that we have no way of knowing how many people may be suffering from destitution who have not approached us. We believe that there is a significant amount of hidden destitution amongst rejected asylum seekers and other irregular migrants who are not allowed to work legally or access state support. This is a hidden problem and difficult to quantify since the victims of such destitution are reluctant to make themselves known to the authorities, or even the voluntary sector.

The BRCS believe that Government policy in this area is creating a humanitarian crisis for thousands of asylum seekers and other vulnerable migrants who are finding themselves homeless and destitute and with no means to support themselves. We ask that Government support should be available for people in this situation pending their removal, that they should have permission to work to support themselves throughout the asylum process, and full access to health and education services. There should also be Government funding available to support local authorities with obligations to assist the exceptionally vulnerable, and families with children.

This issue was raised in the Joint Committee’s Tenth Report for the Session 2006–07⁷². And we would like to see these concerns and recommendations raised again, particularly those in paragraphs 120–122 of the report.

Since clauses on this critically important aspect of the immigration system have yet to be included in the bill we would also welcome the opportunity to submit further evidence when these clauses have been made public.

**Memorandum submitted by the Chartered Institute of Housing, the Housing Associations
Charitable Trust and Shelter**

We are writing to express our concerns as housing organisations about some serious implications of this draft Bill, which we urge you to take into account in developing the JCHR’s comments on it.

We concentrate on aspects of the Bill relating to its impact on housing, welfare benefits and communities. Our three organisations have, in different ways, been engaged for some time with issues concerning asylum, refugees and migrants—and their housing entitlements and integration into the neighbourhoods of our towns and cities. Our comments reflect this experience.

Some of the provisions planned for the Bill, if implemented, would we believe be very damaging. We set these out below. Unfortunately, the provisions are not all set out in the current, partial draft of the Bill, although they were spelt out in the Home Office’s February 2008 paper, *The Path to Citizenship*. By commenting on the proposals in advance of their being put into detailed provisions, it may be more likely that the Committee could influence them.

ENTITLEMENT TO WELFARE BENEFITS

It is an established part of immigration law that many temporary migrants have no access to welfare benefits such as local authority housing and housing benefit. However, the government now plans to restrict access to welfare benefits only to those who have become full British Citizens, and exclude most of those who come into the new category of “probationary citizens.” We understand that the new category will cover all those who currently have various forms of leave to remain, including (for example) family members who currently have indefinite leave to remain (ILR) but have not yet applied for citizenship.

This change would exclude from benefits whole categories of people who currently have access to them. While it may superficially seem appropriate to limit entitlement to full citizens, there are various reasons why in practice the change will create considerable hardship:

⁷² Joint Committee’s Tenth Report for the Session 2006–07.

- Refugees no longer get permanent residence when they have a positive decision on their cases, but have to wait—perhaps several years—to get it. If their status after a positive decision were to become “probationary citizenship”, as seems likely, the current proposals would deny them access to social housing until they eventually receive full citizenship.
- A similar problem occurs with family members who become separated (except through domestic violence, or death of the partner who has citizenship, for which there are exceptions). Such people may have been in the UK for several years yet have no access to housing or welfare benefits if separated from their partners, even if they have dependent children.
- Temporary migrant workers, legally in Britain, will be denied access to benefits if they need them despite paying taxes in the normal way.

The proposal has to be seen against the background of the recent and proposed obstacles to gaining citizenship, such as the tests that must be met, the documents that must be produced and the considerable fees involved at various stages of the process (see below). All of these may delay, for several years, people’s ability to apply and go past their “probationary” status.

It should also be seen against the background of the government’s refugee integration policy, and the recently started Refugee Integration and Employment Service (RIES). It is difficult to see how integration is going to succeed and how RIES will work if, in future, accepted refugees or those given humanitarian protection, who experience hardship, cannot gain access to benefits and therefore risk destitution.

USE OF DESTITUTION AS A POLICY MEASURE

As organisations, we have consistently opposed the use of destitution as a deterrent to immigration, because of its effects not just on individuals but on communities. For example, many poor refugees are in effect supporting other people from the same community who are, for various reasons, ineligible for benefits and are destitute. In extreme cases, destitute people become rough sleepers and beggars, but this aspect is the “tip of the iceberg” of a much bigger problem of people surviving on the margins in poor communities.

Various recent studies have shown that destitution is already a growing problem. For example, there has been a marked increase among migrant workers from EU accession states who lose their jobs and are ineligible for benefits. A recent CLG report said that, from street counts of rough sleepers in London, 20% were accession state nationals.

For our organisations, it is a key test of any new legislation that it reduces—not extends—the use of destitution as a policy instrument. The proposals planned for the full Bill will, tragically, have the opposite effect. Apart from denying welfare benefits to further categories of people, as just described, they do nothing to ameliorate the position of people who are already destitute.

The proposals also perpetuate the situation where most asylum seekers are prevented from working, and this from accumulating even modest levels of resources to prepare themselves for possible refugee status. Such a policy sits uncomfortably with the proposal already mentioned that approved refugees will in future have no recourse to public funds, perhaps for several years.

THE COST OF MIGRATION

The government is now recognising that local authorities have extra costs because of migration, but plans to raise “tens of millions of pounds” by increasing immigration fees, which are already at high levels. The overall effect will be to place further obstacles in the paths to citizenship, so that poor people are excluded or have to wait longer. The irony is that, apart from some categories of skilled migrant, many of those affected are already (effectively) subsidising the economy by working in low paid jobs.

On the other hand, there appears to be no proposal to require employers, who benefit from the labour of new migrants, to pay towards the costs of services they use. We believe that the government should (as an alternative to further increases in immigration fees) consider the potential for raising funds by taxation of business making substantial use of migrant labour.

CRIMINALISATION OF MIGRANTS

One particular aspect of the published Bill gives cause for concern, and that is the further criminalisation of immigrants.

The main example is that many infringements of immigration law will now become criminal offences, liable to imprisonment. For example, a person who has a two-year visa as a spouse, but who fails to renew it or apply for probationary citizenship (currently ILR) before the two years ends, could come to have a criminal record. Of course, there may be many reasons why there is a delay, including the cost (currently £750 for ILR) or failure to pass the “Life in the UK” test. Yet such a person could now be arrested and have to defend themselves in court, risking a fine or imprisonment, and gaining a criminal record which would make it much more difficult for them to find work.

A lesser example is terminology. This is an issue at several points in the proposals. For instance, the term “immigration bail” will apply to those (such as asylum seekers) who have been detained for examination and temporarily released, but the word “bail” is understood by the public as relating to someone suspected of a criminal offence. It is not appropriate to describe someone seeking protection as a refugee.

EFFECTS ON COMMUNITY COHESION

Apart from the effects on individuals, all of the proposals we have highlighted have potentially deleterious effects on community cohesion, making it more likely that migrants will be seen as potential criminals, making worse the current problems of destitution, and delaying migrants’ transition to citizenship and their access to welfare benefits. While those migrants who have the skills and resources to navigate the new system may not be adversely affected, the many who are poor, have language problems, or suffer ill health or disability will encounter even more obstacles than they do now.

For these reasons we urge the Committee to recommend the government to reconsider the relevant proposals which are either in the current draft of the Bill, or which they plan to insert in the Bill at a later stage.

October 2008

Memorandum submitted by the Global Health Advocacy Project

We are a group of students and young healthcare professionals affiliated to the student organisation Medsin. Our aim is to challenge health inequalities in the UK and overseas.

EXECUTIVE SUMMARY

1. A policy of deliberately denying healthcare as a means of forcing people from the country is morally unacceptable.
2. There is no evidence to suggest such a policy would be effective, yet it would impact significantly on the Human Rights of those affected by a charging regime.
3. A policy of denial of healthcare to particular migrant groups would have a direct negative impact on the physical and mental health of individuals; thus contravening the Right to Health, as recognised by the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child.
4. Denial of healthcare would contravene migrant communities’ right to health under the Universal Declaration of Human Rights.
5. The proposals would breach sections 2, 3 and 8 of the European Convention on Human Rights, which describe the right to life.
6. Any restrictions on access to healthcare for particular migrant groups would be likely to exacerbate existing discrimination and harm individuals entitled to access healthcare, but with limited understanding of or ability to communicate their rights.
7. The complexity of determining eligibility would lead to confusion for frontline healthcare workers, who lack the skills to accurately assess the immigration status of their patients. Discrimination against those entitled to care would occur as a consequence.
8. Such discrimination would breach Article 14 of the ECHR through discrimination on the grounds of race, colour, language and national or social origin.
9. A charging regime would also have adverse effects upon public health, NHS administration and NHS finances.
10. Prior to any policy change in this area, a further consultation on access to NHS services should be undertaken, as the findings of the 2004 consultation are now outdated.
11. A full and independent health impact assessment and a race impact assessment of both existing and proposed NHS charging regimes should also be commissioned to better inform any decisions on access that are taken.
12. Any changes in the rules governing access to the NHS should be made by people with public health and health management expertise within the Department of Health.
13. It would be inappropriate for the Home Office to introduce such changes as part of a large piece of immigration legislation.

1. The UK Border Agency document⁷³ introducing the Immigration and Citizenship Bill outlines content that is yet to be published. We are told (page 8) this will include legislation on “access to benefits and services” with the aim of “ensuring that migrants can only access benefits and services where they have ‘earned’ the right to them.”

2. In April 2004, Statutory Instrument 614⁷⁴ limited access to NHS hospital services for undocumented migrants and refused asylum seekers. Subsequent Government documents have suggested a desire to restrict access to NHS primary care^{75, 76} as part of a strategy ensure that for undocumented migrant and refused asylum seekers “living illegally becomes ever more uncomfortable and constrained until they leave or are removed.”⁷⁶

3. In 2004, the Department of Health consulted on limiting access to NHS primary care services by “overseas visitors”. A response to this consultation was never released. We have been attempting to access submissions to this consultation using the Freedom of Information Act and recently published a document summarising a sample of the submissions.⁷⁷ The document, which we have enclosed with our submission, found widespread opposition to the proposals from frontline healthcare workers, primary care trusts and organisations working with migrant groups. 29% of respondents raised concerns that the proposed changes would breach international Human Rights agreements ratified by the UK.

4. This submission will argue that denying healthcare as a means of enforcing immigration policy is not legally compatible with the UK’s Human Rights commitments and that it would be inappropriate to make fundamental changes in health policy as a footnote in a Home Office bill. If these proposals are passed, they may face legal challenge on a number of fronts.

THE CONSEQUENCES OF LIMITING ACCESS TO HEALTHCARE—THE RIGHT TO HEALTH

5. Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states health is a fundamental human right. It describes “the rights of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

The UN Committee on Economic, Social and Cultural Rights have stated that under the ICESCR:

“States are under the obligation to respect the right to health by...refraining from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services”

Charging refused asylum seekers and undocumented migrants for NHS care effectively prevents access, due to high levels of destitution in both populations⁷⁸ which means they cannot access private healthcare. Charging for NHS care discourages engagement with healthcare services. Research in Sweden suggests there is a risk that policies which link healthcare providers with immigration agencies in the minds of migrants also lead them to disengage with services.⁷⁹

Removing access to healthcare from a vulnerable section of the population has massive implications for the physical and mental health of individuals concerned. Case studies show that, since NHS regulations were amended in 2004, both those not entitled to care as well as those entitled to care, but with limited understanding or ability to communicate their rights, have already come to harm.⁸⁰

6. Article 25 of the Universal Declaration of Human Rights recognises migrant communities’ right to health. The right to health “shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”

Evidence of vulnerability and inequitable access to healthcare of migrant populations is given in the latest report from the Confidential Enquiry into Maternal and Child Health.⁸¹ Refugee and asylum-seeking women accounted for 12% of maternal deaths in 2003–05.⁸² Barriers to accessing care for these women are

⁷³ Home Office (July 2008). Making Change Stick: An Introduction to the Immigration and Citizenship Bill. Available from <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/>.

⁷⁴ Department Health (April 2004). “Statutory Instrument 2004 No614. The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2004. Available at <http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Statutoryinstruments/index.htm>.

⁷⁵ Department of Health Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services (May 2004). Available at http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_4087618.

⁷⁶ Home Office (March 2007). Enforcing the rules. A strategy to ensure and enforce compliance with our immigration laws. Available from <http://www.medact.org/content/refugees/EnforcementStrategy.pdf>.

⁷⁷ Global Health Advocacy Project (August 2008). Where’s the Consultation. Available from <http://www.wherestheconsultation.org>.

⁷⁸ Refugee Action (November 2006). The destitution trap: research into destitution among refused asylum seekers in the UK. Available from: http://www.refugee-action.org.uk/campaigns/documents/RA_DestReport_Final_LR.pdf.

⁷⁹ Läkare Utan Gränser (2005). Experiences of Gömda in Sweden: Exclusion from health care for immigrants living without legal status. Available from <http://www.lakareutangranser.se/Global/documents/Rapporter/ReportGomdaSwedenEn.pdf>.

⁸⁰ Kelley N, Stevenson J. First Do No Harm: denying healthcare to people whose asylum claims have failed. Refugee Council, June 2006. Available from <http://www.refugeecouncil.org.uk/policy/position/2006/healthcare.htm>.

⁸¹ CEMACH (December 2007). Saving Mothers’ Lives 2003-2005.

Available from <http://www.cemach.org.uk/Publications/CEMACH-Publications/Maternal-and-Perinatal-Health.aspx>.

⁸² Refugee Action (2004). Department of Health Consultation—Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services: Refugee Action’s Response. Available from <http://www.refugee-action.org.uk/campaigns/documents/Consultation-OverseasVisitorsExcludedfromFreeNHSPrimaryCare-09-08-04.doc>.

already significant.⁸³ A King's Fund survey of organisations providing services for asylum seekers concluded that asylum seekers and refugees in the UK "are subjected to a system that leaves them insecure, impoverished and unhealthy".⁸⁴ Further restricting access to care could only worsen the situation.

7. Lack of alternative healthcare provision to some individuals may constitute a breach of articles 2, 3 and 8 of the European Convention on Human Rights (ECHR),⁸⁵ which guarantee the right to life and prohibit inhumane or degrading treatment. The ECHR is instituted into UK law through the Human Rights Act. Currently, the only free healthcare services available outside the NHS are those provided by organisations such as Project London and the Helen Bamber Foundation, with limited capacity.

THE CONSEQUENCES OF LIMITING ACCESS TO HEALTHCARE—DISCRIMINATION

8. Denial of care to vulnerable migrants may lead to illegal discrimination against asylum seekers through refusing to provide them with healthcare services or by providing lower standards of care⁸⁶

9. Healthcare professionals lack skills needed to accurately determine immigration status.⁸⁵ Identifying those eligible for treatment is difficult and may result in or exacerbate existing discrimination, even against those who are entitled to care.^{85, 86} The extra administrative burden may dissuade GPs from registering migrant populations.⁸⁷ In secondary care, where a charging regime has been in place for over four years, disturbing case studies are emerging describing patients coming to harm through erroneous decision-making.^{88, 89, 90}

10. Project London provides healthcare to vulnerable groups on a temporary basis, and helps patients overcome barriers to NHS registration. Even after registration, many service-users require follow-up due to barriers caused by language, misunderstandings, inhospitable and sometimes hostile GP surgery staff and surgery staff's lack of knowledge and understanding of the regulations. Ninety percent of pregnant women accessing Project London services in 2007 were not registered with a General Practitioner.⁹¹

11. The UK has also ratified the 1969 International Convention on the Elimination of all Forms of Racial Discrimination, which: "accords minority ethnic communities the right to access public health, medical care, social security and social services." (African HIV Policy Network 2004)⁸⁶

12. Any form of discrimination would breach Article 14 of the ECHR which states that "*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"

THE CONSEQUENCES OF LIMITING ACCESS TO HEALTHCARE—RIGHTS OF THE CHILD

13. The United Nations Convention on the Rights of the Child recognises health as a fundamental Human Right. Refugee Action argue that denying care to children "which would run contrary to the Children Act and various Government initiatives supporting the rights of children."⁸⁷

ADDITIONAL CONSEQUENCES OF LIMITING ACCESS TO HEALTHCARE

14. Whilst charging regulations would probably exclude treatment of infectious diseases on public health grounds, this is irrelevant as patients present with symptoms not diagnoses. If doctors are denied opportunities to engage with a patient population, disease will go undiagnosed and untreated; with inevitable public health consequences.⁹²

⁸³ Medact (January 2008). Maternal and infant health of vulnerable migrants. Available from http://medact.org/content/reaching_out/maternal%20and%20infant%20health%20briefing.doc.

⁸⁴ Woodhead D (December 2000). The Health and Well-Being of Asylum Seekers and Refugees. Available from http://www.kingsfund.org.uk/applications/site_search/search.rm?term=asylum+%&searchreferer_id=%23URL.id%23.

⁸⁵ CEMACH (December 2007). Saving Mothers' Lives 2003-2005.

Available from <http://www.cemach.org.uk/Publications/CEMACH-Publications/Maternal-and-Perinatal-Health.aspx>.

⁸⁶ African HIV Policy Network (2004) Department of Health Consultation—Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services: AHPN's Response.

Available from http://www.ahpn.org/downloads/policies/CN_AHPN_Policy_Response_Final_Draft.pdf

⁸⁷ Kelley N, Stevenson J. First Do No Harm: denying healthcare to people whose asylum claims have failed. Refugee Council, June 2006. Available from <http://www.refugeecouncil.org.uk/policy/position/2006/healthcare.htm>.

⁸⁸ Kelley N, Stevenson J. First Do No Harm: denying healthcare to people whose asylum claims have failed. Refugee Council, June 2006. Available from <http://www.refugeecouncil.org.uk/policy/position/2006/healthcare.htm>.

⁸⁹ Morris S, Allison E (February 2008). Hospital defends treatment in asylum seeker death. Available from <http://www.guardian.co.uk/society/2008/feb/13/nhs.immigrationandpublicservices>.

⁹⁰ Cassidy J (August 2008). Free for all? BMJ 337: a1111.

⁹¹ Project London (May 2008). Report and Recommendations 2007: Improving Access to Healthcare for the Community's Most Vulnerable. Available from <http://www.medecinsdumonde.org.uk/doelib/104524-report2007light.pdf>.

⁹² See the Royal Society for Health Promotion submission to the Department of Health Consultation Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services (August 2004). Available from <http://www.rsph.org/policy/consultations/GP.doc>.

15. Any alterations in entitlement to NHS care impact on NHS finances, especially in primary care. At least 86% of the national disease burden is treated cheaply within a primary care setting.⁹³ Those with long-term conditions denied entitlement to primary care would inevitably present to Accident and Emergency Departments in worse health. An average consultation with a GP costs £20, compared to the cost of an A&E consultation at £110, £421 if delivered by ambulance.⁹⁴ A large scale cost impact assessment of either the existing regulations in secondary care or the proposed regulations in primary care has never been undertaken.

16. Implementing these proposals would be an enormous administrative undertaking. An individual's asylum status is not constant. Applications are refused, appeals are won, new applications are made, and the situation in the home country may change. To avoid acting in a discriminatory manner, the immigration status of every patient would need to be determined at every visit. Interpreters would be required and disputes in the reception area would be unpleasant for all concerned and risk damaging the doctor-patient relationship. New billing and payment collection infrastructure would be needed, the costs of which are unlikely to be recovered given the level of destitution among refused asylum seekers and undocumented migrants. The only health impact assessment of proposals to charge "overseas visitors" for primary care concluded ...

*"In light of the broad scope of the organisational and procedural changes required for the effective implementation of the primary care proposals in Newham, and the limited financial burden that Overseas Visitors appear to be having on primary medical services in the Borough ... proposals to streamline charging procedures at primary medical services with those in place at hospitals should be reconsidered."*⁹⁵

LIMITING ACCESS TO SERVICES IS UNLIKELY TO ALTER MIGRATION PATTERNS

17. In 2004, when restrictions on access to NHS hospital services came into force, the discourse focussed upon limiting "health tourism". The Government have since stated no evidence of significant levels of health tourism exists.⁹⁶ Home Office research examining the factors influencing decision-making of asylum seekers when choosing the UK in preference to other destinations demonstrates little knowledge regarding entitlement to services.⁹⁷ Indeed, there is evidence to suggest that many health needs of recent migrants arise after entering the UK; most patients having been in the country for many months or years before accessing health services.^{98, 99, 100} BMA Research finds that health status of new entrants typically worsens in the two to three years after entry to the UK.^{99,101}

18. More recent proposals to restrict access to NHS services have been predicated on the idea that denying access to services might persuade undocumented migrants and refused asylum seekers to leave the country. Such proposals should be rejected on a number of grounds, principally that it is inhumane for a wealthy nation to attempt to reduce the cost of removals by deliberately seeking to damage the health of its most vulnerable residents—those that are both sick and have immigration difficulties.

19. A recent Home Office report stated that, "Illegal migrants are unlikely to place a great strain on the NHS as most are thought to be young and therefore relatively healthy".¹⁰² These proposals may not even encourage the sick to leave: It seems unlikely that unwell patients, who are less able to travel, would voluntarily return to a country lacking adequate health services. Accessible healthcare of a reasonable quality remains unavailable in the home countries of many refused asylum seekers.¹⁰³

⁹³ Royal College of General Practitioners. The Value of General Practice. RCGP Factsheet, November 2006. Available from: http://www.rcgp.org.uk/pdf/ISS_INFO_06_ValueGenPrac.pdf.

⁹⁴ Healthcare Commission (2006). State of Healthcare. Available from www.wales.nhs.uk/documents/State_of_Healthcare_2006.pdf.

⁹⁵ Hargreaves S, Friedland J S, Holmes A (June 2006). The Identification and charging of Overseas Visitors at the NHS Services in Newham: a Consultation. Available from <http://www.newhampct.nhs.uk/docs/publications/IHUEntitlementReport06.pdf>.

⁹⁶ Johnson M (February 2005). Evidence to Third Report from the Health Committee: patient and public involvement in the NHS. Question 211. Available from <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhealth/252/5021008.htm>.

⁹⁷ Robinson V, Segrott J (2002). "The decision-making of asylum seekers", Home Office Findings No 172. Available from <http://www.homeoffice.gov.uk/rds/pdfs2/r172.pdf>.

⁹⁸ Terrence Higgins Trust and George Health Trust (2003). Recent migrants using HIV services in England. Available from <http://www.tht.org.uk/informationresources/publications/policybriefingpapers/recentmigrantsusinghivservices.pdf>.

⁹⁹ Project London (May 2008). Report and Recommendations 2007: Improving Access to Healthcare for the Community's Most Vulnerable. Available from <http://www.medecinsdumonde.org.uk/doclib/104524-report2007light.pdf>.

¹⁰⁰ Burns FM *et al* (January 2008). Missed opportunities for earlier HIV diagnosis within primary and secondary healthcare settings in the UK. *AIDS*; 22(1): 115–22.

¹⁰¹ British Medical Association (October 2002). Asylum seekers: meeting their healthcare needs. Available from [http://www.bma.org.uk/ap.nsf/AttachmentsByTitle/PDFAsylumseekers/\\$FILE/Asylumseekers.pdf](http://www.bma.org.uk/ap.nsf/AttachmentsByTitle/PDFAsylumseekers/$FILE/Asylumseekers.pdf).

¹⁰² Home Office (March 2007). Enforcing the rules. A strategy to ensure and enforce compliance with our immigration laws. Available from <http://www.medact.org/content/refugees/EnforcementStrategy.pdf>.

¹⁰³ For example, see African HIV Policy Network. Completing the Picture: An examination of the Home Office's country reports on the availability of HIV treatment in Zambia, Malawi, Uganda, South Africa, Nigeria and Zimbabwe. Available from http://www.ahpn.org/downloads/campaigns/Completing_the_Picture_2008.pdf.

20. If one disregards the devastating effect these proposals would have upon vulnerable migrants, an ineffective immigration policy could be forgiven if there were no unintended consequences. However, restricting access to healthcare for a section of the community has wide-ranging and unwanted effects outlined above, not least on Human Rights.

HEALTH POLICY SHOULD NOT BE MADE BY THE HOME OFFICE

21. It is clear that limiting access to NHS services could adversely affect Human Rights of individuals concerned, public health, and NHS administration and finances. Introduction of such changes in a Home Office bill as part of a large package of changes would be entirely inappropriate. It would not permit sufficient debate or scrutiny of the changes. Health policy should be made by people with expertise in public health and health management. Legislation on access to NHS services should be drafted by the Department of Health.

CONCLUSION

22. A policy of deliberate denial of healthcare as means of forcing people from the country is morally unacceptable and would breach several international Human Rights agreements. Moreover, there is no evidence to suggest that it would be effective. Such a policy would contribute to discrimination against and marginalisation of vulnerable groups with every right to remain in the UK. There would also be consequences for public health, NHS finances and administration, and professional codes of ethics for healthcare providers. Any changes in the rules governing access to the NHS should be made, following adequate consultation, by people with public health and health management expertise within the Department of Health. It would be a grave error for the Home Office to introduce such changes as a postscript to a piece of immigration legislation.

Date

Memorandum submitted by HSMP Forum

INTRODUCTION

“HSMP Forum” is a “not for profit” organisation. It was formed after the 2006 decision by Government to apply new qualifying criteria for Highly Skilled Migrant Programme (HSMP) for permanent residency (ILR) and for visa extensions of existing resident Highly Skilled Migrants. “HSMP Forum” has been lobbying the Government and courts by challenging unfair policies, so to allow existing legal Skilled Migrants to settle in UK. The organisation’s aim is to support and assist migrants under the world-renowned British principles of fair-play, equality and justice and believes in challenging any unfair policies which undermines migrants’ interests.

We have few serious concerns about this bill which will unfairly affect a large number of migrants. Being a migrant support organisation we directly receive complaints/concerns from our members as well as other migrants and therefore believe that our submission might give the committee a clear idea on how the bill would affect migrants under some categories.

PART 3—RETROSPECTIVE APPLICATION OF LAWS

We believe the journey to settlement and citizenship starts when migrants enters Great Britain under any government approved scheme and hence changing the rules applicable to gain permanent residency / citizenship for such migrants is unfair and undermines the basic notion of fair play and justice.

The new citizenship rules should not be applied to the existing migrants who came under a different set of rules and planned their lives as per the rules in place when they decided to come to the U.K.

In the recent past in April 2006 the Government made changes to the indefinite leave to remain qualifying criteria from 4 to 5 years. This in itself caused hardships for migrants¹⁰⁴ when it was applied retrospectively to existing migrants. In our recent judicial review judgment dated 8th April 2008¹⁰⁵ the high court ruled that application of such retrospective changes as unlawful.

The past changes in qualifying criteria for indefinite leave to remain (ILR) in 2006 from 4 to 5 years has caused various forms of hardships for migrants and their families. Some of the hardships caused include Migrants’ children not being able to attend universities due to exorbitant international student fees resulting in some to take gap year, some to abandon their studies while some to change their career plans. Professionals like Doctors, Accountants and others who intended to do advance courses are unable to do so.

¹⁰⁴ <http://www.hsmpforumltd.com/hsmpilrstatements.html>

¹⁰⁵ <http://www.bailii.org/ew/cases/EWHC/Admin/2008/664.html>

In addition to the travel restrictions to be followed in order to abide by the rules to obtain ILR, many migrants have been facing difficulties in getting permanent employment and senior level positions due to employers' reservations in recruiting those with limited leave to remain. A year more involves a year more of employment limitations and lost opportunities. Migrants are unable to obtain mortgages to buy a house due to their limited visas as Banks and financial institutions hesitate to issue the required mortgages. Needless to say all their plans have been jeopardised and it has led to an insecure and unpredictable future. Any further delay in permanent residency would cause similar or further problems to existing migrants.

The term temporary residence / permission (or probationary citizenship) will further complicate employment for migrants. Migrants already encounter very many issues when applying for job opportunities wherein employers tend to refuse job offers to migrants with limited leave to remain. The term will further create obstacles among migrants, wherein employers will tend to refuse candidature for the jobs on the basis that the migrant in Great Britain is on a temporary basis and would not want to make investments in the migrants training nor will be interested to consider the migrant for managerial or senior level roles. This will hamper the migrant's employability prospects and growth. Hence, make them subject to exploitation and would create inequalities in the work place.

Any immigration law should take into account the ground realities. Once people have managed to satisfy the required thresholds and have made a legal entry in the country, they should be treated on a level playing field.

Existing highly skilled migrants have already encountered various problems due to the retrospective nature of rule changes. In the past, the government back-tracked from the promises they made to migrants to entice them to come to the U.K. Our recent judicial review judgment of April 2008 on HSMP changes clearly emphasized on the unfairness of retrospective nature of rules changes which took place in 2006. The judgment also criticized the government for abusing its powers.

PART 3, CLAUSE 34—VOLUNTARY WORK TO FASTEN THE PROCESS FOR PERMANENT RESIDENCY

We believe expectation from migrants to undergo voluntary work to speed up the process of being permanent residents will lead to exploitation of migrants by organizations providing this voluntary work. It would discriminate ethnic minority in obtaining the permanent residency earlier comparatively their white counterparts.

Migrants will feel being forced to do voluntary work and hence will not contribute whole heartedly. It also undermines the true essence of philanthropic aim of the voluntary work. It would make voluntary work look like a barter system and would reflect it rather in a commercial sense.

Certain voluntary groups might treat migrants as slave labourers and would exploit migrants and demean them since the migrant would be dependent on the recommendation letter from the voluntary organization to obtain his citizenship. It is also wrong to use the voluntary work as a means to integration and would be considered as an insult by certain categories of migrants. Highly skilled migrants have already shown commitment and integrity by making sacrifices, when they decided to come to Great Britain they gave up their well established careers back home, sold properties, winded up investments and uprooted families. Migrants like teachers, doctors, engineers have already been making enormous contribution in Britain.

How much the migrants are integrated in the society may depend on the route through which they have entered the UK. The measures put in place to facilitate their integration should probably depend on it too.

Highly qualified professionals will consider voluntary or community work as a sort of humiliation since it is usually meant for offenders to reduce their sentence.

Memorandum submitted by the Immigration Advisory Service

About the Immigration Advisory Service

The Immigration Advisory Service (IAS) is the UK's largest not-for-profit charity providing services in immigration and asylum law and a leading commentator on these issues. The organisation is independent from the Government. IAS was created in 1993 out of the former United Kingdom Immigrants Advisory Service (UKIAS: established in 1970) as an independent organisation publicly funded under the 1971 Immigration Act to provide free legal advice and representation to persons with rights of appeal against refusal of their applications. Together with UKIAS, therefore, IAS has over 37 years' experience of helping those facing immigration and asylum difficulties. It has 20 offices and almost 400 staff throughout the UK and overseas providing confidential legal advice and representation in immigration, asylum and nationality law from first advice to appeal in the higher courts.

This memorandum is provided in response to the Committee's Call for Evidence of 31st July 2008

 INTRODUCTION

1. The draft (partial) Immigration and Citizenship Bill confirms concerns expressed by IAS in response to the Green Paper, *The Path to Citizenship: Next Steps in Reforming the Immigration System*. The simplification project and this draft Bill do not meet their objectives, the main one of which is to simplify the immigration system.

2. The Bill goes well beyond consolidating and repealing current immigration legislation—it greatly increases the power of the Secretary of State and other border agency staff, whilst decreasing the rights of not only migrants but also of those with the right of abode and British citizens.

3. This is only a partial draft Bill and a number of topics which will greatly impact upon human rights will be included in the full Bill these include; data sharing, biometrics, asylum support, and powers of arrest. In addition to this a large proportion of areas will not be covered by primary legislation and will be covered in the Immigration Rules.

PART 1—REGULATION OF ENTRY INTO AND STAY IN THE UK

4. Clause 1 requires that a person who claims to be a British Citizen prove this, but only by means of a British passport or ID card. This seems unnecessarily restrictive, more restrictive indeed than the EEA Regulations which allow for nationality to be proven *by other means*.

5. Clause 2—This clause, if it is designed to simplify immigration control by using terms which have an ordinary common meaning, fails pointedly to do that. Notwithstanding clause 2(2), this clause would exclude from entering the U.K. persons seeking protection or otherwise establishing their right to enter or stay here.

6. Clause 11, which permits the Secretary of State to vary the conditions on a grant of temporary permission, is drawn far too widely. Given the extent to which the conditions may well impinge on a person's private life, the powers of the Secretary of State to vary conditions of her own volition must be more clearly defined and circumscribed. Our fears are further compounded by the introduction of harsh penalties for breaches under this Bill.

7. The IAS opposes the automatic cancellation of immigration permission in circumstances *inter alia* where a person with permanent permission leaves the U.K. for a defined purpose and defined period longer than 2 years (eg to study abroad for three years). It is noted that there is to be no right of appeal against automatic cancellation.

PART 2—POWERS TO EXAMINE ETC

8. Part 2 bestows upon border agency staff who are not under any special scrutiny, as are the Police, extraordinarily wide powers of stop and search, where they can demand production of identity documents and search any other documents in the person's possession at the time. The stop and search examination could potentially lead to suspension of any immigration permission the person being examined may have an indefinite detention until such time the examining officer is "satisfied" that the person could be released.

9. These give wider powers than current laws, as the border agency staff need not have a reasonable "suspicion" about the possible commission of an immigration offence.

10. Clause 25 (1) and (2) seek to examine those who have arrived into the country, have just entered and those who are seeking to enter, and these could be any British or EEA citizen or migrant. Also these powers go far beyond the idea of exercising border controls. They do not stop with stopping and searching persons within the country. They give the same powers to examine those who are seeking to enter the UK by applying at an overseas post, or those who have such an application pending either for permission to stay in the UK or for transit permission.

11. The powers as to where and who and why an immigration official would stop and search persons are without any constraint and arbitrary to the extent that the likelihood of breaches of human rights of individuals of both British citizens and migrants is high. The requirement to establish a "reasonable suspicion" before stopping a person on the street will make this process less arbitrary. There are no such provisions.

12. The idea of having to produce ID documents at any given time, will mean that people will have to carry their passports or ID documents with them all the time and this will mean both British and migrant persons will be obliged to do so. This clause will effectively provide a "normalising" route or process for the introduction of ID cards.

13. The non production of a valid ID document will be a criminal offence according to clause 101. People may not be able to produce one, for a variety of reasons.

14. The fact that these powers will be disproportionately used against BME communities will not encourage their integration into British society. It is also not clear who will hold such broad powers—all Border Agency Staff, and not "designated officials as stipulated in the 2007 Act"?

PART 3—CITIZENSHIP

15. The present route to citizenship is clear and straightforward. There are three distinct categories of immigration status—limited leave, indefinite leave and British citizenship.

16. Part 3 of the Bill does not meet the intended objective of the legislation—simplification. The proposed three-stage journey to citizenship is more complex and difficult to understand and navigate than the present route to citizenship.

17. Probationary citizenship creates another unnecessary hurdle to achieving settlement or citizenship in the UK. It will lengthen the period before which a migrant can seek permanent residence or British citizenship. Probationary citizenship will not encourage migrants to commit to and integrate into the UK. By the time, they reach this second stage of their journey to citizenship; they would have lived in the UK for five years. In this period, they would have otherwise have been settled and integrated as taxpayers; and otherwise have made significant contributions through their daily activities.

18. Clause 34 state that where a migrant meets an “activity condition” as prescribed, it would take less time for the migrant to become eligible to apply for British citizenship or permanent residence. We have expressed concern and continue to reiterate this concern that the concept of “active citizenship” is discriminatory. British-born citizens are not legally obliged to undertake a form of “active citizenship.” This is likely to create two tiers of British citizens distinguishing those born in the UK and those who came to settle in the UK. In addition to this certain nationalities and ethnic groups will find it harder to meet the standards, also some women and less wealthy migrants would also be disadvantaged. This is unlikely to achieve integration, and social cohesion and harmony between the citizens and migrants.

19. Part 3 of the Bill also has the consequence of pressurising migrants from countries which prohibit dual nationality to abandon their original nationality in favour of British citizenship or permanent residence.

20. The Governments proposal on 16 July 2008 to allow children born to British mothers before 7 February 1961 the right to register as a British citizen is not included in the draft Citizenship, Immigration and Borders Bill. We submit the government should rectify the historical anomaly and discriminatory practice as it is long overdue.

21. Part 3 of the Bill does not include any provisions conferring the right of appeal to migrants should their applications for British citizenship or permanent residence fail. The route to citizenship or permanent residence is based on the concept of “earning the right to stay” which we submit is a formal contract imposed on migrants. As such, the Government’s decision-making process should not be unfettered. It is only fair and proportionate that migrants should expect having entered into contract, a right to challenge the Government’s refusal of their application by appeal.

PART 4—EXPULSION ORDER AND REMOVAL ETC FROM THE UK

22. At present there are two methods used by the SOS to forcibly remove a person not lawfully present in the UK, namely administrative removal and deportation. The Bill proposes to merge this into a single power of expulsion.

23. We object to the terminology. At present there is a clear distinction between administrative removal and deportation, with the latter restricted only to criminals where the Secretary of State deems it not conducive to the public good for the person to remain in the UK. The Bill will eliminate this distinction thus effectively criminalising every person subject to an expulsion order.

24. The Bill also creates a power to expel non-British citizens who are family members of a person against whom an expulsion order has been made. Someone could be expelled from the UK if a family member fails to meet a reporting condition.

25. The Secretary of State is not under a duty to make an expulsion order in all except “foreign criminal cases” but as the power exists it may be exercised arbitrarily or discriminately. For example, if a student overstays for a very short period, merely perhaps due to a minor mistake in the application process, they may be prevented from returning to the UK for anything up to 5 years. This could mean a huge investment thrown away and the potential loss to the U.K. of a skilled migrant..

26. Another worrying factor is that an expulsion order may be made whether or not the person is in the UK when the order is made (clause 37(5)). Clause 171 prevents a person from exercising a right of appeal outside the UK against the decision to make an expulsion order. Therefore where an expulsion order is made while a person is outside the UK, there will be no right of appeal against the decision to make the Order.

27. Of particular concern is the fact that under clause 46, the SSHD may recover the cost of an escort accompanying a person on the flight home. Escorts are often used where a person may self-harm/be a suicide risk or have serious health problems. It is likely that the expulsion of this person will reduce his/her life expectancy (eg HIV+ client refused leave on Article 3 grounds) due to lack of physical or mental health facilities in the receiving State. The additional burden of being charged to travel towards a nearer death is perverse and inhuman.

PART 5—POWERS TO DETAIN AND IMMIGRATION BAIL

28. The Act introduces the new term of immigration bail; we are concerned that this will effectively criminalise those who are awaiting a result of their asylum claim who are currently granted temporary admission. Furthermore a breach of an immigration bail condition is a criminal offence punishable with up to 51 weeks in prison. We believe this is disproportionate.

29. Part five of the Bill contains a list of matters that must be taken into account when deciding when to grant bail and whether to make bail conditional. These factors include only those that weigh against the grant of bail, and do not include factors that are in favour of bail. The list is seriously imbalanced and flawed.

30. We are deeply concerned by the additional powers granted to the SSHD under this section. Clause 62 (2) (c) requires the SOS to consent to an AIT decision to grant bail to those facing imminent removal. This is despite the fact that the court will have already looked into whether removal is in fact imminent when making its decision. It is currently common for people to be held in detention where removal is imminent pending travel documents; however it can often take months for these to come through. This allows the SSHD to overrule the courts, this is not appropriate.

31. We are extremely concerned by the introduction of a financial security under Clause 62, whilst at present this already exists in the form of a surety it is only promised and does not need to be deposited. This will be discriminatory towards refugees and asylum seekers who are less likely than other people in society to deposit the sums of money required. It will also affect those on low income and those with families. We believe that this will lead to more people being detained for longer periods.

PART 7—OFFENCES

32. The Bill increases the powers of examination (Part 2) to include British Citizens. Clause 102, “failure to submit to medical examination or provide medical reports” could therefore potentially apply to British Citizens as well as foreign nationals.

33. Clause 116 provides that a person who breaches a condition of bail, without reasonable excuse, will be guilty of an offence liable to maximum term of imprisonment of 51 weeks. We are concerned that this may leave a person open to arrest and charge where s/he fails to report once (reasons for which may be legitimate). At present a person on bail, who fails to observe a condition of bail may be liable to be detained again. The extension of powers is another example of the Government’s criminalisation of those subject to immigration control for minor breaches of conditions of leave/bail or for offences committed solely to be able to enter the UK, often for protection purposes.

34. While we welcome control of serious criminals, whatever their immigration status, and conviction of those who exploit immigrants, we are concerned that the powers to charge migrants increases with every Act passed through Parliament.

35. It is our view that the additional powers under this Bill will give rise to human rights breaches, the increased powers to examine and the expulsion powers could be used in a disproportionate manner and lead to breaches of a citizen (or migrant’s) private life rights. The powers will target ethnic minorities and are likely to give rise to a breach of Article 14 within the ambit of Article 8.

PART 10—APPEALS

36. Too much is drafted in rather general terms, or left to subsidiary legislation, leaving it open how this would actually work, which is of concern in view of the potential seriousness of the consequences to the immigrant.

37. The appeal rights are mainly under following categories:

- refugees;
- protection permission other than refugee permission;
- family life applications;
- expulsion orders; and
- other individual grants of immigration permission.

38. This section does not define a “family life” application or appeal or the grounds or scope of the appeals.

39. Clause 168—This Section as now drafted seems to mean that once the decision-maker alleges deception, there is no appeal right. That cannot be good as surely there must be an effective way to challenge any accusation of deception. There should be rights to appeal both in-country and overseas against a decision under this section, considering the seriousness of any allegation of deception.

40. Clause 185—It is wholly disproportionate and alarming to suggest that it would be a criminal offence to fail to attend or produce a document as drafted under this section. The sanction of a criminal offence is inappropriate. No criminal sanction should be imposed for any failure to attend or produce a document.

CONCLUSION

41. The draft Bill extends the power of the Secretary of State, reduces the rights of migrants for longer periods of time and is incomplete in its provisions. It is anticipated that the Bill as it currently stands will attract many judicial review challenges, which is precisely what it is seeking to avoid.

October 2008

Memorandum submitted by the Immigration Law Practitioners' Association

INTRODUCTION

1. ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

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

EXECUTIVE SUMMARY AND OVERVIEW

3. The Government has subtitled the simplification project as "*making change stick*".¹⁰⁶ The draft Bill indicates this subtitle is inaccurate. The provisions in the draft Bill are drawn excessively widely. If changes are made in the way proposed by this draft Bill, they will not "stick" because:

- (a) At a minimum, powers drawn as widely as in this draft Bill will require extensive provision in subordinate law (whether in the Immigration Rules, regulations or in policy instructions), without which the powers will on their face be arbitrary and their exercise unforeseeable.
- (b) However, the breadth of the powers proposed in the draft Bill may simply prove insufficiently precise—such powers and any subordinate law made under them could expect to be subject to legal challenge. This imprecision may require amending legislation, which would undermine a key aim of the simplification project in addressing the complexity arising from longstanding failure to consolidate immigration law.

4. If the need for amending legislation were avoided, this could only be at the expense of leaving very wide scope for Government to change policy and increase or redirect powers through subordinate law—Immigration Rules, regulations and policy instructions. Far from establishing a lasting legacy of settled immigration law, this would merely invite future Governments to chop and change immigration law at will without effective parliamentary scrutiny. It would also raise a burden on the UK Border Agency which it, as its predecessors,¹⁰⁷ has consistently failed to meet: ensuring transparency and accessibility of law by making relevant policy instructions and guidance, including an archive of such policy, fully and publicly available.¹⁰⁸

5. This has substantial constitutional implications because increasing the power of the executive in this way, while reducing the influence of Parliament, would need a greater controlling influence from the judiciary. In important respects, the provisions in the draft Bill and other developments proposed within the simplification project seek to reduce the judicial role, which it is said is already under strain. Home Office proposals for the future of the appeals system are to reduce the role for judicial review and scrutiny of the tribunal by the higher courts.¹⁰⁹

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

- (a) provide powers that on their face are without any or any sufficient constraint;
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¹⁰⁶ *Making Change Stick: an introduction to the Immigration and Citizenship Bill* is available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/makingchangestick.pdf?view=Binary>.

¹⁰⁷ both the Border and Immigration Agency and Immigration and Nationality Directorate.

¹⁰⁸ The starkest failure by IND in this respect was to fail to make available its policy on Iraqi asylum claims and refusing, and contesting on appeal, large numbers of asylum claims which its policy required to be accepted, see eg *R (Rashid) v SSHD* [2005] EWCA Civ 744; but it remains the case that relevant and current policy is not consistently made available and is on occasion withdrawn pending revision for long periods of time without any interim policy being introduced or at the least made available, while no comprehensive archive of policy instructions and guidance is maintained.

¹⁰⁹ *Immigration Appeals: fair decisions, faster justice* is available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/immigrationappeals/>

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

- (b) extend barriers and penalties facing refugees and others fleeing serious harm;

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

- (c) reduce judicial oversight and access to judicial remedy;

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

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

These include provisions relating to the *removal of the right of abode* (paragraphs 45), *British nationality, citizenship and naturalisation* (paragraphs 46–48), *access to state benefits and services, and immigration fees* (paragraphs 49–53) and *children and trafficking victims* (paragraphs 54–55).

7. The concluding section, *conclusions and general observations*, highlights misuse of “plain English”¹¹⁰ throughout the draft Bill.

POWERS TO STOP, EXAMINE AND DETAIN

8. The draft Bill contains very broad powers to stop individuals to examine them in order to establish their nationality and/or whether they have permission to be in the UK.¹¹¹ The exercise of these powers would not be restricted to at immigration controls, but would include any place in the UK. The powers are not discriminatory in that any person, British or otherwise, may be subjected to them.¹¹²

9. The Committee has previously raised concerns regarding racial profiling.¹¹³ The draft Bill specifies no grounds, reasonable or otherwise, on which these powers may be exercised leaving wide scope for arbitrary and discriminatory exercise of the powers. This is all the more concerning given that the initial interference with private life, which may result from a person being required to submit to an examination, is attended by a power to detain the person until such time as the “*examination has been completed, and all relevant matters have been determined*”¹¹⁴ (eg the Secretary of State is satisfied of the person’s British citizenship, EEA free movement rights or immigration status¹¹⁵ and the person has provided such information and documentation in respect of these matters as may be required by the Secretary of State.¹¹⁶) These powers carry criminal sanctions.¹¹⁷

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

BIOMETRIC REGISTRATION, IDENTITY CARDS AND DATA PROTECTION

11. The Committee has stated that it “*fundamentally disagrees with the Government’s approach to data sharing legislation, which is to include very broad enabling provisions in primary legislation and to leave the data protection safeguards to be set out later in secondary legislation*”.¹¹⁸

12. It is intended that the full Bill will contain provisions in this area, which are not yet included in the draft Bill. However, the approach most recently adopted in the UK Borders Act 2007 is precisely that with which the Committee has fundamentally disagreed. Indeed, the Committee concluded that provisions in that Act were too widely drawn to allow assessment of their Article 8 compatibility and raised concerns as to

¹¹⁰ Maximising the use of plain English is said to be one of the key “principles” of the simplification project, see the June 2007 *Simplifying Immigration Law: an initial consultation* at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/consultationdocument.pdf?view=Binary> and more recently, the February 2008 *The Path to Citizenship: next steps in reforming the immigration system* at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/pathtocitizenship?view=Binary>

¹¹¹ Clauses 25 & 26.

¹¹² With the exception of British citizens who have never left (and hence never entered) the UK; but it is impossible to envisage how such a distinction can be given effect in practice.

¹¹³ E.g. Oral Evidence from Rt Hon Lord Falconer of Thoroton QC and Rt Hon Baroness Scotland of Asthal QC on Monday 30 October 2006, published with the Joint Committee’s Thirty-second report for the Session 2005–06 *The Human Rights Act: the DCA and Home Office Reviews*, 14 November 2006 HL 278/HC 1716, Q101–Q104.

¹¹⁴ Clause 53(1).

¹¹⁵ Clause 25(2).

¹¹⁶ Clause 28.

¹¹⁷ Clauses 101, 102 & 121.

¹¹⁸ The Joint Committee’s Fourteenth Report for the Session 2007–08 *Data Protection and Human Rights*, 14 March 2008 HL 72/HC 132, Conclusions and recommendations, paragraph 2.

racial profiling.¹¹⁹ The Committee also expressed concern at the prospect that production of an identity card becomes necessary in order to access state benefits. If access becomes linked to immigration control in this way, some immigrants may simply be discouraged from accessing services to which they may be entitled or to which there is a clear public interest that access is maintained (eg to avoid public health risks or so that crime is reported to the police). These concerns are born out by the Committee's findings following the inquiry into *The Treatment of Asylum-Seekers*, which demonstrated that confusion following the introduction of the 2004 Charging Regulations¹²⁰ has led asylum-seekers to fail to seek treatment for "*life-threatening illnesses or disturbing mental health conditions*".¹²¹ Linking access to immigration control would be likely to compound confusion with suspicion.

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

CONDITIONS ON TEMPORARY PERMISSION AND CANCELLATION OF PERMISSION

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

15. Any person granted temporary permission could be subjected to conditions, including reporting and residence conditions.¹²² The draft Bill would also allow for conditions "*restricting the person's work, occupation or studies*".¹²³ That relating to studies is new, albeit the Explanatory Notes are silent as to the condition. Given that any suspicion that a person's entry or stay in the UK is for ulterior motives may be examined and dealt with under current immigration powers it is not understood why this addition should be necessary.

16. No limit or purpose is specified for the application of these conditions; and they may be applied at any time from arrival in the UK.¹²⁴ The current Immigration Rules do not comprehensively set out what conditions will be attached to which categories of entrant or in which circumstances and for what purposes they may be attached. The Rules ought to clearly establish what applicants can expect under each category.

17. For those on routes to citizenship or settlement, the time, for which conditions may last or during which they may be imposed, may be several years.¹²⁵ Failing to comply with any condition may have such disastrous effects as expulsion¹²⁶ without right of appeal,¹²⁷ exclusion from the UK "*for a limited or unlimited period*"¹²⁸ and criminal prosecution.¹²⁹ These consequences may result immediately or at any time during which the person continues to have temporary permission; and regardless of the minor, inadvertent or unavoidable nature of any failure to comply (eg failing to report at a specified time because of hospitalisation or illness).

18. Despite the several circumstances in which permission would be automatically cancelled,¹³⁰ the draft Bill also includes power, which is wholly unconstrained, for the Secretary of State to cancel permission.¹³¹ Although the Explanatory Notes state that criteria for cancellation will be set out in the Immigration Rules,¹³² if there are circumstances where power to simply cancel a person's permission is needed, beyond when permission will be automatically cancelled, such circumstances should be set out in statute.

19. The power to cancel permission includes both temporary and permanent permission.¹³³ Existing powers to withdraw indefinite leave are carefully circumscribed in legislation¹³⁴ and there is no good reason to extend these powers.

¹¹⁹ The Joint Committee's Thirteenth Report for the Session 2006–07 *Legislative Scrutiny: Sixth Progress Report*, 21 May 2007 HL 105/HC 538, paragraphs 1.20 *et seq.*

¹²⁰ National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2004, SI 2004/614.

¹²¹ The Joint Committee's Tenth Report for the Session 2006–07 *The Treatment of Asylum Seekers*, 30 March 2007 HL 81–I/HC 60–I, paragraph 17 of the conclusions and recommendations.

¹²² Clause 10(d) & (e).

¹²³ Clause 10(a).

¹²⁴ Clause 11.

¹²⁵ With the changes to naturalisation and settlement, these periods are extended by several years.

¹²⁶ Clause 37(2)(a) & (4)(d).

¹²⁷ Clause 171.

¹²⁸ Clause 37(6).

¹²⁹ Clause 99.

¹³⁰ Clauses 12(3), 13(1), 13(2), 15(3), 42(1) and 47(2).

¹³¹ Clause 14.

¹³² Paragraph 64.

¹³³ Clause 6(4)(b) & 6(3)(b) respectively.

¹³⁴ These relate to persons who are liable for deportation, obtained indefinite leave by deception, fall within the cessation clauses of the Refugee Convention and where there is reason to review the person's leave on his or her arrival in the UK (see section 5(1), Immigration Act 1971, section 76, Nationality Immigration and Asylum Act 2002 and paragraph 2A of Schedule 2, Immigration Act 1971).

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

EXPULSION AND EXCLUSION FROM THE UK

21. The elision of deportation and administrative removal by the expulsion provisions in the draft Bill would subject individuals, who do not currently face continuing exclusion from the UK, to that fate. The draft Bill would go further than mere return to the position first introduced by changes to the Immigration Rules from 30 April 2008,¹³⁵ a position from which the Government in significant part resiled by introducing concessions in respect of entry clearance applications to join family members, those who had entered the UK as children and those who had been trafficked to the UK.¹³⁶ The draft Bill would impose a mandatory re-entry ban on anyone subject to expulsion regardless of any circumstances; and on the face of the provisions such exclusion may be permanent¹³⁷ or, if the exclusion is temporary or lifted, the individual may nonetheless be required to pay any costs of the expulsion if he or she wishes to return to the UK.¹³⁸

22. The current “*automatic deportation*” regime¹³⁹ is retained by the draft Bill¹⁴⁰ except that the draft Bill explicitly reverses the presumption of liberty.¹⁴¹ Whereas this regime makes exception for those whose removal would be contrary to the ECHR or Refugee Convention, these exceptions merely suspend (rather than cancel) the mandatory deportation for an indeterminate period for so long as the exceptions may continue to apply.¹⁴² As such, the provisions introduce a permanent uncertainty which of itself undermines the individual’s rehabilitation and reintegration and thereby interferes with his or her Article 8, ECHR rights.

23. The regime also fails to protect all child offenders from “*automatic deportation*” by the focus on age at the date of conviction rather than commission of the offence.¹⁴³ The draft Bill erroneously limits the effect of the exception for trafficking victims to this regime, rather than to expulsion generally.¹⁴⁴ This regime may also lead to prolonged detention because of the vague provision for expulsion orders to be made “*at a time chosen by the Secretary of State*”,¹⁴⁵ and the wide power to detain where it is thought “*a person is someone on relation to whom an expulsion order may be made*”.¹⁴⁶

24. *The continuing nature of the expulsion provisions relating to those treated as “foreign criminals” constitutes an Article 8, ECHR interference; and these provisions risk breaches of Article 5, ECHR. The arbitrary focus on age at date of conviction is not compatible with the UN Convention on the Rights of the Child, in particular Article 40.¹⁴⁷ The draft Bill is not compliant with the UK’s obligations to be adopted under the Council of Europe Convention on Action against Trafficking in Human Beings.*

CARRIERS’ LIABILITY, AUTHORITY-TO-CARRY SCHEMES AND IMMIGRATION OFFENCES

25. The extension of visa regimes, introduction of juxtaposed controls and a civil penalty regime for carriers have each created substantial barriers to those seeking sanctuary in the UK. Consequently the power of smugglers and traffickers over asylum-seekers has been extended. The authority-to-carry provisions¹⁴⁸ in the draft Bill would further extend this.

26. The proliferation of immigration offences on the statute book should be curtailed and the refugee defence¹⁴⁹ improved both to meet the UK’s international obligations¹⁵⁰ and to prevent the criminalisation and imprisonment of asylum-seekers on account of the exploitative and harmful circumstances into which immigration controls have forced them.

¹³⁵ Paragraphs 320(7B) introduced by HC 321 Statement of Changes in the Immigration Rules.

¹³⁶ These concessions were first announced by the Minister in Parliament on 13 May 2008 (Hansard HC, 13 May 2008 : Column 1353) and the first two were incorporated into the Immigration Rules from 30 June 2008 (paragraph 320(7C) introduced by HC 607 Statement of Changes in the Immigration Rules); the third concession (on trafficking victims) is to be adopted on the UK’s ratification of the Council of Europe Convention on Action against Trafficking in Human Beings—the Minister had initially indicated the possibility of the second and third of these concessions when questioned by the Committee (see the Minister’s answer to Q16, Uncorrected Oral Evidence given by Liam Byrne MP, Minister of State, Home Office and Lin Homer, Chief Executive, Border and Immigration Agency on 19 February 2008 to the Joint Committee, HC 357–i).

¹³⁷ Clause 37(6).

¹³⁸ Clause 46(4).

¹³⁹ Sections 32 to 39, UK Borders Act 2007.

¹⁴⁰ In particular, clauses 37(2)(b), 32(9), 38, 39, 55 and 171(1), (2) & (3)(b).

¹⁴¹ Clause 55(4).

¹⁴² This follows because once the individual falls within the statutory meaning of “foreign criminal” he or she can never escape statutory label, and the mandatory requirement to deport (or expel) will take effect at any time that any exception ceases to apply.

¹⁴³ Clause 39(2).

¹⁴⁴ Clause 39(4); this exception ought to be included with those in clause 38.

¹⁴⁵ Clause 37(9).

¹⁴⁶ Clause 55(1).

¹⁴⁷ Relied upon by the Grand Chamber of the European Court of Human Rights in finding a violation of Article 8 in Case of Maslov v Austria (Application No. 1638/03).

¹⁴⁸ Clause 149.

¹⁴⁹ Section 31, Immigration and Asylum Act 1999.

¹⁵⁰ Article 31, 1951 Convention relating to the Status of Refugees.

27. The provisions in the draft Bill are inadequate. Firstly, the proliferation of offences would continue. If any sanction were attached to the superfluous duty at clause 7,¹⁵¹ this would immediately expose an asylum-seeker smuggled into the UK to prosecution for three separate offences.¹⁵² Prosecutions would also be extended to include resisting or obstructing any person exercising any immigration function.¹⁵³

28. Secondly, the provision for the refugee defence¹⁵⁴ remains inadequate. Restricting the defence to specified immigration offences¹⁵⁵ necessarily reduces the proper scope of the defence leaving open prosecution for non-immigration offences that in the instant case relate directly to immigration control.¹⁵⁶ Requiring the defendant to show that he or she “*could not reasonably have expected to be given protection under the Refugee Convention*” in another country through which he or she passed¹⁵⁷ restricts the reach of the defence by imposing an obligation not to be found in the Convention; and in focusing on whether the country would have provided sanctuary rather than whether the asylum-seeker could reasonably have been expected to seek it from that country further penalises those forced into the hands of smugglers or traffickers.

29. Thirdly, despite amendments to the current version of the refugee defence,¹⁵⁸ the draft Bill continues the failure to require the asylum determination process to be concluded prior to any prosecution, which is necessary if the defence is to be effective. The criminal justice system is not the place for determining complex issues of fact and law relating to asylum. It is currently the case that many individuals prosecuted before their asylum claims are determined plead guilty despite the potential application of the refugee defence. In many cases, this is because the uncertainty of prosecution and the likelihood that the individual will be refused bail, and hence be held on remand for longer than any sentence, militate in favour of the plea.

30. Although not required by the Refugee Convention, a defence ought to be open to those whose asylum claims are genuinely made whether or not successful. This might include those granted some alternative form of protection, or indeed those found not to be able to meet the high thresholds required before refugee or humanitarian statuses are recognised or granted, but whose claims for asylum were based upon real fears.

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

EXCLUSION FROM REFUGEE STATUS, HUMANITARIAN PROTECTION AND PERMISSION

32. The Committee has previously observed upon the incompatibility of the UK’s interpretative statutory provisions regarding Articles 1F(c)¹⁵⁹ and 33.2¹⁶⁰ of the Refugee Convention.¹⁶¹

33. The Government informed the Committee that the Article 1F(c) construction is no more than declaratory in nature and that Parliament endorsed the Government’s view of when a person is “*rightly excluded from the protection [of] ... the Refugee Convention*”.¹⁶² This reasoning is incoherent. If the construction does no more than declare what is already provided by the Convention, the construction is otiose. If no more than declaratory, there is no need for either Government or Parliament to express any view on when a person should be excluded; and the task of construing the Convention can and should be left to the judiciary.

34. The draft Immigration Rules¹⁶³ would retain the current incompatible construction of Article 1F(c) and create new incompatibilities by constructions of the other constituent parts of Article 1F and of Articles 1C and 1D.¹⁶⁴ These further incompatibilities include:

- (a) The construction of Article 1D, which by the adoption in the Rules of the term “*at present*” abandons the temporal focus of the Article upon the situation at 28 July 1951.¹⁶⁵

¹⁵¹ Clause 7 merely imposes a duty to do something (obtain immigration permission) which a person would be required to do in any case by reason of clause 2.

¹⁵² Entering without permission (clause 97), being in the UK without permission (clause 98) and the breach of clause 7.

¹⁵³ Clause 121(1).

¹⁵⁴ Clause 193.

¹⁵⁵ Clause 193(1).

¹⁵⁶ See eg *R v Asfaw* [2008] UKHL 31.

¹⁵⁷ Clause 193(4).

¹⁵⁸ In particular, cf. clause 193(6) and section 31(7), Immigration and Asylum Act 1999.

¹⁵⁹ Section 54, Immigration, Asylum and Nationality Act 2006.

¹⁶⁰ Section 72, Nationality, Immigration and Asylum Act 2002, and the Particularly Serious Crimes Order 2004, SI 2004/1910.

¹⁶¹ E.g. the Joint Committee’s Third Report for the Session 2005–06 Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters, 5 December 2005 HL 75–I/HC 561–I and Twenty-second Report for the Session 2003–04 The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, 3 November 2004 HL 190/HC 1212.

¹⁶² Letter from the Rt Hon David Hanson MP, Minister of State, Ministry of Justice of 29 April 2008, published as Appendix 2 to the Committee’s Twenty-third Report for the Session 2007–08 Legislative Scrutiny: Government Replies, 26 June 2008 HL 126/HC 755.

¹⁶³ At the time of publishing the draft (partial) Immigration and Citizenship Bill, the Government also published the draft illustrative Immigration Rules on protection

¹⁶⁴ Paragraphs 39 & 41, draft illustrative Immigration Rules on Protection.

¹⁶⁵ Paragraph 39(b)(i), and see *El-Ali & Anor v SSHD* [2002] EWCA Civ 1103.

- (b) The parenthesis in the provision relating to Article 1F(b) that challenges its “*non-political*” element.¹⁶⁶
- (c) The extension of Articles 1F(a) and (b) to include persons said to be responsible for instigating or participating in exclusory acts but not themselves guilty of those acts.¹⁶⁷
- (d) The extension of Article 1F(b) to include acts committed after the refugee has been admitted to the UK albeit before his or her recognition as a refugee.¹⁶⁸
- (e) The provision for cancelling refugee status on grounds relating to “*misrepresentation or omission of facts*” despite such grounds appearing nowhere in the Convention.¹⁶⁹

These erroneous constructions of the Convention would be applied retrospectively.¹⁷⁰

35. The draft Rules also retain the current erroneous construction of Article 33.2.¹⁷¹ Whereas the draft Rules on their face recognise that Article 33.2 does not exclude a person from refugee status, the exclusion of a refugee from immigration permission under those Rules would wrongly lead to his or her exclusion from benefits, such as entitlement to work,¹⁷² receive housing¹⁷³ and other social assistance,¹⁷⁴ naturalise¹⁷⁵ and other benefits to which he or she would be entitled under the Convention.

36. *These provisions are not compatible with the Refugee Convention. Moreover, those who may be excluded from a grant of permission but who cannot be removed because of a risk of serious harm may be left in an indefinite limbo¹⁷⁶ which of itself would be an interference with Article 8, ECHR.*

DETENTION AND IMMIGRATION BAIL

37. Provisions in the draft Bill envisage the detention of people in places that are not suitable for detention and by persons who are not suitable to exercise powers of detention, including the detention by captains on board ships, aircraft and trains¹⁷⁷ or at any other place under the direction of the Secretary of State and by anyone under the authority of the Secretary of State.¹⁷⁸ Where detained persons are mentally ill, suicidal or otherwise seriously vulnerable, such detention may also be contrary to Articles 2, 3 or 8.¹⁷⁹

38. The powers of the Asylum and Immigration Tribunal (AIT) to grant bail would be made subordinate in key respects to the Secretary of State. The AIT would require the consent of the Secretary of State to grant bail where a person’s removal was “*imminent*”,¹⁸⁰ and no appeal was outstanding.¹⁸¹ The Secretary of State would be empowered to unilaterally vary the conditions on which the AIT granted bail, including by imposing conditions the AIT had expressly rejected as unnecessary.¹⁸² The AIT would be powerless to remove an unnecessary condition imposed by the Secretary of State.¹⁸³ The draft Bill would interfere with judicial independence by requiring certain factors to be considered by the AIT before granting bail,¹⁸⁴ including factors which ought not to be part of any consideration of immigration bail.¹⁸⁵ Poignantly, factors in favour of bail are absent from the list.

39. The availability of bail for those detained would be restricted by the draft Bill because of the requirement to deposit any recognizance (whether by the individual or any surety) with the Secretary of State.¹⁸⁶ This may require an individual or surety to deposit a significant sum of money for an uncertain and lengthy period. Moreover, the proposed merging of what is now temporary admission, temporary release and bail into the single concept of “*immigration bail*” would mean that several thousands of individuals, particularly asylum-seekers, who have not been detained nor would be detained, become subject to the same immigration bail powers and may be required to deposit money. Apart from the obvious difficulty in

¹⁶⁶ Paragraph 39(b)(iii)(2).

¹⁶⁷ Paragraph 39(c).

¹⁶⁸ Paragraph 39(d).

¹⁶⁹ Paragraph 41(b)(viii).

¹⁷⁰ Paragraph 41(b)(vii).

¹⁷¹ Paragraph 45(f).

¹⁷² Articles 17–19, Refugee Convention

¹⁷³ Article 21, Refugee Convention.

¹⁷⁴ Article 20 et seq, Refugee Convention.

¹⁷⁵ Article 34, Refugee Convention.

¹⁷⁶ Although not addressed in the draft (partial) Immigration and Citizenship Bill, such individuals may face the prospect of being subjected to the special immigration status provided for by section 130 *et seq*, Criminal Justice and Immigration Act 2008.

¹⁷⁷ Clauses 54 & 56.

¹⁷⁸ Clause 59.

¹⁷⁹ It must be foreseeable that those seeking asylum may include those who suffer from mental illness, self-harming and suicide risks and other vulnerabilities, and detention in unsuitable places by unsuitable persons would preclude the provision of necessary care and attention—cf. *Savage v South East Essex Partnerships NHS Foundation Trust* [2007] EWCA Civ 1375 and *Case of Keenan v UK* (Application No. 27229/95).

¹⁸⁰ In *A and Ors v SSHD* [2008] EWHC 142 (Admin) the Secretary of State appeared to consider the removal of 4 Algerians to be imminent throughout periods in excess of 12 months

¹⁸¹ Clause 62(2)(c).

¹⁸² Clause 68(1).

¹⁸³ Clause 68(2).

¹⁸⁴ Clause 62(6).

¹⁸⁵ E.g. clause 62(6)(e).

¹⁸⁶ Clause 64.

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

40. *The prospect of interferences with individuals' Article 5, ECHR rights would be greatly extended by these measures, which would also create risks of violation of Articles 2, 3 or 8. In addition, the detention of asylum-seekers for the purpose of fast track decision-making and appeals, which it is understood is to be extended to more individuals, remains contrary to Article 26, Refugee Convention and may be contrary to Article 5.¹⁸⁷ Any regime that involves returning cash to refused asylum-seekers immediately before their return to their home country risks exposing them to harm contrary to Article 3, ECHR.*

APPEALS

41. The provision for a right of appeal against the refusal of refugee status where any permission, of whatever length, is granted is welcome.¹⁸⁸

42. However, the draft Bill extends the circumstances in which appeal rights are denied. Refugees who travel abroad after recognition of their status risk cancellation of permission with no appeal right.¹⁸⁹ Asylum-seekers, whose claims are certified as “*clearly unfounded*”,¹⁹⁰ would be denied any appeal right.¹⁹¹ In certain circumstances individuals subject to expulsion orders would be denied any appeal right, including those treated as “*foreign criminals*”¹⁹² and those who have breached a condition of their permission, howsoever minor, inadvertent or unavoidable the breach.¹⁹³ Family members of these individuals would also be denied any appeal right against expulsion.

43. Currently, the Government is consulting on proposals to bring immigration appeals within the scope of the Tribunal Service established by the Tribunal, Courts and Enforcement Act 2007; and to transfer substantial judicial oversight of immigration control from the higher courts (eg the Administrative Court in England and Wales) to the Tribunal Service, including powers of judicial review.¹⁹⁴ Further details of our position regarding these proposals will be set out in our response to the consultation.¹⁹⁵

44. *The provisions in the draft Bill and proposals for the future of the tribunal raise the potential of a failure to provide adequate judicial remedy for human rights breaches as required by Article 13, ECHR. Insofar as the reach of Article 6, ECHR remains unsettled,¹⁹⁶ the influence of the Home Office over the tribunal's procedure rules may breach that Article.*

REMOVAL OF THE RIGHT OF ABODE

45. We have recently provided the Committee with a briefing regarding this matter, which would engage Articles 3, 5 and 8, ECHR.¹⁹⁷

BRITISH NATIONALITY, CITIZENSHIP AND NATURALISATION:

46. The draft Bill leaves unresolved longstanding injustices and complexities created in British nationality law; and in withdrawing the right of abode its provisions would introduce new injustice. In December 2007, we provided a detailed analysis of injustice and complexity in British nationality law in our submission to Lord Goldsmith QC for his review on citizenship,¹⁹⁸ which remains unaddressed by the simplification project to date.

¹⁸⁷ On 19 May 2008, the UK Border Agency announced a “large scale expansion of Britain's detention estate” including to “allow even more fast track cases to be heard”,

see <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2008/largescaleexpansionofbritainsdet>

whereas the Grand Chamber of the European Court of Human Rights in *Case of Saadi v UK* (Application No. 13229/03) held that the faster track process at Oakington in 2001 was not contrary to Article 5, the fast track processes at Yarl's Wood and Harmondsworth do not lead to free legal advice throughout the process, operate much faster at the initial stage but (but unlike that at Oakington) extend beyond the initial decision and through the appeal process, and lead to individuals being detained for far longer periods; moreover asylum numbers are not at anything like the number in 2001, which the court considered material to the lawfulness of use of fast track, and whereas Oakington was to deal with so-called manifestly unfounded claims, the current intake to the fast track may include almost any case.

¹⁸⁸ Clause 166; cf. section 83, Nationality, Immigration and Asylum Act 2002.

¹⁸⁹ Clause 170.

¹⁹⁰ Clause 177.

¹⁹¹ Clause 177(2) & clauses 165(2)(b), 166(2)(b) and 167(2)(b).

¹⁹² Clause 51.

¹⁹³ Clause 171.

¹⁹⁴ See fn. 4.

¹⁹⁵ Which will be made available in the “Submissions” section on the website at www.ilpa.org.uk

¹⁹⁶ Dissenting judgments of the Grand Chamber of the European Court of Human Rights in *Case of Maaouia v France* (Application No. 39652/98) indicate that the current jurisprudence on Article 6, which excludes its application to many immigration-related matters, may be wrong and demonstrate how the court has extended the reach of Article 6 over the years.

¹⁹⁷ This briefing, dated 27 October 2008, is available in the “Briefings” section on the website at www.ilpa.org.uk

¹⁹⁸ The submission is available in the “Submissions” section of the ILPA website at www.ilpa.org.uk

47. The naturalisation provisions in the draft Bill lay the foundation for the adoption of the citizenship proposals that we addressed in detail in our response to the Green Paper.¹⁹⁹

48. We further note that for refugees, the proposals conflict with Article 34 of the Refugee Convention in delaying the opportunity for refugees to naturalise and imposing an additional burden of re-establishing refugee status along the route to citizenship.²⁰⁰

ACCESS TO STATE BENEFITS AND SERVICES, AND IMMIGRATION FEES

49. The draft Bill does not provide for asylum support or provisions that will “*limit access to services*”.²⁰¹

50. The Committee has rightly concluded that the current use of destitution as a tool to discourage asylum-seekers and encourage refused asylum-seekers to return home is inhumane; and we have previously provided oral and written evidence to the Committee on this subject.²⁰²

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

52. The draft Bill would considerably extend charges that could be made upon lawful migration to the UK.²⁰³ Such charges may restrict lawful migration to the UK to those with significant means, with the prospect of indirect discrimination and that respect for family and private life is withheld because of an individual’s inability to pay a fee.²⁰⁴

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

CHILDREN AND TRAFFICKING VICTIMS

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

55. In relation to trafficking, we are particularly concerned at the repetition in the draft Bill of the inadequate UK definition of trafficking for the purpose of criminal prosecution.²⁰⁵ The reference to “*requested or induced*”²⁰⁶ is not in accordance with the Palermo Protocol²⁰⁷ in failing to adequately deal with trafficking in babies or toddlers.²⁰⁸ The Government had insisted that the current offence would cover such cases,²⁰⁹ so it is profoundly discouraging that the draft Bill adopts the same drafting of the offence that has been shown to be defective.

CONCLUDING AND GENERAL OBSERVATIONS

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

57. This highlights the increasing significance of concerns previously expressed by the Committee—eg when considering retrospective changes made to the criteria by which highly skilled migrants could obtain indefinite leave,²¹⁰ the Committee concluded this “*may be symptomatic of a deeper problem about the way in*

¹⁹⁹ See ILPA response to the Path to Citizenship Green Paper, May 2008 available in the “Submissions” section of the ILPA website *op cit*.

²⁰⁰ See the flowchart at page 14 of The Path to Citizenship: next steps in reforming the immigration system—Government response to consultation, July 2008, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/governmentresponseconsultation?view=Binary>

²⁰¹ Annex A to Making Change Stick—an introduction to the Immigration and Citizenship Bill indicates that this is intended (see fn. 1)

²⁰² E.g. see the Joint Committee’s Tenth Report for the Session 2006–07 *op cit*.

²⁰³ Clause 190.

²⁰⁴ Eg in *R (Baiai) & Anor v SSHD* [2008] UKHL 53, the House of Lords concluded inter alia that the substantial fee for a certificate of approval for marriage could, depending on the means of the individuals, constitute an unlawful interference with Article 12.

²⁰⁵ Clauses 108–109 would place section 4, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

²⁰⁶ Clause 109(5) replicating section 4(4)(d), Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

²⁰⁷ 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

²⁰⁸ As stated in the presentation by DI Gordon Valentine to the “Tackling the Trafficking of Women and Children” conference in London on 14 July 2008 in relation to the prosecution of Ms Peace Sandberg, see: <http://news.bbc.co.uk/1/hi/uk/7404090.stm>

²⁰⁹ See Hansard HL report 5 April 2004 : Columns 1645–1648 and 6 July 2004 : Columns 670–671.

²¹⁰ The Joint Committee’s Twentieth Report for the Session 2006–07 Highly Skilled Migrants: Changes to the Immigration Rules, 9 August 2007 HL 173/HC 993.

which changes are made to the *Immigration Rules which affect fundamental rights*". More recently, the Committee was presented with a failure to consider the human rights implications or general impact of measures to introduce mandatory re-entry bans in respect of which the Government had offered no consultation.²¹¹

58. We also note that the Government has previously indicated an intention to "*maximise the use of plain English*".²¹² However, the references to "*the Secretary of State thinks*" throughout the draft Bill contradict that intention. In many instances, the reference should be replaced by "the Secretary of State has reasonable grounds for believing" or some similar phrase. In plain English "thinks" does not mean "has reasonable grounds for believing", and the Secretary of State ought to have reasonable grounds before exercising such powers as the power to detain under clause 55(1). In other instances, the reference should simply be deleted—eg if a person's removal from the UK would contravene international obligations, an expulsion order should be precluded whatever the Secretary of State may think.²¹³

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

- (a) There would continue to be many immigrants lawfully permitted to be in the UK but without "permission"—eg those on immigration bail.
- (b) There would be nothing probationary about "probationary citizenship", which would be no more than a further period of temporary permission.
- (c) "Immigration bail" would include many people who had not been and were not to be detained.
- (d) "Expulsion" under the draft Bill elides two distinct notions—requiring a person to leave the UK and re-establish an entitlement to enter; and banning a person from the UK as dangerous or undesirable.

October 2008

Supplementary memorandum submitted by the Immigration Law Practitioners Association

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—ie 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).

²¹¹ Q5 *et seq* of Uncorrected Oral Evidence given by Liam Byrne MP, Minister of State, Home Office and Lin Homer, Chief Executive, Border and Immigration Agency on 19 February 2008 op cit in relation to HC 321 Statement of Changes in the Immigration Rules.

²¹² See fn. 5.

²¹³ Cf. clauses 38 & 39.

Although clause 1(3) and (4) replaces 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. The new drafting substitutes “must” for “shall”. Whereas the Explanatory Notes at paragraph 47 correctly refer to “must”, no explanation for this substitution is given. In any case, 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, for example, 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—ie 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 (ie 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 is 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*” (eg clause 4(1)(a)), “*permanent permission*” (eg clause 4(1)(b)), “*immigration permission*” (eg clause 2(1)(a)), “*transit permission*” (eg clause 2(1)(b)), “*probationary citizenship permission*” (eg clause 31), “*protection permission*” (eg clause 164(2)(a)) and “*refugee permission*” (eg clause 164(2)(a)). These various types of permission do not relate to each other in the same way—eg some are distinct from each other, some are subsets of others. Further distinctions are between permission “*granted by an individual grant*” (eg 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 (eg 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 6(3)

When read with clause 14 this allows power at large for cancellation of permanent permission. This is in stark contrast to the position regarding ILR at present. Withdrawal of ILR may occur in relation to deportation, where it was obtained by deception, cessation of refugee status and in certain cases where the person arrives and is examined by an immigration officer—see s5(1), Immigration Act 1971, section 76, Nationality, Immigration and Asylum Act 2002 and paragraph 2(A), Schedule 2, Immigration Act 1971. No explanation of the need for wider circumstances for withdrawal (cancellation) than these is provided.

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 (eg 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)).

The regime to be established by clause 8 also removes the concept of exemption from immigration control, currently established under section 8, Immigration Act 1971. This means that those who were previously exempted may face conditions on any grant of permission by order (or individual grant) and have any permission cancelled because they would fall under the formal regime of immigration control. Moreover, the order regime may simply be insufficiently flexible as if conditions were imposed by order they may only be capable of variation by order. Clause 8(2) anticipates some of those who may fall within the new regime, but it does not on its face cover all (albeit the subclause is not stated to be exhaustive), eg visiting or Commonwealth forces, family members of diplomats and others covered by Order made under section 8, 1971 Act.

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—eg 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 and with what may be a more restrictive approach to the circumstances in which new matters may be raised while the person's permission is extended (continues) pending decision on an application.

The difference in wording between clause 12(5) and section 3C(5), Immigration Act 1971 appears significant. Firstly, the current section allows for variation, whereas the new clause would allow for amendment. This appears more restrictive, and that seems to be confirmed by the inclusion of 12(5)(b) for which there is no equivalent in the current provision—presumably because none is needed (as “variation” may extend to making the equivalent of a protection or family life application).

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 (eg 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 clause 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 (eg 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.*"²¹⁴ 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.

²¹⁴ See *The Path to Citizenship: Next Steps in Reforming the Immigration System—Government Response to Consultation*, July 2008 at p18.

Clause 36

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 (eg 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 (eg 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 (eg 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—eg 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 concessions²¹⁵. The Home Office has also previously raised objections to such bans²¹⁶. 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)).

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 (ie allow for breach of those obligations) by mere order.

See also clause 203(1)(b).

²¹⁵ 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.

²¹⁶ 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.

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”²¹⁷.

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 (eg under Article 1F) or against refoulement (eg 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 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).

²¹⁷ 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.

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 (eg 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—eg 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 otiose²¹⁸. 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)

²¹⁸ See *R v SSHD ex parte Khadir* [2005] UKHL 39.

- Paragraph 1, Schedule 12 (measuring and photographing detained persons)
- Paragraph 2, Schedule 12 (testing detained persons for drugs or alcohol)

Clauses 71 to 75

“*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—eg 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—eg 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 (eg obtaining false or falsifying travel documents—eg 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—ie 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 it 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 (eg 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 Bill²¹⁹. 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 (eg at juxtaposed controls and entry clearance posts) are not protected by the safeguarding duty here. These words should be deleted.

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 (eg 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 Article²²⁰. Further, as the House of Lords has recently ruled²²¹, 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.

²¹⁹ *Hansard*, HL Report 17 Mar 2008 : Column 40.

²²⁰ See *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667, 678.

²²¹ See *R v Asfaw* [2008] UKHL 31, paragraph 28.

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.

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.

Memorandum submitted by the Immigration Law Practitioners' Association

1. This briefing is provided in view of the oral evidence session before the Committee with the Secretary of State for the Home Department on Tuesday, 28 October 2008.

2. The draft (partial) Immigration and Citizenship Bill removes all reference to the “right of abode”. The right of abode was originally a common law concept, the freedom to enter and remain in one's own country being part and parcel of being a citizen. At the time of the British Nationality Act 1948 the right of abode was part and parcel of being a British national, whatever form of British nationality a person held. The Commonwealth Immigrants Act 1962 introduced derogations from the common law right of abode. The Immigration Act 1971 recreated the right of abode as a statutory provision, so that all British Citizens have the right to come and go to and from, and to remain in the UK by virtue of a statutory provision that could, in theory, be altered by Parliament. Under the Immigration Act 1971, apart from British citizens, certain Commonwealth citizens retained the right of abode. Such people are free from immigration control and are treated as British citizens by the Immigration Act 1971.

3. It is because not all British nationals enjoy a right of abode in the UK that the UK has been unable to ratify Protocol 4 to the European Convention on Human Rights which provides that no one be deprived of the right to enter the territory of the State of which s/he is a national nor be expelled from that State (Article 3), and provides for rights of free movement within the State and the right to leave it (Article 2).

4. Those who currently enjoy the right of abode in the UK are:

- (a) all British citizens; and
- (b) Commonwealth citizens who had a right of abode immediately before the British Nationality Act 1981 came into force.

5. The Draft (partial) Immigration and Citizenship Bill proposes to change the law so that only a British citizen will remain “*free to enter and leave, and to stay in, the United Kingdom*”.²²² Anyone else, except for European Economic Area (EEA) entrants,²²³ “*may enter or stay in the United Kingdom only if the person has immigration permission*”.²²⁴

²²² Clause 1(1).

²²³ Defined in clause 3.

²²⁴ Clause 2(1)(a).

6. By these provisions, the draft Bill would strip all Commonwealth citizens who had retained the right of abode following the changes made in nationality law by the British Nationality Act 1981 of that right. The Committee has previously found that the current power, contained in section 2(2), Immigration Act 1971 (as amended by section 57, Immigration, Asylum and Nationality Act 2006), to deprive these individuals of the right of abode “*gives rise to a substantial risk of incompatibility with Articles 3, 5 and 8 ECHR*”.²²⁵ The Committee expressed concern at the low threshold at which a person may be deprived of the right. The Committee, however, observed that the right of appeal in relation to deprivation provided a “*sufficient guarantee*”.

7. The Explanatory Notes to the draft (partial) Immigration and Citizenship Bill state:

“... *Those with the right of abode who are not British citizens will now require permission to enter and stay in the UK. The intention is to confer that permission by order under clause 8 of the Bill ...*”²²⁶

“*A grant of permanent permission by order could make provision for Commonwealth citizens with the right of abode as described in paragraph 47 above.*”²²⁷

8. There are several inadequacies with this position:

- (a) Firstly, there is no requirement that the intention is fulfilled. Indeed, the Explanatory Notes cited here expressly indicate that provision “may” be made not “will” be made. Even if the intention to grant permission is fulfilled, it is not clear whether that will be by way of permanent or temporary permission.
- (b) Secondly, even if fulfilled, what is proposed is expressly to make subject to immigration control those who are currently not subject to immigration control. This includes that the person may be subjected to significant conditions or restrictions upon their permission (eg reporting or as to residence),²²⁸ whether at the time permission is granted or anytime thereafter.²²⁹
- (c) Thirdly, the powers to cancel permission, which would then apply to those from whom the right of abode had been stripped, as expressed in the draft (partial) Immigration and Citizenship Bill would provide no threshold whatsoever before the power was exercised.²³⁰
- (d) Fourthly, where the person remained outside the UK for a period of two years, permission would automatically be cancelled.²³¹
- (e) Fifthly, any cancellation (unless occurring on the arrival of a person in the UK) could not be appealed while the person was in the UK.²³²

9. The Committee, when expressing concerns at the introduction of the power to deprive individuals of the right of abode (see paragraph 3, above), was concerned at the scope for arbitrary deprivation of the fundamental entitlement of a particular group of Commonwealth citizens who retained the right of abode and freedom from immigration control (as British citizens) in 1983; and that the exercise of that power could result in violations of Articles 3, 5 and/or 8 of the ECHR. The Committee was satisfied that the right of appeal provided sufficient safeguard at that time.

10. However, the draft (partial) Immigration and Citizenship Bill would strip individuals of the right of abode without any recourse to an appeal or other judicial remedy. Inevitably, there would be no threshold at which the individual would be stripped of this right. Interferences with the individual’s human rights would or may include:

- (a) the arbitrary and/or disproportionate interference with the individual’s established family and/or private life (Article 8) in the UK by subjecting the individual (and in many cases, family members) to immigration control and thereby making less secure their formal status in the UK;
- (b) the potential—not fully disclosed since the draft (partial) Immigration and Citizenship Bill does not reveal the detail of the Government’s intention to “*limit access to services*”²³³—that individuals may in becoming subject to immigration control have access to education, health, housing and welfare services, which they have enjoyed for many years, arbitrarily removed or restricted thereby interfering with their private and family life (Article 8) and/or subjecting them to homelessness and destitution which places them in circumstances reaching an inhuman or degrading threshold (Article 3);
- (c) the risk that deprivation in such circumstances, by subjecting the individual to immigration control, might lead to their and/or their family’s detention under immigration powers that was itself arbitrary and disproportionate (Article 5); and

²²⁵ Committee’s Third Report for the Session 2005-06, paragraph 170.

²²⁶ Paragraph 47, Explanatory Notes on clause 1.

²²⁷ Paragraph 57, Explanatory Notes on clause 8.

²²⁸ Clause 10; this would not apply if permission granted was permanent rather than temporary.

²²⁹ Clause 11.

²³⁰ Clause 14.

²³¹ Clause 13(1).

²³² Clause 171.

²³³ See pages 4-5 & 9 of *Making Change Stick: an introduction to the Immigration and Citizenship Bill*, published by the UK Border Agency in July 2008 along with the draft (partial) Immigration and Citizenship Bill; see: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/makingchangestick.pdf?view=Binary>

- (d) the risk that loss of the right of abode in the UK might lead to the individual's and his/her family's enforced removal to circumstances where they or their family might face torture, inhuman or degrading treatment; or be subjected to conditions which reached such a threshold (Article 3).

11. No explanation has been provided as to why the Government intends to strip the right of abode from this group of Commonwealth citizens to whom the UK recognised and made a commitment when revisiting UK nationality laws by the introduction of the British Nationality Act 1981. This decision, which is presented by the draft (partial) Immigration and Citizenship Bill without previous warning or consultation, is an arbitrary one. The Government's Impact Assessment²³⁴ makes no reference to the right of abode whatsoever. The human rights impact assessment in the Explanatory Notes also makes no direct reference to the right of abode.²³⁵

12. *As highlighted by the Committee when considering the current power to deprive individuals of the right of abode, the wholesale withdrawal of this right risks incompatibility with Articles 3, 5 and 8, ECHR. Indeed, the wholesale withdrawal of this right from certain Commonwealth citizens who have enjoyed this right since 1983 may of itself constitute a violation of Article 8, while substantially increasing the risk previously highlighted by the Committee of violations of Articles 3, 5 and 8.*

27 October 2008

Memorandum submitted by the Joint Council for the Welfare of Immigrants

INTRODUCTION

The Joint Council for the Welfare of Immigrants is an independent, voluntary organisation working in the field of immigration, asylum and nationality law. Established in 1967, we provide legally aided immigration advice to migrants and actively campaign for changes in immigration, asylum and nationality law, and practice. Our mission is to promote the welfare of migrants within a human rights framework.

In this submission on the Draft (Partial) Immigration and Citizenship Bill we focus exclusively on nationality issues due to the importance the Government has indicated British nationality is to assume in the future. As per the Committee's call for evidence, we deal both with the issues raised by the provisions in the Bill, and the wider question of whether the proposals enhance human rights. In the case of the latter, we look at the extent to which some key aspects of nationality law are inconsistent with human rights standards. As existing human rights obligations the UK has assumed have only a limited relevance to nationality laws, we use both the domestic human rights framework, together with the key European human rights instruments governing nationality that we calling for the Government to ratify, or at least reflect in its nationality law making, (ie the 1997 European Convention on Nationality (ECN) and Protocol 4 of the European Convention on Human Rights (P4 ECHR)) as a tool to perform this task.²³⁶

Our paper is therefore structured in the following way. In section one we identify the key human rights issues generated by the proposals within the Bill. Specifically we express concern by reference to the above standards about (a) the position of British nationals other than British citizens who currently enjoy the right of abode, (b) the position of spouses and civil partners, (c) the position of refugees, (d) the lack of availability of naturalisation for certain categories of migrant, (e) the lengthy time frames for naturalisation, (f) the scheme for volunteering, (g) the potentially discriminatory design of the scheme for naturalisation, (h) retrospective application of the naturalisation scheme and (i) human rights issues arising from the Government's intention to link British citizenship with welfare entitlement.

In section two we address some key human rights shortcomings with existing nationality laws that we would hope the final Bill would seek to resolve.²³⁷ Specifically we deal with the following (a) the absence of a right of entry and residence for British nationals other than British citizens, (b) the breadth of the grounds on which nationality can be deprived from dual British nationals, (c) the limitations on naturalisation for "foreign national prisoners" under Part 10 of the Criminal Justice and Immigration Act 2008 (d) the impact of fees on the ability of migrants to naturalise, (e) the impact of the life and language testing on refugees and spouses.

²³⁴ Published in July 2008 as the Partial Impact Assessment of the draft (partial) Immigration and Citizenship Bill, see: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/billpartialimpactassessment.pdf?view=Binary>

²³⁵ Paragraph 414 refers to a wider group of "those who are, under the IA 1971, exempt from immigration control by virtue of having a particular status, such as diplomats and crew members".

²³⁶ The UK has signed Protocol 4 ECHR but is one of five European states not to have ratified it. The UK has neither signed nor ratified the ECN. This has been signed by 28 Council of Europe member states, and ratified by 18.

²³⁷ There are various problems with nationality law which are problematic from a human rights framework that we would ideally like the Bill to deal with, we would be happy to submit a more detailed submission should the Committee require this. In the meantime in the event of interest the Committee is referred to JCWI's submissions to the Lord Goldsmith Citizenship Review available at www.jcwi.org.uk together with those prepared by the Immigration Law Practitioners Association available at www.ilpa.org.uk

SECTION 1: THE DRAFT (PARTIAL) IMMIGRATION AND CITIZENSHIP BILL

(a) *Part 1, clauses 1–3—British nationals other than British citizens*

Article 3 of Protocol 4 prohibits states from expelling or refusing entry to one of its nationals.

The effect of clauses 1-3 of the Bill is to remove the *right* to enter and stay in the UK (the *right* of abode) from Commonwealth citizens. One result of this is that *British nationals who acquired of abode but are not British citizens* will have the essence of their nationality, ie the right to come and go freely from the UK taken from them. They will instead be reduced to obtaining a grant of immigration permission by order to which conditions may be attached²³⁸ and will therefore effectively be relegated to the status of an alien given that they will be vulnerable to “expulsion” on the grounds set out in the Bill, or to refusal of entry in certain circumstances.

The above measures will have particularly serious implications for those with British Subject status who are otherwise stateless, as they will have the right of abode in a territory to which they belong taken from them. In order to recoup the right of abode they will be required to apply for registration as a British citizen, a process under which there remains a residual power of refusal.²³⁹

The upshot of this is to create a risk that expulsion and entry decisions will be inconsistent with standards enshrined in Article 3 of Protocol 4 ECHR. Given that the above individuals are for EC treaty purposes British nationals who enjoy free movement rights between EU states, the provisions may be found wanting from the point of view of EC fundamental rights principles which reflect the above standards.²⁴⁰ The measures of course potentially engage Article 8 ECHR, and may lead to breaches in individualised cases.

(b) *Part 3, clauses 33-34—spouses and civil partners*

European human rights law and principles recognise the centrality of family life to human dignity. Article 8 ECHR requires respect for private and family life. Article 16 of the European Social Charter (Revised) (1996)²⁴¹ states “The family as a fundamental unit of society has the right to appropriate social and economic protection to ensure its development”. Resolution (77) 12 on the Nationality of Spouses of Different Nationalities of the Committee of Ministers of the Council of Europe specifically recognises the importance of family life in the context of nationality and recommends in relation to spouses that states should:

- “3. not [...] require, for the acquisition of their nationality by the foreign spouse of a national, more than five years residence on their territory including not more than three years after the marriage;
4. ... provide in any event that foreign spouses of nationals may acquire their nationality on more favourable terms than those generally required of other aliens”

The preamble to the ECN specifically refers to the need to respect family life in the context of nationality law, and goes on in Article 6(4)(a) to require that states *facilitate the acquisition* of nationality for spouses of its nationals. The explanatory notes to the Convention refer to easier procedures, lower fees, less stringent language requirements and a reduction in the length of the period of residence as means of reflecting this in nationality law.²⁴²

So far as spouses and civil partners go, the provisions within the Bill set up a new structure for their naturalisation. Probationary citizenship is interposed between temporary leave of 2 years, and British citizenship.²⁴³ Probationary citizenship will ordinarily in this context last 3 years.²⁴⁴ Additionally by clause 33²⁴⁵ residence for spouses and partners will only start to count towards the naturalisation time frames from the point in time *that permission was granted on the basis of marriage or partnership*.²⁴⁶

The overall effect of this structure is that:

- (i) the benefits of being a spouse/civil partner for the purpose of naturalisation under this scheme are obscured;
- (ii) spouses and civil partners could often be required to spend longer than 5 years residing in the UK before being able to naturalise;
- (iii) as spouses/civil partners will often spend longer periods subject to immigration control, and given the expansion of the grounds upon which they can be removed under the new expulsion regime

²³⁸ See clause 8 of the Bill.

²³⁹ British Nationality Act 1981, s.4B.

²⁴⁰ See general analysis by H Majid *Protecting the Right to have Rights: The Case of Section 56 of the Immigration, Asylum and Nationality Act 2006* (2008) Vol.21, No.1 p27-44.

²⁴¹ The UK has signed but not ratified this.

²⁴² Para.52.

²⁴³ or permanent permission as the case may be.

²⁴⁴ It can be reduced by two years for voluntary work, or increased by an as yet specified period.

²⁴⁵ See new para. 3 of Schedule 1 at para 3(3)(ii).

²⁴⁶ Currently spouses are required to complete a two year probationary period and apply for settlement after completion of the two year period. They are able to naturalise after three years residence in the UK pursuant to s.3(a) of Schedule 1 of the British Nationality Act 1981. The three years *does not* run from the date of being granted leave in the capacity of a spouse, but instead from residence in the UK for which see para 18.2.2.2 a of Chapter 18, part 1 Nationality Instructions.

within the bill²⁴⁷ and the intention to remove those individuals who are “unable to demonstrate they fulfil the criteria to progress from probationary citizenship to British citizenship.”²⁴⁸ This is likely to result more frequently in the spitting of spouses and partners in a way that is inconsistent with the above framework.

One can of course expect that the implementation of the above scheme, will on an individualised basis rupture familial relations and on occasion breach Article 8 rights of foreign, and British spouses and other family members.²⁴⁹ However the clauses, and the scheme for naturalisation more generally in so far as spouses are concerned also raises real concerns with the common European human rights standards and principles referred to above due to the notable absence of facilitative measures for the acquisition of British nationality.

(c) *Part 3, clause 36(2)—refugees*

Article 34 of the Refugee Convention requires states to *facilitate naturalisation* for refugees. This is replicated in Article 6 (4)(g) ECN 1997.

Clause 36(2)(c) sets out a new definition of who is in the UK “in breach of immigration laws” for naturalisation purposes. Under the new definition these will be migrants who require, but do not possess immigration permission. Under the structure envisaged by the Bill, as asylum seekers will be granted “immigration bail.”²⁵⁰ Those who go on to secure recognition as a refugee, appear on the face of the Bill to be excluded from having the period preceding recognition as a refugee taken into account for naturalisation purposes given that “immigration bail” is not a form of “permission”. Whilst we believe the current arrangements are unsatisfactory as they do not recognise all periods prior to recognition as a refugee, it is notable that presently time spent on temporary permission can, in certain circumstances, be counted for the purpose of the residence requirements for naturalisation purposes.²⁵¹

Whilst we note the existence of a residual discretionary power to treat those in breach of immigration laws as though they were not, this is only applicable in “*special circumstances*.” There is nothing in the explanatory notes indicating that time spent on immigration bail prior to recognition as a refugee will constitute “special circumstances”. JCWI’s experience of casework is that certainly in the past there were a number of individuals who were on temporary admission prior to recognition as a refugee for many years. The current position is that whilst this kind of delay is far less frequently encountered there are asylum seekers who have been and presently are waiting for determination of their claims for a number of years. The effect of the above therefore is that the provisions appear to work to the detriment of refugees, and are arguably inconsistent with the duty under Article 34 of the Refugee Convention replicated in Article 6 ECN to *facilitate* naturalisation, if not the principle they reflect.²⁵²

(d) *Part 3, clause 31—the availability of naturalisation*

Article 6(3) ECN requires a state to “provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory.”

Clause 31 sets out the categories of migrant who are capable of naturalising in the UK. It is to be read in conjunction with the Government’s statement about the categories of migrant who are to be ineligible for naturalising under Part 3 of the Bill.²⁵³ Specifically, students are to be prohibited from any route to settlement or citizenship. Presently a student could proceed through the immigration system and secure indefinite leave to remain after ten years lawful residence²⁵⁴ following which he would fulfil the residence requirements and subject to fulfilment of other relevant criteria, be able to apply to naturalise. Given that students who have been lawfully resident in the UK for 10 years²⁵⁵ would arguably be lawfully and habitually resident within the territory, this provision too may lead to inconsistency with the standards contained within Article 6(3) ECN.

²⁴⁷ See clauses 10(1), 37(2), 4(d), (6) which allow for expulsion for minor immigration infractions.

²⁴⁸ Confirmed by Alan Boyd of the Earned Citizenship bill team to JCWI.

²⁴⁹ See *Bekou-Betts v Secretary of State for the Home Department* [2008] UKHL 39.

²⁵⁰ they are currently granted temporary permission.

²⁵¹ See S.11(3) NIAA 2002 which states that S.11(1) of Immigration Act 1971 (person deemed not to be in the UK before disembarkation, while in controlled area or while under immigration control) shall apply for the purposes of this section as it applies for the purposes of that Act. S.11. of the Immigration Act 1971 deems those temporarily admitted as not having entered the UK. See para 8.7 of Annex B, chapter 18 of the Nationality Instructions for the circumstances in which temporary admission can count towards naturalisation).

²⁵² See clause 33(4)(1).

²⁵³ See *Path to Citizenship: Next Steps in Reforming the Immigration System- Government Response to Consultation, July 2008*, p.14.

²⁵⁴ Rule 276A HC 395.

²⁵⁵ This is the upper period that the ECN at Article 6(3) applies for naturalisation and residence requirements.

(e) *Part 3 clauses 32–34—time frames for naturalisation*

Article 6(3) ECN requires that state parties in establishing the conditions for naturalisation for those lawfully and habitually resident in the territory states “shall not provide for a period of residence exceeding ten years before the lodging of an application.”

Under the Bill it is possible for a migrant to be “lawfully resident” in the UK through the possession of “permission” to remain in the UK granted by the Secretary of State even though they are in breach of conditions attached to their leave. However because the new definition of persons in breach of immigration law *for naturalisation purposes* which now includes those who breach conditions subject to which temporary permission would have been granted²⁵⁶ it seems that migrants who breach conditions attached to their leave would either:

- (i) have their application for naturalisation refused and would subsequently be removed from the territory,²⁵⁷ or
- (ii) have the time up to and including the breach discounted for naturalisation purposes unless their case was considered under the discretionary “special circumstances clauses”.

If the latter is the case, then when viewed in conjunction with clauses 32–34 it appears to lead to a situation whereby lawfully, and habitually resident migrants will be required to reside in the territory for in excess of 10 years for naturalisation purposes. This is arguably inconsistent with the spirit, if not the actual standard contained within Article 6(3) ECN

(f) *Part 3, clause 34—volunteering as a means to reduce residence periods for naturalisation*

Article 14 ECHR prohibits “discrimination” in relation to matters falling within its ambit. Status, and therefore arbitrary denial of citizenship can engage Article 8 ECHR²⁵⁸, and of course removal does engage Article 8 ECHR. Article 4 ECHR prohibits “compulsory” labour save for in limited circumstances set out within the Article.

Clause 34 creates a new provision enabling migrants to reduce the qualifying period for naturalisation in cases where they undertake voluntary work. The possibility of payment for those activities is expressly excluded.²⁵⁹ Problematically, the draft Bill does not as yet identify the nature of the activities or the length of time for which they need to be undertaken for.

This absence of information makes the provisions difficult to comment upon, however one can imagine that certain categories of migrants ie those who work long hours on low incomes, single parents and those with disabilities might, on account of their circumstances, struggle to undertake voluntary work and reduce the period for naturalisation. Given that the conferral of British citizenship status is arguably within the ambit of Article 14 ECHR, the voluntary work provisions raise the possibility of indirectly discriminating against certain groups in relation to securing and accessing citizenship status on grounds of “other status” unless of course these classes are exempt by virtue 4A(2)(b) in clause 34.²⁶⁰

Additionally, from the perspective of the prohibition of compulsory labour, the volunteering requirements *may*, depending on their ultimate shape, generate inconsistency here too, however there is presently insufficient information within the Bill to comment upon this.²⁶¹

(g) *Part 3- the potentially discriminatory nature of the overall design of the scheme*

We understand that the scheme for naturalisation within Part 3 of the Bill with its potentially far longer residence periods for naturalisation and its associated volunteering scheme is to apply only to non EEA nationals.²⁶² It is not yet clear what scheme will apply to EEA nationals for naturalisation purposes however this may raise some human rights based concerns in the event that a more preferable scheme is operated in the light of the Government’s aim behind the measures in Part 3 of the Bill to foster integration.²⁶³ Whilst clearly an EEA national and non EEA national will not be in an analogous position for the purpose of Article 14/8 ECHR when it comes to questions of entry to the territory, an EEA national and non EEA national could arguably be considered to be in an analogous position for the purposes of British citizenship.

²⁵⁶ See clause 10 of the Bill which states that temporary permission will be given subject to conditions limiting work, occupation, studies, access to welfare services, and relating to residence or fulfilment of reporting requirements. Breach of conditions attached to leave are currently considered in the context of the good character requirements.

²⁵⁷ See footnote 13.

²⁵⁸ The proposition that status engages Article 8 was accepted by the Government in *S and Others v Secretary of State for the Home Department* [2006] EWCJ Civ 1157. See also the Grand Chamber judgment in *Sisojeva v Latvia* App. NO 60654/00. See also admissibility decisions in *Slivenko and others v Latvia* App. No. 48312/99 and *Karrashev and Family v Finland* App. No 31414/96 confirming that arbitrary denial of citizenship may breach Article 8 ECHR.

²⁵⁹ See clause 34 of the new para 4A(2)(b).

²⁶⁰ See for example *Thlimmenos v Greece* (2000) 31 EHRR 411.

²⁶¹ Voluntary service may be considered “compulsory” and “against the will of an applicant given that the Government’s intention to withhold access to social entitlements until the point of naturalisation, it is arguably not part of the specified exclusions ie normal civic obligation.

²⁶² Confirmed by the Earned Citizenship team to JCWI.

²⁶³ See *The Path to Citizenship: Next steps in Reforming the Immigration System, Government Response to Consultation*, July 2008 p. 9, 10 and 17).

Given that the wider proposal is for social entitlements to be aligned to British citizenship, and given that failure to fulfil the requirements for probationary citizenship *may* lead to removal from the territory of certain non EEA nationals, it is questionable as to whether there could be said to be a reasonable relationship of proportionality between seeking to engender integration, and the imposition of the above requirements, and penalties in a way that is consistent with Article 14 in conjunction with 8 ECHR.

(h) *Part 3—retrospective application of laws*

Article 8 ECHR requires interference with private and family life to be in accordance with the law. Of course there are a number of migrants already in the UK on the pathway to citizenship. One of those categories by way of example would be migrants who possess indefinite leave to remain. Given that that failure to fulfil the relevant criteria could result in their removal, and/or an inability to apply to naturalise for many more years,²⁶⁴ and is likely to have implications in relation to entitlements to social and economic rights,²⁶⁵ the scheme will no doubt engage Article 8 and in the absence of a range of appropriate transitional provisions, risks operating retrospectively. This in turn raises the possibility of incompatibility with Article 8 ECHR on grounds of failure to fulfil the legality requirement

(i) *The Government's wider proposals to link possession of British citizenship with welfare entitlements*

The Government has expressed an intention to link full access to the welfare state to British citizens.²⁶⁶ The intention appears to be to take away access to non contribution based benefits from all but those who possess British citizenship/possibly permanent permission. This is in contrast to the current structure where there is no probationary period, and migrants move on to ILR which entitles them to full welfare access.

Clearly it is difficult to comment upon what are simply broad proposals at this stage, however when viewed against the naturalisation requirements which will be likely to result generally in lengthier waiting periods for British citizenship and therefore differing welfare entitlements of family members. This is likely to generate similar human rights problems for British spouses/ partners and other family members to that encountered in the case of in *R (on the application of Sylvianne Morris) v Westminster City Council* [2005] EWHC 1184 (CA)²⁶⁷ and gives rise to the possibility of breaches of Article 14 in conjunction with 8 and/or Protocol 1 ECHR.²⁶⁸

SECTION 2: KEY HUMAN RIGHTS ISSUES THAT THE BILL FAILS TO ADDRESS

(a) *The position of British nationals other than British citizens*

There are presently six categories of British nationality. These are as follows; British Citizens, British Overseas Citizens, British Subjects, British Protected Persons, British Nationals (Overseas) and British Overseas Territories Citizens.

Under domestic law, British nationals, other than British citizens, do not presently enjoy the automatic right of abode which confers the freedom to live in and come and go from the UK under section 2(1) of the Immigration Act 1971. This position is replicated in the Draft (Partial) Immigration and Citizenship Bill.

In the light of the above British nationals other than British citizens do not, and will not enjoy the basic rights and entitlements, consistent with holding the nationality of a country, as provided for in Article 3(2) of the Fourth Protocol of the European Convention on Human Rights (prohibition of expulsion of nationals from their territories, and deprivation of their right to enter).

²⁶⁴ See for example the potential implications for those with ILR who would presently be in a position to naturalise flowing from clause 32, and the new schedule 1 at (1)(2)(c)(i) and (d).

²⁶⁵ See *Making Change Stick; An Introduction to the Immigration and Citizenship Bill*, UK Border Agency, p.8.

²⁶⁶ See footnote 29.

²⁶⁷ In the *Sylvianne Morris* case the Court of Appeal made a declaration of incompatibility of S.185(4) Housing Act 1996 with Article 14 in conjunction with 8 ECHR to the extent that it required a dependent child of a British citizen, if both were habitually resident to be disregarded when determining whether the British citizen has a priority need.

²⁶⁸ In *Stec v UK* 20 BHRC the Grand Chamber held that the prohibition of discrimination extends to those additional rights, falling within the scope of any convention article, for which the state has voluntarily decided to provide.

We believe that Bill presents an ideal opportunity for this obvious injustice to be rectified through the restoration of the right of entry and residence to the aforementioned classes of British nationality. This is a conclusion (save for in the case of BN(O)s) that was accepted by Lord Goldsmith in his citizenship review.²⁶⁹ We believe that continuing arguments against this are unpersuasive.²⁷⁰

(b) *The breadth of the grounds upon which British nationality can be deprived from dual British nationals*

Article 7 of the European Convention reflects a human rights resolution to the question concerning the circumstances in which nationality can be deprived from individuals on the basis of their conduct. Article 7 (d) of the Convention permits deprivation where the conduct is “seriously prejudicial to the vital interests of the State party”. Article 5 of the Convention prohibits discrimination in relation to nationality on grounds of race, colour or national origin, and Article 3 of Protocol 4 prohibits the expulsion of its nationals.

Section 56 the Immigration, Asylum and Nationality Act 2006 permits deprivation of citizenship for dual nationals upon fulfilment of a far lower threshold ie on “conducive to public good” grounds. As the JCHR itself has pointed out, these measures give rise to a risk of incompatibility with Articles 3, 5, 8 and 14 ECHR in conjunction with these.²⁷¹ Given however that the measures are also arguably within the scope of Community law, the above ECN/European standards may indirectly be applicable in certain cases as a result of Community fundamental rights principles.²⁷²

In the light of the above, we believe that the draft bill should be used to bring the UK back into line with European standards on this issue.

(c) *The limitation on the naturalisation of “foreign national criminals” under part 10 of the Criminal Justice and Immigration Act 2008*

Part 10 of the Criminal Justice and Immigration Act 2008 introduces a “restricted immigration status” for those deemed to be “foreign national criminals” together with their family members. The definition is extremely widely drawn to include migrants who have committed minor offences.²⁷³ The status can be applied indefinitely and its effect is to preclude its recipients from settling, and indeed ever going on to ever acquire British Citizenship for the entirety of its duration given that the status is not characterised as leave. This again is problematic from the perspective of the standards, and if not the principle enshrined within Article 6(3) of the Convention referred to above, specifically the need to provide the possibility of naturalisation for those habitually and lawfully resident within the territory.²⁷⁴

(d) *The impact of fees on the ability of migrants to naturalise*

Article 13 of the ECN requires that fees for the acquisition of nationality be “reasonable”.

The current fee for naturalisation lies between £665.00–£745.00.²⁷⁵ It should be recalled that this is the equivalent to one month’s salary for at least some poorly paid migrants. Our own casework experience shows that a number of clients who *fulfil the legal requirements* for naturalisation are precluded from naturalising due to a lack of finances. This becomes even more problematic when it is considered that migrants will need to either secure permanent permission or naturalise if they are to remain in the UK. In

²⁶⁹ Lord Goldsmith indicated that the restoration of the right of abode would be contrary to the 1984 Joint Declaration on the Future of Hong Kong however given that the “right of abode” is to be abolished and a separate scheme is to be established this arguably allows for the possibility of the establishment of a scheme that could achieve the same result.. He also recommended that the classes be abolished and a limited registration period be established. See P Goldsmith, *Citizenship: Our Common Bond* (2007), p.73–74.

²⁷⁰ Arguments against aligning British nationality with the contemporary international human rights framework are wholly unpersuasive. It is to be recalled that the numbers of persons who might exercise the right of abode are not significant, not least when measured against EEA nationals and their family members (including those from the eastern European states) who have, or may exercise the right to reside in the UK. In particular there can be no British Subjects from Eire (now the Republic of Ireland) who would gain as they already have the right to reside. Thereafter, British Subjects from territories that now form India and Pakistan are a statistically negligible group. The same is true for British Overseas Citizens from Penang and Malacca. In respect of British Overseas Citizens from east African countries, the restoration of the right of abode would have the added benefit of contributing to the social integration of those so-called east African Asians already settled in the UK. The same is also true for British Protected Persons from Africa and elsewhere. For British Nationals (Overseas), the restoration of the right of abode would settle the lives of persons, not usually ethnically Chinese, who have been left without a place to which they belong. Finally, the restoration of the right of abode to British Overseas Territories citizens would remove the distinction between those who became British citizens on 21 May 2002 (and their descendants) and those who acquire British Overseas Territories citizenship thereafter.

²⁷¹ Joint Committee on Human Rights, *Third Report of Session 2005–2006*, para 164.

²⁷² See analysis of the *Kaur* judgment H Majid *Protecting the Right to have Rights* (2008) Vol.21, No.1 p. 27-44 .

²⁷³ See Section 131 on the definition of a foreign national criminal.

²⁷⁴ Although section 132(1) of the Criminal Justice Act 2008 states that those individuals possessing the restricted immigration status are not to be treated as possessing leave to enter or remain in the UK, the fact is that their presence in the UK is authorised by the state, and so therefore arguably inconsistent with the ECN. On the HRA issues raised by the particular status please see JCWI’s submissions to the JCHR available at <http://www.jcwi.org.uk/news/HOLLEGALADVICEFORJCHR21.05.08.DOC>

²⁷⁵ The fee for naturalisation for a single individual is £655.00 and £735.00 for an application by husband and wife. The text on which the present test is based costs £9.99. The fee for indefinite leave to remain is presently £750.00 and £950.00 for the premium service.

so doing, it raises the possibility of inconsistency with Article 14 in conjunction with 8 ECHR given that the scheme risks discriminating against the poor who could arguably fall within “other status” grounds for the purpose of Article 14.

(e) *The impact of life and language testing in the UK on spouses and refugees*

We note that so far as formalised life and language testing goes, this is to be part of “path to citizenship” in that it will be a prerequisite for securing the new “probationary citizenship.”²⁷⁶ Applicants will not be able to proceed to secure British citizenship without first having completed, and secured this.

Whilst there is a dearth of detailed statistically disaggregated information about test results, the Advisory Board on Naturalisation and Immigration has produced some statistical information on the results.²⁷⁷ Commentators analysing this data note that the highest failures occur with nationalities that tend to be the source of large numbers of refugees, and nationalities whose migration to Britain includes significant shares of migrants in family categories.²⁷⁸ Family migration would overwhelmingly be spouse based migration.

From the perspective, of Article 6 ECN (the duty to facilitate naturalisation for refugees and spouses) and Article 34 of the Refugee Convention, these statistics are problematic and arguably inconsistent with the standards contained within these instruments, and if not, certainly with the spirit of the provisions.

Supplementary memorandum submitted by the Joint Council for the Welfare of Immigrants

ABOUT THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

The Joint Council for the Welfare of Immigrants is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to eliminate discrimination in this sphere and to promote the rights of migrants within a human rights framework.

INTRODUCTION

This is a supplementary submission prepared in the light of the session before the Joint Committee on Human Rights of the 04.11.08. It deals exclusively with (i) the new risks the draft Bill generates for British citizens (ii) the position of British nationals other than British citizens.

1. The British Government’s idea of citizenship and nationality appears to be at variance with the meaning assigned to it by other nations on the international plane. Elsewhere, the citizen/national belongs to a particular state, has rights and duties which derive from belonging, and has a protected, entrenched, constitutional status. However imperfectly this pattern is followed, in some places, the basic standard laid down in Article 12 of the 1966 International Covenant on Civil and Political Rights requiring that “No one shall be arbitrarily deprived of the right to enter his own country” is widely respected. From 1962 onwards however British Governments have systematically denied the rights of certain groups of British nationals to enter or remain in the United Kingdom. The present Government continues to do so, and it is possible that the Draft (Partial) Immigration and Citizenship Bill will extend exclusion to new groups of nationals.

2. The origins of the above problem lie in the British Nationality Act (BNA) 1948, which called the existing status of British subjecthood the nationality of the empire, and then superimposed it on to a “Citizenship of the United Kingdom and Colonies” (CUKCs) which had no rights attached to it, outside its rules on transmission. Other countries, both inside and outside the Commonwealth, regarded the separate citizenships of independent Commonwealth countries as nationalities. But inside the UK, British subjecthood still had attached to it rights associated with nationality.

3. The BNA 1948 had made the terms “British Subject” and Commonwealth citizens’ interchangeable in law. Most people in the UK did not recognise this. When hostility to so called “coloured migration” grew in the late 1950’s that hostility was expressed as concerning “Commonwealth citizens”. This confusion made it possible for the Government in 1962 to legislate for immigration controls over Commonwealth citizens in a manner which placed some CUKC’s under control while others (mainly in or from the UK) were not. Citizens of the independent Commonwealth countries were placed in the same controlled category as colonials; the Government openly used administrative means to facilitate entry from the old, white Dominions, while strictly limiting “coloureds”. Thus began the process, continuous to this day of subordinating nationality/citizenship law to immigration law.

²⁷⁶ *The Path to Citizenship: Next Steps in Reforming the Immigration System: Government Response to Consultation*, UK Borders Agency, July 2008, p.13.

²⁷⁷ ABNI, *Second Annual Report: April 2006-October 2007*, p 24.

²⁷⁸ B Ryan *Integration Requirements: A New Model in Migration Law*, (2008) Vol.21, No.3 p.18.

4. It is a striking feature of the Draft partial Immigration and Citizenship Bill 2008 that it deals almost exclusively with immigration matters concerning control after entry; detention, expulsion and offences. Moreover, the Bills opening clauses indicate a potential reduction in existing citizenship rights. The only citizenship right defined in the 1981 Act was the right of abode, and this was shared with certain citizens of other Commonwealth countries. But right of abode has disappeared, to be replaced by “immigration permission.”

5. Immigration permission is not a right at all. It may be granted by the Secretary of State by order to groups of persons²⁷⁹ or to individuals²⁸⁰. The opening clauses of the Bill begin with “A British citizen is free to enter and leave, and to stay in, the United Kingdom” but immediately qualify this with “That is subject to any requirements or restrictions imposed by or by virtue of this Act or any other enactment.”²⁸¹ The burden of proof is on an applicant who claims to be British citizen to prove the assertion by means of a valid UK passport describing him or her as a British citizen or by a valid identity card.

6. It should be evident from the above that there is room in these provisions for some bureaucratic manipulation. Also, given existing powers to deprive some persons of citizenship, there is a real risk that a new group of British nationals denied entry and stay here, will join the excluded groups created by earlier legislation.

7. The 1962 Commonwealth Immigrants Act had excluded colonial CUKCs from the UK but had left them a home each in his own colony. The 1968 Commonwealth Immigrants Act was far more alarming; It deprived CUKCs in independent Commonwealth countries of a right of entry and stay here unless they had acquired their status through birth, adoption, registration or naturalisation in the UK itself or had a parent or grandparent who so qualified. This effectively excluded CUKCs of Asian origin or descent from the UK, who had become CUKC’s because of birth etc in a colony. The people particularly affected were the East African Asians who believed that they had been guaranteed UK entry if placed under any disabilities when their countries of residence became independent. Their numbers were variously estimated. They became effectively stateless and many suffered great hardship, for example through denial of employment and education for their children. Those who sought to enter the UK were turned back, only to be turned back again in East Africa. After being shuttled back and forth some were imprisoned on arrival in the UK but eventually released and allowed to stay as no other country was bound to accept them. Some were admitted by Canada, some went to India as a supposedly temporary expedient and waited for entry vouchers to the UK which seldom came; some wandered in European countries, sleeping on beaches or on park benches. Their case was ruled admissible by the European Commission on Human Rights, but never proceeded to the Court of Human Rights. There were no three classes of CUKC, each with different rights from the others.

8. The Immigration Act 1971, which united immigration controls over aliens and Commonwealth citizens/British subjects alike created the concept of the right of abode or partiality. Its definition was excessively complicated, but essentially it meant that CUKCs with a UK connection, together with several million citizens of Commonwealth countries with that connection were free from immigration control, but all other CUKCs and persons from other countries were subject to it. The existing groups of CUKCs were re-named in the subsequent 1981 British Nationality Act as British citizens (partial CUKCs), British Dependant Territories citizens (colonial CUKCs) and British Overseas Citizens (non-partial CUKCs no longer legally connected to any colony). All these continued to have the same rights, or lack of rights as before. All could still apply for British passports but these were of little use to BOCs.

9. The numbers of BOCs in the world (in African countries, Malaysia and elsewhere) could never be determined with accuracy. The Government’s estimates have been consistently higher than those of independent varied observers- not only for BOCs but for other British nationals excluded from the UK: British Protected Persons, non- partial British Subjects without citizenship of any Commonwealth country, and British Nationals (Overseas). The British subjects concerned were people in India, Pakistan and Sri Lanka who failed to obtain those countries’ citizenships at independence. Transmission of the status was very limited. (Partial BSs are mostly Irish descent or else people of UK descent from the sub-continent.) BPPs, very numerous in the early twentieth century, originated from the protectorates, protected states, mandated and trust territories: these have almost all disappeared.

10. As to who these people are, their numbers and their whereabouts, we can be sure that most, but not all, BOCs are of non- European descent. There must be some of UK descent too remote to qualify for the right of abode in Latin America, some from families of Syrian traders who settled in West Africa, and a variety of others scattered widely. But of these many have dual citizenship, having gained nationalities in their countries of residence. The latter are not vulnerable like those who are BOCs only, and *they do not have the right to register* as British citizens which was granted to all other BOCs everywhere by 2002 by the Nationality, Immigration and Asylum Act 2002. (BPPs and BSs were given a right to register in the same Act) But much damage had already been done and some remains. Many holders of these forms of nationality (mainly of Indian descent) may not know of their BOC status and therefore obviously do not apply. The total numbers have dwindled as British policy intended then to do because of close limits on transmission. There are probably a few thousand altogether.

²⁷⁹ Clause 8.

²⁸⁰ Clause 5.

²⁸¹ Clause 1(2)

11. So far, there had been a continuing policy line whether the British Government had been Labour or Conservative: the emphasis had always been on restriction of British nationality in order to reduce the number of British nationals outside the UK and thus to reduce future sources of immigration. By far the most populous and economically important British colony was Hong Kong, which was due to return to China in 1997. All ethnic Chinese there were already Chinese nationals under Chinese law, but there were tens of thousands of others who, or whose ancestors, had been admitted under British rule, and to whom China saw no obligation. In agreement with the Chinese Government, the UK abolished the BDTC status for everyone in Hong Kong with effect in 1997. Some became BOCs. The non-Chinese, whether British citizens or aliens, became BOCs. At the same time the status of British National (Overseas) was created: holders resident in Hong Kong could apply for British passports but these would not give them UK right of abode. They could be used to apply for British consular services and protection when in third countries. This provision was intended to facilitate business travel. BN(O)s were not given the right to register as British Citizens at the same time as the excluded groups in 2002. Those who were physically outside Hong Kong in 1997 have no right to live in the Hong Kong Special Administrative Region under Chinese rule.

12. Under the Draft Bill, EEA nationals possess more rights than the excluded groups. They can enter, stay and work in the UK, and are eligible for many benefits here. Moreover, the excluded groups have none of the rights of British citizens to movement and employment in other EEA countries. The contrast is stark.

13. Clearly, the series of laws on nationality and immigration in the second half of the twentieth century had a racially discriminatory effect. During recent years there have been some liberalising changes to correct sex discrimination and the disadvantages of birth outside of wedlock, but the only correction to racial differences has been the British Overseas Territories Act 2002 (apart, that is, from some minor measures of limited effected dealing with Hong Kong).

14. The British Overseas Territories Act 2002 (BOTA) transformed BDTCs into British Overseas Territories Citizens and gave them all British citizenship as well. This domestic double nationality applies to the remaining colonies as they were in 2002: all small islands or island groups except for Gibraltar. Gibraltarians were already either British citizens or possessed or effective right of abode, and held EEA movement rights under a Declaration to the EEC which the UK had been made in 1982. Falkland Islanders had been made British citizens in 1981 by an Act of Parliament passed after the Falklands War with Argentina.

15. The BOTA did not, however correct the situation of yet another excluded group which has received little attention. Persons born in colonial territories have, since 1983, depended for their British nationality (BDTC status and then BOTC status) on having parents who were themselves either British or, more commonly, settled under local immigration law at the time of the birth. The immigration laws of these territories vary widely, some being very restrictive indeed. It is thus possible for a person born in such a territory not to have been born a BDTC or a British citizen: the child must either have the nationality of a foreign parent or be stateless.

16. The same problem has affected UK born children since 1983 under the British Nationality Act 1981. Before then, the simple *ius soli* rule had ensured that every child born (or found in infancy) in the UK was automatically fully British. Since 1983 the child must have one parent who is a British citizen or “settled” under immigration law: otherwise the child takes the nationality of a parent when the parent’s country provides for this or is born stateless within a territory. There have been at least a few hundred stateless deaths a year, but numbers are not accurately known, since only those applying for registration are recorded.

17. Perhaps one of the most worrying features of the Draft Bill is the abolition of the right of abode in favour of “immigration permission”. There could surely be no more striking instance of the primacy of immigration law over nationality law. A British citizen is to be free to enter and leave, and stay in the UK subject to “any requirements or restrictions imposed or by virtue of this Act or any other enactment”. Given the existing provisions on expulsion intended chiefly to deal with suspected terrorists who have been convicted of no offence, and likely future extensions of executive powers, this provision- which removes the only statutory right of citizenship defined in nationality legislation opens up frightening possibilities.

Ann Dummett

Memorandum submitted by Justice

SUMMARY

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.

2. JUSTICE welcomes the Committee’s inquiry into the draft Bill. As a human rights organisation, we have long been concerned with the issues of fundamental rights raised by immigration and asylum. And, as a law reform organisation, we have long been concerned with the increasing complexity of the law governing

these areas,²⁸² the generally poor quality of decision-making by immigration officials, and the progressive trend of government to seek to restrict the appeal rights of immigrants and asylum seekers. Most recently, we have become concerned by statements such as that in the *Governance of Britain* Green Paper last year,²⁸³ which seek to link rights explicitly to British citizenship rather than as something guaranteed to all people governed by British law.

3. As a law reform organisation, we therefore welcome the long overdue simplification and streamlining of immigration and asylum law that the draft Bill aims to achieve. Whether in fact it has achieved this is, however, open to question: Part 3 of the Bill dealing with citizenship seems to us one area where it has actually increased the complexity of the relevant law. More generally, however, we are concerned that the draft Bill has only continued the trend of recent immigration legislation: eroding rights of appeal and diminishing safeguards against arbitrary decision-making, rather than enhancing them. Given the size of the draft Bill, we can do no more than outline our key concerns in this submission.

PART 1: ENTRY INTO AND STAY IN THE UK

4. Clause 1(1) provides that a British citizen is free to “enter and leave, and to stay in, the United Kingdom”. Clause 1(2) provides that this is “subject to any requirements or restrictions imposed by *or by virtue of* this Act or any other enactment”²⁸⁴ The words “by virtue of” indicate that a citizen’s right to enter, leave or remain in the UK may be qualified not only by primary legislation but also by secondary legislation. However, given the draft Bill’s own extensive reliance on regulation-making powers (see eg the immigration rules in clause 21 and the power to designate officials in clause 24), we question whether any proposed limitations on a citizen’s right to enter, leave or remain should be open to qualification in this way.

5. We note that the right to enter and return to one’s country is a fundamental right recognised in international and European law.²⁸⁵ Any restrictions on this right must, among other things, be necessary and proportionate and—above all—“must not nullify the principle of liberty of movement”.²⁸⁶ Although we accept that the right to enter and remain may be legitimately regulated, any proposed restrictions should be clearly spelt out in primary legislation by Parliament itself, not left to the generous rule-making powers afforded to various subordinate officials.

6. We also note that the right to enter and return to “one’s own country” extends beyond people who are citizens. The UN Human Rights Committee makes clear that the right:²⁸⁷

is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.

7. Unlike Part 1 of the draft Bill, the 1971 Immigration Act currently in force explicitly does *not* restrict the right to enter and remain to British citizens only—section 1(1) provides simply that any person with the right of abode under the Act “shall be free to live in and come and go into and from” the UK. By contrast, the provisions for immigration permission for non-nationals under clauses 2 and 4 draw no distinction between individuals who, on the one hand, may have substantial ties to the UK (including those with right of abode under the 1971 Act) and those whom, on the other hand, may be only temporary visitors.

8. In addition, the wide range of restrictions that may be imposed on those with temporary permission under clause 10 (including police reporting requirements and limits on residence and employment) are in many cases likely to engage the Convention rights of individuals (including the right to liberty under Article 5 and the right to respect for private and family life under Article 8). Moreover, the extremely broad discretion to impose conditions under clause 10 does not require any need or justification to be shown, eg the reasonable belief of an immigration officer that a residence requirement is necessary in any particular case. Of additional concern are the severe penalties for breach of conditions (that may include something as minor as failure to notify a change of address).²⁸⁸

9. A separate ground of potential concern is the provision relating to “designated controlled areas” under clauses 22 and 23. In particular, clause 23 provides that, where a designated control area exists at a port, a person “is not to be treated as entering the UK ... until [they] leave the designated control area”. We think

²⁸² In this context, we note the draft Bill is the seventh piece of immigration legislation since 1999.

²⁸³ See eg para 185: “The Government believes that a clearer definition of citizenship would give people a better sense of their British identity in a globalised world. British citizenship—and the rights and responsibilities that accompany it—needs to be valued and meaningful, not only for recent arrivals looking to become British but also for young British people themselves [emphasis added]”.

²⁸⁴ Emphasis added.

²⁸⁵ See eg Article 12(2) of the International Covenant on Civil and Political Rights and Article 2(2) of Protocol 4 of the European Convention on Human Rights: “Everyone shall be free to leave any country, including his own”. See also Article 45(1) of the EU Charter of Fundamental Rights: “Every citizen of the Union has the right to move and reside freely within the territory of the Member States”.

²⁸⁶ UN Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 2.

²⁸⁷ *Ibid*, para 20.

²⁸⁸ See eg clause 37(4)(d) which makes an individual in breach of conditions of their temporary permission liable to expulsion without right of appeal, or clause 99(1) which makes “knowing” breach of such a condition a criminal offence. The requirement to notify a change of address could be imposed under clause 10(1).

it important to reiterate that *arrival* in the UK, as distinct from entry into the UK, is the relevant trigger to the UK's obligations against *refoulement* under the Refugee Convention, the Torture Convention and the ECHR in this context. Notwithstanding the provisions on entry, the use of designated control areas must not be allowed to interfere with an individual's ability to claim asylum in the UK, nor their ability to prevent removal that would breach their rights under the European Convention.

PART 2: POWERS OF EXAMINATION

10. Clause 25 provides immigration officials with a strikingly broad power: a power to examine any person who has arrived in²⁸⁹ or has already entered²⁹⁰ the UK. This power may be exercised to determine the person's identity and immigration status, including whether they are a citizen or not.²⁹¹ There are no geographical or time limits on the exercise of the examination power,²⁹² and it entails not only a power to require that person to submit to a medical examination,²⁹³ but also a power to detain that person pending the completion of the examination, until "all relevant matters have been determined".²⁹⁴ In other words, clause 25 empowers immigration officials to stop any person in the UK at any time and lawfully detain them for as long as they deem necessary to determine any of the matters set out in clause 25(2). In addition, refusal to comply with an examination or to submit to a medical examination constitutes a criminal offence.²⁹⁵

11. It is unnecessary to spell out the numerous ways that placing such a broad and unfettered power in the hands of immigration officials without safeguards would breach fundamental rights. It is plain that this power cannot sensibly be justified, and we look forward to major modifications to this Part in due course.

PART 3: CITIZENSHIP

12. Part 3 is intended to implement the government's proposals first set out in its *Path to Citizenship* consultation,²⁹⁶ as well as those in Lord Goldsmith's review of citizenship.²⁹⁷ We have elsewhere questioned the government's proposal to link citizenship with the enjoyment of rights.²⁹⁸ Here we draw attention to the manner in which Part 3, far from simplifying the current law relating to British nationality, unnecessarily and unduly complicates it. No law which contains mathematical formulas such as those in clause 34 can rightly be described as simplifying anything.

13. We are similarly concerned at the proposed measure in clause 34(6) that seeks to extend qualifying periods for probationary citizenship, not simply for those convicted of criminal offences but for persons "connected" with them—in essence, punishing persons not for their own actions, but for those they are related to.

14. We also draw attention to the language requirements for probationary citizenship, specifically "sufficient knowledge of the English Welsh, or Scottish Gaelic language" in clauses 32 and 33. We understand that the purpose of this is to ensure that UK citizens are able to communicate in at least one national language. However, we question the rationale for requiring knowledge of a national language as a prerequisite for citizenship. We note for example that there are approximately 58,652 Scots Gaelic speakers in the UK,²⁹⁹ as compared to approximately one million people in the UK who speak Urdu.³⁰⁰ If the purpose of a language requirement is to ensure that new citizens are able to communicate with at least some of their fellow citizens, then it is unclear why preference should be given to a language spoken by 0.01% of its population over one spoken by 0.5%. If, on the other hand, the government is willing to recognise the value of linguistic diversity in the UK and, indeed, tie this to its citizenship agenda, then—again—the question becomes why the government should be keen to welcome Scots Gaelic speakers as citizens and not those who speak other languages. If, however, the government's goal is for everyone to speak English, then it is unclear why exceptions should be made for some minority languages but not others.

²⁸⁹ Clause 25(1)(a).

²⁹⁰ Clause 25(1)(b).

²⁹¹ Clause 25(2)(a).

²⁹² By contrast, the power to examine persons *leaving* the UK under clause 26 is only exercisable at a port, international railway station or "other place" which the Secretary of State believes is being used as an embarkation point from the UK (clause 26(1)(b)).

²⁹³ Clauses 25(3) and 27(1)(b).

²⁹⁴ Clause 53(1)(b).

²⁹⁵ Clauses 101 and 102 respectively.

²⁹⁶ Border and Immigration Agency, *Path to Citizenship: Next Steps in reforming the immigration system* (February 2008).

²⁹⁷ *Citizenship: Our Common Bond* (October 2007).

²⁹⁸ See eg Metcalfe, "Human rights v the rights of British citizens", 5 *JUSTICE Journal* (2008).

²⁹⁹ *UK Census 2001*, National Statistics Office.

³⁰⁰ *A Guide to Urdu* (BBC Languages).

PART 4: EXPULSION ORDERS AND REMOVAL FROM THE UK

15. Expulsion orders under Part 4 combine two distinct and long-standing legal regimes—deportation and immigration removal—into a single legal scheme. The traditional “non-conducive” grounds for deportation under section 3 of the 1971 Act, for instance, are now one of several of grounds in clause 37(4) upon which the Secretary of State has the discretion to make an expulsion order against a non-national.³⁰¹ Other grounds include being in the UK without permission (clause 37(4)(c)), breaching a condition of temporary permission (clause 37(4)(d)), and lack of transit permission (clause 37(4)(b)).

16. One of the key distinctions between deportation and immigration removal is that persons who are deported are unable to return to the UK while their deportation order remains in effect, whereas persons removed on immigration grounds are free to seek re-entry into the UK (at which point their previous removal can be taken into account in the decision to allow entry). By contrast, clause 37(1)(b) provides that an expulsion order remains in effect following removal, prohibiting re-entry until the order is cancelled or expires.³⁰² Moreover, clause 37(6) allows expulsion orders to be made for an unlimited period. In other words, Part 4 imposes mandatory and potentially indefinite bans on re-entry for *all* persons removed from the UK, not simply those deported for reasons of criminality, for example. We question why it should be necessary to impose automatic bans of this kind, without any evidence to show that the existing regime governing immigration removal and re-entry has been unsatisfactory.

17. A second consequence of the new scheme for expulsion orders is to collapse the long-established distinction between a decision to remove on the one hand, and the setting of removal directions on the other. Currently, it is the decision to remove which is typically the main subject of legal challenge, while the removal directions may be set much later and given at much shorter notice (currently 72 hours prior to removal)³⁰³ and subject only to the more limited grounds of judicial review.³⁰⁴ By contrast, the making of an expulsion order will be effective immediately upon notice to the individual concerned,³⁰⁵ and removal directions are not required to be served on them.³⁰⁶ The only bar on removal is clause 48, preventing removal where the individual has an in-country right of appeal. However, clause 171(3) excludes any appeal for persons alleged to have breached a condition of their immigration permission, and family members of such persons.³⁰⁷ Given that this is likely to be a common ground for expulsion, it is striking that appeal rights have been stripped away in such a fashion.

18. Clause 37(2)(b) removes the discretion of the Secretary of State to make an expulsion order where the individual is a “foreign criminal” (as defined by clause 51). This essentially restates the automatic deportation provisions of the UK Borders Act 2007 and accordingly shares its flaws. In our view, the mandatory expulsion of persons for criminality without any kind of assessment of individual circumstances (including whether there is any risk of future offending) smacks of arbitrariness, undermines the importance of rehabilitation in general, and are wholly unnecessary. The arbitrary nature of the mandatory scheme for foreign criminals is compounded by the lack of an in-country right of appeal,³⁰⁸ and the provisions for the deportation of family members.³⁰⁹ We also take the view that such provisions are incompatible with the provisions of Article 1(F) of the Refugee Convention, which disapplies the Convention only in cases of “serious” crimes—a mere 12 months imprisonment in clause 51(2) is in our view well below this threshold.

19. The limitations on making expulsion orders in clause 38 by and large restate UK’s obligations under the Refugee Convention, the ECHR and EU law. However, we see no reason for the formulation “the Secretary of State thinks that” in clause 38(1)—in our view, this introduces a wholly unnecessary degree of subjectivity into what are well-established public law principles governing ministerial decisions. We also note that there is no provision to prevent expulsion in contravention of the UK’s obligations under the Council of Europe Convention on Trafficking in Human Beings (all the more striking because such an exception *is* provided in relation to mandatory expulsion orders against foreign criminals in clause 39(5)).

PART 5: POWERS TO DETAIN AND IMMIGRATION BAIL

20. As noted above, the power to detain under clause 53 extends to any person subject to the power of examination under clause 25, which is to say: everyone in the UK. As before, we consider that this provision needs substantial amendment in order to be compatible with fundamental rights.

21. Clause 55 governs detention of persons pending their expulsion. Clause 55(1) grants the Secretary of State the power to detain where she “thinks” the person is someone liable to be subject to an expulsion order. As with clause 38(1) discussed above, we consider that the formulation “thinks” is an inappropriate formulation—at the very least, the power to detain an individual should only be exercised where the

³⁰¹ C.f. clause 37(4)(h) “the Secretary of State thinks that the person’s expulsion from the UK would be conducive to the public good”.

³⁰² Clause 37(7).

³⁰³ See Border and Immigration Agency, Operational Enforcement Manual, chapter 44.

³⁰⁴ C.f. Part 54 of the Civil Procedure Rules, para 18, dealing with judicial review of removal directions.

³⁰⁵ Clauses 37(8) and 44.

³⁰⁶ Clause 44.

³⁰⁷ There is also no in-country right of appeal for exclusion orders against those designated as “foreign criminals”—see para 18 below.

³⁰⁸ Clause 171(3)(b).

³⁰⁹ See eg clause 51.

Secretary of State not only has reasonable grounds to believe they are liable to expulsion, but also where the Secretary of State reasonably believes that detention is *necessary* in order to effect that expulsion. We are also concerned at the provision for open-ended detention, without time limits. We are particularly surprised at the provision in clause 55(4), which creates a presumption in favour of detention of foreign criminals subject to expulsion “unless, in the circumstances, the Secretary of State thinks it inappropriate”. Such a provision seems to us fundamentally at odds with the common law presumption of liberty and the right to liberty under Article 5 ECHR.

22. We are also surprised at the proposals in clause 62(2)(b) and (c) limiting the availability of immigration bail at the behest of the Secretary of State. Clause 62(2)(b) prevents the Asylum and Immigration Tribunal (“AIT”) from granting bail to any person detained on arrival (including a UK citizen) until they have spent at least a week in the UK. Clause 62(2)(c) prevents the AIT from granting bail to any person whose removal is imminent and who has no pending appeal, without the consent of the Secretary of State. It is well-established that the right to liberty under Article 5 includes under Article 5(4) the right to review of one’s detention by an independent and impartial tribunal “by which the lawfulness of his detention shall be decided speedily ... and his release ordered if the detention is not lawful”. It is plain to us that a tribunal whose power to grant immigration bail is variously time-limited and subject to the consent of a government minister is not capable of meeting the requirements of Article 5(4) in such a case.

23. We are similarly concerned at the power in clause 68(1), where the AIT has granted a person immigration bail under certain conditions, for the Secretary of State to impose additional conditions or vary those the AIT has already imposed. This seems to us an unwarranted and improper intrusion by the executive into the independence of the AIT in carrying out its judicial functions.

PART 9: ILLEGAL WORKERS

24. Part 9 of the draft Bill restates with little amendment the existing provisions relating to illegal workers in sections 15 to 26 of the 2006 Immigration Asylum and Nationality Act. As with the 2006 Act, we note that there is already no lack of criminal offences in this area.³¹⁰ Secondly, the focus on illegal workers seems to us a disproportionate measure, given that those subject to immigration control are already subject to strict conditions governing their freedom to work (indeed, asylum seekers in the UK are prohibited from working altogether save with the special permission of the Secretary of State).³¹¹ We note the right to work is a basic human right and one that the UK government has agreed to uphold and protect as part of its international obligations.³¹² Rather than reiterate the provisions of the 2006 Act, Parliament should focus on enhancing the right of all to participate in paid employment, including lifting the bar on asylum seekers from working and providing further protection for those workers subject to immigration control.³¹³

PART 10: APPEALS

25. We note that the UK Border Agency has recently commenced a consultation on the immigration appeals system,³¹⁴ one that includes the long-standing proposal to roll the AIT into the common tribunal framework. We do not propose to comment on that proposal here, other than to note that it is liable to highlight many of the incongruities of the immigration and asylum appeals process and the general erosion of appeal rights as compared with other areas of administrative law. In any event, if that proposal is implemented, Part 10 is likely to undergo substantial revision.

26. As before, we note our concern about the effects of expulsion orders on the current appeal arrangements, including the loss of notice concerning the setting of removal directions and the lack of an in-country right of appeal for those whom are alleged to have breached a condition of their temporary permission or classified as “foreign criminals”.³¹⁵ As we have noted on many previous occasions, the quality of decision-making by immigration officials at first instance is in general staggeringly poor and this accordingly strengthens the case for effective independent judicial oversight, rather than—as the draft Bill envisages—weakening it further. We are particularly concerned at the provision in clause 170(2) that would deny a person granted refugee status in the UK an in-country right of appeal if their permission was cancelled while abroad (eg on holiday). In our view, such a measure may amount to constructive *refoulement* of a refugee contrary to Article 33(1) of the Refugee Convention. We also reiterate our concern expressed earlier about the denial of an in-country right of appeal to family members of those designated as “foreign

³¹⁰ See eg section 8(1) of the Asylum and Immigration Act 1996 which makes it illegal for an employer to hire a person subject to immigration control where that person lacks permission to work in the UK. Similarly, section 9 of the National Insurance Contributions and Statutory Payments Act 2004 creates a scheme of civil penalties for employers who do not make national insurance contributions in respect of their employees.

³¹¹ Section 8 of the Asylum and Immigration Act 1996 and the Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225).

³¹² See eg Article 23(1) of the Universal Declaration of Human Rights 1948: “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”. See also Article 6 of the International Covenant on Economic Social and Cultural Rights 1966, ratified by the UK on 20 May 1976; Article 15 of the EU Charter on Fundamental Rights.

³¹³ See eg the Gangmasters (Licensing) Act 2004.

³¹⁴ *Consultation: Immigration Appeals—Fair Decisions; Faster Justice* (UKBA, 21 August 2008).

³¹⁵ See the discussion at para 17 above.

criminals”—whatever the merits or otherwise of the arrangements for those who have committed criminal offences while in the UK, we can see no justification for denying access to justice to individuals simply by virtue of their family ties.

PART 12: DEFINITIONS

27. The definition of “refugee” in clause 205(3) as someone who is “recognised” as a refugee is at odds with the provisions of the Refugee Convention. Specifically, the definition of refugee under Article 1(2) of the Convention makes no reference to recognition by a receiving state and neither are the UK’s obligations under the Convention limited to those who are “recognised” as such.

28. We also take issue with the definition of “human rights protection” in clause 205(5), specifically its reference to further “conditions ... as are specified in the Rules”. It is not sufficient that any proposed conditions be “framed by reference” to the UK’s obligations under the European Convention on Human Rights—they must in fact be fully compatible with those obligations and we can see no basis for attaching conditions of any kind to a person’s entitlement to protection under this head.

29. Lastly, the proposed limitation of the extraterritorial application of the draft Bill in clause 205(6) is incompatible with both the Refugee Convention and Article 1 of the ECHR. In respect of the Refugee Convention, it has never been held that the scope of a country’s obligations are limited to its territory and, in respect of the ECHR, it is clear from decisions such as *R (B and others) v Secretary of State for Foreign and Commonwealth Affairs*³¹⁶ and *Al Skeini and others v Secretary of State for Defence*³¹⁷ that the UK’s obligations under the Convention are not restricted to the territory of the UK. The ability of a person to make a protection application under the draft Bill should there match the UK’s own jurisdiction and control, rather than its territory.

8 October 2008

Memorandum submitted by Kent Refugee Help

INTRODUCTION

Kent Refugee Help is a small charity working to support immigration detainees and obtaining their release by finding them sureties for bail, legal representation, and after care on release.

GENERAL OBSERVATIONS

This proposed bill and previous legislation have undermined the essential presumption of liberty and the right to be granted bail. We have become increasingly concerned about the length of time people are being held in detention and the difficulty in finding legal representation. From our experience detention without a release date has a very detrimental effect on people’s physical and mental health. The current bill can only exacerbate these problems.

We highlight below the several clauses in the current bill on which we have serious concerns.

The following clauses are of particular concern;

Clause 61(2) requires a detainee to pay the first period of detention (14) days. This is punitive and in the overwhelming number of cases impractical. Detainees have insufficient safeguards at present this puts them further at risk. Detainees are very often destitute or have very little access to any funds by what methods does the SSHD believe the detainee can meet these costs. It also gives rise to issues of transparency by who and by what method will these costs be assessed. The clause is ill conceived and should therefore be deleted.

Clause 62(2)(c) proposes to give the SSHD to the power to decide whether or not to agree with the Immigration Tribunal’s tribunal to grant bail where a person removal is deemed “imminent.” This is clearly an interference with the independence of the tribunal and sets a dangerous precedent for political imperatives to drive bail decisions. If an immigration judge considers the detainee is unlikely to abscond and meets other conditions imposed by the court “eg” sureties reporting conditions etc. This must logically be the only just and transparent method. The clause should therefore be deleted.

Clause 68(2)(b) proposes to grant the SSHD with powers to change the bail conditions imposed by the tribunal this a further interference with independence of the tribunal. The clause should therefore be deleted.

³¹⁶ [2004] EWCA Civ 1344 at para 79: “ the Human Rights Act 1998 requires public authorities of the United Kingdom to secure those Convention rights defined in section 1 of the Act within the jurisdiction of the United Kingdom as that jurisdiction has been identified by the Strasbourg Court”.

³¹⁷ [2007] UKHL 26 per Lord Brown: “Parliament intended the [Human Rights] Act to have the same extra-territorial effect as the Convention”.

Clause 62(11) Proposes that a financial security should be made before a detainee can be released. There is no legal requirement for a bail applicant to have a surety, and that any surety be required to make a financial payment as a condition of release. No rationale has been submitted for this change in the current procedures. The clause is punitive, manifestly unfair and ill conceived. The clause should be deleted.

A final area of great concern is that the SSHD should provide travel expenses or vouchers to enable a person granted bail to travel to the relevant reporting centre as specified by the tribunal. Clearly if the person has no funds to travel to the reporting centre they will be in breach of their bail conditions and therefore at risk of being re-detained. This could rise to an application under Article 5 of ECHR.

Kent Refugee Help

October 2008

Memorandum submitted by Law Centre (NI)

ABOUT LAW CENTRE (NI)

1. Law Centre (NI) is a public interest law non-governmental organisation. The Law Centre works to promote social justice and provides specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. The Law Centre provides advice, casework, training, information and policy services to over 450 member organisations in Northern Ireland. We are the main advisers on immigration law in Northern Ireland and facilitate the Immigration Practitioners' Group consisting of lawyers and voluntary sector organisations. This submission is informed by our experience of immigration work in Northern Ireland.

INTRODUCTION

2. In this paper we outline the significant human rights issues likely to be presented by implementation of the draft Bill, drawing attention to the Northern Ireland specific issues which should be taken into account in analysing this Bill. Our concerns are illustrated by case studies where appropriate. The structure of this paper reflects the distinct parts of the draft Bill. Each section of this paper is prefaced with a summary of the significant human rights issues and also outlines any potential incompatibility with key domestic and international instruments.

PART I—REGULATION OF ENTRY INTO AND STAY IN THE UK (CLAUSES 1–24)

3. Key concerns in this section relate to: potential infringements of Articles 8 and 11 European Convention on Human Rights; incompatibility with the *non-refoulement* principle of the 1951 Convention on Refugees, the 1954 Convention on Statelessness and an erosion of general principles of administrative justice.

(a) *Immigration Permission*

4. The current system of entry clearance, visa, leave to enter, leave to remain and temporary admission is complicated but the proposal that a “migrant either has permission or does not” by way of single concept of temporary or permanent permission is too simplistic to encapsulate the different categories it replaces.³¹⁸ This could lead to confusion and misunderstanding as to the immigration status and related entitlements that a person has, which in turn could lead to potential human right infringements. Furthermore, the concept of permission does not replace the right of abode for persons of certain Commonwealth countries.³¹⁹

(b) *Scope of UK protection?*

5. The draft Bill states that a person is “not to be treated as entering the UK until she or he has either disembarked or left the designated control area.”³²⁰ This distinction of arrival/entry is troubling because it blurs the moment the UK becomes accountable under international human rights law, in particular, the 1951 Refugee Convention and the principle of *non-refoulement*. *It is essential that persons on UK soil can avail themselves of these international protections regardless of this distinction and that no person is denied access to the UK justice system as a result of its application.*

³¹⁸ See UKBA Making Change Stick: an Introduction to the Immigration and Citizenship Bill, Chapter 1.

³¹⁹ Clause 8(2).

³²⁰ Clause 23(1).

(c) *Abolishing Temporary Admission*

6. The existing status of Temporary Admission confers few rights on the applicant but *does* provide the applicant with a form of identity that can be used to access asylum support. The Bill abolishes temporary admission without making alternative provision to provide the documentation necessary to access asylum support.³²¹ This could lead to an increase in the level of destitution among asylum seekers and potentially, more challenges under the Human Rights Act.³²² This approach appears to be consistent with a worrying trend to reduce an individual's access to welfare and, indeed, reduce her/his status in law.³²³

(d) *Abolishing Discretionary leave*

7. The bill proposes a new immigration category, "protection permission", which will replace refugee status, humanitarian protection or human rights protection.³²⁴ This new form of permission does not appear to include permission derived through discretionary means.³²⁵ Current Home Office policy acknowledges the need for discretionary leave in immigration law:

*[...] it is not possible to anticipate every eventuality that may arise, so there remains scope to grant DL where individual circumstances, although not meeting the of any of the other categories, are so compelling that it is considered appropriate to grant some form of leave.*³²⁶

8. It is therefore difficult to understand why the Home Office now considers it appropriate to withdraw discretionary leave. Discretionary leave accounts for a large proportion of all grants. Home Office data shows that 2,075 applicants (excluding dependants) were awarded discretionary leave in 2007, equivalent to 36.12% of all grants of permission; grants of discretionary leave for Unaccompanied Asylum Seeking Children numbered 1,765, equivalent to 82.09% of all grants.³²⁷ These figures clearly demonstrate that a substantial number of people would not be provided for under the new provisions.

9. We are not aware of any data that shows what percentage of discretionary leave grants were awarded in non-ECHR cases. Our experience is that cases do arise that are sufficiently compelling to require a grant of discretionary leave albeit they do not fully engage the ECHR or the Refugee Convention. Below we give examples from our casework where the Home Office has awarded discretionary leave but would be prevented from doing so under the draft Bill.

CASE STUDY A & B

Employer error: A & B arrived in UK on work permits. However, due to an error made on the part of the employer, A & B failed to make an in time application for extension of leave. The Home Office exercised discretion and granted A & B six months discretionary leave so as to enable them to find alternative suitable employment. The Law Centre then submitted applications for further discretionary leave as they had not been issued with Work Permits. However, before the Home Office considered the discretionary leave applications, it awarded A & B with Work Permits. The Home Office subsequently agreed to issue Limited Leave to Remain on the basis of the applicants' Work Permits.

CASE STUDY C

Employer error: C is a Thai national. In circumstances similar to A & B, employer error resulted in her failing to submit an extension application. C made a complaint and was subject to unfair dismissal. C was given one year discretionary leave, which has enabled her to successfully apply for a Work Permit.

CASE STUDY D

Criminal prosecution: D is an Indian national and a victim of trafficking for forced labour. She agreed to give evidence in a Trafficking criminal prosecution. Accordingly, she was granted one year discretionary leave while the prosecution takes place.

³²¹ The draft illustrative immigration rules refer to "Status Documentation" for applicants for protection (paragraph 29), but it is unclear which immigrants will receive such a document.

³²² See, for example, *R v ex parte Adam, Limbuela & Tesema* [2005] UKHL 66 where the House of Lords held that the state is responsible for destitution arising as a consequence of the statutory regime.

³²³ We refer specifically to Part 10 of the Criminal Justice and Immigration Act 2008 that provides for the introduction of a "special immigration status" in which a person is liable to deportation but cannot be removed without a breach of his or her human rights. This status expressly states that the individual is without status and may not be granted Temporary Admission.

³²⁴ Clause 205.

³²⁵ "Minimising reliance on concessions outside the rules" is a stated objective. See Executive Summary, paragraph 15.

³²⁶ Current BIA Asylum Policy Instruction "Discretionary Leave"
<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policvandlaw/asylumpolicvinstructions/apis/discretionaryleave.pdf?view=Binary>

³²⁷ Home Office Statistics Bulletin: Asylum Statistics United Kingdom 2007, Table 4. The figures of grants of discretionary leave for applicants including dependants rises to 2150 grants or 47.83%.

CASE STUDY E

Leave in line: E is a Chinese national. E has a long-term relationship with asylum seeker and they have a baby together. E's partner was granted Humanitarian Protection for having testified in a "snakehead" (trafficking) trial for PSNI (Police Service of Northern Ireland). E was granted Discretionary Leave in line with E's partner.

CASE STUDY F & G

Compassionate: F & G are Chinese nationals and failed asylum seekers. F gave birth in Northern Ireland to a baby who had a medical condition, which although not life-threatening did require a surgical operation. The NHS agreed to operate and F & G were due to submit applications for discretionary leave so as their baby could receive the appropriate follow-up medical care in order to be "fit to travel" to return to China. Unfortunately, the baby has since died.

10. The withdrawal of discretionary leave will also adversely affect a much broader category of cases, namely children. The current discretionary policy of granting leave to a child who has spent seven years of their childhood in the UK has not been incorporated into the Immigration Rules or into the Border Act 2007. It is not clear from this Bill how the government intends to provide for such children. Clause 189 provides for the "promotion of the welfare of children who are in the UK", however, this is not likely to be sufficient in securing permission in such instances. This would have a detrimental impact on children who have spent a significant section of their formative years in the UK and who may not be entitled to any other form of protection.³²⁸

(e) *Conditions of temporary permission*

11. A person who has been granted temporary permission is now subject to an increased number of conditions until she/he obtains permanent settlement or naturalisation.³²⁹ This constitutes a substantial change to current circumstances whereby applicants who have received limited leave to remain (LLR) may be subject to restrictions (such as a bar on joining the armed forces) and may undergo an active review but are not actually subject to conditions. The Secretary of State has broad discretion to apply conditions to the grant of temporary permission and the Bill does not appear to require her to justify such acts. The conditions are wide-ranging and may include police registration, employment restrictions and residence restrictions. When applied over the extended time period that must be satisfied before obtaining permanent settlement (eight years) or naturalisation (six years), these conditions may constitute disproportionate interference with rights protected by Article 8 and 11 ECHR.³³⁰

(f) *Cancelling permission*

12. Immigration permission can be cancelled in a number of ways in the draft Bill. Cancellation of permission renders the individual liable to expulsion.

13. Failure to comply with a condition (as above) may result in cancellation of immigration permission. This could include a failure to notify a change in address. It is difficult to envisage how cancellation of permission in such circumstances could amount to a proportionate interference for purposes of Article 8(2) ECHR.

14. Immigration permission is automatically cancelled if, after it is granted, the person stays outside the UK for a continuous period of two years.³³¹ The application of this provision may unduly hamper the mobility of those with protection permission as it will restrict their opportunity to take up employment outside of the UK. It may also result in refugees becoming stateless, contrary to the UK's obligations to reduce statelessness under the 1954 Convention, which it has both signed and ratified.³³²

16. Automatic cancellation of existing immigration permission also applies to persons who leave the UK while their application for a new permission is pending. Delays within the Home Office in processing applications could therefore have serious implications for applicants who may wish to reside outside the UK for a period, again impacting on freedom of movement. The current processing period for EEA applications

³²⁸ See paragraph 64 for further information about children.

³²⁹ Clause 10 reflects the broad powers in s16 UK Borders Act 2007. The list of conditions is not exhaustive.

³³⁰ These time periods are for applicants who have not been convicted of a prescribed offence.

³³¹ Clause 13.

³³² Consider the possible hypothetical situation. An asylum seeker "X" flees Zimbabwe and secures refugee status. Dual citizenship is prohibited in Zimbabwe following the Citizenship of Zimbabwe Amendment Act No 12 of 2001. X cannot therefore naturalise as she ultimately intends to return to Zimbabwe when it is safe to do so. X is entitled to apply for permanent settlement after eight years (ie assuming she has not committed an offence). During this period of temporary permission, she is subject to a number of conditions. X successfully obtains permanent permission, by which time her Zimbabwean passport has expired. X accepts a three-year contract to work in France. However, after two years, her permanent permission is cancelled by virtue of Clause 13. X can no longer enter the UK; France has no obligations towards her and she is unable to return to Zimbabwe. X is now stateless.

submitted by the Law Centre is in excess of six months. A particular application lodged on Article 3 grounds remains outstanding after four years. Subjecting persons to a *de facto* travel ban for such lengthy periods of times again seems to be a disproportionate exercise of immigration control.

PART 2—POWERS TO EXAMINE (CLAUSES 25–30)

16. The Bill considerably extends the powers to examine. Our key concern in this is the compatibility section of the exercise of these powers with Article 8 ECHR, both in terms of private life and physical integrity.

17. The Bill gives the Secretary of State new powers to examine a person to determine her or his identity and immigration status and can detain the person until the examination is complete. There are no limits to this exercise of power—ie it can apply to any person, British or otherwise, who has arrived in the UK—and the Secretary of State need not meet any condition prior to examination. This marks a dramatic increase in powers compared to current provisions whereby immigration officers can only arrest and detain if there is a “reasonable suspicion” that an immigration offence has/will be committed.³³³

18. The powers of examination that require the production of a valid identity document also apply to any person in the UK, including British citizens.³³⁴ Again, this is a striking extension of powers when compared to the limited circumstances in which identity documents can currently be required in Great Britain under the PoNce and Criminal Evidence Act 1984 and in Northern Ireland under the Police and Criminal Evidence (Northern Ireland) Order 1989 (SI 1989/1341).³³⁵

19. We note that no suspicion of criminality or immigration offending is necessary and that failure to comply is a criminal offence. These provisions represents serious threat to civil liberties. The UK government appears to be using this draft immigration Bill as a vehicle to introduce mandatory identity cards, a concept that has attracted widespread condemnation when proposed through other channels.³³⁶

20. The powers of the Secretary of State to examine any person extend to a “port, international railway station or other place in the United Kingdom”.³³⁷ In Northern Ireland this would result in a significant expansion of immigration powers to the interior of Northern Ireland as examinations could occur at the relevant halts on the main railway line between Belfast and Dublin as well as at the (undefined) “other places”.

21. We are particularly concerned about an increase in the powers to stop and request production of identity documents given our experiences of Operation Gull in Northern Ireland.³³⁸ In Operation Gull, UK Borders Agency immigration officials irregularly sweep sea and airports to stop those they believe are in the process of illegally transiting between the UK and the Republic of Ireland. The Home Office has not published data relating to its Operation Gull operations and we note a worrying trend that immigration officials have begun to question those coming to meet individuals at the ports. We are concerned that this process relies on racial profiling.

22. The Bill also gives the Secretary of State powers to require that a person undergoes a medical examination.³³⁹ Failure to comply is a criminal offence. This requirement may infringe upon Article 8 ECHR with regards to private life and physical integrity.³⁴⁰

23. The draft Bill also provides the Secretary of State with unlimited scope to request records of those staying “at hotels and other premises where lodging or sleeping accommodation is provided”.³⁴¹ This provision again applies to British citizens. The justification for this potentially intrusive (and costly) provision is unclear and raises concerns about its compatibility with Article 8.

PART 3—CITIZENSHIP (CLAUSES 31–36)

24. Our key concerns in this section relate primarily to the introduction of the concept of probationary citizenship and the permanent settlement process. These proposals may engage Article 8 ECHR, the 1951 Convention on Refugees and may also be contrary to UNHCR’s recommendations.

³³³ S28A 1971 Act and confirmed in s45 UK border Act. Note that these provisions were supplemented by s44 Terrorism Act 2000 which introduced wider powers; however, the Terrorism Act makes specific reference to the persons (ie level of police rank) who can exercise this power unlike this draft Bill, which does not appear to constrain these powers at all.

³³⁴ Clause 28(3).

³³⁵ Part II of the Order which governs the circumstances in which police officers can require and search for identity documents.

³³⁶ Widespread opposition includes Liberty, Justice, Bar Council, Law Society, Liberal Democrats, Conservatives.

³³⁷ Clause 26(1)(a).

³³⁸ See Law Centre’s policy briefing on Operation Gull:

<http://www.lawcentreni.org/Policy/Briefinq%20papers/operation%20gull.htm>

³³⁹ Clause 25(3).

³⁴⁰ Physical integrity may be infringed depending on the nature of the examination.

³⁴¹ Clause 30 (1).

(a) *Probationary citizenship*

25. We cannot see legal justification for the term “probationary citizenship” as this status does not appear to bestow the recognised entitlements of full citizenship. The proposals allow no scope for the principle of reciprocity: a person subject to increased responsibilities would have a legitimate expectation of enhanced accompanying rights, which are not provided for in the Green Paper “Pathways to Citizenship”. We do not believe that adding a new component of probationary citizenship is consistent with the aim of simplification, nor do we believe that extending qualifying periods is conducive to the aim of promoting integration.

(b) *Permanent status/naturalisation*

26. The increased qualifying period for permanent status rather than naturalisation may discriminate against those nationals who are restricted from holding dual nationality. Persons will have to make a difficult choice: naturalise or face further insecurity with Temporary Permission. Any proposal that compels persons to naturalise is arguably contrary to the UNHCR’s recommendations that voluntary repatriation is often the best solution for refugees (as refugees who have renounced their nationality to become British may find it extremely difficult to return), and may be inconsistent with the right to return enshrined in Article 13(2) UDHR.³⁴²

27. The draft Bill increases the amount of time required for a person to obtain permanent residency (be it through permanent settlement or naturalisation), while concurrently subjecting the applicant to increased conditions.³⁴³ These provisions will result in further instability and insecurity for persons subject to immigration control; indeed the employment provisions could give rise to increases in exploitation.³⁴⁴ One condition for permanent residency/naturalisation is that a person must enjoy full capacity. The Bill makes no provision for the exercise of discretion in relation to the capacity requirement³⁴⁵ and this could result in challenges being brought forward under Article 8 ECHR.

28. We are particularly concerned that there is no provision to reduce the qualifying periods for “protection” applicants. Refugees and stateless persons have demonstrated their need for surrogate protection and a secure home is corollary to this; thus the proposal to increase qualifying periods and impede access to full rights is arguably incompatible with the UK’s obligations under the 1951 Refugee Convention ie to assure refugees the widest possible exercise of fundamental rights and freedoms.³⁴⁶ The proposed legislation fails to acknowledge that refugees are, by definition, not motivated by choice. They should not be subject to the same requirements as economic migrants: a position that is reflected in the 1954 Convention on Statelessness.³⁴⁷

PART 4—EXPULSION ORDERS & REMOVAL ETC FROM THE UK (CLAUSES 37–52)

29. The substantive issues in this section relate primarily to Articles 2, 3 and 6 ECHR. The proposals also engage with the 1951 Convention on Refugees with particular reference to Article 1(F), Rehabilitation of Offenders Act 1974 and the Convention on the Rights of the Child 1989.

30. The Bill proposes a single “expulsion order” This carries a ban on re-entry for all persons subject to an expulsion order and can be of indefinite length.³⁴⁸ An unlimited expulsion order is extremely punitive. Given its implications for the person subject to the expulsion order and for her or his family members, we would expect the government to provide detail as to the specific circumstances in which this measure could be implemented and provide appropriate regulations to safeguard against arbitrary use. The Bill fails to do this.

31. Current law makes a distinction between (a) the deportation order, which constitutes the immigration decision and (b) the removal directions, which must be served at least 72 hours before removal. In many instances, months (if not years) can elapse between the signing of the deportation order and the issuing of removal directions. Under the draft Bill, however, the expulsion order itself can trigger removal and the Secretary of State has no statutory obligation to notify the person subject to the order of either the removal country or the removal directions.³⁴⁹ This may make it extremely difficult for such persons to obtain legal assistance to challenge their removal as there will be no 72 hour warning and accordingly may engage Article 6 ECHR.

³⁴² See UNHCR Repatriation section <http://www.unhcr.org/protect/4152e0fa10.html> See also UDHR Article 13(2) “Everyone has the right to leave any country, including his own, and to return to his country”.

³⁴³ Clause 34.

³⁴⁴ For example, a person subject to employment restrictions may fear reporting incidents of exploitation, discrimination, abuse, etc. The Law Centre believes that restrictions—such as those associated with Work Permits—may result in increased vulnerability and exploitation wherein applicants will have extremely limited redress.

³⁴⁵ There is currently a “sound mind requirement” to naturalise, however, UKBA specifically allows discretion on this point: <http://www.bia.homeoffice.gov.uk/britishcitizenship/eliqibiltv/soundmind/> The proposals do not explicitly safeguard this exercise of discretion. See Clause 31.

³⁴⁶ See Preamble of Office of the High Commissioner for Refugees: 1951 Convention relating to the status of refugees.

³⁴⁷ 1954 Convention on Statelessness, Article 32: “The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings”. The 1951 Refugee Convention adopted the recommendation to “facilitate in particular [refugees’] resettlement”.

³⁴⁸ Clause 37.

³⁴⁹ Clause 44(2)(3).

(a) *Expulsion of foreign criminals*

32. The Bill extends automatic deportation of foreign criminals to those who receive a minimum 12 month sentence. This regime will also apply to asylum seekers and refugees, which, in effect, prevents such persons from enjoying their rights enshrined in the Refugee Convention. Indeed, this provision is arguably incompatible with Article 1(F) of the Convention, which prevents persons who have committed serious crimes such as war crimes from enjoying Convention protections. It is clearly inconsistent to equate this provision to persons subject to 12 month sentences.³⁵⁰ By removing Convention protection, an asylum seeker or refugee may be exposed to serious harm/persecution, which may be incompatible with the UK's obligations under Articles 2 and 3.

33. The Bill provides that the Secretary of State will be *obliged* to make an expulsion order against foreign criminals unless a specified exemption applies.³⁵¹ There is no appeal right if the Secretary of State fails to exercise her discretion to apply an exemption. This gives rise to the possibility that the Secretary of State may exercise her discretion to order the expulsion of a minor. The court also has power to recommend a minor's expulsion.³⁵² Regardless of whether the Secretary of State intends to use this provision, the draft Bill should specifically prohibit the deportation of minors.

34. Further, automatic expulsion amounts to a double punishment. It fails to take into consideration the principles of the 1974 Rehabilitation of Offenders Act which embeds the principle of rehabilitation as a key concept of the UK justice system.³⁵³

PART 5—POWERS TO DETAIN & IMMIGRATION BAIL (CLAUSES 53–70)

35. The key concerns here are with the extension of immigration powers to non-immigration officials and the proposals to curtail the powers of the Asylum and Immigration Tribunal (AIT); these proposals engage Article 5 ECHR.

(a) *Powers to arrest and detain*

36. The draft Bill extends immigration powers to non-immigration officials. Clause 56 (2) places the onus on the captains of ships, aircraft and trains to act as immigration enforcers by preventing individuals from disembarking the ship, aircraft or train.³⁵⁴ The captain is also permitted to detain the individual in custody on board the ship, aircraft or train. The Secretary of State may designate officials for the "purposes of the Act";³⁵⁵ however, the definition of the officials and indeed the scope of their powers is extremely unclear. These officials may also arrest and detain individuals at ports or international railway stations and have the powers to search individuals.³⁵⁶ We are deeply concerned about the broad range of powers that this Bill invests into persons who are not part of the law-enforcement apparatus and are not therefore subject to the same regulatory framework as other law enforcement officials.

37. The powers of designated officials extend to pursuing and returning individuals to ports if they leave the port or station. This power does not appear to be temporarily or geographically limited.³⁵⁷ The draft also enables the Secretary of State to grant a person authority to "act under Secretary of State authority" when detaining a person or transferring a person, thus creating a third category of persons to whom the Secretary of State has "outsourced" powers of arrest and detention.

38. In addition to raising issues of accountability, the out-sourcing of immigration powers indicates the creation of a *de facto* second policing body. This interaction between the actual police and the *de facto* police for immigration purposes (who have considerable powers of arrest and detention) could be problematic.

39. The draft Bill also introduces a new, strikingly low test of liability of detention: If the Secretary of State thinks that a person is someone in relation to whom an expulsion order may be made, that person can be detained".³⁵⁸ This provision may result in a substantial number of people being liable to detention.³⁵⁹

³⁵⁰ This is particularly relevant given the likelihood of refugees receiving 12 month sentences: consider the fact that failure to submit to a medical examination or failure to comply with a condition of leave can attract a 51 week sentence.

³⁵¹ Exemptions are listed at Clause 39.

³⁵² Clause 40(1)(c).

³⁵³ In Northern Ireland, the relevant statute is the Rehabilitation of Offenders (Northern Ireland) Order 1978 (No 1908 (NI 27)).

³⁵⁴ Clause 56.

³⁵⁵ The definition of "designated official" is extremely unclear. Clause 24 (1) "The Secretary of State may designate officials of the Secretary of State as designated officials for the purposes of this Act".

³⁵⁶ Clause 57.

³⁵⁷ If a person whom a designated official detained/attempted to detain leaves the port or station, they could theoretically be pursued across the UK until their detention is secured. Clause 57.

³⁵⁸ Clause 55.

³⁵⁹ The wording of clause 55 is extremely broad. Compare this to current practice where police officers must meet the "reasonable suspicion" test and are subject to independent complaints procedures when exercising powers to detain and search and must comply with the PACE 1984 Codes of Practice.

(b) *Immigration bail*

40. The Secretary of State has expanded her own powers considerably with regards to bail while curtailing the powers of the Asylum and Immigration Tribunal. The Secretary of State must give her consent for the Asylum and Immigration Tribunal to award bail in cases where removal is imminent.³⁶⁰ This arguably violates constitutional arrangements by removing the Tribunal's independent powers to award bail.

41. In addition, the Secretary of State has the power to review a person's immigration detention, which appears to be incompatible with Article 5(4) ECHR, which specifically states that a review is to be undertaken by a person authorised to exercise judicial powers.³⁶¹ Furthermore, the Secretary of State has unilateral powers to vary bail conditions imposed by the AIT, which is again indicative of the trend to reduce judicial powers.³⁶²

(c) *Immigration detention*

42. The Bill provides for the immigration detention of persons whose removal is known not to be imminent, and, indeed, where there is no prospect of removal.³⁶³ Indefinite detention in such instances may constitute a breach of the right to liberty and security. The UK courts have consistently affirmed a long-standing principle that there must be a prospect of removal for immigration detention to be lawful.³⁶⁴ We see no justification for the government's radical departure from this established principle.

43. The issue of unlawful detention is particularly acute in Northern Ireland where, due to the lack of appropriate detention facilities, persons are arrested in Northern Ireland but are then transferred immediately to Dungavel Removal Centre in Scotland. Given the timings of lots of the arrests and transfers—often out of office hours—it is often extremely difficult for detainees to secure legal assistance. Nonetheless, the Law Centre has successfully challenged the lawfulness of such detentions on some occasions.

44. We are mindful of the fact that this bill was drafted at a time when the Government's proposed anti-terrorism laws—notably the 42 day detention proposal—were under increased scrutiny by civil society as well as parliamentary groups. We cannot help but notice that this draft Bill will provide for precisely that: lawful arbitrary detention.

PART 6—DETAINED PERSONS AND REMOVAL CENTRES (CLAUSES 71–96)

45. Part 6 of the Bill deals with the outsourcing of removal centre and short-term holding facilities as well as escort arrangements. Our concerns primarily echo those outlined in relation to part 5, namely the issue of accountability. Removal centres are not statutorily obliged to make regulations relating to the "safety" or "care" of detained persons³⁶⁵ and we query whether this is consistent with the spirit of the minimum standards Council Directive.³⁶⁶

PART 7—OFFENCES (CLAUSES 97–121)

46. The draft Bill introduces an array of new criminal offences, which appears to be part of a growing trend to criminalise immigration matters. As noted by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, such a trend is disproportionate and can lead to further stigmatisation and marginalisation. We are particularly concerned by the proposal to introduce a new offence of obstructing, resisting or assaulting immigration officials in the course of their duties, which is particularly ill-defined.³⁶⁷ Our concerns are compounded by reports of widespread and seemingly systematic abuse of deportees by private "escorts" contracted by the Home Office.³⁶⁸

³⁶⁰ 43 Clause 62(2).

³⁶¹ Clause 60(4). Article 5(4) states: "Everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial".

³⁶² Clause 68(1).

³⁶³ Clause 70.

³⁶⁴ eg *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1WLR 704; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97; *Regina v Secretary of State for the Home Department (Respondent) ex parte Khadir (FC) (Appellant)* [2005] UKHL 39.

³⁶⁵ Clause 82.

³⁶⁶ Council Directive 2004/83/EC 29/04/2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. In particular, see sections 33–35.

³⁶⁷ Clause 121.

³⁶⁸ "Outsourcing abuse" Report by Bimburg Pierce & Partners, Medical Justice and the National Coalition of Anti Deportation Campaigns: July 2008.

PART 8—CARRIERS' LIABILITY (CLAUSES 122–151)

47. Our concern in this section is one of gross discrimination and incompatibility with the Race Relations Act 1976.

48. The draft Bill introduces an “authority-to-carry scheme”, whereby a carrier may be subject to a penalty if they fail to seek authority to carry specified passengers to the UK.³⁶⁹ The proposed mechanics of this scheme appear to be wholly discriminatory. The Secretary of State has powers to make regulations requiring carriers to specify the “description” of passengers as well as their nationality. This provision, which enables the Secretary of State to specify persons (albeit through contracted third parties) on the basis of race or nationality, may well be unlawful under the Race Relations Act 1976.³⁷⁰ This could give rise to breaches of Article 14 in conjunction with Article 8 ECHR.

49. There is also an issue of accountability: the Law Centre feels that the responsibility for immigration control should not be outsourced to unaccountable private individuals and companies.

PART 10—APPEAL RIGHTS (CLAUSES 163–188)

50. The Bill proposes a general reduction of judicial oversight in immigration matters and could lead to an erosion of long-established legal principles such as the correct burden of proof. This may engage Article 5, 6 and 13 ECHR; where the Bill limits the appeal rights of asylum seekers, Articles 2 and 3 ECHR may also be engaged.

(a) *General issues*

51. The general trend of the provisions is to curtail appeal rights, in particular by limiting in-country appeal rights. This is especially worrying given the poor quality of initial decision-making, which demonstrates the importance of a robust, impartial appeal process. Current data shows almost one in four asylum appeals are allowed and almost one in three non-asylum cases are allowed. Until there is a substantial improvement in the quality of decision-making, it follows that the Home Office is not justified in limiting appeal rights.³⁷¹ By limiting appeal rights in the circumstances outlined below, the applicant may be denied an effective remedy and may therefore engage Article 13 ECHR.

(b) *Limited appeal rights*

52. An applicant will lose their in-country appeal right if their application is certified as “repetitious or unmeritorious”, “clearly unfounded” or “late”. This raises questions about the compatibility of these provisions with the principle of non-refoulement.³⁷² The proposals emphasise the Secretary of State’s obligation to certify applications as clearly unfounded while at the same time expanding the “white list” of countries.³⁷³ Additional countries include India and Mauritius, neither of which are state parties to the 1951 Refugee Convention or 1967 Protocol. This is a grave concern as neither country recognises the minimum standards guaranteed by international refugee law. Many of the proposed countries on the expanded white list are countries whose human rights records are categorised as “poor” to “serious” by the United States State Department and many have high incidences of serious human rights violations.³⁷⁴ It is arguable that such countries can be considered to be “safe”.

53. If the applicant fails to disclose information within a specified time, her/his application can be certified as “late”, thus annulling an in-country right of appeal.³⁷⁵ Denying an asylum seeker (or family member) an appeal right on administrative grounds risks undermining the whole asylum system. The asylum system must be flexible enough to accommodate those asylum seekers—who may be suffering from severe Post Traumatic Stress Disorder or psychiatric conditions—who may be unable to make full and frank disclosures at the initial stage of their application. This concern is compounded by the government’s intention to reduce the need to rely on legal advisers: without access to quality legal advice, a protection applicant may not fully understand her/his duties in putting forward their case.³⁷⁶

54. A person whose refugee permission is cancelled has no out-country appeal right.³⁷⁷ The applicant has an in-country appeal right if she/he was in the UK at the time when the immigration permission was cancelled. This is problematic for two reasons. First, it is a tenet of international law that refugees should

³⁶⁹ Clause 149.

³⁷⁰ In Northern Ireland the relevant statute is the Race Relations (Northern Ireland) Order 1997 (No 869 (NI 6)).

³⁷¹ Home Office Statistics Bulletin: Asylum Statistics United Kingdom 2007, Table 4 states that 23% of appeals brought forward before the AIT were allowed. The HO Statistics Bulletin: Control of Immigration 2007, section 7 states that 32% of non-asylum applications were allowed. See also reports eg Amnesty International (2004) *Get it right: How Home Office decision making fails refugees* Amnesty International, London.

³⁷² See Clause 176, 177, 179 respectively.

³⁷³ Clause 177.

³⁷⁴ See Annex 1.

³⁷⁵ Clause 179.

³⁷⁶ See UKBA 2007 “Simplifying Immigration Law: initial consultation paper” Chapter 7.1 para 223 “[the system] should maximise clarity and predictability for applicants and sponsors, reducing the need to rely on advisers to navigate the system”.

³⁷⁷ Clause 164(2)(f).

be given an opportunity to defend their status where that is revoked. Secondly, if permission is cancelled while the refugee is abroad, such a person could risk becoming stateless: a clear violation of the 1954 Convention on Statelessness.³⁷⁸

55. When an expulsion order is made, the person has no out-country appeal right and only an in-country appeal right in very limited circumstances. The following persons will not have an appeal right: a person who breaches a condition of permission and her or his family members; foreign criminals and their family members.³⁷⁹

56. A person with temporary permission who breaches a condition subject to which the permission was granted is liable to expulsion with no appeal right. Given the increased qualifying periods and the increased conditions during the temporary permission stage, a rise in breaches of conditions is likely. It seems disproportionate that a person may be subject to an expulsion order without a right of appeal for having committed an offence that would commonly be deemed as a civil offence—for example, failing to inform the authorities of a change of address.

57. A foreign criminal has no appeal right. The definition of a foreign criminal can apply to persons with permanent settlement and therefore can apply to someone who has been in the UK for a large number of years.³⁸⁰

58. The family members of such persons are also denied a right of appeal. This proposal is coupled with a new presumption that the needs of *family members* of those with expulsion orders will be outweighed by the public good. This is a radical departure from the current practice whereby family members are given “independent consideration”. It is also contrary to the UN position that children should not be punished because of acts committed by their parents:

Parties shall take all reasonable steps to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.³⁸¹

59. Finally, we note that the exemption from automatic deportation for Irish citizens under Section 33 (1)(b) of the UK Borders Act 2007 has no counterpart in this draft Bill.³⁸² This could result in Irish passport holders who are resident in Northern Ireland being expelled to the Republic of Ireland despite not having ties there.³⁸³ Such a person would have to rely on a challenge under the Human Rights Act to prevent their expulsion.

(c) “*Classified information*”

60. If the Secretary of State personally certifies that the decision is or was taken wholly or partly in reliance on classified information, no appeal right can be brought forward in any circumstances.³⁸⁴ There is a need for effective monitoring powers and for the involvement of the judiciary in such decisions. We envisage that this provision may be relied on in instances that are currently heard by the Special Immigration Appeals Commission (SIAC). Although SIAC has attracted its own criticism³⁸⁵—such as the evidence cannot be tested to the same standards as a criminal court—the Commission is presided over by an independent judiciary, which is infinitely more welcome than the proposed system of the Secretary of State making an executive decision that is not open to scrutiny. The implications for Article 6 ECHR infringements are clear.

(d) *Grounds of appeal*

61. The current seven grounds of appeal listed in full at s 84 of the Nationality, Immigration and Asylum 2002 Act have been reduced to two: “not in accordance with the rules” and “otherwise not in accordance with the law”.

62. The Bill explicitly instructs Immigration Judges not to consider failure to exercise discretion as not in accordance with the law.³⁸⁶ For reasons illustrated in section above, we do not support the abolishment of discretionary leave, nor the curtailment of the Independent Judiciary’s powers. Moreover, the restriction on the Asylum and Immigration Tribunal considering discretionary issues could give rise to an unprecedented rise in legal costs associated with Judicial Review proceedings as this may be the only remedy for discretionary issues to be heard in full.

³⁷⁸ See above.

³⁷⁹ Clause 171.

³⁸⁰ Clause 51.

³⁸¹ UN Convention on the Rights of the Child, Article 2(2).

³⁸² ie this exemption is not listed under clauses 39 “exceptions to the duty to make an expulsion order”.

³⁸³ The right for Northern Irish people to hold either Irish or British or dual nationality is confirmed in the Belfast (Good Friday) Agreement.

³⁸⁴ Clause 180.

³⁸⁵ For example, see House of Commons Constitutional Affairs Committee “The operation of the SIAC and the use of Special Advocates” 7th report of session 2004–05.

³⁸⁶ Clause 183(5).

PART 11—GENERAL SUPPLEMENTARY PROVISIONS (CLAUSES 189–204)

63. Key concerns relate to the protection of children and other protection issues which may engage Articles 2 and 3 ECHR if persons are returned. Article 6 ECHR may also be engaged. These proposals raise concerns as to the compatibility of this Bill with the Convention on the UN Rights of the Child 1989 and the Council of Europe’s Convention on Trafficked persons, which came into force on 01/02/2008.

a) *Children*

64. The Draft Bill outlines a duty regarding the welfare of children in section 189, which does not, however, refer to the “best interests” principle. This section should now be amended to reflect the government’s decision to withdraw its reservations against Articles 22 and 37a of the 1989 UN Convention on the Rights of the Child and should clearly reflect best interests as a “primary consideration” and “paramount” in particular cases.³⁸⁷

(b) *Protection issues*

65. Refugees who, en route to the UK, do not claim asylum in a country where the “could reasonably have expected to be given protection under the Refugee Convention” will have committed a criminal offence under the draft Bill.³⁸⁸ We are extremely concerned by this proposal, not least because there is no definition as to which countries will be included in this list. Will the list be limited to Dublin II Convention countries or will it extend to the “white list” countries listed in Schedule 2? Given that the Secretary of State clearly deems it reasonable for a person to claim asylum from these countries for the purposes of this section. However, this would be a very dangerous rationale given that at least two of the countries are not signatories to the 1951 Refugee Convention and therefore the principle of non-refoulement embodied in the Convention at Article 33 does not apply and could lead to Article 2 or 3 breaches.³⁸⁹ Therefore, in the interests of justice the Secretary of State makes available the list of countries which are covered in this part of the Bill.

66. If a protection applicant becomes liable to criminal proceedings, she/he may be able to rely upon the statutory defences outlined in clause 38. However, there is a presumption that the person has committed a crime (and thus liable to proceedings and expulsion) unless the applicant can show that a defence applies. This is clearly a radical departure from the principle of innocence: a fundamental principle of law both in the national legal systems of the United Kingdom and under ECHR Article 6.2. As stated in a JCHR report, any threat to this principle has implications for the fairness of the trial as whole and could be found incompatible with ECHR.³⁹⁰

67. The proposed statutory defences for refugees explicitly relate only to refugees as defined by the 1951 Convention and do not extend to those who would currently rely on a claim of Humanitarian Protection or Discretionary Leave.³⁹¹ This may result in vulnerable persons being prosecuted for offences and subject to expulsion orders with only an out of country right of appeal. Data for 2007 shows that 10% of 21,775 initial decisions resulted in a grant of Humanitarian Protection or Discretionary Leave. Had the proposed system been in place in 2007 then over 2,000 people would thus be subject to criminal proceedings. These proposals are particularly perverse given that the UK has signed the Convention on Action against Trafficking in Human Beings which calls for the protection of victims of trafficking and the safeguard of their rights and specifically provides a “Non-Punishment” provision for victims.³⁹²

68. If the Secretary of State refuses to grant refugee permission to a person invoking a refugee defence, the provisions prevent the person from being treated as a refugee unless “sufficient evidence” can be adduced to the contrary. This is a fundamental departure from the current standard of proof used in asylum appeals: the *Sivakumaran* principle of a “reasonable degree of likelihood” or “real or substantial risk”.³⁹³ The government has not made its case to justify a change to the long-established burden of proof. In our view, the case for change should be compelling given the ramifications for the principles of justice for this proposal.

³⁸⁷ See Article 3(1) of the Convention.

³⁸⁸ Clause 193(3).

³⁸⁹ Neither India nor Kenya has signed the Convention or Protocol.

³⁹⁰ JCHR April 2001 First Report—Annex 2 23/04/2001

<http://www.publications.parliament.uk/pa/jt20001/jtselect/jtrights/69/6901.htm>

“In *Saloboku v France* the European Court of Human Rights held that provisions which strip the trial court of “any genuine power of assessment and deprive the presumption of innocence of its substance” would be incompatible with: “the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law . . . Article 6(2) does not therefore regard presumptions of fact or law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.

³⁹¹ This position is explicitly confirmed in Clause 205: P is a refugee if P is recognised as a refugee for the purposes of the Refugee Convention.

³⁹² Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197).

Articled: “Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”. The Convention also requires States Parties to introduce legislation to criminalise acts relating to the trafficking of persons. Extraordinarily, the UK appears to have interpreted this as enabling the victims of trafficking to be liable to prosecution.

³⁹³ *Sivakumaran v Secretary of State for the Home Department* [1988] 1 All E.R. 193.

INCOMPLETE BILL

69. The draft Bill is incomplete. Chapter 2 of the UKBA paper “Making Change Stick; an introduction to the Immigration and Citizenship Bill” provides an outline of the areas of law which are not included in the draft Bill. We are concerned that some of the additional measures will not be incorporated as primary legislation and may not be given full parliamentary scrutiny. This is particularly concerning given the significance of some of the proposals including: providing stronger broader controls that start abroad; a more secure Common Travel Area; information sharing.³⁹⁴

70. The recent UKBA consultation, “Strengthening the Common Travel area”³⁹⁵ set out proposals for reforming the common travel area, which are intended for inclusion in the finalised Bill. The proposals in the consultation raise a number of concerns. The measures seek to impose much greater restriction on the freedom of travel for individuals between the states covered by the common travel area.³⁹⁶ This will be done through ad-hoc border checks on the land border between Northern Ireland and the Republic of Ireland, increased checks for those wishing to travel within the common travel area by sea or air and proposals to allow for greater powers for immigration officials to carry out activities such as the ongoing Operation Gull (see above). We remain unconvinced as to the need for the increased powers. Further, the government has failed to demonstrate how its proposals will be immune to racial profiling. The measures allowing for ad-hoc land border checks do not explain how immigration officials will identify the non-UK or Republic of Ireland citizens when there is no requirement for UK or Republic of Ireland citizens to carry identification documents when crossing the land border.³⁹⁷

THE SIMPLIFICATION PROJECT

71. By purporting to “simplify” the grounds for entry into the UK, the Bill will fail to meet the needs of the diverse population that seek entry into the UK. The Government aims to make the immigration system clearer and seeks to replace technical terms with plain language.³⁹⁸ The immigration system, however, must necessarily retain a degree of technicality in order to accurately reflect the diverse range of applicants who will come into contact with it. While we welcome the aim to provide legal clarity, unfortunately, some of the “simplified” language adopted in the Bill does not further this aim. Unworkable examples of simplified language include the term “permission” and the term “Immigration bail” as applied to persons whose immigration detention would, in actual fact, be unlawful.³⁹⁹

CONCLUSION

72. If implemented, this Bill will usher in a regime of unprecedented harshness and insecurity for immigrants and will erode the civil liberties of British citizens. It will undermine long-established legal principles and will erode long-established UK constitutional arrangements. Unfortunately, this Bill presents no opportunities to enhance the protection of human rights. On the contrary, this Bill constitutes a full-scale assault on human rights and its associated protections.

Annex 1

See United States State Department Country Report on Human Rights.

Kenya 2007—The following human rights problems were reported: unlawful killings, torture, and use of excessive force by police; vigilante justice; police impunity; harsh and life-threatening prison conditions; arbitrary arrest and detention; arbitrary interference with the home; prolonged pre-trial detention; executive influence on the judiciary; disrespect for freedom of speech and of the press; internally displaced persons, refugees, and stateless persons; government corruption; abuse of, and discrimination against, women; female genital mutilation (FGM); child prostitution and labour; trafficking in persons; interethnic violence; and lack of enforcement of workers’ rights.

India 2007—The following human rights problems were reported: major problems included: extrajudicial killings of persons in custody, disappearances, and torture and rape by police and other security forces ... lack of accountability, government impunity ... state supported militia ... poor human right offences enforcement ... poor prison conditions ... prolonged detention ... excessive use of force while combating terrorism ... endemic corruption ... attacks against religious minorities and the promulgation of

³⁹⁴ In addition to these broader proposed additional measures, the bill refers to but does not provide detail of the following details: regulations relating to police registration conditions—Clause 10(2); requirements for naturalisation—schedule 1 referred to in Clause 35(2)(b–e); Order specifying offences which attract automatic expulsion, referred to in Clause 51 (2–3); powers of arrest of a person breaching bail conditions—Clause 69 (1)(c).

³⁹⁵ UK Border Agency Strengthening the Common Travel Area Consultation Paper, 24 July 2008.

³⁹⁶ The UK, the Republic of Ireland and the Crown dependencies (the isle of Mann and the Channel Islands).

³⁹⁷ Our full concerns relating to the CTA are incorporated in the submission published by Immigration Law Practitioners’ Association: <http://www.ilpa.org.uk/>

³⁹⁸ See “Pathways to Citizenship: next steps in reforming the immigration system”. Executive Summary, paragraph 4.

³⁹⁹ See Clause 70. The term “immigration bail” replaces concepts of temporary admission, temporary release and bail. The term is grossly misleading. See also the section titled “Immigration Permission” for further examples of inaccurate language.

antireligious conversion laws . . . social acceptance of caste-based discrimination . . . domestic violence, dowry-related deaths, honor crimes, female infanticide, and feticide . . . trafficking in persons and exploitation of indentured, bonded, and child labor.

Liberia 2007—The following human rights problems were reported: deaths from mob violence persisted . . . police abused/harassed, and intimidated detainees and citizens . . . harsh prison conditions . . . arbitrary arrest and detention . . . lengthy pretrial detention . . . denial of due process and fair public trial . . . incidents of trial by ordeal . . . corruption and impunity continued in most levels of the government . . . violence against women, especially reports of rape . . . female genital mutilation (FGM) remained widespread . . . child abuse, trafficking in persons, and racial and ethnic discrimination were problems . . . instances of child labor were reported.

Malawi 2007—The following human rights problems were reported: unlawful killing by security forces, police use of excessive force including torture, occasional mob violence, and harsh and life-threatening prison conditions . . . Arbitrary arrest and detention, including politically motivated arrests, lengthy pretrial detention, and official impunity and corruption . . . restricted freedoms of speech, press, and assembly . . . societal violence against women, child abuse, trafficking in persons, restricted worker rights, and forced child labor.

Mali 2007—Human rights problems included: poor prison conditions, arbitrary arrest and detention, lengthy pretrial detention, prolonged trial delays . . . restrictions on speech, press, and assembly . . . domestic violence and discrimination against women, female genital mutilation (FGM), trafficking in children . . . child labor, and forced labor.

Mauritius 2007—Reported human rights problems included: police abuse of suspects and detainees; allegations of corruption in the police force . . . prison overcrowding . . . violence and discrimination against women . . . abuse of children . . . child prostitution and labor.

Peru 2007—Reported human rights problems included: abuse of detainees and inmates by police and prison security forces; harsh prison conditions, lengthy pretrial detention and inordinate delays of trials; attacks on the media by local authorities; governmental corruption; violence and discrimination against women; violence against children, including sexual abuse; trafficking in persons; discrimination against indigenous people and minorities.

Sierra Leone 2007—Reported human rights problems included: security force abuse, including rape, and use of excessive force with detainees, including juveniles; police theft and extortion; poor conditions in prisons and jails; official impunity; arbitrary arrest and detention; prolonged detention, excessive bail, and insufficient legal representation; restrictions on freedom of speech and press . . . government and chiefdom detention and harassment of journalists . . . widespread official corruption; societal discrimination and violence against women; female genital mutilation (FGM); child abuse; trafficking in persons, including children; forced labor, including by children; and child labor.

Bosnia-Herzegovina 2007—Reported human rights problems included: police abuses, poor and overcrowded prison conditions, increased harassment and intimidation of journalists and members of civil society, discrimination and violence against women and ethnic and religious minorities, discrimination against persons with disabilities and sexual minorities, obstruction of refugee return, trafficking in persons.

The Gambia 2007—Prison conditions remained poor. Arbitrary arrests and detentions continued. Security forces harassed and mistreated detainees, prisoners, opposition members, and journalists with impunity. Prisoners were held incommunicado, faced prolonged pretrial detention, and were denied due process . . . restricted freedom of speech and press/Women experienced violence and discrimination, and female genital mutilation (FGM) remained a problem . . . child labor and trafficking in persons.

Memorandum submitted by London Detainee Support Group

INTRODUCTION

1. London Detainee Support Group (LDSG) is a registered charity, which has been providing emotional support and rights-based advocacy to immigration detainees in the London area since 1993. LDSG maintains a pool of at least 50 volunteer visitors active at any one time visiting individual detainees, primarily at Harmondsworth and Colnbrook Immigration Removal Centres near Heathrow. LDSG staff recruit, train and supervise these volunteers, and conduct advice and casework for detainees, in particular representing detainees in applying for asylum support to enable them to access bail addresses. LDSG also works to improve detention policy and practice, using evidence collected in our visits and casework, through producing submissions and reports highlighting key issues, lobbying policy-makers, and identifying and referring potential test cases for legal challenges.

2. Our response to the Committee's Call for Evidence on the draft Immigration and Citizenship Bill will focus on the issues of immigration detention and bail.

EXECUTIVE SUMMARY

3. Immigration detainees already experience indefinite curtailment of their right to liberty, which in many cases is likely to breach their Article 5 ECHR rights. The draft Bill not only misses the opportunity to improve safeguards, it proposes to make a bad situation worse by formally legislating for the casualness with which the UK Border Agency already approaches the deprivation of liberty. The draft Bill proposes wide new powers for the Secretary of State and a significant reduction of the ability of the Asylum and Immigration Tribunal to restrain them. It reverses the presumption of liberty in certain circumstances and threatens to prevent some detainees from seeking their release through bail. As a result, it is likely to lead to an increase in unnecessary indefinite detention causing breaches of Article 5 ECHR.

4. Our concerns have regard to the following issues:

- (a) The replacement of the presumption of liberty with automatic indefinite detention.
- (b) The power to refuse to consent to a grant of bail.
- (c) The independence of the Asylum and Immigration Tribunal in considering bail.
- (d) Requirements for financial sureties in applying for bail.
- (e) Powers of expulsion without appeal in the case of a single breach of a reporting restriction.

The replacement of the presumption of liberty with automatic indefinite detention

5. The draft Bill legislates for automatic indefinite detention that is disproportionate and discriminatory. Clause 55(4) reverses the presumption of liberty by requiring the Secretary of State to detain anyone subject to an expulsion order unless she believes it to be inappropriate. No indication is provided as to which circumstances would be expected to lead the Secretary of State to consider detention to be inappropriate. This is incompatible with the presumption against detention recommended by the UNHCR Revised Guidelines.⁴⁰⁰

6. This clause legislates for one of the most problematic aspects of current detention policy, the automatic indefinite detention of ex-Foreign National Prisoners (ex-FNPs). Factors which would normally make detention unlikely to be appropriate, such as evidence of torture, severe mental or physical health problems, or the presence of substantial obstacles to removal, are disregarded where there is a criminal conviction. As a result, people are detained for periods of years, even where there is independent medical evidence of dramatic deterioration in their health.

B has been detained since September 2006, a continuing detention of 25 months. He has been diagnosed with severe Post Traumatic Stress Disorder, and hallucinates soldiers coming to kill him in his room in detention. He has previously served a six month sentence for using a false document, which he had obtained in order to work as he had been destitute since the refusal of his asylum claim.

7. Automatic indefinite detention leads to breaches of Articles 5 and 14 ECHR, as long-term detention takes place even where deportation is impossible. De facto stateless people who cannot obtain travel documentation to return to their country of origin cannot be deported, the stated aim of immigration detention. As a result, the policy of automatic indefinite detention is discriminatory as it leaves them far more likely to be detained for long periods. Indefinite detention functions in practice as an improvised extension of the criminal justice system, and is experienced by detainees as punitive. The Bill threatens to exacerbate the tendency of the UK Border Agency (UKBA) to use detention not as a means of effecting removals but as a long-term limbo for people considered to be undesirable. Immigration Removal Centres are not designed or equipped for this purpose, the current legislative framework does not recognise it, and it is in contravention of human rights standards. LDSG is currently supporting 64 detainees who have been held for more than a year and 73 from countries which are known to routinely refuse to issue travel documentation.

P had come from a war-torn African country as a child to join his family, who had refugee status. He served a number of short prison sentences as a teenager. He was detained in June 2006 following a driving conviction. The Embassy of his country of origin routinely refuse to issue travel documentation to nationals without passports, and have refused to allow P to return. He has been detained for 28 months.

8. A similar situation applies to ex-FNPs who cannot be deported because their country of origin is too dangerous for deportations to take place. No forced removals are currently possible to south/central Iraq and south/central Somalia because of Foreign and Commonwealth Office advice against unnecessary travel. In addition, removals are suspended to Zimbabwe, the Democratic Republic of Congo and of Darfur to Sudan. Asylum seekers from these countries are also subject to extreme long-term detention, which amounts to a form of psychological pressure to apply for voluntary return to situations of extreme danger.

9. The draft Bill misses the opportunity to address one of the gravest deficits of the current detention regime, the absence of a maximum time limit for detention. The UK is one of a small number of developed nations which still practice indefinite detention, contrary to the explicit recommendations of the Office for

⁴⁰⁰ UNHCR “Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers” (n47).

the High Commissioner of Human Rights⁴⁰¹ and the Working Group on Arbitrary Detention.⁴⁰² This policy also forces the UK to derogate from the EU Returns Directive, which provides for a maximum of 18 months of detention. The absence of a time limit dramatically increases the likelihood of detention becoming arbitrary, and therefore in breach of Article 5 ECHR. A maximum time limit on detention should be introduced. Where the process of documentation takes longer than this, community-based alternatives to detention should be used.

10. The Bill threatens to exacerbate the tendency of the UK Border Agency (UKBA) to use detention not as a means of effecting removals but as a long-term limbo for people considered to be undesirable. Immigration Removal Centres are not designed or equipped for this purpose, the current legislative framework does not recognise it, and it is in contravention of human rights standards. However, LDSG is supporting 64 detainees who have already been detained for over a year. A large proportion of these detainees are likely to be de facto stateless, as they are from countries such as Iran and Algeria which routinely refuse to allow the return of their nationals. No legitimate purpose is achieved by holding these detainees for periods of years. At present the majority are ultimately granted bail, but the draft Bill could severely reduce their access to bail and perpetuate unnecessary detention for even longer periods. The Bill should require that UKBA return to a policy of detention used only as a last resort to facilitate removal, in order to avoid violations of Article 5 ECHR.

THE POWER TO REFUSE TO CONSENT TO A GRANT OF BAIL

11. Clause 62(2)(c) allows the Secretary of State the power to refuse to consent to a grant of bail “where the person’s removal from the United Kingdom is imminent”. This is an extraordinary restriction on the autonomy of the judiciary. The imminence of a removal is already a factor to which the Asylum and Immigration Tribunal give great weight in considering bail. In normal circumstances, the Tribunal would simply not grant bail if removal is imminent.

12. UKBA routinely oppose bail on the grounds of imminence of removal, even where it is clear that intractable obstacles to removal remain. LDSG is aware of a number of instances where inaccurate claims have been made on behalf of the Secretary of State that removal is imminent. On rare occasions the Asylum and Immigration Tribunal have decided to grant bail on the basis of the available evidence that removal was not imminent. The power to do this is a vital safeguard protecting the rights of detainees from abusive practices.

13. The power to veto bail should be removed as it is unnecessary, invites abuse and is likely to lead to an increase in arbitrary detention in breach of Article 5 ECHR. It is essential that the Tribunal retain unrestricted authority to grant bail from detention.

14. The Bill also once again fails to provide for automatic bail hearings for all detainees, as provided for by Part 3 of the Immigration and Asylum Act 1999 but never implemented and subsequently repealed.

THE INDEPENDENCE OF THE TRIBUNAL IN CONSIDERING BAIL

15. Clause 62(6) requires the Tribunal to have regard to a number of specified factors in deciding whether to grant immigration bail. All are factors that would suggest a refusal of bail. There is no reference to the many factors that would be expected to weigh in favour of bail, such as length of detention, prospects of removal, age, history of torture, mental or physical ill-health. No evidence has been provided that the Tribunal are currently unable to assess objectively all available evidence, in order to justify this interference with the framework of judicial decision-making.

16. In particular, Clause 62(6)(d) requires the Tribunal to consider the likelihood of the person’s presence in the United Kingdom on bail being not conducive to the public good. No definition of “not conducive to the public good” is provided, nor clarification provided as to how the Tribunal should assess this likelihood. However, the majority of current detainees have deportation orders due to previous criminal convictions, and as such have been assessed as not conducive to the public good. Since the imposition of a deportation order appears to be the only apparently relevant factor here, the Tribunal would arguably have no choice but to consider all detainees with deportation orders to be not conducive to the public good, and therefore unlikely to be appropriate for bail. This would be the case even where there is considered to be no risk of reoffending, as this is covered separately at 62(6)(c). This could implement a form of permanent detention for de facto stateless detainees with deportation orders who cannot return due to the unavailability of travel documentation. These detainees may become effectively excluded from the possibility of bail, increasing the likelihood of arbitrary detention in breach of Article 5 ECHR.

17. This clause seems designed to further weight bail hearings against applicants and may compromise the independence of the Tribunal. The Bill should not limit the Tribunal’s authority to assess how much weight to grant to factors for and against bail. Clause 62(6) should be deleted as it serves no legitimate purpose and could cause a breach of Articles 5 and 6 ECHR.

⁴⁰¹ OHCHR, Administrative Detention of Migrants, <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>

⁴⁰² Working Group on Arbitrary Detention, E/CN.4/2000/4.

REQUIREMENTS FOR A FINANCIAL SECURITY IN APPLYING FOR BAIL

18. The requirement at Clause 64(1) to deposit a financial security up front before the detainee is granted bail would make it significantly more difficult for detainees to obtain sureties. The majority of detainees are asylum seekers, and few have wealthy friends. Where sureties are provided, at present the Tribunal considers bank statements and assesses whether the proposed surety is substantial enough to demonstrate confidence in the detainee's future compliance. A surety who knows that he is likely to lose access to his money for an extended period even if the detainee is compliant will by definition not be able to offer a sum of money that he cannot afford. As such, the proposal would undermine the effectiveness of the system of sureties. It appears to serve no purpose other than to make it more difficult for detainees to obtain substantial sureties. It also raises substantial questions about UKBA's capacity to hold and promptly return when required many thousands of financial deposits. Clause 62(11) would increase the likelihood of detention becoming arbitrary and in breach of Article 5 ECHR.

POWERS OF EXPULSION WITHOUT APPEAL BASED ON A SINGLE BREACH OF A REPORTING RESTRICTION

19. Clauses 37(4)(d) and 171(3)(a) provide a power to expel based on a single failure to report. No appeal rights are provided. This is a disproportionate and unreasonable measure that will discriminate against the most vulnerable. For example, migrants with serious health conditions are more likely to have emergency health appointments, which are in LDSG's experience a common reason for missing a reporting event. Likewise, migrants with serious mental health conditions such as Post Traumatic Stress Disorder, which can require medication with disorientating side-effects, find it far more difficult to report reliably. We also question whether the accuracy of the UK Border Agency's record-keeping is sufficiently reliable to provide the basis for such an unconstrained power. Failure to report is already routinely used by UKBA as a reason for opposing bail, yet in many cases our clients have disputed the allegations, and UKBA has been unable to provide any supporting evidence. These clauses should be removed. At a minimum, an automatic right of appeal should be provided to allow appellants to challenge errors of fact or assert reasonable grounds for failing to report.

October 2008

Memorandum submitted by Medact

Medact welcomes the opportunity to provide evidence on the human rights issues raised by the *Citizenship, Immigration and Borders Bill*. Medact is a UK based health charity, with a health professional membership, which undertakes education, research and advocacy on the health implications of conflict, development and environmental change. The Medact Refugee Health Network has a membership of over 300 UK health professionals and academics working with refugees and asylum seekers.

1. RESTRICTING ACCESS TO HEALTH SERVICES

1.1 The UK Border Agency document, *Making change stick: an introduction to the immigration and citizenship bill* (UK Border Agency 2008), states that the Government intends to establish a cross-Government working group to review the various terms used by different Departments to determine whether someone is resident in the UK for the purposes of qualifying to access certain benefits and services. It further states that the review is aimed at meeting the policy objective of limiting access to services to migrants considered to have "earned the right" to them. The details of such changes are to be provided in the Full Bill and are not yet available.

1.2 Medact is concerned that this review of access to local services will result in further restrictions on entitlement to free NHS care for vulnerable migrants. In 2004, Department of Health regulations made a number of groups liable for charging for NHS secondary care, including refused asylum seekers (Statutory Instrument 2004 No. 614). In May 2004, the Department of Health released a consultation document on restricting entitlement to primary care (Department of Health 2004). The outcome of this consultation has not been released. The 2007 Home Office document, *Enforcing the rules*, announced a review of entitlement to NHS services for foreign nationals. This review has not been released. In April 2008, a judicial review of charging regulations determined that most refused asylum seekers were entitled to free NHS care, however the Government has appealed against this decision (*The Queen (on the application of A) v Secretary of State for Health (Defendant) & West Middlesex University Hospital NHS Trust (Interested Party)* [2008] EWHC 855).

2. HEALTH AND HUMAN RIGHTS

2.1 The right to health and health care is enshrined in several international human rights instruments and is clearly stated in Article 12 of the ICESCR. Other international treaties that contain provisions on the right to health are the Convention on the Rights of the Child (Article 24), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (e) (iv)) and the Convention on the Elimination of All Forms of Discrimination Against Women (Article 11.1 (f) and Article 12).

2.2 The ICESCR General Comment 14 clarifies the scope of Article 12 and sets out the State's responsibilities. Essential elements of the right to the highest attainable standard of health are health services that are accessible, affordable, available and of good quality. However, as the ICESCR is not incorporated into UK domestic law, it cannot be brought to stand in domestic courts. Presently the UK Government respects its obligations under the ICESCR by considering its responsibilities when forming new policies however this does not ensure sufficient protection for vulnerable or irregular groups.

2.3 Human rights experts state that rights can only be limited with proportional, justifiable reasons. Governments should only limit the exercise or enjoyment of a right as a last resort and is only legitimate when the following criteria are met:

- the restriction is provided for and carried out in accordance with the law;
- the restriction is in the interests of a legitimate objective of general interest;
- the restriction is strictly necessary in a democratic society to achieve the objective;
- there are no less intrusive and restrictive means available to reach the same goal; and
- the restriction is not imposed arbitrarily, ie, in an unreasonable or otherwise discriminatory manner. (Gruskin and Tarantoa 2005).

2.4 The objectives for further restricting access to health care have changed over time. In 2004, proposals to restrict access to health care were described as addressing abuse of NHS services by "health tourists". The 2007 Home Office document, *Enforcing the rules: a strategy to ensure and enforce compliance with our immigration laws* (Home Office 2007), proposed restrictions on access to "benefits and privileges" as a means of compelling migrants without current visas, including refused asylum seekers, to leave the country. The UK Border Agency document, *Making change stick* (UKBA 2008), states that migrants should "contribute a little extra to the cost of local services" and should not have access to certain benefits until they "have earned the right" to them.

2.5 It is argued that these objectives are not legitimate and further restrictions on access to healthcare are not necessary. Consequently, further restrictions on access to healthcare are not justifiable under international human rights law. The UK Government has provided no evidence on the extent of health tourism, despite numerous Parliamentary questions seeking this information. Empirical research has not supported allegations of widespread abuse (Hargreaves *et al* 2006). There is no evidence to show that restricting access to healthcare will result in the departure of refused asylum seekers and other vulnerable migrants who do not have a current visa. It is unclear what policy objectives underpin the punitive approach described in *Making change stick* (UKBA 2008) of restricting access to services for new migrants or charging extra for them.

2.6 Article 12 of the ICESCR requires states to provide for "the creation of conditions which would assure to all medical services and medical attention in the event of sickness". Further restricting access to free NHS care would violate international human rights as the NHS is the primary provider of health services in the UK and refusal of free NHS care leave virtually no other alternatives. Those who cannot afford to pay for NHS care are unlikely to be able to afford a private GP or hospital.

3. IMPACT ON VULNERABLE GROUPS

3.1 The current regime of restricted entitlement to NHS care is impacting on the health of vulnerable groups, even where exceptions are in place. For example, Department of Health guidance states that maternity care is "immediately necessary" treatment and should not be withheld if the woman is unable to pay in advance. There are numerous examples of vulnerable migrants refused maternity care or deterred from seeking care as a result of charging practices (Project London 2007, Joint Committee on Human Rights 2007, Kelly & Stevenson 2006) which significantly increases risks to the health of mother and baby (Medact 2008).

4. SCRUTINY OF THE FULL BILL

3.1 As the provisions of the *Citizenship, Immigration and Borders Bill*, which relate to entitlement to health care are not yet available, Medact has been able to provide only general comments. Medact would welcome the Committee's scrutiny of this aspect of the Full Bill.

REFERENCES

- Department of Health, 2004, *Proposals to exclude overseas visitors from eligibility to free NHS Primary Medical Services*, London: Department of Health.
- Gruskin, S. & Taranto, D., 2005, "Health and human rights," in Grodin, Gruskin, Annas and Marks (eds), *Perspectives on health and human rights*, New York: Taylor and Francis.
- Hargreaves, S. J. Friedland, A. Holmes and S. Saxena, 2006, *The identification and charging of overseas visitors at NHS services in Newham: a consultation. Final Report*, London: Newham Project Board, Newham Primary Care Trust, London Borough of Newham.
- Home Office, 2007, *Enforcing the rules: A strategy to ensure and enforce compliance with our immigration laws*, London: Home Office.
- Joint Committee on Human Rights, 2007, *The treatment of asylum seekers: tenth report of session, vol. 1*, London: The Stationery Office.
- Kelly, N., & Stevenson, J., 2006, *First do no harm: denying healthcare to people whose asylum claim has failed*, London: Refugee Council.
- Medact, 2008, *Maternal and infant health of vulnerable migrants*, London: Medact.
- Project London, 2007, *Project London report and recommendations 2007*, London: Project London.

Memorandum submitted by Medical Justice

1. INTRODUCTION

1.1. Medical Justice is a network of over 300 volunteers which exposes and challenges medical abuse and neglect in immigration detention centres. The network is a partnership of ex-detainees, doctors, lawyers and other immigration experts, which, since its establishment in 2006, has assisted over 500 individuals in immigration detention. In addition, Medical Justice has conducted over 125 visits to detention centres; published reports, guidelines and articles on detention centre healthcare; negotiated several healthcare-related policy changes with the Home Office; and lobbied successfully for the first ever inquiry into healthcare services at Yarl's Wood Immigration Removal Centre (IRC).

1.2. Our main aims are to defend and promote the health rights, and associated legal rights, of immigration detainees in the UK, and to end the medical abuse and neglect of detainees.

1.3. We welcome this opportunity to contribute to the JCHR call for evidence regarding the Draft (Partial) Immigration and Citizenship Bill. We have restricted our evidence to the issue of detention, which is raised in Part Five of the Bill, since this is our area of expertise and experience. The government has yet to issue the part of the Bill containing proposals for the provision of support to refugees and their entitlement to healthcare, areas of policy which also present cause for concern.

1.4 The evidence presented below is only a small sample of the relevant information we have gathered and we would be pleased to present further evidence during the oral evidence session.

EXECUTIVE SUMMARY

2.1 Medical Justice is deeply concerned about the risks posed to the physical and mental health of individuals in immigration detention by the sweeping extension of powers to detain contained in the draft Bill.

2.2 It is also alarmed by the failure to include within this critical piece of legislation any or any sufficient provision to improve the highly flawed system of healthcare provided to immigration detainees.

2.3 Medical Justice proposes the following recommendations in relation to the draft Bill:

- The powers to detain in unsuitable places and by inappropriate individuals, provided for in clauses 54, 56 and 59, should be removed from the Bill.
- The power to detain individuals indefinitely while considering whether to issue an expulsion order under clauses 55(2)(a) and (b) should be removed.
- The requirement to obtain consent from the Secretary of State in bail applications for those whose removal is "imminent", as provided for in clause 62(2)(c), should be eliminated.
- Responsibility for healthcare provision in detention centres should be given to the National Health Service.
- While this transition is being implemented, provision should be made to subject healthcare in detention centres to regulation by the Healthcare Commission.

- An obligation for the Secretary of State to consider factors which may weigh in favour of bail, in particular the age of the detainee; any disabilities; physical or mental health problems; previous experiences of torture; and other vulnerabilities which may be exacerbated by detention, should be included in the Bill.
- Provision should be made to end the detention of children and to stop the separation of children from their parents by the detention of the parents.

3. BACKGROUND ON HEALTHCARE PROVISION IN DETENTION CENTRES

3.1 There are 10 “immigration removal centres” in the UK, seven of which are sub-contracted by the Home Office to private companies. The other three are converted prisons, run by the Prison Service.⁴⁰³

3.2 Responsibility for commissioning healthcare in all public prisons, and in the three immigration detention centres run by the Prison Service, transferred from the Prison Service to the NHS in April 2006. In privately run immigration detention centres, however, healthcare provision remains the responsibility of independent providers sub-contracted by the company running the establishment.

4. HEALTH RISKS OF INCREASED USE OF DETENTION

4.1 Medical Justice has serious concerns about the widened powers of detention contained in the Bill, which extend the circumstances in which detention may be imposed by the authorities while limiting the scope of detainees to obtain bail.

4.2 Several provisions contain sweeping extensions to the power to detain. Clauses 55(2)(a) and (b) empower the Secretary of State to detain a person indefinitely while considering whether there is a duty to make an expulsion order, with no limitation on the length of detention.⁴⁰⁴ Clauses 54 and 56 empower the Secretary of State to require detention in inappropriate circumstances, that is, in ships, aircraft and trains, under the authority of persons unsuitable to exercise such powers, namely, the captains of such vessels. Clause 59 goes even further to empower the Secretary of State to designate any place as suitable for detention for reasons associated with the Bill. Furthermore, any person acting “under the authority” of the Secretary of State may carry out such a detention.

4.3 As a concomitant to these powers, clause 62(2)(c) restricts the Asylum and Immigration Tribunal’s power to grant bail. Where removal is “imminent” and there is no outstanding appeal, the consent of the Home Office is required before such bail can be awarded. In practice, however, detention deemed “imminent” by the Home Office frequently continues for several months.⁴⁰⁵ Furthermore, clause 62(6) mandates that the Secretary of State, in deciding whether to grant bail, must consider several factors which weigh against the provision of bail, but does not oblige her to take account of any factors which might militate towards bail (see below, paragraph 5.1–3).

4.4 Medical Justice is deeply concerned about the effect on the mental health of detainees of more frequent, and prolonged, use of detention. Case studies and statistics from Medical Justice, Her Majesty’s Chief Inspector of Prisons (HMCIP) and the Home Office figures illustrate the prevalence of such mental health problems in detention centres.

In a survey of 56 patients seen consecutively by Medical Justice doctors over a 6 month period in four detention centres, 33 patients fulfilled the ICD-10 criteria for PTSD or depression. Many reported self-harm or determined attempts at suicide.⁴⁰⁶

Home Office figures bear out the high volume of mental disturbance. Between January 2008 and June 2008 there were 108 incidents of serious self-harm requiring medical treatment across the detention estate, an increase of 73% on the previous six months. There were 772 detainees put on “Formal Self Harm At Risk” (ie suicide watch) during those six months. In Yarl’s Wood Immigration Removal Centre (IRC), where women and families are detained, incidents of serious self-harm increased 250% from the first to the second quarter of 2008. The numbers of individuals put on “Formal Self-Harm at Risk” there was up by 50% to a total of 58.⁴⁰⁷

The official numbers pick up only the most severe cases of mental illness. There is evidence to suggest detention centre staff frequently fail to detect and show due concern for self-harm. An HMCIP report on Harmondsworth in 2008 identified “deficiencies in the management of those

⁴⁰³ Medical Justice (2007), “Beyond Comprehension and Decency”, p. 6.

⁴⁰⁴ This clause should be considered alongside clause 37(9) which that an expulsion order is to be made “*at a time chosen by the Secretary of State*”, a vague stipulation which increases the prospect of lengthy detention resulting from administrative tardiness.

⁴⁰⁵ In *A & Ors v SSHD* [2008] EWHC 142 (Admin), four Algerians were detained for periods exceeding one year despite there being no further or imminent steps available to the Secretary of State to effect their removal. For other cases of prolonged detention for those whose removal is deemed “imminent”, see *Bail for Immigration Detainees*, Briefing Paper on the detained fast track (March 2008), <http://www.biduk.org/pdf/Fast%20track/BID%20briefing%20paper%20on%20DFT.pdf> (accessed on 27 October 2008).

⁴⁰⁶ Medical Justice (2007), see n1.

⁴⁰⁷ See <http://www.ncadc.org.uk/resources/self-harm2008.html> (accessed 27 October 2008) All data obtained under The Freedom of Information Act 2000; analysis of data is by the National Coalition for Anti-Deportation Campaigns.

at risk of self-harm by residential staff”,⁴⁰⁸ with the quality of self-harm monitoring assessments described as “generally poor” and suggestive of “limited interaction”.⁴⁰⁹ Care plans for those at risk of self-harm were described as “generally weak and absent in two cases”.

There have been seven suicides in immigration detention since 2003.⁴¹⁰

4.5 Several studies have documented the drastic consequences on the mental health of detainees subject to prolonged periods of detention.

An Australian study found that detention was an independent risk factor for mental disturbance. Longer detention was associated with more severe disturbance. The damaging effects of detention persisted for an average of 3 years after release from detention.⁴¹¹

Amnesty International reported in June 2005: “We found that languishing in detention with no end in sight had led to mental illness, self-harm and even to people trying to take their own life”.⁴¹²

A BMJ editorial noted, “detainees, particularly those held for long periods, suffer from profound hopelessness, despair, and suicidal urges” and described immigration detention in the UK as a system that “by its very nature causes psychological harm.”⁴¹³

4.6 Recommendations:

- The powers to detain in unsuitable places and by inappropriate individuals, provided for in clauses 54, 56 and 59, should be removed from the Bill.
- The power to detain individuals indefinitely while considering whether to issue an expulsion order should be removed.
- The requirement to obtain consent from the Home Office in bail applications for those whose removal is “imminent” should be eliminated.
- The requirement of the Secretary of State to consider factors weighing in favour of bail (in particular relating to the vulnerability of detainees) should be put on a statutory footing.

5. ACCESS TO CARE IN DETENTION CENTRES

5.1 Any attempt to extend the use of detention, such as was announced by the UK Border Agency in May 2008,⁴¹⁴ is likely to aggravate healthcare failings in detention centres. Currently, medical services fail to treat appropriately the wide range of serious mental and physical conditions presented by detainees. Medical Justice doctors have frequently diagnosed the medical needs of detainees which have gone unnoticed by detention centre practitioners.

A, a 30 year old woman, had fled a West African country after being repeatedly raped and tortured by soldiers. She claimed asylum on arrival in the UK in mid-2005, but her story was disbelieved by the immigration service and she was detained on “Fast Track” at Yarl’s Wood IRC for three and a half months. A had a number of serious health problems which were severely neglected by Yarl’s Wood healthcare. She was never seen by a gynaecologist nor screened for sexually-transmitted infections while in detention. She had raised blood pressure and diabetes, neither of which was treated, and as a result of the untreated diabetes she developed a painful and longstanding complication of damage to the nerves in her feet.⁴¹⁵

5.2 Medical Justice is also concerned at the interruption in medical treatment that too often occurs when people are admitted to or transferred between detention centres.

In a study conducted by Medical Justice in 2007, three of four women who had been receiving anti-retroviral treatment in the community for HIV before detention had an unplanned disruption of their treatment in detention because of problems in arranging appropriate and timely secondary care (this can have the potentially disastrous consequence that the virus establishes immunity to the treatment). Other detainees were not given the results of their positive HIV test until taken to the airport for deportation. Some rape survivors were denied an HIV test.⁴¹⁶

⁴⁰⁸ HMCIP, “Report on an unannounced full follow-up inspection of Harmondsworth Immigration Removal Centre, 14–18 January 2008”, page 5.

⁴⁰⁹ *ibid.*

⁴¹⁰ Figures from the Institute for Race Relations, <http://www.irr.org.uk/2006/december/ak000015.html> (accessed 27 October 2008).

⁴¹¹ Steel Z, Silove D, Brooks R *et al* (2006) “The impact of immigration detention and temporary protection on the mental health of refugees”, *British Journal of Psychiatry* 188:58–64.

⁴¹² Amnesty International (2005) “Seeking asylum is not a crime: detention of people who have sought asylum” http://www.amnesty.org.uk/uploads/documents/doc_16180.pdf (accessed 27 October 2008).

⁴¹³ Fazel M and Silove D (2006) “Detention of Refugees” *BMJ* 332:251–252.

⁴¹⁴ See “Large scale expansion of Britain’s detention estate”, 19 May 2008, <http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/2008/largescaleexpansionofbritainsdet> (accessed on 27 October 2008).

⁴¹⁵ Dr Jonathan Fluxman in Medical Justice (2007), see n1, p. 14.

⁴¹⁶ Medical Justice (2007), see n1, page 12.

In the same study, a patient with tuberculosis had his treatment disrupted after his detention for more than one month, which again can have serious consequences for the efficacy of treatment. The patient was also unable to keep hospital appointments for specialist management of his TB and three other medical conditions.⁴¹⁷

5.3 Medical Justice believes that such failures in medical assessment and treatment are the consequence of a healthcare system provided by private companies, free from regulation by the Healthcare Commission. In such circumstances, too often the health of detainees comes second to operational concerns.

“[A]fter a month in detention, [a] woman attempted to hang herself in Yarl’s Wood and she was put on suicide and self-harm monitoring. Her behaviour became increasingly bizarre. After four months in detention she made a second suicide attempt. Her IND file recorded “no clear evidence of mental illness”, but a few days later she was moved to the local mental health trust under section 48 of the Mental Health Act. Soon after, in response to solicitors’ representations, the IND caseworker replied, “Should your client be released into the general populace without sound of mind [*sic*] the effects could be disastrous. We believe that the continued detention of your client given the current circumstances, to be the safest option available. This view is protective of the interests of both your client and the general public”. This view was not substantiated by reference to any history of dangerous behaviour or any medical opinion. During five months’ detention no attempt had been made to remove her as IND was still investigating whether she could be removed.”⁴¹⁸

5.4 In Medical Justice’s view, the only way to ensure that the health needs of detainees are dealt with appropriately is for responsibility for healthcare provision to be transferred to the Department of Health, as it was for public prisons in 2004. This recommendation is supported by HMCIP, who, following an inquiry into healthcare at Yarl’s Wood IRC in 2006, concluded:

“IND [now the UK Border Agency] and the Department of Health (Prison Health) should expedite arrangements for healthcare provision in immigration removal centres to be commissioned by the National Health Service.”⁴¹⁹

5.5 In addition, all healthcare providers in immigration removal centres should be registered with the Healthcare Commission and their standards of care implemented. This conclusion was also reached by HMCIP:

All healthcare provision in IRCs should be registered with the Healthcare Commission and their specified standards of care should be implemented as a matter of urgency.⁴²⁰

5.6 Recommendations:

- The new Bill should give responsibility for healthcare provision in detention centres to the National Health Service.
- During the transitional phase, provision should be made to subject healthcare in detention centres to regulation by the Healthcare Commission.

6. THE DECISION TO DETAIN VULNERABLE PEOPLE

6.1 According to the UK Border Agency’s Enforcement Instructions and Guidance, several groups are to be detained only “in very exceptional circumstances”. These include unaccompanied minors, individuals with mental illness or a serious medical condition and those for whom there is independent evidence of torture.⁴²¹ Rule 35 of the Detention Rules obliges a detention centre medical practitioner to report any cases in which he suspects that a detainee has suffered torture, has suicidal tendencies or is likely to face harm if detention is continued.

6.2 As enumerated below, however, Medical Justice has encountered many instances of breach of these rules. Given this poor compliance with existing standards, Medical Justice believes the protections for vulnerable people facing detention should be strengthened by including these clinical obligations within the final Bill. In fact, however, the draft legislation conspicuously diminishes such safeguards by weakening the presumption against detention.

6.3 In particular, clause 62(6), which lays out the factors to which the Secretary of State must have regard in considering whether to grant bail, refers only to reasons which weigh against the granting of bail, such as the possibility of a breach of bail conditions or the existence of a previous criminal conviction. Thus, the clause fails to turn the decision-maker’s mind to any considerations which should persuade him to grant bail, such as the state of the detainee’s health, his youth or age, his disabilities, his experience of torture and other vulnerabilities. The importance of these factors militating against detention is acknowledged by the

⁴¹⁷ *ibid.*

⁴¹⁸ HMCIP, “Inquiry into Inquiry into the quality of healthcare at Yarl’s Wood immigration removal centre, 20–24 February 2006”, p. 20.

⁴¹⁹ *ibid.*, paragraph 3.4.

⁴²⁰ *ibid.* para. 3.5.

⁴²¹ UK Border Agency, “Enforcement Instructions and Guidance”, para. 55.10.

Immigration Rules and Enforcement Rules themselves, but by failing to include them in the new Bill, the legislation is likely to entrench the disregard of such instructions and perpetuate the detention of vulnerable groups.

6.4 Medical Justice has collected significant evidence of failures of the Home Office and detention centre health providers to make appropriate investigations of detainees' medical or psychological history or condition.⁴²²

In a Medical Justice survey of 56 patients seen consecutively over a 6 month period in four detention centres by highly respected experts in torture injuries and scarring, 20 gave a history of torture and had physical signs "consistent with" "highly consistent with" or "typical of" torture using Istanbul Protocol definitions. None of the cases had been offered medical assistance or had their claim of torture investigated by the Home Office even when it had been appropriately reported to doctors and Home Office officials.

"B", a woman who had fled from a Caribbean country after her home was attacked and her 6 year old daughter killed in front of her, had been detained for a total of 13 months, in two stints, when seen by Medical Justice doctor. The doctor observed that she had become severely depressed and was a marked suicidal risk but Yarl's Wood healthcare had been completely unaware of this. Once informed, the detention centre placed B on 24 hour suicide watch. B also suffered from asthma and has marked stress-induced high blood pressure. Three removal attempts had to be abandoned because B became too ill during each of them. B was not facing imminent removal at the time she was seen and had become suicidally depressed at the prospect of her ongoing and indefinite detention. B also had a previous history of trying to take her own life after the killing of her daughter and during her previous period in detention.

6.5 The conclusions of Davis J in *D & K v SSHD* [2006] EWHC 980 provide a forceful echo to these concerns. In finding that detention centres failed systemically to comply with Rule 34 of the Detention Centre Rules (see paragraph 6.1), the judge stated:

"It was not a rare and regrettable lapse in the circumstances of these two cases. Rather it reflected the cross-the-board failure to give effect to the requirements of Rule 34 (and applicable Standards): the [Home Office] regarding compliance as neither "necessary nor appropriate". I repeat what I have said earlier: that is not acceptable."

6.6 Particular concerns exist in relation to the detention of children. In addition to the inherent cruelty of this practice, children's healthcare services have frequently been found wanting by HMCIP. In her inspection of Yarl's Wood IRC this year, the Chief Inspector noted:

There were no arrangements for the mental health assessment of children and no pathway to mental health beds for them. During our inspection, an adolescent requiring a mental health admission had to access this through the local accident and emergency department as this was the only pathway open to him, which was unacceptable. There were no links with the local community mental health team or child and adolescent mental health service. There was no provision for detainees who came into the centre already subject to care programme approach and no provision for this process to be commenced if it became necessary during their detention ...

There was no registered sick children's nurse, which was a real concern as there were more than 50 children in the centre on the first day of our inspection.⁴²³

6.7 Medical Justice welcomes the government's decision to withdraw its reservation to the UN Convention on the Rights of the Child. It urges that alternatives to the detention of children and their parents be developed, so that children are not subjected to the trauma of immigration detention, or of separation from their detained parents.

6.8 Recommendations:

- An obligation for the Secretary of State to consider factors which may weigh in favour of bail, in particular the age of the detainee; any disabilities, physical or mental health problems; previous experiences of torture; and other vulnerabilities which may be exacerbated by detention, should be included in the Bill.
- Provision should be made to end the detention of children and to stop the practice of separating children from their parents by the detention of the parents.

30 October 2008

⁴²² These case studies are all discussed in Medical Justice (2007), see n1.

⁴²³ HMCIP, "Report on an announced inspection of Yarl's Wood Immigration Removal Centre, 4-8 February 2008.", page 44.

Memorandum submitted by Médecins du Monde UK

1. MÉDECINS DU MONDE UK

Médecins du Monde UK—(MDM UK) is part of *Médecins du Monde* (MDM), an international medical humanitarian organisation whose volunteers provide healthcare to vulnerable populations in both developed and developing countries.

2. EXECUTIVE SUMMARY

For the last two years we have operated a free clinic in East London. We serve a largely migrant population, seeking to ensure access to healthcare. The clinic provides care on a temporary basis, while working to get patients registered with the NHS. In order to address the Committee's question about whether the draft law would strengthen or weaken Human Rights protections, this evidence provides a brief history of the issues surrounding access to care within the NHS and recounts our main findings. Against the backdrop of proposals which might limit access to primary care, it is particularly notable that we saw no evidence of health tourism. And there is no reason to believe that introducing these limitations would prevent migration to the UK.

3. RECOMMENDATION

The research of Médecins du Monde UK confirms other independent research, including that undertaken by the government. Restricting access to primary care is already having a detrimental impact on migrants in the UK. Mindful of the government's human rights obligations we recommend against any changes which would further restrict access.

4. THE RIGHT TO HEALTH

In addition to the economic, public health and ethical arguments for ensuring that all migrants have access to all NHS services, the UK government has obligations under international law. Having ratified the International Covenant on Economic, Social and Cultural Rights the UK is signed up to the “*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*”.⁴²⁴ The government has a duty to respect, protect and fulfil this “right to health”. What this means, among other things, is that the Government must refrain from “*denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services*”.⁴²⁵

5. It was never envisaged that as soon as countries signed up to the International Covenant all the rights described in it—including the “right to health”—would be realised instantly. But these rights are subject to what is called “progressive realisation”—namely that countries are expected to be making progress and travelling in the right direction towards realising the right to health.

6. By introducing regulations which would further restrict access to healthcare for migrants, the government is not respecting the principle of “progressive realisation”.

7. Sixty years ago the NHS was established to provide healthcare for all, free at the point of need to ensure that the most vulnerable in society have access to care. This principle is far from consigned to history. In fact, the founding principles of the NHS are still quoted and remain important to government in the 21st Century—then Health Secretary Patricia Hewitt recently wrote that “*the best possible healthcare, universally available and free at the point of care is fundamental to a civilised society*”.⁴²⁶

8. There is also increasing understanding of the fact that health is a cross-border issue in an ever more globalised world. The UK's Chief Medical Adviser recently argued that it was no longer possible to consider the health of the UK in isolation, proposing a cross-government global health strategy in recognition of the fact that “*people everywhere have a right to the highest attainable standard of health. Protecting and promoting health is a duty of our global citizenship*”.⁴²⁷

9. As public authorities, NHS organisations have a legal duty to act compatibly with the human rights enshrined in UK law in the Human Rights Act and have related duties in relation to equality under anti-discrimination legislation.

⁴²⁴ International Covenant on Economic, Social and Cultural Rights. Full ref.

⁴²⁵ Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 14.

⁴²⁶ Hewitt ref and url.

⁴²⁷ Department of Health (2007) Health is Global. Proposals for a UK Government-wide strategy. A report from the UK's Chief medical Adviser, Sir Liam Donaldson. London, DH.

10. *The right to respect for private and family life, home and correspondence*

Given the pressure placed upon the NHS by other agencies interested in locating individual migrants, there are serious concerns raised about the protection of their personal privacy. We have already seen examples of GP administrative staff who are under the impression that they have an obligation to share this data, rather than recognising that they have a duty to protect it.

11. *The right not to be discriminated against*

We saw examples of discrimination where non-english speakers were presented with health options without access to an interpreter, undermining their personal agency and leaving them without a voice in their own treatment.

12. *The right to be free from inhuman or degrading treatment*

As a result of the decision to delay treatment until “immediately necessary” individuals are exposed to inhuman and degrading treatment.

Mr. G is a Turkish asylum seeker whose application was denied. He was diagnosed with bowel cancer and needed surgery to prevent his condition worsening but was refused further treatment when he was unable to pay the £6,000 demanded as a deposit. More than one year after his diagnosis, he was admitted to hospital as an emergency case and immediately necessary surgery was performed to remove the cancerous section of his bowel. During the intervening time, his mental health deteriorated dramatically. As his condition worsened he was judged to be a danger to himself and “sectioned” for a period of two weeks, at a significant cost both financially and personally.

13. *Regulations, current and proposed*

GPs currently have the discretion to treat anyone as an NHS patient but in 2004 the government consulted on a proposal to change the health regulations to bar some migrants from accessing primary care. The changes would essentially remove this discretion, and as a result people would be turned away from GP care on the basis of residency status. The draft bill being considered by this committee explores alternative ways of addressing the more general issue of migrant access to public services.

14. *Confusion about the rules—a preview of problems to come*

At the same time the government consulted on the 2004 proposal, it introduced a change to the regulations which barred the same group of migrants from accessing secondary care. The timing has led to confusion which we have seen first hand. Although GPs themselves were usually well informed, the administrative staff responsible for registering patients were often uncertain. In some cases they applied the proposed regulation as if it were already in force. In other cases they even applied the proposed regulation wrongly, extending it to those who it did not apply to— asylum seekers and citizens of EEA countries.

This misunderstanding highlights areas of concern in two important ways:

- It gives us a picture of *the kind of people who would be excluded* from care and the *potential impact of their exclusion*.
- It shows that we can expect these *restrictions* to primary care to be misapplied, by being *extended beyond the group they were meant to target*.

As the Committee considers different options, including exemptions for certain categories of persons or treatment, it is important to bear in mind the difficulties already encountered by the NHS in implementing current exemptions.⁴²⁸

Mr G, a 36 year old suffering from leg pain and depression

A friend accompanied Mr G to our clinic after trying to help him register in 15 different GP surgeries. As an asylum seeker his entitlement was clear, yet he continued to be rejected. Mr G came to the clinic complaining of pains in his legs and depression as a result of his imprisonment and maltreatment in his native Georgia. He had been relieving the pain in his legs through medication supplied by a friend. We were able to get him registered with a GP along with a successful referral for counselling services.

Ms S, 38 weeks pregnant

⁴²⁸ We saw cases where individuals who were absolutely entitled to registration were denied. Firstly, it was sometimes “understood” that the proposals had been enacted and that no discretion remained with the GP. Secondly, it was sometimes “understood” that the access exclusion extended to all migrants. We saw numerous asylum seekers and EEA citizens who were denied access to primary care—despite the fact that they are entitled both under the current law *and the proposed law*.

Ms S came to us during her 38th week, having had no prior antenatal care. Such care is classified as “immediately necessary” and is to be provided without regard to immigration status. Yet she had been refused maternity access at her local GP surgery and had been informed that she would not be able to deliver at her local hospital. With delivery imminent, it was vital to secure a bed in a maternity ward and we were able to do so after intervening on her behalf.

15. *No cost savings*

It may sound logical to argue that cutting off access to primary care will save money and take pressure off the NHS. But an examination of our findings, alongside other independent research, makes it clear that the opposite is true. Providing early and preventive care through primary care is a means of avoiding costly hospital treatment at a later date.

16. *No pull factor*

Over the last two years we saw 893 patients and our medical team provided 1,074 consultations. Our patients had, on average, been living in the UK for *three years* before they came to see a doctor. We saw no evidence of health tourism. Some believe that because NHS care is free at the point of need, the NHS is itself a pull factor. While some consider Britain the only country where migrants have access to publicly-funded care, the fact is that *most European countries provide migrants with better access to healthcare* than the UK does.⁴²⁹

17. *No great burden on the NHS*

The health problems seen in our patients are reflective of the conditions seen among the general population in general practice.

- The most common health problems identified are identical to the ten most common reasons for consulting a GP in the last national survey of ill-health in primary care, with the exception of psychological problems.⁴³⁰
- Of the patients who had medical consultations, less than one third even required prescriptions.
- The majority needed help to access primary care or antenatal services rather than expensive specialist treatment.
- Our data is consistent with the 2007 study by the Audit Commission which noted that “most migrant workers are relatively young and healthy” and that had little need for public services.⁴³¹
- The data likewise accords with a study in the London Borough of Newham, known to have a very diverse population and sizeable migrant population, which found that the impact of “overseas visitors” on primary care was “minimal in terms of absolute numbers” and raised questions about the cost-benefit of expanding the hospital charging scheme into primary care.”⁴³²

18. *Diseases which spread easily—a public health concern for us all*

Infectious diseases do not respect borders, nor do they discriminate on the basis of status. We are all at risk from the spread of diseases and we all have a stake in preventing that spread. Attainment of good health is one of the underlying determinants to the welfare of societies and communities striving for social, economic and political development. Practical steps to enhance rights-based approach are therefore advocated simultaneously when addressing exposure to risks. One such practicality is to provide access to avoid the unnecessary spread of disease or harm by a disease. We saw a baby girl of three months who needed immunization but whose mother, herself a refugee, was unable to secure access to a GP. The herd immunity of a population is about 80% in order to avert outbreaks of vaccine preventable diseases. When the number of susceptibles within a given population increases, this creates a risk of outbreaks from diseases preventable through vaccines.

⁴²⁹ Chauvin P, Parizot I, Drouot N, Simonnot N, Tomasino A European Observatory on undocumented migrants’ access to healthcare. Médecins du Monde European Observatory on Access to Healthcare. Paris: Médecins du Monde; 2007.

⁴³⁰ McCormick A, Fleming D, Charlton J. Morbidity statistics from general practice. Fourth national study 1991-2. Office for Population Censuses and Surveys, Series MB5 no 3. London, HMSO; 1995.

⁴³¹ Audit Commission. Crossing borders—Responding to the local challenges of migrant workers. London: Audit Commission; 2007.

⁴³² Hargreaves S, Friedland JS, Holmes A, Saxena S. The identification and charging over overseas visitors at NHS services in Newham: a consultation. Final Report. London: Newham Primary Care Trust; 2006.

19. *Domestic Violence*

Early intervention also has an impact relative to wider social issues including domestic violence. A GP surgery is often the first port of call for a victim who is either afraid, or physically unable, to contact the police.

20. *The practical obstacle of GP refusal to implement*

The proposal to restrict access has been the subject of considerable debate within the medical community. More than 900 doctors registered to practise in the UK signed a petition opposing the policy. The substance of the petition which appeared in the *Lancet*, is as follows:

This would impose serious health risks on [undocumented migrants] and on the general public. It would also interfere with our ability to carry out our duties as doctors. It is not in keeping with the ethics of our profession to refuse to see any person who may be ill, particularly pregnant women with complications, sick children or men crippled by torture. No one would want such a doctor for their GP.

“We call on the government to retreat from this foolish proposal, which would prevent doctors from investigating, prescribing for, or referring such patients on the NHS.

“We pledge that, in the event this regulation comes into effect, we will: (a) continue to see and examine asylum seekers and to advise them about their health needs, whatever their immigration status; (b) document their diagnoses and required clinical care; (c) with suitable anonymisation and consent, copy this documentation to the responsible ministers, [members of parliament] and the press; (d) inform the public of the human costs, to harness popular disgust at what is being ordered by the government in their name; (e) campaign to speedily reverse these ill-advised policies.”⁴³³

In some cases health care professionals have already had to fight to protect patients wrongly being denied care. In one case a woman who was 36 weeks pregnant had been de-registered from her GP after the GP received a call from the Home Office. Given that her care was immediately necessary, her midwife refused to stop seeing her. And in the meantime we were able to persuade the GP office to re-register her.

21. *The cost of a workforce in ill health*

The government has estimated that ill health costs the economy over £100 billion a year.⁴³⁴ While this is a problem that must be approached from a number of angles, it is clear that improving access to medical care is among them. Access to care helps to enable people to use their skills and energy to contribute to the economy while helping to build a stronger and more cohesive community.

Date

Memorandum submitted by the Migrants' Rights Network

1. INTRODUCTION

1.1 The Migrants' Rights Network (MRN) was established in December 2006. We work to support migrant community organisations and organisations working with migrants, on issues related to employment, the community, access to public services, and on other matters which have consequences for migrants' rights and social justice. Currently there are over 1,500 organisations and individuals which participate in the network's policy discussion and information exchanges.

1.2 We have monitored the Government's development of immigration legislation and policy since the formation of MRN, and welcome the opportunity to comment on the draft (partial) Immigration and Citizenship Bill (hereafter “the draft Bill”) and its possible implications for human rights in the UK. In our response to the previous Border and Immigration Agency “Simplifying Immigration Law” consultation, we laid out our broad support for a project which would consolidate existing immigration law into a single Act. However, we judged that, due to the complexity and significance of the “simplification project, *“seeking to do more than simplify current immigration law through consolidation would jeopardise the project's success”*.”⁴³⁵

⁴³³ Arnold, F *et al.* “Medical justice for undocumented migrants” *The Lancet*, Volume 371, Number 9608. See petition itself at <http://www.gopetition.com/petitions/medical-justice-for-asylum-seekers.html>

⁴³⁴ “Working for a Healthier Tomorrow” (presented to the Secretary of State for Health and the Secretary of State for Work and Pensions), London: TSO 17 March 2008; “Sick note culture” costing £100 billion every year, *Daily Telegraph*, 17 March 2008; Doctors should write “fit notes”, report says, *Guardian*, 17 March 2008.

⁴³⁵ *Response to Simplifying Immigration Law Consultation*, Migrants' Rights Network 29th August 2007

We also expressed our concern “*that the [stated simplification] principles lean too heavily towards administrative efficiency. Principles that the simplification process should see as underpinning immigration law must also encompass access to justice, fairness, providing protection and upholding human rights standards*”.⁴³⁶

2. EXECUTIVE SUMMARY

2.1 MRN’s submission outlines our view that the “*sweeping changes*”⁴³⁷ to the current legislative framework in the draft Bill will seriously impact on the human rights of migrants in the UK, as well as those of British citizens generally. In pursuit of “simplification”, the Home Office has produced a piece of legislation which would increase the powers of the state—in particular the Secretary of State—over migrants, at the expense of individual civil liberties. As the Government has acknowledged on numerous occasions, migrants make invaluable economic and cultural contributions to British society. We are concerned that, through the powers outlined in this draft Bill, the Home Office will jeopardise the human rights of migrants in British society.

2.2 We object in particular to the way that the draft Bill confers selected immigration responsibilities and powers on individuals—including airline pilots, employers and public service officials—who are not trained immigration officials. Such individuals may now, in various circumstances, find themselves assessing migrants’ immigration status, detaining migrants and making judgements about migrants’ entitlement to goods and services in the UK—all at the risk of incurring severe penalties for any mistakes. The great danger of this approach is that damage arising from poor quality decisions on matters involving immigration status will escalate into other areas of social life, such as the labour market, access to public services, and the right to be protected from racism and xenophobia.

2.3 In particular our key concerns are that certain clauses within the draft (partial) Bill, and policy objectives for the full Bill as laid out in accompanying documentation, could lead to breaches of the European Convention on Human Rights (1950) as follows:

- Extended powers of examination, with the potential to lead to breaches of human rights under the European Convention on Human Rights (ECHR) Articles 5 and 8
- Extended powers of detention, with the potential to lead to breaches of human rights under the ECHR Articles 3, 5 and 8.
- Restrictions on citizenship and access to public benefits and services, with the potential to lead to breaches of human rights under ECHR Articles 3, 4 and 5.
- Introduction of a “Migrants Tax”, with the potential to lead to breaches of human rights under ECHR Articles 8, 12 and 14.

3. EXAMINATION

3.1 The draft Bill would allow for very broad powers of examination both at the border and in-country, with serious implications for migrants’ freedom of movement in the UK. Clause 25 (1) would allow for the “examination” of any person in the UK in order to establish their immigration status. There would be no requirement for the official to demonstrate any cause or suspicion, reasonable or otherwise, for conducting this examination. This could allow for migrants, as well as British citizens, to be targeted at random during the course of their daily business, and would introduce the potential for discrimination against ethnic minorities in the UK as a result of racial profiling, in contravention of the right to private and family life under ECHR Article 8 with Article 14.

3.2 The draft Bill provides that people under Clause 25 (1) examination may also be detained indefinitely in the course of the examination until “*all relevant matters have been determined*” (Clause 53 (1)). If a cause or suspicion for such detention would not be required, this power could lead to a contravention of ECHR Article 5(2). The individual may be required to submit to one or more medical examinations if the Secretary of State requires (Clause 25 (3)). It is unclear what the purpose of a medical examination could be in determining a person’s immigration status, but this currently appears to be an unnecessary invasion of privacy, in breach of ECHR Article 8. Clause 27 (1) provides that the Secretary of State may submit the individual to limitless future examinations/detentions, including medical examinations, if required. These extended powers of detention and physical examination—without reference to cause or suspicion—would threaten serious infringements of civil liberties, and in particular would interfere with private and family life (ECHR Article 8).

3.3 The immigration “permission” granted to a migrant will also extend to other dependent members of his/her household if they are also present in the UK. The power granted to the Secretary of State under Clause 29, to suspend a migrant’s “permission” until completion of a Clause 25 examination could therefore extend to several people, with a huge impact on the life of migrants and their families. Employment, family life, access to such benefits/services as he/she is entitled, not to mention the stresses and strains placed on the migrant and any family members could all be severely affected by such a disruptive and potentially arbitrary

⁴³⁶ *Response to Simplifying Immigration Law Consultation*, Migrants’ Rights Network 29th August 2007

⁴³⁷ Pg 2, “*Draft (Partial) Immigration and Citizenship Bill: Public Scrutiny Document*”. Home Office July 2008.

measure as cancelling permission to be in the UK, in violation of ECHR Article 8. There is currently no provision for enforceable compensation to people who are the subject of breaches of the ECHR provisions (ECHR Article 5(5)).

4. DETENTION

4.1 MRN objects to the wide powers granted through the draft Bill to individuals who are not immigration officials (including airline pilots, ship and train captains), and to the Secretary of State, in relation to the detention of migrants in the UK, and the potential impact on human rights therein. Of particular concern, Clause 59 (2) would permit migrants to be detained “*in such places as the Secretary of State may direct*”, without requiring particular circumstances for such a measure to be employed. This confers an extensive level of discretion to the Secretary of State, and we are concerned that immigrants detained outside Immigration Removal Centres could not be guaranteed minimum standards with the potential to lead to infringements of migrants’ rights, potentially leading to interference with rights under ECHR Articles 3, 5 and 8.

5. CITIZENSHIP AND ACCESS TO BENEFITS AND SERVICES

5.1 As laid out in our response to the Home Office “Path to Citizenship” consultation in March 2008, MRN strongly objects to the concept of “probationary citizenship permission”, a category which will make unreasonable demands of migrants in the UK on their journey to British citizenship. The introduction of probationary citizenship would effectively extend the standard time taken to attain British citizenship, from the current five year minimum residency in the UK to an eight year period (reducible to six years upon fulfilment of an “activity condition”) (Clause 34). For family dependents the qualifying period for naturalisation as a British citizen would be extended from the current two years to a minimum of three years. Calculations for the duration of probationary citizenship in the draft Bill are unclear in the draft Bill as it stands. Although the Home Office recently defined a maximum duration for migrants’ probationary citizenship (five years for economic migrants and refugees⁴³⁸), this has not yet been included within the draft Bill.

5.2 An extended path to citizenship would have many potential repercussions for migrants’ ability to live and work fruitfully in the UK. Combined with recent Government measures under the Immigration, Asylum and Nationality Act 2006 requiring employers to check the immigration status of their workers and identify those with conditions attached to their stay, it can be expected that the longer period for migrants under temporary leave in the UK would increase job insecurity and expose more migrants to the risk of exploitation within their employment—potentially breaching ECHR Articles 3, 4 (particularly in the case of domestic servants) and 5. We believe that a stronger case exists for a reduction in the time required to reach citizenship, rather than an extension, with migrants being brought more rapidly to the point when they can plan their future lives in Britain with more confidence and in more security.

5.3 We are particularly concerned about the Home Office’s continued assertion that “*probationary citizens will not ... be entitled to access non-contributory benefits, social assistance, local authority housing or homelessness assistance*”.⁴³⁹ Economic migrants who have reached the stage of probationary citizenship have already demonstrated their commitment to the UK through paying taxes and National Insurance contributions during the five year qualifying period, as well as participating in British society. The new measures would mean that, during their period of probationary citizenship and despite continuing to pay taxes, migrants would not be able to access non-contributory state support. This would be a discriminatory breach of the right to family and private life (ECHR Articles 8 and 14) for tax-paying migrants in the UK. ECHR Article 3 rights could be breached for probationary citizens who fell into unforeseeable inhuman or degrading circumstances including homelessness or destitution or the need to access medical treatment, but were not entitled to access the necessary support.

5.4 “Making Change Stick” also clearly refers to a need to “*simplify the current complex legislation on access to benefits and services*” ... “*in a way that meets our policy objective of ensuring that migrants can only access benefits and services where they have ‘earned’ the right to them*”. This policy objective holds serious human rights implications for those migrants who have not entered probationary citizenship, but who may be in need of healthcare assistance, shelter or other Governmental assistance in order to avoid falling into a situation which would be inhuman or degrading (ECHR Article 3). This could also be a discriminatory breach of the right to family and private life (ECHR Articles 8 and 14).

⁴³⁸ Page 14, “*The Path to Citizenship: Next Steps in Reforming the Immigration System: Government Response to Consultation*”. Home Office UK Border Agency July 2008.

⁴³⁹ Page 20, “*The Path to Citizenship: Next Steps in Reforming the Immigration System: Government Response to Consultation*”, Home Office UK Border Agency July 2008.

6. “MIGRANTS’ TAX”

6.1 The covering document to the draft Bill “Making Change Stick” states that the Government’s intentions that “*migrants contribut[e] a little extra to the cost of local services*”,⁴⁴⁰ presumably through the “Migration Impacts Fund” proposed in the Home Office Green Paper on The Path to Citizenship, published in February 2008.⁴⁴¹ The additional charges are planned for inclusion in the final Bill. We are deeply concerned about the prospect of raising the costs for migrants to come to the UK. Migrants already pay substantial fees towards immigration applications and processes—according to costs at the time of writing,⁴⁴² the majority of visas related to employment were priced at £205, fees for settlement applications were priced at £515, and applications to work in the UK under the new Points Based System Tier 1 at £600 each. Dependents for all applications were charged at the same rate as the main applicant. Increases to immigration fees would impact most heavily on poorer applicants, including those already within the UK applying to vary their leave. This could have the potential to result in indirect discrimination prohibiting fulfilment of other key rights under the ECHR, such as the right to family life and the right to marry (ECHR Article 14 with Articles 8 and 12).

30 October 2008

Memorandum submitted by the National AIDS Trust

EXECUTIVE SUMMARY OF RECOMMENDATIONS

NAT (National AIDS Trust) welcomes the opportunity to provide evidence to the Joint Committee on Human Rights as part of its review of the draft (partial) Immigration and Citizenship Bill as well as of those details outlined by the Government for inclusion in the full Bill. In summary:

Recommendation:

If the draft Bill does address issues of access to NHS care, NAT recommends the following, on human rights, individual and public health grounds: NHS care should be provided free of charge to all people living in the UK, irrespective of residency status; and in advance of this recommendation being implemented, it is urgently necessary for HIV and maternity care to be exempted from charges.

Recommendation:

The Home Office should consider drastically limiting the practice of administrative detention of migrants and alternatives to detention measures should be expressly provided for in the law. While current policy on administrative detention remains in place, NAT recommends a maximum time limit for administrative detention be introduced and that administrative detention is subject to automatic judicial oversight.

Recommendation:

The Home Office should fully implement the recommendations outlined in NAT and the British HIV Association’s best practice guidelines, when finalised, to support consistent high-quality care during detention for individuals living with HIV.

Recommendation:

Asylum applicants should have the right to work. The New Asylum Model, through which all asylum applications are now processed, aims to ensure decisions on asylum claims are made within six months. NAT believes that for those individuals where the process takes longer, they should be granted automatically the right to work after six months.

⁴⁴⁰ Page 4, “*Making Change Stick*”. *An Introduction to the Immigration and Citizenship Bill*, Home Office July 2008

⁴⁴¹ “*The Path to Citizenship: Next Steps in Reforming the Immigration System: Government Response to Consultation*”. Home Office UK Border Agency July 2008.

⁴⁴² Figures sourced from UK Visas website—www.ukvisas.gov.uk/en/howtoapply/visafees/

Recommendation:

Those applying for asylum, with temporary permission or probationary citizenship that have been in the UK for more than six months should have full rights to further and higher education at UK rates.

Recommendation:

NAT believes that those with temporary or permanent permission or probationary citizenship should have the same access to the full range of benefits as British citizens. This includes, for example, full access to housing support.

INTRODUCTION

1. NAT (National AIDS Trust) is the UK's leading policy and campaigning charity on HIV and AIDS. We develop policies and campaign to halt the spread of HIV, and improve the quality of life of people affected by HIV and AIDS, both in the UK and internationally.

2. NAT welcomes the opportunity to provide evidence to the Joint Committee on Human Rights as part of its review of the draft (partial) Immigration and Citizenship Bill and of those details outlined by the Government for inclusion in the full Bill.

3. We are concerned that some of the proposals, if enacted, discriminate against migrants and breach their human rights. NAT believes that UK immigration and citizenship processes should support the human rights of all migrants, including asylum applicants, living with or at risk from HIV.

4. NAT believes it is perfectly possible to establish a fair, effective and robust immigration system without any breach or dilution of the human rights of migrants to the UK. Current human rights violations, as outlined below, neither deter immigration nor encourage departure, but simply entrench and exacerbate infections, sickness and mortality.

5. Supporting human rights and managing HIV effectively within immigration and citizenship processes are relevant to each of the areas of the draft Bill. NAT's submission will focus on the following human rights areas of most pressing concern:

- Right to health.
- Right to liberty.
- Right to work, and access to education and benefits.

These areas will each be discussed in turn after a brief background.

BACKGROUND

6. For certain infections, the major burden of disease falls upon particular groups of people who were not born in the UK. According to the Health Protection Agency, three-fifths of new HIV diagnoses reported in England, Wales and Northern Ireland in 2006 were cases where the individual had been born outside the UK; more than 90 per cent of heterosexual Black Africans diagnosed probably acquired their infection abroad.⁴⁴³ In addition, there are factors that may put some migrants at risk of HIV infection after their arrival in the UK. Some of these factors include the high risk of poverty and poor access to healthcare and to safer sex education.

7. With more people than ever before living with HIV in the UK and a significant number of migrants coming from high prevalence countries, there is a real and urgent need for migrants living with HIV to experience immigration and citizenship processes that support their human rights and the broader quality of life necessary for them to manage their condition well (eg continuity of care, good quality housing) which also translates into public health benefits.

8. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was ratified by the UK in 1951. The Human Rights Act 1998 is the mechanism for incorporating rights granted by the ECHR into UK law. In addition, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is ratified by the UK, but is not incorporated into UK law.

⁴⁴³ Health Protection Agency (2007) *Testing Times*, www.hpa.org.uk/infections/topics_az/hiv_sti/publications/AnnualReport/2007/HIVSTIs_AR2007.pdf. 2007 data on sexually transmitted infections amongst black African and Caribbean communities in the UK will be available in a new report from the HPA to be published in November 2008.

RIGHT TO HEALTH

9. The Committee will be aware that current UK Government policy on NHS entitlement, including restrictions on access to free HIV treatment, effectively denies some of the most vulnerable people in the UK the vital care they may need.

10. New NHS charging regulations introduced in April 2004 mean that refused asylum seekers, undocumented migrants and visa overstayers are charged for NHS services other than those provided in Accident & Emergency departments or those outlined in the 1989 exemptions. This meant that although access to an HIV test and associated counselling remain free of charge, some migrants are charged for life-saving HIV treatment.

11. These new regulations were brought in by the Government in part because of allegations about HIV health tourism to the UK. However, there is no evidence to demonstrate that HIV health tourism to the UK exists. In fact, evidence gathered by NAT specifically addresses and refutes these allegations in a new report, *The Myth of HIV Health Tourism*.⁴⁴⁴

12. A subsequent High Court ruling made it clear that refused asylum seekers could be considered “ordinarily resident” under NHS rules on entitlement.⁴⁴⁵ Therefore, they should not be charged for NHS care, including for HIV treatment, while they remain in the UK. However, the Department of Health is appealing against this ruling in November, making clear the Government’s intention to continue a charging regime for vulnerable migrants.

13. Although the current partial Bill does not directly address issues of entitlement to NHS care for migrants, the accompanying “Making Change Stick” document, published by the UK Border Agency (UKBA), suggests that the issue of access to public services will be addressed in the full Bill.⁴⁴⁶

14. Whilst it is difficult to infer from these references exactly what new regulations may be proposed, NAT is concerned that any such proposals to restrict entitlement to primary or secondary care will seriously impact the ability of vulnerable migrants to access life-saving HIV treatment. NAT believes such restrictions breach:

Article 2 (ECHR): *The right to life shall be protected by law; no one shall be deprived of his life intentionally.*

Article 3 (ECHR): *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

Article 12 (ICESCR): *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

15. The Government has argued that enforcing charging for NHS treatment does not deny access to care. The rules do allow hospitals to first provide the care and then issue a bill, which they may decide to write off if it is obvious that the patient is destitute. However, this is often not clear to clinicians and patients, and frequently does not happen.

16. Evidence shows that charging for treatment endangers the individual health and wellbeing of people living with HIV, including pregnant women. Some people have not been provided with necessary HIV treatment because of misunderstandings over entitlement, or they disappear from care for fear of HIV-related bills.⁴⁴⁷ It is often the most vulnerable who suffer from delayed, denied, interrupted or withdrawn care because they are unable to pay such HIV-related bills for treatment. Many have been pursued aggressively by debt collectors. The consequences for the health and wellbeing of those affected are grave, and can result in serious illness and death.

17. Charging policy also endangers public health. Evidence shows that managed HIV care significantly reduces the infectivity of the individual, thereby reducing the likelihood of onward transmission of the virus. Treatment is also essential to the prevention of mother to child transmission (MTCT) of HIV.

18. Women who have reached the advanced stages of HIV require a combination of antiretroviral (ARV) drugs for their own health. This treatment is also highly effective at preventing MTCT. Their newborn babies will usually be given a course of treatment for the first few days or weeks of life, to lower the risk even further. Pregnant women who do not yet need treatment for HIV can take a short course of drugs to help protect their unborn babies. In 2006, one in 440 women giving birth in England and Scotland was HIV-infected.⁴⁴⁸ The majority of those were migrants living in the UK born in sub-Saharan Africa. The rate of MTCT was 1.2% for women who had received at least 14 days of anti retroviral treatment prior to the birth.⁴⁴⁹

⁴⁴⁴ NAT (2008) *The Myth of HIV Health Tourism*, www.nat.org.uk.

⁴⁴⁵ Justice Mitting’s High Court judgment in *R (A) v Secretary of State for Health (Defendant) and West Middlesex University Hospital NHS Trust (Interested Party)*, CO/8095/2006.

⁴⁴⁶ UKBA (2008) *Making Change Stick*, www.bia.homeoffice.gov.uk.

⁴⁴⁷ NAT has gathered numerous examples that can be accessed by visiting www.nat.org.uk. Please also see Medecins du Monde UK’s second annual report on Project: London (2007) by visiting www.medecinsdumonde.org.uk.

⁴⁴⁸ Health Protection Agency (2007) *Testing Times*, www.hpa.org.uk/infections/topics_az/hiv_sti/publications/AnnualReport/2007/HIVSTIs_AR2007.pdf.

⁴⁴⁹ Townsend C *et al.* *Low rates of mother-to-child transmission of HIV following effective pregnancy interventions in the United Kingdom and Ireland, 2000–2006*. *AIDS* 22: 973–981, 2008.

Case Study

Julia is pregnant and living with HIV. Drugs exist today that can prevent Julia passing the virus onto her unborn child. But Julia is unable to access these drugs because she is a refused asylum seeker and is now living in residency limbo. Following an antenatal screen, Julia received a letter informing her that her residency status means she will not be provided free treatment for HIV and would have to pay thousands of pounds for the drugs she needed. Julia disappeared from care, unable to afford the charges. The fate of her baby is also unknown.

19. Article 12 of the ICESCR includes steps the UK must take to achieve the full realisation of the right to health. NAT believes the Government is failing to guarantee the *provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child*.

20. Evidence shows that HIV treatment also significantly reduces the infectivity of the individual, thereby significantly reducing the likelihood of onward transmission of the virus. Currently HIV transmission is increasing amongst heterosexuals in the UK, with the vast majority of these infections being amongst black Africans. Ensuring HIV treatment is available to all should help prevent further onward transmission. In addition, HIV treatment can enhance the efficacy of treatments for other communicable conditions prevalent amongst migrants, such as TB.

21. Article 12 of the ICESCR includes steps the UK must take to achieve the full realisation of the right to health. NAT believes the Government is failing to guarantee *the prevention, treatment and control of epidemic, endemic, occupational and other diseases*.

22. The Committee recognised these individual and public health concerns in its report, *The Treatment of Asylum Seekers*.⁴⁵⁰ The Committee recommended that the Government provide free HIV treatment for refused asylum seekers for as long as they remain in the UK. This recommendation was based on common humanity, public health risks and to support the Government's wider international goal of halting the HIV pandemic. NAT fully supports the Committee's recommendation.

23. Were migrants' access to HIV treatment or primary care to be further restricted, NAT believes this would be detrimental to both individual and public health. The Government would fail to meet its obligation to support the highest attainable standard of physical health by not guaranteeing the healthy development of children and the prevention, treatment and control of the HIV epidemic in the UK.

24. NAT also believes that these charging regulations amount to discrimination. HIV is the only serious communicable disease and only sexually transmitted infection for which treatment in the UK is not freely available for some migrants. All other sexually transmitted infections are exempt from charges in genitourinary and sexual health clinics, and all other serious communicable diseases are listed as exempt in a schedule to the regulations.

25. The Government is failing to meet its obligation to guarantee the right to life without discrimination, specifically:

Article 14 (ECHR): *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... national ... origin.*

26. In addition, the Government is failing to meet its obligation to the right to health as found in Article 12 of the ICESCR without discrimination:

Article 12 (ICESCR): *States undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to national ... origin.*

27. NAT would highlight that the UN's Committee on Economic, Social and Cultural Rights (CESCR) makes it clear in its General Comment 14 para 34 that Article 12 (ICESCR) means that States are under an obligation to refrain "from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services". This opinion is repeated by the Committee on the Elimination of Racial Discrimination (CERD) and has also been supported by the UN Special Rapporteur on the right to the highest attainable standards of health.

⁴⁵⁰ JCHR (2007) *The Treatment of Asylum Seekers: Tenth report of session 2006-07*, HL Paper 81-I, HC60-I, www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf.

28. *Recommendations:*

NAT does not believe it is appropriate to address a complex issue of health policy, such as access to NHS care, within immigration legislation. If the draft Bill does address issues of access to NHS care, NAT recommends the following, on human rights, individual and public health grounds:

- NHS care should be provided free of charge to all people living in the UK, irrespective of residency status.
- In advance of the above recommendation being implemented, it is urgently necessary for HIV and maternity care to be exempted from charges.

RIGHT TO LIBERTY

29. The draft Bill consolidates powers to detain migrants, including asylum applicants, while a decision is reached on their claim. However, it contains no provision for a maximum time limit for administrative detention. This need was identified by the Commissioner for Human Rights of the Council of Europe recently during his visit to immigration removal centres in the UK. The Commissioner was particularly concerned about poor detention conditions, and on human rights grounds strongly recommended that “a maximum time limit for administrative detention be introduced into United Kingdom legislation.”⁴⁵¹

30. The movement of migrants living with HIV at short notice into and out of administrative detention, or during other asylum processes such as removal, put them at particular risk of interruption to treatment and life-threatening failures of care.

31. NAT is concerned the Government’s public commitment to expand immigration detention of asylum applicants could have serious negative health implications for HIV-positive detainees. This commitment is likely to increase further the practice of administrative detention. NAT believes administrative detention without a maximum time limit is a breach of:

Article 4 (ECHR): *Everyone has the right to liberty and security of person.*

32. *Recommendations:*

The Home Office should consider drastically limiting the practice of administrative detention of migrants and alternatives to detention measures should be expressly provided for in the law. While current policy on administrative detention remains in place, NAT recommends a maximum time limit for administrative detention be introduced and that administrative detention is subject to automatic judicial oversight.

33. In addition, the UK has signed but not yet ratified Protocol 4, Article 2 of the ECHR: *Everyone lawfully within the State shall have the right to liberty of movement and freedom to choose his residence.* NAT urges the Government to ratify Protocol 4 of the ECHR.

34. The development of ARV therapy has changed, fundamentally, the health prospects of those living with HIV in the UK. As long as diagnosis does not take place too late, ARV therapy usually means that an individual can live a long and healthy life. However, once commenced, ARV therapy cannot be interrupted. For optimum effectiveness it must be taken for the remainder of the person’s life and strict adherence to the often demanding drug regimen is essential if drug resistance is not to develop. This has particular implications for asylum applicants going through the stressful and increasingly rapid asylum process, including periods of detention.

35. Research by NAT shows that high-quality care for HIV-positive detainees in immigration removal centres is inconsistent and at best patchy.⁴⁵² However, continuity of care at all points during the asylum process, in particular detention, is vitally important. Administrative detention, in particular the movement in and out of detention and back into communities, inevitably disrupts day to day life, and is likely to interrupt clinical care and drug adherence.

36. NAT and the British HIV Association (BHIVA)⁴⁵³ are working to identify best practice guidance on the detention of asylum applicants living with HIV in removal centres in partnership with removal centre healthcare managers and the HIV clinicians and voluntary sector professionals that work with removal centres. The guidance aims to support consistent high-quality care for asylum applicants living with HIV in detention and during the removal process.

⁴⁵¹ Commissioner for Human Rights of the Council of Europe on his review of asylum and immigration in the UK, CommDH(2008)23, <https://wcd.coe.int/ViewDoc.jsp?id=1339037&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.

⁴⁵² NAT (2007) *Immigration Removal Centre Responses to HIV and AIDS: Results of a survey of healthcare managers – NAT discussion paper*, www.nat.org.uk.

⁴⁵³ BHIVA is the leading UK association of professionals in HIV care. Further information is available at www.bhiva.org.

37. *Recommendation:*

The Home Office should fully implement the recommendations outlined in NAT and BHIVA's best practice guidelines when finalised to support consistent high-quality care during detention for individuals living with HIV.

RIGHT TO WORK, AND ACCESS TO EDUCATION AND BENEFITS

Right to work

38. Many asylum applicants are unable to work even though they may want to, because of the Government's current policy.⁴⁵⁴ NAT believes this is a breach of asylum applicants' right to work, specifically:

Article 6 (ICESCR): States recognise the right to work, which includes the right of everyone to the opportunity to gain his living by which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

39. Access to employment is a major factor in maintaining income and living conditions. Employment also helps improve self esteem and mental health. However, asylum applicants in the UK do not legally have the right to apply for permission to work whilst their case is being heard, unless the process takes more than 12 months. Unemployment means that many asylum applicants are unable to support themselves or their families adequately and unable to contribute financially to society.

40. Unemployment is also closely linked to poverty, which is in turn linked to poor health. For example, the TB epidemic in the UK is primarily the result of latent infection reactivating amongst migrant populations. TB Alert state that the reason for this is poverty, with poor housing and poor diet being key factors.⁴⁵⁵

41. In addition, Article 2 of the ICESCR outlines that: *developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.* Therefore developed countries like the UK are not able to determine the extent of economic rights of non-nationals.

42. *Recommendation:*

Asylum applicants should have the right to work.⁴⁵⁶ The New Asylum Model, through which all asylum applications are now processed, aims to ensure decisions on asylum claims are made within six months. NAT believes that for those individuals where the process takes longer, they should be granted automatically the right to work after six months.

Access to education and benefits

43. The draft Bill proposes a period of "probationary citizenship", an additional one to three years when a migrant must earn their right to British citizenship. The Home Office has proposed that migrants will not have equal access to the full range of benefits available to British citizens during temporary permission or probationary citizenship. NAT is concerned that this will reinforce ill-health and destitution.

44. In reference to education, the draft Bill does not address the important need for training, which if left unmet, can make later integration more difficult. Asylum applicant, those with temporary permission or probationary citizenship are not entitled to further and higher education at UK rates. Without education, an individual's development and integration will be unacceptably delayed, if not permanently harmed. NAT believes this is a breach of:

Protocol 1, Article 2 (ECHR): No person shall be denied the right to education.

Article 6 (ICESCR): Full realisation of this right [the right to work] shall include technical and vocational guidance and training programmes.

45. Migrants living with HIV are often amongst the most marginalised in society. It is widely acknowledged that access to further and higher education can help marginalised communities gain the technical qualifications and skills needed to gain full and fair access to employment, and encourage social inclusion.

⁴⁵⁴ For example, see the Guardian Comment is Free (18 June 2008) *Let them give something back*, www.guardian.co.uk/commentisfree/2008/jun/18/immigration.immigrationpolicy.

⁴⁵⁵ The no-blame game *The Guardian* Jan 28 2008 www.guardian.co.uk/society/2008/jan/28/tb.london

⁴⁵⁶ For further information on the TUC and Refugee Council campaign to let asylum seekers work visit www.refugeecouncil.org.uk/gettinginvolved/campaign/righttowork.

46. *Recommendation:*

Those applying for asylum, with temporary permission or probationary citizenship that have been in the UK for more than six months should have full rights to further and higher education at UK rates.

47. The draft Bill outlines that migrants with temporary permission or probationary citizenship have access to only National Insurance Contribution (NIC) benefits. These include Jobseeker's Allowance, Incapacity Benefit/Employment Support Allowance, state pension and bereavement payments. This does not include other important benefits for those with temporary permission or probationary citizenship that impact on the health and wellbeing of migrants living with HIV, such as housing support.

48. It is widely acknowledged that poor accommodation has the potential to exacerbate the HIV-related needs of migrants. Damp accommodation and inadequate heating creates an unhealthy and potentially dangerous environment for people with respiratory infections and tuberculosis. Daily ARV treatment regimes for HIV, periods of ill-health and frequent clinical appointments can be difficult to explain when living in shared accommodation. Migrants are especially vulnerable to inadequate housing.

Case study

Joseph is living in a one bedroom flat with his wife and two children. He and his wife are both HIV-positive. The flat is very damp with mould growing on the walls. The whole family developed respiratory problems, including the children who had been healthy before. His wife's and his CD4 counts fell significantly, causing his HIV clinician to enquire into what had changed in their lives that might have provoked it. Joseph's health suffered particularly badly and he developed TB. Despite repeated appeals from his GP and HIV clinician he has not been provided with alternative accommodation for him and his family.

49. NAT believes that in many cases being excluded from these important benefits can be regarded as a breach of:

Article 8 (ECHR): *The right to respect for his private and family life.*

50. *Recommendation:*

NAT believes that those with temporary or permanent permission or probationary citizenship should have the same access to the full range of benefits as British citizens. This includes, for example, full access to housing support.

October 2008

Memorandum submitted by No Recourse to Public Funds (NRPF) Network

EXECUTIVE SUMMARY

This submission focuses on the implications of the draft (partial) Immigration and Citizenship Bill on human rights from the perspective of local authorities.

Local authorities have a duty to provide support to migrants with "no recourse to public funds (NRPF)" if they are assessed as having a community care need under community care legislation. In cases where immigration legislation bars local authorities from providing services under these statutes, it is a legal requirement for authorities to assess whether withholding or withdrawing support would be a breach of an individual's or family's human rights under the Human Rights Act 1998.

Approximately 4,000 people subject to immigration control with NRPF are being supported by local authorities as a result of these legal duties. This costs authorities at least £33.4 million per annum; these costs are not reimbursed by central government.⁴⁵⁷ The number of those being supported under human rights obligations nationally is currently unknown, although it is likely to be a small proportion of the overall total because the threshold of support is so high (more detail below). At Islington Council, they represent 5% of the total number of clients supported.

The consequence of this legislative framework is that many vulnerable migrants to whom local authorities are barred from providing support become homeless in the UK or are picked up by the community and voluntary sector. Take up of voluntary return (to countries of origin) is not common amongst migrants. The draft Bill will make this option even less attractive to migrants as it introduces significant bars on return to the UK for those who take up voluntary return.

⁴⁵⁷ No Recourse to Public Funds: Financial Implications for Local Authorities (May 2008) Jonathan Price and Olivia Fellas, NRPF Network.

Local authorities' obligations under human rights legislation to migrants with NRPF arise from the incompatibility of immigration legislation and community care legislation. These obligations are partly unnecessary and could be addressed through adjustments to immigration legislation and policy, with removal/return systematically enforced at the end of the asylum/immigration process and a conclusion to cases currently supported by local authorities. A better functioning immigration system would mean that migrants with NRPF would therefore not come to the attention of local authority social service departments in the first instance.

Key concerns highlighted in this submission in the context of the draft Bill are:

- The Network welcomes a commitment to remove those without “permission” to be in the UK in a sustainable and sensitive way (ideally through assisted voluntary returns programmes). There needs to be resolution to cases currently being supported by local authorities, which may however involve exploring options to grant some form of “permission” and thereby allowing them to work or access mainstream benefits.
- The Bill introduces an additional stage prior to migrants acquiring British citizenship or permanent residence, entitled “probationary citizenship”. This stage will increase the length of time in which some migrants will have no recourse to public funds, and will consequently increase costs to local authorities. We understand that those granted refugee status will be exempt from the NRPF requirement during the “probationary citizenship” stage.
- The introduction of restrictions for those who voluntarily return seeking to re-enter the UK will act as a disincentive to take up voluntary return and will compromise the work of local authority caseworkers and social workers who use this option to resolve cases.
- Charging additional fees for immigration applications for migrants who tend to consume more in public services is unreasonable and may potentially disadvantage vulnerable migrants.

NO RECOURSE TO PUBLIC FUNDS (NRPF) NETWORK

The NRPF Network is a network of local authorities focusing on the statutory response to destitute people from abroad who have no recourse to public funds. The Network, established in 2006, aims to share information and good practice amongst local authorities, work with government departments to raise practical and policy issues and to develop a strategic response to NRPF.⁴⁵⁸

The NRPF Network is currently working with the Home Office on mechanisms for reimbursing organisations for providing support to victims of domestic violence applying for Indefinite Leave to Remain (ILR) under the “Domestic Violence Rule”. The Network has also begun preliminary work with the UK Borders Agency (UKBA) to seek resolutions to individual cases being supported by local authorities. Objectives have been set to identify and conclude cases, taking enforcement action where practicable or granting status to cases in accordance with their policies. These objectives have been set out as part of pilot partnerships with local authorities in the UKBA’s Enforcement Strategy.

The NRPF Network is funded by the UKBA and Islington Council.

WHAT IS NRPF?

“No recourse to public funds” applies to a person who is subject to immigration control; does not have the right to work;⁴⁵⁹ and has no entitlement to welfare benefits, public housing or UKBA asylum support.

The NRPF policy affects a wide range of people who are subject to immigration control, including refused asylum seekers, visa overstayers, post-18 former unaccompanied asylum seeking children, people in the UK on spouse visas and some EEA migrants.⁴⁶⁰

Case law has ruled that those who are destitute and in the country lawfully are entitled to local authority support where they are assessed as being in need of care and attention (National Assistance Act, 1948) or, *if they are in the country unlawfully, where it would be a breach of their human rights to withhold or withdraw support (Human Rights Act, 1998)*.⁴⁶¹ *Individuals with mental health problems, physical health problems, older people and those suffering domestic violence may be entitled to local authority services. In addition, support may be provided by a local authority to a family under the Children Act 1989 where a child is found to be a “child in need”.*

⁴⁵⁸ There are over 700 members of the NRPF Network representing local authorities, the voluntary sector, central government, the police and the NHS. Many of our members work with people who have NRPF and are particularly vulnerable on account of having a community care need which entitles them to local authority support under community care legislation (more information below).

⁴⁵⁹ People granted leave as spouses or civil partners are permitted to take up employment.

⁴⁶⁰ The term “migrant” will be used henceforth to refer to these groups collectively.

⁴⁶¹ Schedule 3, Section 54 Nationality, Immigration and Asylum Act 2002 bars local authorities from providing support to four categories of migrants: EEA nationals and any dependents; persons granted refugee status by another EEA state and any dependents; refused asylum seekers who have failed to comply with removal directions, and any dependents; persons unlawfully present in the UK (this includes people who have overstayed their visas or failed asylum seekers who made their initial asylum claim in-country).

Articles 3 and 8 HRA 1998 are the most relevant to local authorities in regards to their human rights obligations. Under Article 8, local authorities may be under a duty to provide services to a family with NRPF where one parent has leave to remain in the UK in order to avoid a breach of their right to family life (if they were to be returned to their country of origin).

Under Article 3, authorities may be under a duty to provide services to an individual with NRPF in order to prevent inhuman or degrading treatment. It should be noted that the threshold of care in such cases is extremely high, as dictated by case law *N v Secretary of State for the Home Department* [2005], in which it was found that:

*“ ... the test, in this sort of case, is whether the applicant’s illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity.”*⁴⁶²

Most commonly local authorities will undertake human rights assessments in order to assess whether it would be a breach of human rights to offer migrants tickets back to their country of origin.⁴⁶³ Practices across local authorities are inconsistent because they receive no statutory guidance from central government on their obligations to people with NRPF under human rights legislation (or more generally).

Due to complex and overlapping community care, immigration and human rights legislation, and the high threshold for support under human rights legislation as detailed here, many people are found to be ineligible for local authority assistance. Those who do not qualify may become destitute and/or street homeless. Others will become hidden homeless, staying for example with family or friends, or in mosques or churches.

INTRODUCTION

The Draft (partial) Immigration and Citizenship Bill, published on 14th July 2008, does not include details of changes to entitlements to public services and benefits, which is the principle concern of the NRPF Network. However, a document accompanying the draft Bill, “Making Change Stick: an Introduction to the Immigration and Citizenship Bill”, provides a rough outline of how the changes will look in the full Bill. Additionally, the “Path to Citizenship” Green paper, published by the UKBA in May 2008, outlined proposals for amendments to access to benefits and other “public funds” for migrants. It appears that the proposals in the Green paper will be fully incorporated into the legislation.⁴⁶⁴

The objectives of this submission are as follows:

- To demonstrate the potential impact of the draft (partial) Immigration and Citizenship Bill on the work of local authorities with migrants in fulfilling their duties under human rights legislation
- To demonstrate the potential impact of the draft (partial) Immigration and Citizenship Bill on clients local authorities support
- To put forward recommendations on how the negative impacts of the draft (partial) Immigration and Citizenship Bill and UKBA immigration policy on local authorities more generally could be mitigated.

KEY CONCERNS

Those overstaying permission

The document accompanying the draft Bill states that “anyone who knowingly enters or stays here without permission after it has expired or been cancelled will be committing an imprisonable offence”. There are many reasons however why migrants may still be in the country without “permission”. Research undertaken by the NRPF Network in May 2008 found that almost 4,000 people with NRPF were being supported by local authorities across the UK during 2007–8; many of these people are in the country without “permission”.⁴⁶⁵ Their inability to leave the UK may be on account of a physical or mental illness, the lack of a safe route of return, or a lack of travel documentation, to name but a few.

Local authorities have a duty to support migrants with NRPF and have an assessed community care need (most often a mental or physical illness). These individuals and families should not be punished for being in the UK without permission through no fault of their own; furthermore, many of these individuals and families, on account of being supported by the local authority, are particularly vulnerable, and their specific needs and circumstances should be taken into consideration if any enforcement action is to take place.

⁴⁶² *N v Secretary of State for the Home Department* [2005] 2 AC 296 para 69.

⁴⁶³ See the following page for a template human rights assessment:

http://www.islington.gov.uk/DownloadableDocuments/HealthandSocialCare/Rtf/human_rights_assessment.rtf

⁴⁶⁴ Please see the UKBA’s response to the “Path to Citizenship ...” consultation:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/pathtocitizenshipconsultation/governmentresponse.pdf?view=Binary>

⁴⁶⁵ No Recourse to Public Funds: Financial Implications for Local Authorities (May 2008) Jonathan Price and Olivia Fellas, NRPF Network.

In order to avoid the situation in which those without permission are being supported by local authorities, the UKBA should remove refused asylum seekers and other migrants at the end point of the asylum or immigration process, and resolve cases currently being supported by local authorities. In regards to the latter, local authorities collect considerable amounts of information on clients whilst supporting them. The UKBA should use this to inform decision-making and help find sustainable solutions to individual cases. Furthermore, the UKBA should consider adopting a casework approach to address individual cases being supported by local authorities in order to reach these resolutions more efficiently.

There are some individuals and families whose removal from the UK is unenforceable on account of a physical or mental health problem, and in such cases the UKBA should consider granting some form of “permission”, and therefore entitling them to work or access mainstream benefits.

In cases where travel documents cannot be granted, the UKBA should reimburse the local authority for continuing to provide support to the individual until such time that travel documents can be granted.

In cases where return is an option, the UKBA should work with local authorities to seek the best solution for individuals and families. Ideally this would be through assisted voluntary return programmes.

For those who do not meet local authority eligibility criteria, they may have access to alternative support provided by the UKBA (Section 4), although it has been claimed that applicants for such support are subject to unreasonable and impractical eligibility criteria.⁴⁶⁶ Support in returning to countries of origin may also be available through the International Organisation for Migration (IOM). For those who are ineligible for such support or for those who refuse this support, the only options are to remain in the country unlawfully and seek alternative support wherever possible. This could have an impact on community cohesion, through increases in street homelessness, hidden homelessness, overcrowding and illegal working.

Removals

Part four of the draft Bill outlines the power to make expulsion orders for the removal of people from the UK and to restrict re-entry into the UK.

For those who are in a position to leave the UK, the NRPf network welcomes powers to remove in a sustainable yet sensitive way. This should be done systematically at the end of the asylum or immigration process. In cases that are currently supported by local authorities where return is an option, the UKBA should work with those authorities to seek the best solution for individuals and families. It should be highlighted that local authorities have considerable information about these clients and this may assist in carrying out returns. Ideally returns would be achieved through assisted voluntary return programmes.

Earning the right to stay

The introduction of “probationary citizenship” as a step towards permanent permission to reside in the UK aims to inscribe earned citizenship into immigration legislation.

This additional stage further complicates migrants’ path to permanent settlement in the UK. For some migrants, the time period during which they have no recourse to public funds will be increased. This has financial implications for local authorities as well as creating additional barriers for migrants wishing to settle permanently in the UK.

The requirement to undertake voluntary work in order to demonstrate “active citizenship” may be particularly difficult for migrants being supported by local authorities on account of their community care needs. There should be some discretion for migrants with community care needs in regards to this requirement.

Charging migrants “a little extra”

It is proposed that migrants pay a “little extra” towards public services through increased charges on immigration applications. This is justified on the grounds that some migrants tend to consume more in public services. We understand that these additional funds will go towards a fund to manage the transitional impact of migration.

The “Path to Citizenship” Green paper acknowledges that migrants are fiscal contributors in regards to public services.⁴⁶⁷ In light of this, it is difficult to justify imposing further charges on migrants on account of the greater consumption of public services by some migrants. Further, the NRPf Network is concerned that funds will be raised by charging those most vulnerable, such as dependents (which tend to be women, elderly people and children). This would be unreasonable; alternatively, charging additional fees should be means tested.

⁴⁶⁶ Asylum Support Appeals Project (2008) Unreasonably destitute?

http://www.asaproject.org/web/images/PDFs/news/unreasonably_destitute.pdf

⁴⁶⁷ <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/pathtocitizenshipconsultation/pathtocitizenship?view=Binary>

Automatic ban on returns

The legislation introduces a ban on returning to the UK after returning voluntarily and the requirement of foreign nationals to repay cost to taxpayers if they ever want another visa once their exclusion period has been served. It is of concern that the legislation provides for a ban on those who return voluntarily from re-entering the UK for potentially lengthy periods of time. We believe that this acts as a disincentive for take-up of voluntary return. Further, this would appear to restrict the rights of individuals to return to the UK if they experience persecution on returning to their country of origin.

Local authorities frequently use this option to resolve cases either through UKBA Section 4 support or in partnership with the International Organisation for Migration (IOM). Such a ban would compromise the work of local authority caseworkers and social workers.

Managing local impacts

Ultimately there needs to be agreement on how to find case resolution on legacy cases and other complex cases that local authorities are supporting. These cases can be resolved, either by returning people to their countries of origin at the end of the asylum/immigration process if it is safe to do so, or by granting people temporary or indefinite leave to remain, thereby entitling them to work or to claim mainstream benefits. Part of the solution however is to recognise that removal (voluntary or enforced) is not an option in a significant number of cases and that leaving people destitute is not in the interests of broader social cohesion policy.

This would free individuals from a state of limbo, enabling them to continue their lives either in the UK or abroad and have the right to work and live dignified lives. It would also significantly reduce the financial burden on local authorities and council taxpayers.

CASE STUDY

The following case study illustrates some of the points made above in regards to local authority duties to people with NRPF:

B came to the UK on a six-month visitor's visa in March 2003. He overstayed his visa and subsequently suffered a major stroke in November 2003 which caused extensive damage to his brain; he is acutely disabled and requires 24 hour nursing care. In January 2004, his family helped him submit a general cases application for leave to remain to the Home Office on compassionate grounds. This application remains outstanding to this date. B continues to be supported by the local authority to avoid a breach of B's convention rights under the Human Rights Act 1998⁴⁶⁸, but remains unlawfully in the UK.

SUMMARY OF RECOMMENDATIONS

- There are some individuals and families whose removal from the UK is unenforceable on account of a physical or mental health problem, and in such cases the UKBA should consider granting some form of "permission", and therefore entitling them to work or access mainstream benefits. Leaving individuals and families in such a position of limbo is neither sustainable nor humane.
- In cases supported by local authorities where return is an option (subject to human rights considerations), the UKBA should work with authorities to seek the best solution for individuals and families. Ideally this would be through assisted voluntary return programmes.
- Restrictions on those who have returned to their country of origin via assisted voluntary return programmes seeking to re-enter the UK should be reconsidered.
- Charging additional fees on immigration applications should be means tested, rather than targeting dependents.
- Central government should issue statutory guidance to local authorities on their obligations to people with NRPF under human rights legislation. This would ensure consistency of practice across local authorities.

NRPF

October 2008

⁴⁶⁸ As B was a visa overstayer, he is excluded from support by Schedule 3 Section 54 NIA 2002.

Memorandum submitted by the Northern Ireland Human Rights Commission

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,⁴⁶⁹ advising on legislative and other measures which ought to be taken to protect human rights,⁴⁷⁰ advising on whether a Bill is compatible with human rights⁴⁷¹ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴⁷² In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding “soft law” standards developed by the human rights bodies.

2. The Commission welcomes the prioritisation of scrutiny of the Citizenship, Immigration and Borders Bill by the Joint Committee on Human Rights (JCHR). The JCHR’s call for evidence quotes the Draft Legislative Programme as explaining that the Bill will:

[...] replace all existing immigration legislation with a simplified, clear and coherency legal framework to control our borders, manage migration and reform the path to citizenship.

3. The Commission has also prioritised this area and has submitted a range of responses to Home Office policy consultation exercises that cover matters now included in the Bill. While there are a range of other matters within the Bill that engage human rights compliance, this submission will largely focus on the specific areas covered by our previous responses. The Commission intends to prepare briefing papers for parliamentarians as the Bill progresses through both Houses, in which we plan to cover broader issues including our concerns on the refugee protection provisions.

4. Following examination of overarching issues, the areas covered in this submission are structured in accordance with each part of Part of the Bill itself. Where the Government has indicated that a matter not set out in the Partial Bill will be added to the Full Bill, this is included either in the relevant Part or in the Further Provisions section.

OVERARCHING ISSUES

International standards

5. The Commission’s response is informed by international standards, in particular, the European Convention on Human Rights (ECHR). Article 1 makes it clear that ECHR rights apply to all within the jurisdiction and not just to UK citizens. Other Articles, including 3, 5, 10, 11 and 14, are also engaged.

6. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) contains a range of standards in relation to racial discrimination, some of which apply universally and some others to citizens. Article 1 defines racial discrimination as:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The UN has issued a General Recommendation that clarifies the responsibilities of state parties to ICERD in regard to non-citizens.⁴⁷³ This means that differential treatment based on citizenship or immigration status will constitute discrimination if it is not proportional and pursuant to a legitimate Convention aim.

7. The Commission welcomes the decision by the UK to remove its reservations against Article 22 and Article 37(c) of the UN Convention on the Rights of the Child (CRC). The Bill needs to be read in light of that decision.

8. The Commission reiterates its call for the Government to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). The ICRMW provides a framework of international standards around which the relevant provisions of the Bill should be structured. To the extent that the case for failing to ratify rests on a perception that any element of the ICRMW conflicts with domestic legislation, the economic interests of the state, or any other consideration, it is for the Government first to set out those arguments in detail, and then to devise means of addressing the obstacles to ratification.

⁴⁶⁹ Northern Ireland Act 1998, s.69(1).

⁴⁷⁰ *Ibid.*, s.69(3).

⁴⁷¹ *Ibid.*, s.69(4).

⁴⁷² *Ibid.*, s.69(6).

⁴⁷³ General Recommendation No 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

PRINCIPLES FOR HUMAN RIGHTS COMPLIANCE

Measures which engage human rights compliance

9. The Commission recognises the right of the state to regulate migration, in ways that ensure respect for human rights. As the Committee will be aware any interference in human rights must be in pursuance of a legitimate aim, as well as being necessary and proportionate in pursuance of such an aim.

10. The Commission is concerned that many of the measures proposed are either not necessary or are disproportionate. The Commission notes that a considerable amount of official discourse and proposals appear to be based on notions of threats constituted by migration, and the need to control migrants with little credible evidence being put forward to support this case. There is also little evidence of an exploration of the complexity of migration or willingness to consider alternatives. This increases the risk of undue interference in human rights but also the risk that measures designed to combat phenomena, that are either exaggerated or more complex than presented, are likely to be largely ineffective and counterproductive.

11. Government will be aware that public opinion as regards the migration system is often heavily influenced by misinformation and racial prejudice, resulting in demands for the system to be more restrictive. The Commission would therefore suggest that an effective way of increasing public confidence in the system is to challenge misperceptions and combat racial prejudice. A recent example of this is discourse that conflates migrants with criminality. Following a range of reports carried in the media, largely in relation to EU migrants, the Association of Chief Police Officers (ACPO) issued a paper providing empirical evidence that the percentage of persons who offend within migrant communities was, in fact, roughly in line with the broader population.⁴⁷⁴ By contrast, the first subheading in the section on EEA migrants in the Path to Citizenship consultation document is “Obeying the Law”, with measures outlined to ensure that “EEA nationals will not abuse our welcome by committing criminal acts”.⁴⁷⁵ In reference to international commitments to challenge racism, the Government has a duty to challenge assumptions rather than encourage them by treating them as if they were true. General Comment 30 of ICERD urges states to:

Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;⁴⁷⁶

12. The principle of proportionality is of relevance to measures and the sanctions applied for offences. For example, if the Government builds a case that employing irregular workers is damaging to the public purse (for example, through reducing tax revenues) and imposes employer sanctions, there would need to be an explanation as to why the same sanctions are not imposed for practices that damage the public purse in a similar way, for example, through non-payment of the minimum wage.

13. When consulting on the consolidation process, Government had requested models from international practice to inform the process.⁴⁷⁷ The Commission would draw attention to the existence of a broad and detailed international framework of principles that should underpin any such process. There is a range of international instruments, to many of which the UK is already a signatory, which provide the basis for a simplified structure. In particular, the International Labour Organization has recently produced a detailed multilateral framework on principles and guidelines for the regulation of labour migration.⁴⁷⁸

Northern Ireland specific matters

14. The Bill is UK-wide and deals with largely excepted matters in relation to the Northern Ireland Act 1998. However, there are a number of matters that engage specific impacts in relation to the particular circumstances of Northern Ireland which will be raised through out this submission. These include the land border with the Republic of Ireland, the differences regarding detention facilities, the differences in public administration, policing and the administration of justice, the impact of the legacy of conflict, the context and obligations under the Belfast (Good Friday) Agreement 1998, and the fact that a significant proportion of the population are Irish citizens.

⁴⁷⁴ See: ACPO press release, 16 April 2008, [Online]

Available: http://www.acpo.police.uk/pressrelease.asp?PR_GUID=%7b017B1944-5CB2-43F6-BE22-E9AD91364597%7d [accessed 21 October 2008]; and “Migrant crime wave a myth: police study—ACPO report concludes offending rate no worse than the rest of the population”, *The Guardian*, 16 April 2008 [Online]

Available: <http://www.guardian.co.uk/politics/2008/apr/16/immigrationpolicy.immigration> [accessed 21 October 2008].

⁴⁷⁵ See: Home Office consultation document, *Path to Citizenship*, February 2008, paras 211-221. Two other issues are referenced—restriction to accessing benefits and learning English. Other prominent issues, including employment and housing rights abuses, are not referenced.

⁴⁷⁶ General Recommendation No 30 (General Comments): Discrimination against non-citizens, Office of the High Commissioner for Human Rights, 1 October 2004, para 12.

⁴⁷⁷ *Simplifying Immigration Law: An Initial Consultation*, June 2007.

⁴⁷⁸ ILO [Online] *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, ILO, Geneva, 2006, available: www.ilo.org/public/english/protection/migrant/download/multilat_fw_k_en.pdf.

Irish citizens

15. The right to Irish citizenship for most persons born in Northern Ireland predates, but was reaffirmed in the Belfast (Good Friday) Agreement. The Agreement recognised rights to both British and Irish citizenship and identity, as follows:

... recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.⁴⁷⁹

16. The nationalist community is a large proportion of the population. Over 400,000 Irish passports have been issued to Northern Ireland residents in the last 10 years.⁴⁸⁰ While Irish citizens in the UK can exercise EEA treaty rights, Irish citizens are clearly not present in Northern Ireland purely on the basis of European community law. Irish citizens have a range of rights that date back to the 1920s, which will be impacted on by the proposals.

Territorial extent of the Bill

17. Paragraph 46 of the explanatory notes to the Bill indicates that most of the Bill extends to Northern Ireland. There is indication that agreement will be required from the Northern Ireland administration on devolved aspects.

PART 1: REGULATION AND ENTRY

Common Travel Area (CTA)

18. The Partial Bill does not make reference to the Common Travel Area (CTA) between the UK and Ireland,⁴⁸¹ and is a matter on which the Government is currently consulting for inclusion in the Full Bill. Indeed, the Partial Bill does not make reference to the regulation and entry of Irish citizens which, as it stands, would render Irish citizens reliant on the exercise of European treaty rights. The Commission, in relation to this area and others impacting on Irish citizens, intends to examine the Full Bill for compatibility of the proposals with the Belfast (Good Friday) Agreement, the principles of non-discrimination, non-regression and broader international human rights standards.

19. The recent consultation document on the CTA puts forward proposals for major restrictions on freedom of circulation within the CTA. Little evidence is provided as to the necessity of these reforms which appear to be a product of government immigration control agendas relating to e-borders and identity cards. The proposals include checks on air and sea routes between the Republic of Ireland and the UK (including Northern Ireland). This will involve the introduction of full immigration controls for non-CTA nationals and measures to verify the identity of British and Irish citizens, along with monitoring and carriers liability on these routes. In relation to the land border between Northern Ireland and the Republic of Ireland, the Government is not proposing the reintroduction of bricks and mortar checkpoints but is proposing increasing mobile “*ad hoc*” checks on the land border that will “mirror activity in the Republic of Ireland”.⁴⁸²

20. The human rights impact assessment conducted by Government on the consultation proposals indicates that no human rights implications derive from the reforms. However, from this Commission’s initial consideration, the proposals would appear to have far reaching human rights implications for Irish, British and foreign nationals in Northern Ireland.

21. The Commission’s greatest concern is with regard to the land border proposals. There is no implication that there will be any requirement or expectation for British and Irish citizens to carry travel or identity documents to cross the land border and the Government argues that its “*ad hoc*” checks will target non-CTA citizens. The clear questions are, how are those policing the land border going to tell who is a British/Irish citizen and who is not? Who, on indicating that they are not carrying particular travel or identity documents (and have no obligation to do so), will be allowed to proceed and who will be subject to arrest and detention until identity is verified?

22. The Commission would be concerned to ensure that any measures introduced regarding movement across the CTA do not constitute racial profiling and do not adversely impact on minority ethnic persons exercising freedom of movement within the CTA or EEA. Racial profiling is not a human rights compliant

⁴⁷⁹ Paragraph 1(vi) Belfast (Good Friday) Agreement 1998. In Annex 2, the British and Irish Governments declare their joint understanding that the term, “the people of Northern Ireland”, in the above paragraph refers to “all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British Citizen, an Irish citizen or who is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence”.

⁴⁸⁰ Irish Government figures indicate that 402,625 passports were issued to Northern Ireland residents between 1998 and 2008, with the annual figure doubling between 2002 and 2007 (source: *Irish News*, 2 July 2008).

⁴⁸¹ The Common Travel Area also covers the Crown Dependencies. The CTA dates back to the 1920s and was given full statutory recognition in the UK under Section 1(3) of the Immigration Act 1971 and Immigration (Control of Entry through the Republic of Ireland) Order 1972 (as amended).

⁴⁸² UK Border Agency, *Strengthening the Common Travel Area Consultation Paper* 24 July 2008.

exercise and the Commission has consistently raised concerns at measures that may directly or indirectly constitute racial profiling. Racial profiling engages Articles 8, 10, 11 and 14 of the ECHR and other international standards, to which the UK is a party, such as Article 12 of the ICCPR.

23. The Commission is conscious of the concerns of sister organisations in the Republic of Ireland, namely, the Irish Human Rights Commission and the National Consultative Committee on Racism and Interculturalism (NCCRI). Both organisations have raised general concerns that new legislative proposals (in the Republic) may lead to increased racial profiling. In reference to practices of *ad hoc* immigration checks on the land border by immigration Gardaí, the NCCRI is concerned with regard to racial profiling and is encouraging such incidents to be reported as racist incidents. The Commission is, therefore, particularly alarmed at the proposal that land border activity in Northern Ireland will “mirror” that on the southern side of the land border.

Temporary residence restrictions

24. The Commission raised concerns regarding the reporting and residence restrictions on those with limited leave to remain in the UK, brought in by Section 16 the UK Borders Act 2007. The Commission pointed out that there was no explanation why such a measure is needed, when it would restrict individuals’ right to privacy and respect for family life under Article 8 of the ECHR, and to freedom of association under Article 11. By requiring individuals to live and remain in certain geographical locations, this approach will further stigmatise people who have not committed any crime and make them easy targets for attacks motivated by xenophobia and racism.

25. Clause 10 of the draft Bill retains this sweeping power to impose reporting, residence and other restrictions on all non-EEA migrants (that is, persons with temporary residence). Clause 10 also extends the range of persons to whom an individual can be obliged to report.

PART 2: POWERS TO EXAMINE

Extension of powers

26. The Commission has a range of concerns regarding existing powers and their exercise and is extremely concerned regarding the extension of wide and discretionary powers, including their use in-country, proposed in the Bill. The Bill proposes to allow designated officials, at any time or place in the UK, to exercise power to stop any individual to determine their identity and immigration status and subject them to detention for as long as they deem necessary to determine the same.⁴⁸³ Failure to comply, including failing to “provide information or produce documents” in the “possession or control” of the individual constitutes a criminal offence punishable by a civil penalty or up to six months in prison.⁴⁸⁴ Documents can be of any relevant description specified by the Secretary of State.⁴⁸⁵ There is also a similar power to require an individual to submit to a medical examination or provide medical reports under the examination powers. Such powers are clearly grossly disproportionate and this part of the Bill requires significant amendment. The Commission cannot see how such sweeping powers could comply with Article 5 of the ECHR (liberty and security of person).

PART 3: CITIZENSHIP

Path to citizenship

27. This section of the Bill implements proposals that had been detailed under the Home Office’s Path to Citizenship proposals. During the consultation on “Path to Citizenship” the Commission expressed a range of concerns on issues which are retained in the present Bill.

28. For example, one of the concerns the Commission raised was that Government was in danger of leaving itself open to accusations of colonial discourse through the tone of the proposals. The reforms proposed to the immigration system do not affect the rights of EEA nationals. The tone of the proposals could be interpreted as British citizens holding a particular set of values that are not shared by non-Europeans and need to be nurtured or taught. The consultation document made repeated references to “British values” and “our values”, a concept that is the subject of much debate with, in fact, no agreed notion of what exactly a distinctly “British” set of values might be. The formula that Government chose for the purposes of the consultation was to ask people what they would most miss if they emigrated. The conclusion in the document contends that “British values” are “the NHS, tolerance, fairness and freedom of speech, a healthy disrespect for authority and yet a keen sense of order”. Other “values” then implied in the document included “paying your way” and “obeying the law”. From this listing, it is apparent that there is little distinctively British about any of these values. The values listed are in fact largely universal.

⁴⁸³ For detention powers see Part 5 of the partial Bill Clause 53(1)

⁴⁸⁴ For sanction powers see Part 7 of the Partial Bill Clauses 101 and 102

⁴⁸⁵ Clause 28(4)

29. The Commission is also deeply concerned at the move away from recognised human rights towards citizen's rights, explicit in the proposals. Where rights were mentioned in the consultation document, they were presented with the deeply flawed notion that migrants must earn them. Under the ECHR and a range of international human rights treaties, to which the UK is a party, migrants in fact have the same rights as UK citizens. While there is no human right to citizenship in the country one migrates to, rights are not conditional on citizenship. The International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, applies to everyone in the state. Article 2(3) of the ICESCR contains a concession to developing nations only, and requires them to give due regard to human rights and their national economy to determine the extent to which they can guarantee the economic rights in the Covenant to non-nationals. The UK obviously does not fall within the remit of Article 2(3). In addition, the Concluding Observations of a number of treaty monitoring bodies have expressed particular concern at the situation of non-nationals in the UK. The only rights that can be the preserve of citizens are matters such as voting (for example, Article 25 of the ICCPR). The Commission believes that the core premise of the proposals is flawed because the net result is that a range of rights are dependent on citizenship and, even then, are tiered in accordance with the stages an individual reaches on the path to citizenship.

30. The central claim from Government is that citizenship aids integration, yet this is not evidenced or substantiated. Further, the underlying tone of the proposals is that those seeking to reside long-term in the UK should seek to become British by availing of citizenship and assuming British values. While there will be persons who wish to do this, it is important to recognise there will be also other long-term residents who do not.⁴⁸⁶ The Government should recognise that it is a human right to hold an identity and a principle of human rights that no detriment should incur through holding that identity. The current ethos and letter of the proposals are not compliant in this regard.

31. The Commission welcomed the commitment in the Path to Citizenship consultation document that Government, in developing its proposals, will ensure they are consistent with the principles of the Belfast (Good Friday) Agreement. However, there is no reference to this in the proposals as set out in the Partial Bill.

Public services

32. This section is not set out in the Partial Bill, but the intention to include this in the Full Bill in relation to citizenship is referenced in the Bill's introductory document.⁴⁸⁷ The Commission wishes to comment on two main areas. First, on proposals to further examine the eligibility criteria for public services and, second, on proposals to further impose immigration enforcement duties on a broader range of public sector actors.

Eligibility criteria

33. The Bill's introductory document outlines the following proposal for the Full Bill:

Limit access to services to those who earn it

In taking forward our proposals for earned citizenship, we need to simplify the current complex legislation on access to benefits and services and make it as clear and consistent as possible. We will establish a cross-Government working group to review the various terms used by different Departments to establish whether a person is "resident" in the UK for the purpose of qualifying for access to certain benefits and services. A number of different legal terms are currently used, including "ordinarily resident", "habitually resident" and "lawfully present". Our objective will be to ensure that these terms operate and interact with each other as logically, simply, and effectively as possible; and in a way that meets our policy objective of ensuring that migrants can only access benefits and services where they have "earned" the right to them. In Scotland public services are devolved and we will need to work with Scottish Ministers.⁴⁸⁸

34. The Commission is currently conducting an investigation into the extent to which existing legislation, guidance, and practice in relation to homeless provision and social support for migrants, asylum seekers, refused asylum applicants, and non-UK national family members complies with international human rights standards. This was prompted by a range of concerns around individuals being unable to access their rights.

35. While the Commission welcomes legal clarity over criteria, about which it is concerned, regarding the potential for regression in the above exercise. Further, the Commission reiterates its concern of the flawed notion that matters, such as access to essential services and social protection, which constitute basic human rights, require to be "earned".

⁴⁸⁶ One measure of this could be for the Government to ascertain the proportion of EEA long-term residents in the UK who wish to accede to British citizenship.

⁴⁸⁷ *Making Change Stick: An Introduction to the Citizenship and Immigration Bill*, Home Office, July 2008.

⁴⁸⁸ *Ibid.*, p8; NB Public services in Northern Ireland are also devolved.

36. In relation to general rights to social security, the Commission draws attention to Article 9 of the ICESCR, to which the UK is a party. This should be read with Article 2(2) of the same Covenant which prohibits discrimination on the grounds of nationality. The respective ICESCR General Comment on the right to social security indicates that non-nationals should be able to access non-contributory schemes and that any restrictions, including a qualification period, must be proportionate and reasonable.⁴⁸⁹

37. There is reference in the Path to Citizenship consultation document to the Department of Health and the Home Office undertaking a joint review of the rules governing access to healthcare. Under Article 12 of the ICESCR everyone has the right to the highest attainable standard of physical and mental health. Article 2(2) of the same Covenant prohibits discrimination on the grounds of nationality. On the specific issue of primary and emergency medical care, the authoritative interpretation of the Covenant indicates that there should be no restrictions on entitlements in relation to nationality or residency or immigration status.⁴⁹⁰

38. Case law in the UK's domestic courts and the European Court of Human Rights also shows that access to healthcare has implications for the State's duties under Article 8 of the ECHR and, ultimately, Article 2 (the right to life) and Article 3 (the right to be free from inhuman or degrading treatment or punishment). Where migrants might be singled out for having certain forms of health care refused, Article 14 (the non-discrimination clause) is also engaged. Without having access to the detail of the joint review at this stage, the Commission can only remind Government of its obligations under international law and trust that Government will also consult on the implementation of the review in due course. It, of course, would not be acceptable for migrants and members of their families to be expected to pay for certain types of healthcare that could be life saving, that might be a danger to the public if not treated (for example, certain vaccinations) or that would lead to treatment by health professionals or immigration officials crossing the threshold of Article 3 ECHR.⁴⁹¹

Immigration enforcement duties on public sector

39. The Government response to the Path to Citizenship consultation document outlines the following proposal:

As now, temporary residents will have no access to social assistance, social housing or homelessness assistance. Additionally we are, in the context of the forthcoming Immigration and Citizenship Bill, looking at how information on those here unlawfully, obtained by local authorities when dealing with applications for housing and homelessness assistance, might be shared with UKBA, so that appropriate action, including removal from the UK where appropriate, can be taken.⁴⁹²

40. The intention of the proposal is to extend immigration officer duties to those dealing with persons presenting as homeless or otherwise seeking housing support. The Commission has previously expressed concerns regarding the impact of further imposing immigration control duties on public sector staff and fears that such a measure would deter vulnerable persons who have fallen into irregular status, or who are unsure of their status, from seeking essential support in this area from for fear of detention or deportation.

41. In Northern Ireland, a young Ukrainian woman suffered so severely from frostbite in December 2004 that she was forced to have both legs amputated. The case received wide media attention. Reportedly, the woman had been on a work permit but had lost her employment. In circumstances where indigent persons are at severe risk, the state has positive duties under Article 3 of the ECHR to prevent such persons from undergoing suffering of a kind that could engage Article 3. Such practice being adopted in the context of the Bill, may actively discourage migrants (including children) from accessing potentially life saving essential services and therefore engage human rights compliance.

PART 4: EXPULSION POWERS

Deportation of "non-UK citizen criminals"

42. The Commission set out, and reiterates its, concerns regarding the automatic deportation of "foreign criminals" in its briefings to the UK Borders Bill. The Commission argued that by imprisoning and then deporting foreign nationals, Government is punishing people twice for the same crime. Each case ought to be judged on its merits and not on a "one size fits all" approach when non-UK nationals are involved. Deportation is one of the most serious steps that any state can take against an individual within its territory, and it should not be applied automatically in any circumstance; proper consideration must be given to each case by an impartial judge not motivated by political considerations.

⁴⁸⁹ General Comment 19, 4 February 2008, UN Economic and Social Council, paragraph 37.

⁴⁹⁰ *Ibid.*

⁴⁹¹ The undertaking of a joint review of the rules governing access to healthcare by is referenced in paragraph 191 of the Path to Citizenship consultation document.

⁴⁹² *The Path to Citizenship: next steps in reforming the immigration system government response to consultation*, Home Office, July 2008, p20.

43. The current provision in relation to the expulsion of foreign criminals and members of their family includes exceptions under clauses 38 and 39. As the Partial Bill stands, this removes the exemption for Irish Citizens under Section 33 (1)(b) of the UK Borders Act 2007. Without prejudice to the Commission's overall concerns regarding blanket deportation, and, in general, the prospect of persons being returned to jurisdictions to which they have no ties, this could also lead to a circumstance where an Irish citizen resident and imprisoned in Northern Ireland is then expelled to the Republic of Ireland. It will be important to obtain clarification as to Government's intentions to this regard.

44. The Commission is aware of a number of unaccompanied minors coming to Northern Ireland and seeking asylum. The Commission is aware that unaccompanied minors are, for the most part, referred to as disputed minors by the UKBA; and, in one case, an individual, later confirmed to be a 15-year-old, spent eight days in a police custody suite. This "culture of disbelief" may lead to wholly inappropriate arrangements being made for individuals who are in fact children. The continuation of the provision whereby a minor's age is determined on the age of conviction by what the Secretary of State "thinks" their age is (clause 39(2)) is inappropriate.

PART 5: POWERS OF DETENTION AND IMMIGRATION BAIL

Extension of powers

45. Paragraph 27 of this submission earlier raises concerns regarding the sweeping powers in the Partial Bill to detain anyone in the UK for examination.

Immigration bail

46. Clauses 62 and 59 introduce immigration bail which includes reporting, residence, financial securities and electronic monitoring. A particular concern of the Commission, in regard to this proposal, is the subordination of the Tribunal to the Secretary of State (or an immigration officer acting on their behalf), in a range of matters. This includes a veto for the Secretary of State as to whether the Tribunal should grant immigration bail when a persons removal is imminent and there is no pending appeal (clause 62(2)(c)); no power for the Tribunal to cancel a bail condition imposed by the Secretary of State; the Secretary of State being able to amend and impose additional bail conditions after the Tribunal has granted immigration bail (clause 68); and only the Secretary of State, and not the Tribunal, being able to grant bail seven days from a person's arrival in the UK (clause 68(2)(b)).

47. It is inappropriate for a member of the executive to usurp functions of the judiciary. The Commission notes issues of human rights compliance transpiring when this has occurred. For example, the concerns of the UN as regards the subordination to a government minister, rather than an independent judge, of important aspects of control over inquires into murders in Northern Ireland under the Inquiries Act 2005. The UN urges the UK "as a matter of particular urgency" to conduct independent and impartial inquiries.⁴⁹³ This serves as an example of the inappropriateness of the Secretary of States' powers in relation to immigration bail.

Police powers to "designated officials"

48. The Commission expressed concerns, on the passage of the UK Borders Bill, at extended powers for immigration officers designated by the Secretary of State. This included giving immigration officers the power of arrest and detention at ports, for up to three hours, of anyone suspected of non-immigration offences pending the arrival of a police constable. The Commission noted that these are extraordinary powers for immigration officers to be given and potentially engage Articles 5 and 14 of the ECHR. The Commission maintains these concerns with their continuation in clause 57 of the present Partial Bill.

49. A particular concern was that the UK Borders Bill did not address the level of training immigration officers will be expected to undergo in advance of exercising such powers. The appropriate benchmark, given the nature of the powers, would be the training undergone by police officers and the Commission argued that detaining individuals, who are liable to arrest under the stipulated sections of the Police and Criminal Evidence Act 1984, or the Police and Criminal Evidence (Northern Ireland) Order 1989, should be left to police officers. The Commission expressed concerns that the Secretary of State may designate officers who he/she thinks are "fit and proper for the purpose and suitably qualified" and that given the nature of the powers that are to be extended to a civilian force, this Commission did not consider that the Secretary of State's opinion is a sufficient criterion. These concerns are maintained by the Secretary of States' powers to designate officials under clause 24 of the Partial Bill.

⁴⁹³ Concluding observations of the Human Rights Committee on the UK, Ninety-third Session, Geneva, 7–25 July 2008, para 9.

50. The Partial Bill will extend the powers beyond ports to international railway stations. This presently, in Northern Ireland, could mean the following stations: Belfast Central, Portadown, Newry, Lisburn, and Lurgan. The introduction of effectively a new and potentially inadequately skilled and inadequately accountable, group of officers with police powers into these Northern Ireland stations could have a range of human rights implications.

51. More generally, as the Committee will be aware there is also a particular policing context within Northern Ireland including specific contexts for human rights compliance, and different structures for oversight and accountability. The proposals indicate the examination of a proposal by ACPO for the introduction of a new police force into Northern Ireland, and the rest of the UK, as a free standing border police force. Government proposals will be outlined in a forthcoming policing green paper. Such proposals, if ever appropriate in relation to Northern Ireland, should be developed in the context of its particular policing circumstances.

General immigration control orders?

52. The Commission is alarmed at the potential implications of the Interpretation clause regarding the meaning of detention under the proposed Bill (clause 70). The clause seems reminiscent of the Control Orders regime and outlines that persons who *cannot* be subject to detention for a number of specified reasons will be treated as if they were out on immigration bail. The specified reasons are that a person who cannot be removed for “legal, practical or administrative resource reasons”.⁴⁹⁴ The impact is that a person is considered out on bail even though their detention under the Bill would be illegal. This is clearly inappropriate. As set out in clause 116 of the Partial Bill, breaching immigration bail conditions could lead to a level 5 civil penalty or up to six months imprisonment. Circumstances can be foreseen where an individual’s detention is illegal, but the individual is imprisoned for breaching an inappropriately imposed (and potentially impractical) immigration bail condition.

PART 9: ILLEGAL WORKERS

53. Clause 152 defines “illegal worker”. The Commission has concerns that this term is misleading, stigmatising and is not the term used in international standards, where terms such as irregular worker are used.

54. Clearly, while a person can be working without authorisation the person him- or herself is not “illegal”. It is a long established basic principle of human rights that everyone has the right to recognition everywhere, as a person before the law.⁴⁹⁵ The use of such terminology confuses matters regarding legal entrance to a jurisdiction and permission to take up employment. The vast majority of migrants entering the UK do so lawfully, remain lawfully and, if applicable, work lawfully. It is also the case that there are a range of reasons (including being victims of abuse) why persons fall into an irregular status. Further, the vast majority of unlawful work practices in the labour market do not involve migrants but include all those engaging in a range of forms of, for example, tax evasion. The use of the term “illegal worker” in this context leaves the impression that most unauthorised workers are migrants, and *vice versa*. Addressing the small overlap between migration and unlawful working by using a term like “illegal workers”, runs the risk of sending a message that the two issues are equally problematic and are, to an extent, the same issue. In responding to the consultation on irregular working, the Commission noted that there was no mention of the words “exploitation” nor “vulnerable migrants” in the proposals (although both terms were used once in the Ministerial foreword); however, the term “illegal” was used 65 times, conflating immigration with criminality rather than placing discussion of migration in a rights-based framework.⁴⁹⁶

55. The Partial Bill appears to largely replicate the measures introduced under the Immigration, Asylum and Nationality Act 2006. The Commission reiterates its concerns that there is little reference to ensuring the human rights of migrant workers in the pursuance of the stated aims. The areas of action singled out largely focus on sanctions or restrictions potentially impacting on the rights of migrants, rather than preventing unauthorised working through rights-based protection. The aims of the legislative proposals, of reducing irregular working, could be addressed through a range of alternative measures that carry with them less potential to interfere with human rights. Interventions to prevent irregular working must not be formulated so as to lead to destitution and impair access to fundamental socio-economic rights, particularly for vulnerable groups within the migrant worker population.

56. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as outlining rights in relation to favourable conditions of work, has a number of relevant provisions including Article 11 regarding the right of everyone to an adequate standard of living including adequate food, clothing and housing. The state has positive duties under Article 3 of the ECHR to prevent persons from undergoing suffering of a kind that could amount to inhuman and degrading treatment.

⁴⁹⁴ Clause 70 explanatory notes to Partial Bill.

⁴⁹⁵ Article 6, Universal Declaration of Human Rights.

⁴⁹⁶ *Prevention of Illegal Working—consultation on the implementation of new power to prevent illegal migrant working in the UK: Response of the Northern Ireland Human Rights Commission, Belfast, July 2007.*

57. Rights-based strategies should enable the state to pursue the legitimate aim of eliminating irregular working without violating the human rights of migrant workers. It is a basic principle of international standards that migrant workers should not forfeit rights in their employment in pursuance of that legitimate aim. Authoritative interpretation of ICERD in relation to application to non-citizens states:

... while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.⁴⁹⁷

58. The Commission's view is that the emphasis ought to be on removing the financial incentive for employers to take on workers in an irregular situation, and on addressing factors that can push employees into an irregular situation. We would urge the consideration of a human rights-based approach that focuses on tackling such causes of and incentives. This would include reduction of vulnerability to exploitation through equality of protection, access to social protection, measures to enhance fairness in decision making and more flexible migration systems.

59. There is a commercial incentive for rogue employers and agents to employ persons in irregular status. This partly arises from the current "doctrine of illegality" within UK employment law, that effectively means persons whose work becomes unauthorised have no access to employment rights and hence little or no comeback against malpractice. This paradoxically provides rogue employers with an incentive to push workers into irregular status in order to underpay workers or engage in other forms of exploitation. This is in the knowledge that migrant workers lack of recourse to employment rights, combined with the threat of denunciation to immigration authorities, means complaints are unlikely to be made let alone pursued. Provision of access to employment rights in such circumstances tackles the incentive to employ irregular workers and hence can reduce irregular working. While this does not preclude the state imposing sanctions on the irregular worker, it does retain their rights not to face exploitation and remove employer incentives to employ irregularly. Such remedies are referenced in the International Labour Organization (ILO) Multilateral Framework principles.⁴⁹⁸

60. In the Republic of Ireland, casework research has indicated a distinct pattern of exploited migrant workers having been pushed into irregular status. The Migrant Rights Centre Ireland (MRCI) documented 89 cases of workers who had sought assistance due to exploitation.⁴⁹⁹ Of these, 85 had entered Ireland under the work permits system, but 52 were either in irregular status or about to become so by the time they had approached the MRCI for assistance. Within Northern Ireland, while there is no similar statistical evidence in reference either to Work Permits or to those who are pushed into not registering with the Workers Registration Scheme, there is ample evidence that exploitation of migrant workers occurs.⁵⁰⁰ While the measures proposed involve stronger sanctions against employers, they do not provide corresponding protections for exploited workers, and this can increase vulnerability to exploitation and deterring persons from coming forward, contrary to the aims of the policy. This could render such interference neither proportionate nor legitimate.

61. The ILO guidance mentioned above—the ILO Multilateral Framework on Labour Migration—spells out the need to "[implement] policies that ensure that specific vulnerabilities faced by certain groups of migrant workers, including workers in an irregular situation, are addressed" (Guideline 4.4) and "[ensure] that labour migration policies are gender-sensitive and address problems and particular abuses women often face in the migration process" (4.5). The guidance recommends measures including "providing for effective remedies to all migrant workers for violation of their rights, and creating effective channels for all migrant workers to lodge complaints and seek remedy without discrimination, intimidation or retaliation" (10.5). Such standards are particularly relevant in the context of a significant number of exploited workers being in an irregular situation.

62. A further area for improvement is the quality of immigration decision-making. The Law Centre (Northern Ireland), in response to a previous consultation, voiced "significant concerns" about the quality of decision-making. It noted that 33 to 40 per cent of appeals against a decision to refuse an extension of leave to remain are successful or, in other words, incorrect decisions were made in the first instance. It is reasonable to suppose that if the system is perceived as unfair, this increases the likelihood of irregular working. It is significant that the Law Centre (NI) also noted the lower success rate of appeals made when outside the UK.⁵⁰¹ Therefore, the proposals for "tougher checks abroad" may exacerbate this.

63. Realistically, migrant workers will almost certainly arrive in areas where there is a demand for their labour; they will arrive through official channels or, if that opportunity is denied, through irregular means. Equally, employers will always source migrant workers when there is an unmet demand for labour, through official channels or, if such channels do not exist, through irregular means. Systems which place burdens on

⁴⁹⁷ Paragraph 35 General Recommendation No 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

⁴⁹⁸ ILO, *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, Geneva, 2006, para 11.3.

⁴⁹⁹ MRCI, *Briefing Paper: Migrant workers who become undocumented in Ireland*, Dublin, 2006.

⁵⁰⁰ See for example: McVeigh R, *Migrant Workers and Their Families in Northern Ireland: A Trade Union Response*, Irish Congress of Trade Unions, Belfast, 2006.

⁵⁰¹ Law Centre (NI), *Submission on Selected Admission: Making Migration Work for Britain*, Belfast, December 2005.

migrant workers or employers that are perceived as unnecessary, disproportionate and not for a legitimate purpose are likely to lead to significant numbers of migrant workers and employers establishing informal irregular arrangements. In reducing irregular working, there is a need to ensure that systems are sufficiently flexible to meet demand for labour, and are fair and proportionate so as not to place unnecessary or disproportionate burdens that may impair the rights of migrant workers.

64. There is evidence that many migrant workers are unaware of regulations they face. Research into the experiences of the Lithuanian migrant worker population in Northern Ireland has indicated that many were unaware of the Worker Registration Scheme.⁵⁰² Not registering carries sanctions of removal of the right to work and removal of the right to social protection. The Commission would, therefore, welcome a commitment to ensuring the availability of adequate and accessible information on regulations faced by migrant workers. Such information should also contain, or signpost, information on the rights of migrant workers.

65. The inclusion under clause 155 of the issuing of a Code of Practice to prevent unlawful discrimination in recruitment practices is welcome. However, such guidance is only likely to prevent racial discrimination in the course of implementing duties to check documents if it is given the same prominence in publicity and implementation campaigns and all other contexts as the duties themselves. Otherwise, it is likely employers will become much more aware of the duty to check than of the duty not to discriminate.

PART 10: APPEALS

Grounds for appeal

66. The Commission notes that consultation is currently underway on the immigration appeals process. The Commission urges that no regressive steps are put in place as regards the right to appeal, grounds for appeal and onus of proof requirements.

FURTHER PROVISIONS

Fee charging powers: "An immigrant tax?"

67. A proposal that may be further outlined in the Full Bill is the double taxation of non-EEA migrants and immigrants for public services to which they may (or may not) be entitled. Inclusion of this matter in the Bill is referenced in the introductory document as "ensuring migrants contribute a little extra to the cost of local services".⁵⁰³ At present, clause 190(4) of the Partial Bill empowers the Secretary of State to charge a fee for immigration and nationality-related applications that is over and above the cost of processing the application (and related services / processes), although the explanatory notes do not make explicit reference to this power being used for this purpose and thus detail remains unclear. The proposal was outlined in greater detail in the Path to Citizenship consultation document as a fund to "help alleviate the transitional pressures that migration can bring". The manner in which monies would be raised was stated as:

... through increases to certain fees for immigration applications, with migrants who tend to consume more in public services—such as children and elderly relatives—paying more than others. We will work closely across Government to develop a clear and transparent methodology for the appropriate surcharge.⁵⁰⁴

68. The Government response to the Path to Citizenship consultation retains the proposals indicating that the immigrant tax will apply each time an immigration fee is charged (and as such will not apply to EEA nationals or refugees), and that migrants who bring dependants will pay an additional fee per dependant.⁵⁰⁵

69. While arguing that the fund is to alleviate pressures from migration the Path to Citizenship consultation document actually quotes research by the Institute for Public Policy Research (IPPR) showing clearly that migrants have a positive influence on public finances. The Commission welcomed the inclusion of this research but raised concerns that the proposal by Government, in fact, discounted it in favour of the unsubstantiated claim that migrants bring with them a transitional pressure on public services. Should Government wish to present evidence of "transitional pressure", it is difficult to see how this can be blamed on migrants accessing services they are entitled to and paying taxes for. There is a danger, in this regard, that Government is leaving itself open to accusations of scapegoating (non-EEA) migrants for problems that are in fact a product of inadequate and flexible planning by the state in relation to largely EEA-migration.

⁵⁰² Sannino P and McAliskey B, *A Pilot Study of the Self-Identified Needs of "Migrant Worker" Populations in the Armagh-Dungannon Area*, South Tyrone Empowerment Programme, 2005.

⁵⁰³ *Making Change Stick An introduction to the Immigration and Citizenship Bill* Home Office July 2008 p4 Managing Local Impacts

⁵⁰⁴ The Path to Citizenship: next steps in reforming the immigration system, Home Office, February 2008, paragraph 207

⁵⁰⁵ The Path to Citizenship: next steps in reforming the immigration system—government response to consultation, Home Office, July 2008 p24

70. The proposal appears to overlook the fact that migrants through payment of exactly the same taxes as citizens are already paying for public services and social protection. An approach expecting that (non-EEA) migrants should pay twice for services they are receiving is out of line with international standards.

71. In relation to migration for employment, the UK is a party to the International Labour Organisation Convention C97. Article 6 of C97 is a non-discrimination clause, in which the state commits to treatment no less favourable than that which it applies to its own nationals for immigrants lawfully within its territory in relation to a number of matters including “employment taxes, dues or contributions payable in respect of the person employed”.⁵⁰⁶

72. A relevant core UN instrument (in relation to migrant workers and their families) is the ICRMW.⁵⁰⁷ While the UK is yet to ratify to this instrument, it nevertheless provides authoritative guidance as to international standards. Article 48 states:

1. Without prejudice to applicable double taxation agreements, migrant workers and members of their families shall, in the matter of earnings in the State of employment:
 - (a) Not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances;
 - (b) Be entitled to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families.
2. States Parties shall endeavour to adopt appropriate measures to avoid double taxation of the earnings and savings of migrant workers and members of their families.

73. In specific reference to social security, a General Comment on the ICESCR, to which the UK is a party states:

Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.⁵⁰⁸

74. The UK is a party to the European Social Charter, in relation to migrant workers from other (Council of Europe) member states. Article 19(5) states:

[the state party undertakes] to secure for such workers lawful within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons.

75. Contrary to this position, the proposals, as set out above, entail dual taxation of migrants, including migrant workers, for services. Further, the implication from the proposals is that it is those with the highest number of dependants bringing the greatest pressure. This suggestion can be compared to the “poll tax” proposals, where families are charged “per head” for the consumption of public services and where it is the already seriously disadvantaged that are most adversely affected. Dependants and, in particular, children of migrants have their own inalienable rights under the UN Convention on the Rights of the Child: rights that are not dependent on their immigration status or that of their parents or, indeed, on the economic contribution of their parents. The simple fact is that working migrants already pay taxes that are intended to fund public services. Where any transitional pressures are identified, these ought to be funded in exactly the same way that additional pressures emerging from any other large family or vulnerable group of individuals are.

76. In relation to the proposal, Government has indicated that:

... public antipathy to migration can be driven by a perception of unfairness, in that some migrants are perceived to receive more from the state than they contribute—and this can adversely affect community cohesion.⁵⁰⁹

77. The Commission is aware that such perceptions occur within Northern Ireland. For example, until the recent perceptions as to the causes of house price increases were sharply changed by the “credit crunch”, there were a number of instances, including racist attacks, where migrants were being blamed for rising house prices. The Commission, however, reiterates that, when speaking of perceptions, the appropriate response is to actively challenge them, rather than allowing perceptions to drive policy.

⁵⁰⁶ Migration for Employment Convention (Revised), 1949.

⁵⁰⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly resolution 45/158 of 18 December 1990.

⁵⁰⁸ General Comment 19, 4 February 2008, UN Economic and Social Council, para 36.

⁵⁰⁹ *The Path to Citizenship: next steps in reforming the immigration system—government response to consultation*, Home Office, July 2008, p22.

ID cards

78. The Commission’s view is that the National Identity Register and linked ID cards unduly infringe the right to privacy under Article 8 of the ECHR. The fact that the different regime set out in the UK Borders Act 2007 (UKBA 2007) only applies to non-EEA nationals engages Article 8 along with Article 14 (non-discrimination).

79. Government intends to repeal the UKBA 2007 under the Full Bill but, in the absence of any indication to the contrary, clearly intends to replicate or even extend its provisions within the same. Measures under “locking down identity” include “one comprehensive power for UKBA to obtain biometrics from classes of individual it needs to”.⁵¹⁰

80. The Commission would like to see the new Act withdrawing the identity cards scheme for non-EEA migrants introduced by the UKBA 2007. The Commission is deeply concerned as regards the general potential of the National Identity Register and its linked ID cards, particularly in Northern Ireland, to exacerbate racial discrimination. This danger is markedly increased by the different NIR Identity Card scheme set out in the UKBA 2007 to the scheme for other UK residents set out in the Identity Cards Act 2006 (the 2006 Act). Without prejudice to our overall opposition to the scheme, the present Bill could remove the directly discriminatory aspects of the ID cards regime by removing UKBA 2007 provisions that are different to the 2006 Act. Such differences include:

- Children are subjected to the ID cards regime under the UKBA 2007 (The scheme for other UK residents under the 2006 Act is for over 16s).
- Compulsory Registration: The level of compulsion for registration is absolute in the non-EEA migrants UKBA 2007 scheme.
- The UKBA 2007 scheme for non-EEA migrants is backed by a severe sanctions regime incorporating civil penalties (fines) and immigration sanctions including an obligation to effectively leave the country.⁵¹¹ There is also the sanction of not issuing an ID card. Sanctions apply in relation to compulsion to register,⁵¹² maintain data and use the card in particular circumstances.⁵¹³
- The 2006 Act contains the power to allow the provision of public services to be conditional on identity checks. In the 2006 Act this excludes public services which are provided for free. However, such services compulsory registration.⁵¹⁴
- There are protections in the 2006 Act against requirements produce actual identity cards for matters other than public services or when alternatives are not available. However, the legislation exempts non-EEA migrants and others subject to compulsory registration from these protections.⁵¹⁵

Overview of UK Border Agency in Northern Ireland

81. The Full Bill also proposes to legislate to extend the Office of the Police Ombudsman for Northern Ireland (OPONI) to investigate malpractice by UKBA staff.

82. The Commission strongly supports this and has in the past urged for legislative changes enabling the OPONI to investigate complaints against UKBA staff to be introduced as a matter of urgency. The Commission awaits the proposals and urges that:

- the powers given to the OPONI should not be inferior to the comparative powers given to the Independent Police Complaints Commission (IPCC) in England and Wales;
- that the OPONI should be properly resourced to carry out the function and should not be expected to redirect its existing resources;

⁵¹⁰ *Making Change Stick: An Introduction to the Immigration and Citizenship Bill*, UK Borders Agency 2008, p8.

⁵¹¹ Immigration sanctions are, namely, the “disregarding” or refusal of an application to enter or stay in the UK, or a variation (curtailment) or cancellation of a person’s existing permission to enter or remain in the UK. The basic penalty for initial failure to comply with a primary requirement will be one-quarter of the maximum statutory penalty (currently £1,000). See: *Code of Practice Compulsory Identity Cards for Foreign Nationals*, Home Office consultation document, February 2008.

⁵¹² For persons compelled to register, this can encompass being subjected to interview, photographing, fingerprinting, other biometric information and to “otherwise provide” unspecified “information” required by the Secretary of State (See: Section 7 of the *Identity Cards Act 2006*).

⁵¹³ The *Code of Practice Compulsory Identity Cards for Foreign Nationals*, Home Office consultation document, February 2008 references duties to report lost, stolen, altered or damaged cards, when information has become false or misleading or incomplete, and a requirement to “comply with any other requirement specified in the biometric registration regulations” it also references “the requirement to use the card in particular situations” however, these circumstances are not set out in the document; Section 5(1). *UK Borders Act 2007*, provides powers for Ministers to make regulations requiring the use of the ID card for non-EEA migrants, and to disclose personal information for immigration purposes or other “specified” circumstances where a “question arises” about a persons status in relation to nationality or immigration.

⁵¹⁴ *Identity Cards Act 2006*, Section 13(2).

⁵¹⁵ *Ibid*, Section 16(2)(3).

- and that the OPONI powers to investigate complaints should not be restricted to a threshold of serious incidents

In relation to the latter, a broad remit would mean that the OPONI would be in a position to identify potential systemic problems in the way in which BIA staff carry out their duties.

Family visitor sponsorship

83. Government has indicated that the Full Bill will have provisions in relation to sponsoring family visits, namely, to “make sure that sponsors obtain a licence and face sanctions including civil penalties and jail if rules are broken”.⁵¹⁶ These measures were consulted on in the Visitors Consultation Paper of 2006. The Commission questioned the necessity and proportionality for such measures which engage Article 8 of the ECHR (right to family life) and Article 14 of the ECHR (non-discrimination) and raised issues including:

- Opposing any regressive steps that make it more difficult, either through increased cost or requirements, for persons to have contact with their family members.
- Urging a flexible approach whereby visitor categories are not over defined or restrictive to individual circumstances, arguing categorisation of separate visitor visas will create its own problems whereby visitors visit the UK for more than one reason. For example, an applicant who wishes to do tourism in London and who then spends the weekend visiting family in Belfast? If a simpler tourist visa is applied for, will the individual be sanctioned if “caught” also visiting family members?
- In relation to the definition of a family member, in addition to the categories listed in consultation there may be other persons who have genuine family ties. ECHR case law has held establishing such ties are a question of fact and degree and has indicated in particular circumstances foster parents, step parents, adoptive relationships and cohabitantes as constituting family relationships. Clearly there also needs to be cultural competence in decision making on what constitutes close family ties given cultural differences in family groupings.
- Government is proposing to ban any one other than British citizens and those with indefinite leave to remain in the UK from acting as a sponsor for a family visitor. The Commission opposes as both disproportionate and discriminatory any attempt to impose an effective blanket ban on persons of other nationalities on ever receiving a visit from family members whilst temporarily resident in the UK.

November 2008

Memorandum submitted by NO2ID

A. INTRODUCTION

Basis for this submission

1. This submission to the Joint Committee on Human Rights (JCHR) has been prepared by members of the UK campaign against ID cards and the database state, NO2ID. It follows the call for evidence issued by the JCHR by press notice on 31st July.

2. NO2ID volunteers have examined the provisions and practical implications of the draft Bill, discussing it with and—where appropriate—taking advice from legal experts, organisations representing sections of society that may be particularly affected, and concerned individuals. This submission therefore represents a distillation of the views from a significant and informed sample of the public.

About NO2ID

3. NO2ID is a UK-wide, non-partisan, cross-party campaigning organisation opposing “ID cards” (now more accurately identified as the National Identity Scheme) and the database state. NO2ID has no position on the merits or otherwise of immigration and does not campaign for or against immigration controls per se.

4. NO2ID was founded in 2004 in response to the Government’s stated intention to introduce the compulsory registration and lifelong tracking of UK residents by means of a centralised biometric database, and was constituted as an unincorporated association in September 2004. The campaign brings together individuals and organisations from all sections of the community and seeks to ensure that an informed case against state identity control is put forward in the media, in national institutions and among the public at large.

⁵¹⁶ *Making Change Stick: An Introduction to the Immigration and Citizenship Bill*, UK Borders Agency 2008, p8

5. NO2ID is supported by Parliamentarians and members of all parties and more than 140 organisations, including trades unions, political parties, local authorities, NGOs and special interest groups have made formal statements supporting the campaign. More than 55,000 individuals have registered their support.

6. NO2ID is funded by membership fees, occasional merchandise sales and fundraising events, as well as grants from the Joseph Rowntree Reform Trust Ltd, the Andrew Wainwright Reform Trust Ltd and individual and corporate donations. Aside from our small London-based office, the campaign is staffed entirely by volunteers and we have a large, established and active network of local groups across the UK.

B. SCOPE OF THIS SUBMISSION

7. NO2ID does not have expertise or any particular position on immigration law per se. No2ID is concerned with any legislation that provides for the labelling and numbering of British residents in order to collect information about them. We have consistently argued that mass surveillance alters the relationship between citizen and state. Though it appears to be being sold as an “immigration” measure, we note that it is admitted in the title and implicit throughout the draft that this bill is intended to alter the liberties of citizens as well as other residents.

8. We also note that though this draft Bill is offered up as codification and “simplification”, it radically alters even the basic terminology of a highly technical and highly contested area of law that has been the subject of an Act a year, more or less, for a decade; and that it seeks to repeal and replace in their entirety no fewer than 10 Acts of Parliament including the UK Borders Act 2007, much of which has yet to be brought into effect. As a result its effects are likely to be complicated and hidden. Our comments in this submission should not be taken as more than a preliminary indication of the danger areas in the proposals.

9. NO2ID notes that this is only a partial Bill and that further topics are “not yet drafted”. That these include “powers (of arrest, entry, search, etc.); data-sharing; biometrics; asylum support and access to public funds” [our emphasis] is of extreme concern to the campaign. As with the UK Borders Act 2007⁵¹⁷, we see a concern with data-sharing and biometrics as being allied to a general administrative fashion and larger administrative plans and that little attempt is made to justify them as specifically necessary in this connection.

10. That even early drafts are unavailable for scrutiny of such fundamental powers, and the ones through which the liberties and human rights of British residents and visitors will be most directly affected is surprising in what is also presented as a codification measure. Is it intended that these powers should be significantly different from the existing ones in similar legislation? The radical changes of principal incorporated in the clauses that have been presented suggests it may be. We sincerely hope the Committee will call again for evidence when these clauses are eventually published.

11. We wholeheartedly support the Committee’s previous conclusions⁵¹⁸ concerning the danger presented to Article 8 rights by the unprecedented collection and sharing of personal data, and the problem of applying the administrative provisions of the National Identity Scheme in a non-discriminatory fashion (Article 14). NO2ID suggests that these conclusions apply with equal force to the collection and sharing of personal information on the pretext of administering citizenship or immigration status..

12. Official documents leaked in January 2008 confirm it is the intention of the Home Office to use “various forms of coercion” to register people during the early years of the National Identity Scheme. We take the government’s recent promotion of residence visas for non-EEA nationals, issued under the UK Borders Act 2007, as “ID cards for foreign nationals” to illustrate a use of misdirection in the legislative process (that Act having been itself promoted as modernisation of visas), as well as a disturbing appeal to xenophobia.

13. NO2ID believes that these statements and behaviour alone warrant the most careful scrutiny of legislation and regulations drafted in this area. A “simplification” process that introduces sweeping powers which affect the rights of virtually the entire population one way or another deserves no “benefit of the doubt”. The government has shown that it will in practice take the widest possible interpretation of its powers. In the case of this Bill, those powers would be very wide indeed.

⁵¹⁷ See NO2ID’s briefing on the UK Borders Bill, February 2007
<http://www.no2id.net/IDSchemes/NO2IDUKBordersBillBriefingFEB2007.pdf>

⁵¹⁸ Fifth Report of the Session 2004–2005, 26 January 2005, HL 35/HC 283

C. SPECIFIC CONCERNS

The effect on British citizens

14. NO2ID believes the draft Bill represents a massive change to common law rights and culture disguised as codification. It includes provisions which, if implemented, would have serious consequences not only for people from other countries living in or visiting the UK, but also British citizens.

15. Clause 1 appears to reverse the fundamental principle that British citizens are entitled to enter the UK, since it makes the right of entry of British citizens to the UK wholly dependent on the proof provided by a valid passport or ID card. It declares a freedom of movement for British Citizens solely in order to undermine it in subclause (2). In essence the Home Office would be able to lock you out of the country merely by choosing to invalidate documents that it controls absolutely—though Committee members might consider casual incompetence or fraud more likely, the effect for the individual would be the same.

16. Furthermore, any failure of your documents would place you in precisely the same position as a foreign national. This, under clause 22, would mean that a problem with your passport⁵¹⁹ could mean you are deemed not to have “entered” the UK and could therefore either be returned (to where?) or kept in immigration detention without remedy.

17. Another, potentially even more fundamental, change is introduced by clauses 1(3) & (4) in that any person who claims to be a British citizen is required to prove this by production of a passport or identity card.

18. When might they be required to prove it? Clause 25, for example, provides that any individual, whether British or not, and whether they actually wish to enter the UK or not, could be forced to submit to a medical examination at the whim of the Home Secretary. This power would be exercised by the Secretary of State giving notice to the person, but there is neither sign of a reasonableness requirement nor regulation of those officials who exercise these powers to identify themselves, give written explanation of the reason the person was stopped, etc.

19. Clause 26 would similarly mean that officials could check whether a person is British on the way out of the country, despite the assertion in section 1 that British citizens are “free” to enter, leave or stay in the UK. The Bill as drafted seems to provide for an unquantifiable amount of hassle and official oversight in the exercise of this freedom.

Hotel registration

20. Clause 30 would empower the Home Secretary to require hotels and other lodgings to keep records of people, “whether or not they are a British Citizens”, and require them—on pain of a £5,000 fine or year in prison—to provide the information to an as-yet-unspecified list of people such as the Secretary of State considers “expedient”.

21. This represents an extraordinary intrusion into private life, and begs all sorts of questions about what the definition of “staying” might cover, who one could also have in one’s room without registering, etc. The broader effects of this particular section clearly have nothing to do with either immigration or citizenship.

Employment

22. Clause 154 may appear to be intended to prevent illegal working but, in practice, it could require all British citizens to provide proof of their entitlement to work by means of a “designated” document. This would effectively require all UK citizens to produce an identity card or other document of the Home Secretary’s choosing to their employers, and could therefore be used as a means of indirect compulsion into the national identity scheme. Lack of an ID card or passport could mean a practical inability to gain legal employment.

23. Given the significant increase in the civil penalties for employing an illegal worker, one likely side effect of this is some employers being reluctant to employ British workers of “foreign” name or appearance or foreign national workers “just to be on the safe side”.

Effective compulsion to carry and show ID cards

24. On 28 June 2005, during the passage of the Identity Cards Act 2006, the Home Secretary, Charles Clarke MP, promised that there would be no requirement to carry an identity card.⁵²⁰ He also said that the introduction of identity cards would not increase police powers to stop people in the street. He said nothing with regard to other officials, including immigration officers.

⁵¹⁹ The microchips embedded in the new “biometric e-Passports” have only a 2 year manufacturer’s warranty, despite the ten year lifetime of the passport.

⁵²⁰ Hansard, 28 Jun 2005 : Column 1157

http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo050628/debtext/50628-08.htm#50628-08_spnw5

25. On 5 February 2007, during the passage of the UK Borders Act 2007, the Minister for Borders and Immigration, Liam Byrne MP, said that there was no intention to stop people in the street to ask them to produce an identity card, or other documentation, so as to prove their nationality. He said that doing this would be an arbitrary exercise of power.⁵²¹

26. The draft Immigration and Citizenship Bill therefore includes provisions which are not consistent with the reassurances the government has previously given:

- Clause 25 would empower an immigration officer or other Home Office official to examine someone in order to establish whether they were British or not. The official could do this at any place in the UK, since it is applicable under 1(b) “if P has entered the United Kingdom” The power is not limited to immigration controls at the point of arrival to or departure from the UK. There is no criterion of reasonable suspicion or reasonableness of any kind. The official could be a police officer or any other person to whom the Home Secretary chose to grant the relevant power (cl.24).
- Clause 28 would empower the official to require the person to produce a “valid identity document”, which we note is different from proof of nationality, entitlement to residence, or even identity. One would expect an identity card to be deemed a “valid identity document”, but the implication here is clear: the Home Office will seek to decide what documents will be valid.⁵²²
- Clause 53 would empower the official to detain the person until the examination is completed, meaning until the official has been satisfied. The person might therefore be detained until an identity document was produced. There are clearly human-rights implications in arbitrary detention for questioning, and identification, which this amounts to.

27. These powers apply to anyone who has “entered” the UK—whether they are British or not. As currently drafted, the only people who would be exempt would be British citizens born in the UK who have never left the UK. However, it is impossible to see how in practice these powers could be exercised in a way that could take account of this distinction.

28. Effectively, therefore, these powers would do the reverse of what the government has promised. Anybody in the UK could expect to have to carry an identity card or other approved “identity document” and produce it on demand for a class of officials. It would not be a breach of the law to fail to carry a card, but someone who did not carry his or her identity card would be at risk of being stopped and detained until such time as the card was produced.

29. We note that, although these provisions would not make failing to carry an identity card a criminal offence, they do include significant offences:

- Clause 101(1) provides that someone who fails or refuses to submit to an examination commits a criminal offence, which could result in imprisonment for up to 51 weeks;
- Clause 121(1) provides that someone who obstructs or resists an official carrying out an examination commits a criminal offence, which could again result in imprisonment for up to 51 weeks.

Refusing to produce an identity card or other prescribed document if one had one could fall within either of these offences.

D. FURTHER INFORMATION

30. We have tried to indicate some human rights problems we believe ought to be examined by the Committee and which form part of NO2ID’s particular remit. This submission is not intended to be an exhaustive list of such problems. We will naturally provide what further information we can and would be happy to suggest expert witnesses if requested.

31 October 2008

Memorandum submitted by the Refugee Children’s Consortium

Members of the Refugee Children’s Consortium are: Action for Children, The Asphaleia Project, AVID (Association of Visitors to Immigration Detainees), Bail for Immigration Detainees, Barnardo’s, BASW (British Association of Social Workers), British Associations for Adoption and Fostering (BAAF), Children’s Legal Centre, Child Poverty Action Group, Children’s Rights Alliance for England, The Children’s Society, The Fostering Network, FSU (Family Service Units), The Immigration Law Practitioners’ Association (ILPA), The Medical Foundation for the Care of Victims of Torture, National

⁵²¹ Hansard, 5 Feb 2007 : Column 596

<http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070205/debtext/70205-0007.htm#0702053000652>

⁵²² It would not be surprising if that class were to converge over time with documents that had been designated under s4 of the Identity Cards Act 2006, each of which would be equivalent to an identity card, being itself registered in an individual’s entry on the national identity register.

Care Advisory Service, National Children's Bureau (NCB), NSPCC, Redbridge Refugee Forum, Refugee Council, Refugee Arrivals Project, Refugee Legal Centre, Scottish Refugee Council, Save The Children UK, Student Action for Refugees (STAR), Voice and Welsh Refugee Council. The British Red Cross, 11 MILLION (Office of the Children's Commissioner for England), UNICEF UK and UNHCR all have observer status.

1. EXECUTIVE SUMMARY

1.1 The Refugee Children's Consortium asks the Committee to consider the needs of children under the proposals in the Draft (Partial) Immigration and Citizenship Bill; and to do so in context of:

- The recent removal of the general reservation of the UN Convention on the Rights of the Child relating to immigration and citizenship⁵²³ and the concluding observations of the UN Committee on the Rights of the Child.
- *Every Child Matters*.⁵²⁴
- The new duty to safeguard and promote the welfare of children when discharging immigration and nationality functions (cl 189); and the current duty (and forthcoming Code of Practice to Safeguard Children) under s 21 UK Borders Act 2007.

1.2 The measures outlined in the Draft (Partial) Bill at every stage of the immigration process will have a significant impact on children over and above that on those seeking asylum more broadly—for example in relation to powers of immigration officers, immigration offences, exclusion orders, reporting and residence requirements, detention and destitution. We would welcome the Committee's recognition that the current asylum system is failing to meet children's needs or protect their rights and that there is a risk that many of the provisions in the Bill will exacerbate rather than ameliorate this situation. The aim of simplification must not be allowed to have the unintended consequence of weakening protections where they do currently exist for children; and where the proposed immigration legislation is identified as coming into conflict with existing child welfare legislation the latter should take precedent.

2. INTRODUCTION

2.1 The Refugee Children's Consortium (RCC) is a group of NGOs working collaboratively to ensure that the rights and needs of refugee children are promoted, respected and met in accordance with the relevant domestic, regional and international standards.

2.2 The Refugee Children's Consortium asks the Committee to consider the needs of children under the proposals in the Draft (Partial) Immigration and Citizenship Bill. The RCC starts from the position that child refugees and children seeking asylum are children first and foremost and must be afforded the same rights and protection as any other child in the UK. We believe that any proposals for this group of children must be judged against international obligations, notably the UN Convention on the Rights of the Child (CRC). The Government has recently removed the immigration reservation. The reservation was widely criticised, including by the JCHR in 2003 which concluded that it legitimised unequal treatment of asylum seeking children.⁵²⁵ This welcome move will require the Government to fulfil Article 22 which provides for protection and humanitarian help to children claiming asylum and refugees, and implement all provisions of the CRC in relation to this group of children.

2.3 On 3 October 2008, the UN Committee on the Rights of the Child published their concluding observations.⁵²⁶ In relation to asylum-seeking children they recommended that the UK:

- “intensify its efforts to ensure that detention of asylum-seeking and migrant children is always used as a measure of last resort and for the shortest appropriate period of time, in compliance with article 37 (b) of the Convention;
- ensure that the United Kingdom Border Agency (UKBA) appoints specially-trained staff to conduct screening interviews of children;
- consider the appointment of guardians to unaccompanied asylum-seekers and migrant children;
- provide disaggregated statistical data in its next report on the number of children seeking asylum, including those whose age is disputed;
- give the benefit of the doubt in age-disputed cases of unaccompanied minors seeking asylum, and seek experts guidance on how to determine age;

⁵²³ DCSF Press notice, 22 September 2008 http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2008_0209

⁵²⁴ Cm 5860, September 2003. The equivalent strategy documents in Scotland and Northern Ireland are *Getting it Right for Every Child and Children and Young People—Our Pledge: A ten year strategy for children and young people in Northern Ireland 2006–2016*, respectively.

⁵²⁵ Joint Committee on Human Rights Tenth Report of Session 2002–03, *The UN Convention on the Rights of the Child*, HL Paper 117/HC 81, paragraphs 81–87

⁵²⁶ Committee on the Rights of the Child, 49th Session, unedited concluding observations, 3 October 2008 <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

- ensure that when return of children occurs, this happens with adequate safeguards, including an independent assessment of the conditions upon return, including family environment;
- consider amending section 2 of the 2004 Asylum and Immigration (Treatment of Claimants etc.) Act to allow for an absolute defence”

The RCC agrees with all of these recommendations, and urges the Committee to make reference to these in their scrutiny of the Draft Bill.

2.4 Proposals for children in the immigration process should also be judged against the Government’s own standards, priorities and outcomes for all children as set out in *Every Child Matters* (Cm 5860, Sept 2003): to ensure that all children are supported to be healthy, stay safe, enjoy and achieve, make a positive contribution and enjoy economic well-being. These outcomes should be the aspiration for all children regardless of their immigration status.

2.5 The RCC has long campaigned for immigration officials to safeguard children and promote their welfare—akin to the duty in s11 Children Act 2004 which covers other statutory bodies, but excludes the immigration service. The JCHR has supported this recommendation to “help redress this unequal protection of the human rights of asylum seeking children”.⁵²⁷ Section 21 UK Borders Act 2007 established a Code of Practice to safeguard this group of children, and cl 189 of the Draft Bill would go further to both safeguard and promote welfare. Whilst we welcome this clause which came about as a direct result of our continued lobbying, we want to ensure that it will protect children in line with the Children Act principles that underlie s 11 and its accompanying guidance. We would also like to see clarification on a number of issues in cl 189:

- Currently there is no direct reference to guidance under this clause. We would like to see guidance (or secondary legislation) jointly drafted by the Department for Children, Schools and Families and the Home Office to give effect to the intention behind this clause, current s11 guidance and any later advancements to the s 11 guidance
- The Draft Bill would repeal s 21 UK Borders Act 2007, to be replaced with the provisions in cl 189. The Code of Practice, shortly to be laid before Parliament, under s 21 must pave the way for both the safeguarding and the welfare duty so that there is a smooth transition
- Clause 189 refers to “designated officials” and is limited to “children who are in the United Kingdom”—the RCC believes that this should apply to the Secretary of State and all immigration officials including entry clearance officers, those at juxtaposed controls, and those who are working for contracted out companies and services.

2.6 The principles of the UN Convention on the Rights of the Child, *Every Child Matters* and the new duty to safeguard and promote the welfare of children should be the foundation of any consideration as to how the proposals in this Draft Bill (and the full Bill) will impact on children.

2.7 The Draft Bill as published is partial, and does not contain provisions on powers (of arrest, entry, search), asylum support and other matters. Our evidence takes into account the Government’s policy proposals for the remainder of the Bill as set out in the Green Paper *The Path to Citizenship: Next Steps in Reforming the Immigration System*.

3. IMMIGRATION OFFICIALS’ POWERS

3.1 Most of the powers in relation to immigration officials—in particular arrest, entry and search—have not been included in this Draft (Partial) Bill. We recommend that when these clauses are introduced special provision is included for children to ensure that their safety, protection and welfare needs are met. Powers to search, use reasonable force and detain should only be situated within a fully accountable, trained statutory authority; and if these are to be contracted out to private bodies further safeguards would need to be introduced. We agree with the JCHR’s previous recommendations that immigration officers exercising powers of detention, search and seizure should be subject to PACE Codes of Practice and additional training.⁵²⁸

4. REGULATION OF ENTRY INTO AND STAY IN THE UK (PART 1)

4.1 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. Section 16 gives the Secretary of State the power to impose reporting and residence requirements on those with discretionary leave, humanitarian protection and refugee leave. It provides for conditions such as curfews or a requirement to live in a particular location.

In debates during the passage of the UK Borders Act 2007 the then Minister, Liam Byrne MP indicated that initially they intended to apply this measure to unaccompanied asylum seeking children—“we intend to use those powers for categories of people with whom we are keen to stay in close contact, such as unaccompanied asylum-seeking children, so that as they become removable, we can seek to remove them”.⁵²⁹ The Refugee Children’s Consortium (RCC) opposes the application of section 16 to children, contending

⁵²⁷ Joint Committee on Human Rights Thirteenth Report of Session 2006–07, *The Treatment of Asylum Seekers*, Para 1.38

⁵²⁸ Joint Committee of Human Rights, Thirteenth Report of Session 2006–07, *Legislative Scrutiny: Sixth Progress Report*, Paras 1.6–1.19

⁵²⁹ Hansard, House of Commons Official Report, Vol 456, No 40 Monday 5 February, Column 600

that the Government's rationale for doing so was flawed and that it would not achieve its intended aims. By subjecting young people to a reporting regime during this period the Government contends that it makes it easier to remove them. However, the great danger is that faced with these requirements, large numbers of children will be too frightened to comply resulting in increasing numbers disappearing from care to face possible sexual or economic exploitation on the streets. This would not only have the opposite consequence to that intended by the Government but would also seriously undermine the legal duty and moral commitment they have to safeguard all children.

4.2 As currently drafted, provisions in the proposed legislation make the implications of subjecting children to such residence and reporting conditions even more serious. A one-off failure to report however inadvertent, minor or explicable would, provide a ground for the child's expulsion with no right of appeal; future exclusion from the UK for a period of time (as yet unspecified)—see clause 37(2)(a); and may constitute a criminal offence—see clause 99.

5. EXPULSION ORDERS AND REMOVAL ETC FROM THE UK (PART 4)

5.1 Expulsion Orders are introduced by clauses 37–48 to replace the existing concepts of administrative removal, deportation and exclusion. Expulsion Orders extend further the changes to the Immigration Rules made by HC 321 introduced in April 2008 that introduced re-entry bans for anyone who has overstayed for more than 28 days, breached an immigration condition, entered the UK illegally or use deception in an application for entry clearance to the UK. In the debate on HC321 in the House of Commons on 13 May 2008, the Government conceded a “carve-out” for children. The effect of this was that re-entry bans will not automatically be applied to anyone whose breach of UK immigration law occurred when they were under the age of 18. The Government also indicated during debates on HC321 that when the Council of Europe Convention on Action against Trafficking is ratified, victims of trafficking will also be exempted from mandatory re-entry bans in respect of breaches of UK immigration law that occurred by reason of their being trafficked. Despite the need for these exemptions being accepted by the Government only a few months ago there is currently no corresponding provision made in the draft legislation. Given the very broad nature of the expulsion powers it is vitally important that this is rectified.

5.2 The European Court of Human Rights has recently ruled that Article 8, 1950 European Convention on Human Rights requires signatory States to facilitate or promote a child offender's reintegration.⁵³⁰ This includes where the child is a foreign national. In the instant case, the Court found there to be “little room for justifying expulsion” of a settled child migrant where offences were mostly non-violent. The majority of the offences concerned breaking into vending machines, cars, shops or restaurants and stealing cash and goods. The Court drew upon Article 40, 1989 UN Convention on the Rights of the Child, to which of course the UK has recently withdrawn its reservation.

5.3 In relation to these matters, the draft Bill is deficient in two respects. The arbitrary setting of age at date of conviction rather than at date of commission of an offence (clause 39(2)) as the relevant matter for exception from the mandatory expulsion regime (currently the “automatic deportation” regime, section 32, UK Borders Act 2007) on its face stands in contradiction to the duty to facilitate or promote a child offender's reintegration. The intention to penalise the parent of a child offender by delaying or precluding his or her naturalisation by reason of offending by his or her child (clause 34; see also Path to Citizenship consultation) is also not consistent with this duty.

6. POWERS TO DETAIN AND IMMIGRATION BAIL (PART 5)

6.1 The Draft (Partial) Bill continues to permit the detention of children with their families in Immigration Removal Centres (IRCs). The Refugee Children's Consortium believes the case for ending the detention of children is clear and this legislative opportunity to do so should not be missed.

6.2 Children are currently detained under the same policy as adults, without judicial oversight and there is no consideration of the fact that they are vulnerable when a decision is taken to detain. Government guidance on detention states that: “*In all cases detention must be used sparingly, and for the shortest period necessary*”.⁵³¹ However, despite this guidance recent Home Office statistics show that large numbers of children are being detained with their families each year. Asylum statistics show that during 2006, 1,235 children were recorded as leaving detention and in 2005, 1,580 children were recorded as leaving detention.⁵³² Moreover the statistics also show that they are being held for lengthy periods of time. As at 30 June 2007, 35 children were in detention and of this number, 10 (29%) had been in detention for between one and two months, 20 children (57%) had been in detention for between 15 and 29 days and only 5 children (14%) for 7 days or less.⁵³³

⁵³⁰ European Court of Human Rights, Case of Maslov v Austria, 23 June 2008
<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=71203&sessionId=14948024&skin=hudoc-en&attach>

⁵³¹ Operational Enforcement Manual Chapter 38—Detention and Temporary Release

⁵³² Home Office (2007) Asylum Statistics United Kingdom 2006; Home Office (2006) and Asylum Statistics 2005

⁵³³ Home Office (2007) Asylum Statistics: 2nd Quarter 2007 United Kingdom

6.3 We agree with the Committee that “the detention of children for the purpose of immigration control is incompatible with children’s right to liberty and is in breach of UK’s international human rights obligations”⁵³⁴ (Article 5 ECHR, Article 37 CRC—“No child should be arbitrarily deprived of their liberty. Detention should be a measure of last resort and detained children should be treated with humanity.”). We support the Committee’s recommendations made in the report *Treatment of Asylum Seekers* and we would like to see Clause 62(6) amended so that the vulnerability of minors in detention is listed as a factor which should be considered in bail hearings. Decisions to detain children should be subject to automatic judicial scrutiny. Independent scrutiny of the decision to detain is vital to ensuring that alternatives to detention have been thoroughly explored, and detention is not compromising the best interests of the child.

7. OFFENCES (PART 7)

7.1 We are concerned that the overall effect of the provisions in Part 7 will be to make it more likely that refugee children seeking asylum will be subject to prosecution for immigration offences including breach of reporting conditions, or failure to submit to a medical examination, which will be punishable by up to 51 weeks imprisonment.

7.2 The provisions relating to documentation offences (clauses 104–105) are particularly worrying. Despite assurances⁵³⁵ during the passage of existing legislation that children should not normally be prosecuted for such offences, members of the RCC are aware of numerous examples of asylum seeking children and “age disputed” asylum seekers who have been arrested and prosecuted; for example under section 2 of the Asylum and Immigration (Treatment of Claimant’s etc) Act 2004, for failing to produce a passport on arrival in the UK. The Court of Appeal, Criminal Division recently heard an appeal by O against her conviction, on her guilty plea, of possessing a false identity card with the intention of using it as her own. Despite guidance that young people who might be trafficking victims should not be prosecuted if there are concerns that they had been working under duress or if their well-being had been threatened, O was convicted. This decision was overturned on appeal after fresh evidence, namely a report from the Poppy Project, was submitted in June 2008.

7.3 In July 2007 the Howard League for Penal Reform secured another important Court of Appeal decision in the case of J who arrived in the United Kingdom in April 2007 from China. J claimed asylum and was subsequently charged with an offence of failing to have an immigration document contrary to section 2. Although J consistently said that she was 16 years old, she was deemed to be an adult, convicted in the Magistrates’ Court and committed to the Crown Court for sentence. In the Crown Court, the judge accepted that she was 16 years old but sentenced her to a four month Detention and Training Order. On Appeal it was ruled that a custodial sentence should not normally be imposed on a juvenile convicted of an offence under section 2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. Parliament must heed these judgements and ensure that the drafting of offences in this new legislation adequately protects asylum seeking children and victims of trafficking from such damaging prosecutions. For example by taking forward the concluding recommendations of the UN Committee on the Rights of the Child, which asked the UK to “consider amending section 2 of the 2004 Asylum and Immigration (Treatment of Claimants etc.) Act to allow for an absolute defence for unaccompanied children who enter the UK without valid immigration documents”.⁵³⁶

7.4 The provisions in clause 108 and 109 criminalise trafficking in human beings for labour exploitation and have been replicated from the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The definition of the “act” of trafficking is more limited than in the Palermo Protocol. Our main concern is that the definition of “exploit” in cl.109 (4) and (5) is not encompassing enough to apply to very young children.

7.5 We note that the additional proposed offence of obstructing, resisting or assaulting officials is extremely wide ranging and ill defined. The Bill does not contain a definition of the term “obstructing” and we are concerned that it is capable of being open to broad interpretation and could for example negatively impact on the staff of RCC membership organisations in their work supporting asylum-seeking children.

⁵³⁴ Joint Committee on Human Rights Tenth Report of Session 2006–07, *Treatment of Asylum Seekers*, Para 259

⁵³⁵ Beverley Hughes House of Commons Committee 08.01.04 col 15

[...] I accept that some individuals, particularly younger children, will be more likely to follow the instructions of facilitators. Because of their vulnerability they should not when they act in that way, be caught by the clause. It is not our intention that vulnerable people and, in particular, younger children should be convicted of the offence in question.

[...] The prosecution would need to take into account the circumstances of the case—the alleged age and what is established to be the child’s age—in determining whether to bring a prosecution. Guidelines will be needed and they will be defined with reference to the police, the immigration service and the Crown Prosecution Service. They will attend carefully to issues relating to the prosecution of children.

⁵³⁶ <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>
Recommendation 71(g), Concluding Observations published 3 October 2008

8. APPEALS (PART 10)

8.1 The provisions in the Bill relating to appeals are incomplete and it is therefore difficult to offer any comprehensive comment on this section. We do however welcome clause 166 that has the effect of restoring the right of appeal to anyone granted leave of any length on refusal of asylum. Currently under section 83(2) of the Nationality, Immigration and Asylum Act 2002 anyone granted leave that amounts to less than one year (in one grant, or aggregated) is denied this right, a situation which has disproportionately affected unaccompanied children seeking asylum.

9. ACCESS TO BENEFITS AND SERVICES—ASYLUM SUPPORT

9.1 Asylum support is not included in the Draft Bill, but will be included in the full Bill that will be laid before Parliament. The RCC does not believe that destitution should be used as a tool to force compliance with the immigration process, particularly in respect of children. We believe that asylum seekers should be treated humanely and fairly during the immigration process, given adequate support to ensure that they are not living in poverty, and have access to decent housing, healthcare and education. In particular we support the repeal of s 9 Asylum and Immigration (Treatment of Claimants etc.) Act 2004 as it is both an inhumane and ineffective policy. We urge the Committee to restate recommendations made on support for asylum seekers and call on the Government “to end the deliberate use of destitution as an instrument of policy”.⁵³⁷

October 2008

Memorandum submitted by the Refugee Council, the Scottish Refugee Council and the Welsh Refugee Council

As a human rights charity, independent of government, the Refugee Council works to ensure that refugees are given the protection they need, that they are treated with respect and understanding, and that they have the same rights, opportunities and responsibilities as other members of our society.

Scottish Refugee Council provides independent help and advice to those who have fled human rights abuses or other persecution in their homeland and now seek refuge in Scotland. We campaign to ensure that the UK Government meets its international, legal and humanitarian obligations and to raise awareness of refugee issues. Our vision is for a Scotland in which asylum seekers' and refugees' rights are respected and they are welcomed, treated with dignity and empowered to play a full and equal role in their new communities.

The Welsh Refugee Council's vision is to “empower refugees and asylum seekers to rebuild their lives in Wales”. We campaign for a better deal for refugees, so that everyone who comes to Wales seeking asylum can live in safety, security and freedom.

1. INTRODUCTION

The Refugee Councils welcome the process of consolidation of immigration law in the UK as an opportunity to ensure that the overall framework of law enables the state to fulfil its duties under international law to those in need of protection. However, we regret that this approach has not been adopted with the current draft Partial Immigration and Citizenship Bill. We are concerned the draft Bill represents an attempt to simplify the law at the expense of ensuring the protection of refugees.

Our submission examines where the draft Bill fails to ensure refugee protection, under three main headings:

Borders without doors for refugees

As a consequence of the border control measures set out in the draft Bill, refugees needing protection will be prevented from reaching the UK. Whilst the Bill increases the number and scope of measures of interception, it lacks safeguards to ensure these extra-territorial controls do not result in refugees being forced back to persecution. We are concerned that the Bill's provisions will mean that refugees seeking sanctuary are forced into the hands of smugglers and traffickers.

⁵³⁷ Joint Committee of Human Rights, Thirteenth Report of Session 2006–7, *Legislative Scrutiny: Sixth Progress Report*, Para 1.37

Undermining the human rights of refugees in the UK

The extensive use of detention powers, the use of destitution in order to coerce people to leave voluntarily and the designation of failure to comply with administrative asylum procedures as criminal offences, all undermine the human rights of refugees. The wide range of offences listed in Part 7 of the Bill, in conjunction with the lack of legal entry routes into the UK for refugees seeking asylum, means that those refugees who reach the UK are increasingly likely to face imprisonment or detention. Refugees should not be criminalised as a result of seeking asylum and should not be detained whilst their asylum claims are being processed.

Removal of refugees from the UK

The Refugee Councils are concerned that the Bill combines deportation orders and administrative removal into a single concept of expulsion, meaning that people who leave the UK because they have not been recognised as refugees will face with lengthy bans on re-entry. We do not believe that it is appropriate that people should be barred from entry simply because they have sought asylum. Further, the Refugee Councils believe that people should only be removed from the UK to countries that are safe and to which their return is sustainable. In order to ensure that all returns from the UK are safe and sustainable, we recommend that there should be independent monitoring of returns.

1. BORDERS WITHOUT DOORS FOR REFUGEES

The Refugee Councils are concerned that people who need to flee persecution are increasingly unable to do so. The Bill's strengthening of border controls and failure to ensure that refugees are able to access protection will further undermine the spirit of the 1951 Refugee Convention, will undermine the human right to seek and enjoy asylum from persecution, and will contribute to the growth of the smuggling and trafficking of refugees.

Part 2 of the Bill (Powers to Examine) gives the Secretary of State the power to make enquiries of anybody seeking to enter the UK in order to grant or refuse them permission to do so. This power would be exercisable anywhere in the world. It is clear from the explanatory notes that the Government's intention is to extend the reach of its border controls beyond the UK and the EU to all points of the globe.

Under the Bill, immigration officers may be posted abroad and will be given new powers to refuse entry and cancel permission to travel that has previously been granted. The Refugee Councils believe that these officials should also be given powers to enable them to ensure that those individuals they encounter who are in need of protection are able to obtain it. They should ensure that refugees outside their country of origin or habitual residence are able to access the protection to which they are entitled under international law. In some countries to which the UK posts immigration officers there is no functioning asylum determination, and in some countries there is no asylum determination system at all. This means that refugees are unable to obtain effective protection.

The Refugee Councils are concerned that restrictions on refugees' ability to access safety will be further tightened by the proposed "Authority-to-carry" schemes (Clause 149) whereby carriers will be required to seek advance authority from the Secretary of State to carry each individual passenger.

2. UNDERMINING THE HUMAN RIGHTS OF REFUGEES IN THE UK

Detention and immigration bail

The Refugee Councils remain concerned about the extensive detention of refugees in the UK. Article 26 of the Refugee Convention requires states to allow free movement of refugees within their territory⁵³⁸ and yet many are detained for indefinite periods of time, often for the purely administrative purpose of processing their asylum claim. Their detention is not subject to effective judicial scrutiny.

In a memorandum following visits to the UK in February and April 2008, Thomas Hammarberg, Council of Europe Commissioner for Human Rights, expressed strong concerns about the detention of refugees:

"The international refugee law principle of *non-detention of refugee applicants* should be firmly established in British immigration law. Their detention may occur only exceptionally, for the shortest possible time and only for the following purposes: (a) to verify the identity of the refugees; (b) to determine the elements on which the claim to refugee status is based; (c) to deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the country of refuge; (d) to protect national security or public order".⁵³⁹ He also noted the "absence of a special and precise legal framework regarding detention of asylum seekers in Fast Track Processes" leading to a situation where detention may be arbitrary and at the discretion of the immigration officer.⁵⁴⁰

⁵³⁸ See Article 26 of the Refugee Convention <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

⁵³⁹ See The Commissioner—CommDH(2008)23 / 18 September 2008 Paragraph 25

⁵⁴⁰ Ibid Paragraph 21

Most worrying of the draft Bill's new provisions relating to detention is the requirement for the Secretary of State to consent to a grant of bail where the authorities claim there is "imminent removal" (Clause 62 (2) (c)). The Refugee Councils believe that when one party to a case has an effective veto over a Tribunal's decision, the Tribunal can no longer be said to be independent. We note that it is commonplace for people to be held in detention for months, or in extreme cases for years, when there are practical difficulties in effecting their removal. Despite such lengthy detention, the individuals affected would all be described by UKBA as facing "imminent removal". Even at present, detainees' representatives have had to resort to *habeas corpus* in order to secure the release of long term detainees. With the Secretary of State having to consent to a grant of bail we are concerned that this resort to the higher courts will be far more likely to be necessary.⁵⁴¹

We are similarly concerned that the Secretary of State will have the power to impose far more rigorous conditions than those imposed by the Asylum and Immigration Tribunal (AIT) at a bail hearing (Clause 68). For example, this could mean that whilst the AIT may require an individual to report weekly as a condition of bail, in effect this may then be overruled by the Secretary of State were she to require daily reporting. The Refugee Councils strongly believe that the Asylum and Immigration Tribunal (AIT) should set the terms of bail not the Secretary of State who is herself one of the parties in the case.

Clause 62 (6) contains a list of matters that must be considered when deciding whether to grant immigration bail and whether to make bail conditional. The Refugee Councils believe that as currently drafted the list is will lead to the continued detention of individuals when such detention is not appropriate. We recommend that additional factors should also be considered, such as the length of time spent in detention, an individual's state of health and the impact that detention would have on the individual and their family. The emphasis in the Bill appears to suggest a presumption in favour of continued detention irrespective of how long it has gone on or of the resulting effect on people's physical and mental health.

The lack of presumption of liberty is worse for those faced with expulsion on the basis that they are "foreign criminals". Irrespective of the nature of their offence, or whether they are a threat to the community, or the likelihood of their imminent removal, they must be detained under the Bill unless the Secretary of State "thinks it is inappropriate". (Clause 55 (4)). The Refugee Councils strongly believe that the presumption should always be in favour of release unless there is a good reason for detention.

The possible requirement under the Bill for a deposit of a sum of money in order to be granted bail is also a matter of extreme concern. Currently, where sureties are found, they rely upon a trusting relationship with the detainee and an assumption that money only has to be promised and is unlikely to have to be handed over. Under the Bill's new provision, detainees are likely to encounter even greater difficulties in finding sureties if the proposed requirement to pay the money up front and have it held indefinitely is introduced. Refugees and asylum seekers are less likely than many other people in society to have access to the sums of money required, or to know people who are willing and able to pay these sums on their behalf.

Support

Of particular concern with regard to the support of refugees and asylum seekers is the use of destitution as an instrument of policy to coerce voluntary return, whereby individuals are reduced to destitution irrespective of the safety and sustainability of return to their country of origin. This is a breach in some cases of Article 3 of the European Convention on Human Rights, as people are forced into extremely vulnerable situations with a consequent impact on their physical and mental health. Asylum seekers whose claims have been refused are routinely forced into total poverty even though there is no current possibility of immigration officials being able to enforce their removal, for example because of difficulties obtaining travel documents, or on health grounds.

It is hugely wasteful and costly to have two parallel systems of support one, Section 4 support, for people at the end of the process, more restrictive than the other, Section 95 for those within the asylum process.⁵⁴² Levels of asylum support are set are below the UK poverty line. The levels of the more restrictive voucher based Section 4 scheme have not been reviewed since their introduction. The Refugee Council recently published a report highlighting the shocking impact on people of having to live entirely on a voucher system.⁵⁴³ The vast majority of refused asylum seekers are not even eligible for this reduced level of support and live indefinitely with no means of support. Severe implications result for those with health problems, such as HIV or diabetes, who are unable to maintain a healthy diet.

The Refugee Councils believe that asylum seekers should be allowed to work. Where they need support, there should be a single system of cash support for asylum seekers at all stages of the asylum process, up to the point of removal.

⁵⁴¹ See *A & Ors, R v SSHD* EWHC 142 (Admin) 21.1.08 where three Algerians were released under *habeas corpus* after over a year in detention

⁵⁴² This refers to Section 4 and Section 95 of the 1999 Immigration and Asylum Act

⁵⁴³ See "More Token Gestures" Refugee Council, October 2008.
<http://www.refugeecouncil.org.uk/policy/position/2008/section4vouchers.htm>

We would like to draw the Committee's attention to a recent case in the Court of Appeal where the judge declined to impose a custodial sentence on a man from Zimbabwe who had bought a forged South African passport in order to obtain work. The Court exercised "the judicial quality of mercy" for somebody "in a kind of Limbo".⁵⁴⁴

Health

The Refugee Councils are concerned about restrictions on asylum seekers' entitlement and access to health care. The Refugee Council continues to work with clients who are either denied treatment entirely or, having received health services, are presented with a bill for charges that there is no realistic possibility that they could pay.⁵⁴⁵

We further note the concern expressed by the Joint Committee on Human Rights about health care provision within the detention estate, in particular in relation to mental health care.⁵⁴⁶ We are aware that there is evidence that problems of mental care provision persist. Her Majesty's Inspector of Prisons noted recently that at Yarls Wood Removal Centre mental health services were "limited" and recommended that a full assessment of mental health needs should be carried out.⁵⁴⁷ She made a similar recommendation in relation to Tinsley House in her March 2008 report, where she stated:

"The one permanent mental health trained nurse and the bank nurses with mental health qualifications were deployed to general duties, which limited their ability to offer primary care mental health support to detainees. The centre had no multidisciplinary mental health in-reach services, and mental health need had not been part of the recent needs assessment".⁵⁴⁸

Criminalisation

The Refugee Councils are concerned that the effect of existing and proposed immigration offences is that refugees and asylum seekers will be increasingly likely to face prison. The lack of legal routes to the UK for refugees seeking asylum means that refugees are likely to be disproportionately affected by the measures which make it an offence to facilitate illegal entry.

Offences relating to the use of false documents to enter the UK are of particular concern as they run contrary to the spirit of the Refugee Convention, whose drafters recognised that many refugees are not able to obtain the required official travel documents prior to fleeing persecution.⁵⁴⁹ Under the Bill, it will continue to be an offence to fail to produce, when making an asylum claim, a valid travel document which had been used during the course of the journey to the UK. It is of real concern that there are refugees in UK prisons who have been placed there solely for using false documentation in order to flee persecution. In the absence of legal entry routes into the UK for asylum seekers, many will have placed themselves in the hands of agents and may have little actual control over their documentation. Refugees should be protected by Article 31 of the Refugee Convention but, despite the possible defence reproduced in clause 193 of the draft Bill, in practice refugees are routinely imprisoned, often without the benefit of this defence even being explored. Currently many refugees facing prosecution for documentation offences are unable to obtain appropriate immigration advice and representation and instead are being represented by solicitors who do not specialise in immigration law. Alternatively, where they do get immigration advice they are advised to plead guilty as they are unlikely to get bail and would face even longer in prison awaiting trial than the likely sentence from the magistrate's or sheriff's court.

In a more recent statement the Commissioner for Human Rights wrote:

"To put a criminal stamp on attempts to enter a country would undermine the right to seek asylum and affect refugees. In addition, persons who have been smuggled into a country should not be seen as having committed a crime. There are agreed international standards to protect persons who have been victims of human trafficking from any criminal liability.

Criminalization is a disproportionate measure which exceeds a state's legitimate interest in controlling its borders. To criminalize irregular migrants would, in effect, equate them with the smugglers or employers who, in many cases, have exploited them. Such a policy would cause

⁵⁴⁴ See Reference by the Attorney General under S.36 of the Criminal Justice Act 1988 Ref No Nos 1 and 6 <http://www.bailii.org/ew/cases/EWCA/Crim/2008/677.html>

⁵⁴⁵ See "First do no harm". Refugee Council June 2006 <http://www.refugeecouncil.org.uk/policy/position/2006/healthcare.htm>

⁵⁴⁶ JCHR Tenth Report "Treatment of asylum seekers" March 2007 Recommendation 51

<http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/8102.htm>

⁵⁴⁷ See HMIP Yarls Wood Report 4-8 February 2008 Para 5.41 and Recommendation 5.66

http://inspectorates.homeoffice.gov.uk/hmiprison/inspect_reports/ircinspections.html/544687/Yarls_Wood_2008.pdf?view=Binary

⁵⁴⁸ See HMIP Tinsley House Report 10-14 March 2008 Para 5.26 and Recommendation 5.34

http://inspectorates.homeoffice.gov.uk/hmiprison/inspect_reports/irc-inspections.html/544670/tinsley-house-IRC-2008?view=Binary

⁵⁴⁹ Article 31 of the Refugee Convention states: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

further stigmatization and marginalization, even though the majority of migrants contribute to the development of European states and their societies. Immigration offences should remain *administrative* in nature".⁵⁵⁰

Of further concern is that the draft Bill will further criminalise some refugees by making it an offence to breach reporting conditions (Clause 116), or fail to submit to a medical examination (Clause 102). These offences will be punishable by up to 51 weeks imprisonment. The Refugee Councils believe that this is a disproportionate response to what are essentially administrative matters.

We note that the range of actions related to obstructing, resisting or assaulting officials that are to be treated as offences is potentially extremely wide ranging and ill defined (Clause 121). The Bill does not contain a definition of the term "obstructing" and we are concerned that it is capable of being open to broad interpretation. The range of people who may be "obstructed" or "resisted" is also very wide and includes all contracted staff involved in the processes of detention and removal. Given that there have been recent allegations of staff engaging in abusive behaviour towards those in whose detention or removal they are involved, this is a matter of concern.⁵⁵¹

The Refugee Councils are also concerned about the definitions of "conducive to the public good" and "criminal behaviours" and the role if these definitions in decisions to exclude or remove individuals in need of protection. Previous legislation has incorporated a very broad definition of "terrorism" that includes acts which encourage criminal damage, into the interpretation of the Refugee Convention. As a result, acts undertaken by political refugees who have opposed repressive regimes in their home countries may fall within the definition of "terrorism" and as a consequence their claims for asylum may be excluded from consideration for protection entirely.⁵⁵² Even those accepted as refugees may be subsequently subject to an expulsion order on the grounds that they have committed "particularly serious crimes" despite the fact that the list produced in 2004 included shoplifting (theft) and graffiti (criminal damage) as examples of such serious crimes.⁵⁵³ The Refugee Councils believe that it is not proportionate to seek to remove people to countries where they will not be safe simply because they have committed a relatively minor offence.⁵⁵⁴

We are very concerned about the proposed treatment of those who will come within the category of Special Immigration Status.⁵⁵⁵ It is understood by the Refugee Councils that the people to be given this status, who the government wishes to remove from the country but cannot on human rights grounds, will, with their families, be kept on immigration bail indefinitely. They will be forbidden to work and required to live on vouchers with no recourse to public funds for any member of their family. In short, they and their partners and children will be cast into poverty and insecurity for an indefinite period, potentially lasting a lifetime.

3. REMOVAL OF REFUGEES FROM THE UK

The Refugee Councils are concerned about the combination of the current approaches of deportation and administrative removal into a single provision for expulsion. There is clearly a difference between the situation of somebody who is removed for having committed a serious crime and somebody who has been refused protection. The Government should not seek to impose penalties that are appropriate for those who have committed a serious crime upon those who have not committed such crimes. Refugees should not be barred from re-entry under the Rules.

Furthermore an expulsion order will be able to be imposed at any time and potentially hang over people's heads indefinitely. An order could be imposed for an indefinite period of time and be based on minor breaches of conditions such as a failure to report. It could be preceded by a criminal custodial sentence which again is disproportionate if the person is to be removed.

⁵⁵⁰ See "It is wrong to criminalise migration" Council of Europe Human Rights Commissioner 29.9.08
http://www.coe.int/t/commissioner/Viewpoints/080929_en.asp

⁵⁵¹ See "Outsourcing abuse" Birnberg Peirce, Medical Justice and NCADC July 2008
<http://www.medicaljustice.org.uk/images/stories/reports/outourcing%20abuse.pdf>

⁵⁵² Under Article 1 (f) of the 1951 Refugee Convention any body may be excluded from protection if:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."
<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

⁵⁵³ Article 33(2) of the Refugee Convention permits the return of refugees of "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". For the list of offences see Statutory Instrument 2004 No. 1910 The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004
<http://www.opsi.gov.uk/si/si2004/20041910.htm>

⁵⁵⁴ These provisions are reproduced in Paragraph 45 (f) of the Draft Illustrative Immigration Rules on Protection published at the same time as the Bill
<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/draftillustrativeir.pdf?view=Binary>

⁵⁵⁵ Introduced by the Criminal Justice and Immigration Act 2008. See the Refugee Council briefing
http://www.refugeecouncil.org.uk/policy/briefings/2007/special_immigration_status.htm

There will be no right of appeal against expulsion where in the view of the Secretary of State permission was obtained by “deception”. The Refugee Councils strongly believe that the decision on whether deception has taken place should be made by an independent Court and not by the Secretary of State, who is one of the parties in the proceedings.

The powers in the Bill to assist voluntary leavers and to participate in projects which assist the settlement of migrants are to be welcomed. However, we are concerned that the current draft Bill contains no safeguards to curtail the current UK practise of removing people to countries that are unsafe or experiencing rapidly deteriorating conditions, or contrary to the advice of the United Nations High Commissioner for Refugees (UNHCR) to refrain from such forcible removals, such as to central and southern Somalia. We believe there is a need to introduce an obligation on the Secretary of State to monitor the post-return outcomes of asylum seekers who are removed where such removals are contrary to advice from UNHCR, or are to countries experiencing significant or widespread human rights violations. The need for this monitoring may be of greater urgency should the government begin the forced removal of unaccompanied children to their countries of origin. We recommend that the Bill be used to introduce powers to fund the monitoring of post return outcomes to ensure that returns are safe and sustainable and that this should provide funds for independent monitoring.

4. CONCLUSION

It is the view of the Refugee Councils that this much needed reform of the legislative framework is being used by the Government to increase its extensive powers at the expense of providing protection for refugees and of the human rights of refugees and asylum seekers. The Government should:

- Ensure that our borders are protection-sensitive and ensure access to protection for those who are stopped in transit.
- Retain the right to challenge detention decisions before a truly independent Tribunal.
- Ensure access to quality immigration legal advice and representation throughout the asylum process and in particular before proceeding with prosecutions for immigration offences.
- Provide for an in country right of appeal for all asylum applicants and access for appellants to the higher courts.
- Ensure support is provided in cash and levels be reviewed to adequately reflect people’s needs. Asylum seekers should be allowed to work.
- Ensure entitlement and access to primary and secondary health care for all asylum seekers and refugees.

October 2008

Memorandum submitted by the Refugee Legal Centre

ABOUT US

1. The Refugee Legal Centre (RLC) is an independent, not-for-profit organisation and a registered charity. We provide a free legal service to asylum seekers and refugees in the United Kingdom. The RLC has ten regional offices in addition to its head office in London. Our 180 caseworkers and legal officers across the country represent thousands of asylum seekers in initial asylum applications and appeals every year, making us the largest specialist provider of legal advice and representation to asylum seekers in the UK.

2. In addition, the RLC has been responsible for dozens of major precedent-setting cases over the last several years, including the series of Zimbabwean cases challenging the legality of removing anyone to Zimbabwe by force. We are recognised leaders in our field, which is reflected also in our unusually high success rate in appeals before the Asylum and Immigration Tribunal (AIT).

GENERAL OBSERVATIONS

3. The RLC welcomes the long-overdue simplification of the law relating to asylum and immigration. We believe that the project provides a real opportunity to make the law simpler and more accessible, while preserving the checks and safeguards necessary to ensure the UK continues to comply with its international obligations.

4. Regrettably it is clear from the Draft (Partial) Immigration and Citizenship Bill (“the Bill”) that the government’s intention is not merely to simplify the law, but also to diminish the rights of asylum seekers and refugees and weaken the existing system of safeguards against Home Office decision making which is widely recognised to be poor.

5. The draft Bill extends the present harsh regime applicable to asylum seekers and immigrants who have committed a criminal offence to all, even those who have done nothing wrong. It gives the Home Secretary sweeping new powers while reducing the ability of the AIT to supervise the exercise of those powers. It grants the Home Secretary powers to interfere with and even veto decisions of the supposedly independent AIT, and it fails to provide adequate safeguards for some of the most vulnerable groups in society such as children and victims of trafficking, for example by failing to exclude them from detention. Alongside the simplification project itself, the Committee's attention is also drawn to the Home Office's consultation on the immigration and asylum appeals machinery,⁵⁵⁶ which if implemented would seriously curtail access to the higher courts. The proposals represent the erosion of judicial scrutiny of Home Office and Tribunal decision-making, and substantially increase the chances of individuals being returned to situations of persecution and torture.

6. The RLC has serious concerns about most aspects of the draft Bill, including matters relating to the expulsion provisions in part 4 of the Bill that were developed in our memorandum to the Home Affairs Committee.⁵⁵⁷ In light of the short word limit, this memorandum draws specific attention to the following main areas of concern from a human rights perspective:

- Increased powers of detention and reduced rights to bail; and
- Undermining judicial oversight and curtailing appeal rights

Increased powers of detention and reduced rights to bail

7. Part 5 of the Bill grants the Home Secretary wide powers to detain anyone in the UK whose entitlement to be here is being examined, with no limit on the amount of time they can be held. It also considerably reduces the ability of the AIT to exercise oversight of the detention of immigrants through the bail system.

8. In addition to our general concern over the use of the word “bail” to describe the status of individuals who have never been detained, we have a number of specific concerns:

- 8.1 Clause 55(4) creates a presumption in favour of detention in respect of foreign criminals facing expulsion from the UK. Detention may be justified in any given case, but it is a judgment that must be made on the basis of the particular facts of that case. Parliament should never sanction a presumption in favour of detention, which is both objectionable in principle, and would serve to undermine the role of the independent Tribunal in balancing all relevant factors in the assessment of bail. In place of clause 55(4) we would recommend the enactment of the presumption of liberty, and the burden on the Home Secretary to show substantial grounds for detention.⁵⁵⁸
- 8.2 Clause 62(2)(c) allows the Home Secretary to veto the grant of bail if she considers removal to be “imminent” and no appeal is pending. Aside from our obvious concerns about the executive being effectively granted a licence to interfere with decisions of the judiciary, the provision is so unclear as to be unworkable. “Imminent” is not a term capable of precise definition, and our caseworkers are all too familiar with assertions of “imminent removal” being made in bail cases where the facts point in the opposite direction.
- 8.3 Clause 62(6) sets out the factors that must be taken into account when considering any decision to grant bail; it is noteworthy that not one factor weighing against detention is listed here. There is no mention of age, the presence of children, mental or physical illness or disability, a history of torture, trafficking or sexual violence, or any other factors militating against detention. If a list of factors is to be prescribed it must be a balanced list.
- 8.4 Clause 68 provides for the variation of bail conditions after bail is granted. It provides that irrespective of whether the Home Secretary or the AIT initially granted bail, either can amend the conditions of that bail or impose new conditions. It is entirely inappropriate for the Home Secretary to be given the power to increase the control exercised over an individual bailed by the AIT, without going back to the AIT to approve that extension. The AIT makes a careful judgment in imposing bail conditions, and the Home Secretary should not be given a licence to override this judgment without the AIT's consent.
- 8.5 Furthermore, clause 68(2)(b) provides that the AIT may not cancel a condition of bail imposed by the Home Secretary. This provision is deeply objectionable. The AIT's role is to exercise oversight over detention and bail decisions made by the Home Secretary, and it should be free to cancel conditions imposed by her where it believes those conditions to be unnecessary or unreasonable. Clause 68(2)(b) should be removed.
- 8.6 Clause 64 empowers the Home Secretary or the AIT to impose a financial security condition on any grant of bail. Contrary to the current system, money would have to be actually deposited with the Home Secretary before the applicant is bailed. Additionally there is no provision for the AIT

⁵⁵⁶ Immigration Appeals: Fair Decisions, Faster Justice (21 August 2008) available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/immigrationappeals/immigrationappealsconsultation?view=Binary>

⁵⁵⁷ See the RLC's memorandum to the Home Affairs Committee available on our website at: www.refugee-legal-centre.org.uk

⁵⁵⁸ See chapter 55 of the UKBA Enforcement Instructions and Guidance

to supervise the return of the deposit,⁵⁵⁹ contrary to the current system of forfeiture hearings at which sureties can argue that they should not have to pay any or all of the promised amount. This change will lead to far fewer people being prepared to stand surety, which is an unjust policy goal given there is no evidence that the previous system was not working or being abused.

9. In summary it is our view that part 5 of the draft Bill is inconsistent with the right to liberty enshrined in Article 5 of the European Convention on Human Rights (ECHR), and in particular is inconsistent with Article 5(4) which provides that every person detained shall have meaningful recourse to the courts. It is further inconsistent with the guarantee of effective remedies against the violation of rights protected by Article 13. In our view a remedy against a Home Office decision to detain is only effective if it is truly free of executive interference, which cannot be said of Part 5 in its current form.

Undermining judicial oversight and curtailing appeal rights

10. Part 10 of the Bill significantly reduces the access of immigrants to the AIT to challenge negative immigration decisions, and reduces the AIT's ability to meaningfully review Home Office decisions. Part 10 is an example of the government's willingness to put speed and finality ahead of fairness, and when read with the appeals consultation paper; judicial oversight of life-and-death decisions is seriously eroded.

11. We draw specific attention to the following main concerns in what is a deeply flawed set of proposals:

11.1 The Bill makes the right to appeal against certain decisions contingent on the person not having used deception.⁵⁶⁰ In practice this must mean that it is sufficient for the Home Secretary to assert deception in order to prevent the bringing of an appeal. In fact there are many circumstances in which the presence of deception will be a matter in dispute, for example where the Home Secretary asserts that the failure to mention a previous visa application constitutes deception, but the applicant denies ever having made such an application or that their failure to mention it was deceptive. The presence or absence of deception is a matter that should be left to the AIT to decide in hearing the appeal.

11.2 The Bill provides that where an individual's refugee permission is cancelled, they are only able to appeal in the UK, and only if they are in the country at the time the decision is made.⁵⁶¹ The rationale for this last criterion is unclear, and the likely outcome is deeply unfair. The 1951 Refugee Convention allows refugees to travel abroad. Should a recognised refugee have their permission cancelled while travelling abroad, they would have no right of appeal at all. They would be left stranded in whichever country they found themselves, probably with no right to reside there, and would either have to claim asylum again or return to a country in which they face persecution.

11.3 Clause 169 provides for an individual to appeal the cancellation of permission other than refugee permission; by definition this includes protection permission granted for reasons other than refugee status. It provides that they may appeal out-of-country, but may only appeal in-country if certain conditions are met. Amongst those are the absence of deception (for which see above) and that the leave was cancelled on arrival in the UK. This is plainly intended to provide for those who have the equivalent of entry clearance but are refused entry on arrival, however the failure to anticipate the cancellation of non-refugee protection permission leaves such individuals without any in-country remedy against cancellation. In our view a separate appealable decision for the cancellation of non-refugee protection permission must be added, otherwise these vulnerable individuals face removal contrary to the protections of the ECHR without any effective remedy.

11.4 Clause 171 provides for appeals against expulsion orders; in addition to the deception requirement it also prevents any appeal against mandatory expulsion orders for foreign criminals, for those who breach a condition of their permission, and for families of the foregoing. The rationale for excluding these groups is far from clear and is likely to lead to increased Judicial Reviews where, for example, the exceptions in clauses 38 and 39 have been misapplied. It may also prompt disenfranchised individuals to make asylum claims in order to generate an in-country right of appeal.

11.5 Clause 177 deals with asylum and human rights applications that are certified by the Home Secretary as "clearly unfounded". Given the historically poor record of initial decision-making, we have consistently opposed the current system whereby the subjects of "clearly unfounded" certificates are only able to appeal once they have left the UK. However at least the present system contains some basic safeguards, and we know of several individuals who have won their supposedly unfounded asylum appeals out-of-country under this system. The proposed regime goes a step further by removing even the possibility of an out-of-country appeal. Under the new regime there would be no means of challenging the Home Secretary's decision, and asylum seekers removed contrary to the UK's international obligations would have no redress.

⁵⁵⁹ See clause 64(5) and (6), affording the Home Secretary a wide discretion and requiring only that the depositor has the opportunity to make representations

⁵⁶⁰ See clauses 168, 169 and 171

⁵⁶¹ See clause 170

- 11.6 The proposals also remove the current jurisdiction of the AIT to review the Home Secretary's exercise of discretion. This represents a substantial strengthening of the Home Secretary's powers, and a reduction of the powers of the AIT to hold her to account for her decisions. By removing the only statutory way to challenge the unreasonable exercise of discretion, these provisions will lead to poorer quality decisions and may also add to the burden on the Administrative Court.
12. These changes to the legislative framework must be read alongside proposed changes to the appeals machinery, which themselves will not be automatically subject to Select Committee scrutiny as they can be effected through secondary legislation only. The proposed new appeals system would seriously undermine the rule of law by excluding access to the higher courts, potentially leaving an appellant with no remedy against a decision even if that decision is vitiated by bias, irrationality or a lack of jurisdiction. Our specific concerns are:⁵⁶²
- 12.1 The proposed ousting of review by the High Court, through which a Senior Immigration Judge's decision will become final. This is proposed despite evidence that at least 10% of applications to the High Court are successful.⁵⁶³ This represents more than 1,000 people who have had the benefit of a lawful decision (or one per day since the current regime began) who would in future be denied this. The RLC's success rate in these applications is closer to 50%, raising serious questions about the quality of legal representation available to many applicants. Nevertheless, given almost a third of all reconsideration hearings result in the appeal being allowed,⁵⁶⁴ hundreds of individuals are likely to have been spared persecution as a result of the current system of High Court oversight.
- 12.2 The proposed limiting of appeals to the Court of Appeal to matters raising important points of law or other compelling reasons.⁵⁶⁵ This is likely to result in individuals with unlawful asylum refusals being denied any remedy, contrary to their Refugee Convention or ECHR rights, simply because their cases do not raise issues of wider importance.
- 12.3 The focus on speed and finality at all costs, and the lack of analysis regarding why so many cases are reaching the higher courts. This includes the failure to consider the quality of decision-making, the Secretary of State's behaviour as a litigant, the consequences of the single-tier appellate system, or the restrictions on public funding and the consequent effect of having many unrepresented or poorly advised appellants.
- 12.4 The failure to draw any distinction between asylum and human rights appeals, and appeals in what may be called "pure" immigration matters. To assume that procedural safeguards that may be adequate and proportionate in a case involving a student visa for example, can be equally applied to a case involving the threat of torture or death, is to misunderstand the requirements of the rule of law.⁵⁶⁶
- 12.5 The discriminatory reduction in procedural safeguards for immigrants as compared to other appellants in the Tribunal system generally. In particular the reluctance to relinquish the power to draft procedure rules to the independent Tribunal Rules Committee despite the fact that in immigration and asylum appeals, the government is one of the parties to the appeal. To allow the government to enact the rules by which the independent judicial Tribunal is bound to conduct itself is to taint the independence of the judicial process, and to undermine the fundamental principle of equality of arms.

13. In summary these provisions are inconsistent with the fundamental protection against *refoulement* in the Refugee Convention. They are also inconsistent with the substantive ECHR rights relied upon by migrants seeking protection, most especially Article 3 (freedom from torture) and Article 8 (right to family and private life). They are also contrary to the right to an effective remedy in Article 13 ECHR, and the freedom from discrimination enshrined by Article 14 ECHR.

CONCLUSION

14. We would welcome the opportunity to give further and more detailed evidence on the draft Bill when the Committee hears oral evidence. Thank you for your consideration.

October 2008

⁵⁶² Please see the joint response of the RLC and the Refugee Council to the Home Office's consultation on these proposals, available on our website at: www.refugee-legal-centre.org.uk

⁵⁶³ Ministry of Justice, Freedom of Information Act disclosure to the RLC

⁵⁶⁴ *Ibid.*

⁵⁶⁵ 13(6) of the 2007 Act

⁵⁶⁶ See *Bugdaycay v SSHD* [1986] UKHL 3 for the special requirements in asylum cases.

See also *Sivasubramaniam v Wandsworth County Court & Ors* [2002] EWCA Civ 1738 (para 52)

Memorandum submitted by Still Human Still Here

INTRODUCTION

“Still Human, Still Here,”⁵⁶⁷ the campaign to end the destitution of refused asylum seekers, welcomes this opportunity to submit evidence on the Draft Immigration and Citizenship Bill. SHSH is broad coalition of organisations⁵⁶⁸ campaigning to bring all refused asylum seekers out of destitution by extending asylum support, permission to work and access to health care and education until the time of departure or grant of leave to remain. The coalition includes Amnesty International, the Refugee Council, the Red Cross, the Catholic Bishops’ Conference of England and Wales and the Archbishops’ Council of the Church of England.

Although asylum support is not yet included in the draft Bill, it is outlined for inclusion in full Bill. There has been a delay in the publication of the Home Office’s consultation document in this area. This submission will focus on the destination of refused asylum seekers who, for a variety of reasons, remain in the UK. SHSH would welcome the opportunity to provide further evidence once the consultation document is published.

The Committee’s Previous Assessment of Legislation and Policy

Asylum seekers from working unless, through no fault of their own, no decision is made on their application within 12 months.⁵⁶⁹ Support and accommodation is provided to asylum seekers while their claims are considered,⁵⁷⁰ although there is evidence that many fall through the gaps and end up destitute. When an asylum claim has been refused and there is no outstanding appeal, a refused asylum seeker is expected to leave the country within 21 days, with the exception of families with children who continue to receive financial support and accommodation. For single adults and childless couples support and housing are cut off at this point. Government policy also limits access for refused asylum seekers to non-emergency fee secondary healthcare.⁵⁷¹

There are very limited circumstances in which refused asylum seekers can receive low-level support and accommodation after their claims have been refused.⁵⁷²

If asylum seekers are granted asylum, humanitarian protection or another form of leave to enter, they are permitted to work and are able, if necessary, to access mainstream the welfare benefits.

The Committee previously drew conclusions and made recommendations on this policy in its report on the Treatment of Asylum Seekers.⁵⁷³ After concluding that “we have been persuaded by the evidence that the government has indeed been practising a deliberate policy of destination of this highly vulnerable group,”⁵⁷⁴ it recommended :

“The policy of enforced destitution must cease. The system of asylum seeker support is a confusing mess. We have seen no justification for providing varying standards of support and recommended the introduction of a coherent, unified, simplified and accessible system of support for asylum seekers, from arrival until voluntary departure or compulsory removal from the UK.

We recommend that the Immigration Rules be amended so that asylum seekers may apply for permission to work when their asylum appeal is outstanding for 12 months or more and the delay is due to factors outside their control. We recommend that where there is evidence that an asylum seeker will not be able to leave the UK for 12 months or more, he or she should be granted limited leave for a 12 month period with permission to work attached.”

Legislation and policy on asylum support has not significantly changed since these recommendations were made. However, its approach to asylum seekers has changed. Those who claimed asylum after 4 March 2007 will have their claims considered under the New Asylum Model. The government aims to resolve the estimated 450,000 case files relating to unsuccessful asylum claims made before that date by summer 2011. However, UKBA aimed to save £80 million in asylum support costs in 2007–08 as part of its business plan.⁵⁷⁵

⁵⁶⁷ Hereafter “SHSH”

⁵⁶⁸ See www.stillhuman.org.uk for details

⁵⁶⁹ Paragraph 360, Immigration Rules (HC 395)

⁵⁷⁰ Immigration and Asylum Act 1999, Part VI

⁵⁷¹ Although the guidance to NHS trusts is currently being challenged in the Courts, see *A v West Middlesex NHS Trust* [2008] EWHC 855 (Admin). Further policy announcements in this area are awaited.

⁵⁷² See Immigration and Asylum Act 1999, Section 4 and The Immigration and Asylum (Provision of Accommodation to failed Asylum-Seekers) Regulations 2005 S.I. 2005 No.930

⁵⁷³ Joint Committee on Human Rights, *Treatment of Asylum Seekers*, 10th Report of Session 2006–07, 30/03/07

⁵⁷⁴ *Ibid.* Paragraph 120

⁵⁷⁵ UKBA Business Plan April 2008 to March 2011

Destitution as a multiple human rights violation

The House of Lords has recognised⁵⁷⁶ that a combination of law and policy that forces a class of non-nationals within the jurisdiction into destitution, can constitute inhuman and degrading treatment prohibited by Article 3 European Convention on Human Rights.⁵⁷⁷ In addition, obligations under Article 8 ECHR can also be engaged. The denial of access to housing, healthcare, employment, social security and food can breach obligations found in the International Covenant on Economic Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the UN Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women and the European Social Charter. In addition, in this area, the UK needs to have particular regard in its treatment of refused asylum seekers to the prohibitions on discrimination on the basis of nationality found within those treaties. References to destitution violating human rights below are premised on this understanding. Further, the Convention on the Status of Refugees 1951 and the Convention relating to Status of Stateless Persons 1954 and the EC Qualification and Reception Directives also provide relevant obligations in respect of individuals who fall within their respective personal scopes.

The Evidence

The evidence indicates that destitution among refused asylum seekers is widespread and is having a devastating impact on already vulnerable individuals. Reports have been published by Amnesty International, Refugee Action, the Children's Society, Barnardo's, the Joseph Rowntree Charitable Trust and the Independent Asylum Commission and the Asylum Support Appeals Project.⁵⁷⁸

The most recent research shows that the numbers of destitute refused asylum seekers is growing. Between October 2006 and May 2008 there was a "real and substantial increase" in the incidence of destitution amongst asylum seekers in Leeds.⁵⁷⁹ The Inter-Agency Partnership's "Destitution Tally" published in January 2008 indicates that 40% of people using one-stop shop services in November and December 2007 are destitute.⁵⁸⁰

Government policy in this area also results in a significant number of asylum seekers who are legally entitled to support by statute being left destitute. The Inter-Agency Partnership found that 25% of destitute clients seen are pursuing a claim for asylum and so are likely to be legally entitled to support. There is no doubt that their right not to be subjected to inhuman and degrading treatment under Article 3 ECHR is being breached.⁵⁸¹

SSSH's Analysis

An analysis of the population of destitute refused asylum seekers provides an informed basis for the replacement of the current failing policy. It shows that the population of refused asylum seekers are not a homogenous group. There are at least six subgroups within the general group of refused asylum seekers, although there is some overlap between the subgroups and particular individuals may fall into more than one. The subgroups are:

- Subgroup 1: Those without protection needs and for whom return is a viable option;
- Subgroup 2: Those for whom the barrier to removal is instability in their home country;
- Subgroup 3: Those who have protection needs that have not been adequately addressed;
- Subgroup 4: Those who have been in the UK for substantial periods of time;
- Subgroup 5: Those for whom return is not immediately viable due to documentation problems;
- Subgroup 6: Those for whom return is not viable due to statelessness.

⁵⁷⁶ R v SSHD *ex parte* Limbuela [2005] UKHL 66

⁵⁷⁷ Hereafter "ECHR"

⁵⁷⁸ See, for example, Amnesty International "Down and Out in London" www.amnesty.org.uk/uploads/documents/doc_17382.pdf, Refugee Action "The Destitution Trap" www.refugee-action.org.uk/campaigns/documents/RA_DestReport_Final_LR.pdf, The Childrens Society "Living on the Edge of Despair" www.childrenssociety.org.uk/resources/documents/Research/Living_on_the_edge_of_despair_destitution_amongst_asylum_seeking_and_refugee_children_6115_full.pdf, Barnardo's "Like any other child?" www.barnardo's.org.uk/like_any_other_child_asylum_report08_full.pdf, The Joseph Rowntree Charitable Trust "Destitution in Leeds" www.jrct.org.uk/documents.asp?section=00010006&lib=00030002, Independent Asylum Commission, Interim Findings "Fit for Purpose Yet?" www.independentasylumcommission.org.uk.

⁵⁷⁹ The Joseph Rowntree Charitable Trust "More Destitution in Leeds" www.jrct.org.uk/documents.asp?section=00010006&lib=00030002

⁵⁸⁰ Refugee Agencies Policy Response "The Destitution Tally: an indication of the extent of destitution amongst asylum seekers and refugees" January 2008 www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy_responses/IAP_Destitution_Tally_Jan08.pdf

⁵⁸¹ See R v SSHD *ex parte* Limbuela [2005] UKHL 66

This analysis was put to the Home Secretary when she met a delegation from SHSH led by the Archbishop of York in March 2008. It has formed the basis of ongoing discussions between the UK Border Agency and delegates from SHSH concerning the methods by which refused asylum seekers could be lifted out of destitution.

Subgroup 1

SHSH recognises that some refused asylum seekers have no protection needs. Member agencies of Asylum Support Partnership are of the view that for refused asylum seekers with no protection needs, to achieve increased voluntary and assisted voluntary departure, they must have sufficient confidence that decisions on their protection claims are safe and fair and that return will occur in a safe, dignified and considered manner. Refused asylum seekers with no protection needs must have confidence in the system in order to engage with the idea that their claim has been refused and that they should return. More of Subgroup 1 would choose to return to their country of origin if supported by a trusted adviser not simply focusing on the need to survive while destitute

Subgroups 2 and 3

However, Subgroup 2 (those for whom the barrier to removal is instability in their home country) and Subgroup 3 (those who have protection needs that have not been adequately addressed) represent people with continuing protection needs. Return is not the appropriate solution to their predicament. Forcing them into destitution is a multiple human rights violation. They are trapped in the UK, failed by the system that has determined their claims.

Case Study: Subgroup 2

Henry was an MDC activist in Zimbabwe who came to the UK in 2001 after facing threats of persecution relating to his opposition political activities. His claim was considered but refused on the bases that he was not senior enough in the MDC to face persecution if he returned.

Henry was convinced that he would be in danger if he went back and so ended up destitute and reliant on the support of friends and charity. After several months in this situation his dignity was so compromised that he chose to return and face the possibility of persecution than remain destitute in the UK. At least he would be able to support and feed himself in Zimbabwe, he reasoned.

When Henry returned to Zimbabwe he was immediately identified, picked up and detained by security services, and brutally beaten and tortured. Eventually he managed to escape and fled back to the UK, and after a long process involving detention, a hunger strike and a fresh claim, he was granted asylum.

The most recent evidence indicates that the proportion of destitute refused asylum seekers that fall within Subgroups 2 and 3 is large. The Joseph Rowntree Charitable Trust report “More Destitution in Leeds” revealed that destitute refused asylum seekers increasingly from unstable countries such as Zimbabwe, Iran, Eritrea, the Democratic republic of Congo and Iraq.⁵⁸²

Subgroup 2 includes many who fall into a protection gap between UK policy and practice and international standards and practice; particularly with respect to people fleeing armed conflict or endemic violence or those at serious risk of systematic or generalised violations of their human rights who have not been able to establish that they individually are at risk. Since the withdrawal of Exceptional Leave to Remain⁵⁸³ and the country policies in 2003 that had acted as a safety net, there has been a radical reduction in the number of asylum seekers granted complimentary protection. For the majority of this period, asylum claims were considered by the then Immigration and Nationality Directorate’s unreformed and much criticised asylum decision-making process.

The issue can be illustrated by the position that the government in respect of civilians who are fleeing the risks to their lives resulting from armed conflict. Surprisingly the Refugee Convention and the ECHR do not automatically provide protection⁵⁸⁴ resulting in what UNHCR have termed an “unacceptable protection gap.”⁵⁸⁵ A provision of the EC Qualification Directive, transposed into the Immigration Rules in October 2006, potentially re-instates complimentary protection for this group. However, government policy, defended in ongoing litigation, it that this provision does not extend protection any further than the pre-existing rules.⁵⁸⁶ The draft illustrative rules on protection published with the draft Bill do not propose any amendments to the entitlement.

⁵⁸² The Joseph Rowntree Charitable Trust “More Destitution in Leeds” www.jrct.org.uk/documents.asp?section=00010006&lib=00030002

⁵⁸³ Hereafter “ELR”

⁵⁸⁴ See KH (Iraq) [2008] UKAIT 0002, paragraph 1

⁵⁸⁵ Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive, UNHCR, March 2004

⁵⁸⁶ See UKBA Asylum Policy Instruction on Humanitarian Protection at www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/humanitarianprotection.pdf?view=Binary Article 15 of the Qualification Directive is currently being considered in a reference from the Dutch Council of State to the European Court of Justice, see *Elgafaji v Staatssecretaris van Justice* Case C C-465/07

This leaves the unacceptable protection gap open and results in absurd and inhumane outcomes where, for example, civilians who have fled the height of the violence in central and southern Iraq have had their claims refused and are left destitute, but are not being forcibly returned. In contrast, when the Ba'ath Party controlled Iraq, claimants from this part of Iraq were granted, at minimum, a period of ELR.

Another example of the failure of the policy relates to asylum seekers from Zimbabwe. Forced removals to Zimbabwe are currently suspended. By July of this year, SHSH estimated that there were up to 11,500 refused Zimbabwean asylum seekers in the UK. In the first quarter of 2008, 270 of 375 asylum claims considered by the UK Border Agency were refused and only 50 of 285 appeals were successful.⁵⁸⁷ In contrast only 1 forced removal to Zimbabwe has occurred since August 2005, and forced removals had previously been suspended between January 2002 and November 2004.⁵⁸⁸ Although the Prime Minister announced that the situation of refused Zimbabwean asylum seekers was being reviewed,⁵⁸⁹ to date the government has failed to recognise the protection needs of this group and has maintained a policy of refusing them permission to work, often resulting in the loss of valuable skills that Zimbabwe will need in its reconstruction.

At present, forced removals to the Democratic Republic of Congo and of the Darfuri to Sudan are suspended pending the resolution of litigation. Refused asylum seekers from these countries will generally fall into subgroup 2.

Several EU member states bridge the protection gap by offering some form of group or "categorized" protection, much as the UK used to with its country policies. A recent study,⁵⁹⁰ summarised in a European Parliamentary briefing⁵⁹¹ shows that several EU member states offer some form of protection based on the general situation in the country of origin, regardless of an applicant's individual circumstances. Some states postpone the asylum decision⁵⁹² and some postpone removal⁵⁹³ if the asylum seeker does not have an individualised risk, while others grant fully fledged protection status,⁵⁹⁴ including residence rights, to asylum seekers from certain countries or parts of countries. Although the criteria used differ, many of the states studied did offer some form of categorised protection to applicants from Afghanistan, Central Iraq, and Somalia between 2001 and 2005. The Netherlands currently offers categorised protection to some Iraqi and Somali claimants.

ELR was abolished ostensibly because the government considered it to be a "pull factor." Yet the main factor influencing an asylum seeker's preferred destination is known to be the presence of family and friends.⁵⁹⁵ Research commissioned by the Home Office shows:

- (A) there is little evidence that asylum seekers are deterred by the prospect of harsh treatment in a country of asylum;⁵⁹⁶
- (B) measures that prevent asylum seekers from reaching their destination can affect numbers (though the influence is usually temporary);⁵⁹⁷
- (C) asylum seekers have little control over their route or final destination and have little knowledge of UK immigration or asylum procedures before they arrive, nor of entitlements to benefits, the availability of work or how UK policies compare to those of other EU countries.⁵⁹⁸

Further, recent research conducted for the Dutch Advisory Committee on Aliens Affairs found that the prevailing view that the Dutch group protection policy (similar to the UK's country policies) had an "appealing effect" could not be substantiated.⁵⁹⁹

The main influence on the fall in numbers coming to the UK since 2003 has been the drop in numbers of refugees worldwide. However, the policy measures that appear to have had an effect on falling numbers have been barriers to entry, which have had an impact since ELR was abolished. The Home Office's own graphs show the sharpest falls occurred after the introduction of pre-entry measures, such as instituting visa controls on Zimbabweans and transit visas for other nationalities, new technology for searching freight at channel ports and the deployment of Airline Liaison Officers.⁶⁰⁰ Such policies may be criticised for other reasons, but it appears incorrect to attribute the fall in numbers of asylum claimants on fewer grants of complimentary protection or the harsher treatment of refused asylum seekers.

⁵⁸⁷ See Home Office, Asylum Statistics, 1st Quarter, 2008

⁵⁸⁸ See footnote 4 above

⁵⁸⁹ Hansard 10/07/08 Column 1556

⁵⁹⁰ Comparative Study on the Existence and Application of Categorized Protection in Selected European Countries, International Centre for Migration Policy Development (ICMPD), 2006, ordered by Adviescommissie Vreemdelingenzaken (Advisory Committee on Aliens Affairs of the Dutch Minister of Aliens Affairs and Integration), available at www.acvz.com

⁵⁹¹ Briefing note on European protection in cases of group persecution, European Parliament, 2006

⁵⁹² E.g. Switzerland, Netherlands

⁵⁹³ E.g. Denmark, France and Germany

⁵⁹⁴ E.g. Austria, Denmark and Finland

⁵⁹⁵ Asylum migration to the European Union: patterns of origin and destination, Böcker and Havinga 1998

⁵⁹⁶ An assessment of the impact of asylum politics in Europe 1990-2000, Zetter *et al*, Home Office, 2003

⁵⁹⁷ *Ibid.*

⁵⁹⁸ Understanding the decision-making of asylum seekers, V. Robinson, University of Wales, July 2002.

⁵⁹⁹ Categorieel Beschermingsbeleid een "Nood Zak", ACVZ, 2006

⁶⁰⁰ Home Office, Asylum Statistics 2004

Case Study: Subgroup 3

Ahmed is an Iraqi from Mosul. He fled the Ba'ath party regime, arriving in the UK in October 2002 when the government's policy was to grant at least 4 years' ELR to Iraqis in his position. His claim for asylum was refused after one year and his appeal was unsuccessful. His asylum support was withdrawn at that point but he was given section 4 support on the basis that the Secretary of State considered that there was no safe route of return for him. That support was withdrawn in July 2007 because the Secretary of State now considered that there was a safe route of return.

Ahmed fears returning to face the civil war in Iraq. In October 2007, the UN Secretary General reported that Mosul was second only to Baghdad in the number of violent attacks and, on several recent occasions, has recorded more daily attacks than Baghdad. He has been destitute for over 1 year and has slept rough on the streets of Portsmouth.

Subgroup 3 includes people who have not been granted protection because of the long documented failures and inconsistencies in the UK's asylum determination process.⁶⁰¹ Some have claims that have been wrongly refused or others have been failed by the system for example because they may have benefited from one of the country specific policies, which existed at some point during the lifetime of their claim, had the timing of the decision on their case been different. Following litigation, UKBA now recognises that his may entitle them to a grant of ILR.⁶⁰² This group will include refugees and others entitled to international protection who have been wrongly refused. Their destitution breaches the human rights obligations owed to them.

Subgroup 4

Refused asylum seekers that have been in the UK for a long period may have integrated have formed relationships, developing private and family life rights protected by Article 8 ECHR. Following the House of Lords decision in *Chikwamba v SSHD*,⁶⁰³ a significant number will be entitled to a grant of discretionary leave. However, unless they fall within a Case Resolution Directorate priority or exceptional circumstances category, they may have to wait until 2011 for their situation to be considered.⁶⁰⁴ Their destitution is capable of breaching human rights obligations.

Subgroups 5 and 6

These groups include the *de jure* and *de facto* stateless. The UK has no formal status determination procedure or regularisation procedure for the *de jure* stateless. The evidence reveals that both groups will often be impossible to remove them but that the system leaves them indefinitely destitute.⁶⁰⁵ Their destitution breaches human rights obligations and anti-discrimination norms, particularly in light of their non-removability.

CONCLUSIONS

In order to remedy the increasing numbers of asylum seekers, refused and otherwise, who are forced into destitution the asylum support provisions of the Citizenship and Immigration Bill ought to reflect the following principles:

- (1) Asylum support provisions should be premised on the fact that asylum seekers should not be left destitute before they leave the UK and that they should have access to NHS healthcare and state funded education;
- (2) Government policy should recognise that refused asylum seekers are not a homogenous group and that policies need to be tailored to provide solutions that meet their particular situation;
- (3) A fair effective refugee status determination system where essential safeguards, such as adequate remedies and available high quality and adequately funded legal representation, exist and the protection gaps, which many destitute refused asylum seekers currently fall into, are closed.

An asylum support policy based on these principles would avoid the destitution and consequent human rights violations inherent with the current regime.

⁶⁰¹ For a recent summary of those criticisms see the Independent Asylum Commission Interim Findings in note 2 above

⁶⁰² See Case Resolution Directorate Guidance on R (S) Policy, www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/dealingwithfailedasylumclaims?view=Binary

⁶⁰³ [2008] UKHL 40

⁶⁰⁴ See APU Notice "Case Resolution Directorate: Priorities and Exceptional Circumstances" and *R (FH and others) v SSHD* [2007] EWHC 1571 (Admin)

⁶⁰⁵ The Asylum Support Appeals Project "Unreasonably Destitute" www.asaproject.org/web/images/PDFs/news/unreasonably_destitute.pdf

Memorandum submitted by the Terrence Higgins Trust

Following your telephone discussion with my colleague, Victoria Sheard, please find below some brief comments from Terrence Higgins Trust (THT), which I hope will be helpful to the Committee during their forthcoming scrutiny of the Criminal Justice and Immigration Bill.

THT notes within the current partial draft legislation and supporting documents, proposals which may lead to supplementary charging for migrants to the UK who use public services.⁶⁰⁶ If included in the full Bill and subsequently implemented, THT is concerned that such measures may have a detrimental effect on the rights of vulnerable migrants to access vital services such as healthcare, including HIV treatment.

THT does not believe it would be appropriate to address complex health issues within immigration legislation and would be grateful for the JCHR's scrutiny of this aspect of the Bill and the evidence base for any decision to implement further charging. THT has already raised our concerns on this issue in written evidence to the Home Affairs Committee, as part of their current Inquiry into the Bill. We have been asked to give oral evidence before the Home Affairs Committee in their session on 11th November and would be happy to provide oral evidence to the JCHR if that would assist in their Inquiry.

The Committee is already aware of the problems caused by the current policy of charging certain categories of migrants for HIV treatment, which has been in place since the 2004 revision of the Department of Health's guidelines on the *NHS Charges to overseas visitors regulations 1989*. THT submitted evidence on this issue to the Committee's 2006 Inquiry into the Treatment of Asylum Seekers.⁶⁰⁷ As our evidence highlighted, charging vulnerable migrants for HIV treatment is likely to have a detrimental impact on individual and public health, lead to an unnecessary increase in spending on emergency healthcare and may also risk contravening the UK's obligations under international human rights treaties. THT is aware that there are variations across the country in the way in which charging regulations are implemented, causing difficulties for clinical staff and patients alike.

In their report on this Inquiry, the JCHR agreed that the Government's policy of charging some migrants for HIV treatment was unhelpful:

"We accept that there is no universal worldwide access to free medical treatment, but recommend that on the basis of common humanity, and in support of its wider international goal of halting the spread of HIV/AIDS, the Government should provide free HIV/AIDS treatment for refused asylum seekers for as long as they remain in the UK. Absence of treatment for serious infectious diseases raises wider public health risks." (Joint Committee on Human Rights The Treatment of Asylum Seekers; Tenth Report of Session 2006–07; Volume I—Report and formal minutes; para 152)

The Committee will be aware of the High Court judgement,⁶⁰⁸ published in May 2008, made it clear that refused asylum seekers could be considered "ordinarily resident" under NHS rules and therefore should not be charged for NHS care. However, the Department of Health will appeal this judgement in November 2008, making clear its intention to continue implementation of a charging regime for vulnerable migrants using the NHS.

The current partial Bill and accompanying documentation is not clear on exactly what extra charging the Government may introduce through the full Bill, nor does it make clear which public services and which types of migrant would be affected. THT would be concerned however, were this Bill to be used as a vehicle to expand the NHS charging regime so as to further limit the ability of migrants to access free NHS HIV treatment. We would strongly welcome the Committee's further consideration of this issue in their scrutiny of the Bill, particularly with regard to the implications for the human rights of those who might be affected by such a charging regime.

I hope the Committee will find our comments useful.

6 November 2008

Memorandum submitted by the United Nations High Commission for Refugees (UNHCR)

EXECUTIVE SUMMARY

UNHCR has been charged by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organizations.⁶⁰⁹

UNHCR welcomes Government's initiative to simplify and consolidate current UK legislation on immigration and asylum but wishes to highlight a number of human rights issues raised by the Draft (Partial) Immigration Bill and Explanatory Notes. UNHCR urges the Joint Committee to ensure that the

⁶⁰⁶ UKBA 2008: *Making Change Stick*; p3: "We will take powers to ask migrants to pay a little extra towards local public services."

⁶⁰⁷ Terrence Higgins Trust (September 2006) *Written Evidence to the Joint Committee on Human Rights*

⁶⁰⁸ Mr Justice Mitting's High Court judgment in "*R (A) –v– Secretary of State for Health (Defendant) and West Middlesex University Hospital NHS Trust (Interested Party)*—CO/8095/2006"

⁶⁰⁹ Statute of the Office of the United Nations High Commissioner for Refugees, GA Res. 428(V), Annex, UN Doc. A/1775, paras 1, 6 (1950).

new legislation will uphold the UK's tradition of providing sanctuary to those fleeing persecution and is compatible with the UK's obligations under the 1951 Refugee Convention and the European Convention on Human Rights.

UNHCR particularly wishes to draw the Committee's attention to a number of areas of concern relating to the Draft Bill:

1. Primacy of the 1951 Refugee Convention: UNHCR believes that the duties and rights in the 1951 Refugee Convention and its 1967 Protocol should be fully reflected in primary legislation, including the definition of a refugee;
2. Strong safeguards for strong borders: the Bill should, recognise the principle of *non-refoulement* and the UK's extra-territorial obligations;
3. A path to citizenship: the naturalisation requirements of active citizenship and language proficiency should not directly or indirectly impede refugees' access to an effective nationality which UNHCR considers part of the durable solution; further to the UK's international obligations under the 1954 and 1961 Statelessness Conventions⁶¹⁰ appropriate national procedures should be in place to determine statelessness, whether de jure or de facto, and identify access to most relevant solutions which could include offering the opportunity to provide an effective nationality;
4. Criminalisation of/access to asylum: there is an insistence in the Draft Bill on prosecuting individuals claiming asylum in the UK over assessing their international protection needs, whilst "immigration bail" removes the presumption of liberty of those entering the UK.

I. PRIMACY OF THE 1951 REFUGEE CONVENTION

1. There is no direct reference to the primacy of the 1951 Refugee Convention in the Draft Bill as is currently contained in section 2 of the Asylum and Immigration Appeals Act 1993. Instead, protection and reference to the 1951 Refugee Convention are confined to the draft Immigration Rules, which carries a number of risks. UNHCR is of the opinion that the duties and rights in the 1951 Refugee Convention should be fully reflected in primary legislation. Failing that, there should be an equivalent section 2 reference in the Draft Bill.

2. The definition of a refugee in the Draft Bill must reflect the 1951 Refugee Convention, the 1967 Protocol and UNHCR's Handbook 1979.⁶¹¹ Further, the definition is incorrect and should reflect the fact that recognition by the UK Government does not make someone a refugee but declares them to be one.⁶¹²

3. Article 31 (1) of the 1951 Refugee Convention dealing with non-penalisation of refugees has not been accurately reflected in the Draft Bill, Part 11. The Draft Bill makes no mention of Article 31 (1) and adds qualifications which are not found in Article 31 (1). UNHCR believes that this issue could be addressed by having a direct reference to Article 31 (1) in the Draft Bill.

4. Finally, UNHCR is concerned that the Draft Bill appears to limit the UK's obligations to persons present on UK territory. UNHCR's view is that the 1951 Refugee Convention applies to state signatories in an extra territorial manner.⁶¹³

II. STRONG SAFEGUARDS FOR STRONG BORDERS

5. As a signatory to the 1951 Refugee Convention and its 1967 Protocol the UK is obliged to identify persons with international protection needs within the phenomenon of mixed movements when undertaking migration control activities. In the management of migration and border control, States should ensure that safeguards are in place so that people who are seeking international protection can request asylum and be

⁶¹⁰ UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954. United Nations, Treaty Series, vol. 360, p. 117. Available at: <http://www.unhcr.org/refworld/docid/3ae6b3840.html>. UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961. United Nations, Treaty Series, vol. 989, p. 175. Online. Available at: <http://www.unhcr.org/refworld/docid/3ae6b39620.html>

⁶¹¹ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, 1979 (Re-edited, January 1992), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6b3314>

⁶¹² Ibid, paragraph 29.

⁶¹³ For more on the UK's extra-territorial obligations see attached Legal Opinion. See also UNHCR "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>. See also "The Scope and Content of the Principle of Non-Refoulement: Opinion", Sir Elihu Lauterpacht and Daniel Bethlehem, 20 June 2001, in "Refugee Protection in International Law: "UNHCR's Global Consultations on International Protection", edited by Erika Feller, Volker Trk and Frances Nicholson, Cambridge University Press, Cambridge (2003), available at: <http://www.unhcr.org/publ/41a1b51c6.html> and "UNHCR Note on Diplomatic Assurances and International Refugee Protection", 10 August 2006, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=44dc81164&page=search>

assured a fair treatment of their claims. Consequently, border control systems should incorporate measures which make it possible to identify people who are seeking protection. Within these flows, refugees and other people in search of international protection constitute a distinct category.

6. In UNHCR's view, the measures in the Draft Bill do not differentiate adequately between persons seeking international protection and other third-country nationals, and may therefore impede safe access to asylum procedures for persons seeking protection. The proposed new power to refuse permission must not prevent individuals from fleeing persecution or result directly or indirectly, in their *refoulement* or denial of access to the asylum procedure.

7. In UNHCR's understanding, the UK's protection responsibility under international refugee and human rights law, including respect for the principle of non-*refoulement*, is engaged wherever it asserts jurisdiction in relation to all persons within its territory or subject to its jurisdiction, including asylum-seekers and refugees. This responsibility also extends to the actions of out-posted UK immigration officials, as representatives of the UK Government acting on behalf of the UK or in the exercise of governmental authority. UK immigration officials operating overseas to prevent entry to the UK must be required and empowered to identify the protection needs of the people they intercept, allow access to asylum procedures for those seeking international protection, as well as to provide appropriate and differentiated solutions for all the profiles of people involved in mixed movements.

8. UNHCR recommends that any interception measures be guided by the following considerations in order to ensure the adequate treatment of asylum-seekers and refugees amongst those intercepted:

“ ... Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions; ... ”

9. UNHCR has developed a “*Ten Point Plan of Action*”⁶¹⁴ to assist States in finding practical solutions to the challenges of managing their external borders, while complying fully with their obligations under international refugee and human rights law. These practical protection safeguards are required to ensure that such measures are not applied in an indiscriminate or disproportionate manner and that they do not lead to direct or indirect *refoulement*.⁶¹⁵

10. Where profiling mechanisms do not exist or cannot be applied, UK border control officials should be helped to identify asylum seekers and other persons with special needs through the elaboration of guidelines or standardised questionnaires, protection hotlines and/or the possibility to consult with UNHCR. They should receive clear instructions that all asylum seekers are to be referred to the responsible asylum authorities.⁶¹⁶

11. Part 8 of the Draft Bill obliges private carriers to conduct immigration control activities, which may have the impact of seriously limiting the right to seek and enjoy asylum and may be incompatible with the humanitarian tenet on which the international regime for the protection of refugees is based. In UNHCR's view, when interception measures are conducted by private actors on behalf of the Government or in the exercise of governmental authority, the UK should ensure that asylum seekers and refugees have access to protection and respect for the principle of non-*refoulement*. In UNHCR's view, when interception measures are conducted by private actors on behalf of the Government, the UK still should ensure that asylum seekers have access to protection and respect for the principle of non-*refoulement*.

III: A PATH TO CITIZENSHIP

12. In UNHCR's view securing legal residence is of utmost importance to the successful integration of refugees and other persons with international protection needs. Consideration should be given to facilitating naturalisation, especially as regards certain conditions for naturalisation which may prove too difficult for refugees to meet and in fact impair on refugees' access to a durable solution.

13. UNHCR is of the view that the proposed route to citizenship complicates, rather than simplifies, the immigration system by requiring migrants and refugees to pass through an additional stage of “probationary citizenship”. There is a real risk that the complexity of the process and the fees involved will make the integration process longer and more expensive for refugees, contrary to Article 34 of the 1951 Refugee Convention which requires that States “expedite naturalization proceedings” and “reduce as far as possible the costs and charges of such proceedings”.

⁶¹⁴ UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007. Rev.1, available at: <http://www.unhcr.org/refworld/docid/45b0c09b2.html>

⁶¹⁵ UNHCR, *ExCom Conclusion on Non-Refoulement*, 1977. No. 6 (XXVIII)—1977, available at: <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html>

⁶¹⁶ UNHCR's *Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, available at: <http://www.unhcr.org/refworld/docid/46e159f82.html>

14. UNHCR urges the UK Home Office to consider making exceptions for refugees who are unable to participate, or are limited in the manner in which they are able to participate in community activities. In this regard it should be borne in mind that refugees may have faced specific forms of persecution in the past and the association with community activities may have an unintended impact on their emotional and physical well being. Although this “activity condition” is not mandatory, it appears to serve as a form of indirect penalty for not participating in the community activities. In the circumstances described above, in UNHCR’s view, it would not be fair to expect the individuals concerned to spend three years as probationary citizens, increasing the total period of time before they become eligible for citizenship to eight years should they be unable, for reasons of their past persecution experience, to participate in community activities.

15. UNHCR is of the view that the language requirements imposed on refugees and their family members should be understood in the context of their flight. Refugees, unlike migrants, have not chosen to leave their country in freedom and are therefore particularly disadvantaged. UNHCR encourages the Government to ensure that refugees have access to Government funded English language classes given the fact that prior to their arrival in the UK, refugees, those with humanitarian protection and their families are likely to have had less access to English language training institutions and basic education facilities than regular migrants. Many will have fled from communities that have been torn apart by conflict; spent years in makeshift refugee camps; or lived in remote areas of the world where education facilities are minimal and access to specialized English language training as well as the internet is limited. Language classes should be further accessible to refugees taking into account the gender, age and diversity of the refugees to ensure that all refugees have equal access to assistance.

16. UNHCR is concerned that the provisions of the Draft Bill do not make it sufficiently clear that persons who come to the UK illegally and who are in need of international protection should not be penalised.⁶¹⁷ In light of this, UNHCR is concerned that as part of the requirements for naturalisation it is required that the applicant was not at any time in the qualifying period in the UK in breach of the immigration laws (section 33).

17. With regard to the resettlement of refugees to the UK under the Gateway Protection Programme, the majority of refugees who are resettled to the UK under the Gateway Protection Programme have been recognised as refugees by UNHCR for at least five years. They have often spent decades residing in refugee camps, and have been identified for resettlement because they are unable to integrate in their country of asylum, or return to their country of origin. Accordingly, the objective of resettlement is to provide these refugees with a durable and permanent solution. The grant of indefinite leave to remain upon arrival to the UK⁶¹⁸ contributes significantly to the ability of refugees to begin to rebuild their lives in the UK (the first year of which is financed by the Government). UNHCR would like to draw attention to the fact that resettled refugees in all other resettlement countries receive indefinite leave to remain and not a temporary status.⁶¹⁹

18. UNHCR further would like to draw attention to the UK’s international obligations under the 1954 Convention relating to the Status of Stateless Persons⁶²⁰ and the 1961 Convention on the Reduction of Statelessness.⁶²¹ UNHCR is concerned that the provisions of these Conventions have not been transposed in national law. In the absence of a specific procedure to determine statelessness, the legal limbo in which the stateless person exists, remains unresolved. UNHCR therefore recommends that the UK will adopt a designated statelessness determination procedure with a view to identifying stateless persons, to facilitate the acquisition of a legal identity and to provide for a legal status, and where appropriate, to provide for a 1954 Convention Travel Document.

IV: CRIMINALISATION OF ASYLUM

19. Part 4 of the Draft Bill seeks to combine administrative removal⁶²² (used in the majority of cases of failed asylum-seekers), automatic deportation and deportation (used in cases where the concerned individual’s presence in the UK is considered not conducive to public good) into the single concept of “expulsion”. Part 4 also takes away the requirement to give notice to the individual facing expulsion and consequently gives the affected individual no opportunity to make representations before the decision to expel is taken.

⁶¹⁷ Section 31 of the Immigration and Asylum Act 1999 represents UK legislators interpretation of what is required by Article 31 of the 1951 Refugee Convention. Please also refer to UNHCR comments in paragraphs 35 and 37 of this submission for more on UNHCR’s concerns regarding Article 31 as well as the attached Legal Opinion.

⁶¹⁸ This is currently the situation, see the Asylum Policy Instructions on the Gateway Protection Programme, available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>

⁶¹⁹ USA, Canada, Sweden, Norway, Finland, New Zealand, Denmark, The Netherlands, France, Ireland, Brazil, Chile, Argentina, Iceland, Poland, Portugal, Paraguay and Uruguay.

⁶²⁰ The 1954 Convention relating to the Status of Stateless Persons, UNTS, No. 5158, Vol. 360, p.117

⁶²¹ The 1961 Convention on the Reduction of Statelessness, UNTS 14458, vol. 989, p.175

⁶²² Prior to the changes to the Immigration Rules brought under HC321 in April 2008, administrative removal, did not bar removed individuals from returning to the UK. HC321 now imposes re-entry bans of varying lengths for any forced removals or voluntary departures after October 2008. For details on HC321 see <http://ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/>. See also UNHCR comments to Part 3 of the Draft Bill in this submission.

20. UNHCR remains concerned about the Draft Bill's insistence on prosecuting individuals in the UK over assessing their international protection needs. For example, the Draft Bill provides that persons sentenced to at least 12 months are liable to automatic expulsion because they become "foreign criminals" (sections 37(2)(b) and 51 read together).⁶²³ Recognised refugees and those granted subsidiary protection may come under the ambit of "foreign criminals" if they commit even minor offences and are sentenced to at least 12 months. Such persons are protected from removal from the UK if this would contravene the UK's obligations under the Refugee Convention while their application is being decided (according to section 38 (4) of the Bill).⁶²⁴

21. Article 33 (2) of the 1951 Refugee Convention provides that no person shall be expelled to a country where they face persecution unless, "*there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country*". UNHCR believes that the obligation which the Draft Bill places on the Secretary of State, to make an expulsion order where an individual has been imprisoned for 12 months sets too low a threshold to justify an exception to the principle of *non-refoulement*.

22. In introducing the concept of "immigration bail", Part 5 of the Draft Bill appears to take away the presumption of liberty for those in respect of whom an expulsion order has or may be made (section 55). Further, it weakens the judicial oversight on "immigration bail" by limiting the power of the Tribunal to cancel bail conditions imposed by the Secretary of State and by requiring the Tribunal to seek the Secretary of State's consent before granting bail in cases where removal from the UK is imminent.

23. While UNHCR accepts that there may be exceptional situations under which States may detain individuals seeking international protection, it has always been UNHCR's view that the detention of asylum seekers is inherently undesirable, and that there must be a presumption against its use as such measures are contrary to the fundamental human right of freedom from arbitrary detention.⁶²⁵ UNHCR is therefore concerned that the proposed use of the term "immigration bail" in the Draft Bill is not appropriate where it is sought to apply to all individuals seeking international protection who are waiting for their applications to be decided. Individuals fleeing persecution have a right to ask the United Kingdom to offer them international protection, and it is UNHCR's position that the detention of such applicants should be resorted to only exceptionally and where such action would be proportionate to the objectives it is aiming to achieve.⁶²⁶ Use of the term "immigration bail" implies that detention is the rule and not an exception.

24. UNHCR is also concerned that the Draft Bill as currently drafted erodes judicial oversight in detention decisions and the granting of bail.⁶²⁷ In order to ensure that the detention of those seeking international protection is in conformity with international standards and that no individual is subjected to arbitrary detention, UNHCR believes that the detention of each individual held should be submitted to automatic judicial oversight.⁶²⁸ In this respect, UNHCR recommends the re-introduction of automatic bail hearings, as was the position with Part III of the Asylum and Immigration Act 1999, into the Draft Bill, or for the adoption of similar legislative provisions to ensure that a bail hearing is automatically triggered in relation to any individual seeking international protection, once a specified reasonable and proportionate period of time is passed in detention. UNHCR further recommends that affirmative measures be put in place to facilitate bail applications by detained asylum seekers as well as the provisions of quality legal advice and representation.

25. Part 7 consolidates the pre-existing immigration offences and adds a new offence of "obstructing, resisting or assaulting officials". UNHCR's main concern with this part of the Bill is that it makes it an offence for asylum seekers to knowingly enter the UK without a valid travel document, contrary to the UK's obligations under Article 31 (1) of the 1951 Convention. The right to seek asylum is recognized in the

⁶²³ This regime currently exists in the UK Borders Act 2007 and is known as "automatic deportation". See UNHCR Briefing for the House of Lords, second reading, June 2007 on the UK Borders Bill available at: <http://www.unhcr.org.uk/legal/documents/UNHCRComments.June07.pdf>

⁶²⁴ See however, comments in paragraph 28 of the attached Legal Opinion.

⁶²⁵ As set out in "UNHCR's Guidelines on applicable Criteria and Standards relating to the Detention of Asylum Seekers", February 1999. UNHCR also considers that there are certain categories of people who should not be detained, due to their particular vulnerability such as victims of torture, disputed minors, persons with a mental or physical disability, unaccompanied elderly persons, families with children, and other individuals with similarly vulnerable backgrounds and characteristics are also of concern to UNHCR in the context of detention.

⁶²⁶ In conformity with UNHCR ExCom Conclusion No. 44 (XXXXVII)—1986 (available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>), the detention of asylum-seekers may be resorted to if no alternatives are available, and for the minimum period of time necessary to:

- 1) Verify Identity;
- 2) To determine the elements on which the claim for refugee status or asylum is based;
- 3) In cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum;
- 4) To protect national security and public order.

See also UNHCR's submission to the European Court of Human Rights in the case of *Saadi v. United Kingdom* (13229/03) 29 January 2008.

⁶²⁷ This point has been made in UNHCR's Comments on the 2005 Immigration and Nationality Bill, October 2005 available at: <http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/Comments2005IANbilldetention.htm>.

⁶²⁸ UNHCR has stated in ExCom Conclusion No. 44 (see footnote 21 above), that detention measures taken in respect of asylum seekers should be subject to judicial or administrative review.

Universal Declaration of Human Rights (Article 14). Further, individuals become refugees by fulfilling the definition of a refugee under the 1951 Refugee Convention and State recognition simply declares refugee status but does not create it.⁶²⁹

26. The criminalisation of asylum seekers in UK legislation has been the subject of UNHCR comments on a number of occasions in the recent past, including to this Committee.⁶³⁰ Refugees are often forced to flee their own country in fear of their lives. In such desperate circumstances individuals may need to resort to desperate measures merely to survive. It is well-established that the need to escape persecution frequently compels refugees to resort to irregular means of entry into host countries—including reliance on facilitators and/or the use of false documentation. Article 31 is specifically aimed at protecting persons in this situation from prosecution for the measures that they were forced to use to reach safety.⁶³¹

27. UNHCR is also not satisfied that the defence for entering the UK without a passport (section 104 (3)) is sufficient to ensure compliance with Article 31 (1) of the 1951 Refugee Convention. UNHCR is of the opinion that the question of whether an excuse is “reasonable” (and whether non-compliance with the instructions of a facilitator was “unreasonable”) is inherently subjective and requires a careful assessment of the individual circumstances and special situation of asylum seekers. Very often persons who are of special interest to a government find it difficult, if not impossible to either apply for a passport or to leave their country of nationality in a regular manner. Hence, the use of forged or irregular documents and departure by irregular means (including reliance on a facilitator) are common methods used by persons in need of international protection to arrive in a country of asylum. These issues were explored in UNHCR’s third party intervention in the recent case of *R v Asfaw*.⁶³²

UNHCR

November 2008

Memorandum submitted by UNICEF UK

UNICEF UK is one of 37 National Committees based in industrialised countries that advocate for change on behalf of all the world’s children and raise funds for UNICEF’s programmes around the world. UNICEF is the world’s leading organisation working specifically for children. We work with local communities and governments in more than 150 countries to provide emergency relief and run long-term development programmes in areas such as health, education and child protection. The UN Convention on the Rights of the Child, which protects the rights of all children everywhere and has been adopted by almost every country in the world, underpins all of our work.

INTRODUCTION

UNICEF UK shares the Committee’s view that the Draft (Partial) Immigration and Citizenship Bill, published for consultation in July 2008 (Cm 7373), is likely to raise very significant human rights issues and we very much welcome the Committee’s decision to focus its legislative scrutiny on this Bill.

UNICEF UK would suggest to the Committee to look at the Bill and consider its compatibility with the UN Convention on the Rights of the Child (Convention). We believe that this Bill presents opportunity to enhance protection of children’s rights and we would therefore suggest two recommendations, one of general nature and another containing a number of specific measures, as the way forward.

We set out our recommendations in the context of:

- The recent announcement by the UK Government that they will remove their reservation on immigrations and nationality matters to the Convention;
- “Concluding Observations and Recommendations” issued by the UN Committee on the Rights of the Child on 3 October 2008, after examination of the periodic UK Government report on implementation of the Convention.

⁶²⁹ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 29, see footnote 5 above.

⁶³⁰ UNHCR has previously expressed its concern to this Committee, in December 2004, with regard to the implementation of legislation criminalizing asylum seekers for illegal entry or presence, see UNHCR’s submission to the Home Affairs Committee Enquiry into the Policy and Practice of Immigration Control Examination of the entry clearance (visa) system, the granting or refusing of further leave in the UK and the enforcement of immigration control. See also, Asylum and Immigration (Treatment of Claimants, etc.) Bill Lords 2 reading, UNHCR briefing March 2004 and ndUNHCR Comments on the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Clause 2 Draft Guidance of June 2004 available at: <http://www.unhcr.org.uk/legal/position.html>

⁶³¹ Please also see paragraphs 23–33 of the attached Legal Opinion. Article 31(1) of the 1951 Refugee Convention provides that: “Contracting States shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

⁶³² [2008] UKHL 31 [2008] 2 WLR 1178. See also attached Legal Opinion paragraphs 23–33.

UK obligations under the Convention apply to each child within the UK's territory and to all children subject to its jurisdiction (art. 2). Obligations deriving from the Convention apply to all branches of government (executive, legislative and judicial). UK, as a State party to the Convention, has to ensure that the provisions and principles of the treaty are fully reflected and given legal effect in relevant domestic legislation.

With regards to this Bill, UNICEF UK would like to make the following recommendations:

RECOMMENDATION 1

That the leading principles of the Convention are explicitly mentioned in the Bill. The best place for that would seem to be Part 11: General Supplementary Provisions, Children, Clause 189: Duty regarding the welfare of children (page 187).

The current text of cl. 189 would go further than previous legislation so we welcome this clause, however it is still narrow and does not transpose the spirit and main principles of the Convention. These are:

(b) *Non-discrimination (art 2)*

The principle of non-discrimination, in all its facets, applies in respect to all dealings with refugee and asylum-seeking children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant. Measures should also be taken to address possible misperception of these children within the society.

(c) *Best interests of the child as a primary consideration in the search for short and long term solutions (art 3)*

Article 3(1) states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. In the case of a displaced child, the principle must be respected during all stages of the displacement cycle.

(d) *The right to life, survival and development (art 6)*

The obligation of the State party under article 6 includes protection from violence and exploitation, to the maximum extent possible, which would jeopardize a child's right to life, survival and development. Refugee and asylum-seeking children, in particular separated and unaccompanied children, are vulnerable to various risks that affect their life, survival and development.

(e) *Right of the child to express his or her views freely (art 12)*

Pursuant to article 12 of the Convention, in determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account (art. 12(1)).

RECOMMENDATION 2

On 3 October 2008, The UN Committee on the Rights of the Child published its “Concluding Observations and Recommendations” which in relation to asylum-seeking children state the following:

“

71. The Committee recommends that the State party:

- (a) intensify its efforts to ensure that detention of asylum-seeking and migrant children is always used as a measure of last resort and for the shortest appropriate period of time, in compliance with article 37 (b) of the Convention;
- (b) ensure that the United Kingdom Border Agency (UKBA) appoints specially-trained staff to conduct screening interviews of children;
- (c) consider the appointment of guardians to unaccompanied asylum-seekers and migrant children;
- (d) provide disaggregated statistical data in its next report on the number of children seeking asylum, including those whose age is disputed;
- (e) give the benefit of the doubt in age-disputed cases of unaccompanied minors seeking asylum, and seek experts guidance on how to determine age;
- (f) ensure that when return of children occurs, this happens with adequate safeguards, including an independent assessment of the conditions upon return, including family environment;
- (g) consider amending section 2 of the 2004 Asylum and Immigration (Treatment of Claimants etc.) Act to allow for an absolute defence.”

UNICEF UK agrees with all these recommendations, and asks the Committee to make reference to these in their scrutiny of the Draft Bill.

October 2008
