ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

# IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 43
# HOUSE OF LORDS GRAND COMMITTEE JANUARY 2006
# BRIEFING ON *CLAUSES 51 TO 55 – "TERRORISM" PROVISIONS*

*ILPA is a professional association with some 1200 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 teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups. For further information contact Alison Harvey, Legal Officer, alison.harvey@ilpa.org.uk, 0207 490 1553*

***Amendments are numbered as per the marshalled list.***

## INTRODUCTION

1. Proposals for a variety of measures relating to terrorism were published over the summer. Many are now part of the Terrorism Bill. On 15 September 2005 the Home Secretary set out in draft clauses that would be introduced into this Bill. This was done in Commons Committee and the provisions were debated on 27 October 2005. Among them were what is now Clause 7 of the Bill (an ILPA note on this is available on request), which was debated with other clauses on appeals, and clause 42, which has now been placed in the *Informati*on part of the Bill and is therefore covered in the ILPA briefing on that part which is available on request. This briefing deals with the other five clauses: now clauses 51 to 55.

2. ILPA's view is that the case for new legislation in this area has not been made and that the new provisions fail to respect rights and civil liberties. All the arguments about breadth of provision in the Terrorism Bill are relevant to these clauses. The new clauses will suffer from being debated separately from the Terrorism Bill, in that they will not be taken along with the debates on the definition of terrorism, and the need for further legislation. However, we trust that they will gain from scrutiny by those scrutinising immigration, asylum and nationality provisions. It should be emphasised that all the provisions, with the exception of Clause 52, go wider than any current definition of terrorism, and cover broad questions of national security and the public good. Indeed, this may be why the part of the Bill containing them is headed "miscellaneous" rather than "terrorism".

3. ILPA counts among its members those who have undertaken the highly specialised work of representation before the Special Immigration Appeals Commission (SIAC), including former Special Advocates. Members have experience of dealing with cases involving the exclusion clauses of the Refugee Convention and with human rights cases involved the limitations that may be placed upon the exercise of rights in the interests of national security. ILPA members have also represented in the leading cases involving challenges to detention under terrorism legislation and in other leading immigration, asylum and nationality cases involving national security considerations.

4. ILPA has provided evidence to the current Joint Committee on Human Rights enquiry into Counter-terrorism and Human Rights, including giving our initial views on the draft version of these clauses.

## Clause 51 Arrest Pending Deportation

5. Clause 51 extends existing powers to obtain a warrant to enter premises to effect an arrest where a person has been served with notice of an intention to deport him/her to cases

where the notice has not yet been served and entry is for the purposes of service as well as the subsequent arrest. The Immigration Officer or constable would be able to obtain a warrant to serve the notice and affect the subsequent arrest.

6. The Minister of State said in Standing Committee E:
*"the new clause relates to arrest and detention pending deportation and is not specific to terrorism; it is simply broadening things out.* (Standing Committee E, 8th session, 27 10 05, Col 280)

Thus the clause falls to be justified not in the context of what is acceptable to counter a terrorist threat, but more broadly.

7. The discussion of this clause in Standing Committee E included debate on standards and accountability for immigration officers exercising powers of arrest and search. We have picked that matter up in our briefing on the information provisions of the Bill and therefore, for clarity we reproduce material duplicated between the two briefings in the box below. The key points are:

- **Can the Minister indicate whether independent monitoring of immigration enforcement powers by the Independent Police Complaints Commission is beyond the scope of the Bill (which, looking at the short title and given the inclusion of Clause 33, appears unlikely) and if not, whether she will bring forward amendments to the Bill to this effect?**
- **Section 145 of the Immigration and Asylum Act 1999 is certainly broad enough to be used to make modified versions of PACE applicable to the procedure under this clause. Will the Minister undertake to do this?**

Police officers are subject to independent complaints procedures when exercising powers to detain and search and must comply with the PACE Codes of Practice. The Minister of State said during discussions on what is now Clause 51:

*"we are looking to include independent complaints monitoring of immigration enforcement powers by the Independent Police Complaints Commission in the safer communities Bill or some other legislative vehicle… I think that we looked at it in the context of this Bill, but that it was beyond the Bill's scope, although if that is wrong, I shall certainly correct what I have said. None the less, I take the point about there being some overarching independent monitoring body".* (Standing Committee E, col 280 27 10 05)

Section 145 of the Immigration Act 1999 provides that immigration officers exercising any specified power to arrest, search, question or take fingerprints from a person or to seize property found on a person must have regard to specific provisions of the PACE codes, subject to modification. Section 145 was amended in 2002 to provide that anyone exercising powers to collect data about external physical characteristics must have regard to such provisions of the PACE Codes as may be specified. There is confusion as to which powers have been specified, as illustrated by the following discussion on what is now clause 51:

***"Dr Evan Harris****….Section 145 of the 1999 Act provides for immigration officers to have regard to codes of practice when exercising these powers. The codes are the Immigration (PACE Codes of Practice) Direction 2000, and the Immigration (PACE Codes of Practice No. 2 and Amendment) Direction of 19 November 2000. They apply parts of the PACE codes to immigration officers. However, some safeguards that apply to police officers do not apply to immigration officers, such as the requirement to give one's name when conducting certain searches. ..I have been told that it is hard to find those codes of practice. Perhaps the Minister will take note of that and ensure that they are easier to find….*
***Mr. McNulty:*** *As I understand it, the new clause relates to arrest and detention pending deportation...Given that it refers only to arrest and detention pending deportation and not to arrest for criminal offences, PACE does not apply. That has always been the case."* (Standing Committee E, col 280 27 10 05)

This seems to suggest that powers other than those attendant upon an arrest have not been specified. **Can the Minister clarify** this point, and, if the Minister of State is correct, on why application of the modified PACE codes has been limited as it has, since section145 is certainly broad enough to be used to make modified versions of PACE applicable to the procedure. Why is this not being done?

As matters stand IND has an internal complaints procedure, overseen by an audit committee. The internal procedure will handle everything from complaints about a lost document to complaints about delay. It is ill-suited to dealing with complaints of violence and abuse. The chair of the audit Committee, Dr Anne Barker, gave evidence to Home Affairs Select Committee on 13 December, making clear the "indefensible" nature of the current system:

*"There are three major problems: one, that the system* [of complaints-handling] *is so fragmented that it is not working at all efficiently and that customer satisfaction is not what it should be; two, that the quality of investigations is low; and, three, that operational complaints are not being addressed at all adequately and no one knows quite how many there are. There is no systematic procedure whereby they are considered and the system is not working properly; indeed, there is not much of a system…the investigations themselves upon which the decisions are made are not conducted equitably. Complainants are not interviewed. The complainant's statement may be three lines and that is it and there is no attempt to discover more…. There are paucities of independent witness statements because of delays, and evidence like CCTV or medical reports is often missing. There is very little on the complainant's side… it is inequitable, and, if it is inequitable like that, it is indefensible…*
*(*Uncorrected evidence of 13 December 2005, to be published as HC 775-i)
Dr Baker also provided evidence on complaints of violence:

*"… Because Paul Acres and I have police backgrounds, we were happy to work with IND to work through the remit with the IPCC who will be called in if there are very serious allegations of a criminal nature made against enforcement and removal officers. Stephen Shaw, the ombudsman, may take over that same remit for detention centres..*
***Mr Clappison:** Dr Barker, you call for more intensive investigation of complaints of serious misconduct and I note that you say that one third of complaints against individuals fit into that category…*
*Dr Barker: That is one third of the formal complaints, ie, that is the, say, 200….Those are mostly allegations of assault. About half of them occur in detention centres and the other half occur in enforcement and removal. They are not uniformly and universally referred to the police, which is an area we are also concerned about. …*
***Mr Clappison:** What has happened now to those serious complaints? Was each one of them investigated?*
*Dr Barker: Well, I do not know, is the answer. Some of them are referred to the police, but one of the problems is that there is no written audit trail, so all you see in a file is "Police NFA", and you have no idea of what they have investigated…that whole information is lost to the investigator who is looking at it for IND on the balance of probabilities rather than beyond reasonable doubt."* (*Op.cit*)

**CLAUSE 52 (Refugee Convention Construction)**

**A Note on Amendment 69 The Lord Hylton**

8. **Amendment 69** uses Clause 52 as a vehicle for noting opposition to the Secretary of State's decision not to give Indefinite Leave to Remain(ILR) to those recognised as refugees. ILPA's submissions on this decision can be found at www.ilpa.org.uk in the section Submissions under the heading *Refugees and Leave* July 2005. We are not in favour of interpreting the Convention in domestic statute, for the reasons set out below, nor, as Amendment 69 more modestly does, putting limits on its interpretation in national law. We

are opposed to the decision to give refugees limited leave and thus, insofar as this is a probing amendment, we are pleased to see it here. We also refer members of the Grand Committee to the Commons Committee on this Bill's debate on the matter (Standing Committee E 25 October 2005, col 239 to 243) and to the adjournment debate in the Commons (HC Hansard, 10 October 2005, col 126ff).

**Exclusion in Clause 52**

9. This clause provides a statutory construction of the reference to "acts contrary to the purposes and principles of the United Nations" in Article 1(F)(c) of the Refugee Convention, part of the Article setting out the grounds on which a person can be excluded from recognition as a refugee.

10. The 1951 Convention is an international convention. UNHCR statements and international jurisprudence are relevant. To purport to interpret it in statute is to fail to respect this jurisprudence and to usurp the role of judges, in the UK but keeping in view international jurisprudence, in interpreting it. UNHCR has provided detailed criticism of the way the government has interpreted Article 1F(c) in the clause, and we append their comments in full at the end of this briefing. They note *inter alia:*

- "*the assertion in Security Council resolutions that an act is "terrorist" in nature would not by itself suffice to warrant the application of Article 1F (c), especially, as there remains no universally accepted legal definition of terrorism at the international level.*"
- In UNHCR's view only *"persons who are in positions of power in their countries or in State-like entities",* and *"in exceptional circumstances, the leaders of organisations carrying out particularly heinous acts of international terrorism which involve serious threats to international peace and security"* are persons who could act contrary to the principles and purpose of the United Nations and fall within 1F(c)
- 1F(c) envisages acts of such a nature as to impinge on the international plane in terms of their gravity, international impact and implications for international peace and security.

11. Government attempts to justify their new clause by reference to Security Council resolutions, as in the Parliamentary Under-Secretary of State's letter of January 2006 to the House of Lords Committee on the Constitution, thus do not stand up.

12. As UNHCR note, there is no need to define Article 1F(c) to exclude terrorists from recognition as refugees: Article 1F as a whole already does that and there is further provision in Article 33(2) of the Convention to cases where people who have been recognised as a refugees present a threat to national security.

13. As demonstrated by the *Chahal v UK* case in the European Court of Human Rights, which Grand Committee debated in the course of its consideration of Clause 7 on 12 January, a person excluded from the Convention cannot be removed from the UK where s/he would face inhuman or degrading treatment or punishment on return in violation of Article 3 ECHR or a flagrant breach of other rights under the ECHR[1]. The Minister of State in Commons Committee noted that here had been 32 exclusions (i.e. under Article 1F as a whole) in 2004 (Standing Committee E, 27 10 05 Col 297). He accepted that he could not point to any cases where the absence of the clause had led to a person being recognised as a refugee who should not have been so recognised[2].

[1] See the detailed consideration of this point in the JCHR's Third Report of session 2005-6, HL Paper 75-1 *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* paragraphs 47 to 152.
[2] Standing Committee E, col 296

14. Officials have suggested to ILPA that there is a precedent for defining Article 1F in primary legislation in that the European Council Directive 2004/83/EC of 29 April 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 context of the protection granted (the "Qualification Directive). The argument is extremely weak. Article 12 says:

*"12(2) A third country national or stateless person is excluded from being a refugee where there are serious reasons for considering that:*

*(a) he or she 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 or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;*

*(c) He or she has been guilty of acts contrary to the purposes and principle of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.*

*(12)(3) Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein."*

15. Subsection 12(2)(c) repeats the words of Article 1(F)(c); it says where the principles and purposes of the UN are found (and makes no reference to security council resolutions in doing so). It does not seek to substitute a home-grown definition of terrorism for an international convention.

16. Contrast Clause 52. The proposed clause relies on the meaning of terrorism set out in section 1 of the Terrorism Act 2000 (c.11), extensively debated and widely recognised as extremely problematic. *"[E]ncouraging terrorism (whether or not the acts amount to an actual or inchoate offence)"* is enough to bring a person within the statutory construction, no matter who they are.

16. Thus it would appear that a person could be excluded from recognition as refugee for actions that are not a crime under UK law. This is contrary to UNHCR's *Handbook*, which states of Article 1F(c) that *"Article 1F(c)…is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken with the latter, it has to be assumed, although this is not specifically stated, that the acts covered...must also be of a criminal nature"*[3].

18. As the Minister of State acknowledged in Commons Committee, the definition would include some of the list of "unacceptable behaviours" published by the government, which are also to be a basis for deprivation of citizenship and which includes behaviours that are not criminal offences: *"Some of the unacceptable behaviours fall in the area of terrorism and encouraging terrorism and the clause covers them"(*Standing Committee E Col 296). Organisations responding to the consultation, including ILPA, were highly critical of the proposed list of "unacceptable behaviours". We noted:

> *" In the Consultation Document, it is stated that hitherto the power to deport or exclude non-citizens has been "as a general rule" exercised against those who represent a direct threat to those aims…This has not been our understanding or experience…. Our estimation is that many, if not most, of the attempts to deport foreign nationals accused of terrorist activities have been based on allegations of*

[3] *UNHCR* Handbook on Procedures and Criteria for Determining Refugee Status, Paragraph 162.

*activities which amount to indirect threats to the UK's national security… The existing powers are plainly wide enough to secure the deportation of those for which new powers are sought…"*

19. The Joint Committee on Human Rights in their Third Report (*op.cit)* said at paragraph 179 that *"To give effect to the Government's stated purpose of merely making explicit what Article 1(F)(c) implicitly requires, the clause would need to be amended to decouple it from both the broad definition of terrorism in s.1 of the Terrorism Act 200 and the published list of unacceptable behaviours in its present form"* They also indicated that it should be confined to inchoate offences (paragraph 179) and questioned the necessity for the clause (paragraph 174).

20. Clause 52 is not necessary to protect the UK from terrorism. Article 1(F) already does that. Clause 52 may encourage other States to interpret Article 1(F) in their law, perhaps even more widely than the UK, perhaps, by contrast, too narrowly. This risks undermining the Convention and the work of courts all over the world in interpreting and applying it. The House of Lords Committee on the Constitution said in their letter to the Parliamentary Under-Secretary of State of 13 December 2005:

*"We share the views of others that it is not appropriate for Parliament acting unilaterally as a national legislature to reinterpret in this way an international treaty to which the UK has become a party."*

The government in response cited two examples of their doing so, s.72 of the Nationality, Immigration and Asylum Act 2002, which purports to interpret the meaning of "particularly serious crime" under Article 33(2) of the Refugee Convention and s.31 of the Immigration and Asylum Act 1999 to interpret Article 31 of the Convention. In both cases we recall, there was a similar outcry. The Office of the United Nations High Commissioner for Refugees described it as suggesting an approach "*which is at odds with the Convention's objectives and purposes...runs counter to long-standing understandings developed through State practice over many years regarding the interpretation and application of Article 33*.."[4] There are no good reasons for including Clause 52 in this Bill and very good reasons for not doing so.

ILPA supports the Lord Dholakia and the Lord Avebury in saying that Clause 52 should not stand part of the Bill.

**CLAUSE 53 DEPRIVATION OF CITIZENSHIP**

21. The Clause gives the Secretary of State will have powers to deprive a person of British Citizenship if satisfied that this deprivation is conducive to the public good. The powers can only be used where to deprive a person of their British Citizenship will not leave them stateless, i.e. against people with dual nationality. As has been the case since 2002, any dual national can be deprived of their British Citizenship, even if they have held it since birth.

- The new 2002 powers to deprive people of their British citizenship have never been used and have not been shown wanting. The case for their extension is not made out.
- The provisions equate deprivation of citizenship with migration control. People can be deprived of citizenship on grounds incompatible with civil liberties due to the breadth of the provisions.

**New powers are not needed**

23. The government has no need of powers it seeks in this clause. It has everything it needs already. The power to deprive people of British citizenship was last amended by the

[4] UNHCR briefing on the then Clause 64 of the Nationality, Immigration and Asylum Bill

Nationality, Immigration and Asylum Act 2002 (amending the British Nationality Act 1981 s.40(2)). In 2002, for the first time in history, the law was changed to allow the British-born to be deprived of their nationality. The Minister of State said *"the straight answer to the question asked by the hon. Member for Woking about how many are deprived of British nationality under the 2002 powers is none"* (Standing Committee E, 27 10 05, col. 270). The House of Lords Committee on the Constitution in their letter of 13 December 2005 asked for an explanation as to why the new clause was needed.

24. The 2002 Act amended the law to provide that a person can only be deprived of British citizenship under Section 40 (2) of the British Nationality Act 1981 if the Secretary of State is satisfied that he or she has done something that is seriously prejudicial to the vital interests of the United Kingdom or a British Overseas territory. The 2002 wording replaced provisions that can be broadly summarised as disloyalty to the sovereign, unlawful communication with the enemy, or sentences of imprisonment in any country of more than 12 months within 5 years of registration or naturalisation. The 2002 wording was taken from the European Convention on Nationality (Strasbourg 6 September 1997).

**What was said in 2002: "seriously prejudicial to the vital interests"**
Parliamentary Under-Secretary of State for the Home Department, Angela Eagle MP
*"The phrase [vital interests] is mentioned in the European Convention on nationality, and it is in the Bill because it aligns with that. Of course, behaviour has to be pretty appalling to come up for consideration under that. […]*
*The phrase "vital interests" comes from article 8 of the UN convention on the reduction of statelessness 1961 and article 7 of the European convention on nationality 1997…*
*National security does not necessarily cover some of the potentially prejudicial activities that are worthy of deprivation, such as those to do with infrastructure, vital economic interests or the general safety of the population. That is a wider definition but one that has an international meaning. It will have an increasingly international meaning as the conventions that I have mentioned, particularly the one on nationality, are recognised, signed and incorporated in international law." (*HC Committee, 30.04.02 cols. 60-62)

Parliamentary Under-Secretary of State for the Home Department, The Lord Filkin
*"I was asked about vital interests. Of course, that includes national security, but it also covers economic matters, as well as the political and military infrastructure of our society."* (HL Committee 08.07.02 col. 505)
*"Ever since the British Nationality and Status of Aliens Act 1914, the law has made provision for citizenship conferred by administrative grant to be withdrawn where the person concerned is found subsequently to have harmed, or posed a threat to, vital state interests.*
*In current legislation, such actions are expressed in terms of disloyalty or disaffection towards the Crown, or as unlawful trade or communication with an enemy in times of war. Those expressions, while they still carry meaning, have become dated and perhaps fail to reflect the full width of activity that might threaten our democratic institutions and our way of life. […]*
*The government are on record as stating that the term "vital interests" will be interpreted as covering threats to national and economic security and to public safety […] but not to actions of a more general criminal nature.*
*[…] The term occurs in the 1961 and 1997 conventions….As a term of international law, the concept is an evolving one."* (HL Committee 08.07.02 col 535)
*"..the 1997 European Convention on nationality, which we hope to ratify in due course." (*HL 08.07.02 col 537)

24. The Minister of State confirmed in Commons Committee that in fact the UK has not ratified the European Convention of 1997: *We have not yet ratified and we shall have to reflect, in the light of all the nationality legislation in this Bill, on whether it will be possible*

*to do so. There may be a reservation in respect of our powers of deprivation.* (Standing Committee E, 27 10 05, col. 272). It is clear from what was said in 2002 that existing powers cover all that is needed, and it was stated then that it encapsulated an evolving concept. The Minister of State was pressed on this in Commons Committee:

> *"**Dr Evan Harris:** I should be grateful if the Minister would answer my fundamental question: is the intention in the clause to deprive people of their citizenship for acts that are not seriously prejudicial to the vital interests of the UK? ..*
> ***Mr. McNulty:** That is a fair question, and my answer is that I do not think so"*(Standing Committee E, 27 10 05, Col 272).

Then why change the law?

**The proposed new test is incompatible with human rights and civil liberties and may export risk**

25. "Conducive to the public good" is a long-tried concept in immigration law, being the test applied in deportation cases. It is imprecise and ILPA has had concerns at the way in which it has been applied in deportation cases over the years. It goes far beyond terrorism, however widely the latter is defined. Thus the clause falls to be justified not in the context of what is acceptable to counter a terrorist threat, but more broadly.

26. "Conducive to the public good" is not entirely new in nationality law, but it is here given a new twist. The foundation of current nationality law is the British Nationality Act 1981, in which the original s.40 incorporated provision for deprivation of citizenship from its predecessor, the British Nationality Act 1948. It applied only to those who had acquired British nationality by registration and naturalisation, and came into play only in cases of disaffection, treason in time of war and serious criminal conviction within 5 years of acquisition. Once that threshold was passed the Secretary of State had *additionally* to be satisfied that it was "not conducive to the public good that that person should continue to be a British citizen". Thus it served as extra protection for the citizen at risk of deprivation.

27. When the government consulted on its list of "unacceptable behaviours" it was with a view to establishing grounds for deportation and exclusion. They now seek to use the list to found deprivation of citizenship as set out in the Parliamentary Under-Secretary of State's letter of January 2006 to the House of Lords Committee on the Constitution (which repeats almost verbatim what the Minister of State said in Standing Committee E 27 10 05 col 254):

> "*"the Home Secretary published a list of behaviours on 24 August which, he said, would form the basis for the use of his discretionary powers to deport and exclude from the United Kingdom those whose presence here was deemed not to be conducive to the public good. Such behaviours included speaking or publishing material which encourages or provokes terrorism or other serious criminal activity. It is, in our view, now essential that we have similar powers to withhold and to remove British nationality and the right of abode in the United Kingdom where an individual is found to have engaged in such activity…Accordingly, clause 53 brings the criteria for deprivation of citizenship into line with the criteria for deportation or exclusion so that activities of the sort referred to by the Home Secretary could justify either (or in appropriate cases) both types of response.*"

28. Clause 53 amounts to an equation of the deprivation of citizenship with the deportation of aliens. It is a huge leap to move from identifying a basis for excluding or deporting a foreign national from the UK to using the same test as a basis for depriving a person of a citizenship s/he may have held since birth. While some British Citizens have a second nationality this may be a nationality they have never used, of a country in which they have never lived, and with which they have few, if any, connections.

29. Citizenship is not lightly to be taken away, as this clause purports to do. This government has placed emphasis on the value of citizenship, setting up a new test, pledge and citizenship ceremonies for those naturalising as British in 2002, and requiring an appreciation of the history of these islands, as part of the *Life in the UK* test. In 2002 the government set up a new pledge and citizenship ceremonies for those naturalising of British: the aim was to make more of citizenship. Now the equation of the two tests in Clause 53 pulls in the opposite direction, equating dual national British Citizens with foreign nationals. How will this help with problems repeatedly identified, including in the context of Northern Ireland, that insensitive anti-terrorism legislation may alienate communities and undermine security.

30. While it is at least a well-established principle of international law that states have the right to control the admission and expulsion of enemy aliens to and from their territories, there is no such principle legitimising the expulsion of a state's own nationals. British citizens may commit crimes, even heinous crimes, and may conduct themselves in numerous ways that their governments may deplore, but it remains the right of the citizenry to change their government, not of the government to change the composition of the citizenry by banishment of its awkward elements. This is too fundamentally important a principle to be sacrificed to immediate concerns, however serious or well-founded, about terrorism or public order. Those present in 2002 will recall the powerful effect of the speech of the Lord Rees-Mogg:

> ***"Lord Rees-Mogg:*** *I happen to be in a position which gives me a certain understanding of the arbitrariness of this. Were I six years younger, or had my parents not been married at the time that I was born, I should be a dual citizen of the United States. Owing to my age and the fact that they were married, I am not entitled to American citizenship. …It is giving power to the Secretary of State to create a new crime. Although the crime is punishable by only one penalty, the removal of citizenship, it is nevertheless a crime ..It is exercisable without evidence of the crime being produced…An absurdity of this degree is also a manifest and intolerable injustice. …I am not myself prepared to support any Secretary of State having power given to him to create a crime on an arbitrary basis* (9 Oct 2002 Cols 278 to 279)

31. The Joint Committee of Human Rights in their Third Report (*op.cit*) said of this provision *"…the new test for deprivation of citizenship …contains insufficient guarantees against arbitrariness in its exercise in the light of (i) the significant reduction in the threshold (ii) the lack of requirement of objectively reasonable grounds for the Secretary of State's belief (iii) the arbitrariness of the definition of the class affected and…therefore gives rise to a risk of incompatibility with Article 12(4) ICCPR, Articles 3, 5, and 8 ECHR and Article 14 in conjunction with those articles and Article 26 ICCPR"* (paragraph 164). The Parliamentary Under-Secretary of State said at Second Reading:

> *"the Committee [Joint Committee on Human Rights] is clearly saying to us that the public good test is too vague. I look forward very much to discussing the whole issue… I take very seriously what the committee is telling us*" (6 December 2005, cols 586).

31. National security does not depend solely on who is within the UK. The government should not export risk. We recall what was said in 2002:

> *"…Lord Kingsland raised a particularly important point about whether the Government would use such a power to avoid prosecutions under the Acts he mentioned* [Terrorism Act 2000, Anti-terrorism, Crime and Security Act 2001; Official Secrets Act]. *I am happy to give a categorical assurance that if we, or rather – I must qualify that, the Director of Public Prosecutions thinks that there is evidence, the state would hope that prosecutions would proceed in all such cases*."(Lord Filkin, HL Report, 09.10.02 col. 282)

The Minister of State, reminded of this in Common's Committee, said *"we shall not use the powers to export risk"* (Standing Committee E, 7th Session 27 10 05, col 271). This clause increases risk at home, and paves the way for exporting risk abroad.

32. The Nationality Immigration and Asylum Act 2002 s.4(4) contained safeguards against retrospectivity. Thus for acts done before the coming into force of the Act, a person could not be deprived of his/her nationality unless s/he could have been so deprived under the previous law. The Minister of State declined to amend the Clause 53 to provide similar protection, saying:

> *"…the new clauses…talk about an assessment of existing present behaviour. The assessment of existing behaviour and potential threat may be informed by previous behaviour. Individual past conduct and an assessment of the propensity to repeat it is part of the test. That must be clear.* (27, 10 05, Col 271, in Standing Committee E).

ILPA supports **Amendment 70**, the Lord Dholakia and the Lord Avebury to remove subsection (1) of the clause and thus retain the existing test for deprivation of citizenship. This has the effect of the clause not standing part of the Bill, save that the power to hear proceedings on forged documents in private is preserved.

**CLAUSE 54**

33. Britain's colonial history has resulted in there being many, rather than one, forms of British nationality and in nationality status being severed from what one might have expected to be the rights of any national: to enter, reside in and leave the country of nationality, i.e. the rights to be free from immigration control. These rights are treated as a separate package**:** the right of abode set out in s.2 of the Immigration Act 1971, which provides that British Citizens, as well as certain Commonwealth citizens, have the right of abode. Clause 54 provides a new power to deprive people of the right of abode where the Secretary of State thinks that this would conducive to the public good for the person to be excluded or removed from the UK.

34. Those affected by Clause 54 will be Commonwealth citizens who, immediately before the commencement of the British Nationality Act 1981 were Commonwealth citizens with the right of abode in the UK. For those people, such powers were not considered necessary as recently as the Nationality, Immigration and Asylum Act 2002, when nationality law was addressed in detail. The right of abode is a fundamental right associated with citizenship and deprivation of the right of abode has the same serious consequences as deprivation of citizenship for a dual national. The loss of the right of abode is the loss of one of the fundamental rights associated with a nationality and the comments made on Clause 53 above are also applicable here.

35. The Joint Committee on Human Rights concluded that *"there are not sufficient guarantees against arbitrariness in the exercise of the power"*. They noted the *"sheer breadth of the concept of conducive to the public good"* and identified *"the same problems with the significant reduction in the threshold"* as they identified on what is now clause 53, noting the *"very serious consequences for the individual concerned"* and the same problems of legal uncertainty given the list of unacceptable behaviours (*Third Report, op. cit.* paragraph 170). In this regard, it is worth noting that it was in the context of discussions on this clause that the Minister of State made the following point, equally applicable to Clause 53

> *"Our exercise of the power would be informed, but not wholly constrained, by the published list of "unacceptable behaviours"* (Standing Committee E, 27 10 05 Col 256)

36. There is a further problem associated with Clause 54, the use of the word "thinks". The House of Lords Select Committee on the Constitution questioned the use of the word in their letter of 13 December 200, as they had questioned its use in Clause 40, and noted *that "it would be unfortunate if a change in the language were inadvertently to alter the existing*

*judicial approach to such statutory discretions".* The Parliamentary Under-Secretary of State in her response of January 2006 said "*Clause 54 amends the Immigration Act 1971. Since no particular preference for "satisfied" or "thinks" is manifested by the current provisions of that Act, there is an opportunity to use plainer language which we consider appropriate*". She makes reference to the reasons given for preferring thinks in Clause 40*: "The use of the word "thinks" in this clause* [Clause 40]*..is not intended to lessen the obligation on the Secretary of State...The use of thinks is intended to use plain English which will be understandable to lay readers".*

37. Her explanation is different from that given by the Minister of State in Commons Committee:

> *"..new clause 5 amends the Immigration Act 1971, which talks about "thinks". We are clear—and the points were well made—that in substance they mean the same thing. There is not some coded difference between the two in terms of a nice little call-my-bluff exercise about what "thinks" means and what "satisfies" means. Where we are amending previous legislation and where it does not matter in substance, aligning with the language of the previous Acts makes sense, rather than introducing a new concept for the first time… There is no substantial difference in what each of the things I mentioned does.*
> *" (*Standing Committee E, 7th Session, 27 November 2005 Col 270)

We were unable to find any use of thinks in the 1971 Act and assume, from the changed justification, that so were the government. To the lay person that the two words are likely to appear to mean different things.

- **It would be a start if the Minister were to place to on the record, without qualifications such as *"in susbstance"* or *"no substantial difference",* that the two words are intended to mean the same thing.**
- **It would be a lot better if she removed the word "thinks" altogether, for the reasons given by the House of Lords Constitution Committee.**

ILPA considers that the case for this new clause has not been made out.
ILPA proposes an **amendment** to apply to the new powers to deprive people of the right of abode the same test as we suggest be retained for deprivation of citizenship, having done something seriously prejudicial to the vital interests of the UK or a British Overseas Territory and in the course of this, to remove the reference to "thinks" and replace it with the test "is satisfied that"

**CLAUSE 55**

38. Clause 55 extends the statutory requirement that an applicant must be of "good character" in granting British Citizenship to all cases, save those where British Citizenship is granted because of the UK's ratification of the UN Convention on the Reduction of Statelessness. "Good character" takes in matters far beyond terrorism. Thus the clause falls to be justified not in the context of what is acceptable to counter a terrorist threat, but more broadly.

39. Registration and naturalisation are the only two ways in which a person can become British. At the moment the "good character" requirement applies only to those seeking naturalisation as a British Citizen and not to those seeking to register as British.

40. Registration may be discretionary or by entitlement. This Clause applies the "good character" requirement to all registration, as well as naturalisation, applications thus ending

the concept of registration by entitlement. The Minister of State described this clause in Commons Committee as

> *"the registration route is reserved for those people – minors, certain persons already holding a form of British nationality, and certain persons with ancestral connections to the UK – whose particular circumstances are deemed to merit varying degrees of exemption from the full rigours of the naturalisation process…We are aligning the two processes of nationality by naturalisation and registration so that they have a common legal base".* (27 10 05, Col 256)

41. There is however good reason for the different legal base. Registration is there for those who should not have to go through all the hurdles of naturalisation. Registration by entitlement, and that is the language used in Statute recognises special obligations to allow certain categories of person to become British. Those entitled to register by entitlement include:

- Babies under one born in the UK to British nationals (other than British citizens) who cannot pass on their nationality to their children and have been here for the requisite periods (s.3 of the British Nationality Act 1981)
- Children born in the UK who have lived here for the first 10 years of their lives and have not been absent for more than 90 days per year
- Children born in the UK to where the child and/or the parents subsequently settle (i.e. get indefinite leave to remain
- British nationals other than British citizens with 5 years residence
- British Overseas Territories Citizens who fall to be treated as UK nationals for the purposes of community law (s.5 of the British Nationality Act 1981)
- Wives and widows of men who assisted in the defence of Hong Kong during WW2 (The Hong Kong (War Wives and Widows) Act 1996)

42. As to children, the Minister of State said at Committee

> *"The provision just aligns nationality by registration with nationality by naturalisation. The issues pertaining to children and how we measure the good character of a child are the same on both."*(Col.270).

This shows a misunderstanding of the law. Only people "of full age and capacity" can be naturalised as British (British Nationality Act 2002, s.6). Some children are registered by discretion, others by entitlement, but they are not naturalised. The Minister said

> *"It is clear that we will not shake down a four-year-old, looking for a bank account and their recent financial history. A four-year-old's name might be run through the police national computer, but I suspect that there would not be much of a hit.*"(col 270)

What possible reason can there be for removing from a baby under one the right to register by entitlement under this clause?

43. As recently as 2002, two new categories of person to whom these special obligations were owed were created.

- People born to British mothers between 1961 and 1983 (s.4C of the British Nationality Act 1981, inserted by the Nationality Immigration and Asylum Act 2002)
- British nationals other than British citizens with no other citizenship ((s.4B of the British Nationality Act 1981 inserted by the Nationality, Immigration and Asylum Act 2002)

44. In the case of the latter group, the then Home Secretary, David Blunkett MP said in the debates on the 2002 Act *"We are talking here about righting an historic wrong…"*(Commons Consideration of Lords Amendments 05 11 02 Col 147). The Lord Filkin said, in introducing the amendment to right this historic wrong at Lords Report on the Nationality, Immigration and Asylum Act 2002:

*"My Lords, my right honourable friend the Home Secretary gave an undertaking in another place to reconsider the position of British overseas citizens who have no other nationality. As matters stand, those citizens have no right of abode, either in this country or elsewhere.*
*The Home Secretary stated the Government's view that we have a moral obligation to them of long standing and that the present unsatisfactory situation represented unfinished business. We have since concluded that a similar obligation is owed to British subjects and to British protected persons without other nationalities."*
Nationality, Immigration and Asylum, Bill 9 Oct 2002 Column 286)

It is these people, with a form of British citizenship as opposed to *"no right of abode, either in this country or elsewhere"* whom we are now considering denying the right to register by entitlement. Discussing Clauses 53 and 54 at Second Reading, the Parliamentary Under-Secretary of State said:

*"I shall come back…in Committee and discuss in greater depth the relations between individual nation states and how the measure would work. But we would not make people stateless.."* (6 December 2005, col. 586).

Are this group of people so very different from the stateless, who are protected in all these provisions?

45. In their letter of 13 December 2005, the House of Lords Committee on the Constitution asked for an explanation for the policy change in the clause. The Parliamentary Under-Secretary of State replied in her letter of January 2006

*"the Government no longer considers it appropriate that people should be able to acquire our nationality without first satisfying us that they are of good character"*

That, with respect, is not an explanation.

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| ILPA considers that the case has not been made for this clause to stand part of the Bill. |

**UNHCR comments on Clause 52 of the Immigration Asylum and Nationality Bill 2005**

The Office of the United Nations High Commissioner for Refugees (UNHCR) would like to present the following comments on Clause 52 of the Immigration Asylum and Nationality Bill 2005 (IAN 2005), in the hope that our views may inform the forthcoming debate on the Bill:

UNHCR recognises the legitimate interests of States to safeguard their national security and endorses efforts directed at eliminating and effectively combating international terrorism. UNHCR also shares the concern of States to ensure that there should be no avenue for those committing or aiding the commission of terrorist acts to secure access to their territory.

Alongside these concerns, UNHCR emphasises the importance of States maintaining their adherence to essential refugee protection principles, with the understanding that a faithful application of the 1951 Convention will not extend protection to those who are undeserving. It should be emphasised that the 1951 Convention provides the appropriate tools to ensure that refuge is not provided to terrorists. Article 1F (c) is the third of three subsections under Article 1F of the 1951 Convention known as the exclusion clauses, which seek to deprive those guilty of heinous acts and serious common crimes of international protection as refugees. States are encouraged to use the clauses rigorously, albeit appropriately, in a manner consistent with international standards. The interrelationship between the clauses means that acts of a "terrorist" nature are likely to fall within one or more of the clauses; the generally worded clause in Article 1F (c) may overlap with the clause in Article 1F (a), while Article 1F (b) may be particularly relevant as acts of a terrorist nature are likely to be disproportionate to any avowed political objective. Furthermore, Article 2 of the 1951 Convention explicitly states that asylum seekers and refugees must conform to the laws and any public order measures of the host country, whilst Article 32 and 33 (2) make specific provisions for expulsion from the country of asylum.

While it is accepted that acts of terrorism may fall within the scope of Article 1F (c), provided that certain criteria (elaborated below) are met, UNHCR is concerned that Clause 52 may result in an overly broad application of Article 1F (c) with the result that certain persons, who do not fall within the scope of the exclusion clauses, are denied the benefit of international protection. It has been long-standing practice of many States party to the 1951 Convention to maintain a restrictive interpretation and
application of Article 1F (c), especially given its vague nature. It thus remains UNHCR's position that Article 1F (c) must be read narrowly.

We note that the interpretation of international legal obligations by national legislature may, by its nature, lead to a practice which is inconsistent with international law. In light of this, and due to both the complexity inherent in exclusion determinations, and the vagueness of Article 1F (c) in particular, UNHCR is of the view that the interpretation of the 1951 Convention in general, and Article 1F in particular, should
preferably remain within the remit of the judiciary.

UNHCR's "Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees" of September 2003 set out UNHCR's position on the interpretation of the exclusion clauses in greater depth. An instructive approach to Article 1 F (c) is to delineate its material and personal scope of application. UNHCR would like to take this opportunity to clarify our views on these two elements of the analysis.

**Material scope**
The question of whether acts of terrorism fall within the application of Article 1F (c) has become of increasing concern to the international community. UNHCR acknowledges that the UN Security Council has determined in resolutions 1373 (2001), 1377 (2001) and 1624 (2005) that acts of international terrorism are "contrary to the purposes and principles of the United Nations". However, it must be noted that, while all three resolutions contain language to the effect that acts, methods and practices of terrorism as well as knowingly financing, planning and inciting terrorist acts are contrary to the purposes and principles of the United Nations, they do not
contain definitions of "terrorism" or "international terrorism".

Indeed, the assertion in Security Council resolutions that an act is "terrorist" in nature would not by itself suffice to warrant the application of Article 1F (c), especially, as there remains no universally accepted legal definition of terrorism at the international level. As such, the absence of such a definition further justifies the need to adopt a
restrained approach in determining the applicability of Article 1F (c).

While a State has the prerogative to define terrorist acts more broadly to encompass acts which may not have an international dimension, not all acts defined as "terrorist" under national law would fall under Article 1F (c).

**Personal scope**
As regards the personal scope of Article 1F (c), UNHCR maintains that since Articles 1 and 2 of the UN Charter essentially set out the fundamental principles that States must uphold in their mutual relations, in principle, only persons who are in positions of power in their countries or in State-like entities would appear capable of violating these provisions.

UNHCR accepts that, in exceptional circumstances, the leaders of organisations carrying out particularly heinous acts of international terrorism which involve serious threats to international peace and security may be considered to fall within the scope of Article 1F (c).

**Requirements for the application of Article 1 F (c)**
In order to determine whether acts fall within the scope of this Article, an examination of the circumstances and the impact of the acts in question is required. Specifically, Article 1F (c) envisages acts of such a nature as to impinge on the international plane in terms of their gravity, international impact and implications for international peace and security. It is this rationale that should guide States in designating certain acts as being against the purposes and principles of the United Nations which would, in
turn, warrant the application of Article 1F (c).

It should further be reiterated that, in making exclusion determinations under Article 1F(c), each case will require individual consideration, taking into account the unique circumstances of the individual, his/her acts, motivation and the risks on return. As with any exception to a human rights guarantee, it is also necessary to examine the gravity of the offence against the possible consequences of exclusion, including the degree of persecution feared. While such a proportionality analysis would normally not be required in the case of acts falling within the scope of Article 1F(c) - the acts covered being so heinous that they are likely to outweigh the persecution feared - UNHCR remains concerned that an automatic and non-restrictive use of Article 1F(c) to all acts designated as "terrorist" may result in a disproportionate application of the exclusion clause, in a manner contrary to the overriding humanitarian object and purpose of the 1951 Convention.
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UNHCR London