ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 70

HOUSE OF COMMONS REPORT 16 NOVEMBER 2005

ILPA BRIEFING – TERRORISM CLAUSES 7, & 50 TO 54

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

The government has added new clauses on terrorism to the Bill. They are linked to the new Terrorism Bill and the proposals therein. However they apply to a much wider class than those suspected of terrorism, under any current definition. 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. A full briefing on the new terrorism clauses, prepared for Committee stage can be found at www.ilpa.org.uk, in the section *Briefings.*

Clause 7 (Deportation)

The clause provides that where a case raises national security concerns, the part of the appeal dealing with whether the appellant's human rights will be breached on return will be dealt with before removal, and the part that deals with national security will be dealt with after removal, as an out of country appeal. The clause contains a sub-section that would allow it to be repealed were the government to succeed in its attempts to persuade the European Court of Human Rights to overturn its jurisprudence on an absolute ban on return to a place where a person is at real risk of torture and substituting a balancing test.

Our main points

- The clause flies in face of the government's statement that it will not export risk but charge and try, or extradite, alleged offenders. The Minister of State said in Committee *"we shall not use the powers to export risk"* (Standing Committee E, 7th Session 27 10 05, col 271). Here the person is sent back,and only then the question of whether they are a risk to the safety of the UK is examined. In the context of the Terrorism Bill the government has put its case that if a person is a threat to the security of the UK, this may be the case whether the person is physically within the UK or outside it. In the light of this, how can they contend that not to examine that risk before they send the person from the UK, removing any possibility of bringing them before our criminal courts, is not exporting risk?
- Jurisprudence of the ECHR restates a norm of customary international law: no torture, and that means no return to a place where people will be at risk of torture. In instrument after instrument and court after court it has been made clear that this is not a balancing act.
- In some cases the risk on return is born from the national security case against the appellant; if the government only provided details of the national security case once the appellant was back at home, this could put him/her at risk of torture. One result is

likely to be people who are tortured; another will be attempts to raise risk through judicial review etc pre removal.

- In other cases, where the national security case is known, it is likely to be rehearsed in detail as part of the human rights case pre removal, and then again post removal.
- The government is basing its argument for other clauses in the *Appeals* part of the Bill on wanting to have a single appeal at which all matters are dealt with at a single hearing. Yet here it has split one appeal into two. The Minister of State said in Committee *"The new clause is designed to streamline the process of appeals against deportation orders in national security cases."* (Standing Committee E, 8th session 27 October 2005). Yet in the same Committee his defence of Clause 1 of the Bill, removing rights to appeal against a refusal to vary leave, against couched in terms of "*streamlining"* was based on an argument that in variation cases some people might have two appeals not one
- The clause is unworkable in practice: information pertaining to the national security case may well be relevant to risk on return.
- The proposals are incompatible with a fair trial: the appellant will not be present in court as the national security case against him/her is made, unless expensive video links are used.

Case of Ahmed *(named changed)*
A deportation order was made against Ahmed on the grounds that he was a threat to national security - he had an appeal to the Special Immigration Appeals Commission (SIAC). The open evidence that was disclosed showed that the Secretary of State believed Ahmed was an associate of known Al Qaida supporters. It also showed that he was suspected of having been involved in bombings in his country of origin. Ahmed denied this.
The risks to Ahmed on return arose from the national security case against him - he argued that having been labelled a suspected terrorist he would be at risk of being tortured on his return to his home country by the authorities in that country. He was able to mount a convincing claim supported by objective evidence that he was at real risk of being tortured if he was returned having been labelled a suspected terrorist by the UK Government.
A few days prior to the SIAC hearing the Secretary of State withdrew the decision to deport him on the grounds that he accepted that he would be at risk of torture. The national security and human rights aspects of the case were intrinsically interlinked. Without the open evidence on the national security case the Article 3 case could not have been made; no risk of torture would have been found; Ahmed would have been returned to his country, the national security case would, under Clause 7 of the Bill have been disclosed and there is real risk that Ahmed would have been tortured.

Proposed amendments from ILPA

First proposed amendment to Clause 7

Clause 7, page 4, line 36 leave out from "Special" to "to" in line 38 and replace with "the Asylum and Immigration Tribunal, and this shall be treated as"

Purpose:
To press the government on the intention behind this clause. The effect of the amendment is that the appeal against removal on the grounds that return would breach the appellant's rights not to be subjected to torture on return will be heard before the Asylum and Immigration Tribunal, while the out of country national security case will be heard before SIAC. If there will really be no national security element in the case, why does it need to be heard before SIAC? The government reaffirmed in Committee that they would not export risk, yet that is exactly what this clause is doing as described above. It is far from clear that that the two appeals can be separated in the way the government proposes. In many cases it will not be necessary to delve into the national security case to assess the risks on return. If the national

security case is known only to the government then failure to disclose it prior to return could put the person at risk once they have returned and it is disclosed. If the government say they can split national security and risks on return, as the new clause purports to do, they should have no difficulty with this amendment.

Second Proposed Amendment to Clause 7 (repeat of amendment laid by Dr Evan Harris, Mr John Leech at Committee)

Clause 7, page 4, line 40, leave out subsection (4)

Purpose: As described in Committee, the provision to repeal the section is there so that if the government persuaded the European Court of Human Rights to depart from the *Chahal* jurisprudence, that the ban on returning people to face torture is absolute, they could be sent back without an in-country right of appeal. ILPA considers attempts to persuade the court to depart from *Chahal* should be stopped, and therefore would like to see this subsection removed. The Minister stated in Committee:

> *"I agree that were there not at least one case—perhaps a couple of others—before the Court, it might be too prissy and tidy to include the option of the order just in case the Court might alter its interpretation of the convention. Given that discussions on article 3 will continue for a long time to come, the substance of the cases—one is a Dutch case—that the Court potentially will discuss will all revolve around the balancing test. For completeness and tidiness it is more appropriate to have a little flick switch that says we can alter the proposed new section by statutory instrument, subject to resolution of both Houses, and include any transitional provision between what prevails now and subsequent case law."* (Standing Committee E 27 October 2005 301).

It may be worth asking the Minister what the government's current assessment is of the likelihood that the Dutch case he mentions will settle and not come before the European Court of Human Rights and whether the provision for which he contends is really grounded in any likelihood of the jurisprudence he desires emerging from the court before the government passes (yet) another immigration act.

Clause 7 Stand Part

Page 4, line 7, leave out Clause 7

Purpose: For all the reasons given above, ILPA's view is that this clause should not stand part of the Bill. A national security case should be heard as a single appeal, before the person is removed from the UK.

CLAUSE 50 (arrest pending deportation)

The Clause 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.

As with the majority of these new clauses, this clause targets a much wider group than just those who fall within the definition of a statutory definition of a terrorist. It includes cases of people with a criminal record entirely unrelated to terrorism: some of the leading cases have

concerned people with previous convictions for selling drugs, and examples extend to lesser crimes also.

The Minister said in Committee

> *"the new clause relates to arrest and detention pending deportation and is not specific to terrorism; it is simply broadening things out. 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*
> *This is not germane to the Bill, but 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, although it is not for me to say where. 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, 8th session, 27 10 05, Col 280)

- **The Minister should be asked** whether he can confirm that 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, appears unlikely) and if not, whether he will bring forward amendments to the Bill to this effect.

- **The Minister should also be directed** toward Section 145 of the Immigration Act 1999, which provides for immigration officers to have regard to codes of practice in exercising powers to arrest, question, search or take fingerprints and to confirm that these codes are set out in the Immigration (PACE Codes of Practice) Direction 2000, and the Immigration (PACE Codes of Practice No 2 and Amendment Direction of 19 November 2000. He should be asked to make clear that those Codes will apply to the exercise of the powers in this Clause by Immigration Officers.

CLAUSE 51 (Refugee Convention Construction)

This clause purports to define in statute the meaning of Article 1F, the "exclusion clause" of the Refugee Convention. It provides a statutory construction of the reference to "acts contrary to the purposes and principles of the United Nations" in Article 1(F) of the Refugee Convention, which sets out the grounds on which people can be excluded from recognition as a refugee. In ILPA's view the amendment is unnecessary: the Convention provides all that is required without this clause.

Our main points:

- 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 interpreting it.
- There is no need to define Article 1F to exclude terrorists from recognition as refugees: Article 1F already does that.

Resolution 1377 (2001) adopted by the Security Council at its 4413th meeting, on 12 November 2001, stated that *"acts of international terrorism, are contrary to the purposes and principles of the Charter of the United Nation as, and that the financing planning and preparation of, as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the charter of the United Nations"*. All is not as clear-cut as it looks however, given that the UN has never adopted a definition of

terrorism nor of international terrorism. The proposed clause relies on the meaning set out in section 1 of the Terrorism Act 2000 (c.11), extensively debated and widely recognised as extremely problematic.

The proposed new clause is wide. "[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. 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 assumed, although this is not specifically stated, that the acts covered...must also be of a criminal nature"*[1]

Proposed amendments from ILPA

Clause 51 Stand Part

Page 28 line 1 Leave out clause 51

Purpose
To remove this clause from the Bill, for the reasons given above.

CLAUSE 52 (Deprivation of Citizenship) and CLAUSE 53 Deprivation of Right of Abode

Clause 52 extends the grounds on which people, including but not limited to, terrorists, can be deprived of British citizenship. New provision is made in **Clause 53** to deprive people of a "right of abode" in the UK. Rights of appeal and protection against statelessness are preserved.

Our main points:

- People can be deprived of citizenship on grounds incompatible with civil liberties due to the breadth of the provisions.
- The provisions equate deprivation of citizenship and of the "right of abode" (a fundamental right associated with citizenship) with migration control. Citizenship is of a different order and special protection should apply. Rights to reside in the UK, to vote, entitlements in the UK, to travel as a UK national abroad and to the assistance of British Consular authorities in third countries are all engaged.
- The new 2002 powers to deprive people of their British citizenship have never been used. The case for their extension is not made out.

Amendment 26
Mr Humpfrey Malins, Mrs Cheyrl Gillan
ILPA supports the proposed amendment

Clause 52

Page 28, line 31, leave out Clause 52

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

Presumed purpose

The House is being asked to grant an extension of powers to deprive citizenship that were taken in 2002 and have never been used. The case for the clause has not been made. The governments proposed list of "unacceptable behaviours", which would be used to ground a variation, suffer from all the problems of vagueness that beset the Terrorism Bill and rely directly on proposals to make "encouraging" terrorism (as opposed to existing offences such as incitement) a crime. The Minister of State said in Committee

> *"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*"

Organisations responding to the consultation, including ILPA, were highly critical of the proposed list of "unacceptable behaviours". Points made in the ILPA response to the consultation included the following:

" *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 activities which amount to indirect threats to the UK's national security… In ILPA's view, therefore, there is no need for the Secretary of State to seek to persuade Parliament to grant further deportation or exclusion powers. The existing powers are plainly wide enough to secure the deportation of those for which new powers are sought…*

ILPA would also query the underlying policy of the new proposals… As the headline in a Sunday broadsheet article[2[4]] *put it, "throwing people out will not stop terrorism but just send it elsewhere." If the UK is facing a new international threat from an ideology that feeds a network of loosely associated terrorist cells, as the evidence before SIAC alleged, then how does it make it safer to have unwanted terrorist agitators in Beirut or Amman rather than in London?*

ILPA's view, in summary, is that the new powers are unnecessary in the light of existing law and practice and that the underlying policy is a form of shuffling off responsibility for dealing with unwanted terrorist suspects and agitators to other countries, where they can regroup and carry on their activities. These powers will therefore not contribute to making the world a safer place."

But over and above all this, 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 connections. Citizenship is not lightly to be taken away, as this clause purports to do.

Amendment 1
Mr Humpfrey Malins, Mrs Cheyrl Gillan

Clause 52

Page 28, line 35 [*Clause 52],* leave out "satisfied" and insert "sure"

Presumed purpose
To probe the test for deprivation of citizenship and also to compare it to the test for deprivation of right of abode. The Minister said in Committee that the *"satisfied"* test in Clause 52 was the same as the *"thinks"* test in Clause 53 and that the different wording simply reflected their amending different Acts. . He said:

> *"It makes sense when we are amending previous legislation to talk in terms of that previous legislation and its language, where appropriate. New clauses 4 and 6 amend the British Nationality Act 1981 and add new provisions to it. The reference throughout is to the Secretary of State being "satisfied", whereas 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." (*Standing Committee E, 7th Session, 27 November 2005 Col 270)

We are unable to find an example of the "*thinks"* vocabulary in the Immigration Act 1971 that Clause 53 amends; perhaps the Minister could be asked to direct the House to this.

Proposed amendments from ILPA

Clause 52

Clause 52, page 28, line 32, leave out subsection 1

Purpose
To retain the current test for deprivation of citizenship, viz. having done something seriously prejudicial to the vital interests of the UK or a British Overseas Territory.

Clause 53

Amendment 2
Mr Humpfrey Malins, Mrs Cheyrl Gillan

Clause 52

Page 29, line 8 [*Clause 53],* leave out "thinks" and insert "is sure"

Presumed purpose
To probe the test for deprivation of citizenship and also to compare it to the test for deprivation of right of abode. The Minister said in Committee that the *"satisfied"* test in Clause 52 was the same as the *"thinks"* test in Clause 53 and that the different wording simply reflected their amending different Acts. He said:

> *"It makes sense when we are amending previous legislation to talk in terms of that previous legislation and its language, where appropriate. New clauses 4 and 6 amend the British Nationality Act 1981 and add new provisions to it. The reference throughout is to the Secretary of State being "satisfied", whereas 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." (*Standing Committee E, 7th Session, 27 November 2005 Col 270)

We are unable to find an example of the "*thinks"* vocabulary in the Immigration Act 1971 that Clause 53 amends, perhaps the Minister could be asked to direct the House to this.

Proposed amendment from ILPA

Clause 53, page 29, line 8, leave out from "thinks" to the end of line 10 and replace with "is satisfied that the person has done something seriously prejudicial to the interests of

(a) the United Kingdom
(b) (b) a British Overseas territory

Purpose

To apply to the new powers to deprive people of the right of abode the same test as we suggest should be used for deprivation of citizenship, viz the existing test of having done something seriously prejudicial to the vital interests of the UK or a British Overseas Territory.

Clause 54 (Acquisition of British Nationality & c.)

This Clause applies the "good character" requirement to all registration, as well as naturalisation, applications thus ending the concept of registration by entitlement. Children who registered by entitlement (children can only become British through registration), will for the first time be subject to a good character test.

Our main points

- Registration is there for those who should not have to go through all the hurdles of naturalisation, including children and people who previously held other British nationalities registering by entitlement.
- The new measures fail to respect the special obligations to these people, previously recognised by provision for registration by entitlement.

Proposed amendments from ILPA (to be taken together)

Clause 54, Page 29, line 24, leave out "not"

Clause 54, page 29, line 25, leave out from "is" to end of line 25 and replace with
has done something seriously prejudicial to the interests of

(c) the United Kingdom
(d) (b) a British Overseas territory

Purpose

To make the test for refusing to register people who would otherwise have been registered by entitlement, the same as that for deprivation of citizenship from dual nationals, or right of abode.