ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 13
HOUSE OF COMMONS STANDING COMMITTEE
COMMITTEE SESSIONS 27 OCTOBER 2005

GOVERNMENT NEW CLAUSES 2 TO 10: TERRORISM

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.

OUR EXPERTISE

1. 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.

2. ILPA has provided evidence to the current Joint Committee on Human Rights enquiry into Counter-terrorism and Human Rights, including giving our views on the draft version of these clauses. While we have prepared a separate briefing for the Standing Committee, this draws heavily upon the evidence presented to the JCHR.

CONTEXT

3. ILPA stated in its evidence to the JCHR enquiry

> "55. Proper exercise of border and migration control is one element in ensuring national security, alongside use of the criminal law, measures to interrupt the financing of operations designed to [undermine] that security, and good community and race relations which help to ensure that a society is cohesive in working to detect and counter threats to civilians. Migration control is one element but not the only one, nor even one of the most important, especially in situations where terrorism…is identified to be international with threats likely to come from persons based in different parts of the world…the proposed new "terrorism" amendments to the Immigration, Asylum and Nationality Bill are not immune from the error of conflating all "undesirable" migrants with terrorists. If the government has policy reasons that go wider than national security for amending immigration and nationality legislation it should set these out that they can be debated and scrutinised, otherwise allegations of opportunism and using people's fear of terrorism to undermine individuals rights against the state, a vital part of any positive concept of security, will continue to be made. Human rights apply to all within the jurisdiction, and international law also imposes obligations upon States to act to protect the security of all, not just their own nationals. To see deportation, exclusion and detention of foreign nationals as the key elements of the struggle against terrorism would be to fail to respect both human rights and a sensible approach to ensuring security. On a practical level, creating "suspect communities" is ultimately counter-productive. The use of border controls and exclusion in the 1970s and 1980s led to a situation where the thousands of innocent Irish people where detained, examined and felt excluded from the wider community. It did not necessarily mean that they became terrorists themselves, but it certainly alienated

them from law enforcement agencies and discouraged them from volunteering vital information.

56. Since 7 July 2005 we have seen increased objection by the government to judicial scrutiny of its actions, and proposals for measures that would decrease government accountability, to the population whether before the courts or in the face of public criticism. These are not new trends, they can be identified before the 7th July, but developments since that date…provide evidence of the need for vigilance in protecting the rights of the individual against the State. ILPA is particularly concerned by recent statements that amount to attacks upon the independence of the judiciary, which bode ill for a culture of respect for the rule of law and human rights."

UN High Commissioner for Human Rights at the APPG Refugees.

4. The High Commissioner for Human Rights, Alberto Guterres, addressed a reception in parliament hosted by the All Party Parliamentary Group for Refugees on 20 October 2005. The High Commissioner delivered his very eloquent speech without notes. We are thus unable to quote him directly, but given that a number of members of the Committee, including the Minister, were present, we venture to give a summary of some of the points he made here, confident that members of the Committee will correct us if our notes are wrong in any respect.

5. The High Commissioner spoke of an erosion of the institution of asylum caused by a populist approach creating a confusion; a mixture in people's minds where security concerns, including terrorism, migration and asylum are all put together. He described this as a dangerous development that needs a clear answer from government, political parties, MPs, civil society and the media. He noted that we all have the responsibility to fight back and clarify things. He noted that this is not only a question of the protection of refugees but the protection of all us and of vibrant, diverse, viable societies. He emphasised the need to fight for tolerance, for the values of the entitlement, for political and social rational behaviour. He said that UNHCR wants to be in the first line of this struggle and make an alliance with all those who share these values. The High Commissioner observed that refugees are not terrorists, they are the first victims of terror and that if anyone wanted to mount a terrorist attack in a country then claiming asylum would be the most stupid they could do.

THE NEW CLAUSES

6. ILPA has had sight of the letters of the Home Secretary, of 15 September 2005 and 12 October 2005 (to the Rt. Hon David Davis MP and to Mark Oaten MP) and our notes make reference to what the comments say the clauses are about.

7. 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. In this briefing, we refer frequently to debates on the Nationality, Immigration and Asylum Act 2002.

NEW CLAUSE 3 *Arrest or detention pending deportation*

8. The proposal was stated in the letters to be to extend 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.

9. **Will the new powers apply only to cases where a warrant is obtained or are they are sufficiently broad to allow Immigration Officers or constables to arrest a person without a warrant for the purpose of serving the notice under the Immigration Act 1971 (c.77) Schedule 2, paragraph 17(1)?**

10. 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.

11. Part VII of the Immigration and Asylum Act 1999, modelled to a large extent on the Police and Criminal Evidence Act 1984, amended the Immigration Act 1971 to give immigration offices powers of arrest and search previously the sole province of the police. Subsequent legislation has extended these powers. Section 145 of the Immigration Act 1999 provides for immigration officers to have regard to codes of practice in exercising these powers. These codes (the difficult to find Immigration (PACE Codes of Practice) Direction 2000, and the Immigration (PACE Codes of Practice No 2 and Amendment Direction of 19 November 2000 – **we urge the Committee to ask the Minister to produce copies to the Committee because of the difficulty of locating them-**) apply some parts of the PACE Codes to immigration officers. However, some safeguards that apply to police officers do not apply to immigration officers, for example the requirement to give one's name when conducting certain searches.

12. Unlike police officers, Immigration Officers are not publicly accountable to an independent complaints authority. The means of redress against them, apart from a civil action for assault or false imprisonment, is to the Immigration and Nationality Department (IND)'s own complaint procedures. These were designed to enable individuals to complain about the way in which their applications for leave had been handled and are not equipped to adjudicate on the use of powers to arrest and detain, including using reasonable force.

13. The IND Complaint procedures are not in any meaningful way independent. Complaints are dealt with by officers within the department and only monitored by individuals from outside the department, who are appointed by, and who report to, the Secretary of State for the Home Department. This lack of public accountability is of particular concern when the proposed new powers will be linked with a range of new anti-terrorist measures that appear to be targeting certain communities.

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14. This appears to be purely consequential.

NEW CLAUSE 4 *Deprivation of citizenship*

15. The proposal is that 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 power to deprive people of British citizenship was last amended by the 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. We recall what the government characterised as an important exchange then:

What was said in 2002: the importance of prosecution

Parliamentary Under-Secretary of State for the Home Department, The Lord Filkin
"[…] Lord Kingsland [Conservative Front Bench]*, raised a particularly important point about whether the Government would use such a power to avoid prosecutions under the Acts he mentioned* [the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001; the 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*."(HL Report, 09.10.02 col. 282)

16. **Can the government indicate how many times the deprivation of citizenship powers have been used since 2002?**
    - **Can the Minister indicate in how many of these cases a prosecution took place?**
    - **Can the Minister reaffirm the Lord Filkin's commitment to the Lord Kingsland and assure the Committee that they will not use these clauses to export risk, but rather use extradition law, or pursue criminal investigations and prosecutions here?**

17. In ILPA's view, the government has no need of powers it seeks in this clause. It has everything it needs already. 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). We recall what Ministers said then.

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 19997 conventions. It is not expressly defined in either of those places. 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)

18. The existing power thus appears to cover all aspects of terrorism, and is stated also to encapsulate an evolving concept.

- **What more is required?**

However, in this clause the government proposes a different, and lower, test. "Conducive to the public good" is a long-tried concept in immigration law, being the test applied in deportation cases. It 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". This is a far cry from what is now proposed, in terms both of applicability to the British-born and of the removal of the threshold. The current provision amounts to an equation of the deprivation of citizenship with the deportation of aliens.

- **How is the new test intended to differ from the old in its effect?**
- **What class of activity, suspicion or person would be caught by the new test but not the old?**

19. The phrase "conducive to the public good" is imprecise and ILPA has had concerns at the way in which it has been applied in deportation cases over the years. Here, it is proposed to use the power in situations where a person has not necessarily done something which is

seriously prejudicial to the vital interests of the United Kingdom. This government has placed emphasis on the value of citizenship, and an appreciation of the history of these islands, to the extent of requiring this as part of its *Life in the UK* test for new citizens. While it is at least a well-established principle of international law that states have the right to control the admission and expulsion of 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 which 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. British citizens by birth still owe their citizenship to the fact of their birth, not to the discretion of the government of the day. We oppose any erosion of that principle. 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.

20. The use of the term also tends to suggest that anyone whose presence is not conducive to the public good is an actual or a potential terrorist although the ambit of the clause is much broader than terrorism, however widely the latter is defined.

21. **Why are existing powers deemed insufficient?**

- **Is it the intention under this clause to deprive people of their citizenship for acts that are not "seriously prejudicial to the vital interests of the UK?"**
- **How many dual nationals are there?**
- **Did the UK ratify the 1997 European Convention on Nationality?**
- **If not, does the government intend to do so and when, and does the new clause have any implications for that ratification?**

22. As stated, in 2002 the government took the power for the first time to deprive those born British of their nationality, provided that to do so would not leave them stateless (i.e. it could only be used for dual nationals). Concerns were expressed that, given that the powers applied only to dual nationals, they were discriminatory in effect, although Ministers stated that the intention was to remove an unjustified distinction between those registered or naturalised as British and those who acquired British nationality by birth (*Hansard* HL Report 10 October 2002 Vol. 639, No. 194, Col 502). However, we point out that while British citizens of, for example, Jamaican or Zimbabwean parentage may be dual nationals and are thus vulnerable to deprivation under this amendment, British citizens of, for example, Indian or Ugandan parentage will not, because India and Uganda do not permit dual nationality. They, like those born here with no other nationality, will be immune from deprivation under this amendment no matter how heinous their conduct.

- **Will the government comment on the anomaly created by the interplay between this clause and other countries nationality laws?**
- **Does the government have any intention of taking powers in the future that would deprive nationals of their citizenship even at risk of statelessness – for example British nationals holding no other nationality?**

23. It is our understanding that, as with the existing provisions, those to be deprived of their citizenship under this clause will have a right of appeal: s.40A of the BNA 1981 gives a right of appeal against deprivations under s.40(5) and the proposed new s. 40(2) comes within that.

24. The 2002 Act contain important safeguards (see Nationality Immigration and Asylum Act 2002 s.4(4)) 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 proposed amendment contains no such protection against retrospectivity.

- **Given the seriousness of the loss of rights, will the Minister include protection against retrospective application in the new powers?**

25. It was made clear in 2002 that deprivation of a citizenship would be used rarely

What was said in 2002: frequency of use of the new powers

The Lord Filkin**,**
"We have no figures to suggest that the deprivation procedures will target any particular group." (HL 2nd reading 24.06.02 col 1177-1178)

"[…] deprivation […] would not be a routine act; it would be confined to the most serious cases." (HL Committee 08.07.02 col. 506)

"At heart this is a debate about whether there are any circumstances in which the state is entitled to act to deprive a British citizen of that citizenship, howsoever he obtained his citizenship. […] The view of the government is that such circumstances should be extremely rare." (HL Committee 08.07.02 col. 510)

"I wish to emphasise […] that we regard deprivation of citizenship as a very serious step to be contemplated only in the most flagrant cases of deception or disloyalty. It would be reserved, as it has in the past, for serious cases in which the individual's actions were totally incompatible with the holding of British nationality". (HL Report, 09.10.02 col. 279)

26. Can the Minister confirm that these statements continue accurately to reflect government understanding and policy?

27. In 2002 it was emphasised that deportation or removal were separate from deprivation of citizenship and did not affect dependants.

What was said in 2002: Appeal and effect on dependants
Parliamentary Under-Secretary of State for the Home Department, The Lord Filkin
A separate action must be taken by the Secretary of State to deprive of leave of residence and to deport the person.
[…] Deprivation of citizenship is separate from deportation. Deportation does not necessarily follow from the former. It is a separate matter for a separate decision.." (HL Committee 08.07.02 col 508)

"Deprivation may also pave the way for removal from the UK. That is not an inevitable consequence but is something which may flow from the removal of British citizenship and with it the right of abode in the United Kingdom.
[…] *We are, of course, still subject to all our international obligations under the ECHR and the 1951 United Nations Convention and we would respect those in reaching any decision about removal as distinct from deprivation."* (HL Committee, 09.10.02 col 280)

The Minister of State, Home Office, The Lord Falconer of Thoroton
"[…] *It is implicit in what I am saying that the right of abode goes with the removal of British citizenship. The ability to remove from the UK a person deprived of his citizenship is a power which should not in the government's view be given up. Its use in certain circumstances*

might be appropriate: for example when someone is engaged in terrorist activity." (HL Committee, 08.07.02 col.541)

"The position of dependants would, of course, be taken into account in any case where removal or deportation from the United Kingdom was under consideration, but I should make it clear that the citizenship of a spouse would not be affected by the removal of citizenship from his or her spouse.
[…] I suspect that […] if citizenship had been removed before the child born, the position of the child would be as if he was born to someone who was not a citizen. […] I am now told that I got it right." (HL Committee 08.07.02 col 541)

NEW CLAUSE 5 *Deprivation of the right of abode.*

28. ILPA considers that any proposals to deprive people of the right of abode should attract no less protection that powers to deprive people of citizenship. 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.

29. The proposal here is stated in the letters to be to prevent the exercise of a right of abode deriving in part from a person's citizenship of another Commonwealth country where the Secretary of State thinks that it would conducive to the public good for the person to be excluded or removed from the UK. Those affected by the proposal 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.

30. Again we emphasise that this covers all those who come up against the "not conducive to the public good" requirement, not only those who fall within the definition of terrorism. 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.

- **Why then are this broader group included in this clause: if the clause is about terrorism only, why does it not say so?**

31. Again we question how removing a person from the UK, rather than ensuring that they face charge or trial here for any crimes, improves security, either here in the United Kingdom or internationally.

32. The test in this section is that the Secretary of State "thinks" that the person's exclusion or removal would be conducive to the public good, whereas for deprivation of citizenship, in new clause 4, the test was being "satisfied that deprivation is conducive to the public good". We see no reason for the difference. We recall that section 2(2) of the Immigration Act 1971 provides that the Act shall apply to Commonwealth citizens who have the right of abode in the UK "as if they were British citizens". 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.

33. The right of appeal against deprivation of citizenship was introduced by the 2002 Act (although there was provision for a panel hearing back to 1983, and possibly back to 1948)

and we should anticipate that all the arguments proffered for this change would apply equally to cases seeking to deprive people of the right of abode.

- **Why is a different test being applied to deprivation of the right of abode than to deprivation of nationality?**

34. We also question the equation of the right of abode with "exclusion or removal.

- **What rights will a person deprived of the right of abode would have to challenge their exclusion (if not in the UK) or removal if here?**
- **What opportunities they would have to present human rights arguments both against deprivation of the right of abode and against exclusion or removal?**
- **Will a person deprived of the right of abode have any opportunity to challenge their exclusion or removal from the United Kingdom?**
- **Given the seriousness of the loss of rights in associated with loss of the right of abode, will the government amend the clause to provide protection against retrospective application of the new powers?**

NEW CLAUSE 6 *Acquisition of British nationality & c.*

35. This proposes to extend 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.

36. 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.

37. Registration may be discretionary or by entitlement. The effect of this clause is to abolish those who may become British by entitlement, there will be an exercise of discretion in all cases, save those that give rise to obligations under the UN Convention on the reduction of statelessness.

38. Registration is the only way for a child to become British. Children are entitled to register where their parents becomes settled or where the child is born in the UK and remains in the UK for the first 10 years of their life and is not outside the UK for more than 90 days in any of these years and ; where child and/or parents later get ILR. There is also provision for registering children of "2nd generation" British citizens (those who cannot pass on their citizenship and any right of abode) within 12 months of birth.

- **Can the Minister clarify whether the latter category would be affected by this clause or does their registration form part of the statelessness provisions?**
- **Is it appropriate, proportionate and/or necessary, to impose a good character test in these cases of children, some of whom will be babies, and to deny them registration by entitlement?** The new provisions are entirely different from the existing, and otherwise generally benevolent provisions in the existing British Nationality Act s.3(1), which simply mean not imposing the usual statutory requirements that apply in naturalisation cases (periods of residence and absence) in cases of children.
- **If it is appropriate to subject babies to a good character test, how is this to be done?**

39. The following adults can register: British nationals other British citizens, with 5 years residence (s.4); other British nationals with no other citizenship (s.4B – essentially a

"statelessness" provision) and, the most recent example of the use of registration as a mechanism to patch over difficulties created by the operation of entitlement to British Citizenship and the effect of the various forms of British nationality, those born to UK parents between 1961 and 1963 (s4C).

40. In cases of adults the effect of the new measures will be to take away rights to register as British from those whose form of British Nationality gave them little other than this right. It is unacceptable for the government to take away rights that were so recently restored. There is no evidence of any 'abuse' of that right.

- **Will the government confirm that British nationals with no other citizenship will retain their right to become British citizens?**

New Clause 7 *Refugee Convention: Construction*

41. The proposed amendment would provide 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.

42. Subsection (2) of the proposed new clause is not only about terrorism, but about every case in which reliance on the exclusion clauses arises. Subsection (2) refers to Article 1F as a whole, not even just to Article 1(F)(c) which deals with acts contrary to the principles and purposes of the United Nations. Article 1(F) also covers, for example, the commission of serious non-political crimes outside the country of refuge prior to admission as a refugee (1(F)(b)).

43. Statutory construction of the Refugee Convention was a feature of s.72 of the Nationality, Immigration and Asylum Act 2002 where the Home Office construction was the subject of criticism by the Office of the United Nations High Commissioner for Refugees who 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*.."[1]

44. 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 whereas the proposed clause relies on the meaning set out in section 1 of the Terrorism Act 2000 (c.11). This definition will no doubt be a subject of debate on the new Terrorism Bill and ILPA is aware of the Home Secretary's letter to the Rt Hon David Davis MP and Mark Oaten MP of 25 October 2005 discussing the definition. The definition has been widely criticised, including by the Joint Committee on Human Rights. It is an extremely broad definition of terrorism and encompasses actions taken for not only political, but also religious and ideological, reasons. It further includes reference to acts that involve serious damage to property but do not endanger lives or cause any injury to any individual.

45. 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

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

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"*[2]

46. The Home Secretary's letter of 15 September 2005 made reference to "our scope to refuse asylum to those whose conduct is covered by the list of unacceptable behaviours" giving some indication of the anticipated scope of the clause. It is unclear whether a change of policy or drafting considerations have resulted in no express reference being made to the list of unacceptable behaviours or to the provisions that will govern them in the clause.

- **Will the Minister clarify whether the government intention remains that described in the letter of 15 September 2005 as concerns the list of unacceptable behaviours?** If the answer is "yes" then it would appear that an attempt is being made considerably to broaden the scope of exclusion under Article 1F(c). Such an interpretation would go beyond that endorsed by the UNHCR *Handbook.*

47. ILPA responded to the Home Office consultation on this matter on 18 August 2005. A full copy of our response can be found at www.ilpa.org.uk (Section on Submissions). We expressed concern at the imprecise and subjective nature of the proposed list of unacceptable behaviours.

48. ILPA's estimation is that many, if not most, of the attempts to deport foreign nationals accused of terrorist activities to date have been based on allegations of activities which amount to indirect threats to the UK's national security, public order or to the rule of law, and that the existing powers are wide enough to secure the deportation of whom the proposed powers purport to address.

49. Since the *Rehman* [3] case in the House of Lords, national security has remained an undefined, subjective concept, where a government's assessment of any threat rules the day. Because of the secrecy attached to national security, it is usually impossible for members of the public or their lawyers to know whether the government are talking about direct or indirect threats to Britain's national security.

50. Although the Judges in *Rehman* avoided a clear definition of national security they did make it clear that **indirect** threats to British national security, brought about by the promotion of terrorism abroad, were included in the definition. They made it clear that the promotion of terrorism against any state, although not a direct threat to Britain, is capable of being a threat to the UK's national security, since increasingly the security of one country is dependent upon the security of others, so that any activity likely to create a risk of adverse repercussions, including conduct which could have an adverse effect on the UK's relationship with a friendly state, could threaten the UK's national security. Thus planning and organisation in the UK of terrorist acts abroad could be a basis for deportation.[4]

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

[3] *Rehman v SSHD* [2001] UKHL 47 [2001] 3 WLR 877 [2002] INLR 92 [2002] Imm AR 98,affirming*Secretary of State for the Home Department v Rehman (Shafiq ur)* [2000] INLR 531.

[4] See *Rehman* (HL), per Lord Slynn at para 18, Lord Steyn (para 28), Lord Hoffmann (para 49), also *R v Secretary of State for the Home Department, ex p Singh (Raghbir)* [1996] Imm AR 507, CA, at 510.

51. The open evidence in the Belmarsh detainees' cases[5] was based in part upon evidence of activities which could only be described, at their highest, as posing an indirect threat to Britain's national security, such as obtaining supplies, including boots and blankets, for Chechen rebels fighting against the Russians.

52. Where deportation is concerned, what is always required by law is the balancing of the public interest against the private interest. Under existing law, deportation is only warranted if that balance is struck properly and lawfully against the individual concerned. Where it has not been properly struck, or where there is a violation of a Convention right, deportation is not permissible. Where exclusion is concerned, a balance will be required if a Convention right is engaged (e.g. free speech), where the motive for the exclusion is to defeat the exercise of that Convention right.

53. **Can the Minister confirm that the new measures are not directed against those wanted in other countries for crimes committed or to serve prison sentences imposed by a court?**
If those against whom the powers were used could be charged or tried in the UK or abroad, it would be abusive and irresponsible to use deportation rather than extradition.[6] As the headline in a Sunday broadsheet article[7] 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 in the Belmarsh case alleged, deportation or exclusion are an incomplete response.

54. This extra breadth of subsection (2) makes it difficult to determine whether or not it is envisaged that cases involving reliance on the new statutory definition might come up before the AIT or whether they will only arise before SIAC.

- **Can the Minister clarify this?** The response would in itself provide a clue as to whether the powers are going to be used widely or narrowly in terms of the range of people to whom they would be applied.

55. It is not enough to contend that those caught by this clause would still enjoy the protection of the European Convention on Human Rights were they found to be at risk on return. As has been noted many times, recognition as a refugee carries with it enhanced rights, including rights to family reunion and therefore it is vital that, in the words of UNHCR's *Handbook* "*Considering the serious consequences of exclusion for the person concerned…the interpretation of these exclusion clauses must be very restrictive*"[8]

56. Subsection (2) provides that consideration of exclusion should be considered prior to consideration of the substantive matters in the case, but does not go so far as to state unequivocally that the question must be decided prior to consideration of the substantive case. This is the (unsatisfactory) effect of current Asylum and Immigration Tribunal (AIT) caselaw in any event and, as we understand it, the effect of ACTSA sections 33 and 34. Where it is concluded that Article 1F applies, the clause makes provision for the dismissal of the claim for recognition as a refugee. This is no more than a restatement of Article 1F itself.

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[5] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56

[6] See *R v Horseferry road Magistrates' Court ex parte Bennett* [1994] 1 AC 42; *R v Mullen [1999] 2 Cr App R 143, CA.*

[7] John Rentoul, Independent on Sunday 14 August 2005.

[8] *Ibid.* Paragraph 149.

NEW CLAUSE 8 *Appeals: deportation*

57. The effect of this proposed new clause section is that an appeal against a deportation order in a national security case would be "non-suspensive" – the appellant would only be able to challenge the national security case against him or her from abroad. Provision is made for a limited appeal pre removal to consider whether it would be a breach of the person's human rights to remove them from the UK. There is provision in subclause (2)(iii) for the Secretary of State to issue a certificate barring even that limited right of appeal, but provision is made for a challenge of the certificate to SIAC.

58. It is easy to envisage circumstances in which it would be necessary to consider elements of the national security case against a person before determining the risks on return. Where the human rights invoked against removal involve consideration of the extent to which the limitation of rights can be justified on national security grounds (e.g. Article 8) ECHR, it is impossible to envisage SIAC being able to proceed without consideration of the national security grounds. The clause as drafted appears to offer scant protection for the rights of appellants and to be unworkable in practice.

NEW CLAUSE 9 *Information: Embarking passengers*

59. This clause would perhaps be better entitled "*Detention: Embarking passengers"* since this is the most striking power in the clause. The proposed amendment includes a power to detain a person for up to 12 hours to complete the information.

60. See our comments on the powers given to immigration officers under New Clause 3 *Arrest or detention pending deportation* above.

- **Will the Minister give an assurance that the private contractors to whom it is proposed to give powers to detain under Clause 35 would not be involved in detention in these circumstances?** It was suggested by Ministers in debates on that Clause that they would be used in cases Ministers did not consider to require the professional skills of immigration officers. Even if one were to accept this characterisation of powers of search and arrest, the situation envisaged by this clause can is in no way such a situation

61. The powers in the new clause are powers to detain people leaving the United Kingdom and to establish the person's identity, compliance with conditions of leave and whether return to the UK is prohibited or restricted.

- **Can the Minister clarify whether the new powers are in part to ensure that a person's passport would be endorsed accordingly before they were allowed to leave?**
- **What are the financial implications of the clause? Will it entail having to rebook flights at public expense or will a system of compensation operate instead?**
- **Can the Minister assure the Committee that that the detention will not be made known to the airline or to the authorities of the country to which the person is travelling? If, for example, an unsuccessful asylum seeker has decided to return, drawing his or her arrival to the attention of national authorities could lead to increased danger or even to refusal of entry to the home country.**
- **Can the Minister must confirm that this clause will not lead to people being unable to travel when they wish to do so, unless they have been charged with a criminal offence and are attempting to avoid prosecution?**

62. The powers could provide the Government with an opportunity to gather information about the movement of certain "suspect communities" and information that individuals may

be required to give as the result of provisions contained in the Terrorism Act 2000. The 1976 Prevention of Terrorism (Temporary Provisions) Act contained a similar provision for the police and immigration officers at ports to the power to detain and examine individuals arriving in or leaving Great Britain for up to twelve hours and other provisions of the Act required individuals to co-operate with those trying to prevent terrorism. The provision was used extensively to collect information from people travelling to or from the Northern Ireland. Home Office statistics show that in 1985 for example 55,328 people were detained and questioned under these powers and in 1986 for example, 59,481 were detained and questioned.