IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

EVIDENCE TO THE JOINT COMMITTEE ON HUMAN RIGHTS

COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: INITIAL STAGE

A. Our expertise

1. 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.

2. 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.

3. We have been involved in consultation and parliamentary work on all developments in the fields of immigration, asylum and nationality as they relate to counter-terrorism. In this evidence we confine our response to our areas of specialist expertise: "unacceptable behaviours" and the Home Secretary's exercise of powers of exclusion or deportation; "diplomatic assurances" and the proposals for amendment to the Immigration, Asylum and Nationality Bill 2005.

B. "Unacceptable behaviours" and the Home Secretary's exercise of powers of exclusion or deportation.

4. 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). The following paragraphs summarise our comments.

5. ILPA expressed concern at the imprecise and subjective nature of the proposed list of unacceptable behaviours. "Terrorism", "freedom fighting", "insurgency" and a host of other words may be used to describe the same actions or events and the government at one period may "consider" views or actions differently from another. This has been stated frequently but it is still important, when the need to debate and spread information about threats to this society and about the best means to counter them is so vital. ILPA would be concerned if these powers were to be used to stifle debate mainly because the views expressed were unacceptable to a government.

6. 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.

7. Since the *Rehman* [1] 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 excessive 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.

8. 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.[2]

9. The open evidence in the Belmarsh detainees' cases[3] 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

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[1] *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.

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

[3] *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

obtaining supplies, including boots and blankets, for Chechen rebels fighting against the Russians.

10. Where deportation is concerned, what is always required 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.

11. The new measures are not being directed against those wanted in other countries for crimes committed or to serve prison sentences imposed by a court. If those against whom they were used could be charged or tried in the UK or abroad, it would be abusive to use deportation rather than extradition.[4] As the headline in a Sunday broadsheet article[5] 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, deportation or exclusion are an incomplete response.

C. Deportation of non-UK nationals suspected of terrorism on the basis of diplomatic assurances.

12. This matter is discussed in detail in ILPA's submission of 25 September 2005 to the JCHR as part of the JCHR's enquiry into the UK's compliance with its obligations under the UN Convention Against Torture. We refer you to that submission, which also contains full references, and summarise only a few key points here.

13. It is long established in international and UK jurisprudence that the absolute prohibition on torture enshrined in Article 3 ECHR encompasses an absolute prohibition on *refoulement.*

14. This is not caselaw that has grown up free from any consideration of crime, or terrorism. The first case in which the European Court of Human Rights spelled out the principle, *Soering v UK*[6] was an extradition case. The other leading case, *Chahal*[7], again a case against the UK involved a person accused of terrorism.

15. Diplomatic assurances have been used in extradition cases (*Soering* was one such example) where, for example, the extraditing country has outlawed the use of the death penalty and will not extradite a person if to do so would put them at risk of that penalty. In such cases the assurance is given in respect of the sentencing powers that will be made available to

[4] See *R v Horseferry road Magistrates' Court ex parte Bennett* [1994] 1 AC 42; *R v Mullen [1999] 2 Cr App R 143, CA.*
[5] John Rentoul, Independent on Sunday 14 August 2005.
[6] 1989] ECHR 14038/88
[7] *Chahal v UK*, 1996, European Court of Human Rights

a court, sitting in public, in a legal system that provides for the penalty to be withheld from the jury. Where such conditions do not hold and a fair trial is not guaranteed, diplomatic assurances may not be acceptable in such a case and attempts at extradition may fail.

16. Torture by contrast, takes place in secret, behind close doors, and the prohibition against torture is a peremptory norm of customary international law binding on all states (*jus cogens*)[8]. As detailed in ILPA's submission to the JCHR on UK compliance with the UN Convention against torture, all the empirical evidence shows that diplomatic assurances are ineffective protection against the risk of torture on return, this is in accordance with what would be anticipated, and that post-return monitoring is incapable of rendering diplomatic assurances an effective safeguard against torture.

17. The existing jurisprudence has evolved in a context in which terrorism has been part of the facts of the cases. In 1996, in the *Chahal* case, the European Court of Human Rights ruled that the UK government could not rely on assurances against torture to return to India a Sikh activist wanted by the Indian authorities on terrorism charges. In 1999, the government tried unsuccessfully to return four alleged Islamic militants to Egypt by seeking assurances against torture, despite reservations expressed by Home Office and Foreign Office lawyers about the effectiveness of such measures as a safeguard against ill-treatment[9].

18. Successive UN Special Rapporteurs on Torture, the UN Committee against Torture, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Council of Europe Commissioner on Human Rights, and the European Committee for the Prevention of Torture have all expressed concern about the use of diplomatic assurances[10]. In the words of the UN Special Rapporteur on Torture, commenting on the UK government's plan to rely on diplomatic assurances not to torture from Jordan and other government "reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture."[11]

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[8] See ILPA's submission to the JCHR regarding UK compliance with the United Nations Convention Against Torture of 25 September 2005.

[9] The case came to light when one of the men, Hanif Youseef, brought a successful civil action against the UK government for wrongful imprisonment pending deportation, *Youseef v Home Office*, High Court of Justice, Queen's Bench Division, 2004 EWHC [1884] (QB)

[10] Statement of the Special Rapporteur on torture, Manfred Nowak, to the 61st Session of the UN Commission on Human Rights, Geneva, 4 April 2005; Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while countering Terrorism, E/CN.4/2005/103, 7 February 2005; Report of the Special Rapporteur on Torture Theo Van Boven to the UN General Assembly, 23 August 2004, para.30; UN Committee Against Torture (UNCAT) Decision: Communication NO.233/2003, *Agiza v Sweden*, CAT/C/34/D/233/2003, 20 May 2005; Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the UK, 4th to 12th November 2004, CommDH(2005)6, 8 June 2005; European Committee for the Prevention of Torture (CPT), 5th General Report on CPT's activities, 22 September 2005.

[11] *"Diplomatic Assurances" Not An Adequate Safeguard For Deportees, UN Special Rapporteur Against Torture Warns*, United Nations Press Release, 23 August 2005. Similar concerns have been

19. As detailed in ILPA's submission to the JCHR on the UK's compliance with its obligations under the UN Convention Against Torture, government interest in returning people on the basis of diplomatic assurances that they would not face torture predates 7 July 2005, and was formally announced to parliament on 26 January 2005, although the first Memorandum of Understanding was agreed after 7 July 2005, with Jordan, on 10 August 2005.

20. The *non-refoulement* obligation is integral to the prohibition against torture. It is a norm of customary international law, and arguably enjoys the same *jus cogens* status as the overall prohibition. ILPA considers that returns based on agreements such as that concluded with Jordan are incompatible with the UK's *non-refoulement* obligation under the UN Convention Against Torture and under the European Convention on Human Rights, and that by their use, the UK is weakening the global ban on torture.

D. Proposed amendments on the Immigration, Asylum and Nationality Bill 2005

21. ILPA has had sight of the letters of Charles Clarke, Home Secretary, of 15 September 2005 and 12 October 2005 (to the Rt. Hon David Davis MP and to Mark Oaten MP) and our comments on the proposed amendments are based upon reading them. At this stage, with incomplete information, our priority has been to set before the committee what we think the changes would mean in practice rather than to express a views upon them.

Arrest or detention pending deportation

22. The proposal is 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. It is unclear from the wording of the proposed amendment *(Arrest and detention pending deportation)* whether or not the new powers would apply only to cases where a warrant is obtained or whether 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).

23. 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

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expressed by Professor Robert Goldman, former UN Independent Expert on Human Rights and Counter-Terrorism and the European Committee for the Prevention of Torture.

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, as amended 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. Immigration Officers are also not publicly accountable to an independent complaints authority. The only possible 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 matters such as these. Nor are the IND Complaint procedures 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 set to be targeting certain communities.

24. This proposal is exemplary of a more general concern we have with the proposed terrorism amendments: it elides the concept of a person's presence in the UK not being conducive to the public good, with the notion that the person is a terrorist. The concept of a person whose presence in the UK is not conducive to the public good, and the attendant powers to deport, go much wider than terrorism cases. A person might, for example, have a criminal record that is entirely unrelated to terrorism or anything similar: some of the leading cases have concerned people with previous convictions for selling drugs.

Deprivation of citizenship

25. 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. Under the current law 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 which was seriously prejudicial to the vital interests of the United Kingdom or a British Overseas territory. That test is clearly capable to being successfully applied to those involved in terrorism.

26. The phrase "conducive to the public good" is much less precise. Whilst it is correct that deportations on the basis that an individual's presence was not conducive to the public good have been made previously on national security grounds, the proposed repeal of the current wording of Section 40(2) suggests an intention 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. It could be interpreted to include acts done which

interfered with the interests of UK allies, if, indirectly, this was not in the public interest. It would also be used to deprive those convicted of relatively minor offences of British citizenship. 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.

27. Section 40(2) of the British Nationality Act 1981 was last amended only three years ago in 2002. The Committee may wish to refer to its reports on the nationality sections of the Nationality, Immigration and Asylum Act 2002.

28. The 2002 wording " replaced provisions which 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).

29. The other main change in 2002 was that for the first time the Secretary of State had power 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). The Committee will recall concerns 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).

30. As with the existing provisions, it is our understanding that those to be deprived of their citizenship will have a right of appeal.

31. 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 associated with deprivation of citizenship, we should wish to see protection against retrospective application applied to any new powers.

Deprivation of the right of abode.

32. The proposal here is stated 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.

33. Again we note the concern that not being conducive to the public good is being conflated with being a terrorist.

34. 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.

35. We are concerned to note that the test in this section is merely 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 the previous amendment, the test was being "satisfied that deprivation is conducive to the public good". We see no reason for the lower test. 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. We recall that Britain's colonial history has resulted in their 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. The right of appeal against deprivation of citizenship was introduced by the 2002 Act 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.

36. We also question the equation of the right of abode with "exclusion or removal". Is it is not anticipated that a person would have any opportunity to challenge their exclusion or removal from the United Kingdom? In contrast to provisions for deprivation of citizenship, no provision is made for a right of appeal against deprivation of the right of abode. But the government should be asked to clarify what rights they anticipate that a person deprived of the right of abode would have to challenge their exclusion (if not in the UK) or removal if here, and what opportunities they would have to present human rights arguments both against deprivation of the right of abode and against exclusion or removal.

37. 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. That citizenship can be removed if it is considered conducive to the public good for them to be excluded or deported from the United Kingdom.

38. The 2002 Act contain important safeguards (now in s.40A(4) of the British Nationality Act 1981 against retrospectivity. As noted above, no such protection is offered in the new proposals to deprive people of citizenship. The same is true for deprivation of the right of abode. Given the seriousness of the loss of rights in associated with loss of the right of abode, we should expect to see protection against retrospective application applied to the new powers.

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.

39. We have yet to see the draft amendment reflecting this proposal. 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. Registration and naturalisation are the only two ways in which a person can become British.

40. The important matter to note is that certain people have a right to register as a British citizen, which the proposal will take away, making all applications to become British a matter of discretion. One example is children who are born in the UK when one of their parents becomes settled or when the child 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. It is difficult to imagine what the good character test could mean in the case of a baby whose parent becomes settled, and not entirely clear what it would mean in the case of a 10 year old.

41. Registration has also historically been used 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, including in the Nationality, Immigration and Asylum Act 2002. This has included using time limited registration periods or using rights to registration for finite groups. Again, 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.

Information: Embarking passengers

42. Embarkation controls were first reduced in 1996 under the then Conservative government and subsequently by the Labour government[12].

43. The proposed amendment includes a power to detain a person for up to 12 hours to complete the information. See our comments on the powers given to immigration officers under *Arrest or detention pending deportation* above. These 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. We assume this is partly to ensure that the person's passport would be endorsed accordingly before they were allowed to leave. We also observe that it 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

[12] See eg. *Hansard* HC Report 20 December 2004 Col 1965. See also Embarkation Controls, *Hansard* HL Report, House of Lords Written Answer HL957 (the Lord Marlesford, response from the Lord Rooker on behalf of the government) 5 November 2001. News reports at the time drew attention to a perceived link between a reduction in embarkation controls and opportunties for terrorism, see for example "£3 millon cuts "made life easier for terrorists"" Philip Johnston, The Daily Telegraph 29 09 2001. The Conservative's 2005 election manifesto calls for the reintroduction of "full embarkation controls".

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. It 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.

Refugee Convention: Construction

44. 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.

45. 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 United Nation as High Commissioner for Refugees who described it as suggesting and 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.."[13]

46. 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 has been widely criticised by human rights organisations including Liberty and Amnesty International. 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 which involve serious damage to property but do not endanger lives or cause any injury to any individual. The Committee may wish to refer to its reports on that legislation.

47. Moreover, the draft 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*

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

latter, it has to assumed, although this is not specifically stated, that the acts covered...must also be of a criminal nature"[14]

48. It is notable that 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. If the government intention remains that described in the letter of 15 September 2005 then it would appear that an attempt is being made considerably to broaden the scope of exclusion under Article 1F(c) and or concerns about the list of unacceptable behaviours, as set out above, all apply. Such an interpretation would go beyond that endorsed by the UNHCR *Handbook.*

49. Subsection (2) of the draft clause is not merely 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)).

50. 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, which would in itself provide a clue as to whether they were going to be used widely or narrowly in terms of the range of people to whom they would be applied.

51. 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*"[15]

52. 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... Where it is concluded that Article 1F provides, provision is made for dismissal of the claim for recognition as a refugee. The latter is no more than a restatement of Article 1F itself.

Appeals: deportation

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[14] *UNHCR* Handbook on Procedures and Criteria for Determining Refugee Status, Paragraph 162.
[15] *Ibid.* Paragraph 149.

53. The effect of this section is that an appeal against a deportation order in a national security case would be "non-supensive" – the appellant would only be able to challenge the national security case against them 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 draft subsection (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.

54. 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.

The overall social and political context: human rights and national security

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 ensure 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, as described above, is identified to be international with threats likely to come from persons based in different parts of the world. As we have set out, 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, of which some are considered above, 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.

ILPA 15 October 2001

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