ILPA Submission to the Joint Committee on Human Rights Inquiry into the Human Rights implications of Extradition Policy

1. The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency and other 'stakeholder' and advisory groups and has given oral and written evidence to the Joint Committee on many occasions.

Summary

2. ILPA would like to highlight particular concerns about breaches to human rights that arise when persons subject to extradition orders are or, as detailed below, become, persons subject to immigration control.

3. ILPA is aware of cases where those extradited have had their refugee status revoked and their indefinite leave to remain in the UK cancelled while outside the UK, where deprivation appears based on charges that founded the extradition, of which they have been acquitted, and that the Home Office has resisted their attempts to return to the UK to appeal against the revocation of refugee status and the cancellation of indefinite leave.

4. ILPA is aware (see the Freedom of Information Act request appended hereto) that more deprivations of nationality are taking place while the person deprived is outside the UK than while the person is inside the UK. We are aware that deprivations are being accompanied by exclusion orders so that the person is unable to return to the UK. We do not know if any absences from the country are a result of extradition in these cases (we know of cases where they are not) but it is possible, and there are parallels with the situation in relation to Indefinite Leave to Remain outlined above.

5. Thus the human rights implications of the interplay between current extradition policy and current immigration and nationality law and practice are that:

- A person extradited may find him/herself stranded outside the UK, unable to return to the UK, in a country where he or she has no status, with all the risks to protection of his/her human rights that that entails;
- Such a person may also, as has been the situation in cases ILPA has seen, have family in the UK giving rise to the question of breaches of the right to a private and family life (under Article 8 of the European Convention on Human Rights) of both the person stranded and the family members remaining behind in the UK;
- Such a person may hold no nationality or citizenship other than that of a country in which s/he faces persecution as defined in the 1951 UN Convention relating to the Status of Refugees or graves breaches of his/her human rights as set out in the European Convention on Human Rights, and no status in any other country. Cases ILPA has seen include cases of recognised refugees and of persons with a pending claim for asylum;
- The person may be at risk of *refoulement* to a country in which s/he faces persecution or grave violations of his/her human rights;
- Where the decision to revoke refugee status/cancel leave or deprive the person of nationality was unlawful, the person may have no practical prospect of challenging that decision and thus face not only the breach of human rights that this entails in and of itself, but breaches of his/her human rights in consequence, as described above.

6. These concerns must be viewed in the context of the way in which human rights are addressed in cases of extradition to other European member States in cases under Part 1 of the Extradition Act 2003. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[1] says in its 10th Preamble:

   > "(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States."

7. ILPA is concerned at the extent to which that 'high level of confidence' appears to trump in practice evidence of risks of human rights violations submitted in particular cases, putting refugees and those who should be protected from *refoulement* by the European Convention on Human Rights at particular risk.

The case of *Khemiri*

1. Mr Khemiri was a recognised refugee in the UK. A European Arrest Warrant was issued for his arrest in connection with terrorist related

[1] 2002/584/JHA, *Official Journal L 190 , 18/07/2002 P. 0001 - 0020*

activities. Extradition to Italy was sought. His challenge against extradition failed[2] and he was extradited to Italy.

2. It is worth pausing over what happened in that original challenge to extradition. Among those resisting extradition at the same time as Mr Khemiri, one, had claimed asylum in 2004. That claim had yet to be determined at the time of the extradition. We cite *in extenso* from the judgments in an effort to give a full flavour of the hearings.

3. Copious evidence was provided at both the Magistrates' Court extradition hearing[3] and on appeal to the Divisional Court[4] which the courts accepted demonstrated

> (a) that all three men faced a real risk of Article 3 ill-treatment if returned to their country of origin,
>
> (b) a routine practice in Italy of the Executive already having expelled to their country of origin a large number of individuals in precisely the same circumstances of these three in violation of Article 3, i.e. nationals of that country facing terrorism allegations, whether convicted or acquitted (including several in the trial of one of those being extradited), and
>
> (c) that the Italian national security deportation law (the Pisanu decree of 2005) by which these removals had been effected summarily (sometimes within hours) by the Italian Government fails to comply with Article 13 of the European Convention on Human Rights because it prohibits any appeal that is lodged from having a suspensive effect.

4. The District Judge in the Magistrates Court hearing posed the question of whether there were substantial grounds for believing that the defendants would suffer a breach of Article 3 (prohibition of torture, inhuman or degrading treatment or punishment if returned to their country of origin.[5] He answered this question, referring to *Saadi v Italy [2008](Application No 37201/06)* in the affirmative.[6]

5. The District Judge held that:

> *"...the current state of Italian immigration and deportation law, presently the Pisanu law, fails to provide the necessary guarantees that are required by*

---

[2] *R (Ignaoua et ors) v Judicial Authority of the Courts of Milan ; The Serious and Organised Crime Agency &the Secretary of State for the Home Department.* [2008] EWHC 2619 (Admin)
[3] District Judge Evans, Judgment 20 May 2008
[4] *Mohamed Salah Ben Hamadi Khemiri, Habib Ignaoua, Ali Ben Zidane Chehidi v. The Court of Milan Italy* [2008] EWHC 1988 (Admin) Judgment 28 July 2008.
[5] Paragraph 2 of the judgment of 20 May 2008.
[6] Ibid., paragraph 4.

Article 13 and places a person such as these defendants (should they be subject to an order for deportation), at risk."[7]

6. However, the District Judge went on to conclude that:

"...since the 28th February 2008[8] *there will have been many people in the Italian Civil Service giving anxious consideration to the decision in Saadi v Italy, all trying to devise a solution to the 'dilemma'.*

(2) It is highly likely that new provisions will soon be in place, and that would make this whole discussion, based as it is on the Pisanu law, somewhat academic.

(3) I am not surprised that the Minister of Justice has declined to give an undertaking that the Pisanu law will not be applied to any of these three men. There are many reasons why it might not be appropriate to offer such a guarantee. The lack of it does not suggest that, if extradited, the Pisanu law would be applied to them.

(4) I consider it most unlikely that, unless and until the circumstances allow it, the Minster of the Interior would make a deportation order against any of these three men requiring their return...'

(5) Notwithstanding the view I have expressed in paragraph 16 above, I am confident, given all the activity these defendants have generated with the authorities in Italy and their situation being now so 'high profile' that they would have no difficulty accessing the Italian courts, should they wish to challenge any deportation order.

I consider that there is no reason to suppose that any future deportation proceedings would be anything other than in accordance with the Convention and the case of Saadi v Italy. I do not regard what has undoubtedly happened in the past as providing evidence that such an approach will be repeated in the future. Saadi v Italy will cause the Italian authorities to rethink its [sic.] approach to this issue. There is absolutely no reason to suppose that they will ignore the case and carry on as before....The Framework Decision is based on mutual trust and confidence between fellow Member States and I am confident that the Italian authorities can be relied upon not to act contrary to the Convention.'

7. That such confidence might not be well-placed was illustrated just before the Divisional Court hearing by the expulsion by Italy of Ben Khamais, a co-defendant of one of those involved in these extradition proceedings, to the defendants' country of origin in violation of Article 3 and of an order by the European Court of Human Rights under Rule 39 of the rules of court. Ben

[7] Ibid., paragraph 16.
[8] Date of the *Saadi* judgment.

Khamais was summarily deported before he could even inform his lawyer of what was happening. Nonetheless the Divisional Court held

> *"46 …real risk of expulsion …(within the meaning of that expression in the authorities) has not been established in these cases. It is relevant that the extradition to Italy will be effected under the Framework Directive though, as appears from the authorities, the same or a similar principle would have applied under earlier extradition procedures between Western European countries. The Italian authorities are under Article 3 duties in any event, but the Framework Directive adds an additional dimension. It requires cooperation between judicial authorities on the basis of trust and a high level of confidence. When assessing whether there is a real risk of conduct that would involve a breach of Article 3, the court must adopt the approach indicated by Lord Bingham in Dabas. .*
>
> *47 As Baroness Hale put it in Hilali , for better or worse we have committed ourselves to this system. Under the Framework Decision, we can assume that the trust placed in the Italian authorities will be justified. The Framework Decision provides a safeguard and a disincentive to the Italian authorities, as with the authorities of any Member State, not to act in breach of Article 3 of the Convention. Article 34 of the Treaty provides for sanctions against States failing to comply with the basic principles of the Treaty. Bilateral trust also arises. This is bilateral action premised on the existence of a high degree of confidence. Courts in a returning state would be likely to have a real sense of grievance, having regard to the contents of the Framework Directive, if a receiving state subsequently ignored its duty under Article 3 of the Convention. The Italian government had not hitherto deported in an Article 3 case a person received under the Framework Directive and had not deported in the case of Saadi. .*
>
> *48 Moreover, when the Italian authorities receive a person under the Framework Directive, the entire judiciary, including the Justices of the Peace, is likely to be alerted to its duties under Article 3 . That is certainly so in the current cases. … they have received very considerable publicity in Italy and elsewhere.*
>
> *49 I am not prepared to disagree with the District Judge's assessment of the witnesses or his rejection of the appellants' witnesses' low opinion of the Italian judiciary. He did not accept the submission that the Justice of the Peace function when considering a deportation order was that of a "rubber stamp". Justices of the Peace, along with other members of the Italian judiciary, can be expected to have regard to Article 3 of the Convention when considering a deportation order, though I do note the speed with which the decision in BK was effected.*
>
> *50 It is disturbing if the evidence before the court is correct – and the court has to take it at face value – that the Italian executive in the case of BK have apparently disregarded an interim direction of the ECtHR. I cannot regard that act, or the statement of a representative of the Ministry of Justice which is claimed also to have been made, as destroying the trust and confidence which is to be assumed in the context described. I am not*

prepared to hold, on the basis of a single post- Saadi case, that the Italian State will in the present cases ignore its duties under Article 3 of the Convention as confirmed in Saadi.

51 The submission that because the Framework Decision and the 2003 Act inaugurates a procedure between judicial authorities, and executive conduct is outside it, is not without force. However, courts must act on the basis that the confidence required extends to the conduct of the executive arm of the Government which is party to the Framework Decision. The separation and independence of the judiciary from the executive arm of the Government is fundamental to the rule of law, but the Framework Directive entitles an assumption that the conduct of the Italian judiciary and its role in protecting rights under the Convention is not to be nullified by parallel or subsequent action by the executive arm of Government. The risk on return has to be assessed on present evidence, and there is no risk of deportation while the contemplated criminal proceedings and any resulting custodial sentence are extant. That being so, any risk is, to that extent, remote from the current situation."

8. An application for a certificate of a point of law of general public importance was dismissed by the same court on 30 September 2008. On that same date Mr Khemiri and his co-defendants made an application to the European Court of Human Rights under rule 39 of the Rules of Court, for an order preventing their extradition to Italy, on the ground that, if extradited, they would be at real risk of onward removal to Tunisia where they would be subjected to treatment contrary to Article 3 of the European Convention on Human Rights. That application was refused on 7 October 2008. The Registrar of the 4th Section of the Court stated that the Court found that it would be open to the applicants to make an application, including one under rule 39, against Italy, if it appeared that they would be surrendered from Italy in breach of their rights under the Convention. The letters also referred to the Court's express understanding:

> "*… that Italy as a Contracting State would abide by its obligations under Articles 3, 13 and 34 of the Convention and in particular the obligation to respect the terms of any interim measure which the Court might indicate in respect of Italy at the request of the applicants.*"

9. The matters came back before the Divisional Court to consider fresh evidence arising out of the Ben Khamais case. Judgment was given on 30 October 2010.[9] The Court declined to depart from the previous decision of the Divisional Court, observing "This is not in any sense an exceptional case."[10]

[9] *R (Ignaoua et ors v Judicial Authority of the Courts of Milan; The Serious and Organised Crime Agency &the Secretary of State for the Home Department.* [2008] EWHC 2619 (Admin) see http://www.bailii.org/ew/cases/EWHC/Admin/2008/2619.html

[10] *Ibid*., paragraph 47

10. Thus the UK courts and the European Court of Human Rights assumed that the procedure that had been applied to many others would not be applied to these men, although no assurances had been given and the evidence before the courts was a letter from the Italian Ministry specifically stating that they could not promise that the Pisanu Law would not be applied to the men.

11. The passages cited above illustrate how large a role the hopes and expectations that Italy would comply with its human rights and Framework obligations to the men because they would have been extradited from the UK played in the decision. The existence of obligations under the European Convention on Human Rights and the Framework decision appears was sufficient to outweigh the evidence of past State practice and the lack of any evidence that the defendants would not be treated in the same way or of any mechanism by which they could access effective protection that had been denied to all the others. We note that after the defendants in this case were extradited on 1 November 2008, in November 2008 Italy deported another person (MT) to their country of origin despite a Rule 39 indication by the European Court of Human Rights being in place in his case and that there are at least two cases in subsequent years: A in 2009 and M in 2010 in which the same thing happened.

12. What happened subsequently to Mr Khemiri is described in a 26 August 2010 judgment of the High Court in a judicial review.[11] He was tried in Italy and, on 8 July 2010, acquitted of all charges save for one, which related to a procurement of a false travel document. It was common ground in the 2010 judicial review that this charge did not relate to terrorist activities. He was sentenced to 12 months imprisonment but, having already served that on remand, was immediately released from criminal law detention but continued to be held in immigration detention against his return to his country of nationality because a request was immediately made by the Italian police under the Italian 'Pisanu law' for his expulsion to Tunisia and he was detained for that purpose. The same request was made in respect of the two men extradited with him. This can usefully be contrasted with the proceeding envisaged at the time when the extradition case was proceeding through the UK Court, in *R (Ignaoua et ors v Judicial Authority of the Courts of Milan; The Serious and Organised Crime Agency & the Secretary of State for the Home Department.* [2008] EWHC 2619 (Admin):

> *"45. Secondly, it is not in dispute that there has been no other instance of Italy deporting someone in breach of interim measures or of Article 3 of the ECHR since the Saadi decision. The Ben Khemais case remains the sole post-Saadi incident. Thirdly, none of this new evidence has any impact upon the reliance placed by the Divisional Court on how Italy can be expected to behave in respect of someone who has been*

[11] *R(Khemiri) v SSHD* [2010] EWHC 2363 Admin.

extradited to that country under the Framework Decision and a European Arrest Warrant. There is still no evidence of any willingness on the part of Italy to deport such an extradited person to Tunisia or any other country where his Article 3 rights would be at a real risk of being broken. It follows that the Divisional Court's reliance on that fact and on the trust and confidence between states which underlies the Framework Decision remains intact and unaffected by the new material. As I have indicated earlier, that was a powerful element in the Divisional Court's reasoning. It adds an extra dimension to the Article 3 issue.

46. Fourthly, nothing in the new evidence undermines the point made by the Divisional Court that it was agreed that the applicants were genuinely wanted for trial in Italy and that (in the court's view) there was no risk of deportation while criminal proceedings and any resulting custodial sentence were extant, so that any risk was "to that extent remote from the current situation" (paragraph 51). As Miss Dobbin confirmed to us, it was known that Mr Ben Khemais had both been convicted in the past and faced further criminal charges and the Divisional Court also had evidence about the general length of custodial sentences in such cases. Nothing on those aspects has changed since that court's decision."

13. What is striking about paragraph 46 of the judgment is that it does not appear to canvas at all the possibility of what transpired in Mr Khemiri's case, viz. that he was acquitted of all charges and released. The judgment is worthy of more general consideration in the context of this enquiry by the Joint Committee on Human Rights.

14. Mr Khemiri having informed the Italian authorities that he was a refugee those authorities sought to determine whether he could be returned to the UK under the Dublin Regulation.

15. Given the risk of *refoulement,* Mr Khemiri sought, on 9 July 2010, an indication under rule 39 of the Rules of that Court that he should not be returned to his country of nationality (an indication that had not protected Mr Ben Khemais, as described in the extract quoted above). The acting President of the European Court of Human Rights Second Section issued such an indication on 9 July 2010, until 21 July 2010 in the first instance, on that date extended indefinitely.

16. On 16 July 2010, the Secretary of State wrote to Mr Khermiri's solicitors in the UK that she had decided to revoke his refugee status on the ground that Article 1F(c) of the 1951 Convention relating to the status of refugees applied in the case and had also to decided to cancel his indefinite leave on the ground that his exclusion from the United Kingdom would be conducive to the public good. The Secretary of State purported to cancel Mr Khemiri's refugee travel document. Mr Khemiri was fortunate in respect of having

solicitors on record in the UK. ILPA is aware of other cases in which the letter has been sent to the last known address in the United Kingdom of the person being served, while that person is out of the country. In such circumstances there may be deemed service of the letter two days after posting and the time for lodging an appeal would then start to run.[12]

17. The leave of a person whose leave to enter or remain has been varied, with the result that he has no leave to enter or remain, is extended by operation of s 3D of the Immigration Act 1971 where an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 "could be brought, while the person is in the United Kingdom", or where an appeal "brought while the appellant is in the United Kingdom" is pending. The words cited were inserted into the 1971 Act by the Immigration, Asylum and Nationality Act 2006, s 11. The amendments were part of a raft of changes made when the Government was persuaded during the passage of the Bill that became the 2006 Act through the House of Lords not to abolish in-country rights of appeal, at a time when it abolished appeals against refusal of entry clearance. Ministerial statements made at the time of the passage of the Act described the changes as technical:

> *"Amendment No. 12 [now s.11(2) & (3)] corrects a technical problem with the existing continuing leave provision in Section 3C of the Immigration Act 1971. Under the current version of Section 3C leave continues while an appeal could be brought without specifying whether to trigger an extension of leave; the appeal must be brought in the UK or otherwise. Amendment No. 12 inserts a condition that leave will be continued only where appeal may be brought in the UK or where such an appeal is pending. The change has been made to make it absolutely clear on the face of legislation that leave will be continued only where an appeal against a decision to vary leave could be brought in-country." The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, col. 519*

18. The Explanatory Notes to the Act are similarly low key:

> *"28. Section 11 amends section 3C of the Immigration Act 1971 (the 1971 Act), which currently extends leave to enter or remain in the United Kingdom if it would expire while an application is being considered and for such time as an appeal against a decision to curtail or refuse to vary leave could be brought or is pending. The minor amendments to subsections (2) and (3) make it clear that leave shall only be continued when an in country appeal may be brought or is pending."*

19. Thus if notice of a decision is deemed to have been served, and the person is outside the UK, it was argued by the Secretary of State in *Khemiri* that if a

[12] Consolidated Asylum and Immigration (Procedure) Rules 2005 for the First-tier Tribunal SI 2005/*** as amended

person outside the UK did not appeal within the time limits prescribed in the rules, his or her leave would lapse.

20. In Mr Khemiri's case, the letters has been served on his solicitors who were able to take steps to lodge an appeal within the time limits prescribed in the Tribunal chamber rules of procedure. But it was also argued by the Secretary of State in Mr Khemiri's case that, although Mr Khemiri was outside the UK by virtue of having been removed to Italy under a European Arrest Warrant and, being excluded from the UK, unable to return, there was no obligation on the Secretary of State to facilitate his return so that he could exercise an in-country right of appeal or indeed, being a person within the UK, benefit from the provisions of section 3D of the Immigration Act 1971. It was argued on behalf of Mr Khemiri that the Secretary of State was required to take steps to facilitate Mr Khemiri's return to the UK within the period for appealing or not entitled to seek to prevent Mr Khemiri from returning to the UK for the purpose of exercising his right of appeal and should take such steps as required to ensure that Mr Khemiri, whose refugee travel document was purportedly cancelled, should be allowed to return to the UK on that cancelled document or given an appropriate form of laissez-passer.

21. As the judge in *Khemiri* succinctly summarised:

> *"It is, I think, clear, and indeed common sense, so indicates, that there are considerable disadvantages to be faced by an appellant if he has to pursue an appeal while he is out of the country. This is particularly the case where his evidence is crucial, as is obviously the position here, and is more apparent in an appeal to SIAC where national security issues are concerned and where the matters relied upon may, to an extent, be unknown to the appellant."*

22. In Mr Khemiri's case the judge came to the conclusion, as a matter of statutory construction, that the proper construction of section 3D(2)(a) of the Immigration Act 1971 was that leave was extended for such relatively short period as would enable the individual wishing to do so to make arrangements, to return to the UK to pursue an appeal against the cancellation in-country. The Secretary of State is appealing that decision.

23. Matters that remain to be determined in a subsequent consideration of this case by the Special Immigration Appeals Commission are Mr Khemiri's contention that the Secretary of State had failed to take into account his acquittal of the very charges against him that had provoked the decision to revoke refugee status, and that the threshold for exclusion from the protection of the Convention under Article 1F(c) of the Refugee Convention was not met. These matters had been pleaded in the judicial review but in granting permission for judicial review it had been determined that these matters would fall to be dealt with in separate, subsequent proceedings.

They also raise the question of the human rights implications of extradition policy, both in and of themselves and because of the Secretary of State's argument that the person extradited should not be allowed to be present in the UK to give evidence in such proceedings.

24. We pause to note that Mr Khemiri:
    - has had at all times the benefit of lawyers ready to act, in the UK, overseas and at the level of European Court of Human Rights to protect his rights;
    - challenged his extradition in the UK prior to that extradition;
    - benefited from an intervention by the European Court of Human Rights designed to prevent onward *refoulement* from the country in which he found himself stranded;
    - was extradited to a country that is a State party to the European Convention on Human Rights and the Dublin Convention of the European Union.

25. It is not difficult to envisage extradition cases in which the facts are very different and the risks to the person extradited at any given time thereby exacerbated.

Citizenship cases

26. What of citizenship cases? As indicated above, the discussion of the human rights implications of deprivation of citizenship in the extradition context is hypothetical, because ILPA is not aware of examples of such cases involving extradition. We are however aware of at least one case where a person deprived of British citizenship is in their country of other nationality unable to return to the UK to pursue their appeal against deprivation and where their attempts to communicate with their legal representatives put them at risk of harm. It is possible in the light of this and of the consideration of the Khemiri case above, to envisage cases where a person deprived of their citizenship while outside the UK as a result of extradition is *refouled* to the country of their other, and only, nationality.

27. When one turns to the Home Office's Nationality Instructions, Chapter 55 Deprivation and nullity, we find the following:

> ***"C. Conduciveness Deprivation Process***
> *55.8 This policy will be introduced in 2010."*

28. There is no further information.[13] However, we know what happens from experience of cases. The Secretary of State waits until the person is outside the UK (see the freedom of information request described above). The Secretary of State issues a notice of intention to deprive a person of nationality on the grounds that the person's presence is not conducive to the public good. The Secretary of State waits two days, and then deems that notice to have been served. The Secretary of State then issues an order depriving the person of British citizenship and at the same time an exclusion order.

29. The Joint Committee may recall that under the law under which the *Abu Hamsa* case was determined, Mr Abu Hamsa was served with a notice of intention to deprive him of his British citizenship but he remained a British citizen throughout the proceedings. In the event, in November 2010 the Special Immigration Appeals Commission determined that he could not be deprived of his British citizenship because so to deprive him would make him stateless, because he had already been stripped of his Egyptian citizenship. UK law does not permit a person to be deprived of their nationality on the grounds that such deprivation would be to the public good, if to do so would render them stateless.

30. The law under which the Abu Hamsa case was determined has been changed. The Asylum and Immigration Act 2004 Schedule 2 repealed s 40A(6) of the British Nationality Act 1981 which had provided that an order depriving a person of his/her British nationality could not be made in respect of a person during the period in which an appeal against a notice of a decision to deprive that person of citizenship could be brought or was pending. When one consults the Explanatory Notes to the 2004 Act these state

> *"121.Paragraph 4 (British Nationality Act 1981). This provision has the effect that appeals under this Act are handled in the same way as appeals under Part 5 of the 2002 Act, and the same provisions for higher court oversight and legal aid are applied. It also has the effect that a deprivation order can be made before any appeal is heard, thereby allowing deprivation and deportation proceedings to take place concurrently."*

31. There is no mention of the implications of the amendment for those deprived of their nationality while outside the UK in the circumstances outlined above. The repeal came into effect on 4 April 2005[14].

---

[13] See www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter55/chapter55?view=Binary

[14] SI 2005/565

32. Indeed, statements made during the passage of the 2004 Act through parliament referred to the change as 'minor and technical:

> *"My Lords, paragraph 4(b) of Schedule 2 empowers the Asylum and Immigration Tribunal, in the event of a successful appeal against deprivation of British nationality, to direct that any order for such deprivation made prior to determination of the appeal is to be treated as having no effect.*
>
> *The amendment will confer a parallel jurisdiction on the Special Immigration Appeals Commission in relation to successful appeals to that body against deprivation of nationality under Section 2B of the Special Immigration Appeals Commission Act 1997.*
>
> *This might be thought to be a minor technical amendment, and I suspect that it probably is, but it ensures that the Bill gives full effect to the policy on joining deprivation appeals with appeals against deportation action and/or certification, as the case may be, under the Anti-terrorism, Crime and Security Act 2001, whose daily passage I remember even now. The measure was described in detail at recommittal, and your Lordships supported it. I believe that the noble Lord, Lord McNally, said at the time that they were sensible and overdue provisions that should be supported.*
>
> *I want to make it clear for the avoidance of any doubt, because there will not be opportunities later, that the Bill does not alter the grounds for deprivation of citizenship. It is important to make that clear. The Bill does not have retrospective implications. It is not directed, for example, at Abu Hamza and his appeal. The changes in the Bill would make the procedure for appeals against deprivation of citizenship and the effect of such appeals not retrospective. Any appeal currently in progress will be conducted in accordance with the existing procedure. That is an important point; I would not want people to get the wrong idea. Furthermore, the Bill does not limit the grounds for appeal against deprivation of citizenship or take away appeal rights in those cases.*
>
> *Deprivation of citizenship is one issue—but it does not necessarily mean that deportation or removal from the United Kingdom automatically follows. Each case will be considered on its merits and separate decisions taken about the propriety of deportation or removal, as distinct from deprivation of citizenship. There might, for example, be practical or legal difficulties preventing deportation or removal which would not prevent deprivation of citizenship, and circumstances in which the latter action would be desirable or appropriate notwithstanding the impossibility of the former.*
>
> *I believe that I have milked everything that I can from this minor technical amendment. I beg to move."* The Lord Rooker, HL 3rd reading of the Asylum and Immigration Treatment of Claimants Etc. Bill session 2003-2004, 06 07 04 cols 782-784)

Dublin Regulation: responsibility for determining an application for asylum[15]

[15] **Regulation 2003/343/CE**

33. We are aware of at least one case where extradition has been treated by the UK as the European country to which the person is extradited accepting responsibility for determining the person's claim for asylum, despite that country's not having given any indication at the time of the extradition that it would so treat the claim.

Permanent Residence under European Union law

34. As set out above, we have seen instances where a person's indefinite leave has been cancelled while they are outside the UK. Rather than indefinite leave to remain, third country nationals facing extradition may have rights of permanent residence in the UK under Article 16(2) of Directive 2004/38/EC, the 'Free movement' Directive, as a result of their having resided in the UK for more than five years as the family member of a national of an EU member State .

35. Article 16 goes on to state:

> *3. Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of twelve consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.*
>
> *4. Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years."*

36. Article 21 provides that continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

37. Whether a person has permanent residence may be of great importance in challenging any decision to expel him/her. Article 28 Provides:

> *"Article 28*
> *Protection against expulsion*
> *1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.*
> *2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.*
> *3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:*
> *(a) have resided in the host Member State for the previous ten years; or*

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989."

38. Human rights considerations, and in particular considerations under Article 8 of the European Convention on Human Rights (right to private and family life) often loom large in expulsion cases.

39. It can be seen from the legal framework outlined above that if a person, as a result of extradition, loses his/her permanent residence because s/he is out of the country from which s/he has been extradited for over six months, or over two years as the case may be, the result will be that s/he enjoys a lesser protection against any expulsion decision made in his/her absence from the territory than would otherwise be the case. For the reasons outlined above, such persons may also face the prospect of being unable to return to the UK to challenge the expulsion/exclusion decision made against them. Thus rights under European Union law, and the human rights that underpin them, may be undermined in such cases.

Summary

40. Current extradition procedures fail to provide protection against breaches of human rights that arise when persons subject to extradition orders are, or become persons subject to immigration control. Neither extradition proceedings, nor the conduct of the UK and other EU member States thereafter, provides adequate protection against *refoulement.*

Sophie Barrett-Brown

ILPA
21 January 2011