IMMIGRATION BILL
ILPA BRIEFINGS TO AMENDMENTS FOR HOUSE OF COMMONS COMMITTEE STAGE

PART 11 CLAUSES 12 AND 13

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Clause 12 Place from which appeal may be brought or continued

GOVERNMENT AMENDMENTS 1-9
Mr Mark Harper

Clause **12**, page **10**, line **27**, leave out 'foreign criminals' and insert 'persons liable to deportation'. **(Government Amendment 1)**
Clause **12**, page **11**, line **13**, leave out 'foreign criminals' and insert 'persons liable to deportation'. **(Government Amendment 2)**

Clause **12**, page **11**, line **14**, leave out from 'where' to end of line 15 and insert 'a human rights claim has been made by a person ("P") who is liable to deportation under—

(a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or
(b) section 3(6) of that Act (court recommending deportation following conviction).'. **(Government Amendment 3)**

Clause **12**, page **11**, line **18**, leave out 'C' and insert 'P'. **(Govt Amendment 4)**
Clause **12**, page **11**, line **19**, leave out 'C' and insert 'P'. **(Govt Amendment 5)**
Clause **12**, page **11**, line **20**, leave out 'C's' and insert 'P's'. **(Govt Amendment 6)**
Clause **12**, page **11**, line **24**, leave out 'C' and insert 'P'. **(Govt Amendment 7)**
Clause **12**, page **11**, line **26**, leave out 'C' and insert 'P'. **(Govt Amendment 8)**
Clause **12**, page **11**, line **28**, leave out subsection (4). **(Govt Amendment 8)**

Presumed Purpose
These amendments form a group. They broaden the class of persons who can potentially be removed from the UK when they have a pending appeal from "foreign criminals" as defined in s 117D of the Nationality Immigration and Asylum Act 2002 inserted by this Bill to all persons subject to deportation as opposed to administrative removal.

Briefing
ILPA opposes these amendments. They mean that a bad clause will affect more people.

The amendments are concerned with the new s 94B of the Nationality, Immigration and Asylum Act 2002 substituted by this clause. Section 94B creates a new power for the Secretary of State to certify a human rights claim when the Secretary of State considers that it will not breach the UK's obligations under the Human Rights Act 1998 to remove a person before their appeal has been heard. The Secretary of State will be able to certify a claim *inter alia (* for the definition is not exhaustive) on the grounds that to remove the person before their appeal has been heard will cause not them serious irreversible harm.

In the Bill as presented to parliament the Secretary of State could certify claims made by foreign criminals as defined in s 117D of the Nationality Immigration and Asylum Act 2002 inserted by this Bill. Those are persons who are not British citizens, have been sentenced to at least 12 months in prison or have been convicted of an offence that has caused "serious harm" (not defined) or are persistent offenders.

If the amendments are accepted, those who can be removed will be:

- Persons who are not British citizens who are 17 or over, have been convicted of an offence punishable by imprisonment and have been recommended for deportation by a court at the point of sentencing; or
- A person whose deportation the Secretary of State deems to be conducive to the public good or
- A family member of such a person.

Thus the changes are that the person need no longer have been sentenced to 12 months in prison or convicted of a particular type of crime, or with crimes committed particular frequency. A person could have been sentenced to a shorter period, or not convicted of any crime at all. A family member could be of impeccable character; their character is irrelevant.

- **The first question for the Minister is why the clause has been broadened in this way.**
- **The second question is whether the former UK Border Agency can cope.**
- **The third question is what will happen if the Secretary of State certifies a person's appeal but that person is not removed from the UK.**
- **The fourth question is how quickly the Secretary of State will bring a person back to the UK if s/he wins the appeal.**
- **The fifth question is whether the estimates in the Appeals Impact Assessment and in particular the sensitivity analysis which deals with the number of judicial reviews that will result from the changes is being revised in the light of these amendments.**

It was our understanding that the clause in the Bill as presented to parliament had been drafted in the way it had in recognition of the capacity of the former Agency to deal with cases certified (i.e. to remove people).

Perhaps it proves impossible to document the person. Perhaps they are too ill to fly. Perhaps the destination is a place to which it is too dangerous to send an escort. So there is a certificate and the person cannot appeal from within the UK. The person

cannot leave the UK. They are in limbo. A backlog of such cases will build up. The group of people subject to deportation is larger than the group of persons who fitted the definition of "foreign criminal' therefore these very real practical problems that the clause could cause are increased by the amendment.

We recall the words of Lord Justice Sedley in *BA (Nigeria) v SSHD* [2009] EWCA Civ 119 (26 February 2009)

> *"The fact is that, especially but not only where credibility is in issue, the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases. The reason why the Home Office is insistent on removal pending appeal wherever the law permits it is that in the great majority of cases it is the end of the appeal."*

"The end of the appeal". For a person whose presence in the UK the Secretary of State considers is not conducive to the public good although that person may well not have been charged with, let alone convicted of, any crime, and may want to dispute her view in any event. For a dependant whose character is beyond reproach.

We recall the comments of the Constitutional Affairs Committee in 2005 (footnotes omitted but the text can be read at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/21110.htm

> *"78. In its Annual Report of 2001/02, the Council on Tribunals stated that the introduction of non-suspensive appeals was "capable of leading to unfairness and injustice". The Council highlighted some of the "considerable practical problems" that may result:*
>
> > *"The requirement to conduct appeals from abroad will make it more difficult for adjudicators to assess the evidence of appellants. It will also make it more difficult for appellants to have face-to-face discussions with their advisers and to present their cases satisfactorily. Costs will inevitably be greater. And there could be serious problems with regard to the status and safety of tribunal users in the countries form which they are appealing."[70]*
>
> *[…]*
>
> *79. Mr Justice Richards has also described non-suspensive (out-of-country) appeals as "plainly a very serious disadvantage as compared with an in-country appeal."[71] As many asylum appeals turn on questions of credibility, it is particularly disadvantageous for the applicant to be absent from the oral hearing. Research into the relative success rates of oral as opposed to paper based appeal in family visitor cases has shown that oral appeals have a higher rate of success, particularly when the sponsor is available to give oral evidence.[72]*
>
> *Success rate*
>
> *80. In its memorandum to this inquiry, the DCA stated:*

> *"As of 17 April 2003, provisional IAA figures show that 56 out-of-country appeals had been lodged with the IAA. 42 of those have so far been dismissed and one withdrawn. None has been successful."[73]*
>
> *81. We recommend that the Government investigate the fairness of the non-suspensive appeal system, given the extremely low success rate of appellants' appeals under that system.*

Add to this the residence test proposed in the consultation *Transforming Legal Aid* – whereby a person outside the UK will not be eligible for legal aid. ILPA raised with the Ministry of Justice the question of persons whose case was ongoing at the time when they left the UK but has had no response on the point, leading us to fear that that eligibility for legal aid will lapse when the person leaves the UK.

The European Convention on Human Rights provides in respect of qualified rights (i.e. all those that are not absolute) that any interference with the exercise of the right be proportionate. Take the example of a person who is deported, leaving their partner and small child behind the UK. Serious irreversible harm may be done, for example to the child, by the separation. But suppose it is not. Nonetheless, there is an interference with the family life. Is it proportionate? It is unlikely to be in the best interests of the child. It separates the family. It leaves the partner as sole carer, possibly forced to give up work to care for the child and possibly for that reason dependent upon State support for the first time. It makes it more difficult for the person to succeed in the appeal and the family be reunited. The appellant has no control over the length of the separation which will depend upon how long the appeal takes to be heard and, if the appellant wins, how long it takes to implement the decision. The implementation of allowed appeals is an area that has seen some of the very worse Home Office delay as the following examples illustrate.

> ***Case of E***
> *Today* [4 November 2013] *I received letter granting client 30 months Leave to Remain following First-tier Tribunal allowing appeal on Article 8 grounds (hearing 20.02.13 determination promulgated 28.02.13). Home Office so used to delay in these matters they refer to successful appeal as 20.02.2012! Client is now 60 and entered UK as spouse of British Citizen in 2010 - before English language requirement introduced. Sole reason for refusal was lack of English / Knowledge of Life In the UK. Relevant ESOL with citizenship Certificate obtained before hearing but appeal dismissed on Rules. Article 8 successful based on historical wrongs argument - NH (India) and Patel, Modha & Odedra - following previous success on same argument against Entry Clearance refusal of adult son. So: over eight months wait (twice chased) …*
>
> ***Case of G***
> *In-country appeal allowed in July 2012 as decision not in accordance with the law (section 55 duty = interests of the child) - still awaiting Home Office response*
>
> ***Case of K***
> *In-country deportation appeal allowed in 2011 as client stateless and been in the UK since the age of 3, applied for travel document in May 2012 as no docs to establish identity (so difficulties working and generally going about own business) -*

finally received travel doc and Biometric Residence Permit in October 2013, valid 12 months only.

A person who fears removal will be entitled to bring a judicial review of the certificate where the question of serious irreversible harm will be litigated. In cases where this is done, would it not be quicker to hear the appeal? In cases where this is not done, if the Home Office gets its wrong, then the person will be returned to face "serious irreversible harm". The Appeals Impact Assessment in its sensitivity analysis models the effects of an extra 5,600 judicial reviews being started as a result of part II and of up to 1000 granted permission. In 2011 there were 8,711 immigration and asylum judicial reviews and only 4,630 reached the stage of a decision on permission. How is this estimate affected by Government amendments 1 to 9?

CLAUSE 12 STAND PART

ILPA considers that clause 12 should not stand part of the Bill.

Clause 12 contains much more than just new section 94B of the Nationality, Immigration and Asylum Act 2002 to which the Government amendments discussed above relate.

New section 94A deals with when an appeal must be brought from within the UK and when it must be brought from outside the UK.

In the case of a protection appeal or human rights appeal as defined the claim must be brought from within the UK if the person is in the UK when refused unless it is certified

- under s 94(1) of the Nationality Immigration and Asylum Act 2002 as clearly unfounded
- under s 94(7) of the Nationality Immigration and Asylum Act 2002 on the basis that the appellant passed through a third country en route to the UK and that third country should properly hear the claim for asylum.

Appeal against revocation of protection status must be brought from within the UK if the person is in the UK at the time of the revocation, otherwise from outside the UK.

The certificate can be issued before the appeal starts, or while the appeal is in progress. Thus the Secretary of State can pull the rug out from under her opponent. It is objectionable that one party to an appeal can control the proceedings in this manner.

Certificates under section 94 carry with them many problems. There is a presumption of certification if the appellant comes from a State that has been designated by the Secretary of State as one in which there is in general no serious risk of persecution. In *R(JB (Jamaica))v SSHD* [2013] EWCA Civ 666 (12 June 2013) the majority of the Court of Appeal held that the certification of Jamaica was unlawful because of the risk of persecution of gay men there. Lady Justice Black said

> *The question is whether the Secretary of State was entitled to conclude that "there is in general [in Jamaica] no serious risk of persecution of persons entitled to reside" there. Bearing in mind the proportion of the population affected, the fact that the entirety of that sector of the populace is at risk, and the failure of the state to offer sufficient protection, even making full allowance for the margin of appreciation to be afforded to the Secretary of State, I do not consider that she was.* […]

Lord Justice Pill, concurring, said

> *…To permit a relaxed approach to designation would be to defeat the underlying statutory intention. The facts of the present case also illustrate the difficulties that may be involved in establishing a claim, particularly when the risk of persecution does not arise from an easily recognisable physical characteristic.*
>
> *My conclusion is that a state in which there is a serious risk of persecution for an entire section of the community, defined by sexual orientation and substantial in numbers, is not a state where in general there is no serious risk of persecution. …Ministers have repeatedly stated that designation is ruled out "where there is a significant level of persecution, even if it is targeted at minorities". I agree with that approach "*

The Secretary of State is currently appealing the case to the Supreme Court.

If a person contends that the Secretary of State has wrongly certified his/her claim the remedy will be by way of judicial review.

There are difficulties with a judicial review.

First, a person may not be eligible for legal aid to bring a judicial review. See ILPA's evidence to the Joint Committee on Human Rights at http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-br-into-the-implications-for-access-to-

There is no legal aid for immigration (as opposed to asylum) appeals, including those involving Article 8. The Ministry of Justice's residence test proposed in the consultations *Transforming Legal Aid* and *Transforming Legal Aid: next steps* would mean many more people are not eligible for judicial review. The class affected would be all those not lawfully resident in the UK or who have not been so resident for 12 months. That group encompasses anyone outside the UK and anyone who has exhausted their rights of appeal and has no leave. The Ministry of Justice has proposed (very) limited exceptions to the residence test. For example, the exceptions for trafficked persons and for survivors of domestic violence do not extend to judicial review. There is no exception for children.

Second, there are unlawful limitations on judicial review in "safe third country" cases. Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 provides

> "(2)A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place—.

(a)where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,.
(b)from which a person will not be sent to another State in contravention of his Convention rights, and.
(c)from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

The question is the same in throughout the schedule but relates to removal to different countries in different parts. It is :

..for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed—.
(a)from the United Kingdom, and.
(b)to a State of which he is not a national or citizen..

Thus the provisions that the amendment would delete are provisions that deem a country to be safe, regardless of whether it is or not. The Court of Justice of the European Union has criticised deeming a country to be safe in *NS v UK* C-411/10 and C-493/10 (see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0411:EN:HTML)

The court held

2. European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member

State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

The deemed safety" provisions from UK law have been held to be unlawful but remain on the statute book.

Section 94B extends to "foreign criminals" as defined or, if Government amendments 1 to 9 are accepted, to anyone subject to deportation and to their family members, the provisions of section 54 of the Crime and Courts Act 2013 introduced for national security cases. A case of very rapid "mission creep".

As we understand the papers issued with the Bill, it is anticipated that the section would not be used for those claiming asylum or that removal would breach Articles 2 (right to life) or3 (prohibition on torture) of the European Convention on Human Rights, but could be used in Article 8 (family life) cases. However:

a) The clause is not so restricted on its face. While human rights standards would restrict it, the risk is that the point at which you find out they have not been applied and a person has been returned e.g. in breach of Article 2, comes too late.
b) It cannot be assumed that removal of a person from the UK to a destination where they do not face harm will not cause them or someone else serious irreversible harm. Taking them from the UK might have that effect. For example if they are suicidal, or have mental health problems. If a child is involved, including a very small child, can we be confident that the sudden departure of a parent and subsequent separation will not cause serious, irreversible harm, let along be contrary to the best interests of a child.

It is not possible to have confidence that the Home Office will determine correctly whether a human rights claim is clearly unfounded or whether a person would face a real risk of serious, irreversible harm if removed when that decision is not subject to scrutiny unless the person is able to bring a judicial review.

The clause as drafted would permit a certificate to be issued when an appeal had been lodged, and indeed where the tribunal or a higher court had already started to hear the appeal. This would allow one party to proceedings to pull the plug on those proceedings at any time and is contrary to the interests of justice and undermines the authority of the tribunal or court.

A person who fears removal will be entitled to bring a judicial review of the certificate where the question of serious irreversible harm will be litigated. In cases where this is done, would it not be quicker to hear the appeal? In cases where this is not done, if the Home Office gets its wrong, then the person will be returned to face "serious irreversible harm".

CLAUSE 13 STAND PART

No amendments having been laid to clause 13, the stand part is thus the only opportunity to scrutinise this clause.

Appeals in cases before the Special Immigration Appeals Commission are preserved but expressly limited to judicial review principles. The Explanatory Note makes clear that this is to avoid their being the subject of judicial review:

> *"It is more appropriate for judicial reviews in national security cases to be conducted by SIAC than in open court."*

Not so. The right of appeal in these cases should remain, or judicial review should be provided on the same basis as is in any other case.

Where an administrative decision cannot be challenged by way of an appeal, or where an appeal does not provide an appropriate remedy (for example in an immigration case where the appeal will be out of country and it is contended that to be forced to leave the country is unlawful) the decision can be challenged by way of judicial review.

There are no closed material procedures on judicial review. The starting point is to keep cases involving national security out of the High Court, where any judicial review would be heard in open court. The way this has been done is by ensuring that the administrative decision can be challenged by way of an appeal, but before the Special Immigration Appeals Commission, where closed material procedures apply.

Giving a person a right of appeal rather than an opportunity to challenge the decision by way of judicial review would normally give them a wider challenge. This is because judicial review is a procedural remedy, which looks at the way in which a decision is taken and not at the substantive outcome whereas an appeal on merits of the decision looks at facts and law and at the substantive outcome.

By clause 13 that benefit of judicial review is removed, because the appeal before the tribunal is limited to principles that would be applied in judicial review proceedings.

The Special Immigration Appeals Commission is empowered to hold closed material procedures on grounds which extend significantly beyond national security interests. Before the Special Immigration Appeals Commission, the adoption of a closed material procedure is required (not allowed, but required) not only "in the interests of national security" but also, "in the interests of the relationship between the United Kingdom and another country." In addition the Secretary of State can certify that the information on which the decision was based should not be made public because this is "otherwise in the public interest." These additional reasons for using a closed material procedure are not reasons that can justify the interference with a fair trial that a closed material procedure represents. In the Special Immigration Appeals Commission, the procedure rules (rule 4)12 include a general duty to ensure "that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

In proceedings before the Special Immigration Appeals Commission is that there is no requirement for the Secretary of State first to consider making a claim for public interest immunity.

The Special Immigration Appeals Commission Act 1997 gives power to the Lord Chancellor to make procedure rules for SIAC including rules that may[1]:

> "(a) make provisions enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,
> (b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,
> (c) make provision about the functions in proceedings before the Commission of [a special advocate], and
> (d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence."

The procedures adopted under these rules mean that a person before the Special Immigration Appeals Commission may be excluded from written and/or oral evidence which is considered by the Commission and upon which the Commission may be rely in making its decision on the appeal or application. A Special Advocate may be appointed "to represent the interests of the appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded."[2]2 However, the Special Advocate "...shall not be responsible to the person whose interests he is appointed to represent."[3]

At the time when the Special Advocate may communicate with the individual and/or his or her legal representative, neither the Special Advocate, the individual not the legal representative have had sight of the undisclosed evidence. Once the Special Advocate is aware of that evidence, there is no opportunity for communication on the undisclosed evidence, no opportunity for wholly confidential communication and in practice often no communication at all between the Special Advocate and the individual and/or his or her legal representative. The court's ability to do justice is fundamentally impaired by this procedure. The individual is denied knowledge of the case being made against him or her, and denied the opportunity to challenge the evidence on which that case is based. Allegations against him or her contained in that evidence or case are unknown to the individual. Hence, inadequacies in that evidence or case cannot be identified, and evidence that would undermine or answer allegations cannot be put forward.

The Special Advocates[4] who provided evidence to the Constitutional Affairs Committee in February 2005[5] indicated that:

> *"It is one of the Special Advocates' most important functions to ensure that as many as possible of the documents relied upon by the Home Secretary are disclosed to the appellant, whether in whole or in part or in gist form."*

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[1] Section 5(3), Special Immigration Appeals Commission Act 1997
[2] *Ibid.* s 6(1)
[3] *Ibid* s 6(4)
[4] Nicholas Blake QC (now Sir Nicholas Blake, High Court judge), Andrew Nicol QC (now High Court Judge) Neil Garnham QC, Angus McCullough (now QC), Phillipa Whipple (now QC), Tom de la Mare (now QC), Jeremy Johnson (now QC), Daniel Beard (now QC) and Martin Chamberlain (now QC).
[5] See submission at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323we11.htm

In other words, the Special Advocate is able to assist the appellant/applicant where the special advocate is able to persuade the Commission that the material should not remain secret. For so long as the material remains secret and the proceedings closed, the ability of the special advocate to assist the applicant/appellant is severely limited. This the Special Advocates emphasised, stating that:

> *"We do not consider that the existence of one case in which the detainee's appeal was allowed demonstrates, as a general proposition, that the use of Special Advocates makes it "possible... to ensure that those detained can achieve justice". Nor should it be thought that, by continuing in our positions as Special Advocates, we are impliedly warranting the fairness of the SIAC appeal process. We continue to discharge our functions as Special Advocates because we believe that there are occasions on which we can advance the interests of the appellants by doing so. Whether we can "ensure that those detained achieve justice" is another matter. The contribution which Special Advocates can make is, in our view, limited by a number of factors – some inherent to the role and others features of the current procedural regime."*

Nicholas Blake QC, giving evidence to the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, described what happens after judgment is given:

> "If the special advocate thinks there is an error of law in the closed judgment, he gets permission to say, to pass the message out to the other team to say ' I think that you should be appealing, I can't tell you why'. … So there is a sort of open appeal. 'We think there is something wrong but we don't know what it is.' And then the court goes into closed session, so it is antithetical to every [institute] of due process and open justice."[6]

The then Lord Chancellor and Secretary of State for Justice claimed that the extension of the closed material procedure constitutes an extension of justice. At the time of the Justice and Security Bill, he said of the measures to extend the use of closed material procedures that "Of course it's less than perfect, but at the moment the alternative is silence." [7]

But the use of closed material procedures is not an alternative to silence. On the contrary, it is a means for the State to use silence against a party to proceedings, ensuring that that party is denied the opportunity to hear (or see) the allegations against him or her and on the basis of which he or she stands to be condemned by the court. Justice manifestly is not seen to be done, and cannot be said to be done where the allegations against a party cannot be challenged by him or her.

A report of an ILPA/Redress seminar in 2006,10 attended by lawyers with experience of the Special Immigration Appeals Commission and of the Special Advocate Procedure, recorded

> *"It might have been benign at the outset to use a specially cleared advocate…to be able to have access to closed material – it has been acknowledged by Strasbourg that there are legitimate security concerns. However, what is in place now is not what was envisaged then. At least then, in article 3 [of the European Convention on*

[6] Evidence to the Eminent Jurist's Panel on Terrorism, Counter-terrorism and human rights, available at http://ejp.icj.org/IMG/Blake_transcript.pdf

[7] 'Secret justice bill not perfect, says Ken Clarke', The Guardian, 29 May 2012.

Human Rights] cases concerning a national security issue against the individual, if argument was about risk on return then that would be able to be played out in open court with an advocate quite properly representing their client. Since then much has changed. The reality now is that the Government's changes are taking the real argument into a closed arena. There is no basis for or justification whatsoever for arguing about risk on return on the basis of diplomatic assurances made in closed session."[8]

We recall the comments of the Joint Committee on Human Rights:

> "After listening to the evidence of the Special Advocates, we found it hard not to reach for well-worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening…has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them."[9]

[8] A report of the seminar can be read at http://www.redress.org/downloads/publications/Non-refoulementUnderThreat.pdf

[9] Joint Committee on Human Rights, HL Paper 157, HC 394, 30 July 2007. See also Joint Committee on Human Rights Counter-Terrorism Policy and Human Rights (Sixteenth report): Annual Renewal of Control Orders Legislation 2010, HL Paper 64/HC 395, 26 February 2010.