ILPA Briefing for the Counter-Terrorism and Security Bill
House of Commons Report stage 6 January 2014
Part 1 Chapter 2 Temporary Exclusion from the United Kingdom

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members 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 committees, including Home Office, and other consultative and advisory groups.

ILPA has produced a separate briefing on Clause 1 & Schedule 1. For further information please get in touch with Alison Harvey, Legal Director, on 0207 251 8383, Alison.Harvey@ilpa.org.uk

AMENDMENTS TABLED TO CHAPTER TWO

NC1 *Imposition of temporary exclusion orders* NC2 *Conditions A to E* NC3 *Prior permission of the court* and NS1 *Proceedings relating to temporary exclusion orders* in the names of Yvette Cooper MP, Mr David Hanson, Diana Johnson and Phil Wilson

Presumed purpose: We understand these amendments to propose an alternative, rather than an addition to the Bill's regime of Temporary Exclusion Orders, in any event a modification of the scheme, whereby an individual the subject of an order may not return to the UK unless deported to the UK or unless the return is in accordance with a permit to return issued by the Secretary of State.

The Secretary of State may issue such a permit if conditions A to E, set out in NC2, are met, these being that she reasonably suspects that the individual who has the right of abode in the UK is , or has been, involved in terrorism-related activity as defined outside the United Kingdom; reasonably considers that the individual is outside the UK and that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed and that either the court gives permission or she reasonably considers that the urgency of the case requires a temporary exclusion order to be imposed without obtaining such permission. The court that will have jurisdiction is not specified. The Secretary of State is required to keep under review the reasonableness of her considering that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism, for a temporary exclusion order to be imposed.

NC3 provides that the Court must be presented with a draft temporary exclusion order and that its function is to determine whether the relevant decisions of the Secretary of State are obviously flawed, to determine whether to give permission to impose the measures and, where appropriate, to give directions. The court may consider an ex parte application and

the individual concerned need not be notified that it is being made or, if notified, given an opportunity to make representations. The Schedule is concerned with matters to be addressed in rules of court. The Schedule makes provision for a closed material procedure. The provisions are closely modelled on those contained within the Terrorism Prevention and Investigation Measures Act 2011

BRIEFING

ILPA is unpersuaded that temporary exclusion orders are necessary or desirable. Authority to carry schemes, discussed further in ILPA's briefing for Committee stage[1], already provide the Government with information on who is travelling and there has been no suggestion that the security forces could not mobilise rapidly in the event of a person's being deported to the UK, as the clause envisages and permits. [2] Return without first engaging with the authorities is made a crime. Orders are for two years, and further orders can be imposed. The thrust of the orders still appears to be less return than exclusion.

Despite the way in which the decision to take these powers was announced by the Prime Minister on 29 August 2014, [3] the powers are now presented as being about "managed return" and the Home Secretary was quick at Committee stage to refute any suggestion of exile.[4] However, the Committee stage debate left open the question of whether the driver behind the provisions is still[5] the desire to achieve exile, albeit self-imposed in some cases. The following exchange about this clause between the David Anderson QC, the Independent Reviewer of Terrorism Legislation and Baroness Kennedy of the Shaws, when Mr Anderson appeared before the Joint Committee on Human Rights on 26 November 2014,[6] is instructive:

> ***Q11 Baroness Kennedy of the Shaws: …****The main point is: where do you do it? Do you do it outside of the country or in-country? That is the important thing.*
> *… You would wait for them to come in and the authorities then intervene, rather than us engaging with the possibility of leaving someone without a passport in another country, and the implications of that for our relationships with other countries. Is that not a better route to go down?*

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[1] Available at http://www.ilpa.org.uk/resources.php/30446/ilpa-briefing-for-counter-terrorism-and-security-bill-part-4-aviation-shipping-and-rail-part-1-passe

[2] This suggests that the Government has heeded debates in the House of Lords during the passage of the Bill that became the Immigration Act 2014 as to obligations toward other States who have admitted an individual on the strength of his her British passport. See e.g. HC 7 Apr 2014: Column 1169 with particular reference to the opinion of Professor Guy Goodwin Gill, Professor of Refugee Law at the University of Oxford and Fellow of All Souls. His briefings are available on the ILPA website at http://www.ilpa.org.uk/pages/immigration-bill-2013.html

[3] HC Deb. 1 Sep 2014: Column 26.

[4] See e.g. HC Report 15 December 2014, Home Secretary intervening on Caroline Lucas MP, col 1222.

[5] When the Prime Minister first mooted exclusion on 29 August 2014 he said "We need to do more to stop people travelling, to stop those who do go from returning. See also Deb., 1 Sep 2014: Column 26 "…what we need is a targeted, discretionary power to allow us to exclude British nationals from the UK." Permission to return is the approach taken in proposals currently before the US Senate (H.R. 5406, 113th Congress 2d Session (2013-2014 and H.R. 5408, 113th Congress 2d Session (2013-2014) and being discussed in the Netherlands Kabinet versterkt integrale aanpak jihadisme en radicalisering, Government of the Netherlands, 29 August 2014, available at http://www.rijksoverheid.nl/ministeries/szw/nieuws/2014/08/29/kabinet-versterkt-integrale-aanpak-jihadisme-en-radicalisering.html

[5] HC Deb., 1 Sep 2014: Column 26.

[6] HC 836; see http://www.parliament.uk/documents/joint-committees/human-rights/Daivd_Anderson_Transcript_271114.pdf .

> ***David Anderson:*** *It is very much a policy decision, and I am not privy to the operational thinking that went into that. Certainly if one is trying to sell this as an exclusion order, I can see the advantages of imposing it before someone flies back. It may be that the by-product of some people choosing not to come back but to stay out there is seen in some quarters as a welcome one. Where that leaves us in relation to not only the right of abode but, I would stress, the responsibility of the citizenship-granting country to look after its own is another matter. I understand that the solution Baroness Kennedy proposes might be more consistent with the full exercise of that responsibility.*

Where the Government has been able to take powers of exile it has taken them. Where it has been able to prevent persons from returning to the UK to challenge the decision that resulted in their exclusion it has done so.

First there is the stripping of leave of foreign nationals while they are outside the UK. This is illustrated by the case *of SSHD v MK (Tunisia)*.[7] Mr MK was a recognised refugee in the UK. A European Arrest Warrant was issued for his arrest in connection with terrorism-related activities. Extradition to Italy was sought. His challenge to extradition failed. It was accepted that he was at risk of torture in Tunisia, his country of nationality. It was not accepted that there was a real risk that Italy would *refoule* him to Tunisia.

Mr MK was tried in Italy and acquitted of all charges save for one, which related to the procurement of a false travel document and all agree did not relate to terrorist activities. A request was immediately made by the Italian police of his expulsion to Tunisia. Seven days after an indication from the European Court of Human Rights that MK should not be returned to Tunisia, the Secretary of State wrote to Mr MK's solicitors in the UK that she had decided to revoke his refugee status and cancel his indefinite leave to remain. The Home Secretary made reference to this at Committee stage[8] when she talked about serving an order on the last known address or "to file" (i.e. not serving it on anyone). She stated that this works in other contexts "such as informing foreign nationals of their immigration status. It was argued by the Secretary of State that she was under no obligation to facilitate Mr MK's return so that he could exercise an in-country right of appeal. The courts disagreed, as a matter of statutory construction. The Government changed the law by section 53 of the Crime and Courts Act 2013 so that future MKs are unable to return to the UK to appeal.

A different statute governs deprivation of citizenship. During the passage of section 66 of the Immigration Act 2014, there was much discussion of the UK's use of its powers of deprivation of citizenship. Prior to that section's coming into force; the UK could only deprive citizens of their nationality on the grounds of character if they had another nationality or citizenship. Powers of deprivation are frequently exercised when an individual is outside the country, giving rise to summary exile, with no ability to return to the UK to appeal. Baroness Kennedy of the Shaws provided a graphic description of what this can mean during the debates on what became section 66 of the Immigration Act 2014:

> *I have repeatedly told the story of Mahdi Hashi, who had his citizenship removed while in Somalia. Two other persons from whom Britain had removed citizenship were*

[7] *SSHD v MK (Tunisia)* [2011] EWCA Civ 33 (On appeal from *R (Khemiri) v SSHD* [2010] EWHC 2363 Admin).
[8] HC Deb 15 December 2014 Col 1230.

droned—killed by the use of drones—in Somalia. We should reflect on that; it was evidence given to the Joint Committee on Human Rights by the UN rapporteur on counterterrorism only a week or so ago. Mahdi Hashi was advised through his parents of having lost his citizenship and that he had a month to appeal. Somalia has no British embassy. He travelled to Djibouti, where he was picked up by the secret police. On saying that he was British, he was told that inquiries had been made and that Britain was denying any obligations towards him. We washed our hands of him—Pontius Pilate lives on.

Mahdi Hashi was interrogated at length—no lawyers, no court processes. He was then handed over to the CIA and further interrogated—no lawyers, no court processes. He had a hood put on his head and was transported to the United States of America—no extradition processes. This was essentially another rendition. But Britain can now claim that we were not complicit because he was not our citizen. Is that the purpose of this change of law, that we might be able to do things that make people vulnerable and deny them their rights, creating yet more black holes where no law obtains but where we cannot be accused of complicity? [9]

Mr Frank Dobson's reference to the case of a constituent at committee stage [10] recalled this description.

In section 66 of the Immigration Act 2014 deprivation of citizenship resulting in statelessness is limited to cases of naturalised British citizens who have done something seriously prejudicial to the vital interests of the United Kingdom because that was the scope of such powers envisaged in the UK's declaration made[11] on ratification of the 1961 Convention on the Reduction of Statelessness. This part of the Bill appears to be the logical next step: a way to shed those citizens whom the UK cannot make stateless, because they are "natural born" British citizens.

A permit to return can be revoked where the Secretary of State considers that it was obtained by misrepresentation[12] or where a subsequent permit is issued.[13] Nothing on the face of the Bill prevents the Secretary of State revoking and reissuing permits indefinitely. The permit may be subject to conditions.[14] A person can be prosecuted if they return to the UK in breach of an order without a "reasonable excuse". The Home Secretary suggested[15] that the meaning of this would be a matter for the courts.[16] This presupposes that an individual on whom such an order is imposed would have meaningful access to the courts. David Anderson QC said in evidence to the Joint Committee on Human Rights[17] :

The concern I have about this power—the central concern about it—is where the courts are in all of this. With TPIMs, if the Home Secretary wants to impose a TPIM, she has to go to the court first, and if the court thinks she has got it wrong, it will say so. Even more importantly, she has to disclose everything to the court, and if it turns out that she did not make full disclosure to the court, the TPIM will be set aside. We have seen an example of that recently

[9] HL Report 7 April 2014.
[10] HC Report 15 December 2014, col 1232.
[11] Under Article 8(3) of that Convention.
[12] Clause 7(e).
[13] Clause 7(d).
[14] Clause 4(2).
[15] HC Report, 15 December 2014, col 1230.
[16] I*b*id.
[17] *Op.cit.*

in the case of CC. … Of course there is, notionally, judicial review, but if you are abroad when this order is served on you, it is a little difficult to see in practical terms how a right to judicial review could be exercised.[18]

The reasons given by the Home Secretary at Committee stage[19] for not involving the courts do not withstand scrutiny. First she said that exercise of the royal prerogative in the cancellation of a passport does not currently involve the courts.[20] This is a statement of fact, and perhaps a pointer to future amendments, it is not a reason. She suggested that Terrorism Prevention and Investigation Measures can impose restrictions more severe than those that can be imposed by a Temporary Exclusion Order. As Mr David Davies said "the impingement is pretty sizeable".[21] Mr Frank Dobson said

As the right hon. and learned Member for Beaconsfield (Mr Grieve) said, there is then the question of somebody who has been fingered by Britain as a terror suspect subsequently being picked up by the security service of the country in which they are located. This does not quite amount to rendition… it is a sort of stationary rendition whereby people are left in a place where they may be in danger. [22]

Those with a right of abode in the UK are all British citizens and some Commonwealth citizens, persons with a right of abode in the UK before 1 January 1983 and who have remained Commonwealth citizens.[**23**] In response to an important question from Mr Grieve, The Secretary of State confirmed at Committee stage that such an individual subject to such an order would have consular protection[24] but there limits to such protection, most notably that consular protection is not extended to persons in a State of which they are also a national. Nor is it extended to non-nationals, although the clause extends to non-nationals with a right of abode.

The Home Secretary said:

As the Minister with responsibility for national security, it is right that I, as Home Secretary, and not the courts, impose an order of this kind. [25]

But this blurs the issues. There is no question of the courts imposing an order; the question is rather whether the courts should have oversight of her exercise of that function given the gravity of its effects.

Mr David Winnick MP said in Committee:

Is it not the case, if we believe in fairness and the rule of law, that the stronger the action taken against an individual by the state, the more powerful the argument is that the individual should have the right of appeal? [26]

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[18] Response to q 10.
[19] HC Report 15 December 2014, col 1230.
[20] For a description of these powers, see Written Ministerial Statement 25 April 2013.
[21] HC Report 15 December 2014, col 1230.
[22] I*b*id., col 1219.
[23] Section 2 of the Immigration Act 1971, as amended by s.39(2) of the British Nationality Act 1981.
[24] **15** Dec 2014 : Column 1207.
[25] *Ibid*., Column 1208.
[26] (15 Dec 2014: Column 1179.

The Home Secretary suggested that judicial review was the means by which the courts would be involved. Mr Jeremy Corbyn MP reminded the House that a judicial review is not an appeal. The Home Secretary did not dispute his correction.[27] A judicial review, as he explained, is judicial oversight of how the original decision-maker reached his or her decision. It looks for bias, for a decision-maker who is acting outwith his/her powers, for irrationality. It is not an appeal on the substantive merits of the case.

And what of legal aid to be made available? Without it many will struggle even to pay the court fees for a judicial review, let alone secure legal representation. And in any event, the Government has proposed that persons outside the UK should not be entitled to legal aid, a proposal currently on hold because of a successful legal challenge,[28] but one that the Government has appealled. The Government is restricting access to judicial review through the Criminal Justice and Courts Bill, currently in ping pong. Either the right hand does not know what the left hand, if the Lord Chancellor will permit himself to be so described, is doing, or it does not mind.

Opposition amendments at Committee stage focused on notification and managed return orders and on appeals. There was confusion in the debates at Committee Stage as to whether these were an alternative to the proposals on the face of the Bill, or additional. The Home Secretary in response treated them as additional [29] and thus the debate did not tease out as clearly as it might have done the extent to which exclusion, rather than return, was the focus of the amendments.

Mr Frank Dobson summarized the concerns:

> *Allowing a British citizen who is suspected of terrorism to disappear—in fact, in certain circumstances, possibly to be provoked into disappearing—does not seem to be a particularly good idea.*
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> *…….The whole proposition of exclusion orders seems to be predicated on the idea, first, that these people are totally rational; and secondly, that their greatest desire is to come back to Britain. …What the process does not do…is bring people under our jurisdiction, prosecute them and, if they are found guilty, jail them. Surely that should be the main objective of Britain's policy. The process is likely to get them picked up, but not by us: they will be picked up by somebody who may or may not be one of our allies. I believe, therefore, that the basic Government proposal undermines and interferes with their fundamental rights of abode in this country and it does not achieve what we want, which is to see terrorists brought to justice.*
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> *The human right of a British citizen to abode in this country...is a right of citizens to which Gladstone and Disraeli would have subscribed, not to mention Palmerston… There is nothing new about this right and we need to be very careful abut doing anything that would undermine it.*

[27] 15 December 2014, col 1233.
[28] *R (PLP) v Secretary of State for the Home Department* [2014] EWHC 2365 (Admin).
[29] HC Report 15 December 2014, col 1229.

It is worth revisiting the debates on the Immigration Act 2014 and around it[30] to consider the discussions of deprivation therein and the potential consequences of summary exile or banishment both for the principal and for family members. As discussed during those debates, security is a global, not a parochial matter, therefore how does exclusion make the UK any safer? In the debates on the Bill that became the Immigration Act 2014, it was argued that rather than offshoring[31] a person who threatens security, such persons are the responsibility of all States, in the spirit, as Lord Macdonald of River Glaven put it, of "the comity of nations" and "solidarity between free countries in the face of terrorism."[32]

ILPA is concerned that the amendments, like the clauses in the bill, purport to exclude a person from their country of nationality. We are concerned that the amendments allow the Secretary of State to move without the permission of the Court in cases she considers urgent. Finally we are concerned that the "obviously flawed" test means that it will be very difficult to defeat the Secretary of State's decision, particularly for a person stranded outside the country. Moreover, the court may consider the application without the individual's even knowing about the case, let alone being able to make representations to the court. In the circumstances while the decision of the court may provide a check on the most egregious use of the powers, they risk lending an undeserved air of legitimacy to the procedure.

[30] See e.g. H .C. Deb., 11 Feb. 2014, cols. 255WH ff.
[31] See Urry, J., *Offshoring*, April 2014.
[32] *Ibid*.