# ILPA Briefing for the Counter-Terrorism and Security Bill House of Lords Second Reading 13 January 2014

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 is providing briefing for this Bill because experience in the immigration and nationality context is relevant to a number of proposals it contains, albeit that the targets of parts of the Bill on which we comment are not persons under immigration control but British citizens. This briefing covers

- **Clause 1 and Schedule 1 Seizure of passports etc from persons suspected of involvement in terrorism**
- **Chapter 2 Temporary Exclusion from the United Kingdom**
- **Part 4 Aviation, Shipping and Rail Part 1 — Passenger, crew and service information and Schedule 2 Aviation, maritime & rail security**
- **Part 7 Miscellaneous and General, *Miscellaneous* Clause 37 Review of certain naturalisation decisions by Special Immigration Appeals Commission**

***Because of the speed with which this Bill is being rushed through parliament, we have provided as much briefing as possible at this stage. Its report and that of the Joint Committee on Human Rights were published this morning. It is well-nigh impossible for external organisations to contribute to scrutiny of legislation that is rushed through parliament at this pace. For further information please get in touch with Alison Harvey, Legal Director, on 0207 251 8383, Alison.Harvey@ilpa.org.uk***

## CHAPTER 1 POWERS TO SEIZE TRAVEL DOCUMENTS

### Clause 1 and Schedule 1: Seizure of passports etc from persons suspected of involvement in terrorism

Clause 1 introduces Schedule 1 which provides that immigration officers, customs officials, qualified officers and senior police officers can remove a passport from an individual. It defines "passport" as a United Kingdom passport or one issued by another nation and involvement in terrorism-related activity as the commission, preparation or instigation of acts of terrorism; conduct that facilitates the commission of terrorism; conduct that gives encouragement to terrorism; and conduct that gives support or assistance to terrorism. The schedule includes powers to search for, inspect and retain travel documents. Removal of a passport is for 14 days. This can be extended to 30 days by the application to the court. A person can be subject to repeat removals of his/her passport.

As raised during the debates on the Bill that became the Immigration Act 2014,[1] the UK already possesses powers to deprive citizens of their passports on national security grounds.[2] The Home Secretary described on 25 April 2013 the extent and use of these powers:

> *…passport facilities may be refused to or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example, engage in terrorism-related activity or other serious or organized criminal activity.*
> *This may include individuals who seek to engage in fighting, extremist activity or terrorist training outside the United Kingdom, for example, and then return to the UK with enhanced capabilities that they then use to conduct an attack on UK soil. The need to disrupt people who travel for these purposes has become increasingly apparent with developments in various parts of the world.*[3]

As we understand it, prerogative powers are extensive enough to cover seizure of passports at port in the context of withdrawing that passport. Police officers have powers in respect of criminal offences. Immigration officers have extensive powers to seize and retain passports of persons under immigration control. Thus clause 1 appears to be about:

- Giving police officers more extensive powers where there is no investigation of a crime
- Giving immigration officers more extensive powers, in particular in respect of British citizens to seize and retain passports other than in the context of withdrawal.

The nature and extent of existing powers means that the case has not been made in this Bill, the materials accompanying it or in debates to date for the power proposed and that the power cannot be shown to be one required to be introduced by emergency legislation.

The Joint Committee on Human Rights has suggested that the Government has demonstrated a need to be able to seize passports in circumstances not covered by current legislation but has suggested that both proportionality and procedural safeguards are issues and has not endorsed the proposals in the Bill.[4]

Paragraph 13 provides that where a passport is retained under the schedule and any of the powers available under the Schedule have already been exercised in relation to the same person on two or more occasions in the preceding six months, then the passport may only be retained for five days. A further question thus arises of the circumstances in which a person's British passport might be seized and retained under these powers on more than two occasions in six months and yet the person's passport would not be withdrawn. It is hard to envisage this other than in circumstances where the first two withdrawals were found to be in circumstances in which the person was going about his/her normal lawful business in which case it must be of concern that their passport might be retained three times in six months.

At Committee stage Caroline Lucas MP tabled an amendment that would have removed Clause 1 and Schedule 1. She explained:

> ***Caroline Lucas*** *…there will be situations in which it is necessary to prevent a person from*

[1] HL Deb, 7 April 2014, col 1169 per Lord Pannick.
[2] See Written Ministerial Statement, Rt Hon Theresa May MP, 25 April 2013. The issuing, withdrawal of refusal of passports for an explanation of how these prerogative powers are used.
[3] Written Ministerial Statement 25 April 2013, op., cit.
[4] Joint Committee on Human Rights, Legislative Scrutiny: Counter-Terrorism and Security Bill, fifth report of session 2014-15, HL Paper 86, HC 859 at paragraph 2.15.

> *leaving the country, but I would argue that the police already have a tried and tested way of preventing suspects from doing so—the power of arrest, combined with the ability to require passport surrender if a suspect is arrested and released without charge. However, passport surrender is not currently possible in the case of those arrested on suspicion of being a terrorist under section 41 of the Terrorism Act 2000, as conditional police bail cannot be granted following such arrests. …It would be much simpler to remove that loophole than to proceed with the convoluted passport retention scheme set out in clause 1 and schedule 1.*
>
> *The safest and fairest way to prevent suspects from leaving the country to participate in terrorist activity would be for police officers to use their powers of arrest. If an individual was considered to pose an immediate risk to the country, they could be detained rather than left to roam the UK for 30 days, as would happen under the Government's proposal. If they did not pose an immediate risk, they could be detained and bailed, and their passport could be surrendered as part of the process.* (15 Dec 2014: Columns 1182-1183).

The Minister dealt only with the question of bail, saying "To grant bail as the hon. Lady would want to, and at the stage she would want to when significant parts of an investigation are still ongoing, would increase the risk of potentially dangerous individuals being released before they have been sufficiently investigated."[5] He did not address that there exists a power to arrest and detain a person and seize their passport, and that this is an alternative to clause 1 and Schedule 1. The difference being that, as Mark Field MP[6] pointed out, the existing measures require there to be grounds for arrest. One can only conclude from the Minister's reply that he envisages the power to seize a passport being used in circumstances where there are no grounds for arrest.

A challenge to retention of a passport will be by judicial review. Judicial review provides only oversight of the original decision and decision-maker: did they act within their powers, without bias and reasonably? A judicial review of seizure of a passport on the grounds that the officer seizing the passport did not have sufficient evidence on which to form a reasonable suspicion would be would be difficult to win if the material on which the suspicion were based were withheld. The Joint Committee on Human Rights has stated that the availability of judicial review is not sufficient to satisfy the requirements of Article 6 of the European Convention on Human Rights, which the Government accepts applies.[7]

As to the court's supervision of an extension, Mr Geoffrey Cox MP pointed out at Commons' Committee[8] that Schedule 1:

> *…prohibits or prevents the judge from considering whether there is a basis for the order or retention in the first place. All the judge can do is ensure that those who are considering the matter are doing so diligently. He is not able to look at the foundation and basis for the entire retention—at whether there are reasonable grounds for suspicion.*

The Joint Committee calls for a shortening of the period of retention before judicial authority is required, from 14 to seven days; for an amendment of the grounds which must be satisfied before a warrant is issued from diligent and expeditious pursuit of the investigation to there being reasonable grounds to suspect that the person is intending to leave the country to become involved in terrorist related activity abroad and that it is necessary to extend the period of retention to enable steps to be taken toward deciding

[5] HC Report, 15 December 2014 col 1182.
[6] Ibid., col 1183.
[7] HL Paper 86, HC 859, op. cit. paras 2.19-2.20.
[8] *Ibid*., col 1186-7.

what happens next, , for "gisting" of closed material, for special advocates, legal aid and the availability of compensation for loss caused by the wrongful exercise of the power.[9]

At Commons' Committee the opposition tabled amendment 29[10] that would cause the powers in Clause 1 and Schedule 1 to expire after two years at which point parliament could determine the length of its extension. It was pressed to a vote and defeated by 301 votes against, 220 for.[11] The opposition returned to the matter at Commons Report (as amendment 9). The opposition also tabled at Report amendments 10 and 11 which would have created a right of appeal against seizure of a passport.

The Minister had no answer of substance to the sunset clause. He said

> *…to introduce a sunset clause to the temporary passport provisions. Doing so may send an inadvertent message to would-be jihadist travellers of our lack of intent to deal with the threat they pose if they believed that the powers would end in two years' time. …* (HC Report 15 Dec 2014: Column 1188).

This appears fanciful. The "would-be jidhadist traveller" studying the clause would learn that it was to be reviewed by parliament at the end of two years. Should he or she investigate further, it would be to find that the likelihood of a sunset clause of this type resulting in the provision being discontinued, unless to be replaced by another power, is slim indeed. There is no clear reason why a sunset clause should provide any more comfort than any general hope of repeal. A sunset clause would allow the use of the power to be reviewed and considered, to be scrutinized.

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?* (15 Dec 2014: Column 1179)

One suggested objection was that an appeal would take time (amendment 11 prescribes a maximum of seven days) and would thus not be an efficacious remedy. But a person's passport can be retained for 14 days; this can be extended to 30 days. It can be retained repeatedly. It might subsequently be cancelled. That the person might in some cases get their passport back in two weeks is not a reason to deny a right to challenge the power to challenge the substantive merits of having withdrawn it in the first place. Without this, given the costs of judicial review, the power of the State to retain passports is likely to go unchecked**.**

The Minister said of challenges to the extension of the period to 30 days:

> *Legal aid would potentially be available …but at present that would be a discretionary decision for the director of legal aid casework. The Government are considering whether it would be proportionate to bring those proceedings within the scope of the general legal aid scheme to put individuals' access to legal aid, subject to the statutory means and merits tests, beyond doubt. Legal aid is available under the general civil legal aid scheme for judicial review challenges by those subject to the temporary passport seizure power and the temporary exclusion order power, subject to the statutory means and merits tests.*

[9] HL Paper 86, HC 859, op.cit, para 2.24ff.
[10] HC Report 15 December 2014 col 1173ff.
[11] HC Report 15 December 2014 col 1190.

> *In addition, the individual can decide, at any time, to seek a judicial review of the initial passport seizure in the High Court, where closed material proceedings may be available to allow consideration of any sensitive material.* (15 December 2014 col 1187-1188).

It is of concern that the Government is exercised by the question of whether it would be proportionate to grant legal aid for a challenge to the seizure of a passport and the allegation of involvement in terrorism it entails rather than regarding this as a clear case for legal aid. As to the discretionary powers of the Director of Legal Aid Casework, these have been exercised in only a handful of cases since April 2013 when they tool effect and in *Gudanaviciene v Director of Legal Aid Casework* [2014] EWCA Civ 1622, and the Court of Appeal held that the statutory guidance on the exercise of the powers "…impermissibly sends a clear signal to caseworkers and the Director that the refusal of legal aid will amount to a breach only in rare and extreme cases." As to judicial review, the Government proposes a residence test for legal aid so that only those within the UK and with 12 months prior residence will qualify for legal aid. The proposal is currently on hold because of a successful legal challenge,[12] but the Government has appealed. The Government is restricting access to judicial review through the Criminal Justice and Courts Bill currently in ping pong.

## CHAPTER 2 TEMPORARY EXCLUSION FROM THE UNITED KINGDOM

A temporary exclusion order is an order to exclude a person from the United Kingdom, the default duration of which is two years[13]. Orders may be placed end to end,[14] with no maximum duration, so that nothing on the face of the Bill prevents orders from being indefinite and/or lifelong.

There is an obligation to issue a permit to return[15] unless the individual is required to attend an interview with an immigration officer and fails so to do.[16] However, a permit to return can be revoked, where the Secretary of State considers that it was obtained by misrepresentation[17] or where a subsequent permit is issued.[18] Nothing on the face of the Bill prevents the Secretary of State revoking and reissuing permits indefinitely. The permit may be subject to conditions.[19]

The Secretary of State must permit an individual to be deported to the UK.[20] This suggests that the Government has heeded debates 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 with its implied promise that the UK will accept them back.[21]

---

[12] *R (PLP) v Secretary of State for the Home Department* [2014] EWHC 2365 (Admin).
[13] Clause 3(2).
[14] Clause 3(8).
[15] Clause 5(1).
[16] Clause 5(2).
[17] Clause 7(e).
[18] Clause 7(d).
[19] Clause 4(2).
[20] Clause 6(1).
[21] 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 (accessed 2 December 2014).

When the Prime Minister first mooted exclusion on 29 August 2014[22] he said "We need to do more to stop people travelling, to stop those who do go from returning", saying nothing about whether individuals would be permitted to return the to the UK, although permission to return is the approach taken in proposals currently before the US Senate[23] and being discussed in the Netherlands[24]. Similarly with the Prime Minister's statement to parliament on 1 September 2014 when he said "…what we need is a targeted, discretionary power to allow us to exclude British nationals from the UK." [25]

ILPA is unpersuaded that temporary exclusion orders are necessary or desirable. We share the view of the Joint Committee on Human Rights that **"We are opposed in principle to any exclusion of UK nationals from the UK, even on a temporary basis"**[26] Authority to carry schemes, discussed further in ILPA's briefing for Committee stage[27], already provide the Government with information on who is travelling and there has been no suggestion that the security forces would have problems in mobilizing rapidly in the event of a person's being deported to the UK, as the clause envisages and permits. [28] Return without first engaging with the authorities is made a crime.

The Home Secretary was quick at Committee stage to refute any suggestion of exile.[29] However, the Committee stage debate left open the question of whether the driver behind the provisions is still[30] 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,[31] is instructive:

---

[22] HC Deb. 1 Sep 2014 : Column 26.
[23] H.R. 5406, 113th Congress 2d Session (2013-2014 and H.R. 5408, 113th Congress 2d Session (2013-2014).
[24] 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 together with links to the open letter of Minister Opstelten (Onderwerp Integrale Aanpak jihadisme) and action plan Overzicht maatregelen en acties) of that date
[25] HC Deb., 1 Sep 2014 : Column 26.
[26] HL Paper 86, HC 859, op. cit. para 3.9
[27] 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
[28] 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
[29] See e.g. HC Report 15 December 2014, Home Secretary intervening on Caroline Lucas MP, col 1222.
[30] 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
[30] HC Deb., 1 Sep 2014: Column 26.
[31] HC 836; see http://www.parliament.uk/documents/joint-committees/human-rights/Daivd_Anderson_Transcript_271114.pdf .

> ***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?*
>
> ***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)*.[32] 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[33] 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:

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

*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 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?* [34]

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[35] 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 person can be prosecuted if they return to the UK in breach of an order without a "reasonable excuse". The Home Secretary suggested[36] that the meaning of this would be a matter for the courts.[37] 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[38] :

*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 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.*[39]

The reasons given by the Home Secretary at Committee stage[40] for not involving the courts do not withstand scrutiny and the Government has indicated that it will review this matter. ILPA advocates that this be approached on the basis of the courts being involved before an order is issued for we consider that an individual outside the country and faced with a closed material may have considerable difficulty in bringing a challenge that has any prospect of success. This is in line with the recommendation of the Joint Committee on Human

[34] HL Report 7 April 2014.
[35] Under Article 8(3) of that Convention.
[36] HC Report, 15 December 2014, col 1230.
[37] Ibid.
[38] *Op.cit.*
[39] Response to q 10.
[40] HC Report 15 December 2014, col 1230.

Rights that if, contrary to its recommendation, the Government pursues Temporary Exclusion Orders: **"…that the Bill be amended to provide expressly for a judicial role prior to the making of a notification of return order…"** [41] The House of Lords Committee on the Constitution also recommends judicial oversight.[42]

First the Home Secretary said that exercise of the royal prerogative in the cancellation of a passport does not currently involve the courts. [43] This is a statement of fact, and perhaps a pointer to future amendments; it is not a reason. The Home Secretary 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 MP said "the impingement is pretty sizeable".[44] Mr Frank Dobson MP 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.* [45]

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.[46] In response to an important question from Mr Grieve, the Secretary of State confirmed at Committee Commons stage that such an individual subject to such an order would have consular protection[47] and the immigration Minister reiterated this in response to questions from the David Heath MP at Commons Report[48] 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.* [49]

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. 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.[50] 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.

---

[41] HL Paper 86, HC 859, op. cit. para 3.15.
[42] Constitution Committee, 8th Report of Session 2014-2015, Counter Terrorism and Security Bill, 12 January 2014.
[43] For a description of these powers, see Written Ministerial Statement 25 April 2013.
[44] HC Report 15 December 2014, col 1230.
[45] Ibid., col 1219.
[46] Section 2 of the Immigration Act 1971, as amended by s.39 (2) of the British Nationality Act 1981.
[47] 15 Dec 2014: Column 1207.
[48] 6 January 2014, col 2306.
[49] *Ibid*., col 1208.
[50] 15 December 2014, col 1233.

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, as described above, the Government has proposed that persons outside the UK should not be entitled to legal aid, and is restricting access to judicial review through the Criminal Justice and Courts Bill. 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.

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.*
>
> *…….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.*
>
> *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.*

It is worth revisiting the debates on the Immigration Act 2014 and around it[51] 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[52] 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."[53] The eloquent exposition of the late Lord Kingsland[54] was cited in the debates.[55]

> *"If we identify someone as a person proposing to commit a serious terrorist offence, for example, surely the obligation is on us to deal with that person. If we simply deport him, we shall be handing on—in my submission, irresponsibly—this terrorist problem to another state which may not have the same capability of dealing with it as we do. It cannot be a proper response to the terrorist threat to refuse to deal with it ourselves".* [56]

It is unclear what temporary exclusion of individuals from the State that has the primary responsibility both to protect them and to punish them if they have done wrong has to contribute to national security.

---

[51] See e.g. H .C. Deb., 11 Feb. 2014, cols. 255WH ff.
[52] See Urry, J., *Offshoring*, April 2014.
[53] *Ibid*.
[54] Lord Kingsland, 639 H.L. Deb., 9 October 2002, columns. 277-8.
[55] HC Deb 9 October 2002; columns 277-78and HC Report 11 February 2014, col. 255WH.
[56] Lord Kingsland HL Deb 9 October 2002; Vol. 639, c. 277-78, see also H.C., 11 February 2014, col. 255WH.

Possible questions are

- **Are the orders, as was originally suggested, designed to prevent persons from returning to the UK? I.e. is the lack of guarantees that a permit to return will be available to an individual deliberate?**
- **Or is the primary intention to call an individual back to the UK and "ground" him/her in the UK?**
- **If the latter, why are these called exclusion orders?**
- **In either case, how are the orders supposed to contribute to security?**
- **What has emerged from the Government's reflection on the question of access to the courts?**

## PART 4 AVIATION, SHIPPING AND RAIL Part 1 Passenger, crew and service information and Schedule 2 Aviation, maritime and rail security

This sets out an authority to carry scheme. Authority to carry schemes have been a feature of the troubled e-borders programme commenced in 2003 which has rattled on for over a decade without delivering all of the anticipated benefits, with costs of hundreds of millions racked up[57] and then a further sum of over £223,000,000 paid to terminate the contract with the main supplier (termination 2010[58] followed by litigation) as set out in the Home Secretary's letter of 18 August 2014[59] to the Home Affairs Committee.

We are particularly dubious as to the compatibility of the measures with EU law, a matter that did not receive any substantial scrutiny in the House of Commons.

There continue to be concerns as to whether the scheme is compatible with the laws of countries to which passengers are carried and with the law of the European Union. These and the earlier history of the programme is admirably summarised in two House of Commons' library notes: SN/HA/3980 *E-borders and Operation Semaphore* (November 2008) and SN/HA/5771 *The e-borders programme* (November 2010). During this period the Home Affairs Committee also reported repeatedly on the failings of the programme.[60]

For subsequent developments see the Independent Chief Inspector of Borders and Immigration, *Exporting the border'? An inspection of e-Borders October 2012-March 2013*, October 2012[61], although this is not an easy read because even some of the recommendations are censored, or in the more accommodating modern parlance "redacted." The Public Accounts Committee recorded of this report in its report 31st report session 2013-2014 The Border Force Securing the Border HC 663 2 December 2014.

> *"4…It was frustrating to the Committee to only see the Independent Chief Inspector's report on e-borders on the morning of our hearing. The report contains damning evidence of the nearly half a billion pounds of public money spent so far on the*

[57] HC Deb, 15 April 2013, c38W confirming that £475 million has so far been spent and that future expenditure cannot currently be predicted.
[58] See HL Deb 14 June 2010 cWA94.
[59] Available at https://www.gov.uk/government/news/home-secretary-letter-on-the-e-borders-programme-arbitration
[60] Home Affairs Committee: *The E-Borders Programme*, HC 170, 18 December 2009; *Follow-up on E-Borders and Asylum Legacy Cases*, HC 406, 7 April 2010 and *Follow-up of Asylum Cases and e-Borders Programme: Government Response to the Committee's Twelfth Report of Session 2009-10*, HC 457, 16 September 2010.
[61] Available at http://icinspector.independent.gov.uk/wp-content/uploads/2013/10/An-Inspection-of-eborders.pdf .

*development of the e-borders programme …*

***6. The Border Force's IT systems are inadequate and its future development plans seem to be unrealistic…*** *The Department's aim to achieve 80% passenger exit checks by April 2015 will place more demands on IT, but plans are unrealistic given it has not yet issued tender documents for the new technology required. Progress on replacing the Warnings Index system and introducing exit checks relies heavily on the development of the e-Borders programme (…the Border Systems programme) which worryingly is currently rated amber/red by the Major Projects Authority.*[62]

*10. On the day of our hearing in October 2013 the Independent Chief Inspector of Borders and Immigration published a critical report on the e-Borders programme, which contained issues pertinent to the hearing. The report states that high-level findings from the inspection were first presented to the Border Force's Chief Operating Officer and Programme Director for e-Borders in March 2013 We found it frustrating that the Department did not share the detail of this report in advance of the hearing to give us sufficient time to familiarise ourselves with the findings.*

It doubted that exit checks by 2015 could be delivered and cited the Chief Inspector's prediction that the system would not be in place until 2015 or so.[63]

In the circumstances, the report of the National Audit Office on e-borders, commissioned by the Home Secretary, is eagerly awaited.

- **Should not parliament have sight of the National Audit Office report before it is asked to agree yet more authority to carry schemes?**
- **What is it estimated that the proposals on authority to carry will cost?**
- **Are the proposals of the Bill compatible with EU law and with the laws of other States to and from which passengers travel and with whose laws carriers must comply?**

## PART 7 MISCELLANEOUS AND GENERAL

### *Miscellaneous*

### Clause 37 Review of certain naturalisation decisions by Special Immigration Appeals Commission

We start by recalling the words of Sir Richard Shepherd MP on the Special Immigration Appeals Commission during ping pong on the Immigration Bill 2014:

[62] Public Accounts Committee, 31st *Report op.cit.* Evidence 20, 9 October 2013: Q192 Stephen Barclay: What is the Major Projects Authority's current RAG rating for the e-Borders project? *Sir Charles Montgomery:* Amber-red. Q193 Stephen Barclay: What is the definition of amber-red? *Sir Charles Montgomery:* It is a high-risk programme. Q194 Stephen Barclay: Red, in essence, means that the project should be cancelled, so amber-red for a continuing project is basically as high a rate as you can get. *Sir Charles Montgomery:* It is. Q199 Stephen Barclay: What assessment have you done? I would like to put on the record that I asked the House of Commons Library for the original business case for the e-Borders IT project to see what the original spec was. The Labour Member of Parliament, Frank Field, asked for it in two parliamentary questions on 24 and 30 May this year. … when I checked last night, it still wasn't there. … Frank Field … despite him chasing it … has not had that information…. it is quite outrageous that a parliamentarian as respected as Mr Field can ask for something, chase it up, be given two assurances by the Minister that a key document, which I wanted to rely on for today's hearing, was in the Library, and it not to be there...

[63] Public Accounts Committee, 31st Report *op. cit.*, Evidence 20 Q628.

*…my concern is not the difficulty for Governments; my concern is for the British common law system. This is not about the European Court of Justice—its rulings or anything else. The issue of concern to me is: what is our process?*

*I believe, and this was fundamental to our legal system, that a person should know the reasons they are to be aggrieved… they can make no case that can be held to be valid, because they do not know what they are challenging—or they will claim they do not know what they are being challenged with. We do not know and the public do not know, so this violates one of the first principles of our legal system—our common law system. I want the House always to remember that our common law system in England has been absolutely essential to our liberties, freedoms, standing and our sense of who we are.*

*I understand the difficulties that Governments face, as there are a lot of wicked, evil people out there, but the answer has always been to prosecute. We are told, "Oh we can't prosecute because in a prosecution we may have to reveal our sources." This is the nightmare situation that the world in which we now live is facing: we are not to know, we cannot know and we cannot challenge. The Special Immigration Appeals Commission is one of the most monstrous extrusions on the national scene, as not even the solicitor representing the accused or the person who loses their citizenship knows the reasons their client is there. Gisting? Well, all those rules that have been put in place essentially deny open justice using the argument of national security.*

*I have been a Member of Parliament for 36 years, and I look back over the decline of our sense of who we are, what our system is, and our freedoms and liberties, which are concentrated in the concept of the common law. I did not invent it—we did not invent it—it came from the movement of the people of this country over hundreds of years and the development of our legal system. Year after year, in a way that one could never assume would happen, Governments have gone out searching for new measures to conceal the openness of what justice should be. We, as citizens of this country, have a right to know why people are charged. That is why we have an open court system, so that we can judge whether the measures are competent, reasonable or truthful to the purpose of our nation. That is why I cannot support the very notion that so much power should be concentrated in one individual—a Home Secretary—whether good or bad, that they may make decisions of this nature without our being able to challenge whether they are valid, true or right. I want the House to stand up for who we are and what our system of justice is—and it is not secret justice.*[64]

The effect of clause 37 of the Bill is to extend the provisions of s 2D of the Special Immigration Appeals Act 1997 which concerns challenges to the refusal to naturalise a non-EEA national as a British citizen under s 6 of the British Nationality Act 1981 to refusals to naturalise a non-EEA national as a British Overseas Territories citizen under s 18 of the British Nationality Act 1981. It received no debate in the Commons.

Section 2D was inserted by s 37 of the Justice and Security Act 2013 with effect from 25 June 2013.[65] There is no right of appeal against a decision to refuse to naturalise a person as a British citizen, nor as a British Overseas Territories citizen, therefore any challenge must be brought by way of judicial review.

The circumstances in which cases can be transferred to the Commission so that closed material can be used are broad, much broader than the basis on which, under the Justice and Security Act 2014, closed material procedures can be used in the ordinary courts.

[64] HC deb 7 May 2014 : Columns 205-206.
[65] Justice and Security Act 2013 (Commencement, Transitional and Savings Provisions) Order SI 2014/1482 (C.58).

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."* The Constitution Committee considered that 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.[66] In proceedings before SIAC is that there is no requirement for the Secretary of State to consider first making a claim for public interest immunity.

Section 2D provided a right of appeal to the Special Immigration Appeals Commission against the refusal. By section 2D the right of appeal to the Commission is restricted to the principles that apply in a judicial review. That is to say the Commission exercises a supervisory jurisdiction, looking at whether the decision-maker acted reasonably, within his/her powers and without bias etc., rather than at the merits of the substantive decision. Being subject to closed material procedures on such a broad basis is not offset by having a full right of appeal on the merits of the decision.

In Special Immigration Appeals Commission, the procedure rules (rule 4) 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.*"

Thus the comments of the then Lord Chancellor and Secretary of State for Justice during the passage of the Justice and Security Act 2013 that "*...the only issue where you will go into closed proceedings will be national security*"[67] do not hold good in immigration cases.

The dangers of the broader reasons for using closed material procedures were highlighted by the then Nicholas Blake QC, himself a special advocate at that time, giving evidence to the Joint Committee on Human Rights:

> *"If you have a ton of reasons why there should be disclosure and you have a feather against, the feather beats the ton because the statute says nothing which transgresses the line is permitted and that is the point."* [68]

The requirements for naturalisation as a British Overseas Territories citizen are broadly the same as for a British citizen (good character, residence, knowledge of English, intention to resided in the territory with shorter residence requirements and no intention requirement for spouses and partners) The British Overseas Territories, formerly known as the British Dependant Territories and before that as part of the Crown's dominions and allegiance are Akrotiri and Dhekelia (Sovereign Base Areas on Cyprus); Anguilla; Ascension Island;

---

[66] See the Constitution Committee, Third Report, 13 June 2012, Justice and Security Bill, http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/1803.htm

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

[68] Oral evidence before the Joint Committee on Human Rights, 11 March 2006, published as part of the Committee's 19th report of session 2006 to 2007, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/7031204.htm See also his evidence to the Eminent Jurist's Panel on Terrorism, Counter-terrorism and human rights, available at http://ejp.icj.org/IMG/Blake_transcript.pdf

Bermuda; British Antarctic Territory (no permanent inhabitants but in theory at least a baby could be born here and thus acquire the citizenship of territory), the British Indian Ocean Territory (the Chagos Islands); the British Virgin Islands ; the Cayman Islands; the Falkland Islands; Gibraltar; Montserrat; Pitcairn, Henderson, Ducie and Oena Islands; St Helena, Ascension and Tristan da Cunha; South Georgia and the Sandwich Islands; Tristan da Cunha and the Turks and Caicos Islands

During the passage of the Immigration Act 2014 it was stated that protective measures, to allow children born out of wedlock to register as British citizens, could not be extended to British Overseas Territories citizens because it would be necessary first to consult with those territories.[69] **It would therefore be appropriate to ask in this case what consultation has taken place on this provision and what has been the result.**

We sound a particular note of concern with regard to the Chagos Islands and **ask how consultation has been carried out in respect of that territory.**

ILPA has long been concerned with the ever widening use of closed material procedures of which this is the latest example. In summary we contend:

- The case for the extension of closed material procedures has not been made out.
- Any use of closed material procedures must be closely circumscribed; more closely than is currently before the case before SIAC.
- All controls and limitations that apply in the courts should apply equally to cases that come before SIAC. Those appearing before SIAC should not be subject to a lower level of protection.

[69] HC Deb 6 May 2014: Column 1417 per Lord Taylor of Holbeach.