



House of Lords
House of Commons
Joint Committee on
Human Rights

Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters

Third Report of Session 2005–06



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Report and formal minutes

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

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Current Staff

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Summary

In this report, the Committee's first report in its ongoing inquiry into counter-terrorism policy and human rights, the Committee considers the human rights implications of the terrorist attacks and attempted attacks in London on 7 and 21 July 2005 and of various counter-terrorism measures which have been taken by the Government in the wake of those attacks: the Terrorism Bill, the changes to the way in which the power of deportation and exclusion will be exercised, and the counter-terrorism clauses of the Immigration, Asylum and Nationality Bill. The Committee considers that the definition of "terrorism" needs to be changed for the purposes of many of these measures if they are to avoid incompatibility with human rights standards (paras 12–13).

Terrorism Bill

Encouragement and glorification of terrorism

The Committee accepts, on balance, that the case has been made out by the Government that there is a need for a new, narrowly defined criminal offence of indirect incitement to terrorist acts. However, it considers that the offence of encouragement in clause 1 is not sufficiently legally certain to satisfy the requirement in Article 10 that interferences with freedom of expression be "prescribed by law" because of (i) the vagueness of the glorification requirement, (ii) the breadth of the definition of "terrorism" and (iii) the lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence. In the Committee's view, to make the new offence compatible, it would be necessary to delete the references to glorification, insert a more tightly drawn definition of terrorism, and insert into the definition of the offence requirements of intent (which could include subjective recklessness instead of the objective recklessness test introduced at Commons report stage) and likelihood. The Committee also believes that a "reasonable excuse" or "public interest" defence to this new offence should be included to make it less likely that the offence would be incompatible with Article 10 of the European Convention on Human Rights (ECHR). The Committee also considers that the new offence does not faithfully implement Article 5 of the European Convention on the Prevention of Terrorism, because it does not contain either of the two restrictions on the scope of the offence which that Convention requires, and would therefore be an obstacle to ratification of the Convention by the UK. (paras 18–41)

Other new offences

The Committee considers that the proposed new offence of dissemination of terrorist publications suffers from some of the same compatibility problems as those identified in relation to the proposed encouragement offence: including the lack of connection to incitement to violence, and the absence of any requirement that such incitement be either intended, carried out with reckless indifference, or likely. The Committee recommends that a "reasonable excuse" or "public interest" defence, which would provide protection

of the legitimate activities of the media and academics, be included to make it less likely that the offence would be incompatible with Article 10 ECHR. (paras 42–49)

The Committee is satisfied, on balance, that the necessity for the new offence of preparation of terrorist acts has been made out. It recommends that a “reasonable excuse” or “public interest” defence to the new offence of training for terrorism be included. In the Committee’s view, criminalising mere attendance at a place used for terrorist training appears to be disproportionate, and in order to be compatible with Article 10 ECHR the scope of the new offence should be qualified, for example by requiring an intention to use the training for terrorist purposes. It considers that extending the grounds of proscription to cover organisations glorifying acts of terrorism is unlikely to be compatible with the right to freedom of expression in Article 10 ECHR or the right to freedom of association in Article 11 ECHR for the same reasons as those given above in relation to the new offence of encouraging and glorifying acts of terrorism. (paras 50–63)

Pre-charge detention

In relation to the Bill as introduced, on the compatibility of a maximum pre-charge detention period of 90 days with the UK’s obligations under the Convention (notably Article 5), the Committee concluded that three months would have been clearly disproportionate and, in view of the deficiencies in the procedural safeguards for the detainee, which the original Bill did nothing to improve, would also have been accompanied by insufficient guarantees against arbitrariness. It would also in the Committee’s view have risked leading to independent breaches of Article 3 ECHR, and to the inadmissibility at trial of statements obtained following lengthy pre-charge detention. Similar, if less substantial risks obtain, in the Committee’s view, even in relation to the 28-day maximum period now allowed for in the Bill. Recognising that this is a matter on which the relevant legal standards are not very concrete, but bearing in mind the heavy onus of justification on the state where it is depriving of liberty, in the Committee’s view the proportionality case for any increase from the current 14 day limit has not so far been made out on the evidence. It does not, however, rule out the possibility that such evidence might be produced which would persuade it that a proportionate extension of the maximum period of detention would be justified, subject to the necessary improvements in procedural safeguards for the detainee being made. (paras 64–92)

In the Committee’s view, any increase beyond the current 14 day maximum would at the very least require amendment of the relevant provisions of the Terrorism Act 2000 which currently enable detention to be extended in the absence of the detainee or his or her legal representative and on the basis of material not available to them. There should be nothing less than a full adversarial hearing before a judge when deciding whether further detention is necessary, subject to the usual approach to public interest immunity at criminal trials, including when necessary the use of a special advocate procedure when determining whether a claim to public interest immunity is made out. Such safeguards would make it much less likely that the UK would be found in breach of the right to liberty guaranteed in Article 5 of the Convention. The Committee also considers that the

provision in the Bill for, in effect, a presumptive minimum of 7 day extensions requires deleting. The presumption should be in favour of liberty not detention. The Committee welcomes the provision that the judge authorising further detention should be a High Court judge. It would also prefer a higher level of police officer to be responsible for the application to the judge, such as an Assistant Chief Constable or Chief Constable. The new ground for extending detention does not of itself raise any human rights issues. (paras 93–103)

Deportation and exclusion

“Unacceptable behaviours”

In the Committee’s view the phrase “fomenting, justifying or glorifying terrorist violence” on the list of unacceptable behaviours justifying deportation suffers from the same legal uncertainty as afflicts the criminal offence of encouragement and glorification in clause 1 of the Bill. The Committee welcomes the Home Secretary’s undertaking to reconsider the wording of his list of “unacceptable behaviours” when the Terrorism Bill has received Royal Assent, but believes that the unacceptable behaviours wording should be immediately amended to render it legally certain and less broad. Any such modification will also have a key role in the application of powers to deprive persons with dual nationality of British citizenship, or others their right of abode. Without such a modification there is a high risk that the application of this part of the list of unacceptable behaviours will be in breach of Article 10 ECHR and the use of other powers based on the application of the list will cause further breaches of ECHR rights. If the retrospective application of the new list of unacceptable behaviours leads to the deportation of individuals for views expressed before the publication of the new list, and in circumstances in which the power has never previously been exercised, there is also in the Committee’s view a serious risk that such exercise of the power will be incompatible with the prescribed by law requirement in Article 10 ECHR. (paras 109–119)

Deportation with assurances

In relation to deportation with assurances, in the Committee’s view states are entitled to seek assurances about torture from other states, particularly in the context of wider and more concerted efforts to address the human rights situation within the other state, and such assurances are capable, in principle, of satisfying the State’s obligation not to return an individual to a serious risk of torture. They will be treated by the courts as being relevant to the assessment of the risk of a person being subjected to torture in the particular circumstances of the case, along with all relevant evidence about the likelihood of their being respected in practice. The Committee welcomes the Home Secretary’s unequivocal acceptance that whether a deportee faces a substantial risk of torture on his return is a matter for the courts, which in the Committee’s view is a correct understanding of the legal framework under which it is for the courts to determine the factual question of whether an individual faces a substantial risk of torture on his return. (paras 120–146)

Torture and national security

The Committee welcomes the Home Secretary's unequivocal statement that he is not prepared to deport somebody where he is satisfied that there is a substantial risk of their being tortured in the receiving country, which reflects the UK's obligations under the absolute prohibition on torture. In the Committee's view, it follows from the Government's acceptance of the absolute nature of the torture prohibition that considerations of national security cannot be balanced against the risk of torture. (paras 147–152)

Immigration, Asylum and Nationality Bill

Deprivation of British citizenship

The Committee considers that the new test for deprivation of citizenship contains insufficient guarantees against arbitrariness in its exercise in light of (i) the significant reduction in the threshold, (ii) the lack of requirement of objectively reasonable grounds for the Secretary of State's belief, and (iii) the arbitrariness of the definition of the class affected, and that it therefore gives rise to a risk of incompatibility with a number of human rights standards. (paras 155–164)

Deprivation of right of abode

In relation to the power to deprive of a right of abode, the Committee considers that (i) the same problems with the significant reduction in the threshold referred to in relation to the power to deprive of citizenship also apply to the use of the power to deprive of a right of abode and that (ii) the legal uncertainty caused by the width of the current definition of unacceptable behaviours means that there are not at present sufficient guarantees against arbitrariness in the exercise of the power to deprive of a right of abode, and that therefore the power as currently set out gives rise to a substantial risk of incompatibility with various human rights. However, in the Committee's view, if these two concerns were addressed, the availability of a full right of appeal in relation to this power would provide a sufficient guarantee. (paras 165–170)

Terrorists and asylum

In relation to the statutory construction of Article 1F(c) of the Refugee Convention, excluding terrorists from international protection as refugees, the Committee considers that in order to be compatible with the Refugee Convention, and to give effect to the Government's stated purpose of merely making explicit what Article 1F(c) implicitly requires, the clause would need to be amended to decouple it from both the broad definition of "terrorism" in s.1 of the Terrorism Act 2000 and the published list of unacceptable behaviours in its present form. (paras 171–179)

Out of country appeals in national security cases

In relation to the clause requiring appeals against deportations on national security grounds to be brought out-of-country, except where the deportation is challenged on human rights grounds, the Committee considers that the failure of the new clause to preserve an in-country appeal on asylum grounds, as well as on human rights grounds, gives rise to a risk of incompatibility with the Refugee Convention. In the Committee's view, the effect of the new clause is that there is no mechanism for independent review of the Secretary of State's assertion that an asylum seeker is a threat to national security before his or her removal. In order to be compatible with the Refugee Convention, it considers that the new clause ought to preserve in-country appeals on asylum grounds as well as human rights grounds. (paras 180–185)

1 Introduction

Our inquiry

1. This Report considers the human rights implications of the terrorist attacks and attempted attacks in London on 7 and 21 July 2005 and of various counter-terrorism measures which have been taken by the Government in the wake of those attacks. Recognising that reconciling the requirements of security and public safety with human rights standards is likely to be a dominant theme in Parliament's work this Session, we decided to conduct an inquiry into "counter terrorism policy and human rights". On 21 September 2005 we issued a call for evidence on the human rights implications of developments in counter-terrorism policy in the UK since 7 July 2005 and potential future developments in that policy, including but not restricted to:

- i. the new list of "unacceptable behaviours" drawn up after consultation indicating some of the circumstances in which the Home Secretary may exercise his powers of exclusion or deportation;
- ii. the Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3 ECHR;
- iii. the various measures announced by the Prime Minister at his press conference on 5 August (available in full at www.number-10.gov.uk)
- iv. the possibility of allowing sensitive evidence, including intercept evidence, to be adduced in criminal trials
- v. the possibility of establishing a judicial role in the investigation of terrorist crimes
- vi. the overall social and political context in which human rights standards are understood and applied by the courts, the Government and others, and in which the requirements of security are reconciled with those standards.

2. We also called for evidence on the human rights compatibility of the provisions of the draft Terrorism Bill, the Terrorism Bill and the Government's amendments to the Immigration, Asylum and Nationality Bill.

3. We have received written evidence from a number of organisations: the Campaign Against Criminalising Communities, the Mental Health Act Commission, the Law Society, the Redress Trust, Amnesty International, the Medical Foundation for the Care of Victims of Torture, British Irish Rights Watch, the Immigration Law Practitioners' Association, JUSTICE, Liberty, the Mayor's Office of the Greater London Authority, the British Psychological Society, Human Rights Watch and the Association of University Teachers. We also received written evidence from two interested individuals, Dr. Chris Pounder and Professor Clive Walker. We heard oral evidence from the Home Secretary, the Rt Hon Charles Clarke MP; Mr. Peter Clarke, Deputy Assistant Commissioner and Head of the Metropolitan Police Anti-Terrorist Branch; Mr Ken Jones, Chief Constable of Sussex

Police; Professor Clive Walker, and representatives of Amnesty International, JUSTICE, Liberty, the Law Society and the Muslim Council of Britain. This evidence is published in a separate volume. We are grateful to all of those who have assisted us in our inquiry so far.

The human rights implications of the terrorist attacks in London

4. The terrorist attacks in London in July 2005 constitute gross violations of human rights. The murder of 52 innocent civilians and severe maiming of scores of others is an act not capable of legal justification. Such terrorist acts are universally recognised as being gross violations not only of the rights of the individuals killed and injured, but also of the foundational values of democracy and the rule of law on which human rights law is built.¹ They can never be justified by invoking the language of human rights, for it is well established in human rights law that invoking human rights to justify the destruction of other human rights is an abuse of rights and never attracts protection. Human rights law is unequivocal in its condemnation of these atrocities.

5. Human rights law, however, does more than merely condemn such unjustifiable crimes. It also imposes onerous positive obligations on states to take steps to protect the lives and physical integrity of everyone within their jurisdiction against the threat of terrorist attack.² Moreover, those steps must be effective in providing such protection. The increasing recognition of the rights of victims also entails a corresponding obligation on states to do everything possible to bring to justice suspected perpetrators, organisers and sponsors of terrorist acts.³

6. Where an attack has taken place, it follows that the state is required by human rights law itself to review the adequacy of the legal measures it has in place to protect people from terrorist attack and to bring the perpetrators to justice, and to take such measures as are identified as being necessary to provide adequate protection. This is the first of the human rights implications of the attacks themselves.

7. The second implication of the attacks concerns the application and interpretation of the relevant human rights standards. The Government argues that the fact of the attacks having taken place is a significant change of circumstances which affects the way in which the relevant human rights standards apply in the UK.⁴ We accept that this is correct in a

1 See for example, UN General Assembly Resolution 54/164, *Human Rights and Terrorism*, 17 December 1999, recognising that terrorism is aimed at the destruction of human rights, fundamental freedoms and democracy; and, most recently, the Preamble to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), signed on 16 May 2005: "Recognising that terrorist offences and the offences set forth in this Convention, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".

2 See the Joint Committee on Human Rights report on *Review of Counter-terrorism Powers*, 18th Report of Session 2003–04 (HL Paper 158, HC 713) at paras 7–14.

3 See for example the *Council of Europe Guidelines on the Protection of Victims of Terrorist Acts* (2005), published in *The fight against terrorism: Council of Europe Standards* (CoE Publishing, 3rd edn., 2005) at p. 331.

4 See in particular the statement of the Prime Minister on 5 August 2005 (see below). The Home Secretary similarly stated, announcing the arrest and detention of ten individuals with a view to their deportation: "The circumstances of our national security have changed. "Cf. the Director General of the Security Service who has said that the UK's plans for its Presidency of the EU have not needed to be much amended in light of the attacks because "we anticipated further attacks and were not surprised when they occurred": "The International Terrorist Threat and the Dilemmas in Countering it", speech by the Director General of the Security Service, Dame Eliza Manningham-Buller, at the Ridderzaal, Binnenhof, The Hague, Netherlands, 1 September 2005.

number of respects. The fact that the attacks have taken place, for example, is highly relevant evidence to any factual assessment of the level of the terrorist threat faced by the UK, which itself is relevant both to whether there exists a public emergency threatening the life of the nation⁵ and to the proportionality of any interference with those human rights which can be restricted in the interests of public safety and national security.⁶ The European Court of Human Rights explicitly takes into account the problems of preventing terrorism as part of the background when deciding the proportionality of interferences with certain rights.⁷ The fact that attacks have recently taken place will therefore be regarded as an important part of the context when the justification for measures restricting rights is being considered.

8. However, even in the immediate aftermath of a serious terrorist attack, it remains the case that all measures taken by states to counter terrorism must respect human rights and the principle of the rule of law; they must exclude any form of arbitrariness, as well as any discriminatory or racist treatment, they must be subject to appropriate supervision, and they must respect the absolute prohibition of torture.⁸ In other words, national rules may change in the wake of an attack to the extent required and permitted by human rights law, but the applicable human rights rules themselves do not change. The UK has frequently been a party to intergovernmental statements reaffirming that states must ensure that all counter-terrorism measures, and their implementation, are in accordance with all relevant international human rights standards, including refugee and humanitarian law,⁹ most recently in the UN World Summit Declaration on 16 September 2005.¹⁰ We welcome the Home Secretary's unequivocal acceptance in his evidence to us that "it is important that any legislation that we propose is consistent with both the European Convention on Human Rights and also human rights law in general".¹¹

9. We have also been very struck in the course of our inquiry so far by the number of organisations who are deeply concerned about the danger of certain of the counter-terrorism measures being counterproductive in the sense that they risk alienating the very sections of the community whose close co-operation and consent is required if terrorism is to be defeated.¹² These were sometimes presented as pragmatic concerns about the effectiveness of the measures proposed in achieving their aims. We regard this as being

5 For the purposes of derogating from Convention obligations under Article 15 ECHR

6 Most significantly Articles 8–11 ECHR

7 See for example *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121 at para. 59

8 See *Council of Europe Guidelines on Human Rights and the Fight Against Terrorism* (July 2002), Guideline II (published in *The fight against terrorism: Council of Europe Standards*, op cit., at p. 295)

9 See for example UN Security Council Resolution 1456 (2003), UN Doc. S/RES/1456 (2003), Annex at para. 6: "States must ensure that any measure taken to combat terrorism complies with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law." See, to similar effect, the *Council of Europe Guidelines on the Protection of Victims of Terrorist Acts* (2005), published in *The fight against terrorism: Council of Europe Standards* (CoE Publishing, 3rd edn., 2005) at p. 331.

10 UN Doc. A/60/L.1, A/RES/60/1 at para. 85, using the same formula as in Security Council Resolution 1456 (2003). The formula appears again in the UN Security Council Resolution concerning incitement to commit terrorist acts (Resolution 1624 (2005), UN Doc. S/RES/1624 (2005) at para. 4). A similar formula appears in Council of Europe intergovernmental agreements, for example, the Convention for the Prevention of Terrorism (above).

11 Q 1

12 Q 93

directly relevant to any assessment of the human rights compatibility of the measures. If the measures introduced to improve security are in fact counterproductive, the state will be failing to fulfil its positive obligations outlined above. We welcome the Home Secretary's acceptance that "one of the most damaging things would be to have any growth of frustration, alienation ... as a result of the application of the legislation"¹³ and acknowledge that the Government believes that it has "worked closely with the Muslim community ... in order to try and ensure that, in so far as we can achieve it, the measures that we propose could not lead to any generalised counter reaction".¹⁴

The Measures

10. Since the first attacks on 7 July a number of counter-terrorism measures have been introduced by the Government. They range from administrative measures, not requiring legislation, which have already been consulted on and implemented, to measures which require primary legislation. This Report is concerned principally with the following measures:

- (1) The Terrorism Bill;
- (2) The list of "unacceptable behaviours";
- (3) The administrative practice of deporting on the basis of assurances;
- (4) The Government's intervention in a case before the European Court of Human Rights to invite the Court to overturn its decision in *Chahal*; and
- (5) Those aspects of the Immigration, Asylum and Nationality Bill dealing with terrorism and national security (consisting of amendments made and new clauses added to the Bill at committee stage in the Commons)¹⁵.

11. After publication of this Report we will be continuing our inquiry into counter-terrorism policy and human rights, and we expect to give further consideration to a number of matters, some of which are covered in this Report. Amongst these issues will be—

- possible mechanisms whereby the judiciary could have an investigative role in relation to terrorist offences
- whether, and if so the means by which, intercept evidence could be used in courts
- proposed powers to control places of worship
- use of lethal force by the police

13 Q 15

14 Q 3

15 Clauses 7 and 51 to 54 of HC Bill 70

- significant changes or additions to the Terrorism Bill or the Immigration, Asylum and Nationality Bill made after the publication of, and not covered in, this Report, where it is appropriate, and timely to do so.

We are also conducting a separate inquiry into the UK's compliance with the terms of the UN Convention against Torture (UNCAT). In some respects that inquiry overlaps with this one. In the context of that inquiry we will be giving further consideration to issues such as the use of evidence which may have been obtained by torture, deportations with assurances, and extraordinary renditions.

The definition of "terrorism"

12. A number of the questions we address in this Report relating to the human rights compatibility of the provisions of the Terrorism Bill and related measures hinge upon the definition of "terrorism" on which they rely. This definition is contained in section 1 of the Terrorism Act 2000, which includes any action designed to influence the policy of any government, anywhere in the world, including by, for example, damage to property. The main problem to which this gives rise is that the counter-terrorism measures are capable of application to speech or actions concerning resistance to an oppressive regime overseas. For example, the creation of the offence of encouragement of "terrorism" defined as broadly as in s.1 of the Terrorism Act is to criminalise any expression of a view that armed resistance to a brutal or repressive anti-democratic regime might in certain circumstances be justifiable, even where such resistance consists of campaigns of sabotage against property, and specifically directed away from human casualties. The Home Secretary does not deny that this is the effect of the offence but defends its scope on the basis that there is nowhere in the world today where violence can be justified as a means of bringing about political change.¹⁶ He went on to say that new offences of encouragement would apply to those seeking to justify acts of vandalism or sabotage against property in the area of animal rights extremists.¹⁷

13. In letters of 25 October to the Chairman of the Commons Home Affairs Committee and the front-bench spokesmen of the two main Opposition parties, the Home Secretary set out the difficulties he saw with establishing an alternative and narrower definition of terrorism which could, for example, concentrate on attacks on civilians, concluding that it was necessary to stick with the definition in the 2000 Act. However, it appears clear that the alternative definitions set out in that letter—the EU Council Framework Decision and UN Security Council Resolution 1566¹⁸—are narrower in the area of damage to property than

16 Q 11

17 Q 19

18 The texts of the Decision and Resolution are as follows:

EU COUNCIL FRAMEWORK DECISION OF 13 JUNE 2002

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:
 - seriously intimidating a population, or
 - unduly compelling a Government or international organisation to perform or abstain from performing any acts, or
 - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a

that given in the 2000 Act. It remains the case that the breadth of this definition raises a number of problems in relation to provisions of the Terrorism Bill and related matters, particularly in relation to the proposed new offence of encouragement and glorification of terrorism and similar new offences in clauses 1, 2 and 8, the new power to proscribe organisations in clause 21, powers to deprive individuals of British citizenship or right of abode, powers to deny asylum to individuals through a wide construction of Article 1F(c) of the Refugee Convention, and the list of unacceptable behaviours which the Home Secretary has adopted to guide the exercise of his discretion to exclude or deport. **The Home Secretary has announced that he has invited Lord Carlile to undertake a review of the definition of “terrorism”, consulting parliamentary committees as appropriate. We welcome this initiative and believe it to be urgently essential. However, we believe that the definition of terrorism—for the purposes of the provisions identified in this paragraph—needs to be changed in order to avoid a high risk of such provisions being found to be incompatible with Article 10 of ECHR and related Articles.**

country or an international organisation,
shall be deemed the terrorist offences:

- (a) attacks upon a person's life which may cause death;
- (b) attacks upon the physical integrity of a person;
- (c) kidnapping or hostage taking;
- (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- (e) seizure of aircraft, ships or other means of public or goods transport;
- (f) manufacture, possession acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons as well as research into, and development of, biological and chemical weapons;
- (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
- (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) threatening to commit any of the acts listed in (a) to (h).

UN SECURITY COUNCIL RESOLUTION 1566

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

2 The Terrorism Bill

Introduction

14. The Government published its Terrorism Bill on 12 October 2005, after previously publishing and consulting on draft clauses of the Bill.

15. The Government believed that all the measures in the Bill as introduced were compatible with the ECHR. Its justification for this view is summarised in the Explanatory Notes to the Bill paras. 165–176 and Annex A to the written evidence submitted to this Committee by the Home Office on 18 October.¹⁹

16. The Bill creates a number of new criminal offences. In his recent speech to the European Parliament making a number of proposals for countering the terrorist threat, the Home Secretary accepted that it was incumbent on the British Government, as advocates of change, to make the case that such measures will in fact make a practical difference. We welcome the fact that the Home Secretary accepted, in his evidence to us, that the same onus rests on the Government to demonstrate to the UK Parliament the necessity for the measures it is proposing, for example where it is proposing the creation of a new criminal offence, by identifying precisely the gap in the law which exists and providing evidence to demonstrate that the law's protection against terrorism is inadequate.²⁰ We accept the Home Secretary's qualification that it is not possible to prove that a particular measure is the single thing which has prevented a particular event or proposed attack taking place, but we welcome the fact that he accepts that the basic test ought to be necessity.

17. The Bill received its Third Reading in the House of Commons on 10 November 2005 and had its Second Reading in the House of Lords on 21 November. At report stage in the Commons on 9 November a number of significant amendments were made to the Bill, particularly in relation to the provisions concerning encouragement of terrorism (clause 1) and the maximum period of pre-charge detention for terrorist suspects and judicial supervision of extensions of the period (clause 23). We take account of these amendments as appropriate in the analysis of the Bill which follows, summarising the effect of those amendments along with our views on the extent to which they have addressed concerns we had about the human rights compatibility of the Bill's original wording.

Encouragement and glorification of terrorism (clause 1)

18. Clause 1 of the Terrorism Bill would create a new criminal offence of "encouragement of terrorism", carrying a maximum penalty of 7 years' imprisonment.²¹ In the Bill as introduced, the offence would be committed by a person who publishes a statement, or causes another to publish a statement on his or her behalf, at the time knowing or believing, or having reasonable grounds for believing, that members of the public to whom

¹⁹ Appendix 4

²⁰ Q 2

²¹ Clause 1 of the Bill

the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism.²²

19. Glorification of terrorism, which in the draft Bill was to constitute a separate and less serious offence, is now part of the offence of encouragement of terrorism.²³ Statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism include statements which glorify the commission or preparation of such acts and “is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances”.²⁴ The words “by them” were added by the Government by amendment at report stage in the Commons to clause 1(4)(b).²⁵ The Government argued that this was a significant narrowing of the scope.²⁶

20. Criminalising the publication of statements engages the right to freedom of expression in Article 10 ECHR. Article 10’s protection extends to expression which offends, shocks or disturbs, but proportionate restrictions are permissible on expression which amounts to incitement to violence, including terrorist acts. Restrictions on direct incitement to violence (which is already a criminal offence in English law) are clearly compatible with Article 10. It appears from the Strasbourg case-law that restrictions on *indirect* incitement to commit violent terrorist offences are also capable in principle of being compatible with Article 10, provided they are

- necessary
- defined with sufficient precision to satisfy the requirements of legal certainty, and
- proportionate

to the legitimate aims of national security, public safety, the prevention of crime and the protection of the rights of others. In one case the Court of Human Rights has held that a restriction on expression, in the form of a refusal to allow a radio journalist to interview a terrorist (Red Army Faction) suspect, was justified because the words spoken by the suspect could possibly be understood by supporters of the terrorist group as an appeal to continue its violent activities, even if they did not directly incite violence.²⁷ The main issues, therefore, are whether the proposed new offence of encouraging terrorism is necessary, and is defined in the Bill as currently drafted sufficiently precisely to satisfy the requirements of legal certainty and proportionality.

22 Clause 1(1)

23 By clause 1(2) of the Bill

24 Clause 1(2)(b)

25 Similar wording was added in clause 2 (4)(b)

26 HC Deb, 9 November 2005, cols. 392–3

27 *Hogefeld v Germany*, App. no. 35402/97 (20 January 2000)

Necessity for the new offence

21. The Home Secretary's evidence is that there is a gap in the law which makes it difficult to prosecute incitement to terrorism of a general nature, as opposed to incitement of a specific terrorist act.²⁸ In his view, the law already outlaws incitement to commit a particular terrorist act, such as the statement "Please will you go and blow up a tube train on 7 July in London?", but not a generalised incitement to terrorist acts such as "We encourage everybody to go and blow up tube trains."

22. Incitement to violence, including terrorist violence, is already a criminal offence in UK law. Incitement to commit an act of terrorism overseas is also a criminal offence by virtue of s. 59 of the Terrorism Act 2000. Solicitation to murder is an offence under s. 4 of the Offences Against the Person Act 1861. Incitement to racial hatred is a crime under the Public Order Act 1986. In light of the wide range of criminal offences already available, the question is why a new offence of encouragement of terrorism, including by its glorification, is necessary.

23. Recent prosecutions illustrate the current law. In *R v El-Faisal*, for example, the Court of Appeal upheld the convictions of a minister of Islam for soliciting murder under s. 4 Offences Against the Person Act 1861 and incitement to racial hatred under the Public Order Act 1986, for having made audio tapes urging Muslims to fight and kill, among others, Jews, Christians, Americans, Hindus and other "unbelievers".²⁹ In the course of its judgment the Court of Appeal explained the very great width of the offence of soliciting to murder:

"26. The offence of soliciting to murder is contained in s.4 of the 1861 Act which states:

"Whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to imprisonment for life."

27. The scope of the behaviour sufficient to constitute the offence was classically identified as follows in *R v Most* (1881) 7 QBD 244 per Huddleston B. at 258:

"The largest words possible have been used, "solicit" that is defined to be, to importune, to entreat, to implore, to ask, to attempt to try to obtain; "encourage", which is to intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident; "persuade" which is to bring any particular opinion, to influence by argument or expostulation, to inculcate by argument; "endeavour" and then, as if there might be some class of cases that would not come within those words, the remarkable words are used, "or shall propose to", that is say, make merely a bare proposition, an offer for consideration."

28 Q 8

29 [2004] EWCA Crim 456

24. The Muslim cleric Abu Hamza Al-Masri was also charged, on 19 October 2004, with solicitation to murder for soliciting or encouraging others at a public meeting to kill non-believers in the Muslim faith, and with incitement to racial hatred.

25. In view of the breadth of the offence of solicitation to murder and of common law incitement, the strict necessity for a new offence might be thought to be questionable. However, it is true that there is some uncertainty about the scope of the existing offences. The Law Commission, for example, is currently considering the law on encouragement and other offences of complicity. **A clarification of the law is therefore in principle justifiable, even if it overlaps to some extent with other existing offences. We therefore accept, on balance, that the case has been made out by the Government that there is a need for a new, narrowly defined criminal offence of indirect incitement to terrorist acts.**

Legal certainty and proportionality

26. The Home Office's written evidence acknowledges, in Annex A, that it could be argued that the description of the offence in Clause 1 of the Bill is "insufficiently precise". This is said to engage the requirement in Article 7 ECHR that the criminal law should be sufficiently accessible and precise to enable an individual to know in advance whether his conduct is criminal. The Explanatory Notes state that the Home Office has concluded that the clause is compatible in this respect because the constituent parts of the offence are clearly laid out in a publicly accessible piece of primary legislation and the consequences of action falling within the offence are clearly formulated in the clause.³⁰ In its written evidence the Home Office says that the clause is judged to be compatible in this respect because the European Court recognises the need for criminal law to be flexible and acknowledges that general descriptions can be interpreted and applied by the courts.

Vagueness of "glorification"

27. The first source of legal uncertainty in the definition of the offence of encouragement of terrorism in clause 1 of the Bill is the inclusion of "glorification of terrorism" within the encouragement offence.³¹ "Glorification" is defined in the Bill to include "any form of praise or celebration".³² The legal certainty concern is that terms such as glorification, praise and celebration are too vague to form part of a criminal offence which can be committed by speaking. The Home Secretary draws a distinction between encouraging and glorifying on the one hand and explaining or understanding on the other. The last two, he says would not be caught by the new offence, because they do not amount to encouraging, glorifying, praising or celebrating.

28. In our view, the difficulty with the Home Secretary's response is that his distinction is not self-executing: the content of comments and remarks will have to be carefully analysed in each case, including the context in which they were spoken, and there will be enormous

30 EN para. 167

31 Clause 1(2) of the Bill

32 Clause 20(2)

scope for disagreement between reasonable people as to whether a particular comment is merely an explanation or an expression of understanding or goes further and amounts to encouragement, praise or glorification. The point is made by the vast range of reaction to the comments of both Cherie Booth Q.C. and Jenny Tonge M.P. about suicide bombers. Some reasonable people thought they fell on one side of the Home Secretary's line, other reasonable people thought they fell on the other. We return to this issue when we discuss the use of the word "justify" in the list of unacceptable behaviours and the Government's interpretation of the Refugee Convention at paragraphs 116 to 118 and 177 to 179.

Overbreadth

29. Another source of legal uncertainty about the scope of the new offence is the breadth of the definition of "terrorism" for the purposes of the new offence. The Government accepts that the effect of the clause as drafted is to criminalise expressions of support for the use of violence as a means of political change anywhere in the world, but defends the offence having this scope with the argument, questioned by some who gave evidence to us, that there is nowhere in the world today where resort to violence, including violence against property, could be justified as a means of bringing about change. This argument is far from convincing and there are plenty of historical examples and indeed some present day resistance movements whose aims and acts—where they are targeted at sabotage—which have been justified and indeed supported by individuals who would not be considered to be encouraging terrorism currently but yet would be potentially liable to prosecution under the terms of this offence.

Lack of requirement of intent

30. In the Bill as introduced, the final sources of uncertainty about the scope of the offence stemmed from the lack of any requirement in the definition of the offence that there be an intention to incite the commission of a terrorist offence, and that the statement must cause a danger of a terrorist offence being committed. As originally drafted, the state of mind which had to be proved by the prosecution was the knowledge or belief that members of the public were likely to understand the statement as a direct or indirect encouragement or other inducement to acts of terrorism, or having reasonable grounds for such belief. This fell short of a requirement of a specific intention to incite the commission of a terrorist offence. The only reason given by the Home Secretary for not restricting himself to a requirement of intent in the definition of the offence was that this would make it more difficult to secure convictions for the offence. Whilst this is true it can also be argued that this is a good reason for its inclusion as a necessary safeguard against the offence being of too broad an application.

31. **We consider that the Bill should require a subjective test of recklessness to be proved, as an alternative to intent, if the Bill is to satisfy the need for legal certainty in this respect.** As a general rule, every crime requires a mental element, the nature of which depends on the nature and definition of the crime in question. The burden is upon the prosecution to prove the necessary criminal intent. The mental element required to constitute serious crimes is an intention to bring about the elements of the crime in

question or recklessness. Recklessness arises in this context where the act in question involves an obvious and serious risk of causing injury or damage and either (1) the defendant fails to give any thought to the possibility of there being such a risk, or (2) having recognised that there is some risk involved, he nonetheless goes on to take it.

32. The above paragraph describes a test of subjective recklessness. At report stage in the Commons, an amendment, proposed by the Government, to clause 1 was made to the effect that the state of mind to be proved by the prosecution is that the person publishing a statement or causing it to be published by another “intends the statement to be understood” by members of the public as a direct or indirect encouragement or other inducement to acts of terrorism, or is “reckless as to whether or not it is likely to be so understood”.³³ The cases in which a person is taken to be reckless include “any case in which he could not reasonably have failed to be aware of that likelihood”.³⁴ This formulation is claimed by the Government to be a significant improvement over the original wording of the Bill and a safeguard against the offence being of too broad an application. However it does not represent a subjective test of recklessness, but an objective test. It can be argued that such a test actually provides little narrowing of the application of the offence compared to the original wording. At Commons report stage the Minister, Hazel Blears MP, said that “If we have only a subjective test, people will be able to say that they did not realise what the effect of their actions would be. We would then find it incredibly difficult to prosecute people who genuinely were encouraging other people, indirectly, to commit terrorist acts”.³⁵

33. We consider it necessary for this offence either to be restricted to intention or – if it is to be extended beyond intention—that it should be extended only to recklessness; and if it is so extended it should contain a subjective test of recklessness (that is, knowing or being aware of but indifferent to the likelihood that one’s statement would be understood as an encouragement to terrorism), rather than the objective test currently contained within it.

Lack of requirement of danger that an act of terrorism will result

34. There is nothing in the definition of the offence which would require the prosecution to prove that the statement in question gave rise to any danger that an act of terrorism might be thereby committed.

35. It is essential for there to be a public interest defence to protect the right to freedom of expression against unnecessary interference. **Most of the anti-terrorism offences which impinge on freedom of expression in the Terrorism Act 2000 include a “reasonable excuse” defence.**³⁶ The European Court of Human Rights treats the availability of such a defence as a significant factor in determining whether the criminal restriction of freedom of expression is proportionate. In light of the concerns about the breadth of

33 HC Bill 84, clause 1(2)

34 HC Bill 84, clause 1(3)

35 HC Deb, 9 November 2005, col. 390

36 See for example ss 19(3), 38B(4), 35(5)(b) and 58(3)

various of the new offences created by the Bill, and in particular the impact of the resultant uncertainty on freedom of expression, we believe that a “reasonable excuse” or “public interest” defence to this new offence should be included to make it less likely that offence would be incompatible with Article 10 ECHR.

36. With the amendment to introduce a requirement of intent or objective recklessness, we consider that the offence in clause 1 is not sufficiently legally certain to satisfy the requirement in Article 10 that interferences with freedom of expression be “prescribed by law” because of (i) the vagueness of the glorification requirement, (ii) the breadth of the definition of “terrorism” and (iii) the lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence. To make the new offence compatible, it would in our view be necessary to delete the references to glorification, insert a more tightly drawn definition of terrorism, and insert into the definition of the offence requirements of intent and likelihood.

37. In this context we consider that the doubts of those witnesses who questioned the unqualified argument that there is nowhere in the world today where resort to violence, including violence against property, could be justified as a means of bringing about change cannot be dismissed out of hand. While the argument as stated refers to “today”, the legislation is not limited to such a time frame. We observe that the argument could also have significant implications for foreign policy.

Compatibility with the Convention on the Prevention of Terrorism

38. In the Home Secretary’s statement to the House of Commons on 20 July 2005, he said that legislating to create a new offence of indirect incitement to terrorism will enable the UK to ratify the Council of Europe Convention on the Prevention of Terrorism.³⁷ Article 5 of that Convention requires states to criminalise “public provocation to commit a terrorist offence.” It provides:

“1. For the purposes of this Convention, ‘public provocation to commit a terrorist offence’ means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.”

39. The Explanatory Report to the Convention explains that the proposed offence of public provocation to commit a terrorist offence is designed to fill a lacuna identified in the international legal protections against terrorism.³⁸ It also explains that it allows States a

37 CETS No. 196, signed by the UK on 16 May 2005. The Convention has not yet been ratified.

38 *Explanatory Report*, at para. 97

certain amount of discretion with respect to the definition of the offence and its implementation.

40. However, as the Explanatory Report also makes clear,³⁹ Article 5(1) of the Convention on the Prevention of Terrorism requires that the scope of such an offence be restricted by two limitations. First, there must be a specific intention to incite the commission of a terrorist offence. And second, the making available of a message to the public must cause a danger that such offences may be committed. Article 12 of the Convention also requires states to respect relevant human rights obligations when creating the offences required by Article 5. It provides:

“Article 12 – Conditions and safeguards

1 Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

2 The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any forms of arbitrariness or discriminatory or racist treatment.”⁴⁰

41. As currently drafted, the proposed offence of encouraging terrorism in clause 1 of the Bill does not contain either of the two restrictions on the scope of the offence which Articles 5 and 12 of the Convention on the Prevention of Terrorism require. We consider that it therefore does not faithfully implement Article 5 of the Convention on the Prevention of Terrorism, for the reasons given above, and would be an obstacle to ratification of that Convention by the UK.

Dissemination of terrorist publications (clause 2)

42. Clause 2 of the Bill would create a new offence of dissemination of terrorist publications, carrying a maximum penalty of 7 years' imprisonment.

43. The offence would cover a number of ways of disseminating a publication. A publication would be a “terrorist publication” for the purposes of this offence if matter contained in it constitutes a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism (though only if it is likely to be

³⁹ *ibid.* at paras. 99–100

⁴⁰ The Explanatory Report at paras 143–152 describes this as “one of the key provisions of the Convention by which the negotiators purport to enhance the efficiency of the fight against terrorism while ensuring the protection of human rights and fundamental freedoms.”

understood as such by some or all of the persons likely to see it), or information of assistance in the commission or preparation of such acts.

44. It is a defence for a person to show that he had not examined the publication and that he had no reasonable grounds for suspecting that it was a terrorist publication. There is also the same defence for internet service providers as is provided in draft clause 1.

45. The Association of University Teachers is concerned that this clause will restrict university teachers who wish to distribute materials to their students on courses such as those concerning terrorism, history or international relations.

46. In our view the proposed new offence suffers from some of the same compatibility problems as those identified in relation to the proposed encouragement offence, including the lack of connection to incitement to violence, and the absence of any requirement that such incitement be either intended, carried out with reckless indifference, or likely.

47. This offence, being concerned with dissemination, engages Article 10's particular regard for the freedom of the media in a democratic society. In *Erdogdu v Turkey*, for example, the Court said

“where a publication cannot be categorised as inciting to violence, Contracting States cannot with reference to the prevention of disorder or crime restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media”.⁴¹

48. For the same reasons given above in paragraph 35 we recommend that a “reasonable excuse” or “public interest” defence, which would provide protection of the legitimate activities of the media and academics, to this new offence be included to make it less likely that offence would be incompatible with Article 10 ECHR.

49. In our view the proposed new offence of “disseminating terrorist publications” is unlikely to be compatible with the right to freedom of expression in Article 10 ECHR in the absence of an explicit requirement that the dissemination of such publications amounts to an incitement to violence and is both intended and likely to do so. Amendments made in the Commons at report stage effected some narrowing of the offence, but it is essential for the Bill to set out the necessary mental elements of the offence so as to require proof of intention or recklessness. It is also essential for there to be a public interest defence to protect the right to freedom of expression against unnecessary interference (including the chilling effect of such a widely drawn offence).

Preparation of terrorist acts (clause 5)

50. The Home Secretary has said⁴² that the proposed new criminal offence of “acts preparatory to terrorism” is designed to address the situation where there is “clear evidence

41 (2002) 34 EHRR 50 at para. 71

42 Letter of 15 July 2005 (Annex I)

of an intention to commit a serious terrorist act. For example, instructions on how to build a bomb, evidence of intention to acquire chemicals and evidence that terrorist related websites have been accessed”, but “the precise details of the planned terrorist act are not known—indeed, the terrorists themselves may not have decided exactly how they will act.”

51. The Joint Committee on Human Rights in the last Parliament considered this proposal in its 2004 Report, *Review of Counter-terrorism Powers*.⁴³ In light of the Newton Committee’s observation that in the course of its inquiry nobody had suggested that it has been impossible to prosecute a terrorist suspect because of a lack of available offences, the fact that the Newton Report did not recommend the creation of any new criminal offences, and the Director of Public Prosecution’s evidence to the effect that the wide range of criminal offences already available was adequate, the Committee concluded:⁴⁴

“We have considered carefully whether there appears to be a need for new criminal offences in relation to terrorism. We are not yet persuaded that a new criminal offence of acts preparatory to terrorism would be a valuable addition to the existing range of offences or a means of ensuring that the current detainees could be dealt with through the criminal process. We find it difficult to see how the existence of such an offence would overcome the obstacles to prosecution identified by the Newton Report, in particular the problem that the evidence relied on in relation to a suspected international terrorist is usually intelligence material which is either inadmissible as evidence in a criminal court, or material which the authorities do not wish to disclose for fear of compromising sources or methods. In our view, that is an obstacle which needs addressing directly, and is unlikely to be helped by the creation of still more criminal offences.”

52. The proposed new offence certainly appears to overlap with existing offences. Possession of an article for purposes connected with the commission, preparation or instigation of acts of terrorism⁴⁵ and collecting information of a kind likely to be useful to a person committing or preparing an act of terrorism⁴⁶ are already criminal offences under the present law. These would already seem to cover some of the conduct referred to by the Home Secretary as intended to be caught by the proposed new offence, with the exception of evidence of intention to acquire chemicals. Whether this is a genuine lacuna in the current law merits further exploration.

53. The conviction of Andrew Rowe on 23 September 2005 for possessing items which could be used in terror attacks, including instructions on firing a mortar, demonstrates the scope for using existing offences. Peter Clarke of the Metropolitan Police was quoted following the conviction as saying “We do not know when, what or where he was going to attack, but the public can be reassured that a violent man has been brought to justice.”

54. Notwithstanding this overlap between the new and existing offences, the removal of the requirement to demonstrate an agreement between two or more people, which is a

43 op cit., at paras. 65–67

44 ibid. at para. 67

45 Terrorism Act 2000, Section 58

46 ibid., Section 59

necessary ingredient of the common law offence of conspiracy, does overcome a real obstacle to prosecuting under the present law. **We are therefore satisfied, on balance, that the necessity for the new offence has been made out.**

Training for terrorism (clause 6)

55. By clause 6(1) of the Bill, a person commits an offence if he provides instruction or training in certain skills (including the “design or adaptation for the purposes of terrorism ... of any method or technique for doing anything”) and at the time he does so he “knows or suspects” that a person receiving the training or instruction intends to use the skills for terrorist purposes.

56. University teachers have expressed concern about the breadth of this offence.⁴⁷ **We consider that, if the offence can be committed by suspecting that the trainee has a terrorist purpose, there ought to be a defence which would protect those who took reasonable steps to report their suspicion to the appropriate authorities. Without such a defence the offence can be committed where a person has reported their suspicion but the relevant authority has failed to act.**

57. **For these reasons and for those given above in paras 35 and 48 we therefore recommend that a “reasonable excuse” or “public interest” defence, to this new offence be included, to make it less likely that offence would be incompatible with Article 10 ECHR.**

Attendance at a place used for terrorist training (clause 8)

58. Clause 8 of the Bill makes it a criminal offence to attend at any place, here or abroad, which is used for terrorist training, and in relation to which the person knows or believes, or could not reasonably have failed to understand, that terrorist training was being provided there.⁴⁸ It is immaterial whether the person concerned receives the instruction or training.⁴⁹ Concern has been expressed about the impact of this offence on the work of journalists and academics.

59. **Criminalising mere attendance at a place used for terrorist training appears to us to be disproportionate, and in order to be compatible with Article 10 ECHR we consider it would be necessary to qualify the scope of the new offence, for example by requiring an intention to use the training for terrorist purposes.**

Proscription (clauses 21 and 22)

60. Clause 21 of the Bill would extend the grounds for proscribing organisations under the Terrorism Act 2000 so as to include organisations whose activities include the unlawful glorification of the commission or preparation of acts of terrorism, or are carried out in a

47 Appendix 8

48 Clause 8(1) and (2)

49 Clause 8(3)(a)

manner that ensures that the organisation is associated with statements containing any such glorification.⁵⁰ Glorification is defined in the same way as in clause 1.

61. Extending the power to proscribe in the way proposed raises the very same compatibility issues as the proposed new offence of encouraging and glorifying terrorism in clause 1: in particular, whether the definition of the new grounds for proscription are too vague and imprecise to satisfy the requirement that interferences with the right to freedom of expression and (in the case of proscription) association be both prescribed by law and proportionate.

62. The interference with freedom of expression through a prior restraint demands a very high level of justification, as has long been recognised in the common law of libel.⁵¹ The European Court has emphasised that prior restraints upon expression require the most careful scrutiny.⁵² The same applies to freedom of assembly. The fundamental problem with prior restraint is that self-censorship is required in order to avoid prosecution, and this particularly applies to the proscription of organisations.⁵³

63. In our view extending the grounds of proscription to cover organisations glorifying acts of terrorism is unlikely to be compatible with the right to freedom of expression in Article 10 ECHR or the right to freedom of association in Article 11 ECHR for the same reasons as those given above in relation to the proposed new offence of encouraging and glorifying acts of terrorism. If our recommendations concerning the proposed offence of glorification are accepted, this concern would be addressed.

Pre-charge detention (clauses 23 and 24)

64. Clauses 23 and 24 of the Bill introduce significant changes to the current regime governing pre-charge detention of those arrested on reasonable suspicion of being a terrorist. In the Bill as introduced the maximum period of detention without charge was extended from 14 days to three months, with a requirement that each period of extension had to be for seven days unless the application asked for a shorter period or the court authorising the extension was satisfied that there were special circumstances meaning that the extension of seven days was inappropriate. Amendments made at Commons report stage reduced the maximum period of detention from three months to 28 days, removed the requirement for the court to be satisfied that the circumstances making it inappropriate to grant an extension for seven days be “special”, and made it a requirement that extensions beyond 14 days be approved by a High Court judge (or, in Scotland, a judge of the Court of Session).

50 Clause 21, inserting new s. 5A–5C in the Terrorism Act 2000

51 See *Gatley on Libel and Slander* (9th ed, 1998), para. 25.6

52 See *Sunday Times v UK (No 2)* (1991) 14 EHRR 229; *Wingrove v UK* (1996) 24 EHRR 1

53 See *R v Secretary of State for the Home Department, ex parte Kurdistan Workers' Party & Ors* (2002) ACD 99

Evolution of the law on pre-charge detention in terrorist cases

65. The Prevention of Terrorism Act (Temporary Provisions) Act 1984 provided for detention without charge for up to seven days without judicial authorisation. In 1988 this was held by the European Court of Human Rights to violate the right to be brought promptly before a judge under Article 5(3) ECHR.⁵⁴

66. The UK derogated from Article 5(3) in order to keep its period of seven day pre-charge detention. In 1993 that derogation was upheld by the European Court of Human Rights as being strictly required by the exigencies of the situation.⁵⁵

67. The Terrorism Act 2000 kept the period of pre-charge detention in terrorism cases at seven days, but introduced judicial control over the period of detention, which enabled the UK to withdraw its derogation from Article 5 ECHR.

68. The Criminal Justice Act 2003 extended the maximum period of pre-charge detention from seven to fourteen days, again subject to judicial authorisation.⁵⁶

The current position

69. Under the present law (Terrorism Act 2000), a person who has been arrested on reasonable suspicion of being a terrorist⁵⁷ can be detained by police for up to 48 hours from the time of their arrest.⁵⁸ Their detention is periodically reviewed by a review officer, with the first review as soon as reasonably practicable after arrest and subsequent reviews at intervals of not more than 12 hours.⁵⁹ A review officer can authorise continued detention only if satisfied that one of the grounds for continued detention exists. The grounds for such continued detention include that it is necessary to obtain relevant evidence, whether by questioning him or otherwise, and to preserve relevant evidence.⁶⁰ The review officer must also be satisfied that the investigation in connection with which the person is being detained is being conducted diligently and expeditiously.⁶¹ The detained person, or their solicitor, is entitled to make representations to the review officer before he or she decides whether to authorise continued detention.⁶²

70. The police can apply to a designated District Judge (Magistrates' Court) for a "warrant of further detention".⁶³ Such a warrant shall authorise the further detention of the detainee for a specified period up to a maximum of seven days from the time of his or her arrest⁶⁴

54 *Brogan v UK* (1989) 11 EHRR 117

55 *Brannigan and McBride v UK* (1994) 17 EHRR 539

56 S. 306 Criminal Justice Act 2003

57 Under s. 41(1) Terrorism Act 2000

58 S. 41(3)

59 Terrorism Act 2000, Schedule 8, para. 21

60 *ibid.*, para. 23(1)(a) and (b)

61 *ibid.*, para. 23(2)

62 *ibid.*, para. 26(1)

63 *ibid.*, para. 29

64 *ibid.*, para. 29(3)

and the period specified in such a warrant can be extended and further extended by a court up to a maximum of 14 days from the time of arrest.⁶⁵ The judge may only issue a warrant of further detention, or extend or further extend a warrant, if satisfied that there are reasonable grounds for believing that the further detention is necessary to obtain relevant evidence, whether by questioning him or otherwise, or to preserve relevant evidence, and that the investigation is being conducted diligently and expeditiously.⁶⁶ A person must be released straight away if at any time the reason for his detention ceases to apply before the extension is at an end.⁶⁷

71. There are certain procedural safeguards for the detainee in the process of obtaining or extending a warrant of further detention. They are required to be given notice of the fact that an application for a warrant of further detention has been made, the time at which it is to be heard and the grounds upon which further detention is sought.⁶⁸ They are also to be given an opportunity to make oral or written representations to the judge and are entitled to be legally represented at the hearing.⁶⁹

72. However, the safeguards are also subject to some important limitations. The judge hearing the application for a warrant of further detention, for example, has a very broad discretion to exclude the detainee and his representative from any part of the hearing.⁷⁰ The grounds on which such exclusion can be justified are not specified. There is also power for the judge, on application by the police, to order that specified information upon which the police intend to rely be withheld from the detainee and his representative,⁷¹ if satisfied that there are reasonable grounds for believing that if the information were disclosed it would have one of a number of specified consequences, such as interfering with or harming evidence of an offence, hindering the recovery of property, hindering the apprehension, prosecution or conviction of other terrorist suspects, and making more difficult the prevention of an act of terrorism.

The effect of the Bill

73. The Bill as introduced made three significant changes to the regime for pre-charge detention for terrorist suspects:

- (1) it increased the maximum period of pre-charge detention for terrorist suspects from the current limit of 14 days to 3 months;⁷²
- (2) whereas at the moment extensions, on judicial authority, can be for *anything up to* seven days at a time (up to a maximum of 14 days), the Bill provided that each period of judicially authorised extension *must be* for seven days unless satisfied that

65 *ibid.*, para. 36(3A), inserted by the Criminal Justice Act 2003, s. 306

66 *ibid.*, para. 32(1)

67 *ibid.*, para. 37

68 *ibid.*, para. 31

69 *ibid.*, para. 33(1)

70 *ibid.*, para. 33(3)

71 *ibid.*, para. 34

72 Clause 23(5)

there are special circumstances which would make it inappropriate to detain the suspect for a further seven days;⁷³

(3) it added to the grounds for extending detention, by making it a ground on which a warrant may be extended “pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence”.⁷⁴

As noted above, amendments made at Commons report stage reduced the maximum period of pre-charge detention to 28 days and removed the requirement that a judicial authority be satisfied that circumstances which might make it inappropriate to extend a period of detention by a further seven days be “special”.

The human rights implications

74. This part of the Bill engages three overlapping aspects of the right to liberty in Article 5 ECHR:

- i. the requirement in Article 5(1) that deprivation of liberty must be “in accordance with a procedure prescribed by law” and “lawful”, which imports a requirement that the detention must be neither arbitrary nor disproportionate;
- ii. Article 5(2) ECHR, the right of an arrested person in Article 5(2) ECHR to be informed “promptly” not only of the reasons for his arrest but also “of any charge against him”; and
- iii. the right of a person arrested on reasonable suspicion of having committed an offence to be brought promptly before a judge, under Article 5(3) ECHR.

75. The Explanatory Notes to the Bill as introduced stated that the Home Office had concluded that detention under the Bill was compatible with Article 5 because further extension of detention was at the discretion of a judicial authority, and the person had to be released straight away if the reason for his detention ceases to apply.⁷⁵

76. The written evidence we received from the Home Office in response to our call for evidence went a little further than the Explanatory Notes to the Bill. It said (in Annex A) that clauses 23 and 24 were judged to be compatible “in the absence of European Court jurisprudence on the length of time for which a person may be detained pending charge.”

77. The justifications relied on by the Government for extending the maximum period of pre-charge detention to three months were summarised in a document annexed to the letter dated 15 September from the Home Secretary and in a memorandum dated 6 October 2005 from Assistant Commissioner Andy Hayman.

73 Clauses 23(3)–(5)

74 Clause 24(1)

75 EN para. 174

78. The case for change which is made in those documents, in short, was that the threat from international terrorism is now so completely different, particularly in the magnitude of the potential harm and the indiscriminate nature of the targets, that public safety demands earlier intervention, with the result that there is less time available for investigation and evidence gathering prior to arrest. This means that in some extremely complex cases “evidence gathering effectively begins post-arrest”. A longer period of pre-charge detention is therefore required in order to enable that evidence-gathering to take place.

79. In addition, there are said to be a number of features of modern terrorism which require the possibility of a longer period of pre-charge detention, such as its international nature, which requires enquiries to be undertaken in many jurisdictions, the frequent use of false identities, the need to employ interpreters, the need to decrypt large numbers of computer hard drives and to analyse the product as well as disclose prior to interview, the need to make safe premises where extremely hazardous material may be found, the need to obtain and analyse communications data from service providers, the need to allow time for religious observance by detainees, and the fact that suspects often use one firm of solicitors which causes delay in the process.

80. We also heard oral evidence on this important issue from Deputy Assistant Commissioner Peter Clarke, Head of the Metropolitan Police Anti-Terrorist Branch, and Chief Constable Ken Jones representing the Association of Chief Police Officers which has been pressing for the change. In their evidence, in addition to the operational reasons for the extension already summarised above, they stressed that the threat from international terrorism was fundamentally different from the type of terrorist threat faced by the UK in the past, in particular in that “we now have people prepared to use suicide as a weapon and an ideological motivation”, and the terrorist organisation the police are dealing with is shapeless, amorphous and constantly changing.⁷⁶ They also emphasised that the existing powers are only used in the most serious of complex cases,⁷⁷ that the new extended period would only be used very selectively and very carefully, “in the most exceptional circumstances”,⁷⁸ and that there was no intention on the part of the police to take their time with the investigation just because they had more time: “we desperately hope to resolve them inside the seven days never mind the 14 days or beyond”.⁷⁹ They disagreed that the problem was one of resources: although more resources would help, they could not solve the problem entirely, because there was an irreducible amount of sequencing involved in any complex investigation, involving discrete stages in the collection, retrieval and analysis of information which then has to be incorporated into an effective interview strategy for the detainee.⁸⁰

81. As far as alternatives to extended detention were concerned, the police saw a number of problems with bringing lesser charges and then continuing to investigate more serious

76 Q 61

77 Q 63

78 Q 84

79 Q 67

80 QQ 70 and 72

offences, including the possibility that a less serious charge might not be available, the risk of bail being granted and the regime governing investigation post-charge.⁸¹ They regarded the control order regime as a useful complement for pre-charge detention, not a substitute,⁸² because “the degree of control afforded by a control order might not always be appropriate”.⁸³ Although minded in principle to endorse the use of intercept material as evidence, the risks and difficulties of doing so “within the current legal landscape” remained too great so that at present the police remained uncomfortable about the use of such evidence at trial and preferred the status quo of prohibition, though they hoped to have made progress on this by the end of the year.⁸⁴

82. Lord Carlile, the independent reviewer of the operation of the terrorism legislation, lends considerable support to the case put forward by the police for an extension to 90 days. He has reported that he is personally aware of “several operations” in which arresting early in terrorist cases, in order to avoid the possibility of the terrorists carrying out their acts with dreadful consequences, has led to problems gathering enough evidence after arrest to be able to charge at all, or at the appropriate criminal level.⁸⁵ He also reports that the evidential issues requiring prolonged attention in terrorism cases had been demonstrated to him by the police in England and Wales as “real problems”, and that he is “satisfied beyond doubt that there have been situations in which significant conspiracies to commit terrorist acts have gone unprosecuted as a result of the time limitations placed on the control authorities following arrest”.⁸⁶ He concluded that as a *maximum* three months is “probably a practicable and sensible option, all other things being equal.” His main concern was with the adequacy of the safeguards for the suspect against arbitrary or over-long detention.

83. By contrast, none of the NGOs from which we received or heard evidence considered the case to have been made out for the proposed extension of pre-charge detention. Liberty accepted that there may be circumstances where the police feel they need to act sooner against suspects because of the nature of the offences they are dealing with,⁸⁷ but considered that more appropriate and proportionate ways of meeting the police’s concerns are available, including by providing the police and security services with additional resources, relaxing the ban on the admissibility of intercept evidence, bringing lesser charges while continuing to investigate more serious terrorist allegations, amending the PACE Codes to allow interviews to take place after charge where new forensic evidence becomes available and there are legitimate questions to put to a suspect, and introducing conditional bail to enable stringent conditions to be attached to police bail in terrorism cases. They were also concerned that the justifications relied on by the police apply equally

81 Q 76

82 Q 77

83 Q 79

84 Q 77

85 *Proposals by Her Majesty’s Government for changes to the laws against terrorism*, Report by the independent reviewer Lord Carlile of Berriew Q.C., October 2005 at para. 58

86 *ibid.*, para. 61

87 Q 122

to other types of criminal investigation. The Law Society had similar concerns and was also opposed to any extension of the period of pre-charge detention.

84. Professor Walker considered the justifications offered for an increase in the maximum period of pre-charge detention and concluded that “a proportionate case is not made out”.⁸⁸ He accepted that there were operational difficulties faced by the police, but pointed to the lack of evidence that the problems relied on by the police have prevented prosecution in any given case. He argued that while there may have been a quantitative change since October 2003 when the period was last extended to 14 days, placing a greater strain on police resources, there had not been any significant change in qualitative terms: all the reasons now relied on by the police as reasons for the extension were also relied on in the debate in October 2003 for the extension from seven to 14 days.⁸⁹ He also claimed that there is a lack of proportionality between the claim of a need for three months’ detention and the progress in actual cases to date. Professor Walker advocated use of a combination of control orders, to enable further evidence-gathering to proceed whilst the suspect is subject to severe restrictions on their liberty, the use of lesser charges to enable questioning to continue in relation to possible more serious charges, looking at the bail provisions with a view perhaps to having a presumption against bail in terrorism cases, and devising a procedural mechanism for post-charge questioning in the form of a judicially managed examination, modelled on the procedure in the Explosive Substances Act 1883, where a suspect is brought before a court for further questioning, but the function of the judge is not to become an investigator but to umpire the questioning of the suspect.⁹⁰

The period of detention

85. As the Government correctly notes, there is no European Court of Human Rights jurisprudence setting a clear limit on the length of time for which a person may be detained pending charge. The constraints in the European Court’s Article 5 case-law are derived from the requirements that a person be informed “promptly” after his arrest of any charge against him, and that the detention not be disproportionate, and regulated by sufficient safeguards to ensure that the detention is not arbitrary. However, we note that in many cases the European Court has found violations of Article 5 in cases of detention for periods less than 14 days.

86. Other constraints on the length of pre-charge detention derive from other substantive guarantees in the Convention, including the right not to be subjected to inhuman and degrading treatment in Article 3, and the right to a fair hearing in Article 6(1). Some respondents to our call for evidence have pointed out possible human rights concerns which might arise as a result of such a long period of pre-charge detention. For example, it has been suggested that such a lengthy period of police custody may lead to detainees suffering inhuman and degrading treatment given the inappropriateness of police custody facilities holding detainees for lengthy periods. The police in their oral evidence accepted that the facilities available to the police are not suitable for such a lengthy period of

88 Appendix 27, para. 4.6.1

89 QQ 163 and 165

90 Q 168

detention and recommended that any detention beyond 14 days should be in prison.⁹¹ It has also been suggested in evidence to us that statements obtained from suspects who have been detained for interrogation for a period much longer than the current maximum of 14 days are increasingly likely to be regarded as unreliable by courts and therefore excluded under s. 78 of the Police and Criminal Evidence Act. Again, the police in their evidence very fairly accepted that the longer a person has been in custody the greater the risk that any statement by them will be regarded as unreliable by the courts.⁹² However, the likelihood of this happening is tempered by the reality of a lack of co-operation from such individuals and the advice from Lord Carlile who says:

“Those arrested in groups often share the same solicitors, usually drawn from a narrow circle of firms with special expertise and experience in terrorist crime. Those solicitors are generally very professional, skilled and analytical ...”⁹³

However, he goes on to say “the reality is that most suspects exercise their right of silence in interview”.⁹⁴

87. In relation to the Bill as introduced, on the important question of whether a maximum pre-charge detention period of 90 days would be compatible with the UK’s obligations under the Convention (notably Article 5), we concluded that three months would have been clearly disproportionate and, in view of the deficiencies in the procedural safeguards for the detainee, which the Bill did nothing to improve, would also have been accompanied by insufficient guarantees against arbitrariness. It would also in our view have risked leading to independent breaches of Article 3 ECHR, and to the inadmissibility at trial of statements obtained following lengthy pre-charge detention. Similar, if less substantial risks obtain, in our view, even in relation to the 28-day maximum period now allowed for in the Bill.

88. We recognise that there will be a very wide range of views in Parliament and beyond as to the cogency of the justifications put forward by the police in their written and oral evidence, and on the acceptability of varying maximum periods of detention, including the 28 days now in the Bill. We accept that a longer period than the current 14 day limit is in principle capable of justification by the sorts of considerations put forward in the evidence from the police, concerning the volume and complexity of the evidence in modern terrorist cases, and the different nature of the threat from terrorists today compared to in the past. The police have the difficult task of investigating actual and potential terrorist offences and due regard must be given to their evidence about the nature of the threat and the means needed to tackle it. However, it is, of course, ultimately for Parliament and the Courts to decide whether the means proposed are proportionate to the legitimate aim pursued.

89. The Convention’s protection of liberty as a fundamental value in a democratic society prescribes the framework in which the assessment of such evidence should take place. Starting from a presumption in favour of liberty, which is central also to the common law

91 Q 65

92 Q 66

93 Proposals by Her Majesty’s Government for Changes to the Laws against Terrorism, op cit., 6 October 2005, p.18

94 *ibid.*

tradition, there is a heavy onus on the state to justify, by clear evidence, any measure which reduces liberty. We therefore consider it to be our task to subject the justifications offered to stringent scrutiny. **We note that the Commons Home Affairs Committee has begun an inquiry into terrorism detention powers, including the police case for an extension of the maximum period. We are willing to co-operate with them on it.**

90. In our view, the most important evidence capable of justifying an extension of the current maximum of 14 days would be firm statistical evidence demonstrating the number of actual cases in which the current 14 day limit had either prevented charges from being brought at all, or required the police to bring the wrong or inappropriate charges. The police in their oral evidence, when pressed to provide statistics or examples of cases where they felt particularly under pressure after the 14 days and would have liked longer, said “there are numerous cases, many dealing with the decryption of data and the exploitation of computer material, where we would have liked to have longer”.⁹⁵ Mr. Clarke very fairly said “I cannot sit here and say X number of terrorists have evaded justice because of the lack of provision”⁹⁶ and Mr. Jones similarly said “it is a good question and I tried to have some work done on this, ... it is such a small number of cases that we are talking about ... and we are hopefully dealing with a tiny number of cases in the future, but the statistical rigour that might perhaps bolster this is pretty difficult to give you. We did try very hard to do that but without delving into some very difficult cases it is hard to explain”.⁹⁷ There was no clear statistical evidence in Lord Carlile’s recent report.⁹⁸ It is clear that we are not dealing with a numerically large or statistically significant number. Such cases will continue, hopefully, to be rare. As such we have to rely on the qualitative analysis of such difficulties as relayed to us by the police and the Crown Prosecution Service.

91. We were therefore unable to find the concrete evidence for which we were looking in the material provided or the answers given. We also found persuasive the evidence of those who suggested that there were alternative means of achieving the police’s objective, without extending the period of pre-charge detention, in particular by the use of a combination of lesser charges (carrying a likelihood of remand in custody) and control orders, and relaxing the restriction on post-charge questioning, with appropriate safeguards, all of which would enable the police to continue their investigations without prejudicing public safety.

92. Recognising that this is a matter on which the relevant legal standards are not very concrete, but bearing in mind the heavy onus of justification on the state where it is depriving of liberty, in our view the proportionality case for any increase from the current 14 day limit has not so far been made out on the evidence. We do not, however, rule out the possibility that such evidence might be produced which would persuade us that a proportionate extension of the maximum period of detention would be justified,

95 Q 67

96 Q 74

97 *ibid.*

98 We also note the Annual Report of the Interception of Communications Commissioner for 2004, which states that the use of information security and encryption products by terrorist and criminal suspects is not as widespread as had been expected (*Report of the Interception of Communications Commissioner for 2004*, HC 549, SE/2005/203)

subject to the necessary improvements in procedural safeguards for the detainee being made.

The adequacy of the safeguards for the detainee

93. The longer the possible period of pre-charge detention, the more important are the procedural safeguards for the detainee to guarantee against arbitrary or disproportionate detention. When the maximum period was increased from 7 to 14 days in the Criminal Justice Act 2003, our predecessor Committee drew attention to the deficiencies in those safeguards and warned of the potential for a lack of fairness in the decision-making system and consequent risk of a violation of Article 5(1) ECHR.⁹⁹ That warning was not heeded by the Government. There has been no amendment of the relevant provisions of Schedule 8 of the Terrorism Act 2000 which prescribe the procedure for judicial authorisation of extended detention.

94. Lord Carlile in his recent report doubted the ECHR compatibility of the current procedural safeguards for the detainee given the length of extended detention which is now envisaged. In his view, the existing procedure for judicial scrutiny by district judges of applications to extend detention periods was suitable for short interferences with liberty, but would not be adequate for longer periods. He said:¹⁰⁰

“Inevitably the material they see is likely to be one-sided, and they have only modest opportunity for in-depth scrutiny. Though they can ask questions and do seek further information, they have no role in the inquiry under way and they have no independent advice or counsel before them. ... A more searching system is required to reflect the seriousness of the State holding someone in high-security custody without charge for as long as three months.”

95. Amnesty in its evidence made the similar point that judicial scrutiny of extensions is simply a review of the reasons adduced by the police of the need for such extension, and it is already not particularly onerous for the police to convince the judiciary of the need for an extension of detention. Professor Walker similarly told us that an English judge will find it difficult to gainsay what the police say about the exigencies of the investigation. The police in their evidence to us could not bring to mind a case where an application for an extension had been totally refused, although they said that it was very often the case that the district judge would reduce the amount of time that they were asking for, for example from four or five days to 48 hours.¹⁰¹

96. If there is to be any extension of the maximum period of pre-charge detention beyond the current 14 days, the question therefore arises as to what protections there ought to be, in the way of procedural safeguards for the detained person. In our view any further increase beyond 14 days will require the procedural deficiencies in the current regime to be addressed in order to avoid incompatibility with Article 5 ECHR. The Home Secretary said

99 Eleventh Report of Session 2002–03, *Criminal Justice Bill: Further Report*, HL Paper 118, HC 724

100 *op cit.* at para. 64

101 Q 80

that the Government was sympathetic to the point that the judicial scrutiny of the period of detention should be supervised by a higher level judge than a district judge,¹⁰² and, as noted above, amendments to the Bill made at Commons report stage now require extensions of detention beyond 14 days to be made by a High Court judge. This is some improvement on the current position, but it does not in our view meet the substance of this concern about the adequacy of the procedural safeguards for the detainee.

97. Lord Carlile suggested that for the system of protection for the detained person to be sufficiently strong was likely to require a shift to a more investigative approach of the kind first envisaged in the Newton Report.¹⁰³ As Lord Carlile envisaged it, this would involve a security-cleared judge with power to require specific investigations to be pursued, a suitable opportunity for written and oral defence representations against extended detention, and the use of a special advocate to make representations on the interests of the detained persons and to assist the judge.¹⁰⁴

98. The Home Secretary indicated that this was not a realistic possibility, because although he personally thought there was a lot to be said about an investigating judge regime rather than the current adversarial system, there was considerable disagreement within Government about shifting to an inquisitorial regime for terrorist cases.¹⁰⁵ Most of the NGOs were also opposed to the idea. The Law Society, Liberty and JUSTICE were all opposed to establishing a judicial role in the investigation of terrorist crime. One of the principal grounds offered for opposing the suggestion is that this would represent a major change from the UK's adversarial system. This does not seem to us to be enough of a reason to reject the possibility that there may be scope to devise a novel procedure borrowing elements from the investigating judge model used in some European countries. We note, however, some of the concerns expressed about such a model, in particular the lack of training available for judges on how to conduct investigations, and the appropriateness of deploying a special advocate in a case where personal liberty is at stake.¹⁰⁶ **We intend to return to the question of the possible use of investigating judges in terrorism cases in a later report.**

99. **In the meantime, bearing in mind that what is at stake is individual liberty, in our view, any increase beyond the current 14 day maximum would at the very least require amendment of the relevant provisions of the Terrorism Act 2000 which currently enable detention to be extended in the absence of the detainee or his or her legal representative and on the basis of material not available to them.¹⁰⁷ These two procedural deficiencies should be remedied. We consider that there should be nothing less than a full adversarial hearing before a judge when deciding whether further detention is necessary, subject to the usual approach to public interest immunity at criminal trials, including when necessary the use of a special advocate procedure when**

102 Q 33

103 *op cit.* at para. 65

104 *op cit.* at para. 67

105 Q 33

106 See the concerns expressed by JUSTICE at Q 141

107 Paras 33(3) and 34(1) and (2) of Schedule 8 to the Terrorism Act 2000

determining whether a claim to public interest immunity is made out. Such safeguards would make it much less likely that the UK would be found in breach of the right to liberty guaranteed in Article 5 of the Convention.

100. Furthermore, in order for the safeguards to be adequate, the provision in the Bill for, in effect, a presumptive minimum of 7 day extensions also requires deleting. The presumption should be in favour of liberty not detention. The court which authorises further detention should have an unfettered discretion to decide the period of the extension (within the limit), as it does under the current law. We welcome amendments made at Commons report stage to provide for this and also to meet our concern that the correct level of judge to decide these issues is a High Court judge.

101. We consider that these issues surrounding an extension of pre-charge detention are an illustration of avoiding the damages of counter-productivity to which we refer in paragraph 9.

102. We would wish a higher level of police officer to be responsible for the application to the judge, such as an Assistant Chief Constable or Chief Constable.

The additional ground for extension

103. In our view, the new ground for extending detention does not of itself raise any human rights issues. It is already a ground for extending detention that there are reasonable grounds for believing that further detention is necessary to obtain relevant evidence whether by questioning him or otherwise, and the new ground appears to us to be no more than a sensible clarification of the existing ground to cover cases where evidence has not yet been obtained because of a process which is being conducted.

3 Deportation and Exclusion

Introduction

104. The Government has indicated four significant changes of approach in the exercise of its powers of exclusion and deportation.

105. First, the Home Secretary has published a new list of “unacceptable behaviours” indicating some of the circumstances in which he will exercise his power to exclude or deport an individual on the grounds that their presence in the UK is not conducive to the public good. The change of approach is retrospective in the sense that behaviours exhibited before publication of the list can be the basis for exercise of the power. The Home Office in conjunction with the FCO and the Intelligence Agencies are compiling a database of individuals around the world who have already demonstrated the relevant behaviours who will be considered for exclusion by the Home Secretary. A list of specific extremist websites, bookshops, networks, centres and particular organisations is also being drawn up, active engagement with which by a foreign national in the UK will be a basis for the Home Secretary to consider deportation.

106. Second, the Government has indicated this new list of unacceptable behaviours will be a basis for the use of powers it is taking in the Immigration, Asylum and Nationality Bill, to deprive individuals of British citizenship, to deprive individuals of the Right to Abode, to deny individuals previously able—in fact entitled—to claim British citizenship by registration of such citizenship. The test for the use of such powers will be (and in some cases the test has been reduced to) a low one of conduct not conducive to the public good. While we cover these aspects in more detail in Chapter 4, it is important to note the read across from the list of unacceptable behaviours. Individuals subject to these powers will in most cases subsequently be liable for deportation for conduct covered by the list of unacceptable behaviours. Indeed a British citizen with dual nationality may be stripped of citizenship (or a settled Commonwealth citizen be deprived of the right of abode) and then deported for the same act falling within the list of unacceptable behaviours.

107. Third, in relation to deportation, both the Prime Minister and the Home Secretary have indicated that the power to deport will be exercised on the basis of assurances from the receiving country that deportees will not be subjected to torture or ill-treatment contrary to Article 3 ECHR, and that such Memoranda of Understanding are being discussed with ten countries. On 10 August a Memorandum of Understanding with the Government of Jordan was signed and on 18 October another was reached with Libya. Discussions with Algeria and Lebanon are said to be at an advanced stage. Ten individuals have been detained with a view to deportation pursuant to this change of approach.

108. Fourth, the Government has sought, and been granted, leave to intervene in a Dutch case which is pending before the European Court of Human Rights, in which the Government will ask the Court to revisit its decision in *Chahal v UK* “in the light of current circumstances”, in effect to reverse it by preferring the approach of the minority in that case. The minority in *Chahal* held that States are entitled under Article 3 to balance the

extent of the potential risk of ill-treatment of the deportee on the one hand against the threat to their national security on the other. In other words, on the minority's view, a state is entitled to expel an individual on national security grounds even where there is a substantial risk of torture or ill-treatment in the receiving country.

The New List of “Unacceptable Behaviours”

109. The Home Secretary has the power both to exclude and to deport from the UK non-UK nationals on the grounds that their presence in the UK is not conducive to the public good.¹⁰⁸ On 20 July 2005 the Home Secretary announced that these powers “need to be applied more widely and systematically”. In particular, he said that in the circumstances we now face, he had decided that it was right to broaden the use of these powers to deal with those who foment terrorism or seek to provoke others to terrorist acts. He therefore intended to consult on an indicative list of “unacceptable behaviours” which would fall within this.

110. On 5 August 2005 the Home Secretary published his consultation paper, containing the proposed list. The consultation paper explains that the Home Secretary's powers to exclude or deport on “non-conducive to the public good” grounds have been exercised in the past against those the Government considers represent a direct threat to national security, public order or the rule of law in the UK, or the UK's good relations with a third country, and those involved, or suspected by the Government to have been involved, in war crimes or crimes against humanity. The Home Secretary's intention was to broaden the exercise of these powers to those who represent an indirect threat under the same categories, in particular those who foment terrorism or seek to provoke others to terrorist acts. The proposed list indicates the sorts of unacceptable behaviours which demonstrate such an indirect threat.

111. On 23 August the Home Secretary announced the outcome of the consultation and published the final list of unacceptable behaviours.

112. The Home Secretary's power to exclude or deport from the UK on the ground that a person's presence in the UK is not conducive to the public good is an extremely broad power. Particularising behaviours which will be regarded as being “not conducive to the public good” is in principle to be welcomed from a human rights perspective as capable of enhancing legal certainty about the exercise of a very broadly worded power capable of interfering with a number of different human rights.

113. The behaviours listed all concern the expression of views and therefore engage the right to freedom of expression in Article 10 ECHR, as the Home Secretary himself acknowledges. The main compatibility issues raised by the new list of unacceptable behaviours are firstly whether those behaviours are defined with sufficient precision to satisfy the “prescribed by law requirement” in Article 10, bearing in mind the likely impact on freedom of expression, and, secondly, whether such limits on free expression, however

¹⁰⁸ The power to deport is a statutory power under the Immigration Act 1971; the power to exclude is a prerogative power

tightly defined, are not disproportionate and therefore incompatible with Article 10 on the grounds of disproportionality.

114. Two outcomes of the consultation are to be particularly welcomed in this respect. First, the Home Secretary removed from the final list the phrase which made determinative the Government's subjective view of the effect of certain views being expressed.¹⁰⁹ Second, the Home Secretary removed from the final version the extremely vague reference to "what the Government considers to be extreme views that are in conflict with the UK's culture of tolerance". The Home Secretary explained that on reflection it was accepted that this does not fit within the intended scope of this list.

115. In our view, these changes to the list following consultation addressed two of the most significant concerns about the original list's compatibility with Article 10 ECHR. Two significant compatibility concerns remain however.

116. The first concern is whether the phrase "fomenting, justifying or glorifying terrorist violence in furtherance of particular beliefs" is sufficiently precisely defined, bearing in mind the likely impact on legitimate public debate about the causes of terrorism, and therefore on freedom of expression. As we reported above in relation to the proposed new offence of encouragement of terrorism, it is clear from the Strasbourg case-law that restrictions on indirect incitement to commit terrorist acts is not in principle incompatible with the right to freedom of expression in Article 10 ECHR. Compatibility with Article 10, however, will depend on the precise wording of the restriction in question, and in particular whether it is sufficiently precisely defined to ensure that it does not disproportionately stifle legitimate debate.

117. The phrase "fomenting, justifying or glorifying terrorist violence" on the list of unacceptable behaviours justifying deportation in our view suffers from the same legal uncertainty as afflicts the criminal offence of encouragement and glorification in clause 1 of the Bill. Fomenting is probably sufficiently certain in its own right, carrying with it as it does connotations of deliberate incitement or stirring up. "Justifying" or "glorifying", however, have no such clear meaning. The reasons why the term "glorify" does not satisfy the requirements of legal certainty are set out above in the context of clause 1 of the Bill and in our view apply equally here. "Justifying" terrorist violence, however, is not part of the offence of encouragement of terrorism, but it is part of the list of unacceptable behaviours. On the face of it, it appears to be much broader in scope than any of the terms used in clause 1. The Home Secretary's distinction,¹¹⁰ in the context of clause 1, between encouraging and glorifying on the one hand and explaining or understanding on the other, cannot apply to the term "justify", since explaining or understanding can be seen as a form of justifying. In addition to the vagueness of the notions of justifying and glorifying, the list of unacceptable behaviours uses the definition of "terrorism" which has been criticised above for being too broad.¹¹¹

¹⁰⁹ The consultation paper version referred to the expression of views "which the Government considers" foment terrorism etc. The omission of these words suggests that an objective standard is to be applied.

¹¹⁰ HC Deb, 26 October 2005, col. 336

¹¹¹ See paras. 12 and 13 above

118. The Home Secretary has indicated that there is a case for consistency between the precise wording used in the list of unacceptable behaviours and that used in the new offence of encouragement and has undertaken to look at the relationship between the two wordings when the Terrorism Bill has received Royal Assent.¹¹² **While we welcome this undertaking, we believe that the unacceptable behaviours wording should be immediately amended to render it legally certain and less broad. As noted in paragraph 106 above, any such modification will also have a key role in the application of powers to deprive persons with dual nationality of British citizenship, or others their right of abode. Without such a modification there is a high risk that the application of this part of the list of unacceptable behaviours will be in breach of Article 10 ECHR and the use of other powers based on the application of the list will cause further breaches of ECHR rights.**

119. The second compatibility concern arises from the retrospective application of the new list of unacceptable behaviours, i.e. to the expression of views before the list came into effect. The “prescribed by law” requirement in Article 10 requires the applicable law to have the qualities of accessibility, foreseeability and predictability, to enable individuals to know the consequences for them of their behaving in particular ways. **If the retrospective application of the new list of unacceptable behaviours leads to the deportation of individuals for views expressed before the publication of the new list, and in circumstances in which the power has never previously been exercised, there is a serious risk that such exercise of the power will be incompatible with the prescribed by law requirement in Article 10 ECHR. We therefore urge the Home Secretary immediately to make clear that such questionable retrospective application will not be implemented.**

Deportation on the Basis of Diplomatic Assurances

Background

120. Since December 2004 the Government has been actively seeking Memoranda of Understanding with certain foreign Governments. An agreement with Jordan was reached in August. Another was reached with Libya on 18 October 2005. According to the Home Secretary’s evidence, negotiations with Algeria and several other Governments have progressed significantly and it expects to be in a position to make further announcements very shortly.¹¹³

121. Since 7 July the Government has arrested a number of individuals, including reportedly all of the so-called Belmarsh detainees previously held under the ATCSA 2001, with a view to their deportation when Memoranda of Understanding have been finalised with the relevant countries. The Home Secretary told us that he has so far detained six people where a memorandum of understanding has been signed with their government, and 17 where such a memorandum of understanding had not yet been formally signed. Lord Carlile has questioned the legality of detaining individuals with a view to deporting

112 Q 43

113 Appendix 4, para. 10; Q 49

them when Memoranda of Understanding are concluded.¹¹⁴ The Home Secretary told us that the basis of the detention of the 17 was that the Government is “imminently going to be able to sign such a memorandum of understanding ... in those cases” and that “we are at an advanced stage of negotiations and/or discussions.”

122. This issue is therefore one of the most pressing as action is already being taken to implement the new approach in respect of a number of individuals who are currently being detained and who face deportation to countries where there is a risk of torture. It is also an issue on which public debate has become polarised. JUSTICE, Amnesty, the Law Society, Human Rights Watch, Redress and the Medical Foundation for the Care of Victims of Torture all express their “serious concerns” over deportations on the basis of diplomatic assurances, primarily on the ground that they circumvent the absolute obligation of *non-refoulement*, that is, not to return people to countries where there is a substantial risk that they will be tortured. JUSTICE criticise the Memorandum of Understanding with Jordan as providing no effective protection for the rights of the returned person, and doubt that a British court would accept as a sufficient guarantee assurances from countries where there is evidence of the repeated use of torture by the authorities. Amnesty says that such assurances are not worth the paper they are written on because the Governments concerned have demonstrated that they do not take their obligations under multilateral treaties seriously. The Home Secretary, on the other hand, argues that those concerned about human rights “ought to welcome our conclusion of memoranda of understanding with these countries because what will happen as a result of this is a much stronger relationship on precisely the human rights agenda which is concerned.”¹¹⁵

The relevant human rights standards

123. The proposal to deport on the basis of diplomatic assurances engages the UK’s obligation not to return people to countries where there is a real risk of them being subjected to torture or ill-treatment. This is often referred to as the principle of non-refoulement, or the rule against refoulement. In the hierarchy of human rights norms, it is widely recognised as being one of the most fundamental, being an aspect of the universally recognised obligation not to torture.¹¹⁶

124. The obligation is to be found in a number of different treaties. Most relevant for present purposes are Article 3 of the European Convention on Human Rights (“ECHR”) and Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”), as interpreted and applied by the European Court of Human Rights and the UN Committee Against Torture respectively.

¹¹⁴ op cit. at para. 104: “In my view it is of real concern that detention without charge should be reinstated in effect for this group of people unless there is an early and realistic prospect of the relevant MoU being reached presently.”

¹¹⁵ Q 52

¹¹⁶ It is almost certainly recognised as a norm of customary international law, which means that it would be binding on the UK even if the UK had not voluntarily assumed the obligation in various treaties. Customary international law is automatically part of the common law of the UK: it does not require specific legislative incorporation. In 2002, however, in the case of *Suresh v Canada*, the Canadian Supreme Court, while acknowledging the clear position under international law, said “We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified.”

ECHR Standards

125. Article 3 of the ECHR provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

126. Article 3 has long been interpreted by the European Court of Human Rights as imposing on States an obligation not to deport a person where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.¹¹⁷

127. In *Chahal v UK* the European Court of Human Rights had to decide whether this principle applied even in cases where the person concerned posed a danger to the national security of the state which wanted to deport him.¹¹⁸ Because of the importance of the issue the case was decided by a Grand Chamber of the Court (sitting with 19 judges). The deportation order in that case concerned a Sikh separatist leader whom the Home Secretary had decided to deport on the ground that his continued presence in the UK was unconducive to the public good on grounds of national security, including the international fight against terrorism.¹¹⁹

128. The UK Government argued that the guarantees afforded by Article 3 ECHR were not absolute in expulsion cases, but subject to an implied limitation entitling a state to expel an individual to a receiving state even where a real risk of ill-treatment existed, if such removal was required on national security grounds.¹²⁰ The danger posed by the person in question to the security of the host nation, the Government argued, was therefore a factor to be taken into account in determining whether deportation would be in breach of Article 3.

129. The European Court of Human Rights expressly rejected the UK Government’s argument, by a majority of 12 votes to 7.¹²¹ It did not doubt the *bona fides* of the Government’s allegations about the applicant’s terrorist activities and the threat posed by him to national security, but it held that it was not necessary to consider them because they were not a material consideration once substantial grounds had been shown for believing that the applicant would be subjected to ill-treatment if deported. In view of its importance to the debate about the Government’s present proposal, the operative part of the Court’s judgment merits citation in full:

“79. Article 3 enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or

117 See e.g. *Soering v UK* (1989) 11 EHRR 439 at paras 90-91; *Vilvarajah v UK* (1992) 14 EHRR 248 at para. 103

118 (1997) 23 EHRR 413

119 *ibid.* at paras. 25 and 75

120 *ibid.* at para. 76.m The views of the minority are also summarised below, in light of ministerial suggestions that the Government is considering legislating to require UK judges to follow the minority approach and may seek to persuade the European Court of Human Rights to reconsider the majority’s approach.

121 *ibid.* at paras. 79-82

degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and Protocols Nos 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation.

80. The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.”

130. Having held that there is no room under Article 3 for balancing the risk of ill-treatment against the reasons for expulsion, the Court went on to consider whether, in the circumstances of the particular case, there was a real risk of Mr. Chahal being subjected to treatment contrary to Article 3 if he were returned to India.¹²² In support of its argument that there was no real risk of ill-treatment if he were returned,¹²³ the UK Government relied on an assurance obtained by the Home Secretary from the Indian Government in the following terms:

“We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honour to confirm the above”.¹²⁴

131. The Court rejected this reliance on assurances from the Indian Government:

“105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of that Government, the NHRC [National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.”

132. Relying on evidence contained in the US State Department's report on India, the National Human Rights Commission's Report on Punjab, and reports by Amnesty International, attesting to the involvement of the Punjab police in killings and abductions outside their state and alleging serious human rights violations by members of the Indian security forces elsewhere, the Court found, by the same 12–7 majority, that there was a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he were returned to India.

122 *ibid* at paras. 83–107

123 See paras. 88 and 92

124 *ibid.* para. 37

133. The minority of 7 judges on the Article 3 issue disagreed both with the majority's conclusion that Article 3 is absolute, even in cases concerning deportation on national security grounds, and with their conclusion that a real risk of ill-treatment had been substantiated on the evidence. In the minority's view:

“a Contracting State which is contemplating the removal of someone from its jurisdiction to that of another State may legitimately strike a fair balance between, on the one hand, the nature of the threat to its national security interests if the person concerned were to remain and, on the other, the extent of the potential risk of ill-treatment of that person in the State of destination.”

134. The minority of 7 also disagreed with the majority's view about the value of the assurances given by the Indian Government. In the minority's view,

“In light of the Indian Government's assurances and the clear prospect of a domestic and international outcry if harm were to come to him, there would be cogent grounds for expecting that, as a law-abiding citizen in India, he would be treated as none other than that.”

135. The Court's majority decision in *Chahal* has been consistently applied by the Court in subsequent cases.¹²⁵

UNCAT Standards

136. Article 3 of UNCAT provides:

“1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

137. The UN Committee Against Torture, which considers complaints from individuals against states which have recognised the Committee's competence to do so,¹²⁶ recently considered a complaint that Article 3 had been violated by Sweden's deportation of an individual to Egypt in reliance on diplomatic assurances.¹²⁷ The applicant, who had been convicted in Egypt in his absence for membership of an Islamic fundamentalist terrorist group, had been removed by Sweden to Egypt after assurances were obtained from the Egyptian authorities that he and his family would be treated in accordance with international law on his return to Egypt. The exact text of the assurances is not published in the Committee's decision, but they are described in the Committee's summary of the

¹²⁵ See for example, most recently, *N v Finland*, App. no. 38885/02 (26 July 2005) at paras 158–160

¹²⁶ Article 22 UNCAT

¹²⁷ *Agiza v Sweden*, Case No. 233/2003 (24 May 2005)

State Party's submissions.¹²⁸ They were made by a senior official of the Egyptian government. They included written guarantees of fair trial, that he would not be subjected to torture or other inhuman treatment, and he would not be sentenced to death or executed. The trial was to be monitored by the Swedish embassy and it was to be possible to visit the complainant, even after conviction. Sweden pointed out that the assurances were considerably stronger than those provided in *Chahal* and were couched more affirmatively, in positive terms of prohibition. According to the Swedish Government, a monitoring mechanism had also been put in place and had been functioning for two years.¹²⁹

138. The Committee Against Torture found that, notwithstanding these assurances, the removal of the complainant to Egypt violated Sweden's obligations under Article 3 UNCAT. It acknowledged that measures taken to fight terrorism, including denial of safe haven, pursuant to binding UN Security Council resolutions, are both legitimate and important, but pointed out that, as the Security Council itself had repeatedly affirmed, their execution must be carried out with full respect to the applicable rules of international law, including UNCAT. The Committee considered that it was known, or should have been known, to the Swedish authorities at the time of the removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The Committee was satisfied that the evidence showed that the complainant was at real risk of torture in Egypt in the event of expulsion. In relation to the assurances relied on by Sweden, the Committee said "The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk".¹³⁰

139. On 23 August 2005 the UN Special Rapporteur Against Torture,¹³¹ Manfred Nowak, issued a statement warning that diplomatic assurances are not an adequate safeguard against torture for deportees.¹³² Referring specifically to the Prime Minister's statement on 5 August 2005, the UN Special Rapporteur stated that he fears that the plan of the UK to request diplomatic assurances for the purpose of expelling persons in spite of a risk of torture reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture. He said that the fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subjected to torture or ill treatment in the receiving country. "Diplomatic assurances are not an appropriate tool to eradicate this risk." He pointed out that since most of the states with which Memoranda of Understanding might be agreed are parties to UNCAT and/or the ICCPR, and are therefore already obliged not to resort to torture or ill treatment under any circumstances, such memoranda of understanding do not provide any additional protection to deportees.

128 *ibid.* paras. 4.24–4.25

129 *ibid.* para. 4.29

130 *ibid.* para. 13.4

131 The Special Rapporteur is an independent expert appointed by the UN Commission on Human Rights

132 Annex VI

The Special Rapporteur therefore called on Governments to observe the principle of non-refoulement scrupulously, and requested them to refrain from seeking diplomatic assurances and the conclusion of memoranda of understanding in order to circumvent their international obligation not to deport anybody if there is a serious risk of torture or ill-treatment.

140. The European Commissioner of Human Rights also commented on the UK's intention to deport the former detainees under the ATCSA 2001 on the basis of diplomatic assurances in his recent Report on the UK.¹³³ He observed: "There is clearly a certain inherent weakness in the practice of requesting diplomatic assurances from countries in which there is a widely acknowledged risk of torture. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot be sufficient to permit expulsions where a risk is nonetheless considered to remain. There are sufficient examples already of breached assurances for the utmost caution to be required." He drew attention to the importance of the State in question not condoning or practising torture and being able to exercise an effective control over the actions of state and non-state actors. "Given the extremely serious consequence at stake it would be vital that the deportation of foreigners on the basis of diplomatic assurances are subject to judicial scrutiny capable of taking all these elements, the content of the assurances and the likelihood of their being respected into account."

141. The observations about the value of diplomatic assurances by both the UN Special Rapporteur and the European Commissioner for Human Rights reflect that taken by a large number of human rights NGOs with experience of working with victims of torture. Human Rights Watch recently published a report collecting together a number of cases in which suspects who have been returned on the basis of assurances have then credibly alleged that they have been tortured on their return, and arguing that diplomatic assurances cannot provide effective protection against torture.

Analysis

142. We understand the concern which motivates the UN Special Rapporteur's statement and the position of many of the human rights NGOs, namely that the pursuit of bilateral agreements in relation to torture undermines the multilateral framework of the UN and other treaty bodies concerned with the eradication of torture. However, in our view it does not follow from this that diplomatic assurances are never capable, in principle, of satisfying the State's obligation not to return an individual to torture.

143. On our reading of the case-law of both the European Court of Human Rights and the UN Committee Against Torture, states are entitled to seek assurances about torture from other states, particularly in the context of wider and more concerted efforts to address the human rights situation within the other state, and such assurances are capable, in principle, of satisfying the State's obligation not to return an individual to a serious risk of torture. They will be treated by the courts as being relevant to the assessment of the risk of a person being subjected to torture in the particular circumstances of the case, along with all

¹³³ op cit. at paras. 28–30

relevant evidence about the likelihood of their being respected in practice. We agree that diplomatic assurances should be treated with great caution in case they undermine the absolute nature of the prohibition on deportation to torture. But this does not obviate the need to examine the content of the assurances relied on, and to do so in the specific context of the particular case.

144. Whether there is in fact a breach of the UK's obligations in any particular case depends on an assessment of the risk of torture to the particular individual concerned, which is clearly a question to be determined on the facts of the particular case, first by the Secretary of State and then by the courts. It is not a matter on which the Committee can express a definitive view because it cannot consider individual cases. We have not therefore, for the purposes of this Report, considered the contents of the Memoranda of Understanding which have so far been signed with Jordan and Libya. We will, however, scrutinise those agreements very carefully in the context of our inquiry into the UK's compliance with UNCAT, including the adequacy of the provision for independent post-return monitoring.

145. For the purposes of this Report, we consider it to be sufficient to welcome the Home Secretary's unequivocal acceptance in his evidence to us that whether a deportee faces a substantial risk of torture on his return is a matter for the courts.¹³⁴ In our view this is a correct understanding of the legal framework for the determination of individual cases which contains sufficient safeguards to make it unlikely that a breach of Article 3 ECHR or UNCAT will occur in practice. It will be for the courts to determine the factual question of whether an individual faces a substantial risk of torture on his return, and in reaching that decision the courts will properly take into account the assurances given as part of its consideration of all the relevant evidence, including evidence about the likelihood of those assurances being delivered in practice.

146. The Home Secretary in his evidence to us also expressed the hope that in reaching that decision the courts would give "due weight" to the fact that a memorandum of understanding has been reached between two bona fide governments. We would only comment that the question of the weight to be given to any particular agreement will be a matter for the court in the light of all the evidence in the case. We would point out that in *Chahal v UK* the European Court of Human Rights said that it did not doubt the good faith of the Indian Government in that case in providing the assurances relied on by the UK, but nevertheless was not persuaded that those assurances provided an adequate guarantee of safety because it was satisfied on the evidence that the violation of human rights by members of the security forces was beyond the Indian Government's control.

Torture and national security

147. In his oral evidence to us the Home Secretary stated unequivocally that he is not prepared to deport somebody where he is satisfied that there is a substantial risk of their being tortured in the receiving country.¹³⁵ He said that this is not only his position but it is

¹³⁴ QQ 4 and 46

¹³⁵ QQ 46 and 47

Government policy. This is reiterated in the Home Office's written evidence to us, which says "protection from torture and ill treatment is a fundamental human right, and we would not return an individual to a country in the knowledge that they would be tortured".¹³⁶ **We welcome this unequivocal statement, which reflects the UK's obligations under the absolute prohibition on torture outlined above.**

148. At the same time, however, the Government has sought, and been granted, leave to intervene in a Dutch case which is pending before the European Court of Human Rights, in which the Government will ask the Court to revisit its decision in *Chahal v UK* "in the light of current circumstances", in effect to reverse it by preferring the approach of the minority in that case. The rationale for this reconsideration of the Strasbourg jurisprudence was explained by the Home Secretary in his speech to the European Parliament on 7 September 2005, in which he said that the UK Government believes it is necessary to look very carefully at the way in which the jurisprudence around the application of the ECHR is developing. In particular, he said, it is

"necessary to balance very important rights for individuals against the collective right for security against those who attack us through terrorist violence. Our strengthening of human rights needs to acknowledge a truth which we should all accept, that the right to be protected from torture and ill-treatment must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism, sometimes cause, instigated or fomented by nationals from countries outside the EU. ... The view of my Government is that this balance is not right for the circumstances which we now face ... and that it needs to be closely examined in that context."

149. The minority in *Chahal* held that States are entitled under Article 3 to balance the extent of the potential risk of ill-treatment of the deportee on the one hand against the threat to their national security on the other. In other words, on the minority's view, a State is entitled to expel an individual on national security grounds even where there is a substantial risk of torture or ill-treatment in the receiving country. In our view, it follows from the Government's acceptance of the absolute nature of the torture prohibition that considerations of national security cannot be balanced against the risk of torture, because that presupposes returning somebody to a risk of torture because national security trumps their right not to be tortured.

150. In any event, in our view the prospects of persuading the Grand Chamber of the European Court of Human Rights to overturn its decision in *Chahal* are difficult. Although the Court of Human Rights is prepared to reconsider its own decisions, it is reluctant to depart from them without very good reason for doing so.¹³⁷ The decision has subsequently been consistently applied by the Court.¹³⁸

¹³⁶ Appendix 4, para. 12

¹³⁷ See *Chapman v UK* (2001) 33 EHRR 18 at para. 70

¹³⁸ See for example *Selmouni v France* (28 July 1999) at para. 95; *V v UK* (16 December 1999) at para. 69; *Labita v Italy* (6 April 2000) at para. 119

151. The Home Secretary, in his speech to the European Parliament, said that the balance struck between the protection of individual rights and the protection of democratic values such as safety and security is “not right for the circumstances which we now face – circumstances very different from those faced by the founding fathers of the European Convention on Human Rights.” The decision in *Chahal*, however, which is the source of the rule in the Convention case-law that national security cannot be balanced with the risk of torture, was not the work of the founders of the ECHR but of a much more recent Court which said that it was “well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence.” It is certainly arguable that the nature of international terrorism has changed since 1996, which pre-dates the attacks on New York and Washington in September 2001 and numerous other Al Qaida attacks in more recent years. However, there is evidence to suggest that the majority decision in *Chahal* remains an important standard in this changed context. The rule established by the majority judgment in *Chahal* features, for example, in the *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism* (2002), which recognise the positive obligation on States to take the measures needed to protect everyone in their jurisdiction against terrorist acts, but reiterates the absolute prohibition on the use of torture or inhuman or degrading treatment or punishment, in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.¹³⁹

152. We welcome the Home Secretary’s unequivocal reassurance that it is not the Government’s intention to amend the Human Rights Act to require courts to follow the minority judgment in *Chahal*.¹⁴⁰ He emphasised in his evidence to us that it was only the Government’s intention to ask the Court to reconsider its jurisprudence, not to withdraw from the Convention or to amend the Convention or take any other legal step of that kind. He also made clear that the only purpose of changing the law in this country in a way that was not compatible with the ECHR would be to ask the European Court to return to that question, otherwise the only choice would be to leave the ECHR, which the Government does not wish to do. We are considerably reassured by the Home Secretary’s response to our questions.¹⁴¹

139 Guidelines I and IV. The document *Texts of reference used for the preparation of the guidelines on human rights and the fight against terrorism* makes clear that *Chahal* and the line of cases following it are the basis for Guideline IV concerning the absolute prohibition of torture: see *The fight against terrorism: Council of Europe Standards* (CoE Publishing, 3rd edn., 2005) at pp. 308–309

140 QQ 4 and 48

141 However, we also note that the Prime Minister appeared to keep open the possibility of amending the Human Rights Act, or seeking changes to the ECHR, in his evidence to the Liaison Committee on 22 November 2005. Asked whether it was still his intention, if necessary, to legislate to amend the Human Rights Act, he answered (Q98) ‘Yes, we have got to be in a position where we can rely on the memoranda’, and (Q99) that ‘in the end the bottom line has got to be that we have got to be able to make sure that we return people if they are a threat to the security of this country.’ (*Uncorrected transcript of evidence*). We find these answers much less reassuring than the Home Secretary’s.

4 Immigration Asylum and Nationality Bill

Introduction

153. On 15 September 2005 the Home Secretary indicated that the Government would be bringing forward amendments to the Immigration, Asylum and Nationality Bill in order to give effect to certain of the counter-terrorism measures which it had decided to take following the events of July. On 12 October the Home Secretary published draft clauses for consultation. The Government subsequently brought forward amendments to the Bill in Committee and they now form part of the Bill.¹⁴²

154. Because the new clauses have been brought forward by way of amendment to an existing Bill, there is no ministerial statement of compatibility with ECHR rights,¹⁴³ nor are there any explanatory notes accompanying the clauses or considering their human rights impact. For the purposes of this Report, we have therefore considered the explanations of the clauses given by the Home Secretary in his letters dated 15 September and 12 October 2005, and the Minister's explanations when proposing the amendments in Committee.¹⁴⁴ We have also received representations on the new clauses from the Immigration Law Practitioners Association (ILPA)¹⁴⁵ and the Law Society.¹⁴⁶

Deprivation of British citizenship

The effect of the new clause

155. New clause 52 of the Bill would introduce a new test for the deprivation of a person's British citizenship by the Secretary of State. Under the present law, the Secretary of State can by order deprive a person of their British citizenship if he is "satisfied that the person has done anything seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory" and does not think that it would make the person stateless.¹⁴⁷ The requirement that the person not be rendered stateless¹⁴⁸ means that the power is in practice available only in relation to people holding dual nationality. However, it is not

142 HC Bill 70, as amended in Standing Committee E (printed 27 October 2005)

143 Section 19 of the Human Rights Act 1998 does not require ministers to make statements of compatibility in relation to Government amendments to Bills

144 Hansard, 27 October 2005, cols. 251–316 (Standing Committee E)

145 Appendix 15

146 Appendix 18

147 Section 40(2) of the British Nationality Act 1981. The language of the test in the current law reflects the language used in the European Convention on Nationality, which requires that no one shall be arbitrarily deprived of his or her nationality, and that there should only be power to deprive of nationality in very narrowly defined circumstances, including "conduct seriously prejudicial to the vital interests of the State Party" (Article 7(1)(d)). The UK has not yet ratified the Nationality Convention, but in a written answer in response to Lord Lester on 18 July 2002 Lord Filkin on behalf of the Government said "If the Nationality, Immigration and Asylum Bill is enacted in its present form, we shall, once its provisions are brought into force, be in a position to sign and ratify the convention and would hope to do so."

148 The requirement flows from the UK's obligations under the UN Convention on the Reduction of Statelessness 1961

confined to people who have acquired their British citizenship by naturalisation. The power to deprive of citizenship was made available, for the first time, against a person who was born a British citizen by the Nationality, Immigration and Asylum Act 2002.¹⁴⁹

156. The new clause would replace the “serious prejudice to the vital interests of the UK” test with the same test which applies to the Secretary of State’s powers of exclusion and deportation of non-nationals: the Secretary of State will have the power to deprive a person of their British citizenship if he is “satisfied that deprivation is conducive to the public good”.¹⁵⁰ There would be a right of appeal against the deprivation, either to the Asylum and Immigration Tribunal, or to the Special Immigration Appeals Commission (“SIAC”) if the Secretary of State certified that the case concerned national security.¹⁵¹ The statutory framework does not, however, prescribe the grounds on which such an appeal can be brought, or the matters which can or must be taken into account by the tribunal on appeal, and the scope of the appellate jurisdiction is therefore uncertain.¹⁵²

157. Although this is not stated on the face of the Bill, the Minister introducing the amendment in Committee, Mr. Tony McNulty MP, made clear that it is the Government’s intention that the list of “unacceptable behaviours” which the Secretary of State has adopted to guide the exercise of his discretion to exclude and deport non-nationals will also apply to the exercise of his similarly worded discretion to deprive a person of their British citizenship. The Minister said, after referring to the list of unacceptable behaviours:¹⁵³

“It is, in our view, now essential that we have similar powers to withhold and to remove British nationality and the right of abode in the United Kingdom where an individual is found to have engaged in such activity. It is wrong that certain individuals with rights of residence elsewhere should be allowed to acquire and then to shelter behind their British citizenship, or their right of abode here, so as to avoid the consequences that would otherwise befall them.”

158. Although the Minister referred in his speech to the power being exercised against individuals who *acquire* British citizenship, the scope of the power is very much wider: it applies also to British born citizens, that is, people who acquired their nationality not by naturalisation, but by birth. Under the new clause, a person who was born a British national, but has dual nationality, will therefore be able to be deprived of their British citizenship if the Secretary of State is satisfied that he or she has engaged in one of the unacceptable behaviours, including “justifying” terrorism.

149 Section 4(1), inserting a new s. 40 into the British Nationality Act 1981

150 New clause 52(1), substituting a new s. 40(2) of the British Nationality Act 1981

151 Section 40A of the British Nationality Act 1981, also inserted by s. 4 of the Nationality, Immigration and Asylum Act 2002

152 There have so far been no such appeals because the power to deprive of citizenship conferred by the 2002 Act has yet to be exercised

153 Hansard, 27 October 2005 at cols. 254–255 (Standing Committee E)

The human rights implications

159. Human rights law does not confer any free standing right to be a citizen of any country. However, deprivation of citizenship has such serious consequences for the individual concerned that it indirectly engages a number of other human rights.¹⁵⁴ It may, for example, deprive the person of their right of abode in the UK, rendering them subject to immigration control, and therefore liable to be removed or excluded from the UK, which engages, for example, the right to be free of degrading treatment (Article 3 ECHR), the right to liberty (Article 5 ECHR), the right to respect for family life (Article 8 ECHR), and the right not to be arbitrarily deprived of the right to enter one's own country (Article 12(4) ICCPR).¹⁵⁵ Deprivation of British citizenship also entails loss of the right to a UK passport, which may affect the person's ability to travel, loss of British diplomatic protection, loss of status, loss of the ability to participate in the democratic process in the UK, and serious damage to reputation and dignity.

160. In view of the extremely serious consequences of deprivation of British citizenship for other human rights, the main question which arises is whether there are sufficient safeguards against the arbitrary exercise of the power. There are three reasons to be concerned about the adequacy of the safeguards against arbitrariness.

161. First, it is a well established principle of international law, including human rights law, that states have the right to control the admission and expulsion of non-nationals to and from their territories. This explains the width of the administrative discretion accorded to the Secretary of State to exclude or deport non-nationals, on the ground that their presence is not conducive to the public good, subject to the requirements of due process. States do not, however, enjoy the same degree of discretion in relation to their own nationals. British citizens who acquired their nationality by birth do not owe their citizenship status to an exercise of the Government's discretion. The effect of the new clause is to make the test for the deprivation of citizenship from a British national (with dual nationality) the same as the test for exclusion or deportation of a non-national. The "serious prejudice to the vital interests of the nation" test contained a very much higher threshold, reflecting the seriousness of the consequences of the decision. The new "conducive to the public good" test imports a very much lower threshold and therefore introduces greater scope for arbitrariness in the exercise of the power. This greater scope for arbitrariness is demonstrated by the fact that, under the new power, a British born citizen will be liable to be deprived of their citizenship if they have said something which in the Secretary of State's view "justifies" terrorism.¹⁵⁶

154 Article 3 of the Fourth Protocol to the ECHR, which provides that no-one shall be expelled from, or deprived of the right to enter, the territory of the State of which he is a national, would be engaged, but the UK has not ratified it.

155 Although the UK has entered a reservation to Article 12(4) ICCPR, reserving its right to continue to apply such immigration legislation governing entry into, stay in and departure from the UK as they deem necessary from time to time", this does not permit arbitrary deprivation of the right, which would frustrate one of the central purposes of Article 12(4).

156 The Minister indicated, in Committee, *op cit.* at col. 254, as did the Secretary of State in his evidence to the JCHR, that the list of unacceptable behaviours might be amended so as to be consistent with the wording used in the enacted version of clause 1 of the Terrorism Bill.

162. Second, although there is a statutory right of appeal against the decision to deprive of citizenship, there is no explicit requirement that the Secretary of State's decision be based on objectively reasonable grounds, and it is not clear whether the scope of the appellate jurisdiction is broad enough to enable an appeal to be brought on that ground. The Secretary of State need only be "satisfied" that deprivation of citizenship is conducive to the public good. There is no requirement that he have objectively reasonable grounds for his subjective belief. When the Joint Committee on Human Rights reported in the last Parliament on the changes to the power to deprive of citizenship in the Nationality, Immigration and Asylum Act 2002, it expressed its concern about the lack of a requirement that the Secretary of State show that there were objectively reasonable grounds for exercising the power to deprive.¹⁵⁷ The lack of such a requirement seemed to the Committee "to put at risk a person's legal status without adequate safeguards against arbitrariness." The Committee drew to the attention of each House its view that, "as a matter of general principle ... it is a far more effective guarantee against arbitrariness, and a better way of assuring good administrative decision-making (as well as being far more compatible with the rule of law which underpins human rights), to require public authorities to justify the deprivation of a person's status to a standard of reasonableness".¹⁵⁸ Notwithstanding the Committee's concerns, the clause was not amended by the Government and was enacted using the same subjective language as the clause which was the subject of the Committee's concern. The clause currently under consideration uses the same subjective formula.

163. Third, the measure could also be said to discriminate between British nationals, by applying only to dual nationals. This amounts to treating them differently on the basis of their also having another nationality, a difference of treatment which could not be objectively justified because who happens to be a dual national, and therefore liable to deprivation, will depend on the nationality laws of other countries which are not uniform in this respect. ILPA point out, for example, that a British-born citizen of Jamaican or Zimbabwean parentage may be a dual national and therefore liable to deprivation of their British citizenship under this new clause, while a British-born citizen of Indian or Ugandan parentage will not, because India and Uganda do not permit dual nationality.

164. We therefore conclude that the new test for deprivation of citizenship in new clause 52 contains insufficient guarantees against arbitrariness in its exercise in light of (i) the significant reduction in the threshold, (ii) the lack of requirement of objectively reasonable grounds for the Secretary of State's belief, (iii) the arbitrariness of the definition of the class affected, and that it therefore gives rise to a risk of incompatibility with Article 12(4) ICCPR, Articles 3, 5 and 8 ECHR and Article 14 in conjunction with those Articles, and Article 26 ICCPR.

157 Seventh Report of Session 2001-02, Making of Remedial Orders, HL Paper 58, HC 473, at paras. 27-31

158 *ibid* at para. 30

Deprivation of right of abode

165. British citizens are not the only group with the right of abode in the UK. Certain other Commonwealth citizens also have the right of abode in the UK under section 2 of the Immigration Act 1971.¹⁵⁹ The Bill also provides for the deprivation of such a right of abode enjoyed by a non-national. New clause 53 would empower the Secretary of State by order to remove such a right of abode if he “thinks that it would be conducive to the public good for the person to be excluded or removed from the UK”.¹⁶⁰

166. Again, although not on the face of the Bill, it is the Government’s intention that the exercise of the power “would be informed, but not wholly constrained, by the published list of ‘unacceptable behaviours’”.¹⁶¹ A Commonwealth citizen with a right of abode in the UK could therefore have that right of abode taken away for speech which the Secretary of State thinks amounts to “justifying” terrorism. There would be a right of appeal against any deprivation to the asylum and immigration tribunal, or to SIAC where sensitive information might otherwise be disclosed in the course of the appeal.¹⁶²

167. Deprivation of the right of abode has many of the same serious consequences as deprivation of citizenship. Effective guarantees against arbitrary deprivation are therefore also important. Two of the concerns set out above in relation to the power to deprive of citizenship do not seem to apply in this case.

168. First, although there is again a lack of any requirement on the face of the Bill that the Secretary of State has reasonable grounds for believing that exclusion or removal from the UK would be conducive to the public good (the test is whether he “thinks” it would be so conducive), this is less problematic in this case because it is clear that the statutory right of appeal is to a body with full jurisdiction,¹⁶³ which would have the power to reverse the Secretary of State’s decision if not satisfied itself on the evidence that exclusion or removal would be conducive to the public good.

169. Second, the power to deprive of the right of abode does not give rise to the same discrimination problem: whereas only some British nationals (those holding dual nationality) are subject to the power to have their citizenship removed, all non-nationals with a right of abode are potentially liable to have their right of abode taken away. There are no arbitrary distinctions within the class affected.

170. This leaves as the main issue whether the power to deprive of a right of abode contains sufficient guarantees against arbitrariness in light of, first, the sheer breadth of the concept of “conducive to the public good” and, second, the relatively low threshold which it sets for

159 In Committee the Minister described this group as comprising, primarily, citizens of Commonwealth countries such as Australia and Canada whose mothers were born in the UK and Commonwealth citizen women married before 1983 to men with the right of abode here: *op. cit.* at col. 255.

160 New clause 53(1), inserting new section 2A into the Immigration Act 1971

161 Standing Committee E Hansard, *op. cit.* at col. 256

162 New clause 53(2), inserting new s. 82(2)(ib) into the Nationality, Immigration and Asylum Act 2002

163 The right of appeal is under s. 82 of the Nationality, Immigration and Asylum Act 2002: new clause 53(2). On such an appeal the appellate body may take into account any matter which might have led the Secretary of State to reach a different decision.

the exercise of a power of deprivation which has very serious consequences for the individual concerned. **We consider that (i) the same problems with the significant reduction in the threshold referred to in relation to clause 52 powers (set out in paragraphs 161 and 164) apply to the use of this power and that (ii) the legal uncertainty caused by the width of the current definition of unacceptable behaviours as set out in paragraph 118 above means that there are not at present sufficient guarantees against arbitrariness in the exercise of the power to deprive of a right of abode, and that therefore the power as currently set out gives rise to a substantial risk of incompatibility with Articles 3, 5 and 8 ECHR. However if these two concerns were addressed, the availability of a full right of appeal in relation to this power would provide a sufficient guarantee.**

Terrorists and asylum

171. New clause 51 of the Bill lays down a statutory construction of a provision of the Refugee Convention. Article 1F of the Refugee Convention sets out the categories of people who are not considered to be deserving of international protection as refugees. It provides:

“1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

172. The new clause provides that in the construction and application of Article 1F(c), the reference to “acts contrary to the purposes and principles of the UN” shall be taken as including acts of committing, preparing or instigating terrorism, and acts of encouraging or inducing others to commit, prepare or instigate terrorism, whether or not the acts themselves amount to an actual or inchoate offence.¹⁶⁴

173. The Minister introducing the new clause in Committee said that the purpose of the new clause is to make explicit that “terrorists should be excluded from asylum”.¹⁶⁵ He said that this was already implicit in Article 1F(c) itself, but it was appropriate to make it explicit that terrorists should not be afforded the protection of the Refugee Convention. He cited UN Security Council Resolution 1373 as evidence of the UN’s acceptance that terrorist acts are contrary to the purposes and principles of the UN:

“Any act of international terrorism constitutes a threat to international peace and security ... acts, methods and practices of terrorism are contrary to the purposes and

¹⁶⁴ New clause 51(1)

¹⁶⁵ Standing Committee E Hansard, op cit. at col. 284

principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.”

174. Insofar as the Government’s purpose in new clause 51 is merely to ensure that Article 1F(c) of the Refugee Convention, properly interpreted in accordance with the purposes of that Convention, is given proper effect in domestic law, it is unobjectionable in human rights law terms. The necessity for such a provision may be questionable, in light of the Minister’s acceptance in Committee that he could not point to any cases where the absence of the new clarifying clause had led to an individual being granted asylum by the courts who should not have been granted it because he was a terrorist,¹⁶⁶ but the absence of such evidence does not mean that it is not appropriate to make explicit what is implicit in the Refugee Convention to avert such a possibility in the future.

175. As drafted, however, the new clause 51 goes considerably further than the Government’s stated purpose, and would significantly widen the scope of the exclusion from protection in Article 1F(c) in two important ways.

176. First, “terrorism” is given its domestic definition in s. 1 of the Terrorism Act 2000 for the purposes of the new clause.¹⁶⁷ That definition includes a very wide range of conduct. It also covers acts wherever they are committed. Like clause 1 of the Terrorism Bill, the provision therefore directly raises the possibility that it will be used to deny asylum to individuals who may have been engaged abroad in resistance to an oppressive regime but are caught by the UK’s very wide definition of “terrorism.” The Minister very fairly accepted that this is the effect of the clause. He said “terrorist acts committed abroad will be covered by the definition of Article 1F(c) and subsection (1) of the clause”.¹⁶⁸ He also repeated the Home Secretary’s position that there are today no circumstances in the world in which violence can be justified as a means of political change. He said “We have also made it clear that we do not believe that there are any circumstances in which terrorism is justified, wherever the terrorist act is committed; we cannot condemn terrorist acts in the United Kingdom but tolerate them elsewhere.”¹⁶⁹

177. The second way in which the new clause would significantly widen the scope of the exclusion from protection in Article 1F(c) is by its inclusion of the phrase “whether or not the acts amount to an actual or inchoate offence.” The effect of these words is to make the applicability of the exclusion from asylum wider than the actual commission of terrorist offences. Again this is the Government’s explicit intention. The scope of the exclusion from asylum is intended to be wider than the new encouragement offence in clause 1 of the Terrorism Bill, and to include the “unacceptable behaviours” in the Home Secretary’s published list which include behaviours which are not criminal offences. That this is the Government’s intention was made clear in the letter from the Home Secretary dated 15

166 *ibid.*, at cols. 285 and 297

167 New clause 51(3)

168 SCE Hansard, *op cit.* at col. 296

169 *ibid.*, at col. 284

September 2005 and it was confirmed by the Minister in Committee.¹⁷⁰ The new clause would therefore operate to exclude from asylum individuals who have not committed any terrorist crime under UK law.

178. Guidance on the proper interpretation of Article 1F(c) is available from the United Nations High Commission for Refugees, which is responsible for supervising the application of the provisions of the Refugee Convention. The most up to date guidance on from the UNHCR in relation to Article 1F is to be found in its *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*.¹⁷¹ Those Guidelines state that, given the possible serious consequences of exclusion from refugee status, the exclusion clauses in Article 1F should always be interpreted restrictively and used with great caution, and only after a full assessment of all the individual circumstances of the case. In relation to Article 1F(c), the Guidelines say that it should be read narrowly: it is “only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category.” To redefine the scope of the Article 1F(c) exclusion so as to catch anyone who has threatened damage to property as a means to political change anywhere in the world, and anyone who in the Secretary of State’s view has engaged in one of the unacceptable behaviours such as “justifying” terrorism, is in our view to broaden the scope of the exclusion in Article 1F(c) in a way which is not itself compatible with the Refugee Convention.¹⁷²

179. In order to be compatible with the Refugee Convention, and to give effect to the Government’s stated purpose of merely making explicit what Article 1F(c) implicitly requires, the clause would need to be amended to decouple it from both the broad definition of “terrorism” in s.1 of the Terrorism Act 2000 and the published list of unacceptable behaviours in its present form. The Minister has helpfully indicated the Government’s preparedness to keep the drafting of the clause under review in light of debates on the Terrorism Bill. To achieve compatibility it is in our view necessary to combine a narrower definition of terrorism with confining the scope of the exclusion to actual—rather than inchoate—existing terrorist offences in UK law, including, if it is satisfactorily defined in its enacted form, the proposed new offence of encouragement.

Out of country appeals against deportation in national security cases

180. New clause 7 would require appeals against deportations on national security grounds to be brought out-of-country, except where the deportation is challenged on human rights

170 *ibid.*, at col. 296. “The clause is about excluding those who commit, prepare or instigate acts of terrorism or encourage or induce them. Some of the unacceptable behaviours fall in the area of terrorism and encouraging terrorism and the clause covers them”.

171 HCR/GIP/03/05, 4 September 2003

172 For similar concerns about the compatibility of a statutory construction of the Refugee Convention, see 22nd Report of Session 2003–04, *The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004*, HL Paper 190, HC 1212, in which the Committee expressed its concern that the order was incompatible with the Refugee Convention because it included within its scope a number of offences which do not amount to “particularly serious crimes” within the meaning of the Convention itself properly interpreted.

grounds.¹⁷³ The Secretary of State has the power to certify that removal would not breach the ECHR, but the new clause provides a right of appeal to SIAC against such a certificate.¹⁷⁴

181. The purpose of the new clause, according to the Minister introducing it in Committee, is to streamline the process of appeals against deportation orders in national security cases:¹⁷⁵ “the aim is to be sure that those who threaten the security of the UK and its people will be removed from the UK more quickly than is currently the case.” The rationale for the measure is that in cases where deportation orders have been made on national security grounds, the current appeals system results in unnecessary delays because the hearing of the national security aspects of the case can be the most time-consuming element of an appeal. The new clause would speed up the system, because the national security aspects of the case would only be dealt with after removal, whilst retaining judicial scrutiny, prior to removal, of the Secretary of State’s decision that removal would not breach the individual’s human rights.

182. In cases where the deportee has an arguable case that he or she will be tortured on their return, to provide only for an out-of-country right of appeal against such deportation would, it seems to us, be incompatible with the right to an effective remedy as stipulated in Article 13 ECHR in conjunction with Article 3, and with Article 3 of UNCAT. The preservation of an in-country human rights appeal in the new clause meets this concern. A person who is the subject of a deportation order will have an opportunity, in-country, to challenge their deportation on human rights grounds. This would not only enable Article 3 claims, concerning risk of torture, to be properly determined before removal, but it would also enable a person who challenges their removal on the grounds that it constitutes a disproportionate interference with their family life, contrary to Article 8 ECHR, to have their claims determined, even though the proper determination of such Article 8 claims is likely to involve consideration of the strength of the national security justification for deportation as part of determining the proportionality of any interference with family life.

183. The drafting of the new clause does, however, give rise to one concern about compatibility with the Refugee Convention. It preserves an in-country right of appeal on human rights grounds, but not on asylum grounds. The Minister in Committee explained that the reason for this is that a person who is a national security threat is excluded from the protection of the Refugee Convention, and as the purpose of the clause is to ensure that the national security aspect is only to be challenged from abroad, there would be no point in granting an appeal right on asylum grounds in-country as the appeal would certainly fail.¹⁷⁶

184. The European Commissioner for Human Rights, Mr. Alvaro Gil-Robles, in his recent report on the UK, expressed “grave concerns” about non-suspensive (i.e out-of-country)

173 Inserting new s. 97A into the Nationality, Immigration and Asylum Act 2002

174 New s. 97A(3) NIAA 2002

175 SCE Hansard, op cit. at col.298

176 *ibid.*, at col. 299

appeals in asylum cases.¹⁷⁷ He said that this requirement is difficult to reconcile with the Geneva Convention, as it puts potentially successful applicants at serious risk of persecution upon their return to their countries of origin. He also observed that it is clearly harder to lodge an appeal from abroad and difficult for applicants to maintain contact with their lawyers. He concluded that removing the essential guarantee that an in-country right of appeal provides cannot be considered appropriate.

185. We consider that the failure of the new clause to preserve an in-country appeal on asylum grounds, as well as on human rights grounds, gives rise to a risk of incompatibility with the Refugee Convention. The problem with the Minister's argument that an in-country asylum appeal would certainly fail because national security risks are excluded from protection is that it presupposes the correctness of the Secretary of State's certificate that the person is a national security threat. The effect of the new clause is that there is no mechanism for independent review of that assertion by an asylum seeker before his or her removal. In order to be compatible with the Refugee Convention, we consider that the new clause ought to preserve in-country appeals on asylum grounds as well as human rights grounds.

177 CommDH(2005)6 (8 June 2005) at para. 67

Formal Minutes

Monday 14th November 2005

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Mr Douglas Carswell MP
Lord Judd	Mary Creagh MP
Lord Plant of Highfield	Dr Evan Harris MP
Baroness Stern	Dan Norris MP
	Mr Richard Shepherd MP

Draft Report [Counter-terrorism policy and human rights: Terrorism Bill and related matters], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 8 read and agreed to.

Paragraphs 9 to 12 read, amended and agreed to.

Paragraph 13 read, as follows:

“In letters of 25 October to the Chairman of the Commons Home Affairs Committee and the front-bench spokesmen of the two main Opposition parties, the Home Secretary set out the difficulties he saw with establishing an alternative and narrower definition of terrorism which could, for example, concentrate on attacks on civilians, concluding that it was necessary to stick with the definition in the 2000 Act. It remains the case that the breadth of this definition raises a number of problems in relation to provisions of the Terrorism Bill and related matters, particularly in relation to the proposed new offence of encouragement and glorification of terrorism in clause 1, the new power to proscribe organisations in clause 21, and the list of unacceptable behaviours which the Home Secretary has adopted to guide the exercise of his discretion to exclude or deport. **The Home Secretary has announced that he has invited Lord Carlile to undertake a review of the definition of “terrorism”, consulting parliamentary committees as appropriate. We welcome this initiative.**”

Amendments made.

Another Amendment proposed, in line 10, after the word “deport.” to insert the words **“We share the concerns of those who believe that the 2000 Act definition of terrorism is too wide, especially when it relates to speech offences and prior restraint”**—(*Dr Evan Harris.*)

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Another Amendment proposed, in line 12, to leave out the word “**this initiative**” and insert the words “**strongly this initiative, and hope it will be seen as a priority**”—*(Baroness Stern.)*

Question proposed, That the Amendment be made:—Amendment, by leave, withdrawn.

Another Amendment made.

Another Amendment proposed, in line 12, at the end, to insert the words “**However we believe that the definition of terrorism—for the purposes of the provisions identified in this paragraph—needs to be changed in order to avoid a high risk of such provisions being found to be incompatible with Article 10 of ECHR and related Articles**”—*(Dr Evan Harris.)*

Question put, That the Amendment be made.

The Committee divided.

Content, 7

Not Content, 3

Lord Bowness
Mr Douglas Carswell MP
Dr Evan Harris MP
Lord Judd
Lord Plant of Highfield
Mr Richard Shepherd MP
Baroness Stern

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph, as amended, agreed to.

Paragraph 14 read and agreed to.

Paragraph 15 read, amended and agreed to.

Paragraph 16 read and agreed to.

A paragraph — *(The Chairman)* — brought up, read the first and second time, amended and added (now paragraph 17).

Paragraphs 17 to 19 (now paragraphs 18 to 20) read, amended and agreed to.

Paragraphs 20 to 26 (now paragraphs 21 to 27) read and agreed to.

Paragraph 27 (now paragraph 28) read.

Amendments made.

Question put, that the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 7

Lord Bowness
Mr Douglas Carswell MP
Dr Evan Harris MP
Lord Judd
Lord Plant of Highfield
Mr Richard Shepherd MP
Baroness Stern

Not Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph 28 (now paragraph 29) read, as follows:

“Another source of legal uncertainty about the scope of the new offence is the breadth of the definition of “terrorism” for the purposes of the new offence. The Government accepts that the effect of the clause as drafted is to criminalise expressions of support for the use of violence as a means of political change anywhere in the world, but defends the offence having this scope on the basis that there is nowhere in the world today where resort to violence, including violence against property, could be justified as a means of bringing about change.”

Amendment made.

Another Amendment proposed, in line 6, at the end, to add the words “This argument is far from convincing and there are plenty of historical examples and indeed some present day resistance movements whose aims and acts—where they are targeted at sabotage—which have been justified and indeed supported by individuals who would not be considered to be encouraging terrorism currently but yet would be potentially liable to prosecution under the terms of this offence.” —(*Dr Evan Harris.*)

Question put, that the Amendment be made.

The Committee divided.

Content, 7

Lord Bowness
Mr Douglas Carswell MP
Dr Evan Harris MP
Lord Judd
Lord Plant of Highfield
Mr Richard Shepherd MP
Baroness Stern

Not Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph, as amended, agreed to.

A paragraph — (*Baroness Stern.*) — brought up, and read, as follows:

“We note that the Muslim Community Security Working Group has expressed concern at the inclusion of “glorification of terrorism” in the new offence. In particular, the Working Group considers that its “breadth and vagueness” could lead to a “significant chill factor” in the Muslim community in expressing legitimate support for self-determination struggles around the world and in using legitimate concepts and terminology because of fear of being misunderstood and implicated for terrorism by authorities ignorant of Arabic/Islamic vocabulary, e.g. a speech on “jihad” could easily be misunderstood as “glorifying terrorism”. The Working Group believes that this would not only result in an inappropriate restriction on the practice of Islam but also on its development in the present context.”

Question proposed, that the paragraph be read a second time:—Paragraph, by leave, withdrawn.

Paragraph 29 (now paragraph 30) read, as follows:

“The final source of uncertainty about the scope of the offence stems from the lack of any requirement in the definition of the offence that there be an intention to incite the commission of a terrorist offence, and that the statement must cause a danger of a terrorist offence being committed. As presently drafted, the state of mind which must be proved by the prosecution is knowledge or belief that members of the public are likely to understand the statement as a direct or indirect encouragement or other inducement to acts of terrorism, or having reasonable grounds for such belief. This arguably falls short of a requirement of a specific intention to incite the commission of a terrorist offence. The only reason given by the Home Secretary for not including a requirement of intent in the definition of the offence is that this would make it more difficult to secure convictions for the offence. That is true, but is a reason for its inclusion as a necessary safeguard against the offence being of too broad an application. The definition of the offence could be improved by a requirement to prove either specific intent to incite terrorist acts or subjective recklessness about doing so (that is, knowing or being indifferent to the likelihood that one’s statement would be understood as an encouragement to terrorism).”

Motion made, to leave out the paragraph and insert the following new paragraph:

“In the Bill as introduced, the final source of uncertainty about the scope of the offence stemmed from the lack of any requirement in the definition of the offence that there be an intention to incite the commission of a terrorist offence, and that the statement must cause a danger of a terrorist offence being committed. As originally drafted, the state of mind which had to be proved by the prosecution was knowledge or belief that members of the public were likely to understand the statement as a direct or indirect encouragement or other inducement to acts of terrorism, or having reasonable grounds for such belief. This arguably fell short of a requirement of a specific intention to incite the commission of a terrorist offence. The only reason given by the Home Secretary for not including a requirement of intent in the definition of the offence was that this would make it more difficult to secure convictions for the offence. At report stage in the Commons, an

amendment to clause 1 was made to the effect that the state of mind to be proved by the prosecution is that the person publishing a statement or causing it to be published by another “intends the statement to be understood” by members of the public as a direct or indirect encouragement or other inducement to acts of terrorism, or is “reckless as to whether or not it is likely to be so understood”. The cases in which a person is taken to be reckless include “any case in which he could not reasonably have failed to be aware of that likelihood”. This formulation is an improvement over the original wording of the Bill and an additional safeguard against the offence being of too broad an application. At Commons report stage the Minister, Hazel Blears MP, said that “If we have only a subjective test, people will be able to say that they did not realise what the effect of their actions would be. We would then find it incredibly difficult to prosecute people who genuinely were encouraging other people, indirectly, to commit terrorist acts”. **While we consider it would be preferable for the Bill to contain a subjective test of recklessness (that is, knowing or being indifferent to the likelihood that one’s statement would be understood as an encouragement to terrorism), rather than the objective test currently contained in it, we consider that the clause as it now stands is more legally certain as a result of this amendment.** —(*The Chairman.*)

Ordered, That the paragraph be read a second time.

Amendment made.

Another Amendment proposed, in line 2, to leave out the words from “from” to “an” and insert the words “its failure to be restricted to occasions where there is.” —(*Dr Evan Harris.*)

Question proposed, That the Amendment be made:— Amendment, by leave, withdrawn.

Other Amendments made.

Another Amendment proposed, in line 11, to leave out from the word “offence.” to the end of the proposed new paragraph.—(*Dr Evan Harris.*)

Question put, that the Amendment be made.

The Committee divided.

Content, 6

Lord Bowness
Mr Douglas Carswell MP
Dr Evan Harris MP
Lord Judd
Mr Richard Shepherd MP
Baroness Stern

Not Content, 4

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP
Lord Plant of Highfield

Paragraph, as amended, inserted (now paragraph 30).

A paragraph — (*Dr Evan Harris*) — brought up, and read, as follows:

“ In other words the Home Secretary’s own justification for that wording is in itself a key reason for it to be amended.”

Question proposed, That the paragraph be read a second time:— Paragraph, by leave, withdrawn.

Another paragraph — (*Dr Evan Harris*) — brought up, and read, as follows:

“ We consider that the Bill should require a subjective test of recklessness to be proved, as an alternative to intent, if the Bill is to satisfy the need for legal certainty in this respect. As a general rule, every crime requires a mental element, the nature of which depends on the nature and definition of the crime in question. The burden is upon the prosecution to prove the necessary criminal intent. The mental element required to constitute serious crimes is an intention to bring about the elements of the crime in question or recklessness. Recklessness arises in this context where the act in question involves an obvious and serious risk of causing injury or damage and either (1) the defendant fails to give any thought to the possibility of there being such a risk, or (2) having recognised that there is some risk involved, he nonetheless goes on to take it.”

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 7

Not Content, 3

Lord Bowness
 Mr Douglas Carswell MP
 Dr Evan Harris MP
 Lord Judd
 Lord Plant of Highfield
 Mr Richard Shepherd MP
 Baroness Stern

Mary Creagh MP
 Mr Andrew Dismore MP
 Dan Norris MP

Paragraph inserted (now paragraph 31).

Another paragraph — (*Dr Evan Harris*) — brought up, and read, as follows:

“ The above paragraph describes a test of subjective recklessness. At report stage in the Commons, an amendment, proposed by the Government, to clause 1 was made to the effect that the state of mind to be proved by the prosecution is that the person publishing a statement or causing it to be published by another “intends the statement to be understood” by members of the public as a direct or indirect encouragement or other inducement to acts of terrorism, or is “reckless as to whether or not it is likely to be so understood”. The cases in which a person is taken to be reckless include “any case in which he could not reasonably have failed to be aware of that likelihood”. This formulation is claimed by the Government to be a significant improvement over the original wording of

the Bill and a safeguard against the offence being of too broad an application. However it does not represent a subjective test of recklessness, but an objective test. It can be argued that such a test actually provides little narrowing of the application of the offence compared to the original wording. At Commons report stage the Minister, Hazel Blears MP, said that “If we have only a subjective test, people will be able to say that they did not realise what the effect of their actions would be. We would then find it incredibly difficult to prosecute people who genuinely were encouraging other people, indirectly, to commit terrorist acts”.

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 6

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Plant of Highfield
Mr Richard Shepherd MP
Baroness Stern

Not Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph inserted (now paragraph 32).

Another paragraph — (*Dr Evan Harris*) — brought up, and read, as follows:

“. We consider it necessary for this offence either to be restricted to intention or—if it is to be extended beyond intention—that it should be extended only to recklessness; and if it is so extended it should contain a subjective test of recklessness (that is, knowing or being aware of but indifferent to the likelihood that one’s statement would be understood as an encouragement to terrorism), rather than the objective test currently contained in it.”

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 6

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Plant of Highfield
Mr Richard Shepherd MP
Baroness Stern

Not Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph inserted (now paragraph 33).

Ordered, That further consideration of the Chairman's draft Report be now adjourned. —
(*The Chairman.*)

[Adjourned till Monday 21 November at 3pm.

Monday 28th November 2005

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Mr Douglas Carswell MP
Lord Campbell of Alloway	Mary Creagh MP
Lord Judd	Dr Evan Harris MP
Lord Lester of Herne Hill	Dan Norris MP
Baroness Stern	Mr Richard Shepherd MP

Consideration of the Chairman's Draft Report resumed.

Paragraph 30 (now paragraph 34) read, amended and agreed to.

A paragraph — (*Lord Lester of Herne Hill*) — brought up, read the first and second time, amended and added (now paragraph 35).

Paragraph 31 (now paragraph 36) read, as follows:

“ As drafted, we consider that the offence in clause 1 is not sufficiently legally certain to satisfy the requirement in Article 10 that interferences with freedom of expression be “prescribed by law” because of (i) the vagueness of the glorification requirement, (ii) the breadth of the definition of “terrorism” and (iii) the lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence. To make the new offence compatible, it would in our view be necessary to delete the references to glorification, insert a more tightly drawn definition of terrorism, and insert into the definition of the offence requirements of intent and likelihood.”

Amendment made.

Another Amendment proposed, in line 1, to leave out the word “is” and insert the words “**may still not be**”.—(*The Chairman.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Not Content, 8

Lord Bowness
Lord Campbell of Alloway
Mr Douglas Carswell
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Mr Richard Shepherd MP
Baroness Stern

Another Amendment proposed, in line 4, to leave out the words “**the lack of any**” and insert the words “**its failure to be restricted to**”.—(*Dr Evan Harris.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 4

Lord Bowness
Dr Evan Harris MP
Lord Lester of Herne Hill
Baroness Stern

Not Content, 5

Lord Campbell of Alloway
Mr Douglas Carswell MP
Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Another Amendment proposed, in line 4, after the word “**intent**” to insert the words “, **including perhaps recklessness with a subjective test only,**”.—(*Dr Evan Harris.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 4

Lord Bowness
Dr Evan Harris MP
Lord Lester of Herne Hill
Baroness Stern

Not Content, 5

Lord Campbell of Alloway
Mr Douglas Carswell MP
Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph, as amended, agreed to.

Another paragraph — (*Lord Judd*) — brought up, and read, as follows:

“In this context we consider that the doubts of those witnesses who questioned the unqualified argument that there is nowhere in the world today where resort to violence, including violence against property, could be justified as a means of bringing about change cannot be dismissed out of hand. While the argument as stated refers to “today”, the legislation is not limited to such a time frame. We observe that the argument could also have significant implications for foreign policy.”

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 6

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Not Content, 3

Mr Andrew Dismore MP
Dan Norris MP
Mr Richard Shepherd MP

Paragraph inserted (now paragraph 37).

Paragraphs 32 to 34 (now paragraphs 38 to 40) read and agreed to.

Paragraph 35 (now paragraph 41) read, amended and agreed to.

Another paragraph — (*Lord Judd*) — brought up, and read, as follows:

“Subject to our recommendations at paragraph 36 being incorporated into the Bill, it is unlikely that the Bill would be incompatible with Article 5 of the Convention on the Prevention of Terrorism.”

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 2

Mr Andrew Dismore MP
Lord Judd

Not Content, 8

Lord Bowness
Lord Campbell of Alloway
Mr Douglas Carswell MP
Mary Creagh MP
Dr Evan Harris MP
Lord Lester of Herne Hill
Dan Norris MP
Mr Richard Shepherd MP

Paragraphs 36 to 39 (now paragraphs 42 to 45) read and agreed to.

Paragraph 40 (now paragraph 46) read, amended and agreed to.

Paragraph 41 (now paragraph 47) read and agreed to.

Another paragraph — (*Dr Evan Harris*) — brought up, read the first and second time, and added (now paragraph 48).

Paragraph 42 (now paragraph 49) read, amended and agreed to.

Paragraphs 43 to 49 (now paragraphs 50 to 56) read and agreed to.

Another paragraph — (*Dr Evan Harris*) — brought up, read the first and second time, and added (now paragraph 57).

Paragraph 50 (now paragraph 58) read and agreed to.

Paragraph 51 (now paragraph 59) read, as follows:

“ . Criminalising mere attendance at a place used for terrorist training appears to us to be disproportionate, and in order to be compatible with Article 10 ECHR we consider it would be necessary to qualify the scope of the new offence, for example by introducing a requirement of intent to receive training.”

Amendment proposed, in line 3, to leave out from the word “**example**” to the end of line 4 and insert the words “**by requiring an intention to use the training for terrorist purposes**”.—(*Baroness Stern.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 8

Not Content, 3

Lord Bowness
 Lord Campbell of Alloway
 Mr Douglas Carswell MP
 Dr Evan Harris MP
 Lord Judd
 Lord Lester of Herne Hill
 Mr Richard Shepherd
 Baroness Stern

Mary Creagh MP
 Mr Andrew Dismore MP
 Dan Norris MP

Paragraph, as amended, agreed to.

Paragraphs 52 and 53 (now paragraphs 60 and 61) read and agreed to.

Another paragraph — (*Lord Lester of Herne Hill*) — brought up, and read, as follows:

“ The interference with freedom of expression through a prior restraint demands a very high level of justification, as has long been recognised in the common law of libel. The European Court has emphasised that prior restraints upon expression require the most careful scrutiny. The same applies to freedom of assembly. The fundamental problem with prior restraint is that self-censorship is required in order to avoid prosecution, and this particularly applies to the proscription of organisations.”

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 6

Not Content, 2

Lord Bowness
Mr Andrew Dismore MP
Dr Evan Harris MP
Lord Lester of Herne Hill
Mr Richard Shepherd MP
Baroness Stern

Lord Campbell of Alloway
Mr Douglas Carswell MP

Paragraph inserted (now paragraph 62).

Paragraph 54 (now paragraph 63) read and agreed to.

Paragraph 55 (now paragraph 64) read, amended and agreed to.

Paragraphs 56 to 63 (now paragraphs 65 to 72) read and agreed to.

Paragraph 64 (now paragraph 73) read, amended and agreed to.

Paragraph 65 (now paragraph 74) read and agreed to.

Paragraphs 66 to 69 (now paragraphs 75 to 78) read, amended and agreed to.

Paragraphs 70 to 73 (now paragraphs 79 to 82) read and agreed to.

Paragraph 74 (now paragraph 83) read, as follows:

“ By contrast, none of the NGOs from which we received or heard evidence considered the case to have been made out for the proposed extension of pre-charge detention. Liberty accepted that there may be circumstances where the police feel they need to act sooner against suspects because of the nature of the offences they are dealing with, but considered that more appropriate and proportionate ways of meeting the police’s concerns are available, including by providing the police and security services with additional resources, relaxing the ban on the admissibility of intercept evidence, bringing lesser charges while continuing to investigate more serious terrorist allegations, amending the PACE Codes to allow interviews to take place after charge where new forensic evidence becomes available and there are legitimate questions to put to a suspect, and introducing conditional bail to

enable stringent conditions to be attached to police bail in terrorism cases. They were also concerned that the justifications relied on by the police apply equally to other types of criminal investigation. The Law Society had similar concerns and was also opposed to any extension of the period of pre-charge detention.”

Amendment proposed, in line 14, at the end, to add the words “We note that the Muslim Community Security Working Group has expressed the view that, rather than extending the period of pre-trial detention, the police should concentrate on improving their intelligence “whose failures have led to huge resentment on the part of the Muslim community””.—(*Lord Lester of Herne Hill*.)

Question proposed, That the Amendment be made:— Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraph 75 (now paragraph 84) read and agreed to.

Paragraphs 76 and 77 (now paragraphs 85 and 86) read, amended and agreed to.

Paragraph 78 (now paragraph 87) read.

Amendments made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 6

Not Content, 4

Lord Bowness

Lord Campbell of Alloway

Dr Evan Harris MP

Mary Creagh MP

Lord Judd

Mr Andrew Dismore MP

Lord Lester of Herne Hill

Dan Norris MP

Mr Richard Shepherd

Baroness Stern

Another paragraph — (*The Chairman*) — brought up, and read, as follows:

“. In the event, the House of Commons concluded that a maximum of 28 days would be an appropriate extension. Subject to the recommendations we make below of additional guarantees and safeguards, we regard the 28 day maximum period as less likely to be incompatible with the UK’s obligations under the Convention.”

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Not Content, 7

Lord Bowness
Lord Campbell of Alloway
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Mr Richard Shepherd MP
Baroness Stern

Paragraphs 79 and 80 (now paragraphs 88 and 89) read, amended and agreed to.

Paragraph 81 (now paragraph 90) read.

Amendments made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 7

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Mr Richard Shepherd
Baroness Stern

Not Content, 2

Mr Andrew Dismore MP
Dan Norris MP

Paragraph 82 (now paragraph 91) read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 6

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Mr Richard Shepherd
Baroness Stern

Not Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph 83 (now paragraph 92) read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 5

Not Content, 3

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraphs 84 to 86 (now paragraphs 93 to 95) read and agreed to.

Paragraph 87 (now paragraph 96) read, amended and agreed to.

Paragraph 88 (now paragraph 97) read and agreed to.

Paragraph 89 (now paragraph 98) read, amended and agreed to.

Paragraph 90 (now paragraph 99) read, as follows:

“ In the meantime, bearing in mind that what is at stake is individual liberty, in our view, any increase beyond the current 14 day maximum would at the very least require amendment of the relevant provisions of the Terrorism Act 2000 which currently enable detention to be extended in the absence of the detainee or his or her legal representative and on the basis of material not available to them. These two procedural deficiencies should be remedied. Whether there should be nothing less than a full adversarial hearing before a judge when deciding whether further detention is necessary, subject to the usual approach to public interest immunity at criminal trials, including when necessary the use of a special advocate procedure when determining whether a claim to public interest immunity is made out, is a question which we think needs further consideration and to which we plan to return in a later report.”

Amendment proposed, in line 4, to leave out from the word “**of**” to the word “**Whether**” in line 6 and to insert the words “**legal representation on behalf of the detainee**”.—(*The Chairman.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 3	Not Content, 6
Mary Creagh MP	Lord Bowness
Mr Andrew Dismore MP	Dr Evan Harris MP
Dan Norris MP	Lord Judd
	Lord Lester of Herne Hill
	Mr Richard Shepherd MP
	Baroness Stern

Another Amendment proposed, in line 6, to leave out the word “**Whether**” and to insert the words “**We consider that**”.—(*Lord Lester of Herne Hill.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 6	Not Content, 3
Lord Bowness	Mary Creagh MP
Dr Evan Harris MP	Mr Andrew Dismore MP
Lord Judd	Dan Norris MP
Lord Lester of Herne Hill	
Mr Richard Shepherd	
Baroness Stern	

Another Amendment made.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 6	Not Content, 3
Lord Bowness	Mary Creagh MP
Dr Evan Harris MP	Mr Andrew Dismore MP
Lord Judd	Dan Norris MP
Lord Lester of Herne Hill	
Mr Richard Shepherd	
Baroness Stern	

Paragraph 91 (now paragraph 100) read, amended and agreed to.

Another paragraph — (*Lord Judd*) — brought up, and read, as follows:

“We consider that these issues surrounding an extension of pre-charge detention are an illustration of avoiding the damages of counter-productivity to which we refer in paragraph 9.”

Question put, that the paragraph be read a second time.

The Committee divided.

Content, 7

Not Content, 2

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Mr Richard Shepherd
Baroness Stern

Mr Andrew Dismore MP
Dan Norris MP

Paragraph inserted (now paragraph 101).

Another paragraph — (*Mary Creagh*) — brought up, read the first and second time, and added (now paragraph 102).

Paragraph 92 (now paragraph 103) read and agreed to.

Paragraph 93 (now paragraph 104) read, amended and agreed to.

Paragraph 94 (now paragraph 105) read and agreed to.

Another paragraph — (*Dr Evan Harris*) — brought up, and read, as follows:

“Second, the Government has indicated this new list of unacceptable behaviours will be a basis for the use of powers it is taking in the Immigration, Asylum and Nationality Bill, to deprive individuals of British citizenship, to deprive individuals of the Right to Abode, to deny individuals previously able—in fact entitled—to claim British citizenship by registration of such citizenship. The test for the use of such powers will be (and in some cases the test has been reduced to) a low one of conduct not conducive to the public good. While we cover these aspects in more detail in chapter 4, it is important to note the read across from the list of unacceptable behaviours. Individuals subject to these powers will in most cases subsequently be liable for deportation for conduct covered by the list of unacceptable behaviours. Indeed a British citizen with dual nationality may be stripped of citizenship (or a settled Commonwealth citizen be deprived of the right of abode) and then deported for the same act falling within the list of unacceptable behaviours.”

Question put, That the paragraph be read a second time.

The Committee divided.

Content, 6

Not Content, 1

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Dan Norris MP

Paragraph inserted (now paragraph 106).

Paragraphs 95 and 96 (now paragraphs 107 and 108) read, amended and agreed to.

Paragraphs 97 to 99 (now paragraphs 109 to 111) read and agreed to.

Paragraph 100 (now paragraph 112) read, as follows:

“The Home Secretary’s power to exclude or deport from the UK on the ground that a person’s presence in the UK is not conducive to the public good is an extremely broad power. Particularising behaviours which will be regarded as being “not conducive to the public good” is in principle to be welcomed from a human rights perspective as capable of enhancing legal certainty about the exercise of a very broadly worded power capable of interfering with a number of different human rights.”

Amendment proposed, in line 6, at the end, to add the words “However the list is described as indicative and not limited, and this was confirmed by the Home Secretary in his oral evidence and in practice therefore the advantages in respect of certainty of such a list may be limited.”—(*Dr Evan Harris.*)

Question proposed, That the Amendment be made:— Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraph 101 (now paragraph 113) read, amended and agreed to.

Paragraphs 102 and 103 (now paragraphs 114 and 115) read and agreed to.

Paragraph 104 (now paragraph 116) read, as follows:

“The first concern is whether the phrase “fomenting, justifying or glorifying terrorist violence in furtherance of particular beliefs” is sufficiently precisely defined, bearing in mind the likely impact on legitimate public debate about the causes of terrorism, and therefore on freedom of expression. As we reported above in relation to the proposed new offence of encouragement of terrorism, it is clear from the Strasbourg case-law that restrictions on indirect incitement to commit terrorist acts is not in principle incompatible with the right to freedom of expression in Article 10 ECHR. Compatibility with Article 10,

however, will depend on the precise wording of the restriction in question, and in particular whether it is sufficiently precisely defined to ensure that it does not disproportionately stifle legitimate debate.”

Amendment proposed, in line 9, after the word “defined” to insert the words “and narrow in its scope.”—(*Dr Evan Harris.*)

Question proposed, That the Amendment be made:— Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraph 105 (now paragraph 117) read, as follows:

“. The phrase “fomenting, justifying or glorifying terrorist violence” on the list of unacceptable behaviours justifying deportation in our view suffers from the same legal uncertainty as afflicts the criminal offence of encouragement and glorification in clause 1 of the Bill. Fomenting is probably sufficiently certain in its own right, carrying with it as it does connotations of deliberate incitement or stirring up. “Justifying” or “glorifying”, however, have no such clear meaning. The reasons why the term “glorify” does not satisfy the requirements of legal certainty are set out above in the context of clause 1 of the Bill and in our view apply equally here. “Justifying” terrorist violence, however, is not part of the offence of encouragement of terrorism, but it is part of the list of unacceptable behaviours. On the face of it, it appears to be much broader in scope than any of the terms used in clause 1. Indeed, the Home Secretary’s distinction, in the context of clause 1, between encouraging and glorifying on the one hand and explaining or understanding on the other, cannot apply to the term “justify”, since explaining or understanding can be seen as a form of justifying. In addition to the vagueness of the notions of justifying and glorifying, the list of unacceptable behaviours uses the definition of “terrorism” which has been criticised above for being too broad.”

Amendment proposed, in line 5, to leave out the words ““Justifying” or “glorifying”, however, have no such” and insert the words ““Glorifying” has less”.—(*The Chairman.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2

Mr Andrew Dismore MP
Dan Norris MP

Not Content, 5

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Other Amendments made.

Question put, that the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 6

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Not Content, 2

Mr Andrew Dismore MP
Dan Norris MP

Paragraphs 106 and 107 (now paragraphs 118 and 119) read, amended and agreed to.

Paragraphs 108 and 109 (now paragraphs 120 and 121) read and agreed to.

Paragraph 110 (now paragraph 122) read, as follows:

“ . This issue is therefore one of the most pressing as action is already being taken to implement the new approach in respect of a number of individuals who are currently being detained and who face deportation to countries where there is a risk of torture. It is also an issue on which public debate has become polarised. JUSTICE, Amnesty, the Law Society, Human Rights Watch, Redress and the Medical Foundation for the Care of Victims of Torture all express their “serious concerns” over deportations on the basis of diplomatic assurances, primarily on the ground that they circumvent the absolute obligation of *non-refoulement*, that is, not to return people to countries where there is a substantial risk that they will be tortured. JUSTICE criticise the Memorandum of Understanding with Jordan as providing no effective protection for the rights of the returned person, and doubt that a British court would accept as a sufficient guarantee assurances from countries where there is evidence of the repeated use of torture by the authorities. Amnesty says that such assurances are not worth the paper they are written on because the Governments concerned have demonstrated that they do not take their obligations under multilateral treaties seriously. The Home Secretary, on the other hand, argues that those concerned about human rights “ought to welcome our conclusion of memoranda of understanding with these countries because what will happen as a result of this is a much stronger relationship on precisely the human rights agenda which is concerned.” ”

Amendment proposed, in line 8, to leave out the word “substantial” and insert the word “real”.—(*Dr Evan Harris.*)

Question proposed, That the Amendment be made:— Amendment, by leave, withdrawn.

Paragraph agreed to.

Paragraphs 111 to 139 (now paragraphs 123 to 151) read and agreed to.

Paragraph 140 (now paragraph 152) read, amended and agreed to.

Paragraphs 141 to 150 (now paragraphs 153 to 162) read and agreed to.

Paragraph 151 (now paragraph 163) read.

Question put, that the paragraph stand part of the Report.

The Committee divided.

Content, 5

Not Content, 3

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraph 152 (now paragraph 164) read.

Question put, that the paragraph stand part of the Report.

The Committee divided.

Content, 5

Not Content, 3

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Paragraphs 153 to 157 (now paragraphs 165 to 169) read and agreed to.

Paragraph 158 (now paragraph 170) read, as follows:

“ . This leaves as the main issue whether the power to deprive of a right of abode contains sufficient guarantees against arbitrariness in light of, first, the sheer breadth of the concept of “conducive to the public good” and, second, the relatively low threshold which it sets for the exercise of a power of deprivation which has very serious consequences for the individual concerned. **We consider that the legal uncertainty caused by the width of the current definition of unacceptable behaviours means that there are not at present sufficient guarantees against arbitrariness in the exercise of the power to deprive of a right of abode, but if the list were cured of legal uncertainty by more precise definition of the behaviours concerned, the availability of a full right of appeal in relation to this power would provide a sufficient guarantee.**”

Amendment proposed, in line 5, after the word “**that**” to insert the words “**(i) the same problems with the significant reduction in the threshold referred to in relation to clause**

52 powers (set out in paragraphs 161 and 164) apply to the use of this power and that (ii)” —(Dr Evan Harris.)

Question put, That the Amendment be made.

The Committee divided.

Content, 6	Not Content, 2
Lord Bowness	Mr Andrew Dismore MP
Mary Creagh MP	Dan Norris MP
Dr Evan Harris MP	
Lord Judd	
Lord Lester of Herne Hill	
Baroness Stern	

Other Amendments made.

Question put, That the paragraph, as amended, stand part of the Report.

The Committee divided.

Content, 6	Not Content, 2
Lord Bowness	Mr Andrew Dismore MP
Mary Creagh MP	Dan Norris MP
Dr Evan Harris MP	
Lord Judd	
Lord Lester of Herne Hill	
Baroness Stern	

Paragraphs 159 to 164 (now paragraphs 171 to 176) read and agreed to.

Paragraph 165 (now paragraph 177) read, as follows:

“. The second way in which the new clause would significantly widen the scope of the exclusion from protection in Article 1F(c) is by its inclusion of the phrase “whether or not the acts amount to an actual or inchoate offence.” The effect of these words is to make the applicability of the exclusion from asylum wider than the actual commission of terrorist offences. Again this is the Government’s explicit intention. The scope of the exclusion from asylum is intended to be wider than the new encouragement offence in clause 1 of the Terrorism Bill, and to include the “unacceptable behaviours” in the Home Secretary’s published list which include behaviours which are not criminal offences. That this is the Government’s intention was made clear in the letter from the Home Secretary dated 15 September 2005 and it was confirmed by the Minister in Committee. The new clause

would therefore operate to exclude from asylum individuals who have not committed any terrorist crime under UK law.”

Amendment made.

Another Amendment proposed, in line 10, to leave out from the word “Committee.” to the end of line 12.—(*The Chairman.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2

Not Content, 6

Mr Andrew Dismore MP
Dan Norris MP

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Paragraph, as amended, agreed to.

Paragraph 166 (now paragraph 178) read, as follows:

“. Guidance on the proper interpretation of Article 1F(c) is available from the United Nations High Commission for Refugees, which is responsible for supervising the application of the provisions of the Refugee Convention. The most up to date guidance on from the UNHCR in relation to Article 1F is to be found in its *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*. Those Guidelines state that, given the possible serious consequences of exclusion from refugee status, the exclusion clauses in Article 1F should always be interpreted restrictively and used with great caution, and only after a full assessment of all the individual circumstances of the case. In relation to Article 1F(c), the Guidelines say that it should be read narrowly: it is “only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category.” To redefine the scope of the Article 1F(c) exclusion so as to catch anyone who has threatened damage to property as a means to political change anywhere in the world, and anyone who in the Secretary of State’s view has engaged in one of the unacceptable behaviours such as “justifying” terrorism, is in our view to broaden the scope of the exclusion in Article 1F(c) in a way which is not itself compatible with the Refugee Convention.”

Amendment proposed, in line 18, to leave out from “1F(c)” to the end of line 19.—(*The Chairman.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2

Mr Andrew Dismore MP
Dan Norris MP

Not Content, 6

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Paragraph, as amended, agreed to.

Paragraph 167 (now paragraph 179) read, as follows:

“ . In order to be compatible with the Refugee Convention, and to give effect to the Government’s stated purpose of merely making explicit what Article 1F(c) implicitly requires, the clause would need to be amended to decouple it from both the broad definition of “terrorism” in s.1 of the Terrorism Act 2000 and the published list of unacceptable behaviours in its present form. The Minister has helpfully indicated the Government’s preparedness to keep the drafting of the clause under review in light of debates on the Terrorism Bill. Compatibility could in our view be achieved by a combination of a narrower definition of terrorism and confining the scope of the exclusion to existing terrorist offences including, if it is satisfactorily defined in its enacted form, the proposed new offence of encouragement.”

Amendment made.

Another Amendment proposed, in line 9, to leave out from the word “to” to the end of line 10 and insert the words “**terrorist offences under UK law**”. —(*The Chairman.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 3

Mary Creagh MP
Mr Andrew Dismore MP
Dan Norris MP

Not Content, 5

Lord Bowness
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Another Amendment made.

Paragraph, as amended, agreed to.

Paragraphs 168 and 169 (now paragraphs 180 and 181) read and agreed to.

Paragraph 170 (now paragraph 182) read, amended, and agreed to.

Paragraphs 171 and 172 (now paragraphs 183 and 184) read and agreed to.

Paragraph 173 (now paragraph 185) read, as follows:

“ We consider that the failure of the new clause to preserve an in-country appeal on asylum grounds, as well as on human rights grounds, gives rise to a risk of incompatibility with the Refugee Convention. The problem with the Minister’s argument that an in-country asylum appeal would certainly fail because national security risks are excluded from protection is that it presupposes the correctness of the Secretary of State’s certificate that the person is a national security threat. The effect of the new clause is that there is no mechanism for independent review of that assertion by an asylum seeker before his or her removal. In order to be compatible with the Refugee Convention, we consider that the new clause ought to preserve in-country appeals on asylum grounds as well as human rights grounds.”

Amendment proposed, in line 2, after the word “a” to insert the word “**significant**”. —(*Dr Evan Harris.*)

Question proposed, That the Amendment be made:— Amendment, by leave, withdrawn.

Paragraph agreed to.

Motion made, and Question put, That the Report, as amended, be the Third Report of the Committee to each House. —(*The Chairman.*)

The Committee divided.

Content, 6

Not Content, 2

Lord Bowness
Mary Creagh MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Mr Andrew Dismore MP
Dan Norris MP

Several Papers were ordered to be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and Baroness Stern do make the Report to the House of Lords.

[Adjourned till Wednesday 7 December at 2pm.]

Witnesses

The oral evidence taken before the Committee and written evidence submitted to the inquiry listed against the following Ev pages are printed in Volume II of this Report

Page

Monday 24 October 2005

Rt Hon Charles Clarke MP, Secretary of State for the Home Department **Ev 1**
Mr Peter Clarke CVO QPM, Deputy Assistant Commissioner, Head of the Metropolitan Police
Anti-Terrorist Branch and National Co-ordinator of Terrorist Investigations and
Mr Ken Jones QPM, Chief Constable of Sussex Police, Head of Business Area for Terrorism and
Allied Matters, Association of Chief Police Officers **Ev 15**

Monday 31 October 2005

Mr Livio Zilli, UK Researcher, Amnesty International
Dr Eric Metcalfe, Director of Human Rights Policy, Justice
Mr Gareth Crossman, Director of Policy, **Mr James Welch**, Legal Director, Liberty
Ms Alexandra Marks, Chair, Reform Board, The Law Society **Ev 22**

List of Written Evidence

Government

- | | | |
|---|---|-------|
| 1 | Copy of letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department to Rt Hon David Davis MP and Mark Oaten MP, with attachments, re draft clauses to the Terrorism Bill on glorification and the issue of pre-charge detention period | Ev 49 |
| 2 | Copy of letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department to Rt Hon David Davis MP and Mark Oaten MP, re draft clauses to the Immigration, Asylum and Nationality Bill as counter-terrorism measures | Ev 55 |
| 3 | Copy of letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department to Rt Hon David Davis MP and Mark Oaten MP, re the definition of terrorism that applicable to the new offences in the Terrorism Bill | Ev 59 |
| 4 | Submission from the Home Office to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 61 |

Public bodies

- | | | |
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| 5 | Submission from the Mental Health Act Commission to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 65 |
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Other Organisations

- | | | |
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| 6 | Submission from Amnesty International on the Draft Terrorism Bill | Ev 68 |
| 7 | Submission from Amnesty International, Europe and Central Asia Programme to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 86 |
| 8 | Submission from the Association of University Teachers (AUT) on the Draft Terrorism Bill | Ev 91 |
| 9 | Submission from British Irish Rights Watch on the Terrorism Bill | Ev 93 |
| 10 | Further submission from British Irish Rights Watch to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 98 |
| 11 | Submission from The British Psychological Society to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 103 |
| 12 | Submission from Campaign Against Criminalising Communities (CAMPACC) to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 108 |
| 13 | Submission from Campaign Against Criminalising Communities (CAMPACC) Student Group to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 109 |
| 14 | Submission from Human Rights Watch on the Draft Terrorism Bill | Ev 112 |
| 15 | Submission from Immigration Law Practitioners' Association to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 118 |
| 16 | Submission from JUSTICE to the JCHR's inquiry into Counter-terrorism policy and human rights | Ev 125 |
| 17 | Submission from the Law Society on the Draft Terrorism Bill | Ev 131 |
| 18 | Further submission from the Law Society on additional amendments to the Immigration, Asylum and Nationality Bill | Ev 134 |
| 19 | Further submission from the Law Society to the JCHR's inquiry into counter-terrorism policy and human rights | Ev 135 |

20	Submission from Liberty to the JCHR's inquiry into Counter-terrorism policy and human rights	Ev 138
21	Submission from the Mayor of London on the Terrorism Bill	Ev 144
22	Submission from Medical Foundation for the care of victims of torture to the JCHR's inquiry into Counter-terrorism policy and human rights	Ev 145
23	Submission from 'Protect Our Rights' comprising Birnberg Peirce & Co, CAMPACC, Christian Khan solicitors, East London Communities against State Terror, Hizb-ut-Tahrir, Islamic Forum of Europe, Islamic Human Rights Commission, Liberty, National Civil Rights Movement, Muslim Association of Britain, Muslim Council of Britain, Newham Monitoring Project, State Watch, Stop Political Terror, The 1990 Trust, The Monitoring Project to the JCHR's inquiry into Counter-terrorism and human rights	Ev 146
24	Submission from REDRESS to the JCHR's inquiry into Counter-terrorism policy and human rights	Ev 151

Individuals

25	Submission from Dr CNM Pounder, Editor, Data Protection and Privacy Practice, on the Draft Terrorism Bill	Ev 156
26	Submission from Professor Clive Walker, School of Law, University of Leeds, on the Terrorism Bill	Ev 162
27	Further submission from Professor Clive Walker, School of Law, University of Leeds, to the JCHR's inquiry into Counter-terrorism policy and human rights	Ev 164

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651