



House of Lords
House of Commons
Joint Committee on
Human Rights

**Government Response to the
Committee's Third Report of
this Session: Counter-Terrorism
Policy and Human Rights:
Terrorism Bill and related
matters**

Tenth Report of Session 2005–06



House of Lords
House of Commons
Joint Committee on
Human Rights

**Government Response to the
Committee's Third Report of
this Session: Counter-
Terrorism Policy and Human
Rights: Terrorism Bill and
related matters**

Tenth Report of Session 2005–06

*Report, together with formal minutes and
appendix*

*Ordered by The House of Lords to be printed 1 February 2006
Ordered by The House of Commons to be printed 1 February
2006*

**HL Paper 114
HC 888**

Published on 7 February 2006 by authority of the House of Lords and
the House of Commons London: The Stationery Office Limited
£0.00

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.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current Membership

HOUSE OF LORDS

Lord Bowness
Lord Campbell of Alloway
Lord Judd
Lord Lester of Herne Hill
Lord Plant of Highfield
Baroness Stern

HOUSE OF COMMONS

Mr Douglas Carswell MP (Conservative, *Harwich*)
Mary Creagh MP (Labour, *Wakefield*)
Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Dan Norris MP (Labour, *Wansdyke*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Nick Walker (Commons Clerk), Ed Lock (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Jackie Recardo (Committee Assistant), Pam Morris (Committee Secretary) and Tes Stranger (Senior Office Clerk).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk.

Contents

Report	<i>Page</i>
Report	3
Appendix	5
Letter and memorandum from Rt Hon Charles Clarke MP, Secretary of State for the Home Department	5
THE TERRORISM BILL	5
DEPORTATION AND EXCLUSION	14
THE IMMIGRATION, ASYLUM AND NATIONALITY BILL	16
Formal Minutes	23
Reports from the Joint Committee on Human Rights in this Parliament	24

Report

Under cover of a letter dated 24 January 2006 from Rt Hon Charles Clarke MP, Secretary of State for the Home Department, we have received the Government's Response to our Third Report of this Session, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (HL Paper 75-I, HC 561-I). We publish this Response as an Appendix to this Report. Our inquiry into counter-terrorism policy and human rights continues, and we will comment as appropriate on this Response in future Reports which we publish on the subject.

Appendix

Letter and memorandum from Rt Hon Charles Clarke MP, Secretary of State for the Home Department

I am very grateful to your Committee for producing a characteristically thorough and thoughtful report on these important issues.

I attach the Government's response to the report.

* * * * *

THE TERRORISM BILL

Encouragement of Terrorism - Clause 1

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. (Paragraph 13)

The Government is of the view that the Terrorism Bill as introduced to Parliament, and as amended during its passage through Parliament so far, is compatible with the ECHR. The reasons for this are set out in paragraphs 172 to 183 of the House of Lords version of the Explanatory Notes which accompany the Bill.

The Government believes the existing definition of 'terrorism' is appropriate and does not create the possibility of the Bill being found to be incompatible with Article 10 of the ECHR and related Articles. The current definition is clearly and carefully set out in section 1 of the Terrorism Act 2000, has operated successfully for five years and does not, in the Government's view, go beyond what is necessary. It is important that the UK should demonstrate its opposition to terrorism wherever it may occur, and whatever form it may take.

As has been explained during the debates on the Bill, the Government does not believe that a better definition of terrorism could easily be constructed. Nevertheless, the Government has invited the independent reviewer of terrorism legislation, Lord Carlile of Berriew, to review the definition of terrorism. He has said that he will consult widely in performing this task and the Government has made a commitment to give Parliament the opportunity to debate his report.

A clarification of the law [with regard to the offence in Clause 1] 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. (Paragraph 25)

Although the Government does not agree that the new offence overlaps with existing offences to the extent described by the Committee, it welcomes the Committee's endorsement of the need for a new offence of indirect incitement to terrorist acts.

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. (Paragraph 31)

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 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. (Paragraph 33)

The Government was of the view that the provisions in clause 1 of the Terrorism Bill as introduced were compatible with the ECHR for the reasons set out in the Explanatory Notes which accompany the Bill.

The inclusion of a recklessness limb is an important part of the offence because a person should be caught by the offence for failing to heed a risk, as well as if he or she has specific intent. The Government believes that encouraging terrorism should be an offence whether it is done intentionally or through objective recklessness. The Government has, however, listened to concerns expressed in both Houses of Parliament and has accepted that the recklessness test in clause 1 should be subjective rather than objective and the Bill has accordingly been amended to provide for this.

Most of the anti-terrorism offences which impinge on freedom of expression in the Terrorism Act 2000 include a “reasonable excuse” defence. 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 concerns about the breadth of 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 the offence would be incompatible with Article 10 ECHR. (Paragraph 35)

Clause 1 of the Terrorism Bill includes a defence in clause 1(6). It is a defence for a person charged with the offence to show that the statement encouraging terrorism neither expressed his views nor had his endorsement, and that it was clear in the circumstances that this was the case. At the moment the defence is only available to those providing or using electronic services. The Government, however, intends to amend this defence so that it can cover all persons. The Government is satisfied that, for this offence, this defence is more appropriate than a defence of reasonable excuse or public interest and will ensure no-one is convicted under this offence who should not be.

In addition, no prosecution can be commenced without permission from the Director of Public Prosecutions (DPP). Although not the same as a public interest defence, the DPP will consider whether any prosecution would be in the public interest before giving his consent.

The Government does not believe that clause 1 impinges on legitimate freedom of expression.

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 the 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. (Paragraph 36)

Although the House of Lords removed it on 17 January, the Government is satisfied that the glorification provision as introduced had the necessary clarity. The concept of glorification was limited and defined to ensure that a person would be able to regulate his conduct. Glorification of conduct per se was not enough: in order to fall within the offence, the conduct would have had to be glorified as conduct to be emulated and it would have had to be possible to emulate the conduct that was being glorified. In addition, the concept of ‘likelihood’ was and remains present in clause 1(1) of the Bill.

On 17 January, the House of Lords voted to replace the glorification provision with a definition of ‘indirect encouragement’ as ‘describing terrorism in such a way that the listener would infer that he should emulate it’. The Government does not believe that this definition is fit for purpose. It will seek to reintroduce the glorification provision in the House of Commons.

The issue of the definition of terrorism is addressed above.

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. (Paragraph 37)

The Government opposes terrorism wherever it may occur. Subject to consideration of any suggestions from Lord Carlile, the Government does not believe it is appropriate to distinguish between ‘good terrorists’ and ‘bad terrorists’.

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 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. (Paragraph 41)

The offence created in clause 1 of the Terrorism Bill is broader than that required by Article 5 of the Convention on the Prevention of Terrorism. But this would not in any way

limit the ability of the UK to ratify the Convention. The UK can ratify the Convention if the offence in clause 1 of the Terrorism Bill is as broad as, or broader than, the offence in Article 5 of the Convention.

For reasons already explained, the Government believes it should be an offence to encourage terrorism either intentionally or recklessly. Both Houses of Parliament have endorsed this approach. The Government does not believe it would be appropriate for the prosecution to have to prove that a statement which gave rise to a prosecution under clause 1 actually created a danger that a terrorist act would be committed. Such a requirement would involve proving the state of mind of the members of the statement's audience, when what is relevant is the state of mind of the person publishing the statement.

The Government is satisfied that the Bill, including clause 1, meets the requirements set out in Article 12 of the Convention.

Dissemination of terrorist publications - Clause 2

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. (Paragraph 46)

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. (Paragraph 48)

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). (Paragraph 49)

The Government is of the view that the provisions in the Terrorism Bill are compatible with the ECHR for the reasons set out in the Explanatory Notes.

The Government does not believe it should be necessary for the prosecution to have to demonstrate intent or recklessness on the part of the defendant when prosecuting under clause 2. However, the Government listened to the concerns expressed in Parliament and elsewhere about clause 2 of the Bill and agreed to insert intent and recklessness tests into clause 2 at Report stage in the House of Lords. These were duly inserted on 17 January.

The original drafting of the Terrorism Bill, as introduced to Parliament, made it clear that publications would be terrorist publications only under certain circumstances arising from

the contexts in which they were disseminated. The Bill also contained a general defence at clause 2(8) to cover those who had not examined a publication and did not endorse its content.

The offence also included defences in clause 2(9) which would be applicable to those providing a service electronically. At Report stage, the Government expanded the defences in clause 2(9) to make them generally available. The defence in clause 2(9), as amended, will be available to those who can show that a publication did not express his views and did not have his endorsement and that it was clear in all the circumstances that this was the case. Having generalised the defence in 2(9) and limited the offence by including requirements relating to intent and recklessness, the Government no longer believed the defence in clause 2(8) was necessary. The House of Lords removed the defence in 2(8) at Report stage.

It is the Government's view that the remaining defence with the intent and recklessness tests are appropriate. They ensure legitimate librarians, academics teachers and others are protected, but they will still allow the offence to operate effectively.

Prosecutions under clause 2 can only be undertaken with the consent of the DPP. Although not the same as a public interest defence, the DPP will consider whether prosecution would be in the public interest before giving such consent. It would not be possible to create a tightly defined public interest defence.

The Government is satisfied that clause 2 as originally drafted would not have created a chilling effect. The changes which have now been made should remove any concerns which remain in this respect.

Preparation of terrorist acts - Clause 5

We are therefore satisfied, on balance, that the necessity for the new offence has been made out. (Paragraph 54)

The Government welcomes the Committee's endorsement of the new offence created in clause 5.

Training for terrorism - Clause 6

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. (Paragraph 56)

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. (Paragraph 57)

The Government is of the view that the Terrorism Bill, as introduced to Parliament, was compatible with the ECHR. However, the Government has listened to concerns expressed in Parliament and elsewhere and has amended the offence in clause 6 as originally drafted

so that it is only committed if someone gives training knowing (and not merely suspecting) that the pupil intends to use it for terrorist purposes.

Attendance at a place used for terrorist training - Clause 8

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. (Paragraph 57)

Clause 8 does not criminalise mere attendance at a place used for terrorist training. Rather it criminalises attendance at such a place when the attendee knows or believes, or could not reasonably have failed to understand, that training was being provided there wholly or mainly for terrorist purposes.

This distinction means that those who attend a terrorist training camp but do not know and could reasonably have failed to know its purpose will not be guilty of an offence. People who attend a camp and discover its true purpose while there will only be guilty of an offence if they remain at the camp. Likewise, journalists who suspect that a camp is a training camp will not be guilty of an offence if they attend the camp but leave as soon as they have established that their suspicions were correct.

The Government does not believe that anyone has reasonable grounds knowingly to attend a place where terrorist training is taking place and is satisfied that the offence is drafted appropriately.

Proscription - Clauses 21 and 22

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. (Paragraph 63)

The Government is of the view that the Terrorism Bill, as introduced to Parliament, was compatible with the ECHR and that it remains so after various amendments during its passage through Parliament. It is the Government's view that glorification in clause 1 was a sufficiently certain concept for the reasons set out above, and that the provision relating to glorification in clause 21 is also sufficiently certain even in the absence of a provision relating to glorification explicitly in clause 1.

The Government believes that organisations which try to create a climate in which terrorism is regarded as acceptable by glorifying acts of terrorism should be able to be proscribed. It should be clear in law that the grounds on which organisations can be proscribed should include unlawful glorification of terrorist acts. This will allow the security and law enforcement agencies to combat terrorism more effectively.

The provisions in clause 21 add to the existing proscription regime. It will therefore be necessary for any proposed proscription to be approved by both Houses of Parliament by affirmative resolution before it comes into effect. It will also be possible for organisations to

appeal against any proscription. These safeguards will ensure that the proscription powers are used appropriately.

Pre-charge detention - Clauses 23 and 24

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. (Paragraph 87)

The Government remains of the view that increasing the maximum period of pre-charge detention in terrorist cases to 90 days would be an appropriate and necessary step in the fight against terrorism. Nevertheless, the Government accepts the decision of Parliament to set the maximum limit at 28 days.

The Government is of the view that the proposed extension of the limit either to three months, as the Bill was originally drafted, or to 28 days, as the Bill has been amended, would be compatible with human rights. The reasons for this are set out in paragraph 181 of the Explanatory Notes which accompany the Bill.

The Government does not accept that there are deficiencies in the procedural safeguards surrounding pre-charge detention. Apart from the safeguards which are already contained in the Terrorism Act 2000, the Terrorism Bill provides that all detention beyond 14 days will need to be authorised by a High Court Judge or Judge of the High Court of Justiciary.

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. (Paragraph 89)

The Government will examine the report of the Commons Home Affairs Committee carefully and welcomes the willingness of the JCHR to co-operate with the Home Affairs Committee in its inquiry.

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, subject to the necessary improvements in procedural safeguards for the detainee being made. (Paragraph 92)

The Government accepted the advice of the police with regard to the 90 day maximum pre-charge detention limit. Andy Hayman, the UK's most senior anti-terrorist police

officer made the case for an extension of detention limits to a maximum of 90 days in his letter to the Home Secretary, dated 6 October. The Government found this case compelling.

Any detention under Schedule 8 of the Terrorism Act 2000 is subject to a number of important safeguards. All detention beyond 48 hours must be authorised by a District Judge nominated for the purpose by the Lord Chancellor (or territorial equivalent). The judge must ensure that investigations are carried out expeditiously and that people are detained for no longer than is necessary to obtain or preserve relevant evidence. It is not possible for the judge to grant extensions for more than seven days at a time. The person detained must be released as soon as the reason for his extended detention ceases to exist.

During the passage of the Terrorism Bill through Parliament, a number of changes have been made to the provisions relating to detention limits. The maximum limit was reduced to 28 days, which the Government has accepted. The level of judge involved in supervising detentions beyond 14 days was raised from District Judges to High Court Judges. Judges were given power to grant extensions for periods of less than seven days if there were any circumstances which warranted it.

The Government was, and remains, satisfied that the provisions originally included in the Bill relating to maximum detention limits were fully compatible with the ECHR, primarily because such detentions would be supervised by a judge, and that the Bill as it now stands is equally compatible with the ECHR.

We intend to return to the question of the possible use of investigating judges in terrorism cases in a later report. (Paragraph 98)

The Government will consider the Committee's report on investigating judges carefully.

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. 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 determining whether a claim to public interest immunity is made out. (Paragraph 99)

The Government does not believe it is appropriate to change the arrangements which are in place with regard to applications for detentions to be extended under Schedule 8 of the Terrorism Act 2000.

The purpose of hearings to consider whether extensions should be extended is to establish whether it is appropriate to allow more time for the police to carry out their investigations. If it is not, the judge will turn down the application for detention to be extended. Given that such hearings are about the nature of the investigation it is possible that they will involve consideration of sensitive material. At these hearings it is necessary to strike a balance between giving the person detained an opportunity to be heard, and ensuring that

a terrorist investigation is not prejudiced. The Government is satisfied that providing judges with a discretion to exclude the person detained and his representative, and to withhold information from them, is the best means of striking that balance.

The person detained is not denied the opportunity to put forward his case, as under paragraph 33(1)(a) of Schedule 8 to the Terrorism Act 2000 he must be given the opportunity to present arguments on whether his detention should be continued.

Paragraph 34 of Schedule 8 creates a procedure which governs the circumstances in which material can be withheld from the person detained. Under that paragraph, the judge must be satisfied that the test in paragraph 34(2) or (3) is met before he can withhold information from the person detained. The tests in paragraph 34(2) and (3) relate to the prejudicial effect of the material in question.

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. (Paragraph 100)

The Government does not accept that the Bill provides a presumption in favour of detention. A judge can authorise continued detention if, and only if, he is satisfied that the investigation is being conducted as expeditiously as possible and that an extension is necessary for the purpose of gathering relevant evidence.

As the Committee has noted, the Bill has been amended to provide that a Judge can authorise continued detention for a period of less than seven days if there are any circumstances which warrant it and the Government welcomes the Committee's endorsement of both this change and the change relating to the level of judge.

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. (Paragraph 101)

The Government agrees that it is important to ensure that legislation is not counter-productive and has sought to work with all communities in the fight against terrorism.

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. (Paragraph 102)

The Government does not believe it is appropriate or necessary to require applications for extensions to detentions to be made by Chief Constables or Assistant Chief Constables.

The legislation already requires that any police officer who makes such an application must be of the rank of superintendent or above, ensuring that only senior officers can perform this role. It is right that applications should be made by an officer who is well placed to understand the operational needs associated with the relevant investigations and who can provide the necessary details to the judge so that the judge can be satisfied that the investigation is being carried out as expeditiously as possible.

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. (Paragraph 103)

Clause 24 of the Bill is not designed to create a new ground for continued detention under the Terrorism Act 2000 but rather to clarify the existing situation which had been called into question in a case in Northern Ireland. The Government welcomes the Committee's support for this measure.

DEPORTATION AND EXCLUSION

Unacceptable behaviours

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 of their right of abode. Without such a modification there is a risk that the applications of this part of the list of unacceptable behaviours will be in breach of Article 10 of the ECHR and the use of other powers based on the application of the list will cause further breaches of ECHR rights. (Paragraph 118).

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 the 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 action will not be implemented. (Paragraph 119).

The powers to exclude or deport are deliberately broad to allow the Home Secretary of the day to react to changing circumstances and, the often unique nature, of these type of cases. The power to exclude is of course non-statutory, but is underpinned by a requirement within the Immigration Rules which requires that a person so excluded should be refused entry clearance or leave to enter (paragraph 320(6) of these Rules). That Rule refers to exclusion "where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good". This mirrors the language used at Section 3(5)(a) of the Immigration Act 1971 in respect of deportation "The Secretary of State deems his deportation to be conducive to the public good".

The unacceptable behaviours list has been prepared to address particular concerns about particular activities and was drafted in language designed to be accessible to the general public. The Government believes that the language used does make clear, in an accessible way, the type of activity that will not be acceptable.

The list of unacceptable behaviours does not change the legal basis on which the immigration powers will be exercised. Where a person's presence is not conducive to the public good the Home Secretary may exercise his power to exclude or deport a person from the UK. The list of unacceptable behaviours will neither extend nor constrain that power. The list of unacceptable behaviours is simply intended to provide an indicative set of the behaviours which would lead to the Home Secretary considering whether to exclude or deport a person. The exercise of the power in any particular case would need to take into account the UK obligations under the ECHR, including Article 10. It would be wrong to see this as a legal definition of what will make a person's presence here not conducive to the public good and so justify their exclusion or deportation. However, where a person has engaged in unacceptable behaviour they should be in no doubt that exclusion or deportation will be considered.

All cases for exclusion or deportation on the basis that an individual's presence here is not conducive to the public good will continue to be considered on their individual merits by the Home Secretary. The Home Secretary will take into account the balance between an individual's right to freedom of expression, and the need to protect society from those who support the use of violence in the furtherance of a cause.

The Government notes the Committee's concerns about the retrospective application of the list of unacceptable behaviours but notes that as indicated above the publication of this list of unacceptable behaviours did not extend the basis on which a person might be excluded or deported from the UK. The Committee notes that when publishing the list of unacceptable behaviours the Home Secretary set out the circumstances in which the power to exclude or deport on "non-conducive to the public good" grounds and indicated that he intended to broaden the exercise of these powers. However, although these powers had not routinely been exercised in the circumstances covered by the list of unacceptable behaviours, it would be wrong to assume they were never exercised in this way: the power to do so was available to the Home Secretary.

In deciding cases that fall within the scope of the list of unacceptable behaviours the Home Secretary will take account of such factors as the frequency with which comments/actions have occurred and the time since they happened.

Diplomatic Assurances and Torture and national security (Paragraphs 120–152)

The Government welcomes the Committee's measured analysis of its proposals for seeking Memoranda of Understanding, and, in particular, the Committee's conclusion that "it does not follow ... that diplomatic assurances are never capable, in principle, of satisfying the State's obligation not to return an individual to torture." The Government has noted that the Committee intends to scrutinize these agreements in the context of its inquiry into the United Kingdom's compliance with the United Nations Convention Against Torture (UNCAT). The Government has also taken note of the Committee's comments regarding the judgment in *Chahal* and the Government's intervention in the case of *Ramzy* which is currently before the European Court of Human Rights.

THE IMMIGRATION, ASYLUM AND NATIONALITY BILL

Deprivation of British citizenship – clause 53

The new test for deprivation of citizenship in new clause 53 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. (Paragraph 164)

(i) the significant reduction in the threshold

The Government believes that deprivation of British nationality and/or of right of abode in the United Kingdom would be an appropriate response to such activities as:

- Conduct seriously prejudicial to vital national interests, including acts of terrorism directed at this country or at an allied power and actions liable to damage relations between the United Kingdom and another country;
- War crimes;
- Public order offences;
- Other serious crime; and
- Unacceptable behaviours of the kind mentioned in the Home Secretary’s statement of 24 August.

In exercising these powers the Government shall, of course, be guided by the outcome of Lord Carlile’s review of the statutory definition of terrorism. However, as previously stated, the Government does not think it would be appropriate to constrain the present and future Secretaries of State by, for example, setting out on the face of the Bill the precise circumstances in which he would be able to remove citizenship or the right of abode. Today’s threats to public safety and national security are very different from those facing the country just a few years ago. Activities of the sort indicated above might, in the circumstances of a particular case, amount to conduct which is “seriously prejudicial to the vital interests of the United Kingdom” (the existing criterion for deprivation of British nationality) but it cannot be said that this would always be the position. It is impossible to predict the threats which may emerge in the future, and from which the people of this country would rightly expect the kind of protection which these powers are designed to provide.

(ii) the lack of requirement of objectively reasonable grounds for the Secretary of State’s belief

The notion that it is appropriate for deprivation of nationality to be based on the subjective view of the Secretary of State as to the propriety of such action has a long history. The current provisions in the British Nationality Act 1981 refer to the Secretary of State being “satisfied” as to certain matters before a deprivation order will be made. This follows on

from similar provisions in the both the British Nationality Act 1948 and the British Nationality and Status of Aliens Act 1914.

It is, in the Government's view, entirely appropriate that the Secretary of State should be able to act on his own assessment that a particular set of circumstances made it conducive for the person concerned to be deprived of his or her British nationality or right of abode. However, in some cases, for example where the individual had fled the country after committing a terrorist act, the certainty of a conviction might be unattainable. But the continuance of such a person's British citizen or possession of the right of abode here would be an affront. In matters relating to national security, the courts have stated that the Secretary of State is undoubtedly in the best position to judge what the public interest requires (*Secretary of State for the Home Department v Shafiq Ur Rehman* [2001] Imm AR 30).

The fact that the Bill would facilitate deprivation of nationality and/or the right of abode on the subjective view of the Secretary of State does not mean that the powers would be exercised arbitrarily. Natural justice (and, in the case of deprivation of nationality, section 40(5) of the British Nationality Act 1981) would require the subject of the proposed deprivation order to be given notice of the case against him. That person would be free, on appeal, to raise any issue bearing on either the legality or the merits of the decision.

The Committee suggests that there is some uncertainty about the jurisdiction of the appellate bodies in the case of an appeal against a proposed deprivation of British nationality. The Government submits that there is no such uncertainty. Provision in respect of such appeals is made by the British Nationality Act 1981 and the Special Immigration Appeals Commission (SIAC) Act 1997, as amended by the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004. The decision whether or not to deprive, which would (rightly) be at the discretion of the Secretary of State, would be informed by his assessment of whether the proposed action would best serve the public interest. Both the decision and the assessment on which it rested would be subject to review by the appropriate appellate body. In other words, there would be a "full merits" appeal. In the event of a successful appeal, the Asylum and Immigration Tribunal or, as appropriate, SIAC may direct that any deprivation order made before the date of final determination is to be treated as having had no effect.

(iii) the arbitrariness of the definition of the class affected

It is suggested that the prohibition in section 40(4) of the British Nationality Act 1981 on the creation of statelessness, to which the new provision in clause 53 would be subject, amounts to or could facilitate unlawful discrimination. The Government wishes to be clear that the powers to remove citizenship and the right of abode would and could not be directed in a discriminatory fashion against particular ethnic groups. The prohibition on deprivation of citizenship where this would lead to statelessness is a long-standing feature of our law and reflects our obligations under the UN Convention on the Reduction of Statelessness, which was ratified in 1966. (Deprivation on the ground that the individual in the first place obtained our citizenship by deception or concealment of relevant information is not subject to this prohibition.) However, section 44 of the British Nationality Act 1981 prevents the Secretary of State from having regard to the race, colour

or religion of any person who would be affected when considering the exercise of his discretionary powers under the Act. Further safeguards against such discrimination in the Race Relations Act 1976, as amended, would also apply.

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

When considering the question of human rights, it is important to be clear about the purpose and effect of deprivation of British nationality and the right of abode. With the loss of British citizenship and/or the right of abode, the person concerned would become subject to immigration control and could, potentially, face deportation. But subsequent deportation would not be a foregone conclusion, and separate consideration would need to be given to whether that, too, was in the public interest and could lawfully be executed bearing in mind the particular circumstances of the case. Existing legislation (s. 84, Nationality, Immigration and Asylum Act 2002) provides a clear legal basis for challenging a deportation on grounds of incompatibility with the person's ECHR rights. Clause 7 of the IAN Bill preserves this right of appeal against deportation on human rights grounds. For completeness, the following points should also be mentioned—

- (1) On ratification of the International Covenant on Civil and Political Rights in 1976, the United Kingdom Government reserved “the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of Article 12.4 and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom.” (Treaty Series No.6/1977, Cmnd 6702). We recently concluded that this reservation should be maintained (Department for Constitutional Affairs, *Report on the Interdepartmental Review of the United Kingdom's Position under various International Human Rights Instruments*, July 2004).
- (2) The Government has not ratified Protocol 4 to the ECHR, of which Article 3.2 makes similar provision to that made by Article 12.4 of the ICCPR.
- (3) There are no “rights” to a United Kingdom passport or to consular assistance (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Everett* [1989] Imm AR 155, CA; *R v (1) Secretary of State for Foreign and Commonwealth Affairs and (2) Secretary of State for the Home Department ex p. Abbasi* [2002] EWCA Civ 1598, [2003] UKHRR 76).

Deprivation of right of abode – clause 54

The same problems with the significant reduction in the threshold referred to in relation to clause 53 powers apply to the use of this power and 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, and that therefore the power as currently set out gives rise to a significant 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. (Paragraph 170)

The Committee is referred to the response to considerations on clause 53.

Terrorists and asylum – clause 52

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. 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 (paragraph 179).

Clause 52 provides a statutory interpretation of Article 1F (c) of the Refugee Convention relating to "acts contrary to the purposes and principles of the United Nations". The clause interprets 1F (c) as including acts of committing, preparing or instigating terrorism or of encouraging or inducing others to commit such acts. The aim of the clause, as the Committee correctly observes, is to exclude terrorists and those who support terrorism from asylum.

The Committee considers that clause 52 extends the scope of Article 1F (c) beyond current case law and internationally accepted norms. This is not the Government's intention, nor does the Government believe that this is the effect of the clause. The intention behind clause 52 is to make explicit what is already implicit within the wording of Article 1F (c): that terrorists are not entitled to the protection of the Refugee Convention.

The Government is clear that the clause is entirely consistent with UN Security Council Resolutions which interpret the meaning of Article 1F (c) as it applies to terrorism. In addition to the Security Council Resolution quoted in the Committee's report, UNSCR 1377 states that "the financing, planning and preparation of as well as any other form of support for acts of international terrorism ... are ... contrary to the purposes and principles of the United Nations." UNSCR 1624 (14 September 2005) reaffirms this principle, condemns "in the strongest terms the incitement of terrorist acts" and repudiates "attempts at the glorification of terrorist acts that may incite further terrorist acts." It also calls on States to adopt necessary and appropriate measures "to deny safe haven to any person with respect to who there are credible reasons for believing that they have been guilty of incitement to commit a terrorist act or acts."

The Government notes the Committee's concern in relation to the scope of clause 52. However the clause has been constructed deliberately to capture a broad spectrum of terrorist activity and draws heavily on existing and prospective terrorist legislation. It defines terrorism in the same terms as the 2000 Act. As that definition was approved by Parliament, the Government considers that it is the legitimate starting point. The references to "committing, preparing or instigating" in the clause are drawn from section 32 of the Terrorism Act 2000. The references in the clause to acts of "encouraging or inducing others" to commit, prepare or instigate terrorist acts draw on similar language in the Terrorism Bill.

The Government also considers that the definition of terrorism in the 2000 Act is compatible with definitions in international fora. The Committee has expressed particular concern that the 2000 Act makes reference to damage to property. However the draft UN definition of terrorism itself refers to “serious damage to public / private property” where the purpose is to intimidate or compel a Government or international organisation to abstain from doing any act.” The agreed EU definition of terrorism includes damage to public / private property—or even threatening to commit such an act—where the aim is seriously to destabilise or destroy the structures of a country or to intimidate or compel persons to act as described. **All Member States are required as a minimum to criminalise what is in the EU framework decision.**

It is the Committee’s view that an individual should only be excluded from asylum on the basis of Article 1 F (c) if they have committed a criminal offence. However the wording of Article 1F is not premised on the “acts” having to be criminalised. In addition, the standard of proof required is “serious reasons for believing” rather than the criminal standard of “beyond reasonable doubt”. It is envisaged that there will be cases that fall within the scope of Article 1F (c), despite the fact that no crime has been committed under UK law.

The Committee has suggested that the Government intends to exclude any individual who engages in one or more unacceptable behaviours from asylum by virtue of clause 52. This is not the case. The position is that commission of one or more unacceptable behaviours could result in exclusion from asylum, but only if that behaviour falls within the scope of Article 1F or 33(2). In many cases, such behaviour will bring an individual within the scope of the exclusion clauses, but there will be instances where it will not. **Some of the unacceptable behaviours are concerned with serious criminality but not national security. In these cases separate provisions of domestic law and the Refugee Convention apply.**

While noting the Committee’s approval for UNHCR’s position on the scope and interpretation of Article 1F (c), the Government considers this position is not in line with the UK’s domestic case law nor with UN Security Council Resolutions interpreting the meaning of “acts contrary to the purposes and principles of the United Nations” as they apply to terrorism. In the case of *KK* the Immigration Appeal Tribunal rejected UNHCR’s argument that only those in power or a state or stake like entity should be covered by Article 1F (c). The Tribunal stated that “owing at least partly to the growth of terrorist activity, it is now accepted by almost everybody that the meaning of Article 1F (c) is not so confined ... we are perfectly content to hold that a private individual may be guilty of an act contrary to the purposes and principles of the United Nations, and we see no difficulty in reading the words in this way ... we should have some difficulty in confining 1F (c) to individuals who control States.” The Canadian case of *Pushpanathan* also accepted the possibility that non-state agents could engage in acts falling within the scope of Article 1F (c).

Indeed, UNSCR 1377 itself suggests the UN Security Council’s acceptance of such an approach. It states that the Security Council “reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whoever committed.” The timing of this resolution, shortly after the terrorist attacks on 11th September 2001,

strongly suggests that this statement was made specifically with the non-state agents such as Osama Bin Laden in mind.

The UNHCR has also suggested that Article 1F (c) should only be applied following a full assessment of all the circumstances of each individual case. However, it would continue to be the case that cases would be assessed on the individual facts to decide whether a person had committed acts contrary to the purposes and principles of the UN, as defined in clause 52, and hence whether they were excluded from the protection of the Refugee Convention.

The Government will continue to look at the approach to defining Article 1F (c) in the Refugee Convention in the light of developments in the Terrorism Bill. In response to concerns raised about the definition of terrorism in both Houses, the Government has invited Lord Carlile of Berriew to conduct an independent review of our definition of terrorism and report back within a year of the commencement of the new Terrorism Act. If Parliament decides, in the light of that review, that changes to the existing definition are needed, this change will be brought forward as soon as Parliamentary time allows. If amendments were to be made to the Terrorism Act 2006, the definition in section 52 of the Immigration, Asylum and Nationality Act would be reviewed as necessary.

Out of country appeals against deportation in national security cases – clause 7

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 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 clause ought to preserve in-country appeals on asylum grounds as well as human rights grounds. (Paragraph 185)

The Government welcomes the Committee's recognition that the provision within clause 7 for an in-country right of appeal to the Special Immigration Appeals Commission (SIAC) against any certificate issued by the Secretary of State that removal would not breach the United Kingdom's ECHR obligations provides an important and necessary safeguard.

However, the Government does not accept the Committee's contention that the absence of an in-country appeal on asylum grounds will result in a protection gap and in people being deported from the United Kingdom in breach of our obligations under the 1951 Refugee Convention. Particularly in the light of the judgment of the House of Lords in the case of *Ullah* [2004] UKHL 26 the Government considers that the protection afforded by the European Convention on Human Rights is sufficiently wide so as to ensure that where removal would be compatible with our obligations under that Convention it would also be compatible with our commitments under the Refugee Convention. As the Committee is aware, clause 7 already provides for a full out of country appeal against the decision to make the deportation order and any claim to refugee status can be considered fully at that stage. The Government is therefore wholly satisfied that the clause will operate in a manner that is compatible with our obligations under the Refugee Convention.

The purpose of clause 7 is to ensure that people who are assessed as representing a threat to the national security of this country should be removed as quickly as possible so far as is compatible with our international obligations. In essence this requires that: where the Secretary of State makes a decision to make a deportation order on the grounds of national security, the substance of the national security case should only be substantively assessed once the proposed deportee has left the UK. The Government's firm position is also that wherever the exclusion clauses in the Refugee Convention are relevant they must be applied.

If clause 7 were to provide for an appeal on asylum grounds prior to removal, in considering the application of the Refugee Convention, SIAC would be required to determine whether the national security case against the appellant was such as to require his exclusion from the protection of the 1951 Convention. This would necessarily frustrate the effective operation of the Clause. On this basis and in view of the wider protection afforded by the ECHR we are clear that it is necessary and appropriate to provide an in country right of appeal only in respect of any human rights issues raised by the appellant.

Formal Minutes

Wednesday 1 February 2006

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
Lord Plant of Highfield	Mr Richard Shepherd MP

* * * *

Draft Report [Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters], proposed by the Chairman, brought up, read the first and second time, and agreed to.

Resolved, That the Report be the Tenth Report of the Committee to each House.

Ordered, That a paper be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Lord Judd do make the Report to the House of Lords.

* * * *

[Adjourned till Monday 6 February 2006 at 4 pm.]

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
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887