

COMMENTS ON BEHALF OF THE BAR OF ENGLAND AND WALES

PROSCRIPTION

Coverage

1. This paper sets out some comments, from the perspective of the Bar of England and Wales, on those provisions of the National Security (Miscellaneous Provisions) Bill 2003 (the “Bill”) which amend the Societies Ordinance to provide for the proscription of organisations. It also summarises the appeal procedures created in the UK under immigration and terrorism legislation.

Introductory comments

2. In approaching the proposed provisions we consider that it is fundamental to recognise the importance of the right of an individual to freedom of expression, to freedom of association and to freedom of thought, conscience and religion.
3. Only where absolutely necessary should these freedoms be restricted on the grounds of national security. Any such restriction should be necessary and proportionate.
4. Any legislation providing the basis for restriction of these rights should be absolutely clear and should protect the rule of law.

Comments on Section 8A(2)(a) and (b)

5. There is inevitably a problem in defining with sufficient precision the minimum conditions which must be met before an order for proscription may be made. One solution to the problem is to seek

to define the types of activity which may lead to proscription of an organization which commits, promotes, encourages or is otherwise concerned with such acts. This broadly speaking is the approach adopted in England by the Terrorism Act 2000 (“TA 2000”) in Sections 1 and 3.

6. This statutory scheme and its implementation are very controversial in the UK. Hence we express no view as to whether it is consistent with international human rights standards. But whether one approves of the scheme or not, one can at least acknowledge that it is rational in that it focuses attention on specified activities.
7. It seems to us that the scheme proposed in Section 8A(2)(a) and (b) of the Societies Ordinance is irrational and virtually unworkable in that it focuses on crimes rather than activities. The proposed section reads:

“This section applies to any local organisation-

- (a) the objective, or one of the objectives, of which is to engage in treason, subversion, secession or sedition or commit and offence of spying;*
- (b) which has committed or is attempting to commit treason, subversion, secession or sedition or commit an offence of spying;”*

“Local organization” is defined in section 8A(5)(f) of the Bill as

“(i) any society which is registered, registrable or exempted from registration under this Ordinance; or

(ii) any body of persons listed in the Schedule”

8. In Section 8A(2), both (a) and (b) assume that it is possible for a “local organization” to commit the offences of treason, subversion, secession, sedition and spying. There are enormous difficulties in applying this concept.
9. Firstly, the question arises whether it is even possible for an organization to commit some of these crimes as defined in the Bill. Take treason as an example. Section 2 of the Bill, defining treason begins with the words “A Chinese national commits treason if he...”. Of course a number of Chinese nationals could collectively commit acts of treason. But then each would be liable as an individual. They could not be collectively liable as an organization simply because organizations cannot possess nationality.
10. Secondly, the offences of subversion, secession, and sedition, as defined in the Bill, and spying, as defined in the Official Secrets Ordinance, can only be committed by “a person”. Moreover the acts which are made offences are acts which one would normally think of as being committed by one or more human beings; such as joining armed forces, instigating foreign forces, overthrowing, intimidating, inciting. An organization cannot do any of these things. Nor can it perform such physical activities as approaching, inspecting or passing over a prohibited place, making sketches, models or notes etc. which may constitute spying.
11. Suppose that 5 men agree to gather secret information and pass it on to a hostile government. They do so in a number of ways (e.g. making sketches and notes). They are all members of an

association having 2000 members. One could sensibly say that all 5 were guilty of spying. But it would make no sense to accuse the association itself of the offence, unless some proper basis of non-personal liability can be invoked.

12. Of course it may be said that some principle of corporate or vicarious liability may be invoked. But what is that principle and why is it not expressed in the Bill if it is to be relied upon? If the organization is an incorporated body, then it has legal personality. There is substantial – and very complex - authority on the question whether a corporation can commit criminal offences. We do not propose to make a detailed review of those authorities. It has been held that those who represent the directing mind of the corporation can render it criminally liable for their actions as in the leading case of *Tesco v Natrass*¹. But again there is an insuperable physical problem. Because a company cannot go to prison it can only commit offences punishable with a fine². The Bill provides that any person convicted shall be liable to imprisonment for life in the case of treason, subversion secession and sedition under Section 9A(1)(a) namely inciting others to commit treason, sedition or subversion. The only case where a fine can be imposed is under Section 9A (1)(b) (inciting others to violent public disorder).
13. It may be argued that there is no obligation to impose a prison sentence for any of these offences. The Bill merely creates a liability to be sentenced to imprisonment. But we cannot conceive of any act which could properly be prosecuted as treason, secession

¹ (1972) AC 153 see also Smith and Hogan Criminal Law (10th ed) at 201 – 205

² Smith and Hogan at p205

subversion or incitement thereto which would merit a penalty no greater than a fine.

14. Thus the Bill appears to contemplate the possibility that an organization might be guilty of all of these offences even though it could never be prosecuted for them. This is a quite artificial and unfair basis for proscription.

15. The difficulties are even greater if the association is not incorporated. In *A.G. v Able*³ Woolf J in dealing with an alleged offence under the Suicide Act 1961 said

“It must be remembered that the (Voluntary Euthanasia Society) is an unincorporated body and there can be no question of the society committing an offence”

16. However Smith and Hogan question whether this is correct. They rely on the Interpretation Acts for the proposition that⁴

“Since 1889 unincorporated bodies have been able to commit any offence under an enactment passed after 1989 which makes it an offence for a “person” to do anything which an unincorporated body is capable of doing”.

17. But is an unincorporated body capable of committing any of the offences of treason, subversion, secession, sedition or spying? This begs the question. We would submit that the answer is “no” for the reasons already given.

18. Thus proscription of a local organization under (a) or (b) of Section 8A(2) depends upon it having the objective of committing, or

³ (1984) QB 795

⁴ At p208

actually committing, or attempting to commit certain crimes. But there is a powerful argument that as a matter of law it could never commit any of those crimes because (for example) it could never be a citizen, lacks any physical capacity and could never go to prison.

19. Moreover the Bill gives no guidance as to how these difficulties are to be overcome. It is typical of political organizations that they may represent many shades of opinion and ranges of activity. If members of an organization commit or plan acts of treason then one would need clear statutory criteria for judging how many must do so and at what level of seniority within the organization to render it guilty of treason and hence liable to proscription. Moreover if one were considering the “objectives” of the organisation then one would have to ask the hypothetical question whether a particular objective would constitute an offence of (say) subversion if it were to be translated into physical action.
20. Dealing with these complex issues effectively and fairly is all the more difficult because the Bill defines treason, subversion, secession and sedition so vaguely and broadly. We make a number of points in relation to these proposed offences in our separate paper dealing with the relevant sections of the Bill in which the proposed offences are set out.

Comment on Section 8A(2)(c)

21. The operation of this section stems from a decision to proscribe an organisation by the Central Authorities under the law of the PRC.

22. It is unclear if or to what extent the Hong Kong government will have any further discretion in relation to the primary decision to proscribe the parent organisation. None is provided in the Bill.
23. How is the Hong Kong government to decide whether it “reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose” (as it is required to do under Section 8A(1)) when it has not been party to the original decision and is merely supplied with a certificate as conclusive evidence of the prohibition (under Section 8A(3))? It seems to us that this will not be possible.
24. We have no knowledge of the procedures which may exist in the PRC for any appeal against the original decision to proscribe the parent organisation. Even bearing in mind the principle of deference to the decision of the executive (which in our jurisdiction is based upon the concept of primacy of an elected government in certain areas) and the possible need to protect sensitive information, other jurisdictions have recognised the need to provide for independent appeal or review procedures (as to those in the UK, see paragraphs 30 to 64 below).
25. Section 8A(2)(c) is wholly unclear as to how the rights of individuals will be protected in circumstances in which the decision to proscribe has been taken by the Central Authorities.

Appeal procedures under Sections 8D and 8E of the Bill

26. It is understood that reliance is placed upon UK practice for some of the procedures suggested in sections 8D and 8E of the Bill.

27. We believe that it is important to bear in mind the limited context, and in relation to terrorism the urgent and exceptional circumstances, in which these procedures have been developed.
28. The context of legislation is all-important. For example, in relation to the procedures under the ACTSA 2001, it has been recognised that apart from the emergency situation arising from the 11 September 2001 atrocity some of the procedural provisions would not be acceptable.
29. It is therefore with considerable caution that the UK procedures should be approached in order to establish any form of analogy with the purposes of Section 8A of the Bill.
30. Bearing in mind this overall caveat, three forms of procedure are briefly summarised below:
 - (a) Special Immigration Appeals Commission (“SIAC”) under the Immigration Act 1971 (“IA 1971”);
 - (b) SIAC under the Anti-terrorism, Crime and Security Act 2001 (“ATCSA 2001”);
 - (c) Proscribed Organisations Appeal Commission (“POAC”) under the Terrorism Act 2000 (“TA 2000”).

SIAC under IA 1971

31. The context of the origin of the SIAC procedure in the UK was that of a decision of the Secretary of State to make a deportation order under the IA 1971.

32. It is important to bear in mind that deportation of aliens involves no fair trial rights under European Convention on Human Rights (“ECHR”) Article 6. The issue of deportation does not involve the determination of a criminal charge and therefore the applicant is not entitled to the full protection of Article 6.

33. The background to the SIAC procedure is set out in the judgments of the House of Lords and Court of Appeal in *Sec of State for Home Dept v Rehman [2003] 1AC 153 at 157 and 188*.

34. Section 3 of the 1971 Act contains the general provisions for regulation and control of immigration. S.3(5) identifies who is liable to deportation:

“(5) A person who is not [a British Citizen] shall be liable to deportation from the United Kingdom... (b) if the Secretary of State deems his deportation to be conducive to the public good; or....”

35. If the Secretary of State proposes to make a deportation order, the first step is to make a decision to deport. The decision to deport is one in relation to which there is normally an appeal under s.15 of the 1971 Act. Section 15(1)(a) which provides:

“(1) Subject to the provisions of this Part of this Act, a person may appeal to an adjudicator against - (a) a decision of the Secretary of State to make a deportation order against him by virtue of section.3(5) above; or...”

36. Deportation involves a two-stage process. First the decision to make a deportation order and then, if there is no successful appeal, the deportation order. Once a deportation order has been made, there can be an appeal against a refusal to revoke the deportation. There are however limitations both with regard to who is entitled to

appeal against a decision to make a deportation order and who can appeal against a decision to refuse to revoke a deportation order.

The limitation on such an appeal is expressed in the Act as follows:

”15(3) A person shall not be entitled to appeal against a decision to make a deportation order against him if the ground of the decision was that his deportation is conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature.”

37. Although s.15(3) refers to three specific grounds why deportation can be conducive to the public good, s.3(5) does not refer to those grounds. S.3(5) is silent as to the circumstances which need to exist to make a deportation because it is conducive to the public good to do so. The Secretary of State is however required to give his reasons why he considers deportation to be conducive to the public good and if he relies on “interests of national security” etc. he brings into play s.15(3).
38. Although there was no appeal under the IA 1971 in s.15(3) cases, there was a non-statutory advisory procedure which enabled those to whom the section applied to appear before “the Three Advisors” and then make representations to them. They then advised the Secretary of State as to whether he should adhere to his decision.
39. The question whether this non-statutory protection complied with the standards of the ECHR was considered by the European Court of Human Rights in *Chahal v The UK* [1997] 23 EHRR 413. In that case it was held that the procedures did not do so as the advisory panel was not a “court” within the meaning of Article 5 (4) ECHR and judicial review, where national security was involved,

did not provide an “effective remedy” within the meaning of Article 13. The court however recognised that the use of confidential material may be unavoidable where national security is at stake and the European Court of Human Rights was impressed by the fact that in Canada a more effective form of judicial control had been developed for cases of this type.

40. The response of the government was to introduce the Special Immigration Appeals Commission Act 1997 (“SIAC Act 1997”). That Act was clearly designed to bring the United Kingdom into a position where it complied with its obligations under the European Convention and to provide greater protection for individuals who it was intending to deport on national security grounds.
41. Section 1 of the SIAC 1997 Act established the SIAC. Its membership was significant: one member has to have held high judicial office and one had to be or have been the Chief Adjudicator or a legally qualified member of the Immigration Appeal Tribunal. While there was no statutory restriction as to who was to be the third member, it had been indicated that the third person would be someone who had experience of national security matters.
42. Section 2 dealt with the jurisdiction of the Commission. One situation in which the jurisdiction exists is where a person would have been entitled to appeal but for s.15(3). SIAC’s task in relation to determining appeals is set out in s.4(1) and (2) of the 1997 Act. S.4 so far as relevant provides:

“(1) The Special Immigration Appeals Commission on an appeal to it under this Act - (a) shall allow the appeal if it

considers - (i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and (b) in any other case, shall dismiss the appeal.

(2) Where an appeal is allowed, the Commission shall give such directions for giving effect to the determination as it thinks requisite, and may also make recommendations with respect to any other action which it considers should be taken in the case under the Immigration Act 1971; and it shall be the duty of the Secretary of State and of any officer to whom directions are given under this subsection to comply with them.”

43. The SIAC has full jurisdiction to review questions of fact and law. It was emphasised in *Rehman (at para 49, page 191)* that this jurisdiction was limited by:

- (a) The fact that it was exercising a judicial function and that it had to recognise the constitutional boundaries between judicial, executive and legislative power;
- (b) The fact that it was an appellate body and thereby had to show deference to the primary decision-making body.

44. However within the constraints set out above it was emphasised (*Rehman para 54, page 193*) that the SIAC had responsibility to check the decision of the executive to ensure that:

- (a) The factual basis for deportation had to be established by evidence;
- (b) The decision of the executive was not one that no reasonable minister advising the Crown could in the circumstances reasonably have held;

(c) There was no other issue which should have been taken into account by the executive which was outside its exclusive competence; for example whether deportation would have infringed the individual's rights under Article 3 ECHR (as to relief from torture or inhuman treatment)

45. Rule making powers under Section 5 of the 1997 Act gave the Lord Chancellor wide powers to make rules for regulating the exercise of the rights of appeal, enabling him to make the most satisfactory arrangements practicable to deal with the tension which will inevitably arise in cases involving national security between the rights of the individual and the need to maintain the confidentiality of security information. The 1997 Act provided for the appointment of a special advocate in accordance with Section 6. He was able to represent the appellant before the SIAC during those parts of the proceedings from which the appellant and his legal representatives might be excluded. In order to perform this purpose, the special advocate would usually be present during the entire proceedings and not only the closed sessions. This means that in practice an appellant will have two sets of legal representatives. Those of his own choice can represent him during open sessions and in private sessions (sessions during which the public are excluded but not the appellant) and the special advocate in closed sessions, where the information is of a category which it is necessary to keep confidential from the appellant and the appellant is not present. It should be emphasised that the special advocate should be independent of the executive and acts on behalf of the appellant.

46. Section 7 of the 1997 Act gave “any party” the right to bring a further appeal “on any question of law material” to SIAC’s determination.
47. The rules anticipated by the 1997 Act are the *Special Immigration Appeals Commission (Procedure) Rules 1998* (“the SIAC 1998 Rules”).
48. To this extent it is correct that the UK’s SIAC system was introduced following the criticisms of the wise men procedure in the *Chahal* judgment that prevented a suspected terrorist detained pending deportation effective access to a court to secure his release. The system was supposedly based on the Canadian system. There is a debate as to the extent to which it is. The case of *Canada v Chiarelli (1992) 1 SCR 711* is a case in which the Canadian Supreme Court upheld the procedure.
49. As stated above it is important to bear in mind that deportation of aliens involves no fair trial rights under Article 6. There is no requirement in human rights for a deportation appeal, and the SIAC system can be said to be better than nothing.
50. Strasbourg has twice commented on the SIAC:
 - (a) In *Tinnelly v UK (62/1997/846/1052-1053)*, it found a violation of Article 6 where a discrimination claim was ousted by a national security certificate and it pointed out that SIAC showed some measure of judicial control was possible in such circumstances. This was implicit recognition of SIAC although not explicit

- (b) In *Al Nashif v Bulgaria June 2002* the Court expressly indicated it was not approving the SIAC procedure but again noted that it provided some guarantee against arbitrary executive decisions where no appeal rights were expressly needed. In this case there was a violation of Article 5(4) in respect of the review of detention, Article 8 in respect of a deportation on national security grounds because the law was not sufficiently specific to regulate the proscribed conduct as well as a violation of Article 13 because of procedural deficiency.

The POAC under the TA 2000

51. The context of the TA 2000 and the Proscribed Organisations Appeal Commission (POAC) procedure was the activity of terrorist organisations in Northern Ireland.
52. Two new procedures accompanied the Act. That providing for an application for de-proscription to the Secretary of State under Section 4(1) of the Act and an application to the POAC in the event of refusal of the former, pursuant to Section 5. A right then exists for further appeal on a point of law to the Court of Appeal.
53. The POAC (Procedure) Rules 2001 (the “POAC Rules”) regulate the procedure for the appeal to the POAC.
54. The constitution of the POAC is independent of the executive; the panel must be three strong and must include a (past or present) senior judicial member.

55. By section 5(3) of the Act, the POAC reviews the decision of the Secretary of State “*in the light of principles applicable on an application for judicial review*”.
56. In summary the POAC Rules provide for:
- (a) appeals to be heard in the absence of the appellant and his representative where necessary;
 - (b) the circumstances in which a special advocate is to be appointed to represent the interests of the appellant; a similar procedure to that of the SIAC;
 - (c) the ability of the Secretary of State to adduce evidence which would not be admissible in a court of law;
 - (d) application for permission to appeal on a point of law to the Court of Appeal.
57. The extension of the SIAC system to POAC is controversial and the legislation and its procedures have not been tested at higher court level. The combination of limited powers of scrutiny under the principles of judicial review and the limited involvement of the applicant in the process because of evidential sensitivity may trigger a breach of Article 6 if a challenge is made.

Extension of the SIAC procedure by the ACTSA 2001

58. In December 2001 the ATCSA 2001 extended the SIAC procedure to national security internment of suspected members of the Al Qa’ida network and derogation was made to Article 5 (the right to liberty).

59. There was vigorous opposition to this move but the government was firm about the threat and the need for exceptional measures.
60. The Lord Chief Justice made clear the exceptional context of this legislation and the associated appeal procedure in the judgment of the Court of Appeal in *A & Others v Sec State for Home Dept* [2002] EWCA Civ, at para 64:
- “The unfortunate fact is that the emergency which the government believes to exist justifies the taking of action which would not otherwise be acceptable”*
61. A challenge was brought to various aspects of the SIAC regime in *A & Others v Sec State for Home Dep*. The CA held that SIAC did, within the exceptional circumstances, meet the standards of Article 6 as far as a challenge to a decision to detain was concerned. The matter is pending before the House of Lords. In brief UK law and Strasbourg seems to have concluded that this is a relevant and permissible procedure for reviewing decisions to detain alien terrorists facing removal on national security grounds, in circumstances of a national emergency caused by global terrorism.
62. Even within such exceptional circumstances it was important that the courts should protect the rule of law.
63. ATCSA 2001 provided for a regular independent review of the actions of the executive under these provisions. The review of Lord Carlile dated January 2003 is to be found on the Home Office web site. A further review is to be carried out by a committee of Privy Counsellors who have not reported yet.

64. It is of note that Lord Carlile was particularly concerned (at para 4.28) with the disadvantage created for the certified person in not being provided with evidence which would have enabled him to know and address the true issues. He stated that: “*the justification for this apparent inequality if there is justification could only be founded in overwhelming national security consistent with the emergency upon which the ECHR derogation is founded*”. He also made a number of comments about the role of the Special Advocate.

Comments on the relevance of the UK procedures to the proscription provisions under the Bill

65. The Bill seeks to apply features of these procedures to cases of executive proscription of Hong Kong domestic organisations envisaging procedural rules which would deny a full right of appeal in which the proscribed organisation could respond to the evidence.
66. The most obvious point is that the procedures summarised above have been developed within certain strictly limited contexts. The context in which an organisation in Hong Kong is considered for proscription might or might not fall within the context of terrorism and global emergency. However the proposed sections are not limited to such circumstances and the uncertainty of their terms exposes the provisions to much wider use.
67. Even within the narrow confines of the particular UK legislative context the appeal procedures are the subject of criticism and debate within the UK and have not expressly been endorsed by the European Court of Human Rights.

68. Within these narrow contexts the appeal procedures in the UK:
- (a) provide for a level of independent review of the primary decision; the precise limitations varying with the context;
 - (b) restrict the limitations on the subject's rights to a minimum within the particular context;
 - (c) provide for a special advocate independent of the executive;
 - (d) provide for judicial independence in making an independent assessment of whether an organisation violates national security;
69. Aspects of these contentious procedures adopted in the UK for situations of national emergency or other established terrorist threat have been drafted into Sections 8D and 8E whose operation is not restricted to such narrow situations.
70. Of particular concern is the situation envisaged by Section 8A(2)(c) in which the appeal procedures suggested in Sections 8C and 8D will not avail the subordinate organization because they will not enable a review of or challenge to the original decision to proscribe the parent organization taken by the Central Authorities under PRC law. The appeal will only permit a challenge to the decision of the Hong Kong Secretary of Security whose own decision will have been dictated by the conclusive certificate of the Central Authorities.
71. Accordingly the proposed legislation provides no protection at all to the subordinate organisation proscribed in Hong Kong against an

arbitrary or unsupportable decision by the Central Authorities to proscribe the parent organisation.