CRIME AND COURTS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Home Office and Ministry of Justice published an ECHR memorandum on Introduction of the Crime and Courts Bill in the House of Lords on 10 May 2012. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 5 February 2013 for Commons Committee Stage.

Proceeds of crime

2. The amendments to the Proceeds of Crime Act 2002 (POCA), arising out of the case of Perry v Serious Organised Crime Agency [2012] UKSC 35, broadly fall into two categories:

> (a) amendments to Chapter 2 of Part 5 of POCA (civil recovery) addressing extra-territorial jurisdiction and a Schedule that makes provision about enforcement where property or evidence is outside the United Kingdom and makes provision (amendments to the Civil Jurisdiction and Judgments Act 1982) about the enforcement of interim orders in the United Kingdom. The amendments to Chapter 2 of Part 5 of POCA will have retrospective effect and will come into force on Royal Assent.
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> (b) amendments of provisions about investigations under POCA, in particular, making provision under Part 8 of POCA (investigations) in connection with civil recovery investigations and making provision about obtaining evidence overseas. These amendments will come into force by order of the Secretary of State.

New clause *Civil recovery of the proceeds etc of unlawful conduct* and new Schedule *Proceeds of crime: Civil recovery of the Proceeds etc of unlawful conduct*

3. This new clause and new Schedule make provision for Chapter 2 of Part 5 of POCA to have extra territorial effect and make provision about the enforcement of interim orders in the United Kingdom and enforcement where property or evidence is outside the United Kingdom.

4. The amendments set out that the court can make an order in respect of property wherever situated when there is or has been a connection between the case and the relevant part of the United Kingdom. The connections include those set out in new Schedule 7A of POCA; broadly speaking they concern: (i) the unlawful conduct; (ii) the property; and (iii) a person.

5. New Schedule *Proceeds of crime: Civil recovery of the proceeds etc of unlawful conduct* is split into two Parts and it is the second part that is the subject of consideration in this memorandum. Part 2 identifies various mechanisms for

enforcing, outside the United Kingdom, orders made under Chapter 2 of Part 5 of POCA both before and after a recovery has been made. This Part is modelled on section 74 of POCA, on repealed section 376 of POCA and the Crime (International Co-operation) Act 2003.

6. The Government considers that, in individual cases, the amendments to POCA may raise issues under Article 7, Article 6 or Article 1 of Protocol 1 ECHR, but that they are compatible with those provisions for the reasons set out below.

Article 7 ECHR

7. Article 7 ECHR prohibits the retrospective application of a penalty but it has been held that civil recovery orders do not amount to a penalty: *Director of the Assets Recovery Agency v Jia Jin He and Dan Dan Chen* [2004] EWHC (Admin) 3021; *Director of Assets Recovery Agency v Charrington* [2005] EWCA (Civ) 334; *Walsh v Director of the Assets Recovery Agency [2005] NICA 6*.

8. The new clause and new Schedule will not make civil recovery orders become a penalty; rather the amendments to POCA deliver the intention of the Government in 2002 concerning behind Chapter 2 of Part 5 of that Act; where there is or has been a connection between the case and a relevant part of the United Kingdom the court can make an order in respect of property wherever situated outside the relevant part of the United Kingdom. Article 7 is not engaged by these amendments.

Article 6 and Article 1 of Protocol 1 ECHR

9. In individual cases, the amendments may engage Article 6 and Article 1 of Protocol 1 ECHR. In such cases, the key issue will be that the amendments are a justified and proportionate response for the prevention of crime.

10. In *Jia Hin He and Dan Dan Chen* [2004] EWHC (Admin) 3021, Collins J. held that civil recovery represented a proportionate measure to deter crime, and in particular to ensure, so far as possible, that those involved in crime should not enjoy the fruit of their criminal activities. In this context civil recovery applies to "*recoverable property"* which is defined by section 304(1) of POCA as: "*Property obtained through unlawful conduct*."

12. The amendments made to POCA by the new clause and new Schedule enable a court to make an order under Chapter 2 of Part 5 of POCA in respect of property wherever situated outside the relevant part of the United Kingdom as long as there is or has been a connection between the case and the relevant part of the United Kingdom. This reflects the Government's intention in 2002 behind civil recovery and is a justified and proportionate response reflecting the strong public interest in preventing individuals from having the use and benefit of such property.

13. The retrospective effect of the legislation is narrowly focussed; it applies to the amendments to Chapter 2 of Part 5 of POCA. This tight focus reflects strong public interest reasons. A court has been (or may be) satisfied that the property in question is the product of criminal activity and there are strong public interests in preventing individuals having the use and benefit of such property. Those strong public

interests apply to property outside the United Kingdom just as they do to property in the United Kingdom, and there is no difference between the past and the future in that respect.

14. The Government therefore considers that the amendments are compatible with Article 7 (which is not engaged), Article 6 and Article 1 and Protocol 1 ECHR.

New Schedule *Proceeds of crime: Investigations*

15. New Schedule *Proceeds of crime: Investigations* makes changes to Part 8 of POCA. Part 8 of POCA sets out powers for use in confiscation investigations, money laundering investigations, civil recovery investigations, detained cash investigations and exploitation proceeds investigations.

16. New Schedule *Proceeds of crime: Investigations* is split into three parts, the first two warrant consideration in this memorandum. Part 1 makes provision about orders and warrants under Part 8 of POCA in connection with civil recovery investigations. Part 2 makes provision about obtaining evidence overseas in relation to certain forms of civil investigation.

17. The Government considers that, in individual cases, the amendments may raise issues under Article 6, Article 8 and Article 1 of Protocol 1, but that they are compatible with those provisions for the reasons set out below.

New Schedule *Proceeds of crime: Investigations* - Part 1 [Article 6, Article 8 and Article 1 and Protocol 1 ECHR]

18. Part 1 of the new Schedule amends the provisions in Part 8 POCA about orders and warrants that may be obtained in connection with a civil recovery investigation. The main changes are to the definition of a civil recovery investigation to clarify that the focus of an investigation can be a person or property and also to clarify that there can be an investigation into property that has not yet been clearly identified. As a result, an investigation may begin with a person and, as property is identified and more is known about the property, become an investigation into property. Equally an investigation may begin with property and, as more information about its ownership emerges, become an investigation into a particular person. But the key is that investigators can only exercise their powers in the circumstances set out in the amendments and investigators will operate in accordance with the ECHR in accordance with section 6 of the Human Rights Act 1998 (HRA). Also the role of the court in granting the orders and warrants under Part 8 of POCA has not been displaced. In this context the court must first be satisfied that the order or warrant requested is consistent with ECHR rights in accordance with section 6 HRA.

New Schedule *Proceeds of crime: Investigations* - Part 2 [Article 6, Article 8 and Article 1 and Protocol 1]

19. Part 2 makes provision about obtaining evidence overseas in relation to certain forms of civil investigation; it is modelled on repealed section 376 of POCA and sections 7 to 9 of the Crime (International Co-operation) Act 2003. The amendments to POCA made by Part 2 of the new Schedule create two routes to

obtaining evidence overseas. One route is an application to a judge by an appropriate officer or a person subject to the investigation, and the other route is a request for assistance by a relevant Director or a senior appropriate officer. In either case the request is transmitted overseas.

20. In terms of an application to a judge, an appropriate officer will operate in accordance with the ECHR in accordance with section 6 of the HRA. The person who is subject to the investigation can also make an application, which ensures parity of arms. In either case, the court must first be satisfied that the assistance requested is consistent with ECHR rights in accordance with section 6 of the HRA.

21. In terms of a request for assistance by a relevant Director or a senior appropriate officer, the request must be in relation to relevant evidence and it will be made by a senior individual. In either case, a relevant Director or senior appropriate officer will operate in accordance with the ECHR in accordance with section 6 of the HRA.

22. In respect of the two routes: (i) it must be thought that there is relevant evidence in a country or territory outside the United Kingdom and the assistance is to obtain that evidence; and (ii) unless the person who provided the evidence consents, any evidence obtained must not be used for any purpose other than for the purposes of the investigation or for the purposes of certain proceedings.

23. The Government therefore considers that the amendments are compatible with Article 6, Article 8 and Article 1 and Protocol 1 ECHR.

Extradition

Part 1 (*Forum*) of new Schedule (*Extradition*)

24. Part 1 of new Schedule *Extradition* will amend the Extradition Act 2003 (the 2003 Act) by requiring the judge at the extradition hearing to consider the issue of forum (that is,. where the offence should be prosecuted). New sections 19B to 19F of the 2003 Act will apply in Part 1 cases (that is, cases concerning a request for the person's extradition to face prosecution in another EU Member State) and new sections 83A to 83E will apply in Part 2 cases (that is, cases concerning a request for the person's extradition to face prosecution in another State with which the UK has extradition arrangements).

25. Extradition will be barred by reason of forum if the judge decides that (i) one or more of the acts material to the commission of the offence were performed in the UK; and (ii) having regard to a list of specified matters relating to the interests of justice, the extradition should not take place.

26. Extradition cannot be barred on forum grounds if a designated prosecutor issues a certificate that s/he (i) has considered the offences for which the person could be prosecuted in the UK, (ii) has decided that there are one or more such offences which correspond to the extradition offence, and either (iii) has decided that the person should not be prosecuted in the UK for a corresponding offence because the prosecutor believes that there is insufficient admissible evidence or it would not

be in the public interest, or (iv) believes that the person should not be prosecuted in the UK for a corresponding offence because there are concerns about the disclosure of sensitive material. A designated prosecutor may apply for an adjournment in the proceedings in order to consider whether to give a certificate. The certificate can be challenged but only on appeal under the 2003 Act.

27. The Government considers that these provisions are compatible with the Convention rights. At the extradition hearing the judge must already satisfy him/herself that the person's extradition is compatible with the Convention rights. That is set out in sections 21 (for Part 1 cases) and 87 (for Part 2 cases) of the 2003 Act. Those sections remain. Therefore, it will continue to be the case that the judge at the extradition hearing must discharge the person if s/he is of the view that the person's extradition would not be compatible with the Convention rights.

Part 2 (*Human rights issues*) of new Schedule *Extradition*

28. Part 2 of new Schedule *Extradition* will amend the 2003 Act to provide that in Part 2 cases human rights issues (including those raised after the end of the normal statutory process) must not be considered by the Secretary of State, but may be raised with the courts right up until the time of surrender.

29. At present, human rights matters in Part 2 cases are first considered by the judge at the extradition hearing. As set out above, section 87 states that the judge must discharge the person if s/he is of the view that the person's extradition would not be compatible with the Convention rights. A person may also raise human rights matters on appeal; first to the High Court (under section 103 and/or 108) and second, with leave, to the Supreme Court (under section 114). This process, including the ability to raise human rights issues at the extradition hearing and on appeal, will not be affected by paragraph 3 of the new Schedule.

30. Currently, once the appeal process is complete, but before the person's surrender has taken place, the person may (and people sometimes do) raise human rights issues with the Secretary of State. As the Secretary of State is a 'public authority' for the purposes of section 6 of the Human Rights Act 1998, she is obliged to consider any such issues to ensure that the person's extradition would be compatible with the Convention rights. This can lead to lengthy delays at the end of the process, with the Secretary of State's decision often being challenged by way of judicial review. In some cases the issues have already been raised before the courts.

31. Part 2 of new Schedule *Extradition* will amend the process by making clear that the Secretary of State is not to consider human rights issues raised after the end of the statutory appeal process (or indeed at any time during the Part 2 process). Instead, in cases where the person wishes to raise late human rights issues s/he will be able to give notice of appeal out of time (in cases where s/he has not appealed and the time limit for doing so has expired). The High Court will consider the appeal if it is satisfied that (i) the appeal is necessary to avoid real injustice, and (ii) the circumstances are exceptional and make it appropriate to consider the appeal. In cases where an appeal has already been finally determined, the person will be able to apply to the High Court to have the appeal re-opened on human rights grounds.

Paragraph 52.17(1) of the Civil Procedure Rules governs the re-opening of appeals and contains the same test.

32. The Government considers that these amendments are compatible with the Convention rights. It will remain the case that, at the extradition hearing, the judge must discharge the person if s/he is of the view that extradition would not be compatible with the Convention rights. The person may also raise human rights issues on appeal. The person will also still be able to raise human rights issues after s/he has exhausted his/her appeal rights (or after the time limit for appealing has expired) right up until the time of actual surrender. It is simply that s/he will have to raise those issues with the courts rather than with the Secretary of State.

33. The Government believes that the provisions in Part 2 of new Schedule *Extradition* will strike the correct balance between, on the one hand, ensuring late human rights issues which are deserving of the court's attention are considered and, on the other, ensuring that people are not able to abuse the system and delay extradition endlessly by means of raising last minute, specious human rights points which can then be the subject of judicial review.

Deportation on national security grounds: appeals

34. New Clause *Deportation on national security grounds: appeals* is intended further to limit the circumstances in which national security related deportations attract in-country rights of appeal on human rights grounds. The provision will remove an appellant's in-country right of appeal where the Secretary of State certifies that removal of an appellant prior to an appeal against the making of a deportation order being exhausted would not breach the UK's obligations under the ECHR. The grounds on which the Secretary of State may reach this conclusion include one or both of the following: first, that all or part of the appellant's human rights claim is clearly unfounded; and, second, that removal from the UK pending the appeal being exhausted would not cause serious, irreversible harm. The 'clearly unfounded' test is well-established, as it is already used in section 94 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The test of 'serious, irreversible harm' is the test which the European Court of Human Rights ("ECtHR") itself uses when deciding whether to grant interim relief prior to its substantive consideration of appeals against deportation or removal, and implements the approach which it has adopted in its jurisprudence on when domestic regimes must grant in-country appeals.

Legislative context

Ordinary appeals

35. The framework for appeals against a decision to make a deportation order, and other immigration decisions, is set out for most cases in Part 5 of the 2002 Act. Section 82(1) of the 2002 Act provides that where an 'immigration decision' is made in respect of a person he or she may appeal to the Tribunal. Section 82(2) defines 'immigration decision' for the purposes of section 82(1). A decision to make a deportation order is an immigration decision by virtue of section 82(2)(j). Section

82(3A), however, provides that section 82(2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007 ("the 2007 Act"); but a decision that section 32(5) applies is itself an immigration decision and therefore appealable. Section 32 of the 2007 Act requires the Secretary of State to make a deportation order in respect of 'foreign criminals' as defined in section 32(1), provided none of the exceptions set out in section 33 of the 2007 Act applies. Deportation orders made under section 32(5) of the 2007 Act are known as 'automatic deportation orders'.

36. Several sections in Part 5 of the 2002 Act qualify or restrict the right of appeal set out in section 82. In particular, section 92 makes provision for certain appeals to be in-country and therefore suspensive of removal, and for other appeals to be out of country and therefore non-suspensive of removal. Section 92(2) provides that an appeal under section 82(2)(j) against a decision to make a deportation order will be in-country, but an appeal against a refusal to revoke a deportation order need not be. An appeal against a decision that section 32(5) of the 2007 Act applies will not be in-country unless it is made in the circumstances described in section 92(4). Section 92(4)(a) provides that an appeal against any immigration decision will be in-country, if the appellant has made an asylum claim, or a human rights claim, while in the UK.

37. If an appeal falls to be in-country by virtue of section 92(4)(a), section 94(2) provides that the Secretary of State may nevertheless certify that the appellant's asylum or human rights claim is 'clearly unfounded'. The effect of a certificate under section 94(2) is that the appeal in question will not be in-country or suspensive of removal as a result of section 92(4)(a). A certificate under section 94(2) may not be appealed, but is amenable to challenge by way of judicial review.

38. An appeal against a deportation order which states that it is made in accordance with section 32(5) of the 2007 Act may therefore be rendered non-suspensive by a certificate under section 94 of the 2002 Act, and such a certificate would be subject to challenge by way of judicial review.

National security appeals

39. Section 97 of the 2002 Act provides for the Secretary of State to certify that an immigration decision was taken wholly or partly in the interests of national security or of the relationship between the UK and another country, or that an immigration decision was taken wholly or partly in reliance on information which should not be made public in the interests of national security, the relationship between the UK and another country, or otherwise in the public interest. Section 97A of the 2002 Act provides for the Secretary of State to certify that a person's deportation would be in the interests of national security. Certificates made under section 97 or section 97A have, among other consequences, the effect that appeals may not be brought or continued under Part 5 of the 2002 Act.

40. Section 2(1) of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") provides an alternative right of appeal when appeals under Part 5 of the 2002 Act are prevented or discontinued by virtue of certificates under section 97 or 97A of the 2002 Act. Section 2(2) of the 1997 Act then provides that certain

provisions in the 2002 Act shall apply, with any necessary modifications, in relation to an appeal against an immigration decision under that section as they apply in relation to an appeal under section 82(1) of the 2002 Act. Section 2(2)(c) of the 1997 Act lists sections 78 and 79 of the 2002 Act. This means that when an immigration decision, including a decision to make or not to revoke a deportation order, is subject to a certificate under section 97 of the 2002 Act, the subject of the decision cannot be removed (section 78), and, where relevant, no deportation order can be made against him (section 79). Section 78(4) restricts the prohibition on removal so that it only applies if the appeal is in-country as a result of section 92 and is still pending, as per the definition in section 104 of the 2002 Act. Section 2(5) of the 1997 Act confirms that an appeal may only be brought under that section in-country if it could be brought or continued in-country under section 82(1) of the 2002 Act. This means that, in respect of most national security immigration decisions, including refusals to revoke a deportation order, it is possible to render appeals out of country using section 94 of the 2002 Act.

41. Section 97A(2)(c) of the 2002 Act makes alternative provision about the circumstances in which an appeal against a decision to make a deportation order in national security cases certified under section 97A(1) ("a certified decision") will be in-country. Section 97A(2)(a) provides that section 79 will not apply to a certified decision. This means the Secretary of State can make a deportation order while an appeal is still pending. This would have the effect of cancelling the person's leave to enter or remain. Section 97A is the only mechanism that would allow a deportation order to be made, and therefore a person to be deported, while their appeal is pending in a national security case.

42. Even in cases certified under section 97A, section 78 may continue to prevent removal in relation to appeals which must be in-country as a result of section 92. But section 97A(2)(c)(i) provides that section 92 of the 2002 Act will not apply to a certified decision by virtue of section 92(2) to 92(3D) of the 2002 Act. This means that an appeal against a certified decision is not appealable in-country per se. Section 97A(2)(c)(ii) of the 1997 Act provides that section 92 of the 2002 Act will not apply to a certified decision by virtue of section 92(4)(a) of the 2002 Act in respect of an asylum claim. Section 97A(2)(c)(iii), however, provides that section 92(4)(a) of the 2002 Act is capable of applying to an appeal against a certified decision by reference to a human rights claim, unless the Secretary of State further certifies that the removal of the person from the UK would not breach the UK's obligations under the ECHR. Such certification is subject to an in-country appeal as a result of section 97A(3). The effect of these provisions is that there will be a suspensive substantive appeal on the human rights challenge to a deportation order, but the challenge to the national security case will be out of country.

43. There are therefore three broadly distinct sets of arrangements for making and challenging deportation orders: first, ordinary deportation orders, which are subject to an appeal with automatic suspensive effect; second, deportation orders made under section 32(5) of the 2007 Act, in which appeals may be non-suspensive if any asylum or human rights claim is certified as clearly unfounded; and, third, national security deportation orders, which may be certified under section 97A(2)(c)(iii) of the 2002 Act.

Detail of New Clause *Deportation on national security grounds: appeals*

44. New Clause *Deportation on national security grounds: appeals* allows the Secretary of State to certify that removal of an appellant prior to an appeal against the making of a deportation order being exhausted would not breach the UK's obligations under the ECHR. The grounds on which the Secretary of State may reach this conclusion include one or both of the following: first, that all or part of the appellant's human rights claim is clearly unfounded; and, second, that removal from the UK pending the appeal being exhausted would not cause serious, irreversible harm.

45. New Clause *Deportation on national security grounds: appeals* also provides that a certificate rendering an appeal out of country may be challenged by way of an application to SIAC. SIAC will decide the application on the principles applicable in an application for judicial review.

46. In substantive appeals against deportation, the Secretary of State and the courts may conclude that serious, irreversible harm in respect of qualified articles of the ECHR is proportionate because of the case in favour of deportation. When assessing whether a substantive appeal should be in or out of country, however, the new provisions accept that there is no such balancing exercise. As is evident from the ECtHR cases cited below, this approach is consistent with the ECHR.

ECHR implications of New Clause *Deportation on national security grounds: appeals*

47. The ECtHR has consistently acknowledged that, as a matter of well-established international law and subject to their treaty obligations, individual states have the right to control the entry, residence and expulsion of aliens, including on the grounds of criminality and national security (see *Uner v The Netherlands* [GC], no. 46410/99, §54, and *Othman (Abu Qatada) v The United Kingdom*, no. 8139/09, §184). Article 6 does not apply to the determination of matters relating to immigration (*Maaouia v France* no. 39652/1998). It is in this context that the ECtHR has considered what the ECHR requires in terms of appeal rights.

48. In addition, the ECHR acknowledges that appeals against deportation in national security cases may be subject to special procedures. Article 1 of Protocol 7 provides that:

> (a) An alien lawfully resident in the territory of a State shall not be expelled there from except in pursuance of a decision reached in accordance with law and shall be allowed:
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> (i) to submit reasons against his expulsion,
> (ii) to have his case reviewed, and
> (iii) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

(b) An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded in reasons of national security.

49. The UK has not signed Protocol 7, but the Government assesses that Article 1 paragraph 2 is a powerful confirmation of the principle that appeals in national security cases, as well as other cases involving the interests of public order, need not be automatically suspensive. Nevertheless, in light of domestic and European case law, most recently the Grand Chamber's firm comments in *De Souza Ribeiro v France* [GC], no. 22689/07, discussed below, it is clear that the new clause is not only compatible with the Convention because it relates to national security.

50. New Clause *Deportation on national security grounds: appeals* has two main effects in national security deportation cases. First, it allows the Secretary of State to certify that removal of an appellant prior to an appeal against the making of a deportation order being exhausted would not breach the UK's obligations under the ECHR; second, it allows an appellant to apply to SIAC to review such a decision to issue a certificate. The human rights implications of these provisions are considered in turn.

<u>Certificate stating that removal of an appellant prior to an appeal against the making of a deportation order being exhausted would not breach the UK's obligations under the ECHR</u>

51. New Clause *Deportation on national security grounds: appeals* reflects the practice and jurisprudence of the ECtHR in relation to the concept of 'serious, irreversible harm', and ECHR jurisprudence and domestic authority on the 'clearly unfounded' test. These are considered in turn.

Serious, irreversible harm

52. The ECtHR distinguishes between cases in which removal pending the outcome of an appeal would risk causing serious, irreversible harm, and those in which the nature of the human rights claim means there is no risk of serious, irreversible harm in breach of the requirements of the ECHR. The jurisprudence and practice of the ECtHR applies the test of serious, irreversible harm when distinguishing between Articles 2 and 3 of the ECHR, and other Articles which could found an appeal against deportation, such as Article 8. Where a claim based on Articles 2 or 3 is arguable, there must be a real risk that the removal of an appellant could cause serious, irreversible harm. Consequently, the ECtHR has ruled that there is an imperative requirement that arguable claims based on Articles 2 or 3 give rise to appeals which are automatically suspensive of removal. The ECtHR acknowledges, however, that an arguable human rights claim based on other articles need not give rise to such an automatically suspensive right of appeal, because removal pending the outcome of an appeal would not cause serious, irreversible harm.

53. The ECtHR has considered the circumstances in which an appeal must be automatically suspensive recently in *De Souza Ribeiro v France* [GC], no. 22689/07. It noted:

> 82. Where a complaint concerns allegations that the person's expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority (see *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 448, ECHR 2005-III), independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see *Jabari*, cited above, § 50) and reasonable promptness (see *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV). In such a case, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect (see *Gebremedhin [Gaberamadhien]*, cited above, § 66, and Hirsi *Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, 23 February 2012). The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention. Lastly, the requirement that a remedy should have automatic suspensive effect has been confirmed for complaints under Article 4 of Protocol No. 4 (see *Čonka*, cited above, §§ 81-83, and *Hirsi Jamaa and Others*, cited above, § 206).
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> 83. By contrast, where expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien's right to respect for his private and family life, Article 13 in conjunction with Article 8 of the Convention requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality (see *M. and Others v. Bulgaria*, no. 41416/08, §§ 122-132, 26 July 2011, and, mutatis mutandis, *Al-Nashif v. Bulgaria*, no. 50963/99, § 133, 20 June 2002).

54. The ECtHR drew the same distinction between appeals by reference to Articles 2 and 3, and those based on Article 8 in *Al Hanchi v Bosnia and Herzegovina*, no. 48205/09:

> 32. ... in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of ill-treatment materialises, the effectiveness of a remedy for the

> purposes of Article 35 § 1 imperatively requires that the person concerned should have access to a remedy with automatic suspensive effect (see M.S.S. v. Belgium and Greece [GC], no. 30696/09, § 293, 21 January 2011, and the cases cited therein) ...
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> 56. ... the Convention does not require that an applicant complaining about his or her deportation under Article 8 should have access to a remedy with automatic suspensive effect (in contrast to such complaints under Article 3, see paragraphs 32-33 above).

55. The distinction between cases in which removal risks causing serious, irreversible harm, and those in which it would not, is reflected in the ECtHR's practice in relation to rule 39 indications. An appellant may apply to the ECtHR for interim measures under rule 39 of the ECtHR's rules. Such measures may include an indication that the appellant should not be removed pending the ECtHR's consideration of the appeal. A rule 39 indication acts as a form of injunction preventing removal. The ECtHR's Practice Direction on rule 39 states:

> The Court will only issue an interim measure against a Member State where, having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied.

56. In light of the ECtHR's jurisprudence and practice in relation to the concept of 'serious, irreversible harm', the Home Office assesses that the ECHR does not require an appeal to be suspensive when there is no risk that the appellant will suffer serious, irreversible harm if removed pending the outcome of the appeal. In particular, the ECtHR has made it clear that cases not involving Articles 2 or 3 are unlikely to involve any risk of serious, irreversible harm, with the result that appellants may be removed pending their appeal. That is not to say there will not be such cases and the ECHR's Factsheet itself recognises that in exceptional cases there may be serious, irreversible harm in Article 8 cases or indeed under other articles such as Article 6. However, the new clause has not been drafted by reference to specific articles. Consequently, a deportee can seek a suspensive appeal by reference to any article.

Clearly unfounded

57. Domestic authority and the case law and practice of the ECtHR confirm that claims which are clearly unfounded, including those which frivolously cite Article 2 or 3, need not be considered in appeals which are automatically suspensive. The 'clearly unfounded' element of New Clause *Deportation on national security grounds: appeals* is most likely to be relevant in the context of Article 2 or 3, since other articles will not normally give rise to a risk of serious, irreversible harm even if they are not clearly unfounded.

58. Section 94 of the 2002 Act has been used in respect of appeals based on asylum claims and human rights claims which cite Article 3. A number of cases have upheld the lawfulness of section 94 certificates used to render appeals out of country

when they were clearly unfounded. In particular, the House of Lords and the Supreme Court have accepted the lawfulness of section 94 certificates in principle in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] UKHL 6 and *BA (Nigeria) v Secretary of State for the Home Department* [2009] UKSC 7. These domestic authorities confirm that clearly unfounded human rights claims, including those based on Articles 2 and 3, need not be subject to an appeal with automatic suspensive effect. They are considered further, below, in relation to the provisions relating to applications to SIAC to review certificates issued as a result of New Clause *Deportation on national security grounds: appeals*.

59. Even in relation to claims based on Articles 2 or 3, the case law of the ECtHR confirms that appeals must have some foundation in order to require automatic suspensive effect. In *Gebremedhin [Gaberamadhien] v France*, no. 25389/05), the court explained:

> In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, this finding obviously applies also to cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature: Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect [§66].

60. This approach was confirmed in *Hirsi Jamaa and Others v Italy* [GC], no. 27765/09:

> In view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the Court has ruled that the suspensive effect should also apply to cases in which a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature (see *Gebremedhin [Geberamadhien] v. France*, no. 25389/05, § 66, ECHR 2007-II, and M.S.S., cited above, § 293) [§200].

61. The suggestion that frivolous Article 2 or 3 claims should not result in an automatically suspensive appeal is supported by the fact that the ECtHR itself does not grant rule 39 indications in response to all applications based on Articles 2 and 3, but only those where it assesses that there is in fact a real risk of a breach of Article 2 or 3.

Conclusion on certificates stating that ECHR does not require an appeal to be in-country

62. The Government assesses that the power to render certain appeals out of country set out in New Clause *Deportation on national security grounds: appeals* is compatible with the ECHR. In most cases which are not based on Article 2 or 3, the ECtHR takes the view that removal pending an appeal would not cause serious, irreversible harm; and in Article 2 or 3 cases, if the underlying claim is clearly

unfounded, there is no need for the appeal to be suspensive. Thus the grounds on which the Secretary of State may issue a certificate under New Clause *Deportation on national security grounds: appeals* are compatible with the ECHR.

Application to SIAC for review

63. New Clause *Deportation on national security grounds: appeals* provides that appellants may apply to SIAC to review a certificate stating that removal of an appellant prior to an appeal against the making of a deportation order being exhausted would not breach the UK's obligations under the ECHR. SIAC will review the certificate applying the principles applicable on an application for judicial review. This procedure reflects the practice in relation to section 94 of the 2002 Act, which can be challenged by way of judicial review. It is also consistent with the requirements set out by the ECtHR. The Government therefore assesses that it is compatible with the ECHR.

64. Although only certain appeals against deportation need to be automatically suspensive, the ECtHR has confirmed that there must be some suspensive mechanism through which appellants may challenge a decision that a substantive appeal is to be non-suspensive. In *De Souza*, the Grand Chamber stated that, 'without prejudice to the issue of its suspensive nature, in order for a remedy to be effective and to avoid any risk of an arbitrary decision, there must be genuine intervention by the court or "national authority" ' [§93]. De Souza himself was removed so quickly that the national authority had no opportunity to consider his case at all. The ECtHR found that this meant that his removal was a breach of Article 13 in conjunction with Article 8 of the Convention, notwithstanding the fact that his appeal was ultimately successful and he was given a residence permit [§99]. Although Article 13 is not among the Convention rights for the purposes of the Human Rights Act 1998, the Home Office acknowledges the need to avoid arbitrary expulsions in order to avoid breaching international law and the substantive rights which may found an appeal against a deportation decision.

65. The Government notes that a decision to remove pursuant to a certificate issued under New Clause *Deportation on national security grounds: appeals* must comply with the common law principle of access to justice. The most recent domestic authority on the notice period that has to be given when setting removal directions is *R (aoa Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710. Current practice, in line with *Medical Justice*, is to provide at least 72 hours notice of removal. This rule is set out, with some exceptions, in Chapter 60 of the Enforcement Instructions and Guidance ("EIG") documents on the website of the UK Border Agency. The rule ensures there is sufficient time for a claimant to access legal advice and lodge an application for judicial review. Removal directions provided alongside certificates issued under New Clause *Deportation on national security grounds: appeals* will continue to provide sufficient notice to comply with the common law requirement for there to be a proper opportunity for access to justice. Where removal directions are not issued alongside a certificate, appellants will have a longer period in which to challenge the certificate.

66. In the *Medical Justice* case, Lord Justice Sullivan considered the minimum requirements necessary in order to give claimants an effective opportunity for access

to justice. It is clear from Sullivan LJ's judgment that the challenge must be capable of being made before removal is effected [§19]. This conclusion is consistent with the ECtHR case law, and with the ruling of the High Court in the *Medical Justice* case. Silbur J in the High Court explained what the 'constitutional right of access to justice' means in practice:

> 171. This right means that every individual must be in a position to challenge a decision in the court. This right was acknowledged by the Secretary of State in the 2007 policy document which stated that "we need to ensure that persons, subject to removal enforced removals [sic] have sufficient time between the notification of the [removal directions] and the date/time of removal to seek legal advice and/or to apply for [judicial review]" ...
>
> 173. ... nothing in this judgment casts any doubt on the legality of the minimum 72 hour time frame and the effect of this quashing order is that those covered by the 2010 exceptions now fall within that time frame.

67. The policy and practice of the UKBA, as implemented in the EIG, reflect the approach endorsed by the High Court and Court of Appeal judgments in the *Medical Justice* case, namely that, save for limited exceptions, sufficient time must be given to enable a claimant to apply for judicial review and removal will be deferred when an application for judicial review is properly made. Although the precise wording of the EIG will have to be revised to accommodate these new provisions, it will continue to set out a notice period in order to ensure access to justice prior to removal pursuant to a certificate issued under New Clause *Deportation on national security grounds: appeals*.

68. Domestic authority on section 94 of the 2002 Act confirms that scrutiny using the principles applicable on an application for judicial review is compatible with the ECHR. In *ZT (Kosovo)*, when considering the use of section 94 certificates in relation to asylum claims, Lord Carswell commented:

> 58. A formidable power has been conferred upon the Secretary of State by section 94 of the Nationality, Immigration and Asylum Act 2002. If she certifies that a claim is clearly unfounded, the person claiming asylum can be removed at an early date and is not entitled to remain in the United Kingdom to pursue an appeal against the decision to refuse asylum, which has to be brought from outside the United Kingdom. The object is to minimise the possibility that claimants with a groundless application can prolong their stay in the United Kingdom for a substantial period while they traverse the appellate process. Because of the draconian nature of this power, the House expressed the opinion in *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920, in considering the predecessor provision, that in order to justify its exercise the claim must be so clearly lacking in substance that it is bound to fail: para 34, per Lord Hope of Craighead, and cf para 14, per Lord Bingham of Cornhill. It is necessary accordingly that ***367** the matter must receive most anxious scrutiny before a certificate is issued, in order to give full weight to the

obligations of the United Kingdom under the European Convention for the Protection of Human Rights and Fundamental Freedoms : ibid, paras 9, 34.

69. SIAC will apply the same 'most anxious scrutiny' in relation to certificates under New Clause *Deportation on national security grounds: appeals* that the High Court applies in relation to section 94 certificates.

70. The ECtHR has endorsed the principle that a judicial review-style challenge to removal is an effective remedy. In *NA v The UK* no. 25904/07, it commented:

> 90. In determining whether the applicant in the present case has exhausted domestic remedies for the purposes of Article 35 § 1 of the Convention, the Court first observes that where the applicant seeks to prevent his removal from a Contracting State, a remedy will only be effective if it has suspensive effect (*Jabari v. Turkey* (dec.), no. 40035/98, 28 October, 1999). Conversely, where a remedy does have suspensive effect, the applicant will normally be required to exhaust that remedy (*Bahaddar v. the Netherlands*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998 I, §§ 47 and 48). Judicial review, where it is available and where the lodging of an application for judicial review will operate as a bar to removal, must be regarded as an effective remedy which in principle applicants will be required to exhaust before lodging an application with the Court or indeed requesting interim measures under Rule 39 of the Rules of Court to delay a removal. This is particularly so when a claim for judicial review is defined in the domestic law of the respondent State, *inter alia*, as a claim to review the lawfulness of a decision (see paragraph 28 above) and section 6(1) of the Human Rights Act provides that it is unlawful for a public authority, which would include the Secretary of State, to act in a way which is incompatible with a Convention right (see paragraph 27 above).

71. Although the access to justice case law, the EIG and the policy and practice of the UKBA are considered to mean that an application to SIAC under New Clause *Deportation on national security grounds: appeals* will be suspensive, there is a further provision for SIAC to direct that no removal shall take place within a stated time period. This provision gives further reassurance that ECHR requirements on emergency applications will be satisfied. In addition, those subject to a certificate under New Clause *Deportation on national security grounds: appeals* retain the ability to apply for injunctions or for rule 39 indications.

72. The Government assesses that the provisions of New Clause *Deportation on national security grounds: appeals* in relation to applications to SIAC to review a certificate are consistent with the requirements of the ECHR. Appellants will have an opportunity to ensure that a court reviews the decision to certify that their substantive appeal will be non-suspensive, and it will do so using well-established and effective methods of scrutiny.

Conclusion

73. The Government assess that both of the key effects of New Clause *Deportation on national security grounds: appeals* are compatible with the ECHR.

Home Office
5 February 2013