



Borders, Citizenship and Immigration Bill
House of Lords Committee
Part 3
Clause 46 Common Travel Area
Citizenship
Amendments 108A to D, 108BA* and stand part

ILPA supports the Lord Smith of Clifton, the Lord Avebury, the Lord Glentoran and the Viscount Bridgeman in their opposition to Clause 46's standing part of the Bill.

ILPA supports amendments 108 A to C in the names of the Lord Glentoran and the Viscount Bridgeman

108A* Page 39, line 23, after "in" insert "or departs from"

108B* Page 39, line 23, after "from" insert "or to"

108C* Page 39, line 24, at end insert "be subject to control under this Act, nor"

Presumed purpose

These appear to be wrecking amendments. Clause 46 amends s 1(3) of the Immigration Act 1971 to remove *inter alia* the words 'shall not be subject to control under this Act' and thus allows for control to be reimposed on journeys within the common travel area. The effect of the amendments is that those travelling within the common travel area would not be subject to control, save insofar as their journey was not a 'local journey' within the meaning of s 11 of the Immigration Act 1971, , viz.as a journey that begins and ends in the Common Travel Area and is not made by a ship or aircraft which began its voyage to the United Kingdom from, or called at, a place not in the common travel area, or if travelling from the United Kingdom, is due to end its voyage in or calls in the course of its voyage at, a place not in the common travel Area.

ILPA supports amendment 108BA* in the names of the Lord Glentoran and the Viscount Bridgeman

Page 39, line 23 leave out 'any of the Islands'

Purpose

The amendment would mean that controls could not be imposed on a person entering the UK from the Channel Islands and the Isle of Man. This amendment is thus to *probe* why the government is taking powers to impose controls on persons entering the UK from ‘the Islands’, i.e. the Channel Islands and the Isle of Man (defined in the Immigration Act 1971 section 33) when there has been no consultation about this nor suggestion that it might be necessary, indeed it is our understanding that the government does not currently intend to impose such controls.

Briefing

Clause 46 would re-impose immigration controls between the UK and the Republic of Ireland, as well as the Channel Islands and the Isle of Man. The Common Travel Area comprises the UK, the Channel Islands, Isle of Man and the Republic of Ireland. It is defined in s 1(3) of the Immigration Act 1971. Unfortunately much of the Explanatory Note to the Clause is virtually incomprehensible to those who do not practice in immigration law and, once it is understood, misleading. We have provided a translation as an Annexe to this briefing. Although the government has stated, including in the Impact Assessment prepared for this Bill¹, that it will not re-introduce controls along the land border, nothing in Clause 46 would prevent its doing so².

What does re-impose immigration controls mean? Is it the abolition of the common travel area or not? First, it is important to note that powers to abolish the common travel area or to change its borders already exist. . They are subject to a test of necessity by reason of differences in immigration laws, as far the Channel Islands and Isle of Man are concerned; in the case of the Republic of Ireland there is no such test. Sections 1(3) and 9 of the Immigration Act 1971 deal with the Common Travel Area. Section 9 states:

‘9(5) If it appears to the Secretary of State necessary to do so by reason of differences between the immigration laws and UK and any of the Islands he may by order exclude that island from [the Common Travel Area] for such purposes as may be specified in that Order..’

“9(6) The Secretary of State shall also have power by order to exclude the Republic of Ireland from [the Common Travel Area] for such purposes as may be specified in the order.’

Orders under section 9 are subject to the negative resolution procedure in parliament.

The government say that they are not abolishing the common travel in the sense that citizens of the UK (including those living on the islands) and of the Republic of Ireland will not require visas to travel to each other’s countries.

¹ Home Office January 2009, www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/border-cit-imm-bill/supporting-documents/finaliaofcommontravelarea?view=Binary

² See in particular the briefing of the Northern Ireland Human Rights Commission for 2nd reading of this bill, available at [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Submission_on_Borders_Citizenship_Immigration_Bill_\(HoL_2nd_reading\)_February_2009.pdf](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Submission_on_Borders_Citizenship_Immigration_Bill_(HoL_2nd_reading)_February_2009.pdf)

Those who see Clause 46 as tantamount to abolition of the common travel area do so because with the re-imposition of immigration controls entitlement to travel will be required to be proven at the border and the panoply of immigration controls will operate there, as set out below. One imagines, given that the Republic of Ireland is part of the European Union, that henceforth travel from the UK to the Republic of Ireland, or vice versa, will be like travelling to another EU country. As far as non-EU nationals are concerned, there is already within Europe the Schengen system, which the UK and Ireland are not part of, which has travelled in the opposite direction to clause 46, reducing controls between the Schengen states so that a visa for one allows a third country national to travel to the others.

The purported rationale for Clause 46 is said in the Home Office Impact Assessment, prepared January 2009, to be

“Policy objectives: To strengthen further the UK’s borders and the security of the UK CTA borders. To work in partnership with the Crown dependencies and Irish authorities in order to secure the non-UK CTA borders.

Intended effects:

- a) reduce immigration abuse, organised crime and security risks within the CTA; while*
- b) minimising impact on industry and travelling public³*

But the Common Travel area is, as its name suggests an area within which people can travel. It is defined in an immigration act. This is because it is concerned with controls on the movement of persons, not of goods. It does not address movement of capital, such as tax evasion, nor movement of goods such as the smuggling of contraband. Indeed, the impact assessment says:

“It is purely an immigration arrangement; other agencies such as Her Majesty’s Revenue and Customs still operate controls on passengers and traffic entering the UK from another part of the CTA.”

What of the movement of persons? Everyone moving across the internal borders of the Common Travel Area has already had to penetrate the external borders of that area, unless they are born within the Common Travel Area. The external borders are those of the UK, including the Channel Islands and the Isle of Man, and the Republic of Ireland. The existence or non-existence of the Common Travel Area in and of itself makes no difference to the question of whether a person is subject to immigration control within the UK.

It is perhaps surprising that nowhere in the impact assessments prepared for this Bill or the consultation which was entitled *Strengthening the Common Travel Area* is it explained why resources should be directed at this internal border than the external borders of the Common Travel Area where people subject to immigration control are first controlled. The impact assessment describes the intended benefits of the proposals as

“Common Travel Area

- *Reduction in imported asylum cases and abuse of immigration system.*

³ Final Impact Assessment of Common Travel Area (CTA)

Reform 15 January 2009 see

www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/border-cit-imm-bill/supporting-documents/finaliaofcommontravelarea?view=Binary

- *Increased border security.*
- *Reduction in number of illegal migrants and potential reduction in illegal working.*
- *Reduction in cross border crime (including serious organised crime)."*

As the Impact Assessment is candid enough to state, none of these proposed benefits have been quantified. It is unclear whether resources are to be diverted from the external borders of the common travel area, or given to this new measure rather than to the external border of the common travel area. A 'border' in true humpty-dumpty fashion, appears to mean what we want it to mean in a particular bullet point.

One must also question, if these are the objectives, whether a model that proposes control on the air and sea borders but not on the land border, is going to achieve them.

The January 2009 Home Office Impact Assessment for the proposals in Clause 46 identifies at 2.2 those who can already be controlled at the internal border under s.9 of the Immigration Act 1971:

- *Persons subject to a deportation order issued by UK authorities - Immigration (Entry Otherwise than by Sea or Air) Order 2002 (SI 2002/1832);*
- *Persons who have been excluded from the UK by the Secretary of State because their exclusion is conducive to the public good (exclusion is limited to cases involving national security for the Crown dependencies, and provided an immigration officer gives the person written notice of the exclusion on the person's arrival in the UK) - s.9(4) of the 1971 Act;*
- *Persons who have at any time been refused leave to enter the UK and have not since been given leave (either by the UK or the Crown dependencies) - s.9 (4) of the 1971 Act.*

The impact assessment also explains:

*2.6 Notwithstanding the principle of free travel within the CTA, it is not lawful for a person who is not a British Citizen to enter the UK (including the Crown dependencies) where their presence was unlawful in another part of the CTA, unless they are given leave to enter. The practical effect of this is that if someone with valid leave in the UK or Islands travels to another part of the CTA, and their leave subsequently expires, and that person then returns to the UK or Islands, without obtaining further leave, that person becomes an illegal entrant. This enables enforcement action to be taken when appropriate and reduces the risk of abuse within the CTA."*⁴

In other words, the lack of an internal border has no magic effect on the rights and entitlements of those under immigration control. The most dramatic effect of the re-imposition of controls will be upon those not subject to immigration control. Peers have already grappled in Part 2 of this Bill with the late addition of the new confused and confusing notion of a Common Travel Area entitlement, which appears to be an attempt to re-introduce, for nationality law purposes, what is taken away by Clause 46. The late introduction of this provisions encourages the concern that perhaps this proposal has not been entirely thought through and that the government has not yet got a grip on all the possible ramifications.

⁴ See section 9 of the Immigration Act 1971

According to the impact assessment the assumptions on which the proposal is based, are:

- *Success subject to successful delivery of existing dependent programmes within the UK Border Agency (e.g. e-Borders, Simplification) and the Border Force (e.g. Northern Ireland Operations, Mobile Response Teams).*
- *Sensitivities regarding operations at the Irish/UK land border remain constant.*

The existence of this Bill, rather than the much-needed consolidation by a full simplification Bill originally promised, must cast doubt on the prospects of the assumptions being fulfilled. But there is another reason to pay special heed to the assumption concerning simplification, one that was not lost on the Northern Ireland Human Rights Commission⁵. The proposals in Clause 46 should be read in the light of the government's Draft (partial) Simplification Bill which had proposed new internal controls affecting British citizens along with others such as, notoriously, draft Clause 30 Hotel Registration, which would have required records to be kept of those 'staying' at an hotel, and for people including British citizens to supply the necessary information, with failure to comply with these requirements being made a criminal offence.

In Part 2 of that draft Bill clauses 25 to 28 were to give very wide powers to the Secretary of State to examine individuals to determine whether the person was a British citizen or not. Under draft Clause 25(1)(b) of that Bill the Secretary of State could have examined anyone who has entered the UK (including British citizens) to establish their citizenship or immigration status, without the need for any suspicion, reasonable or otherwise, regarding the person's citizenship or nationality. A person (including a British citizen) could simply be stopped in the street and required to demonstrate his or her nationality and be required to submit to medical examination which could be repeated any number of times (Clause 27). In the exercise of this power, that same person could be detained for such time as it might take to satisfy the detaining official (clause 53). The draft Bill effectively provided a power to immigration officials to stop the citizen on the street (and elsewhere) and demand the production of an identity card (once introduced) on pain of indefinite detention. Clause 27 means that an examination under clauses 25 or 26 may be repeated any number of times. Compliance with all of these measures was to be on pain of prosecution – see clauses 101 and 102.

It is one thing to propose to exert greater internal controls on British citizens. It is quite another to do so under the guise of strengthening immigration controls.

Others will be better placed than ILPA to determine the economic effects of the measures, in particular at a time of recession, and the accuracy of the government's estimate in the impact assessment that the total costs of re-introducing controls could be as high as £75.8 million with estimated costs to the tourism industry of £43.5

⁵ See their briefing for second reading of this Bill, available at [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Submission_on_Borders_Citizenship_Immigration_Bill_\(HoL_2nd_reading\)_February_2009.pdf](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Submission_on_Borders_Citizenship_Immigration_Bill_(HoL_2nd_reading)_February_2009.pdf)

million over 10 years at a time of recession. The Impact Assessment appears a little sanguine on the point

“Lost tourism expenditure

There will be some costs to the tourism industry over the initial period.

However, the economy is flexible and will adjust in the longer term.”

Others will be better placed than ILPA to determine what will be the political repercussions in the short, long and medium term of imposing controls within the Common Travel Area. Such controls were not introduced at a time when ‘the troubles’ were at their height which must cast doubt on the proposition that they are required for security reasons.

There are many ways to strengthen the common travel area: the mutual recognition of visas is one of the most obvious. The provisions in this clause are not.

For further information, please get in touch with Steve Symonds, Steve.Symonds@ilpa.org.uk or Alison Harvey, Alison.Harvey@ilpa.org.uk, 0207 251 8383.

Annexe – The ‘Explanatory’ Note explained

- 171.** Comprehensible but misleading. Subsection 1 of the Clause will have the effect of enabling the routine control of persons arriving in or departing from the UK whether they are going ‘via’ via by the common travel area or whether the common travel area is the end point. Clause 46(1) will not only enable the routine control of all those arriving by ‘air or ship’ as the Explanatory Note states. The clause is not limited to air or ships and would permit routine control, or any control, of those arriving overland.
- 172.** Incomprehensible as drafted. Those who require leave to enter when arriving in the UK from the Common Travel Area are those listed at paragraph 2.2 of the Impact Assessment, which we have cited above. In addition the reference to section 9(6) of the Immigration Act 1971 is a reference to the power to exclude the Republic of Ireland from the Common Travel Area, as explained at the beginning of this briefing. As explained there, there is also a power to exclude one or more of the islands.
- 173.** Incomprehensible as drafted. Section 11 of the Immigration Act 1971 is entitled ‘Construction of references to entry and other phrases relating to travel’. It is thus an interpretation section. Hence to amend it produces effects throughout the Immigration Act 1971, which is still the cornerstone of UK immigration legislation.
- 174.** Incomprehensible as drafted. All the provisions mentioned relate to embarkation in the UK for a journey within the common travel area but outside the UK. Section 3(7) of the Immigration Act 1971 allows the Her Majesty to make Orders in Council controlling or preventing immigration. Paragraph 3 of Schedule 2 to the 1971 Act provides immigration officers with powers to examine embarking passengers. Paragraph 5 is concerned with the Secretary of States’ powers to require embarkation cards. Paragraph 26 is concerned with the powers the Secretary of State has to direct private carriers as to embarkation, or refusing to let people embark. The offences mentioned in this paragraph are:
s 24(1)(g) embarkation in contravention of an Order in council
s 26 (1)(e) without lawful excuse obstructing an immigration officer ‘or other person acting lawfully in the execution of this Act’ – the ambit of this offence is very wide
s 27 offences committed by captains of ships or aircraft who fail without reasonable excuse to do what the Secretary of State tells them to do, including furnishing passenger lists or controlling embarkation and disembarkation.
- 175.** Incomprehensible as drafted. All concerned with disembarkation in the UK following a journey from a place within the common travel area but outside the UK, Re paragraph 5 of Schedule 2, see above. Paragraphs 16(3) and (4) of Schedule 2 provide for removal from a ship or aircraft for detention and indeed for the captain of a ship or aircraft to have to refuse to let a person land and keep them in custody on board. Paragraph 26 is concerned with the powers the Secretary of State has to direct private carriers as to disembarkation, or refusal to let people disembark. Paragraph 27(1) relates to the obligations on carriers to prevent disembarkation before immigration control has been exercised. The offences are those described above.