ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

5th February 2007

BRIEFING: Second Reading of UK Borders Bill

ILPA is a professional association with some 1100 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

Generally, this Bill

- significantly extends immigration officer powers to act like police officers without addressing longstanding concerns as to proper guidance and oversight regarding these powers;

- fails to identify or target real mischief, leaving the purpose for which powers may be used open-ended or simply allowing for their application to all subject to immigration control whatever their particular circumstances; and

- adds further complexity by providing more legislation in an area crying out for consolidation.

For convenience, this briefing will take some clauses together under distinct heading. For ease of reference, all the clauses discussed under each heading are listed. Reference is made to all substantive clauses within this briefing.

Immigration Officer Powers:
Clauses 1-4, 18, 20-24, 40-41
There are several new and extended powers granted to immigration officers. Some of these relate to non-immigration offences (clauses 1-4); and all of these may involve British citizens as well as foreign nationals. This will be the fourth piece of legislation extending immigration officer powers since the coming into force of section 145 of the Immigration and Asylum Act 1999, which enables the Secretary of State to specify codes of practice for exercising such powers. It is high time that proper codes of practice were implemented. It would also be appropriate for immigration officers exercising such powers to be subject to oversight by the Independent Police Complaints Commission.

The power to detain and search anyone on suspicion of any offence for up to 3 hours is on its face very wide (clauses 1-4). Someone detained may not understand why (this may be inadequately or simply not explained) and may find themselves subjected to questioning without caution. This should all be subject to codes of practice (e.g. PACE). All the more so given clause 3 which creates a new criminal offence of not

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cooperating with these powers. More information is also needed regarding what training immigration officers will receive. Moreover, the recent report of HM Chief Inspector of Prisons on short-term holding facilities gives further reason for concern about new detention powers[1].

Clause 20 would empower immigration officers to seize cash if they believe it is to be used for, or is a product of, an immigration offence. We understand that this is aimed at illegal working. Highly vulnerable migrant workers (who may be overstayers, illegal entrants or simply have as a condition of their leave prohibition on taking employment) may suffer a further and severe penalty of being stripped of money, often hard-earned in highly exploitative situations. In such circumstances, leaving aside the risk of corruption, these powers would be plainly disproportionate.

Clause 40 would apply to anyone arrested for any offence. It empowers an immigration officer or constable to search premises if he or she suspects that a person may not be British and that person's nationality documents may be found there. The clause says: (i) nothing as to how that suspicion may be formed; (ii) nothing to justify a power to search a person's home merely on suspicion that the person is not British; (iii) nothing to indicate a legitimate purpose for searching for a person's passport. It is a highly intrusive power, which might be exercised in respect of something as straightforward as a minor traffic offence. Bearing in mind Britain's ethnic, racial, cultural and linguistic diversity, it is likely to be used disproportionately against members of ethnic minorities, raising serious issues of discrimination, human rights violation (Articles 8 and 14) and community relations.

Reporting and Residence Conditions for those with Limited Leave to Enter/Remain:

Clause 16

This clause would allow for these conditions to be imposed on anyone with limited leave (which could include refugees, work permit holders, highly skilled migrants and family members of those settled in the UK); and there is no restriction on the extent of conditions that may be set. Reporting and residence conditions (which could include daily reporting to an immigration officer and curfews) are far more intrusive than the conditions (prohibition from working, no recourse to public funds and registration with the police) now available under section 3(1)(c) of the Immigration Act 1971.

The Explanatory Notes provide neither an explanation of why the power to impose these conditions is thought necessary, nor any indication of to whom and to what extent they may be applied. It is understood there are particular and limited circumstances for which these powers are wanted. If so, this should be clearly stated; and attention then given to: (i) whether there is good reason; and (ii) drafting a clause which does not (as the clause currently does) provide a catch-all power for very onerous conditions to be applied to all migrants excepting those granted indefinite leave to remain.

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[1] http://inspectorates.homeoffice.gov.uk/hmiprisons/

Deportation

Clauses 28-35

The Bill refers to "automatic" deportation. This is highly misleading, since deportation is not automatic. What these clauses provide for is mandatory deportation in certain cases, with suspensive appeals on refugee and human rights grounds. It should be recalled that there is currently an absolute prohibition on removal in breach of Article 3 of the ECHR (prohibition on torture and inhuman and degrading treatment), although this is a position which the UK government is seeking to undermine in the European Court of Human Rights. There is no such absolute prohibition on deportations which will breach the right to respect for private and family life under Article 8 of the ECHR. Convention refugees can be deported where there are reasonable grounds to regard them as constituting a danger, having been convicted of a particularly serious crime.

ILPA's view is that this approach is unnecessary and wrong-headed. Last year's problems were not about inadequate deportation powers or problems with appeal rights, but simply failure of the Home Office administration. A failure to make and act on a deportation decision is not solved by legislating that deportation should be/should have been mandatory. The clause offers no protection to the public against administrative failure to activate the "automatic" provision. Indeed it expressly denies a right to victims to sue for compensation if such failure leads to the commission of further offences by someone who ought to have been deported. All that is done here is to take away any discretion which the Secretary of State might wish to exercise in the most exceptional cases; and to compound that problem by restricting appeal rights. In many cases there will be no avenue for consideration of individual circumstances. Those who have convicted relatively minor offences, with few family links here, will be particularly vulnerable. This approach risks inviting the cost and delay of judicial review applications in cases such as that of Sakchai Makao[2].

This is all the more concerning when one considers the enormous breadth of offences covered by the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004, SI No. 1910, to which clause 28(3)(a) refers. To get no further than the first page of an extremely long list of offences set out in that Order, it can be seen that, for example, a person sentenced to any term of imprisonment for frequenting a place used for opium smoking would be caught by these provisions.

Deportation, often of individuals who have significant ties and very long-standing in the community, should require the rational consideration of the interests of the public, and of all the circumstances of the individual and family. We note two further points. Firstly, if provisions such as these are to be introduced, Exception 2 (clause 29(3)) should refer to age at commission of offence not conviction, since it is surely that the person was a minor when committing the offence that is relevant to whether deportation should follow rather than delay to conviction. Secondly, retrospective implementation of these provisions (clause 44(4)(d)) is a concern – particularly, if this were to resurrect or mandate deportation where that had previously been rejected. It

[2] Sakchai Makao faced deportation to Thailand, following his conviction for what was a serious offence, but completely out of character, despite his being a respected and valued member of his local community in Shetland having lived in the UK since the age of 10 years; and which deportation threat was met with massive local resistance and an ultimately successful appeal.

should be noted that, by clause 29(4), these provisions do not apply to EU nationals, who have a greater protection against deportation.

Restriction of Evidence in certain Appeals:
Clause 19
Clause 19 would mean that on an appeal by a person refused leave to enter or remain following an application under the 'points based system', the Tribunal could only consider evidence about the points based application that was submitted at the time of the application. It could not look at relevant evidence that was not given to the original decision-maker or came into existence after the original decision was made.

The Inevitable consequence would be for matters that cannot be raised before the tribunal as a result of clause 19 to be pursued by additional representations to the Home Office, applications for judicial review and requests for the help of constituency MPs.

Use of Biometric Data and Other Personal Information:
Clauses 5-15, 36-39
If clauses 5-15 constitute a forerunner of identity cards for British citizens, that is a subject on which others will be better placed to brief. However, these provisions, and those concerning passing on of other personal information, have the potential to be highly intrusive; and there is much cause for concern in that certain of these provisions leave entirely open the use to which such information may be used. Clear purposes should be identified and justified, and provisions restricted to these.

Asylum-Seekers' Support:
Clause 17
ILPA understand this is intended to close a small potential lacuna in current support provisions; and will not in effect change current practice or remove any rights to support.

Entry and Trafficking Offences:
Clauses 25-27
ILPA understand that these close lacunae in existing provisions and extend the offences of facilitating entry and trafficking to non-British citizens.

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