ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 66

BRIEFING FOR LORDS REPORT 6 FEBRUARY 2006

INFORMATION – CLAUSES 27 TO 42

ILPA is a professional association with some 1200 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 high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups. ILPA briefings to date can be found at www.ilpa.org.uk For further information contact Alison Harvey, Legal Officer, alison.Harvey@ilpa.org.uk, 0207 490 1553

INFORMATION - AMENDMENTS AND ASSURANCES

In this briefing, we focus upon our two main concerns in this part of the Bill.

- Disclosure to foreign law enforcement agencies (clause 39)

This section provides broad and ill-defined powers to share information with "a person" with "functions similar to" a police force in the United Kingdom or "any other foreign law enforcement agency". As drafted it affords little or no clarity or accountability.

- Searches: contracting out (Clauses 40 and 41)

These clauses make provision for private contractors, as well as officers of Revenue and Customs, to be given powers of detention and search. They will be able to hold people for up to three hours at ports. It is intended that these powers be exercised, *inter alia*, in the juxtaposed controls in France where it is likely that French firms will hold the contracts. We are told that these are *"mundane"* tasks, that do not make best use of immigration officers time. Powers to deprive another person of their liberty are never mundane and here private contractors are given powers vastly exceeding those of Community Support Officers, as described below. Child protection concerns have been raised and at Grand Committee, the Minister undertook to discuss the clause with the Children's Commissioner. The Public and Commercial Services Union, representing immigration officers, is opposed to this clause.

Amendments proposed

Clause 39 Disclosure to foreign law enforcement agencies

- **Amendment** to impose the same limits on the purposes for which information may be disclosed as are imposed on the purposes for which it may gathered (under Clauses 32 and 33) , viz. "police purposes" as defined.
- **Amendment** to require the Secretary of State to give his consent to the disclosure of information and to require him to be satisfied that such disclosure will not breach human rights, again a requirement borrowed from the limitations imposed in clauses 32 and 33 on the gathering of the information
- **Amendment** to replace current the definition of a foreign law enforcement agency as "a person with functions similar to" that of a police of force in the UK, with a definition that describes them as State or international agencies and requires the Secretary of State to specify them in an order, promoting transparency and accountability.

Clauses 40 and 41

- These clauses **should not stand part of the Bill** : powers to detain should be limited to immigration and police officers, as they are now.
- **Amendment** to remove private contractors from the groups authorised under these clauses.
- **Amendment** to remove the word "thinks" from the phrase that the Secretary of State can authorise private contractors whom he *thinks* are fit for the purpose and suitably trained
- **Amendment** to deny those authorised under these clauses the power to detain: the deprivation of liberty would, as now, have to be carried out by a police or immigration officer.

Assurances to seek

- An **assurance** that the Children's Commissioner considers that the Minister has satisfied him on all child protection concerns
- An **assurance** that full details of the procedures put in place by private contractors to deal with vulnerable people including children will be made public and not kept secret
- An **assurance** that the government will pilot any use of the powers to search and detain, using reasonable force, and subject to the pilot to independent evaluation, just as it did when uniformed Community Support Officers of Police were given, to the grave concern of parliament, the power to request people to remain for ½ an hour.

CLAUSE 39 DISCLOSURE TO FOREIGN LAW ENFORCEMENT AGENCIES

Overview

Clause 39 gives chief officers of police power to disclose information obtained under clauses 32 and 33 to exchange data with police forces in Jersey, Guernsey and the Isle of Man and with "foreign law enforcement agencies". The latter are very broadly and loosely defined as *"a person outside the United Kingdom with functions similar to functions of a police force in the United Kingdom or the Serious Organised Crime agency"*. The clause is wholly lacking in provisions for accountability or transparency, and in safeguards, and nor was any reassurance forthcoming in Grand Committee. The Minister prayed in aid existing data protection legislation (see 17 01 06 GC 210ff), as had the Minister of State before her in Standing Committee E (see 21 10 05, Col 219). However, as she acknowledged, data protection legislation contains wide exemptions (17 01 06 GC210ff). The amendments proposed are designed to press the government to explain the current lack of accountability, transparency and safeguards: the responses received may lead to further need to return to these clauses at Third Reading.

The need for limitations on the purposes for which information may be disclosed

In clauses 32 and 33, which provide for the gathering of the information to be shared under clause 39, there is a limitation on the purposes for which information may be gathered. It may be gathered only for "police purposes" defined in s.21(3) of the Immigration and Asylum Act 1999 Act to mean the prevention, detection, investigation or prosecution of criminal offences, safeguarding national security and such other purposes as may be specified. The Minister confirmed in Grand Committee that no other purposes had been specified to date (17 Jan 2006 : Column GC218). Yet no limitations are imposed on the purposes for which information may be disclosed to foreign law enforcement agencies under this Clause, where

the risks are far higher. The amendment is more than modest: as set out above "police purposes" is very broadly defined already, and orders could define it even more broadly. The reason for laying this amendment is less, in some ways, for the protection if offers, than to see whether the government resist it, and if so, what reasons they give, so that we can better understand, and challenge, the lack of accountability, transparency and safeguards under this clause.

The need expressly to provide that disclosure must not breach human rights and for the Secretary of State to consent to such disclosure

The Minister said in Grand Committee:

> *"We would have to ensure that there is a legitimate aim under Article 8(2) [of the ECHR]; that disclosure is in accordance with the law; and that any interference is proportionate to the legitimate aim."* (17 Jan 2006 : Column GC211)

In clauses 32 and 33, the clauses providing for the gathering of the information to be shared under Clause 39, it was deemed necessary to make express reference to disclosures being in accordance with the European Convention on Human Rights, so it is reasonable to require the same express safeguards here, where the risks are so much greater. The Minister asserted *"we will expect chief police officers to fulfil their obligations properly"* (*ibid.)* but these disclosures are unlikely to be made public, and it will be impossible to know whether that expectation has been met.

The need to define "foreign law enforcement agencies and to name those to whom information can be disclosed in an order.

The Minister said in Grand Committee *"in our definition, foreign law enforcement agencies must perform similar functions to a UK police force or the Serious Organised Crime Agency. In that way, we have defined the kind of organisations we will be dealing with" (***17 Jan 2006 : Column GC221)**. That was all the explanation we got.

Police forces have a whole range of functions and any number of people abroad may have functions "similar to" at least some of these. For example, under clause 40 and 41 of this Bill, private contractors as well as constables are to be given powers to detain and search. Presumably if such contractors were in another State, a case could be made that data could be shared with them. . The definition is so loose that it is not impossible to envisage information being shared with militia and paramilitaries under this clause: they have some "functions" similar to those of a police force, but, of course, they have others that are very different indeed. The minimum requirement must be to take out the reference to "a person" and to require that " a foreign law enforcement agency" be a State or international agency (such as Interpol). More than that, the list of agencies should be published in an order. Then, if for example the Secretary of State were contemplating sharing information with security forces of Burma or Zimbabwe, two examples given in the debate (see 17 January 2006 GC 221), this would be known and there would be an opportunity to object.

CLAUSES 40 AND 41 : SEARCHES CONTRACTING OUT

These clauses should not stand part of the Bill

Overview

Clause 40 would allow the contracting out of powers to search and detain (for up to three hours, at ports), and to use reasonable force in doing so. The clause would allow the power to be exercised by police constables but also by officers of revenue and customs and "other

authorised persons", i.e. private contractors. The contractors would be used to seek to detect people hidden in vehicles and, most significantly, to then expose and arrest them.

Sub-clause 40(1) refers to Schedule 2, paragraph 2 of the Immigration Act 1971, a reference to people who have arrived by ship or aircraft and the Minister confirmed in Grand Committee that Ministers confirmed in Grand Committee that the intention is to use the power, *inter alia*, in the juxtaposed immigration controls operating in France.

We do not consider that it would be a satisfactory state of affairs if juxtaposed controls are operating without oversight of immigration officers, let alone that no Immigration Officer could be called to a particular incident for three hours, which is the possibility envisaged by the clause. It is all very well stating that private contractors will merely be searching lorries; our concern is – what if they find someone?

Accountability and transparency: exercise at juxtaposed controls

One difficulty to which the use of these powers at juxtaposed controls gives rise is the accountability in the UK of those exercising the power: as the Minister acknowledged in Commons Committee we could be looking at French companies, incorporated under French law, employing French nationals as contractors (17 Jan 2006 : Column GC231). This gave rise to considerable confusion in Grand Committee: for example in talking about child protection the Minister acknowledged that it would be necessary to check French nationals against French criminal databases. However, she then went on to talk about the services UK social services provide to, for example, unaccompanied children. Let us be clear: no one found in these vehicles would get anywhere near the UK. If claiming asylum, they would be handed to over to the French authorities. If not, they would face removal from France, probably being handed over to the French police. They, and any grievance or complaint of ill-treatment they might have, would never reach the UK.

Lack of accountability; lack of redress

Since the debate in Grand Committee the **Police and Justice Bill 2006** has been published. Clause 38 of that Bill provides powers to make immigration officers exercising enforcement powers subject to the Independent Police Complaints Commission. This further widens the divide between police officers and immigration officers on the one hand, and private contractors, on the other.

This is not to be taken likely. IND has an internal complaints procedure, overseen by an audit committee. The chair of the audit Committee, Dr Anne Barker, gave evidence to Home Affairs Select Committee on 13 December 2006 . This included the following exchange:

> ***Mr Clappison:*** *Dr Barker, you call for more intensive investigation of complaints of serious misconduct and I note that you say that one third of complaints against individuals fit into that category…*
> *Dr Barker: That is one third of the formal complaints, ie, that is the, say, 200….Those are mostly allegations of assault. About half of them occur in detention centres and the other half occur in enforcement and removal. They are not uniformly and universally referred to the police, which is an area we are also concerned about."*

Is dealing with vulnerable groups, including children, a mundane task or not?

The Minister said in Grand Committee *"All contractors will be required to submit to the Secretary of State detailed procedures for handling vulnerable groups, including unaccompanied minors"* (17 Jan 2006 : Column GC231). It would be useful to seek an **assurance** that these procedures would be made public: past experience suggests that we would be told that they were subject to commerical confientiality and could not therefore be

scrutinised. However, even if the documents were in the public domain, what real accountabilty would they provide?

The Minister's responses in Grand Committee betrayed considerable confusion. On the one hand she appeared to acknowledge the considerable concerns expressed on all sides of the House about the extremely difficult situation that results when vulnerable and desperate people, including children, are found:

> *"The training that must be included involves, among other things, managing detention anxiety and stress, including the detention of vulnerable trainees* (s sic.)*; health and safety; suicide and self-harm prevention; and race relations, cultural awareness, and human rights issues. The safety and security of those who will be in the care of the authorised person is of the utmost importance—I want that to be on the record—and must not be jeopardised.* …(17 Jan 2006 : Column GC231)

> *"Children may be frightened, speak little English and have no idea what is going on. They may try to run away or perhaps might lash out—that is always a possibility. One issue to address is to ensure that staff are properly trained to hold a child."* (17 Jan 2006 : Column GC237)

She went so far as to agree to talk with the Children's Commissioner about the clauses (17 January 2006, col GC232). We look forward to hearing what he had to say and an **assurance** should be sought that the Minister has satisfied him on all child protectin concerns.

On the other hand, the Minister repeatedly referred to "mundane" and simple

> *"It is meant to enhance their* [Immigration Service] *ability to do their work by bringing in those who can help in what are often, frankly, simple and mundane operations. (17 Jan 2006 : Column GC229)*

> *"We are looking to …release staff from some of the more mundane responsibilities that could be undertaken by others". (17 Jan 2006 : Column GC233)*

The Minister cannot have it both ways. It may be mundane indeed to walk along the sides of vehicle after vehicle looking for people. It is anything but mundane to find them. A hospital may have auxilary staff handling routine tasks: it has professionals on hand for emergenices. Finding people in a vehicle is an emergency: a professional should should be on hand. Instead the clause envisages a private contractor holding a person for three hours before handing them over to an immigration officer.

Immigration Officers have "grave concerns" about the clause.

This is about saving money aka *"using resources effectively"* (Baroness Ashton of Upholland, (17 Jan 2006 : Column GC228) echoing the debates in Standing Committee E (cols 227 to 229). No one objects to saving money, but saving money by handing over powers to deprive people of their liberty and to use force are not the first choice of a democratic society when it comes to budget cuts. The Public and Commercial Services Union, who represent Immigration Officers, are opposed to the clauses, as the Baroness Turner of Camden expalined in Grand Committee:

> *"The union …says that it has grave concerns that this sensitive area of public service could not operate effectively without properly trained professional civil servants…The people who operate the service at present have grave concerns about what is proposed in the Bill"* (17 Jan 2006 : Column GC224)

Private contractors operating in France will have powers far exceeding those of uniformed Community Support Officers of Police

Powers to deprive others of their liberty are a serious matter. The Lord Brooke drew attention in Grand Committee (17 January 2006, col 230-1) to the contrast between the powers given to private contractors, including foreign nationals, under this clause and those given to (uniformed) Community Support Officers of police (CSOs) operating within the UK under the Police Reform Act 2002. As he recalled, those limited powers were the subject of what the Lord Falconer characterised as "long and hard" debate (*Hansard* HL Report 22 07 02, col 94).

The result of that long and hard debate was that parliament gave a CSO power to "require a person to wait for up to 30 minutes pending the arrival of a constable" or, with their consent, accompany them to a police station. Further, it obtained from government a promise to pilot these limited powers and evaluate them before extending beyond the pilot. An evaluation has been undertaken (*Community Support (Detention) Powers Evaluation Research* Lawrence Singer, Home Office) 2004). The pilot finds that 30 minutes was sufficient (see page 5) and concludes that the limited powers could be used effectively. It nonetheless describes difficult situations, including verbal and physical assaults on CSOs exercising the powers. It also draws attention to the youth of those against whom they were exercised. Will the Minister provide an **assurance** that the government will subject these provisions to a similar process of piloting and independent evaluation?

The Minister asserted that three hour detentions would be rare, but nonetheless the longer period was needed *"..it is anticipated that there will rarely need to be anything like that period of time. It is anticipated that people will be detained for minutes only, but we need to give people the power to implement the provision"* (17 Jan 2006 : Column GC230-231) . A House that has debated 90 and 60 days detention under the Terrorism Bill needs no lessons from us in what to make of such arguments.

The new powers far exceed those of detainee custody officers, yet have none of the safeguards provided in the case of such officers.

Private contractors can already be authorised as Detainee Custody Officers under s.154 of the Immigration Act 1999 but:

- detainee Custody Officers do not have the power to detain, only to take custody of a person who has been detained by an immigration officer.
- the powers of the Secretary of State to authorise detainee custody officers are more circumscribed than under this Bill. Clause 154(4) of the 1999 Act states "The Secretary of State may not issue a certificate of authorisation unless he is satisfied that the applicant (a) is a fit and proper person to perform the functions to be authorised and (b) as received training to such standard as the Secretary of State considers appropriate for the exercise of those functions". This clause uses different wording: it is phrased as a power ("may authorise"), rather than a restriction on a power, and the standard is that the "thinks" (see clause 40(5)(b)(ii)) that the person is "fit and proper for the purpose" and "suitably trained".

"The Secretary of State "thinks" are fit proper and suitably trained" is not a proper test.

The Minister has sought to contend that 'thinks' means the same as 'is satisfied that' and is merely plain English. How very odd then, that Clauses 32(7) and 33(7) of this Bill, which do not amend previous legislation (an excuse proffered for not using the "plain" "thinks" in other clauses) use "is satisfied that" and that the Minister herself, in the debate on Clause 40 in Grand Committee, instinctively reached for "is satisfied that:

> *" Individuals will receive training to ensure that they are fully competent in the care of children. They will not be authorised unless the Secretary of State is satisfied on that point"* (17 Jan 2006 : Column GC231.)

As to the weak phrase "suitably trained" the Minister's assurances on children got weaker as the debate progressed. Contrast:

> " The safety and security of those who will be in the care of the authorised person is of the utmost importance—I want that to be on the record—and must not be jeopardised. … ..Of course the checks will be as rigorous as those made in the public sector; that is the whole point. We do not want anyone to be given access to children who should not have it. I am absolutely determined on that point and I speak on behalf of Home Office Ministers in saying it. The checks must be rigorous and done properly because we have to protect children in all circumstances….. (17 Jan 2006 : Column GC23 –35)

with

> *"We have to make a differentiation here. On training in relation to children, we want to make sure that those who will deal with such children or people in a vulnerable situation are properly trained in issues like* (sic.) *human rights, racial awareness, dealing with vulnerable people in traumatic circumstances, and of course all the issues around children. That is quite different from the kind of skills needed by immigration service officers as a part of their professional training. ..I want to differentiate between those carrying out reasonably mundane and regular tasks, but who need to be professional in how they deal with people when they come across them, and those undertaking far more detailed and challenging tasks in order to ascertain where people are and so forth.* (17 Jan 2006 : Column GC237)

Thus the private contractors will be people whom the Secretary of State 'thinks' are 'suitably trained' for their 'reasonably mundane' tasks. This is not the stuff of which good child protection practice, nor the protection of human rights and civil liberties, is made.

If the government will not remove these clauses from the Bill, it should at the very least amend the Bill to raise the test to that to be fulfillled by detainee custody officers, and remove the provision to authorise private contractors or, at the very least, deny private contractors the power to detain or to use reasonable force, so that, as with detainee custody officers, they exercise these powers under supervision of an immigration or (UK) police officer accountable before the IPCC.