ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 43
HOUSE OF LORDS GRAND COMMITTEE JANUARY 2006

BRIEFING ON *INFORMATION* PROVISIONS

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. For further information contact Alison Harvey, Legal Officer, alison.harvey@ilpa.org.uk, 0207 490 1553.

Amendments are numbered as per the marshalled list.

INTRODUCTION

This part of the Bill contains a miscellany of provisions, although a considerable number deal with data, including biometric data collection and retention provisions as part of e-borders schemes. Insofar as it is possible to draw themes that run throughout this section we should highlight concerns at the privileging of administrative convenience over individual rights and liberties, and failure to take account of the implications of measures for individuals at all. Our main concern in this part is with **Clauses 40 and 41 Searches: Contracting Out**, which would give a power to detain to private contractors, who could be authorised as a group to use such powers. We address them first, then the rest of the provisions

Clauses 40 & 41 Searches: Contracting Out

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.

Sub-clause (1) refers to Schedule 2, paragraph 2 of the Immigration Act 1971, a reference to people who have arrived in the UK by ship or aircraft. Ministers confirmed in Commons Committee that the plan is to use these powers within ports, specifically

> *"It is envisaged that the powers would be useful in the operation of the juxtaposed controls—the controls over the channel where it may not be sensible or practical to deploy fully-fledged immigration service staff or other border controls at all times of the day."* (Andy Burnham MP, Standing Committee E 25 10 05, col. 231).

Powers of detention are not to be given away lightly to private persons, and it is of extra concerns that these private persons will be working overseas. There is widespread concern, including from PCS, the union representing immigration officers (see the comments of Gwyn Prosser MP at Commons Committee, quoted below), at these clauses and members of all parties pressed the government on these concerns in the Commons.

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.
- detainee Custody Officers have to be authorised individually, by a certificate of authorisation. These clauses make provisions for the authorisation of private

contractors as a class (all the employees of Group 4, for example?) and do not specify a procedure involving certificates.

- as described below, 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 change in wording was queried by the House of Lords Select Committee on the Constitution in their letter to the Minister of 13 December 2005. In her reply of 9 January, the Minister said:

> *"The Secretary of State will be bound by public law to ensure that his decision is reasonable and objective and properly considers all relevant considerations and disregards irrelevant considerations. In our view there is no legal difference between the use of thinks and a phrase such as "is satisfied that". The use of "thinks" is intended to use plain English which will be understandable to lay readers. This is part of a general intention to use plain English in drafting legislation".*

First we hope that the Minister will put on the record that "thinks" means the same as "is satisfied that". Secondly, plain English is one thing; failure to use language of sufficient precision for the law is quite another. We bear in mind that under Clause 41 the Secretary of State can authorise a group of persons and is not obliged to authorise people individually. In such circumstances, what meaning does the "fitness" criterion have?

ILPA is a member of the Refugee Children Consortium. The Consortium's concerns as to the child protection risks raised by the clause are detailed in the Consortium's briefing.

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? The maternity department of a hospital may operate perfectly well with nurses and midwives most of the time, but a doctor is on call to attend if there are complications. That is necessary to provide the requisite service. One may not need to be an immigration officer to run a heartbeat detector along the side of a lorry but if that detector picks up a heartbeat, then an Immigration Officer or a police officer should attend. Those working at a port have the powers of citizens' arrest that we all have, in an emergency, but the idea that they should effect routine detentions is irresponsible in the extreme. Gwyn Prosser MP, a Labour backbencher and member of the home Affairs Committee, described by the Junior Minister in the debate as "a renowned expert on these matters" (Col 229) spelt out at Commons Committee what the clause will mean in practice:

> *"Anyone who has witnessed the searching in, for example, my home port of Dover, and who has seen some of the tragic scenes of the back of a lorry opening and families of asylum seekers with young children coming down the ladder, will know that they are traumatic incidents, which must be dealt with sensitively. The idea is to hire private agency staff, although the Bill says that they must be properly trained and provide a proper service. What does the description "fit and proper" for the purpose and "suitably trained" mean? It describes a fully trained immigration officer or a fully trained customs officer. It is not by accident that they have to go through rigorous tests.*
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> *We do not have to look into a crystal ball to see what might happen, because we already have the situation in Calais, where private agency workers, who happen to be*

*French nationals working for a French agency on very low pay that is close to the minimum wage, are required to help at berthside inspections, supporting the immigration officers. They have only a limited power, not the extended powers in the Bill and cannot carry out searches of peopl*e. *The Bill mentioned inspecting the inside of a person's mouth. That involves detaining someone, possibly against their will, and could give rise to all sorts of concerns. We only have to think about the debate that took place on whether community support officers should be given powers to detain and arrest to know that. We have gone through the process of providing fully trained customs officers and immigration officers, and that should be the end of that… …those same customs and immigration officers whose professionalism, efficiency and judgment have been lauded are the very people who were saying that this is a step too far and this is not the most effective way to guard our borders"* (Standing Committee E, 25 10 05 Col 223 to 226).

We are also concerned at what power there will be to bring complaints against the private contractors who exercise those powers.

Police officers are subject to independent complaints procedures when exercising powers to detain and search and must comply with the PACE Codes of Practice. The Minister of State said during discussions on what is now Clause 42:

"we are looking to include independent complaints monitoring of immigration enforcement powers by the Independent Police Complaints Commission in the safer communities Bill or some other legislative vehicle… I think that we looked at it in the context of this Bill, but that it was beyond the Bill's scope, although if that is wrong, I shall certainly correct what I have said. None the less, I take the point about there being some overarching independent monitoring body". (Standing Committee E, col 280 27 10 05)

Can the Minister clarify why it cannot be included in this Bill? Once immigration officers as well as police officers are subject to independent monitoring the distinction between the scope for redress against them, as opposed to against private contractors, will be even more stark. Yet these private contractors will have powers to search, detain and use reasonable force.

Section 145 of the Immigration Act 1999 provides that immigration officers exercising any specified power to arrest, search, question or take fingerprints from a person or to seize property found on a person must have regard to specific provisions of the PACE codes, subject to modification. Section 145 was amended in 2002 to provide that anyone exericisng powers to collect data about external physical characteristics must have regard to such provisions of the PACE Codes as may be specified. There is confusion as to which powers have been specified, as illustrated by the following discussion on what is now clause 42

"Dr Evan Harris*….Section 145 of the 1999 Act provides for immigration officers to have regard to codes of practice when exercising these powers. The codes are the Immigration (PACE Codes of Practice) Direction 2000, and the Immigration (PACE Codes of Practice No. 2 and Amendment) Direction of 19 November 2000. They apply parts of the PACE codes to immigration officers. However, some safeguards that apply to police officers do not apply to immigration officers, such as the requirement to give one's name when conducting certain searches. ..I have been told that it is hard to find those codes of practice. Perhaps the Minister will take note of that and ensure that they are easier to find….*

Mr. McNulty: *As I understand it, the new clause relates to arrest and detention pending deportation...Given that it refers only to arrest and detention pending deportation and not to arrest for criminal offences, PACE does not apply. That has always been the case."* (Standing Committee E, col 280 27 10 05)

This seems to suggest that powers other than those attendant upon an arrest have not been specified. Clarification on this point, and, if the Minister is correct, on why application of the

modified PACE codes has been limited as it has, since s.145 is certainly broad enough to allow for such extension, would be welcome.
As matters stand IND has an internal complaints procedure, overseen by an audit committee. The internal procedure will handle everything from complaints about a lost document to complaints about delay. It is ill-suited to dealing with complaints of violence and abuse. The chair of the audit Committee, Dr Anne Barker, gave evidence to Home Affairs Select Committee on 13 December, making clear the "indefensible" nature of the current system:

> *"There are three major problems: one, that the system [of complaints-handling] is so fragmented that it is not working at all efficiently and that customer satisfaction is not what it should be; two, that the quality of investigations is low; and, three, that operational complaints are not being addressed at all adequately and no one knows quite how many there are. There is no systematic procedure whereby they are considered and the system is not working properly; indeed, there is not much of a system…*
> *…the investigations themselves upon which the decisions are made are not conducted equitably. Complainants are not interviewed. The complainant's statement may be three lines and that is it and there is no attempt to discover more…. There are paucities of independent witness statements because of delays, and evidence like CCTV or medical reports is often missing. There is very little on the complainant's side… it is inequitable, and, if it is inequitable like that, it is indefensible…*
> *(*Uncorrected evidence of 13 December 2005, to be published as HC 775-i)

Dr Baker also provided evidence on complaints of violence:

> *"… Because Paul Acres and I have police backgrounds, we were happy to work with IND to work through the remit with the IPCC who will be called in if there are very serious allegations of a criminal nature made against enforcement and removal officers. Stephen Shaw, the ombudsman, may take over that same remit for detention centres..*
> ***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. ..*
> ***Mr Clappison:** What has happened now to those serious complaints? Was each one of them investigated?*
> *Dr Barker: Well, I do not know, is the answer. Some of them are referred to the police, but one of the problems is that there is no written audit trail, so all you see in a file is "Police NFA", and you have no idea of what they have investigated…that whole information is lost to the investigator who is looking at it for IND on the balance of probabilities rather than beyond reasonable doubt.* (Op.cit)

If this is the position for officials, it bodes ill for any hope of making a complaint or getting information about use of violence by contractors, under a contract no doubt subject to commercial confidentiality, who will not be subject to this procedure, such as it is and such as it might be if Dr Barker succeeds in reforming it.

We can see no reason, if the intention is to deliver a professional service, and if, as was stated in Standing Committee E (Col 224), this is not an exercise in saving money, to move this role of detention away from an immigration officer. Which leads us to think that perhaps it is about money after all. The Junior Minister, Andy Burnham MP, pressed on this at Commons Committee, did start to crumble:

> *"It might not always be practical or the best use of resources to devote our available personnel to front-end responsibilities…. Some functions require less skill and*

experience than others. The whole premise of the clause is flexibility… We want to use the resources that are allocated to the immigration service to the best effect. …. This is about using our resources well …"(Cols 227 to 229)

ILPA supports:
Leaving the clause out of the Bill because of the child protection and other concerns it raises as per the Refugee Children's Consortium Briefing**Amendment 64A** (and consequential **Amendment 64B**), The Lord Dholakia, the Lord Avebury to leave out the power to authorise private contractors to under this clause.
Amendment 64C the Lord Dholakia the Lord Avebury to provide that those authorised under this clause have no power to detain,. Thus they would have to rely on an immigration officer or a police officer to make the detention.
Amendment 65 the Lord Dholkaia and the Lord Avebury, to leave out the power in clause 41 for a class of persons to be authorised rather than named individuals.

OTHER PROVISIONS

Clause 27 Documents produced and found
The clause extends powers to 'detain' passports or other documents from the current position whereby an immigration officer is permitted to retain the document for 7 days or, if the document is or may be needed for criminal proceedings, until satisfied it will not be so needed, to a position where passports or other documents can be retained 'for any purpose' until the grant of leave or the departure of the holder, and indeed beyond.

All passports are and remain the property of the issuing governments and traditionally government agencies have appropriately been given limited powers to retain them. The junior Minister, Andy Burnham MP, rejected in Commons Committee the entirely reasonable suggestion that people should be given certified copies of passports where these are retained, for example where a person has applied for an extension of leave, so that they could prove their identify to landlords, employers, doctors, hospitals, childcare etc., but the only reason he could offer for this peremptory rejection was administrative convenience: *"Although I listened with interest to the suggestion of the hon. Member for Woking about certified photocopies, that could cause an extra administrative burden on the immigration service*"(Col 177 Standing Committee E. He did not appear to be aware that passports are routinely submitted and retained where immigration applications are made. How difficult is it for an official to take a photocopy, stamp and sign the back? What is this minor inconvenience compared to the trouble it could save the individual asked to prove their identity and save other people, such as employer asking to see the document?

We are particularly concerned that the clause on its face gives the immigration authorities power to retain a passport beyond the time when a person is removed from the UK. The junior Minister gave confusing (and arguably confused) responses in Commons Committee so that we were wholly unable to determine if, and if so, when, a person being removed would have their passport returned to them.

ILPA supports **Amendment 51A**, the Lord Dholakia and the Lord Avebury: Clause 27, page 13, line 11 Before "after" insert "where a person has been given leave to enter the United Kingdom" to deny powers to retain a passport beyond the time when a person is removed from the UK.

Clause 31 Attendance for fingerprinting
The clause provides for the Home Office to set timed appointments for people attending for fingerprinting, rather than ask them to turn up on a particular day and wait. No one objects to

that. However, other aspects of the clause are objectionable. The clause imposes more stringent time limits on people seeking recognition as a refugee or humanitarian protection to attend for fingerprinting (minimum notice 3 days) than on people in other categories (those who have failed to produce a valid passport or identity document on arrival; a person refused leave to enter but on temporary admission whom it is feared will not comply with residence conditions and a person in whose case a decision has been made to make removal directions or to deport, who will get a minimum notice of 7 days).

Whether a person gets three or seven days, this period starts to run from the date of the notice, not the date it is received. The notice will take time to go through the post, and might be delayed in the post, or the person be temporarily absent from their accommodation. People seeking asylum, who are likely to have the most difficulty getting the money to travel to attend, may only get the letter the day before they are due to attend, or quite possibly after. The consequences of failure to attend can be arrest without warrant (Immigration and Asylum Act 1999 s.142(3).)

A half-hearted attempt was made by the Junior Minister, Andy Burnham MP, at Commons Committee to suggest that the shorter time limit for people seeking asylum was there to ensure compliance with the EU Reception Directive, but as was clear from the debate, the procedure envisaged by the clause is neither necessary to ensure compliance (fingerprints are needed to issue an ARC card, but not to issue a Standard Acknowledgement letter, which satisfies the requirements of the directive) nor it is going to mean that the ARC card can be issued to a person recalled for fingerprinting within three days of arrival in any event. The Junior Minister was forced to conclude: *...I am not making the point that we have an EU directive and that is why we have to do it within three days.* (Standing Committee E, col 183)

ILPA supports **Amendment 54** (**53** is consequential), Lord Dholakia and Lord Avebury to leave out lines 3 to 12 (proposed subsection 2A(b)) and thus preserve the current position whereby all those required to attend for fingerprinting, including those seeking recognition as a refugee or humanitarian protection are given seven days notice of the requirement to attend

Clauses 32 to 39
These clauses make provision for exchanges of data on arriving and departing passengers and on freight

Clause 32 makes provision for the police to request information from owners of ships or aircraft arriving in or leaving the UK. Blanket orders may be made, covering any movements for a period of up to six months. We are concerned that the clause states "The Secretary of State may make an order under this paragraph only if satisfied that the nature of the information sought is such that there are likely to be circumstances in which it can be required under subsection (2) without breaching Convention rights" This would appear to give the Secretary of State too wide a discretion. As drafted it suggests that the Secretary of State can make an order if he can envisage circumstances in which requiring the information would not breach human rights. He might be able to envisage such circumstances, while knowing that in the case before him requiring the information will breach human rights.

Clause 32
ILPA supports **Amendments 56 and 58** in the names of the The Lord Dholakia and the Lord Avebury to, page 16, line 13, leave out "generally or", and page 16, line 25, leave out subsection(a) to prohibit the Secretary of State from making orders that apply generally.
ILPA supports **Amendment 57** in the name of The Baroness Anelay, the Viscount Bridgeman, the Lord Dholakia, the Lord Avebury page 16, line 14, leave out "six months" and insert "one month" to limit the time for which a requirement to provide information remains in force from 6 months to one month.

ILPA support **Amendment 57A**, the Lord Dholakia and the Lord Avebury to probe the drafting of this clause. The drafting would appear to permit the Secretary of State to make an order if he can envisages circumstances in which requiring the information would not breach human rights, even if in the particular case he knows that this is not so.
ILPA supports **Amendment 58**, the Lord Dholakia and the Lord Avebury which would prevent orders being made that apply generally.

Clause 33 provides the police with powers to request information about freight. In the Terrorism Act 2000, paragraph 17 of Schedule 7 gave the Secretary of State power to make orders specifying information to be requested, provided that information related to passengers, crew or vehicles belonging to passengers or crew. When the order was made (Terrorism Act (Information) Order 2002), it also allowed information to be requested about goods carried on a vehicle, namely a description, the address from which they were to be collected and that to which they were to be delivered and the registration number of that vehicle. Here we see attention turning from people to goods on the face of the Bill, but it is far from clear that this falls within the short title of a bill which is to "Make provision about immigration, asylum and nationality and for connected purposes" unless "connected purposes" is interpreted so broadly as to be meaningless. The government has a Terrorism Bill going through parliament at the moment, so it has somewhere else to put this clause.

The Minister of State in Commons Committee simply said *"If it did not relate to the Bill, parliamentary counsel and the House authorities would have ruled the thing out of order…Freight is utilised and exploited for people trafficking."* (Standing Committee E, col 202). This is not an explanation. The type of freight carried gives no indication as to the likelihood of the vehicle being used to transport people, as was tragically illustrated in the case of the 58 Chinese immigrants who died being smuggled into Dover in a sealed container, in which they were unable to breathe. All sorts of legislative provisions may help to tackle people trafficking, but surely that alone would not bring them within the short title of this Bill?

ILPA supports Lord Hylton's proposal that Clause 33 should not stand part of the Bill.

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"*. We note that an agency is defined as a "person", and the loose wording "similar to" and "functions". 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.

ILPA supports **Amendment 59** in the names of the Lord Dholakia and the Lord Avebury which probes the definition of "foreign law enforcement agencies with whom information could be shared.

Clause 42 provides new powers to detain embarking passengers for up to 12 hours. This provision was introduced with other amendments on terrorism (now clauses 7, and 51 to 55). This clause would perhaps be better entitled "*Detention: Embarking passengers"* since this is the most striking power in the clause. The powers in the clause are powers to detain people leaving the United Kingdom for up to 12 hours and to establish the person's identity,

compliance with conditions of leave and whether return to the UK is prohibited or restricted. The Minister of State explained in Commons Committee:

"*Currently, we are able to take all that information from someone only if they are arrested. Clearly, we do not want to arrest everybody… …In that regard, having the facility, which is all that the two new clauses propose, to establish beyond doubt a person's identity as they are leaving and to take a record of that by biometrics is a more than appropriate halfway house." (Col 308).*

Arrest is unpleasant, but it also carries safeguards. Asked whether people would be able to contact a lawyer, or their embassy or High Commission the Minister said:

> *"The power to detain a person pending examination is an administrative power for immigration purposes, and it is for a maximum of 12 hours. If the individual is subsequently arrested for an offence, the usual safeguards of the Police and Criminal Evidence Act 1984 will apply, including the right to legal representation...Before the 12 hours are up, there will be no right to legal representation and none of the other rights afforded by PACE. ..If it goes beyond 12 hours, the legal rights and powers under PACE will kick in* (Col 310, 27 10 05)

It is unlikely that anyone will realise that the embarking passenger is being detained. They will not be allowed to tell anyone. The comments we made above (Clause 40 and 41) on section 145 of the Immigration Act 1999 and the PACE codes, and on existing and future complaints procedures, also apply here. Section 145 could be used to make modified versions of PACE applicable to this procedure. Why is this not being done, as the Minister of State's comments at Commons Committee, cited above, suggest it is not.

What are the financial implications of the clause? Will it entail having to rebook flights at public expense or will a system of compensation operate instead?

The powers could provide the Government with an opportunity to gather information about the movement of certain "suspect communities" and information that individuals may be required to give as the result of provisions contained in the Terrorism Act 2000. The 1976 Prevention of Terrorism (Temporary Provisions) Act contained a similar provision for the police and immigration officers at ports to the power to detain and examine individuals arriving in or leaving Great Britain for up to twelve hours and other provisions of the Act required individuals to co-operate with those trying to prevent terrorism. The provision was used extensively to collect information from people travelling to or from the Northern Ireland. Home Office statistics show that in 1985, for example 55,328 people were detained and questioned under these powers and in 1986, for example, 59,481, were detained and questioned. The impact on the Irish community was immense, and exacerbated, rather than ameliorated tensions.