IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Response by the Immigration Law Practitioners Association 28 July 2006:

Consultation Document: Private freight searching and fingerprinting at Juxtaposed Controls

Introduction

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.

We are grateful for this opportunity to express our concerns regarding the proposed extension of UK activities in France and Belgium regarding the detention and fingerprinting of individuals and the extension of UK powers of detention to companies acting in France and Belgium.

ILPA provided briefings to parliamentarians and also discussed with Ministers and officials what are now sections 41 and 42 of the Immigration, Asylum and Nationality Act 2006 and also the fingerprinting provisions of the 2006 Act and its predecessors. We have drawn attention in this response to comments made by Ministers at the time, which could usefully have been discussed more extensively in the consultation paper itself.

We have looked at the questions posed in the consultation paper. Given that many of them are directed at those operating in the ports concerned we have not structured our response around those questions. We have, however, highlighted them where appropriate.

Our concerns revolve primarily around two aspects of the legislation and its proposed implementation:

(1) Private contractors will be given the power to search vehicles and any person to detect and to detain and escort such persons to the nearest immigration detention facility. The period of time for which the private contractor will be allowed to detain individuals is three hours.
(2) Power to finger print individuals in France and Belgium according to criteria which are yet to be specified.

Sovereignty and private contractors; detention and crime

The UK government proposes to authorize private contractors to search vehicles and detain individuals in the port of Calais in France.. The private contractors will be able to act independently in the circumstances defined, without any UK (or French) officials present. Private contractors will replace UK immigration officers for the identified tasks, according to the consultation document. Only one objective for this proposal is identified in the consultation paper: to reduce costs, since "[w]arranted immigration officers receive extensive training which enables them to be directed to other equally important areas…"[i] Nor are we

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aware that other objectives were identified during the passage of what are now s.40 and s.41, although we recall statements of Ministers denying that cost was the motive:

> *"I stress that this is not a question of saving money."* Andy Burnham MP, then Parliamentary Under-Secretary of State, Standing Committee E, 6th session 25 October 2005, col.224[ii]

Clearly the cost of the training and/or salary is considered to be just too high to justify the deployment of UK officials for the purposes of detention of individuals and search of freight in France. In response, ILPA reiterates its view that these proposals are not prudent measures to cut expenditure: they raise fundamental questions of sovereignty and, on an operational level, will result in the cutting of corners and the taking of unjustifiable risks. We fail to understand a hierarchy of values that treats deprivation of liberty as the function selected for contracting out to those who are not state officials.

The question that arises is that of sovereignty. When UK officials act on UK territory, they act within the scope of national sovereignty. When they act at UK consulates abroad, they act under the mandate of international law, which recognizes a limited degree of national sovereignty on foreign territory. As we well know, the UK courts exercise an anxious scrutiny over the acts of UK officials in the UK and at consulates abroad. The control function to ensure the rule of law, and respect for the UK constitution, which is the responsibility of the UK courts exercising jurisdiction over the UK administration, has gradually evolved into a system of administrative law.

Now there are new challenges before this system – firstly the activity of UK officials (and agents) on the territory of other sovereign countries but outside the scope of international law on diplomatic protection; and secondly the sub-contracting of that activity to private companies. In some ways this mirrors the current crisis in the UK justice system regarding the actions of UK military personnel in Iraq – as regards the activities of UK authorities in foreign countries outside the diplomatic realm, and the looming challenging of the activities of UK authorized private contractors in Iraq.

Section 141 of the Nationality, Immigration and Asylum Act 2002 allows the Secretary of State to make provision by order for the purposes of giving effect to an international agreement which concerns immigration control at an EEA port, including providing for laws of England and Wales to have effect. The international agreement in question is the *Treaty between the Government of the United Kingdom and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of Both Countries on the Channel and the North Sea*, done at Le Touquet on 4 February 2003 (Cm 5832) and entering into force on 1 February 2004 (No. 18 of 2004). In accordance with the Treaty, an EEA port is defined in s.141 to mean a port "from which passengers are commonly carried by sea to or from the United Kingdom". The power to extend UK law beyond UK borders under that provision is limited to sea ports. See also the Nationality, Immigration and Asylum (Juxtaposed Controls) Order 2003 (SI 2003/2818).

Article 3(2) of the Treaty provides for the laws and regulations relating to Frontier Controls of the "State of Arrival" (in Calais, the UK) to be applicable in the Control Zone and for breaches of the laws and regulations relating to Frontier Controls to be subject to the laws and regulations of the State of Arrival (in this case, the UK- Article 3(3)). It provides that where an offence of any other kind is committed in the Control Zone the State of Departure (in the case of the Calais Port, France) shall have jurisdiction (Article 3(4)). The article is silent

other areas of law, including tort, child protection where the act does not amount to a criminal offence, and general administrative, contract and human rights law.

Moreover, Article 3(1) states that the government of each State shall permit "Responsible Officers" of the other State to carry out their functions. Responsible Officers are defined in Article 2(f) as "the officers given responsibility by each Government for the exercise of Frontier Controls". We note also that Article 1(4) of the Treaty states that the arrangements for control zones "shall initially be limited to the exercise of Frontier Controls by the immigration authorities of either State in the Sea Ports in question". There is no scope in these definitions to use s.141 to authorise private contractors to carry out tasks; yet s.40 and s.41 are drafted to give them powers to act when immigration officers are not present. Thus we pose the questions: does the Treaty make any provision for the exercise of controls by private contractors at all? If so, under what system of law would these private contractors act? Would they be subject to UK contract law only? Would they be subject to French contract, tort and criminal law? What would happen if a private contractor is intentionally or accidentally injured by an individual whom he or she is seeking to detain? Would this be a breach of UK criminal or tort law? Or would this be a breach of French criminal or tort law? If so, by whom - the private contractor or the Immigration Officer purportedly directing and supervising him/her?

Many of these questions were posed during the debates on sections 40 and 41. They received only limited answers, with no reference whatsoever made to the Treaty, and it is disappointing that the Consultation Paper has not endeavored to answer them. Examples from debates include:

> *The French police will screen all contractors who work on the post, and will check criminal records, including those for sex offences.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186
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> *…the French police will check all those who are to work in the Calais port area, regardless of the nationality of the employee. All persons will be checked for the existence of a criminal record in France.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, col. 577
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> *Authorisation will be granted only following stringent checks against a number of criminal record databases in the UK and in France, because people operating in France may be French.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232

We are aware that Article 5(1) of the Treaty makes provision for the confirmation of the exercise of the controls set out in Article 3 to be confirmed through the exchange of diplomatic notes. Not having had sight of these notes, we cannot comment on their contents. However, this power of confirmation set out in the Article is expressly limited by the phrase "insofar as they concern Frontier Control agencies expressly permitted to undertake juxtaposed control functions by international agreement" and thus we do not see any scope for an exchange of diplomatic notes to make good lacuna in the agreement as to any work by private contractors.

We assume that it is in an attempt to deal with this that the consultation document says that "The [private contractors] will be directed and supervised by the UK Immigration Service on site"? But what does this mean? Especially given that the consultation paper also says "The new legislation will allow for a firm of private contractors to act independently"[iii]. More detailed comments were provided during the debates in parliament, but these provided no more clarity than does the consultation paper:

> *Private contractors will work under the Immigration Service, which will be present at the ports where they operate*. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC230
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> *Private contractors will be supervised by the Immigration Service…* The Baroness Ashton of Upholland, Parliamentary
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> *We retain responsibility…* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186
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> *…a contractor who is brought in must be able to speak sufficient English to be able to converse with the officers of the UK Immigration Service, under whose supervision they will operate..*. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186
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> *We have to begin from an understanding that we are not delegating responsibility for these activities …The operation of the UK border remains in the hands of the UK immigration authority* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186

The power to detain for up to three hours indicates that circumstances are envisaged in which the private contractor would be unable to call upon an immigration officer for up to three hours. During three hours they would be depriving people of their liberty, and searching them, without supervision. This is very different to the activities of Detainee Custody Officers in Control Zones for which provision is made in the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003 (SI 2003/2818), Article 12. That the authorised persons are exercising powers relating to Frontier Controls is apparent from the very text of s.40 and s.41, which derive the activities they are to be permitted to undertake from references to Schedule 2 of the Immigration Act 1971 (c.77) – see for example s.s.40(1), s.40(7), s.40(5). The long title of the Immigration, Asylum and Nationality Act 2006 is "An Act to make provision about immigration, asylum and nationality and for connected purposes". Provision is made s.41(6) for a criminal offence where a person does not comply with the instructions of an authorised person. This is a sanction for breach of the laws and regulations governing immigration control and would thus fall with Article 3(3) of the Treaty. As described above however, there is not scope in the Treaty for Article 3 to be extended to the work of private contractors.

We are not aware of any similar treaty with Belgium. We are aware of the Channel Tunnel Act 1987 and the orders made under it, but s.141 relates only to sea ports and cannot be used in respect of trains. There are grave difficulties in seeking to make the order apply to Calais port, as is stated to be the intention within the consultation paper. There would be further questions of vires were any attempt made to draft an order that could apply more broadly. In

commenting on the use of private contractors in the paragraphs that follow, we proceed on the basis that the order is intended to be limited in terms to their deployment at the port of Calais.

It is regrettable that the consultation paper gives no explanation how Ministerial undertakings are to be fulfilled and that no clear explanations of the applicable law and the fora empowered to adjudicate on that law have been supplied.

We consider in more detail the matter of detention. No explanation has been provided as to what happens if the contractor unlawfully imprisons a French (or Belgian – were the order more widely drafted) national on the territory of their country. Under what international agreement does the contractor purport to exercise UK Frontier Controls on French soil? Is the contractor (or the Immigration Officer purportedly directing or supervising him/her) liable in French law for unlawful detention? Would it be different if the individual detained were neither French nor Belgian? As to the offence set out in s.41 (6), in certain circumstances, such as assault (s.41(6)(d)), it would appear that a criminal offence may have been committed over and above those relating to a breach of immigration control. The detained person assaulting the authorised person could be liable for "an offence of any other kind" within the terms of Article 3(4) of the Treaty and would appear to be liable under the French criminal law. Similarly for the authorised person who uses more than the reasonable force for which provision is made in s.40(7)(e) and thus assaults the person in custody, or, for example, abuses a child. The authorised person would appear to be liable under French criminal law. A matter raised during debates in Parliament, but never answered, was the question of what would happen if a contractor abused a child during the three hour period? Who would be liable – the contractor or the Immigration Officer purportedly directing and supervising him/her? If the Immigration Officer, then under Article 3 of the Treaty, liability would appear to arise under French criminal law. Would that law allow prosecution of the Immigration Officer for the actions of the contractor? Would the contractor, directed and supervised as s/he purportedly is, according to the consultation paper, get off scot free? If not, under which criminal law would the contractor be liable? Which employment law would govern the question of their dismissal? Which child protection system would set the standards for the entitlements of the child to care and support?

What state is sovereign in this circumstance as regards the most severe penalty with Council of Europe states are permitted to exercise against individuals – detention? Detention is the most severe penalty which Council of Europe states are entitled to apply against the individual. Torture, corporal punishment and the death penalty are all excluded by the European Convention on Human Rights (ECHR). The power of detention is jealously guarded within the system of sovereignty. Here detention is related to public order, or in the words of the consultation document, to "ensure that we maintain the integrity and security of our borders" (a manifestly sovereign issue). Under the laws of which State, France or the UK, would an individual allege a breach of his/her rights under Article 5 ECHR?

The justification given for detention is that it is for the purposes of immigration control, as was stated in debates. Such detention, if carried out by an immigration officer, appears to be permitted under the terms of Article 3 of the Treaty, but what is the position where the person is detained by a private contractor? Section 40(1) states that the private contractor may exercise powers of detention etc., "for the purposes of satisfying himself whether there are individuals whom an immigration officer might wish to examine under paragraph 2 of Schedule 2 to the Immigration Act 1971".

The consultation document makes no reference to offences, extradition or other criminal justice procedures.

The power to facilitate the use of power under Schedule 2 of Paragraph 2 involves matters, including criminal offences, related to "Frontier Control". If carried out by immigration officers they appear, under the provisions of Article 3(3) of the Treaty, to be subject to UK law. However, if the private contractor has no authority to act that can be derived from the Treaty, then it would appear that s/he is committing an offence.

We understand that Article 12(6) of the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003 (SI 2003/2818) makes provision for an offence in relation to the provisions set out in Article 12(1) by a constable or immigration officer in the exercise of their functions to be treated as having been committed in the County of Kent or the inner London area as set out in Article 12(6). But we do not consider that this can obviously neatly be extended to authorised persons who may be of any nationality given the terms of Article 3(4). Although it is not applicable here, we draw attention to the more detailed attention given to similar questions in the international articles appended as Schedule 2 to the Channel Tunnel (International Arrangements) Order 1993 (SI 1993/1813 as amended, especially international articles 38 to 41, and ask whether similar attention will be paid to the questions here? We note in passing that the provision made in the Article 5 of 1993/1813 (again not applicable here), dealing with similar questions of conflict of laws, provides a saving provision for the jurisdiction of other courts and would remark that it gives rise to concerns of double jeopardy.

Matters are further complicated by the definition of a breach of immigration law in s.25(2) of the Immigration Act 1971, whereby the relevant law is the law of a "member State". One can envisage circumstances where an act done in a Control Zone constituted an attempt to breach French immigration law (for example an attempt to facilitate a person's leaving the control zone and escaping, undetected, back into France) and thereby constituted a breach of UK immigration law given s.25(2). The questions of *forum conveniens* that arise do not, in our view, appear wholly to be resolved by the provisions of the Treaty.

Subsection 25(4) of the 1971 read with 25(1) and 25(5) makes it an offence to do an act that, for example, facilitates the commission of a breach of immigration law (as defined) outside the United Kingdom where the act is done by a British national (British citizens or others) or a company incorporated in the UK. This raises the spectre of the liability of authorised persons who abuse their position differing depending on the nationality of the private contractor, or of the private company with whom the Home Office enters into a contract for the provision of private contractors

The UK's "Frontier Control" laws are backed, in many cases, by criminal offences. If the person is deprived of their liberty on suspicion of having committed a criminal offence then, do the procedural guarantees of French or UK criminal law apply? Attempts to extrapolate from the provisions of Articles 13 and 14 of SI 2003/2818 do not appear to assist, as these deal only with persons arrested, rather than detained, and, as we understand it, the powers of authorised persons do not extend to powers of arrest under the terms of s.40 and s.41 of the 2006 Act.

If the person is deprived of their liberty, in accordance with s.40(1) on the basis of powers under immigration law not backed by criminal offences, then what of the safeguards for

which provision is made in UK law in cases of detention under immigration act powers, including the serving of the relevant documents, IS91, IS91R & c.? Will authorised persons serve these papers? If they fail to do, and the detention is not thereby lawful under UK law, have they committed an offence of wrongful imprisonment under French law? Have they committed a breach of Article 5 ECHR (cf. *Saadi v UK* ECHR 11 July 2006)? If so, does the detained person complain to the French or the UK authorities? If the UK wishes to charge a person discovered during a freight search with a criminal offence linked to breach of "Frontier Controls" do they have to seek the extradition of that person to the UK? If it is not envisaged that a criminal charge would ever in practice be brought, this has implications for the extent of powers to detain and examine the person.

If contractor accepts a bribe, or attempts to facilitate the illegal entry of a person in the UK and thereby attempts to commit a breach, not only of his/her contract of employment, but of UK Frontier controls, what happens? Is the offence an inchoate offence of attempt (or possibly conspiracy), because no one has yet entered the UK? Suppose the contractor is a French national. Do extradition procedures apply if the UK wishes to bring him/her to the UK for any breach of UK law? What of third country nationals? Attempts to extrapolate from the provisions of SI 2003/2818 do not provide obvious answers to these questions.

In sum, the UK legislation intends to confer on private actors powers which are the most coercive permitted under the ECHR and these powers are to be exercised outside the UK's sovereign territory. There is not one word in the consultation document of the right of redress of the individual, who could be a French or Belgian national, who is detained by a private contractor in France or Belgium in accordance with a UK power conferred on him. Who is sovereign?

Other Matters

Authorised constables and officers of Revenue and Customs

Section 40 would also allow these people to be authorised persons. The consultation paper provides no information on whether they are to be used and clarification on this point would be helpful. We are particularly confused by constables, for which adequate provision appears already to have been made in Article 14(2) and related articles of SI 2003/2818.

Individual authorizations

Paragraph 2(a) of the consultation paper refers to "individual authorization". Paragraph 2(c) states that "The new legislation will allow for a firm of private contractors to act independently". You will be aware that Ministers gave undertakings during the debates in Parliament that persons would be authorised individually and we trust that this will be made clear in the secondary legislation. It would have been helpful to see in the consultation details of the authorization procedure. Note for example:

> *Authorisation will be granted to individuals and will be suspended or revoked if there are any concerns.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232

…there will be absolute clarity about the vetting of each individual. . The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1187

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. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC231

Training

Ministers gave a number of assurances about the training that contractors would undergo. We are disappointed that the consultation paper does not provide details of this. Among the commitments made:

Security checks will be undertaken, and training will include cultural awareness, race relations, the legal framework, interpersonal skills and care for vulnerable detainees. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, cols. GC229-230

We talked in Grand Committee about the strict safeguards that will apply to the recruitment and the work of the contractors. These include security checks, which will be undertaken in both the UK and France. The training will include cultural awareness, race relations, the legal framework, interpersonal skills and care for vulnerable detainees, including—perhaps I would say especially—unaccompanied minors. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186

Nor do timescales permit this work adequately to be carried out. The Consultatoin paper speaks of private freight searching being commneced in August 2006 at Calais port. We are concerned that the proposals risk breaking promises made to parliament and indeed, putting Ministers in the position of having misled parliament because officials have failed to give effect to the undertakings they gave.

Openness and freedom of information

We recall the undertakings given by Ministers as to transparency in the process:

I understand noble Lords' need to ensure that the contractors are properly trained. They will have to provide the Immigration Service and the appointed monitors with access to the course material and the opportunity to attend the training they provide to ensure that there is high quality. I am happy to that training document available to noble Lords, if they would find it of value. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, cols. 576-577

We need to use resources, especially people, effectively and properly within training and contract regimes that are as transparent as possible within commercial confidentiality. The issues relating to children need to be addressed. The Baroness Ashton of Upholland, HL Report, 7 February 2006, col 578

Yet not one aspect of the tender documents has yet been made public. We trust that this will be remedied as soon as possible.

Timetable and obligations upon contractors.

We note that an August 2006 start-up is envisaged for fingerprinting but no timescale has been set out for use of private contractors. We suggest that it will take some time to set this up: a tendering process will need to be completed, and individual authorisations and training dealt with. We are particularly mindful of the time that it takes to complete criminal record checks in the UK, in accordance with Ministerial undertakings. It was stated in parliament:

> *…we want to identify a contractor through an open and fair competition that will require any potential bidder to submit references and their work-related history for verification. We further propose that a contract will be awarded on the same basis as that issued to detention custody officers. Firms will have to operate in accordance with their operational policy standard and procedures that are agreed with the IND's detention services department.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186-7

> *…a contractor who is brought in must be able to speak sufficient English to be able to converse with the officers of the UK Immigration Service, under whose supervision they will operate, and to be able to carry out their functions properly.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL 3rd Reading, 14 March 2006, col. 1186

> *The training that must be included involves, among other things, managing detention anxiety and stress, including the detention of vulnerable trainees; 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.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC231

> *All contractors will be required to submit to the Secretary of State detailed procedures for handling vulnerable groups, including unaccompanied minors..* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232

It will be necessary to subject references and work-related history to adequate verification, agree policy standards and procedures and check individuals to authorised, as well as to train those individuals.

Consultees

The Children's Commissioner is not among the list of consultees. He should be consulted, along with the Défenseuse des Enfants in France, given the Ministerial undertakings given at the time of the debate. In the light of recent reports on short term holding facilities we should have expected that the views of HMIP would also be sought. We note in saying this that other statutory bodies, such as the Treasury have been included on the list of consultees

therefore we assume that the omissions noted mean that the people have not been consulted. They should be consulted before any implementing legislation is laid before parliament.

We recall that the Défenseuse des Enfants has issued a number of *Opinions* (*Avis)* raising concerns about the treatment of children held under immigration powers in France [iv]. Last year she looked at what was happening to unaccompanied children from abroad held at Roissy airport in France, expressing concerns at their being held with adults, being at risk of being shuttled back and forth to and from countries of transit and being returned to their country of origin without arrangements having been made for their safety and care on return. She also drew attention to risks of abuse.

Complaints and safeguards

See our comments in response to question 6 below. As to private contractors we should have expected at the very least to see detailed codes governing their conduct, publicly available, released for consultation prior to issuing invitations to companies to tender. We invite you to make good this lacuna before any question of awarding a tender arises. We should like to see details of to whom those who are aggrieved can complain, how the complaint will be dealt with, how the complainant will be invited to respond and know the outcome, and the sanctions to be applied when the complaint is upheld. We consider that it is vital that the jurisdiction of the IPCC over matters of immigration enforcement, for which provision is made in the Police and Justice Bill currently before parliament, be extended to cover private contractors.

Response to ***Q5 Are the new powers an effective tool to combat clandestine entry through the Calais port?***

No. They are a high risk attempt to cut costs in an area where the greatest degree of transparency and integrity is required: in the deprivation of liberty of individuals. The confusion of applicable laws, be they criminal law, tort law, contract law, employment law, or child protection law will lead to a reduction of safeguards for individuals and may lead to costly litigation .

Response to ***Q6. What other measure would you prefer in addition to, or instead of, private searching?***

Searches should be conducted by Immigration Officers and Immigration Officers should be present in all cases where an individual is detected. We are pleased that the government is trying, in the current Police and Justice Bill, to introduce a power to make Immigration Officers' exercise of a range of powers subject to the IPCC. We trust that that measure will be implemented with at least the speed with which the proposal under discussion is being pushed through. As stated above, we consider that provision should be made to extend the jurisdiction of the IPCC to cover private contractors.

We note the extensive, underutilised, powers in s.145 of the Immigration Act 1999 to draw on the PACE codes for models of codes to apply to immigration officer in situations where immigration officers are, *inter alia,* searching or taking fingerprints from people. These modified codes could be used far more widely than in cases of arrest: modified codes could be issued to govern all aspects of, for example, search, questioning and fingerprinting.

Response to Q. 10 **Will the proposal disadvantage minority groups in any way? If so, in what ways can this be avoided?**

Careful monitoring will be required to ascertain whether or not particular minorities are subject to these powers more often than others. In comparison with those identified at UK ports or in-country they will be subject to detention by private contractors that is, in its turn, subject to a much less rigorous system of complaints and oversight. We have referred to the risks attendant upon giving private individuals and companies powers to deprive individuals of their liberty. The failure to identify the applicable systems of law (criminal, child protection, determination of asylum and human rights claims) that will deal with those in difficulty – children or adults subject to abuse or violence in the course of detention, for example makes it difficult to determine whether they will be subject to less favourable treatment than groups whose members are for the most part identified within the UK, but we see enormous scope for difficulties in this regard.

The Power to Fingerprint

Vires

The consultation paper states that there is no obligation to consult to implement these provisions at Coquelles, Calais-Frethun, Lille Europe, Paris Gare du Nord and Brussels because they are not covered by s.141(5) of the 2002 Act (paragraph 2(c) of the consultation paper). But on what basis is intended that they be implemented there? Subsection 141(5) simply refers to an order made under s.141(5). The named ports are not covered by s.141(5). Neither are they covered by other parts of s.141. There are no powers under s.141 to make provision for UK law to have effect or for the Secretary of State to make provision for the giving effect to an international agreement that concerns immigration control other than at a sea port. The same conclusion can be drawn by reference to Treaty No.18 of 2004, discussed in the previous section.

Nor does the consultation paper suggest any other basis on which the provision could be extended to those ports. The consultation paper also fails to identify the international agreement to which effect is being given by the measures, another requirement of s.141. If, as we assume, it is intended to take powers under the Channel Tunnel Act 1987 and the Channel Tunnel (International Arrangements) Order 1993 (SI 1993/1813) as amended, within the limits imposed by the Sangatte Protocol (Treaty Series No. 70 (1993) Cm 2366 and the Additional Protocol thereto (Treaty Series No.33 (2002) Cm 5586,then it would have been helpful to spell this out in the consultation paper.

It is our understanding that it is proposed that the power to fingerprint be exercised by immigration officers only (paragraph 1(h) of the consultation paper). If we are wrong about this then our concerns voiced above in relation to private contractors apply, given that SI 1993/1813 deals with "officers belonging to the United Kingdom" and makes no provision for the delegation of these powers to persons other than such officers. It will be important to ensure that no such delegation inadvertently takes place. The government has only just passed (yet) another piece of immigration legislation – if it lacked powers it had the opportunity as recently as March this year to take them.

Response to **Q. 7 What are your concerns regarding the introduction of the routine fingerprinting of holders those holding *[sic]* false documents or attempting clandestine entry at a UK immigration juxtaposed control?**

The consultation document proposes UK legislation to permit the fingerprinting of (unspecified) individuals in France and Belgium. This could well include French and Belgian nationals, and other EU nationals. The argument in favour of this UK measure, according to the consultation document is that "it has become apparent that there is a real need for officers…" to have this power. There is no indication of the grounds on which it has become apparent. This is stated as a fact. It is curious though, that the consultation document acknowledges that when the initial legislation was passed in 1999, no need was seen for the extension of fingerprinting power to France and Belgium.

Comment [S1]: .

In the UK fingerprinting is reserved for suspected criminals and certain persons subject to immigration control. The powers are extended by s.28 of the Immigration, Asylum and Nationality Act 2006. The fingerprint data is held in databases and is consulted regularly for the purposes of crime control and immigration. We recognize that the UK authorities seek to have fingerprint data of as many people internationally as possible. The developments in technology have made the use of such data much easier and increased the desirability of having ever more complete databases in order to find people. But in European law it is the individual who has the right to his or her data (article 8 ECHR). If a state seeks to interfere with that right of privacy, the state must justify that interference. Where is the justification here? The consultation paper states that "all persons refused entry to the UK are handed over to the French or Belgian authorities". Moreover, in accordance with Article 10 of the international articles (as set out in Schedule 2 to SI 1993/1818 as amended) officers of that State can exercise powers of detention or arrest in the control zones linked to the channel tunnel. The French or Belgian authorities are then in a position to decide, within the limits of their own laws, whether or not to fingerprint the individuals, and the UK may have access to this data in accordance with the relevant provisions and operations of European Union law (EURODAC etc). In these circumstances why should the UK be permitted to collect, store and manipulate the individual's data without his or her consent? What provision will be made to ensure that the UK is not taking the fingerprints of persons who have already been fingerprinted by the French or Belgian authorities? Are the proposals merely an attempt to circumvent the law and safeguards governing the sharing of information between member States? We consider that this would contravene, *inter alia,* articles 8 & 9 of the "international articles" as set out in Schedule 2 to SI 1993/1813). To which State does an individual submit a claim that his/her rights under Article 8 ECHR have been breached? We note the provisions of Article 4 of the Channel Tunnel (International Arrangements) Order (1993/1813 as amended) making provision for the application of the Data Protection 1998 to data collected in control zones by treating the data as processed by a data controller established within the United Kingdom for the purposes of the 1998 Act but do not consider that this goes far enough to tackle questions of conflict of laws and rights of redress of the individual if they would prefer to rely on French or Belgian, rather than UK law.

Response to **question 10 – Will the proposal disadvantage minority groups in any way? In what way can this be avoided?**

Categories of applicant

The consultation paper makes reference to fingerprinting "certain categories of applicant" but then goes on to identify those who would be fingerprinted by reference to individual circumstances (previous presentation of a forged document, previous attempts to circumvent controls). How is it intended to identify those to be fingerprinted? We note that if it is proposed to fingerprint people on the basis of their nationality, or a measure that will apply differentially to different nationalities (for example flights between particular destinations may contain passengers the majority of whom are from one nationality – indirect discrimination thus becomes an issue even where this is not a matter of direct discrimination). Ministerial authorisations in accordance with s.19D of the Race Relations Act 1976 may be required. We note the terms of Article 4(1C) of the Channel Tunnel (International Arrangements) Order (1993/1813 as amended), making express provision for the application of the Race Relations Act 1976 to the control zones. We thus consider that paragraph 4 of the consultation paper (Race Equality Impact) is unduly insouciant. It will be important to monitor the use of the powers to establish whether certain groups are affected more than others. We suggest that fingerprinting people of a particular race on bases other than their own personal history and conduct will lead to challenges under the Race Relations legislation. We note that the Independent Monitor of the authorizations, Ms Coussey, is not on the list of consultees and suggest that the provisions be drawn to her attention.

Conclusion

The proposed legislation raises very interesting question about sovereignty and law in Europe. We do not consider that it is appropriate to carry out a consultation on such an important area when, as the Consultation Document states "an Invitation to Tender document was issued on 2 April 2006" for private companies to bid for contracts to carry out some of the activities. In our view a much more extensive consultation is required which seeks to examine the fundamental issues of sovereignty before such an extension of legislation would be justified. This consultation should make available in the form of annexes or links to the documents on the internet the relevant treaties and orders asserted to provide the powers to make the modifications proposed, including, where relevant, exchanges of letters.

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[i] Paragraph 2(d) of the Consultation Paper.

[ii] c.f. the discussion on the same day at col. 230 "**Mr. Leech:** The Minister mentions the word cost. Previously, he suggested that it was not an issue, but now he says that it is a factor. **Andy Burnham…**We want to use the resources that are allocated to the immigration service to the best effect. …. This is about using our resources well…"

[iii] Paragraph 2(c) of the Consultation Paper.

[iv] Communiqué de la Défenseure des Enfants sur les mineurs étrangers isolés maintenus à Roissy (January 2005). ; Enfants sans frontières (September 2004). Proposition de réforme : pour l'attribution de plein droit des prestations familiales au titre d'enfants étrangers dont les parents séjournent régulièrement en France (June 2004).L'avis de la Défenseure des Enfants sur la question des mineurs étrangers isolés (4 October 2000).