

**BRIEFING FROM THE IMMIGRATION LAW
PRACTITIONERS' ASSOCIATION ON THE IDENTITY
CARDS BILL, SECOND READING TUESDAY 28 JUNE 2005**

ILPA opposes the introduction of identity cards because we believe:

- * they will not solve the problems they are claimed to address
- * they will give a false sense of security to those who believe government claims, with consequent disillusion when those claims are shown to be unrealistic
- * they will lead to discrimination against black and other ethnic minority groups, particularly if non-British nationals are required to own them sooner and will enhance social exclusion
- * the estimated cost has spiraled even since this government proposed the idea and the actual cost will be higher still, meaning less government money to spend on worthwhile projects
- * it will not be possible for the National Identity Register to be secure and mistakes in inputting, hacking, unauthorised access and corruption could lead to errors and falsification of data

The government has attempted to justify its proposal for identity cards by suggesting that it will help to stop illegal migration and working and therefore promote good community relations. From the Home Office consultation paper on 'entitlement cards' in 2002, through the results of that consultation, the further consultation paper and draft Bill of April 2004, the Bill of November 2004 and the current Bill, statements such as, "The identity cards scheme is intended primarily as a United Kingdom wide measure to help deter and control illegal immigration..." (para 2.72, Cm 6178) to the first sentence of the Regulatory Impact Assessment of the current Bill, "the identity cards scheme will help to deliver the following outcomes: (i) less illegal immigration and illegal working; and better community relations as a result;" have abounded.

If this is really the government's justification for the Bill, ILPA believes that the scheme is a wholly disproportionate, multi-billion pound ineffective response to the problems of illegal migration and illegal working. It will have much more serious effects on the civil liberties and entitlements of the whole population and will disproportionately affect those of ethnic minority origin, the vast majority of who are legally in the country and British citizens. The suggestion of an initially-voluntary card, made compulsory for different groups at different times, starting with people who are not British citizens, also raises concerns under human rights, anti-discrimination and EU law.

1. 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. Our comments will therefore focus on the effects of identity cards on those subject to immigration control and their connection to people's immigration status as that is our main area of expertise.

ILPA commented on all government proposals since 2002, stressing our concern that the introduction of identity cards would not solve the problems the government claimed to be addressing, in particular identity fraud, access to services and illegal immigration. We remain concerned that identity cards will be an extremely expensive way of providing a false sense of security and a new way of harassment of people of visible ethnic minority origin, will have adverse impact on civil liberties and will serve as an instrument of social exclusion. We also find the Bill confusing and unjustifiable, and extremely vague. It is stated to be an 'enabling Bill'; in numerous areas there are provisions for the government to extend its scope through Regulations and Orders (this includes clauses 2, 3, 4, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 19, 23, 28, 37 and 41, and a Code of Practice in clause 36) but no indication is given of what the government intends to put in these regulations.

ILPA fears that the government still wishes to leave itself ample room for manoeuvre in adding to these in the future, when it thinks of something else it believes appropriate. The government also lays great weight on the fact that Parliament will have to look at the whole situation again and pass regulations by affirmative resolution in order to make cards compulsory but this is not a serious safeguard. David Blunkett said to the Home Affairs Select Committee on 4 May 2004, "It is actually irrelevant whether it is an affirmative or negative order actually, let us be clear about that, the real issue is that there has been a report that the card system itself is agreed nationally..." (HC 130-II, Ev. 111, Q 661). Charles Clarke's 8 February 2005 response to the Joint Committee on Human Rights states, "It has always been made clear that the identity cards scheme is being designed to be a compulsory scheme but will be introduced in two phase." If this Bill is passed, it will mean that identity cards will become compulsory at some time in the future. ILPA opposes this.

2. National Identity Register: dangers of databases

The government has planned several huge national databases. As well as the National Identity Register there is the Citizen Information Project, a national register to be kept by the Department for Work and Pensions and, under the Children Act 2004, a database of all children in the UK. ILPA remains sceptical about the government's ability to keep them correct and up-to-date, remembering the past history of large government IT projects. There

is no justification for creating these multiple databases nor for some of the information it is proposed to record on them.

The Citizen Information Project website, www.gro.gov.uk/cip explains its intention but now states that it may be combined with the National Identity Register.

The CIP proposal for a population register is based on fundamental information management principles: it is beneficial to maintain basic contact information on a central database. ... Creating a master list of contact details may be essential for the register to work efficiently. Each public body would adapt their systems over time so that they no longer manage the contact information themselves. They would link their own records to the appropriate contact on the population register... With ministerial approval, the long-term vision is that CIP should look to the National Identity Register (NIR) to build a high-quality population register of adults. The NIR is the register that will be compiled as identity cards are issued. Contact details will be collected on enrolment, and there would be a statutory obligation for identity card holders to keep this information up-to-date. Using the NIR could reduce the need for a separate CIP. The proposed content and format of the NIR emerging from the recent consultation exercise would closely mirror the requirements identified for CIP.

If these two proposals are to be combined, ILPA urges that further safeguards on access to the Register and information that may be given out are established, to ensure that information does not leach out in unacceptable ways.

If the purpose of the register and card is to help deter and control illegal immigration, but people who are here for less than three months are not to be on it, it is difficult to see how this objective would be met. Although visitors now are normally given leave to enter for six months, the government plans to halve that time, in line with EU proposals. Under the old 'aliens registration scheme', most non-Commonwealth citizens given leave to remain for more than six months had to register with their local police station; this requirement has been progressively removed from different groups as it served no useful or proportionate purpose in immigration control. ILPA does not see how the new system would be better.

ILPA is also concerned about how a person's "residential status" (clause 1(5)(e) and (f)) will be defined in the register. How does a person who has been waiting for three years for the Home Office Immigration Directorate to deal with his application for leave to remain record his immigration status? If he is granted leave for a year and then applies again to extend it, what information must be passed on? Many people just do not understand what their immigration status is; will they be penalised for failing to explain it? Or will the Home Office pass information to the register of its work-in-progress? As its own databases are often not up-to-date, how can it expect to keep another external database as well? How far back will people be required to record their immigration history? How can it be relevant, several years later, if a person overstayed on a visit as a student in the summer holidays, and returned with a work permit several years later? What cross-referencing might there be to other entries in the register?

Information such as addresses changes frequently. If the purpose of past addresses is to check information would that lead to further discrimination against people who have come from abroad, if employers or others cannot use the register to check people's backgrounds, for example from countries where addresses used are generally Post Office boxes? Security checks can already be a problem for people who cannot provide evidence of five years in the UK; if this register were the main source of information it could add to discrimination against more-recently-arrived people.

The Bill is objectionable in that it proposes that, from a specified date, an application made for a "designated document", for which the examples of passports or driving licenses are given, but there is scope to add to this list, must also include an application to go on the register and, later, for an identity card. This could result in those who have a principled objection to the register and card deciding not to travel or to drive or being restricted unwillingly from doing so, at a time before they are compelled to apply for an identity card.

3. Information on the National Identity Register

Throughout the Bill, it is stated that the Secretary of State 'may' record information on a register, but not what he 'must' do. There is no obligation on him to record correct information or to make corrections if he is notified of errors by the individual concerned. He may also put on information himself, without the individual requesting or knowing that this has been done (clause 2(4)) and with no check on its accuracy. In general, the individual seems to be the person who has least right of access to the information held on him or her, or to know about inquiries from third parties about that information.

The 'registrable facts' (clause 1(5)) which are to be recorded are extremely detailed. Requiring information about people's old and current addresses and old and current immigration statuses both appear to be recipes for incorrect information to be recorded and perpetuated. These change frequently; how is a homeless person, or a refugee who was moved around frequently by NASS before gaining status for example, to keep his or her register entry up-to-date with details of every short-term hostel where he or she has slept? The Home Secretary has suggested that "a person would be required to notify the agency of a change of address for any place where he or she has lived continuously for three months or more" (letter to JCHR, 8.2.05), so this could also lead to unverifiable gaps in the records of such people. The Bill requires that a person's "entitlement to remain in the UK" and "the terms and conditions of that entitlement" be registered. Under British immigration law, of course, people have no entitlements but may be granted leave to enter or to remain in the country. Immigration status has become an increasingly complex area and the individuals are often not aware of the full "terms and conditions" of their stay; how will the information be collated for the register?

It is also not clear what standard of proof, or physical documents, will be required to put an entry on the register or to procure an ID card. When people from abroad are applying, will the authorities in charge of registration be extra-zealous in the case of passports as proof

proffered by non-British citizens or non-UK born British citizens? Such people may well fear that the officials in charge might not accept their documents at face value, that they might want to go behind them. In order to avoid unlawful discrimination, a clear statement that it will not be the function of the officers making such entries to the register to determine questions of status, only to record what is produced to them, is needed. If there are obvious questions about the forgery of a document, these should be raised with the individual and he or she should be told that they will be investigated. It should also be clear that while people may record details of dual or multiple nationality, this should not be compulsory, and that an entry in this register would not be determinative of nationality.

4. Information on the card

The research the UK Passport Service published in May 2005 on the recording of biometrics has shown a high chance of failure to match. Only 69% of participants' facial biometrics were recognised, 81% for fingerprints and 96% for iris verification. There was a lower success rate for enrolment of iris records for black and ethnic minority participants and they were also more concerned about having their biometrics recorded. Given these results, this is hardly surprising.

It is still not clear what safeguards there are against fraud - how a person who has stolen a passport or national insurance number, but who knows the personal details of the rightful owner, could not obtain a card, and secure an entry in the register, with his own biometric details. If the rightful owner did not know that the documents had been stolen, and had not had to apply for a card himself, he could later face inordinate difficulties in proving his identity – particularly if the fraudulent user had not kept entries in the register up-to-date, or had left the country anyway. The Home Secretary has not explained how this could be avoided, but has only stated that someone who obtained a card in a false identity would have to keep up that false identity for the rest of his life (or in fact, the rest of his life that he planned to be in the UK or access services here) which would probably be his intention anyway.

It is not clear for how long an ID card would be issued. ILPA fears that cards issued for shorter periods, in line with the duration of a person's permitted stay in the UK, could lead to unwarranted discrimination against their holders, both in relation to the use made of that information by employers, banks etc and because they will have to pay the fees for new cards or alteration of information on cards, more often. The Home Office has not yet made a final decision on payment for alteration of cards or information on the Register; if the scheme comes into force, ILPA urges that those whose cards are for a shorter period of time should pay proportionately less.

The 'registrable information' people must provide for the register may be very personal and not such that they would want all authorities who may have reason to ask for an identity card to see. If information is on a card that the holder cannot see, it must also be clear that others accessing the card cannot see it unless they have a specific need to do so and they inform the card holder.

ILPA urges in particular that no details of a person's immigration status, or the reasons for their stay, should be on the face of the card or machine-readable from the card. While we recognise that the holding of a card might be of use to a person who has recently been recognised as a refugee or granted discretionary or humanitarian leave after a long period in limbo, and without an ARC, for example, the reasons for the person's leave to remain should not be known to others. If this is to be called "residential status" then the word "resident", on cards of UK nationals, settled people and all those permitted to work should be sufficient. If a card is issued for the same length of time as a person's leave to remain, it should be made clear that permission to work and entitlement to benefits continue while an application to the Home Office for an extension of stay is made.

5. Access to information

The Bill appears to allow several law enforcement agencies to have more access to the National Identity Register than the individual has to his or her own details. When there is the power for the Secretary of State to insert information on the Register off his own bat, it is particularly important that the subject should have clear rights of access to his entry and be able to correct errors. The right of access of government agencies and the purposes for which they may seek or gain access need to be more clearly defined. The proposal for a National Identity Scheme Commissioner has been strengthened since the original Bill but it is vital that this person should have power to oversee the whole scheme and to report to Parliament on *all aspects* of it which give rise to disquiet.

ILPA is also concerned about the right to privacy under article 8 ECHR - the individual is entitled to protection of his or her identity including the use of identity information. The use of identity information in, for instance, data bases must be with consent, and there must be a remedy to correct information or delete wrong information, the information must be no more than is proportionate and relevant for the purpose and must be deleted when no longer required or needed for the purpose. The UK government cannot avoid its duties to the data subject merely by passing legislation seeking to avoid international obligations. ILPA is concerned about what role if any is envisaged for the Data Protection Registrar in this scheme.

6. Discrimination

It is proposed that the register, and then the cards, will be for those allowed to reside in the UK for three months or more. One of the groups proposed to be forced to register earlier than others are non-British nationals (para. 45 and 46 of the Explanatory Notes on clause 6). This proposal raises serious questions of discrimination, explained eloquently by Shami Chakrabarti, Director of Liberty, in evidence to the Home Affairs Select Committee on 8 June 2004 (HC 130-II, Ev. 120, Q705). Requiring people from abroad to join in this scheme and to pay for it sooner than others, and to be guinea pigs and suffer all the teething problems of a flawed system before the majority of the population could also be seen as discriminatory, contrary to the Race Relations (Amendment) Act. The Home Secretary has

asserted that this discrimination would be justified “in the interests of enforcing immigration controls and prohibitions on working and restricting access to public services to those entitled to use them.” This suggests that only non-British nationals are of concern. Although British citizens are not subject to immigration controls, not all British citizens are entitled to access all public services – for example, when they have lived abroad until recently and are no longer ordinarily resident in the UK, their access to means-tested benefits and the National Health Service is restricted by regulation. I

ILPA also fears that if this proposal for foreign nationals were implemented, then British nationals of minority ethnic origin would be more seriously disadvantaged than others in the majority population. They are statistically more likely to be required by persons in authority to prove their status than the majority British population, but they would not be required to have an identity card when non-nationals were. People from all communities may object to holding an identity card and decide to apply for one at the last possible moment, or to continue with principled objections. If a British citizen of Pakistani or Jamaican ethnic origin is more frequently requested to prove their entitlement to be here, or to access services or employment, on the stated or unstated grounds that they ‘look foreign’, this could also amount to unlawful discrimination under the Race Relations Act as well as adding to problems of everyday life and to feelings of alienation.

The then Home Office Minister, Des Browne,’s answer to a written question (col. 820W, 8 July 2004) on safeguards to guard against discrimination against ethnic minorities in the ID card scheme is inadequate as it makes no mention of this potential problem and does not refer to the intention that foreign nationals will be required to have biometric ID documents earlier, and the extra potential for unlawful discrimination that raises. The new Race Equality Impact published with this Bill goes into more detail about the fears expressed by minority ethnic consultees but does not discuss the nexus between immigration status and ethnic minorities and when the cards would become compulsory. It does however recognise that black and other ethnic minority groups have a higher level of apprehension about the use that the police might make of the card.

7. Effects on illegal working

In general, it takes two people to collude in arranging for illegal working. With the 2004 tightening-up of the documentation required for employers to show a defence under s. 8 of the 1996 Act it is already more difficult for people whose immigration status is unclear, or illegal, to find work with *bona fide* employers. This has led to hardship for those who, for example, have failed in their asylum claim but cannot return to Somalia or Iraq, or who have applied as students to remain as spouses but have had no response from the Home Office for months or years and their permission to work as students has run out. Reputable employers are concerned that there is no up-to-date document from the Home Office to confirm people’s right to work and find it hard to believe that it is routine for a person to wait for two or three years for such a decision. But when employers are well aware that workers are, or may be, illegally in the country, because of the working conditions and wages they are prepared to accept, they will not be asking for identity cards, any more than

they ask for documents now, but will continue to try to exploit people. The way to tackle such exploitation is through the employers, in effectively tackling gangmasters and sweatshops, in prosecuting and fining employers of illegal workers as well as removing the workers, in more enforcement of the minimum wage and in ensuring that workers who are exploited will have a chance of redress before or instead of being forced to leave the country.

8. Fees and penalties

ILPA believes that the fees proposed are too much to pay for a dubious benefit. Even in the two years since the Home Office made these proposals, estimated costs have rocketed. In August 2003, when people were asked about what they would expect to pay for an identity card the vast majority expected it to be under £30. The Home Office suggested £35 in November 2003. The Explanatory Notes (para 233) now state that a 'combined package' of a passport and an ID card would be £93 at 2005/06 prices; a passport costs £42 now so an ID card would be £51. There is every reason to suppose that costs would continue to rise exponentially before the Bill came into force, both the costs to the taxpayer in setting up the scheme and the costs to the individuals forced to obtain ID cards.

It appears that as the scheme is rolled out it will become impossible to obtain a 'pure' British passport or driving licence, or any other 'designated document' without also applying for, or obtaining a document which can also be used as, an ID card. The Bill must be amended to safeguard the position of those groups who are required to register, or to obtain ID cards, earlier than others to ensure that they do not face discrimination or double payment or be subjected to the draconian penalties for failing to register or to update their register entry sooner than others.

9. Conclusion

ILPA believes that this Bill would not do what the government has stated it is planned to do. It will be hugely expensive and bureaucratic and will increase the government's knowledge about citizens and residents for no objective useful purpose. It will increase the scope for discrimination from different public bodies in providing services. It will not prevent exploitation of workers by unscrupulous employers nor effectively deter terrorists who are probably among the most sophisticated forgers around, or who have recruited nationals who are not under suspicion. Nor will it significantly deter identity fraud with bank cards (the chip and pin system, becoming more and more widespread, is intended to eliminate this). The huge expense and the buildup of unrealistic public expectations for this project are not worthwhile. ILPA urges that the Bill should be rejected.

ILPA
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