



**COMMENTS FROM THE IMMIGRATION LAW PRACTITIONERS'
ASSOCIATION ON *LEGISLATION ON IDENTITY CARDS: A CONSULTATION,*
*CM 6178***

“The identity cards scheme is intended primarily as a United Kingdom wide measure to help deter and control illegal immigration...” (para 2.72)

If this is really the case ILPA believes that the scheme is a wholly disproportionate, multi-billion pound ineffective response to this problem. 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, 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 the government's 2002 paper, *Entitlement cards and identity fraud*, 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. Developments since then, and the government's latest paper, have not altered our views. 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 practical and legislative proposals confusing and unjustifiable, and extremely vague; in numerous areas of the draft Bill, there are provisions for the government to extend its scope through Regulations and Orders (this includes clauses 2, 3, 4, 6, 8, 10, 11, 13, 14, 15, 16, 18, 24, 28, 37 and 40, 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, “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...” (p.36, uncorrected transcript). But the objective justification for the proposals is still unclear and ILPA urges the government not to implement them, or at least not in this form.

2. The government’s intentions

These are not spelled out clearly and no justification for the project is given. Para 2 of the Executive Summary (page 7): "This paper explains (at Chapter 1) the need for new legislation". Para 1.2 of Chapter 1 (at page 10): "The Government is convinced that a national identity cards scheme will bring major benefits". Para 1.6 (at page 11): "The reason for introducing legislation ... now is to ensure ... there is a clear legal basis for such a major policy development". Quite frankly, none of this explains why we NEED to have a national ID scheme, only why legislation is needed to bring it about. The Home Secretary has said that he had thought of cards as ‘entitlement cards’ – “entitlement to services and benefits – which we had built up by the contributions we made and the mutuality that has stood us in good stead and is part of the National Insurance concept...” (evidence to Home Affairs Select Committee, 4.5.2004) but that comments on his White Paper made it clear that this gloss was not acceptable and that people realised he was talking about identity cards and wanted an honest proposal.

3. National Identity Register and Citizen Information Project: too many databases

ILPA remains confused about the reasons for creating two new national databases and sceptical about the government’s ability to keep them correct and up-to-date, remembering the past history of large Home Office IT projects. There is no justification given for creating these databases apart from creating them. We also see no justification for some of the information it is proposed to record on them.

The requirements that a person’s “entitlement to remain in the UK” and “the terms and conditions of that entitlement” be registered also raise serious questions. Under British immigration law, of course, people have no entitlements but may be granted leave to enter or to remain in the country. EU law does give entitlements and one of these is for economically active EU nationals and their families to be treated in the same way as nationals of the host country, so the proposal that “foreign nationals” would be required to obtain biometric identity documents when this was still voluntary for UK nationals (para. 1.11) would appear to be contrary to EU law. It is not stated whether in this context

Irish nationals would count as “foreign” or not. ILPA disputes the Home Secretary’s bald assertion that it would be legal to impose such a requirement on other EU citizens that would not be required of British citizens.

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. Very few visitors are given leave to enter for three months or less, the usual period is six months, even if the person only intends to stay a few days. If people remain longer than they originally planned, quite legally, will they become liable to register? Would whether they had done so be checked at any point, on this visit or in the future and would a failure to register create problems later? There is a fear that this three month period could herald the shortening of the standard period of leave to be given to visitors, in line with that permitted under the ‘Schengen visa’. 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” (which might more accurately be termed “immigration status”) 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 penalized 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, twenty 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 change frequently, and it is proposed that only “addresses in the UK” (clause 1(4)(c)) should be registered. Would that lead to discrimination against people who have come from abroad, if employers or others cannot use the register to check people’s backgrounds? 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.

There is no adequate justification given for creating a second national database, the Citizen Information Project. The paper suggests that its use would be as an entitlement register, but the basic information about people’s entitlements to benefits and services would be on the National Identity Register and short-term changes would be liable to error and misinterpretation. ILPA is concerned about the accuracy of any information on

this register. If a person is refused a particular benefit, for example income support, and this refusal is recorded, but the refusal was wrong in law, will it still result in the person being refused a related benefit, such as housing benefit? How are people able to see their entries on this register and ensure they are correct? Who is authorised to pass on information for inclusion in either register?

Government policies also include a national register to be kept by the Department for Work and Pensions and, under the Children's Bill, a database of all children in the UK. The government appears to think that population databases are an idea whose time has come, but the arguments for their creation, maintenance and usefulness do not justify the vast amount of work and costs involved.

4. Information on the National Identity Register

Throughout the draft 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(4)) 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, for example, to keep his or her register entry up-to-date with details of every shop doorway or park bench where he or she has slept? How far is the register expected to be a historical document? Say the registration process becomes operational as from 1 January 2008 and a 60-year-old man applies for inclusion. During the course of his long life he may have lived at 50 different addresses (imagine the infinite range of individuals involved, with varied lifestyles, backgrounds etc). 1(4)(c) requires not only that he state where he has previously resided, but under 1(4)(d) he would be expected to give a breakdown of the relevant periods. We know only too well how young people (not just students) when they have left home (if they have a secure one, that is) often move from place to place, or just drift, in and out of institutions etc. Even their National Insurance records often do not reflect their life's progress. How would they be able to give the information that is required of them? Again, while this may not be so difficult for regular first generation immigrants, the same cannot be said about asylum seekers or foreign short-term workers who may have been allowed to remain longer.

It is also not clear what proof will be required to put an entry on the register or to procure an ID card. There is no direct reference to this; it is only through the operation of a number of closely interlinked provisions that we deduce that some sort of supporting

documentation would have to be produced before an entry containing the requisite information about an individual is processed and entered in the National ID Register.

If we assume that a passport or a birth certificate will be the primary form of such documentation, should we therefore be worried about the possibility that the authorities in charge of registration will 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 Registration Officer 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.

In Para 2.19 at page 19 we are reminded that "it will be necessary to make a personal application so that a biometric can be recorded". This will be done sensitively, so that it is hoped to "have special arrangements to make enrolment checks less vigorous on certain applicants (for example the very elderly)". This must not apply conversely to make such checks unnecessarily intrusive on other groups. There is nothing to explain how someone who could not provide an iris check (who is blind) or a fingerprint (who has had his hands amputated) would be able to prove identity. There is nothing to show 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 make 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.

ILPA believes that the information on a register should be the minimum as this will reduce the scope for mistakes and for intrusive questioning and invasion of privacy.

5. Information on the card

The draft 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, or for an identity card. This could result in those who have a principled objection to the card deciding not to travel or to drive or being restricted

unwillingly from doing so, at a time when they are not compelled to apply for an identity card.

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.

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.

6. Access to information

The draft 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 appears only to give this person power to look at disclosure of information from the Register (clause 25(2)); 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.

7. 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. This proposal raises serious questions of discrimination, explained eloquently by Shami Chakraborti from Liberty in evidence to the Home Affairs Select Committee on 8 June. 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.

ILPA 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, on the stated or unstated grounds that they 'look foreign', this could amount to unlawful discrimination under the Race Relations Act as well as adding to problems of everyday life and to feelings of alienation.

The Home Office Minister'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 Race Equality Impact published with the Bill does not discuss the nexus between immigration status and ethnic minorities and when the cards would become compulsory.

8. Effects on illegal working

In general, it takes two people to collude in arranging for illegal working. With the tightening-up of the documentation required for employers to have 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. 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 more enforcement of the minimum wage, in ensuring that workers who are exploited will have a chance of redress before or instead of being forced to leave the country.

9. Fees and penalties

ILPA believes that the fees proposed are too much to pay for a dubious benefit. 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.

10. Conclusion

ILPA believes that this scheme will 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 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 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 (there are new chip and pin proposals from banks for that). The huge expense and the buildup of unrealistic public expectations for this project are not worthwhile.

ILPA
July 2004