

**Juxtaposed controls: ILPA note for the Chief Inspector re his inspection of juxtaposed controls.**

For ease of reference we have highlighted our recommendations for the inspection in bold.

**I. Powers of detention and to fingerprint**

We refer you to ILPA's 28 July 2006 response to the Home Office consultation on Private freight searching and fingerprinting at Juxtaposed Controls, available at <http://www.ilpa.org.uk/data/resources/13137/06.07.28-ILPA-response-to-juxtaposed-controls-consultation.pdf>. We append the UK Border Agency's subsequent letter to ILPA of 8 February 2007.

We direct your attention to the two areas addressed in these documents: the power of private contractors to search vehicles and any person to detect and to detain and escort such persons to the nearest immigration detention facility, with the private contractor allowed to detain a person for up to three hours and the powers for private contractors to fingerprint individuals.

We recall the undertakings given by Ministers as to transparency with direct reference made to monitors such as the Chief Inspector:

*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*

The phrase "that training document" refers to the document used for the training of private contractors. **The Chief Inspector should ask for a copy of this.**

The UK Border Agency said in its response to us about which law applies to the actions of Authorised Search Officers at the juxtaposed controls at Northern French ports. The Agency wrote:

*An ASO committing any criminal act would be handed to the French authorities for investigation and prosecution. Within the Le Touquet treaty there is scope (see Articles 10, 11, 12 and 14) for ASOs, as responsible officers, to be subject to English civil and criminal law in respect of their actions in the course of their duties. However, we have not amended the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003 (see articles 11(5), 12(2) and 12(5) of the Order) to take advantage of that.*

...

*We will keep this position under review and are aware that the position of ASOs at the Channel Tunnel juxtaposed controls is different due to the drafting of the 1993 Order. In the event that there is the possibility of ASOs at the Northern French ports not being fully subject to legal action we will act to remedy this but as things stand we are satisfied that French law provides more than enough protection.*

**We invite the Chief Inspector to ascertain whether this is indeed the case.**

Copious undertakings have been scattered like confetti about the way in which private contractors will use powers to detain and search. We consider that the most useful thing the inspection could do would be **to audit performance against such undertakings.**

*1.a Recruitment*

Undertakings to be audited:

*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*

*...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*

*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 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) 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. **We suggest that the Chief Inspector ask to see those notes as part of the inspection.** As per our submission however, 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 as opposed to officials.

*1.b Division of labour and responsibility*

**We invite the Chief Inspector to endeavour to get to the bottom of how the division of labour between officials and private contractors is working.** The consultation document said that “The [private contractors] will be directed and

supervised by the UK Immigration Service on site” but also said “The new legislation will allow for a firm of private contractors to act independently.”

Undertakings to be audited:

*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*

*...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*

*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 UK legislation confers on private actors coercive powers and these powers are to be exercised outside the UK’s sovereign territory. They are physically and in some cases in law, outside the jurisdiction (in some cases they are in law in the county of Kent, but access of lawyers and others to the persons detained is very much less than it would be were the detention physically taking place in the county of Kent). What, in practice, are the rights of redress of the individual, who could be a French or Belgian national?

**We invite the Chief Inspector to examine whether there have been cases of unlawful imprisonment by private contractors and what has happened to ensure redress for those unlawfully detained. We invite the Chief Inspector to examine whether there have been any charges brought under sections 40(7)(e) and 41(6) of the Nationality Immigration and Asylum Act 2002.** Have any private contractors been held to be liable, as a matter of criminal law, or faced sanctions under employment law, as a result of any of their actions?

**Do private contractors who use their powers of detention serve forms IS91, IS91R & c. or is this not done until an immigration officer arrives?** If there is a delay in serving these papers, then we do not consider the detention is lawful.

The letter to ILPA of 2 February 2007 states:

*You have questioned the use of constables and officers of HMRC. Prior to the introduction of Sections 40 and 41 of the IAN Act 2006 the searching of vehicles for immigration purposes was strictly limited to immigration officers. (Schedule 2 paragraph 1(5) to the Immigration Act 1971 refers.) The use of these powers by*

*constables or officers of Revenue and Customs remains under consideration and consequently I have no further information to impart*

Events have moved on since then, especially where Her Majesty's Revenue and Customs are concerned. However the use of these powers other than by immigration officers could usefully be examined.

*I.c Authorisation*

Undertakings to be audited

Ministers gave undertakings during the debates in Parliament that contractors would be authorised individually and **these should be audited**.

*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*

*We do not want anyone to be given access to children who should not have it. I am absolutely determined on that point and I speak on behalf of Home Office Ministers in saying it. The checks must be rigorous and done properly because we have to protect children in all circumstances. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC234*

*We will scrutinise closely the application of the powers by the individual ASOs and where failings are noted swift action will follow. This will include the loss of authorisation. Letter to ILPLA of 2 February 2007*

*I.d Training and selection of contractor*

Ministers gave a number of assurances about the training that contractors would undergo.

Undertakings to be audited:

*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

...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

I can give an assurance that the Home Office will ensure that cultural issues are fully addressed as part of the training. Andy Burnham MP, Parliamentary Under-Secretary of State, 6th sitting, 25 October 2005 pm, col.225

...we will ensure that there is a period of training before authorisation that will include the care of vulnerable persons, including children. The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC232

We have to make a differentiation here. On training in relation to children, we want to make sure that those who will deal with such children or people in a vulnerable situation are properly trained in issues like human rights, racial awareness, dealing with vulnerable people in traumatic circumstances, and of course all the issues around children. That is quite different from the kind of skills needed by

*immigration service officers as a part of their professional training. While they will have the skills I have outlined, they will have other skills as well. I want to differentiate between those carrying out reasonably mundane and regular tasks, but who need to be professional in how they deal with people when they come across them, and those undertaking far more detailed and challenging tasks in order to ascertain where people are and so forth.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC235

*One issue to address is to ensure that staff are properly trained to hold a child. The noble Earl knows well from our discussions on children with special needs and behavioural issues that this is an important point.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, col. GC237

*I.e* Individuals at risk

Undertakings to be audited

*All contractors will be required to submit to the Secretary of State detailed procedures for handling vulnerable groups, including unaccompanied minors. 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

*...it is anticipated that there will rarely need to be anything like that period [three hours] of time. It is anticipated that people will be detained for minutes only, but we need to give people the power to implement the provision.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Grand Committee, 17 January 2006, cols. GC230-231

*The three hours should be seen in the context of the maximum amount of time and not the norm. That is not the intention underlying this part of the Bill.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, col. 578

*...we want to ensure that we can hang on to people so that we can hand them over properly. However, when I have discussed the matter with officials, the expectation has always been that you would hand them over very quickly—much more quickly than three hours. The three hours is a maximum limit and the critical point in legislation is to be clear about the maximum limit.* The Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, DCA, HL Report, 7 February 2006, col. 576

*I.f* Searches

Undertaking to be audited

*...at this stage we are not talking about a search that has to be comprehensive in every respect.*

*Immigration officers have powers to conduct further searches if necessary. The purpose of searches is described here, and it is related to the other points about training. They are brief and non-intrusive searches to establish basic facts about what the person is carrying and if there is anything that needs to be drawn to the attention of an immigration officer. Andy Burnham MP, Parliamentary Under- Secretary of State, 6th sitting, 25 October 2005 pm, col.225*

## **2. Compliance with the law as per the judgment of the European Court of Justice in *MRAX v Belgium C-459/99***

We are concerned at instances, which in members' experience are now less frequent, where immigration officers on these routes do not understand the legal position as set out by the Court of Justice in *MRAX* (Mouvement contre le racisme, l'antisémitisme et la xénophobie ABSL).

**We ask that the Chief Inspector examine whether immigration officers are acting in compliance with the *MRAX* judgment** as we have seen instances where they do not appear aware of the judgment. *MRAX* applied to the Belgian Conseil d'Etat for annulment of a circular relating to obtaining a visa for the purpose of contracting a marriage in Belgium or of reuniting a family on the basis of a marriage contracted overseas. The questions referred by the Conseil d'Etat were whether a member State could

- refuse entry to third-country nationals married to an EEA national who failed to produce valid Identity document and, where required, a visa; and
- withhold a residence permit and expel a person if they had effected an unlawful entry or if their visa had expired.

It was held that on a proper construction of Article 3 of Directive 68/360, Article 3 of Directive 73/148 and Regulation No 2317/95, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where s/he is able to prove identity and relationship and there is no evidence of a risk to public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148. It was therefore held that in view of the importance which the Community legislature has attached to the protection of family life, it is disproportionate and, therefore, prohibited to send back a third country national in such a case (paragraphs 61-62 of the judgment.)

It was held that on a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of identity and of relationship on the sole ground of unlawful entry. It was held that refusal of a residence permit, and an expulsion order, based solely on the failure of the person concerned to comply with legal formalities concerning the control of aliens would impair the very substance of the right of residence and be manifestly disproportionate to the gravity of the infringement. It was held that failure to comply with legal formalities cannot in itself give rise to application of the

measures of public policy and public security referred to in Article 3 of Directive 64/221 (see paragraphs 77-80).

It was held that on a proper construction of Articles 3 and 4(3) of Directive 68/360, Articles 3 and 6 of Directive 73/148 and Article 3(3) of Directive 64/221, a Member State may neither refuse to issue a residence permit to a third country national who is married to a national of a Member State and entered the territory of that Member State lawfully, nor issue an order expelling the person from the territory, on the sole ground that his/her visa expired prior to his/her applying for a residence permit. Article 4(3) of Directive 68/360 and Article 6 of Directive 73/148 authorise the Member States to demand, for the purpose of issue of a residence permit, production of the document with which the person concerned entered their territory, but do not require that the document still be valid. Again, the issue of proportionality arises (paragraphs 89-91).

There is a right of appeal. The minimum procedural guarantees laid down in Article 9 of the directive would be rendered largely ineffective if entitlement to them were excluded in the absence of an identity document or visa or where one of those documents has expired (paragraphs 101, 103-104).

### **3. Multiple checks at juxtaposed controls**

At an ILPA seminar on free movement law in September 2012, the member of staff of the European Commission there present highlighted that he had passed through three checks on the Eurostar in traveling from Brussels to London. **We consider that the Chief Inspector could usefully look at how many checks travellers go through, the purported justification for these and the effect on travellers.**

ILPA

8 October 2012