

ILPA Briefing for the Counter-Terrorism and Security Bill**House of Commons Report stage 6 January 2014****Clause 1 and Schedule 1: Seizure of passports etc from persons suspected of involvement in terrorism**

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CHAPTER 1 POWERS TO SEIZE TRAVEL DOCUMENTS**Clause 1 Seizure of passports etc from persons suspected of involvement in terrorism**

Amendment 9 in the name of Yvette Cooper MP, Mr David Hanson, Diana Johnson and Phil Wilson

Purpose (taken from the order paper): *This amendment would require a vote in Parliament to renew the power temporarily to seize passports.*

The amendment would cause the powers in Clause 1 and Schedule 1 to expire after two years at which point parliament could determine the length of its extension. The amendment was tabled at Committee stage as amendment 29.¹ It was pressed to a vote and defeated by 301 votes against, 220 for.²

Amendment 10 in the name of Yvette Cooper MP, Mr David Hanson, Diana Johnson and Phil Wilson

Purpose (taken from the order paper): *This amendment to Schedule 1 would create the right for an appeal in court following a temporary seizure of a passport, and requires the Secretary of State to set out in regulations a relevant court and time limit by which an appeal must have been heard.*

The amendment restricts the appeal to being "over" the evidence on which the conditions for the exercise of the power were met, those conditions being that the officer seizing the passport has reasonable grounds to suspect that the person intends to leave Great Britain

¹ HC Report 15 December 2014 col 1173ff.

² HC Report 15 December 2014 col 1190.

for the purpose of involvement in terrorism-related activity outside the United Kingdom, or has arrived in Great Britain with the intention of leaving it soon for that purpose.

The proposed regulations would be subject to the negative resolution procedure. The relevant court is not specified. The notion of an appeal was floated at Committee stage in very general terms as amendment 17.³

Amendment 11 *In the name of Yvette Cooper MP, Mr David Hanson, Diana Johnson and Phil Wilson*

Purpose (taken from the order paper): This amendment would create the right for an appeal in court following a temporary seizure of a passport and require the appeal to have been heard within seven days

The only difference between amendments 10 and 11 is that the latter requires the appeal to have been heard within seven days; the former leaves this time limit to regulations.

Briefing

The nature and extent of existing powers means that the case has not been made in this Bill, the materials accompanying it or in debates to date for the power proposed and that the power cannot be shown to be one required to be introduced by emergency legislation.

Schedule 1 provides that immigration officers, customs officials, qualified officers and senior police officers can remove a passport from an individual. It defines “passport” as a United Kingdom passport or one issued by another nation and involvement in terrorism-related activity as the commission, preparation or instigation of acts of terrorism; conduct that facilitates the commission of terrorism; conduct that gives encouragement to terrorism; and conduct that gives support or assistance to terrorism. The schedule includes powers to search for, inspect and retain travel documents. Removal of a passport is for 14 days. This can be extended to 30 days. A person can be subject to repeat removals of his/her passport.

As Mr Geoffrey Cox pointed out⁴ Schedule 1

...prohibits or prevents the judge from considering whether there is a basis for the order or retention in the first place. All the judge can do is ensure that those who are considering the matter are doing so diligently. He is not able to look at the foundation and basis for the entire retention—at whether there are reasonable grounds for suspicion.

Amendment 9 would improve on the Bill in its current form were it to be accompanied by detailed monitoring of the exercise of the power so that parliament, when it came to vote on an extension, could understand how the power had been used.

As raised during the debates on the Bill that became the Immigration Act 2014⁵ and at second reading of this Bill⁶, the UK already possesses powers to deprive citizens of their

³ Hansard, 15 December 2014, col 1173.

⁴ *Ibid.*, Col 1186-7.

⁵ HL Deb, 7 April 2014, col 1169 per Lord Pannick.

passports on national security grounds.⁷ The Home Secretary described on 25 April 2013 the extent and use of these powers:

*...passport facilities may be refused to or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example, engage in terrorism-related activity or other serious or organized criminal activity.*⁸

As we understand it, prerogative powers are extensive enough to cover seizure of passports at port in the context of withdrawing that passport. Police officers have powers in respect of criminal offences. Immigration officers have extensive powers to seize and retain passports of persons under immigration control. Thus clause 1 appears to be about:

- Giving police officers more extensive powers where there is no investigation of a crime
- Giving immigration officers more extensive powers, in particular in respect of British citizens to seize and retain passports other than in the context of withdrawal.

If this is correct then it is difficult to understand why Clause 1 and Schedule 1 find a place in emergency legislation. If there is any suggestion of the commission of a crime, the simple emergency response would appear to be to have police officers exercise these powers and require immigration officers to work alongside one or more police officers.

Paragraph 13 provides that where a passport is retained under the schedule and any of the powers available under the Schedule have already been exercised in relation to the same person on two or more occasions in the preceding six months, then the passport may only be retained for five days. A further question thus arises of the circumstances in which a person's British passport might be seized and retained under these powers on more than two occasions in six months and yet the person's passport would not be withdrawn. It is hard to envisage this other than in circumstances where the first two withdrawals were found to be in circumstances in which the person was going about his/her normal lawful business in which case it must be of concern that their passport might be retained three times in six months.

At Committee stage Caroline Lucas MP tabled an amendment that would have removed Clause 1 and Schedule 1. She explained:

***Caroline Lucas** ...there will be situations in which it is necessary to prevent a person from leaving the country, but I would argue that the police already have a tried and tested way of preventing suspects from doing so—the power of arrest, combined with the ability to require passport surrender if a suspect is arrested and released without charge. However, passport surrender is not currently possible in the case of those arrested on suspicion of being a terrorist under section 41 of the Terrorism Act 2000, as conditional police bail cannot be granted following such arrests. ...It would be much simpler to remove that loophole than to proceed with the convoluted passport retention scheme set out in clause 1 and schedule 1. The safest and fairest way to prevent suspects from leaving the country to participate in terrorist activity would be for police officers to use their powers of arrest. If an individual was*

⁶ HC Deb 2 December 2014 col s 210-211

⁷ See Written Ministerial Statement, Rt Hon Theresa May MP, 25 April 2013. The issuing, withdrawal of refusal of passports for an explanation of how these prerogative powers are used.

⁸ Written Ministerial Statement 25 April 2013, op., cit.

considered to pose an immediate risk to the country, they could be detained rather than left to roam the UK for 30 days, as would happen under the Government's proposal. If they did not pose an immediate risk, they could be detained and bailed, and their passport could be surrendered as part of the process. (15 Dec 2014: Columns 1182-1183).

The Minister dealt only with the question of bail, saying "To grant bail as the hon. Lady would want to, and at the stage she would want to when significant parts of an investigation are still ongoing, would increase the risk of potentially dangerous individuals being released before they have been sufficiently investigated."⁹ He did not address that there exists a power to arrest and detain a person and seize their passport, and that this is an alternative to clause 1 and Schedule 1. The difference being that, as Mark Field MP¹⁰ pointed out, the existing measures require there to be grounds for arrest. One can only conclude from the Minister's reply that he envisages the power to seize a passport being used in circumstances where there are no grounds for arrest.

The Minister had no answer of substance the sunset clause when it was table at report. He said

...to introduce a sunset clause to the temporary passport provisions. Doing so may send an inadvertent message to would-be jihadist travellers of our lack of intent to deal with the threat they pose if they believed that the powers would end in two years' time. ... (HC Report 15 Dec 2014: Column 1188).

This appears fanciful. The "would-be jihadist traveller" studying the clause would learn that it was to be reviewed by parliament at the end of two years. Should he or she investigate further, it would be to find that the likelihood of a sunset clause of this type resulting in the provision being discontinued, unless to be replaced by another power, is slim indeed. There is no clear reason why a sunset clause should provide any more comfort than any general hope of repeal. A sunset clause would allow the use of the power to be reviewed and considered, to be scrutinised.

Amendments 10 and 11 provide for judicial oversight of the exercise of the power by means of a full appeal. Without it, challenge to retention of a passport will be by judicial review. Judicial review provides only oversight of the original decision and decision-maker: did they act within their powers, without bias and reasonable? A judicial review of seizure of a passport on the grounds that the officer seizing the passport did not have sufficient evidence on which to form a reasonable suspicion would be difficult to win if the material on which the suspicion were based were withheld.

Mr David Winnick MP said in Committee

Is it not the case, if we believe in fairness and the rule of law, that the stronger the action taken against an individual by the state, the more powerful the argument is that the individual should have the right of appeal? (15 Dec 2014: Column 1179)

One suggested objection was that an appeal would take time (amendment 11 prescribes a maximum of seven days) and would thus not be an efficacious remedy. A person's passport

⁹ HC Report, 15 December 2014 col 1182.

¹⁰ Ibid., col 1183.

can be retained for 14 days; this can be extended to 30 days. It can be retained repeatedly. It might subsequently be cancelled. That the person might in some cases get their passport back in two weeks is not a reason to deny a right to challenge the power to challenge the substantive merits of having withdrawn it in the first place. Without this, given the costs of judicial review, the power of the State to retain passports is likely to go unchecked.

The Minister said of challenges to the extension of the period to 30 days:

Legal aid would potentially be available ...but at present that would be a discretionary decision for the director of legal aid casework. The Government are considering whether it would be proportionate to bring those proceedings within the scope of the general legal aid scheme to put individuals' access to legal aid, subject to the statutory means and merits tests, beyond doubt. Legal aid is available under the general civil legal aid scheme for judicial review challenges by those subject to the temporary passport seizure power and the temporary exclusion order power, subject to the statutory means and merits tests.

In addition, the individual can decide, at any time, to seek a judicial review of the initial passport seizure in the High Court, where closed material proceedings may be available to allow consideration of any sensitive material. (15 December 2014 col 1187-1188).

It is of concern that the Government is exercised by the question of whether it would be proportionate to grant legal aid for a challenge to the seizure of a passport and the allegation of involvement in terrorism it entails rather than regarding this as a clear case for legal aid. As to the discretionary powers of the Director of Legal Aid Casework, these have been exercised in only a handful of cases since April 2013 when they took effect and in *Gudanaviciene v Director of Legal Aid Casework* [2014] EWCA Civ 1622, and the Court of Appeal held that the statutory guidance on the exercise of the powers "...impermissibly sends a clear signal to caseworkers and the Director that the refusal of legal aid will amount to a breach only in rare and extreme cases." As to judicial review, the Government proposes a residence test for legal aid so that only those with 12 months prior residence will qualify for legal aid and is restricting access to judicial review through the Criminal Justice and Courts Bill, currently in ping pong.