

**ILPA Briefing for the Counter-Terrorism and Security Bill
House of Lords Committee First Day 19 January 2014 Clause 1
and Schedule 1 Seizure of passports etc from persons suspected
of involvement in terrorism to Amendment 20**

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups.

ILPA is providing briefing for this Bill because experience in the immigration and nationality context is relevant to a number of proposals it contains, albeit that the targets of parts of the Bill on which we comment are not persons under immigration control but British citizens. We refer you to our second reading briefing for general evidence and analysis; the committee stage briefings addressed specifically the amendments tabled. Briefing to an amendment does not imply support for it; where we support an amendment this is indicated clearly. We have not had sight of groupings at the time of preparing this briefing. **For further information please get in touch with Alison Harvey, Legal Director, on 0207 251 8383, Alison.Harvey@ilpa.org.uk**

CHAPTER I POWERS TO SEIZE TRAVEL DOCUMENTS

Clause 1 and Schedule 1: Seizure of passports etc from persons suspected of involvement in terrorism

Clause 1 introduces Schedule 1 which 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 by the application to the court. A person can be subject to repeat removals of his/her passport.

Government amendment 1 to Clause 1 page 1 line 8, Lord Bates

Presumed purpose: makes provision for legal aid for proceedings relating to the extension of time for which a passport seized can be retained, including for Advocacy before a district judge hearing such proceedings.

Briefing

The extension of legal aid is to be welcomed but for the reasons set out below it is not enough to address the problems that the clause creates for those whose passports are taken away.

Amendment 2 Baroness Smith of Basildon and Lord Rosser page 1 line 8

Purpose: a sunset clause: the affirmative procedure is required for the section to continue beyond two years. As we understand it, this is a provision for one exercise of the affirmative procedure, after which the clause will continue in force unless and until repealed by primary legislation.

Amendment 3 Baroness Smith of Basildon and Lord Rosser page 1 line 8

Presumed purpose: requires the Secretary of State shall commission an annual report to be laid before each House of Parliament by the Independent Reviewer of Terrorism Legislation on the exercise of powers in Clause 1, i.e. the seizure of passports at ports. The report is laid by the Reviewer, rather than the Home Secretary,

Briefing: A version of amendment 2 was tabled at Commons' Committee stage as amendment 29.¹ It was pressed to a vote and defeated by 301 votes against, 220 for.² A version was tabled at the Commons' Report and a vote was lost by 228 votes for to 311 against.³

Amendment 4 Baroness Smith of Basildon and Lord Rosser page 1 line 8

Presumed purpose: requires the Secretary of State annually to publish figures on the usages of powers in clause 1. What need be published is not further specified.

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.

Amendment 2 would improve on the Bill in its current form were it to be accompanied by detailed monitoring of the exercise of the power, including but not limited to, the monitoring set out in amendments 3 and 4 so that parliament, when it came to vote on an extension, could understand how the power had been used and take its decision on whether it should be continued on an informed basis.

As raised during the debates on the Bill that became the Immigration Act 2014⁴ and at Commons' second reading of this Bill⁵, the UK already possesses powers to deprive citizens of their passports on national security grounds.⁶ 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.*⁷

¹ HC Report 15 December 2014 col 1173ff.

² HC Report 15 December 2014 col 1190.

³ HC Report 6 January 2015 col 219.

⁴ HL Deb, 7 April 2014, col 1169 per Lord Pannick.

⁵ HC Deb 2 December 2014 col s 210-211

⁶ 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.

⁷ Written Ministerial Statement 25 April 2013, op., cit.

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 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.

At Commons' Committee the opposition tabled amendment 29⁸ that 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. It was pressed to a vote and defeated by 301 votes against, 220 for.⁹ The opposition returned to the matter at Commons Report (as amendment 9). The opposition also tabled at Report amendments 10 and 11 which would have created a right of appeal against seizure of a passport.

The Minister had no answer of substance to the sunset clause. 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 scrutinized.

Amendment 5 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule 1 page 26 line 24

Presumed purpose: limits the seizure of passports etc. to the seizure of British passports. Removes the powers in the Bill to seize passports of other States, documents such as a UN or EU *laisser-passez* and identity cards or emergency travel documentation.

Briefing

The HM Passport's website says "The inclusion of 'Her Majesty's' in the title recognizes that passports are the property of the Crown, ..." ¹⁰ Many other countries have similar laws. Thus to seize and retain a passport issued by a foreign state. It is of course the practice that States seize the passports of nationals of other states. This amendment however provides

⁸ HC Report 15 December 2014 col 1173ff.

⁹ HC Report 15 December 2014 col 1190.

¹⁰ <https://www.gov.uk/government/news/passports-introducing-her-majestys-passport-office>

an opportunity to probe what the Government would do if another State asked for return of its property, the passport and also whether the provisions are compatible with the UK's obligations toward other States and with the obligations resulting from its membership of those international organizations which issue *laisser-passez*.

Amendment 6 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule 1 page 27, line 13

Presumed purpose: Amendments the definition of “terrorism-related activity, which is relevant to when a document can be seized, so that the part of the definition that currently reads “conduct that gives encouragement to the commission, preparation or instigation of such acts, or is intended to do so” would read conduct that gives encouragement to the commission, preparation or instigation of such acts either intentionally or recklessly as to the consequences.” Thus broadens the definition.

Amendment 7 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule 1 page 27, line 14

Presumed purpose In the definition of terrorism-related activity, which is relevant to when a document can be seized, excludes from that part of the definition which reads “conduct that gives support or assistance to individuals who are known or believed by the person concerned to be involved in conduct falling within [*the commission preparation or instigation of acts of terrorism*] , humanitarian instance.

Briefing

ILPA supports this amendment. Humanitarian assistance is provided to all, to alleviate suffering. There can be no intention that persons be dissuaded from affording it. While questions of the purpose of travel may be unclear in an individual case, this clear statement will go to the reasonableness of the belief of the officer seizing the passport and will mean that respect for humanitarian assistance is taken into account.

Amendment 8 Baroness Smith of Basildon and Lord Rosser Schedule 1 page 28 line 3

Presumed purpose: to probe the nature and extent of the protection afforded by the requirement that an officer have reasonable grounds to suspect that the person is at a port with the intention of leaving Great Britain 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.

Briefing

We should be very surprised if without intelligence or other evidence an officer could have grounds, and certainly not reasonable grounds, to suspect a person's involvement in terrorism. The amendment thus appears to provide an opportunity to probe the burden and standard of proof.

Amendment 9 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule I page 28, line 25

Presumed purpose:: to extend the documents a person is required to hand over from those in his /her possession to those under his/her control

Briefing

We are unclear how a person could hand over documents not in his or her possession and await the debate.

Amendments 10, 12 and 13 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule I page 29, lines 3 and 40 and page 30 line 6

Page 29, line 40, leave out “and” and insert “and the reasons for this suspicion, and () allow the person the opportunity to make representations”

Presumed purpose: Augments the requirements upon an officer as to what they must tell the person whose passport is searched for or seized (Amendment 10) or retained (Amendments 12 and 13) from telling the person that s/he is suspected of intending to leave the United Kingdom for the purpose of involvement in terrorism-related activity outside the United Kingdom, and that the constable or officer is therefore entitled to exercise the power to include requirements to tell the person the reasons for this suspicion, and to allow the person the opportunity to make representations”

Briefing

ILPA supports the requirement to tell a person the reasons for the suspicion. The person should have an opportunity to make representations but for the opportunity to be meaningful the person should have access to a legal representative, at public expense if s/he cannot afford to pay.

Amendment 11 Baroness Smith of Basildon and Lord Rosser Schedule I page 29 line 35

Presumed purpose: Places a limit of 12 hours on the period for which a document seized by a constable can be retained without the authorization of a senior officer. At the moment there is no limit but a statement that authorization must be obtained (or the document returned) as soon as possible.

Briefing

Twelve hours is an extremely long time for a person to be prevented from travelling and their passport retained without the involvement of a senior officer. The amendment provides an opportunity to probe for how long the Government envisages that a passport should be held. We should support a time limit, but for a very much shorter period. We are particularly concerned at the prospect that a passport should be retained for more than a matter of minutes on the authority of an immigration officer.

The Immigration Act 1971 has been repeatedly amended so that it is increasingly possible for immigration officers to exercise powers alone where previously they would have to work with the police. They enjoy powers of examination, search, arrest and detention and

also powers to investigate crimes. Section 55 of and Schedule 21 to the Crime and Courts Act 2013 greatly extended these powers and the January 2013 Factsheet *Powers of Immigration Officers* provided during the passage of the Bill, although it does not describe existing powers in detail, is a good introduction to their breadth and extent.¹¹ The area is ripe for detailed consideration by a parliamentary committee.

Scarce was the ink dry on the Crime and Courts Act 2013 when the Immigration Act 2014 was passed, with section 2 and Schedule 1 further extending the powers immigration officers. The schedule amended Schedule 2 to the Immigration Act 1971 to provide immigration officers with increased powers of search and seizure. It also, notoriously, amended the Immigration and Asylum Act 1999 to give immigration officers power to use reasonable force in the exercise of any of their duties under the Immigration Acts in force at the time of its passage, the Immigration Act 2014 and under future “immigration acts” as defined.

Schedule 2 to the Immigration Act 1971 at para 4(4) provides a power to seize and retain a passport of any person for up to seven days for the purposes of examining it, and then for a broader range of powers in respect of persons under immigration control. Clause 1 of and Schedule 2 to this Bill permit the retention of passports both of British citizens and of foreign nationals.

Immigration Officers may have many of the powers of police officers but they are not police officers. They are not organised into regions in the same way and this results in a very different command structure. The operating manual of the force is unpublished.¹² The professionalism of immigration officers has been called into question on many occasions, most recently in October in *R(Ntege) et ors*. His Honour Judge Madge stayed the prosecution in this ‘sham marriage’ trial because of both bad faith and serious misconduct on the part of the prosecution. He held ‘I am satisfied that [immigration] officers at the heart of this prosecution have deliberately concealed important evidence and lied on oath.’ To continue with the trial would, the judge said, have been an affront to the administration of justice.¹³

Amendments 14 and 15 Baroness Smith of Basildon and Lord Rosser, Lord Pannick Schedule 1 page 28 line 3 and page 30, line 23.

Presumed purpose Amendment 14 provides a right of appeal against seizure of a passport to a person whose travel document has been seized that would extend to a challenge to the evidence on the basis of which the conditions for seizure: that s/he is at a port with the intention of leaving Great Britain for the purpose of involvement in terrorism-related activity outside the United or has arrived in Great Britain with the intention of leaving it soon for that purpose, are met. This provides a right of challenge at an earlier stage than that for which provision is currently made on the face of the Bill (when it intended to extend the retention period beyond 14 days) and on broader grounds, since t on the face of

¹¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98430/fs-mg-pwers-immigration.pdf

¹² See https://www.whatdotheyknow.com/request/border_force_operations_manual for repeated attempts to secure sight of parts of it using the Freedom of Information Act.

¹³ See www.ilpa.org.uk/resources.php/30347/r-v-ntege-and-others-on-abuse-of-process-by-immigration-officers-21-october-2014

the Bill as drafted is limited (paragraph 8 of Schedule 1) to the question of whether the relevant officials have been acting diligently and expeditiously in relation to deciding whether to cancel the passport or use other counter-terrorism powers against the person. Amendment 15 provides a regulation making power in respect of such appeals. The regulations would be subject to the negative procedure.

Briefing

ILPA supports amendment 14. A 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 reasonably? 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. The Joint Committee on Human Rights has stated that the availability of judicial review is not sufficient to satisfy the requirements of Article 6 of the European Convention on Human Rights, which the Government accepts applies.¹⁴ Moreover, the Government is restricting access to judicial review through the Criminal Justice and Courts Bill currently in ping pong.

As to the court's supervision of an extension, Mr Geoffrey Cox MP pointed out at Commons' Committee¹⁵ that 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.

The Joint Committee called for an amendment of the grounds which must be satisfied before a warrant is issued from diligent and expeditious pursuit of the investigation to there being reasonable grounds to suspect that the person is intending to leave the country to become involved in terrorist related activity abroad and that it is necessary to extend the period of retention to enable steps to be taken toward deciding what happens next.¹⁶

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. But a person's passport 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.

As to amendment 15, we assume that the Secretary of State empowered to make regulations would be the Secretary of State for Justice but for the sake of clarity it might be helpful to

¹⁴ HL Paper 86, HC 859, op. cit. paras 2.19-2.20.

¹⁵ *Ibid.*, col 1186-7.

¹⁶ HL Paper 86, HC 859, op.cit, para 2.24ff.

specify the Lord Chancellor as it would not be acceptable for the Home Secretary to make rules for appeals to which she is a party. We consider that the same level of detail should appear on the face of the statute as opposed to in rules as is the case for the Special Immigration Appeals Commission under the Special Immigration Appeals Commission Act 1997.

Amendment 16 Baroness Smith of Basildon and Lord Rosser Schedule 1 page 28 line 3

Presumed purpose: to require those retaining a travel document other than a British passport to inform the embassy of the country whose passport it is of the seizure as soon as it takes place.

Briefing

The mention of “embassy” in the amendment may not work the cases of *laissez passez* issued by international organizations. It would be vital that the person concerned were told of such notification as it may put them at risk of persecution, torture or ill-treatment by the State concerned.

Amendments 17 to 20 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule 1 page 30 line 6

Presumed purpose: to reduce the period for which a document can be retained before the authority of the court is sought from 14 to seven days.

Briefing

These amendments give effect to a recommendation made by the Joint Committee on Human Rights. The Joint Committee calls for a shortening of the period of retention before judicial authority is required, from 14 to seven days; for an amendment of the grounds which must be satisfied before a warrant is issued from diligent and expeditious pursuit of the investigation to there being reasonable grounds to suspect that the person is intending to leave the country to become involved in terrorist related activity abroad and that it is necessary to extend the period of retention to enable steps to be taken toward deciding what happens next, for “gisting” of closed material, for special advocates, legal aid and the availability of compensation for loss caused by the wrongful exercise of the power.¹⁷

¹⁷ HL Paper 86, HC 859, op.cit, para 2.24ff.