

**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 from Amendment 21**

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. This is our second briefing on Clause 1. 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 1 POWERS TO SEIZE TRAVEL DOCUMENTS

Clause 1 and Schedule 1: Seizure of passports etc from persons suspected of involvement in terrorism continued – for amendments 1 to 20 see our first briefing.

Amendment 21 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford page 31, line 12

Presumed purpose : Augments the requirements upon a constable to whom a passport is passed as to what they must tell the person whose passport it is 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

See briefing to amendments 10, 12 and 13 which are in the same terms.

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.

Amendments 23, 25, 33, 34, 36 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford page 32, lines 16 and 21, page 33 lines 38 and 43, page 34, line 10

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

See briefing to amendments 17 to 20 which are in the same terms. The 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.¹

Amendments 24, 26 and 27, 29 to 32 Baroness Kennedy of the Shaws page 32 lines 16, 21, 37, 40; page 33 lines 7 and 35

Presumed purpose: Amendment 24 introduces the concept of a warrant of further retention which is built on in amendments 26 and 27. The amendments are concerned with an application for judicial authority to retain a warrant beyond 14 days. Amendment 26 places obligations on a senior police officer applying for a warrant. None are to be found on the face of the Bill. Amendment 26 obliges the senior police officer to set out the grounds upon which an extension is sought; make a statement of the suspicion which forms the basis for the original seizure and continued retention of the person’s travel documents; and gist the information on which the suspicion is based. Amendment 27 substitutes a new basis on which the judicial authority may grant the extension. Instead of the Bill’s provision for an obligation to authorize retention if satisfied that the relevant persons have been acting diligently and expeditiously in considering whether to deprive the person of their passport, charge them with an offence or take other steps under counter terrorism action and to act on any decisions, the amendment provides that an extension may be granted only if the judicial authority is satisfied that there are substantive grounds for the retention of the document are met, viz there are reasonable grounds to suspect that the person intends to leave Great Britain for the purpose of involvement in terrorism-related activity outside the United Kingdom and for believing that an extension of a seven days period is necessary to carry out the permitted actions. Finally the provision as to reasonable and diligent action is reinserted.

Amendment 29 removes the option of the person whose passport is to be retained being permitted to make only written representations and thus gives them an entitlement to be heard orally. Amendment 30 provides an entitlement both to legal aid and to

¹ HL Paper 86, HC 859, op.cit, para 2.24ff.

representation by a special advocate in any closed procedures for the person whose passport is retained.

Amendment 31 places limitations (there are none on the face of the Bill) on the circumstances in which the person whose passport is to be retained and/or their representative can be excluded from the hearing, adopting the same tests as those that apply to refusing to disclose evidence to them.

Amendment 32 makes provision for ‘gisting’ information to be withheld. Gisting is not required where this would put national security at risk, but in all other circumstances must be sufficient to enable the person to give effective instructions to the special advocate. If the authorities elect not to provide a gist in circumstances where one is required, then they are not permitted to

Briefing

ILPA supports these amendments which would give the judicial authority a supervisory role and require it to address whether the powers have been exercised lawfully, introduce a modicum of procedural fairness and accountability into the procedures at least at the retention stage.

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.²

Amendment 28 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule 1 page 32 line 21

Presumed purpose: augments the requirements that must be met for an application for further retention to be heard from the Bill’s existing requirements that reasonable efforts have been made to give to the person to whom the application relates a notice stating the time when the application was made and the time and place at which it is to be heard with a requirement that there are reasonable grounds to suspect that the person to whom the application relates intends to leave the UK for the purpose of “terrorism-related activity” outside the United Kingdom.

Briefing: The effect of the amendment is similar to that of parts of amendment 28 in that it introduces a substantive test into extending the retention period although it does not provide detail as to how the test is to be satisfied.

² HL Paper 86, HC 859, op.cit, para 2.24ff.

Amendment 35 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule 1 page 34, line 2

Presumed purpose Makes provision for a judicial authority (unspecified) to provide compensation to a person whose passport is seized, whether or not it is retained.

Briefing

ILPA supports this amendment which has the potential to provide some accountability for the exercise of the power. In the immigration context, the Home Office has paid out hundreds of thousands of pounds of damages for unlawful detention etc. and the judgments in these cases have caused egregious and unlawful action to be recorded.

Consider for example the cases where the Home Office is found to have breached Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman or degrading treatment or punishment. In *BA v SSHD* [2011] EWHC 2748 (Admin) the judge found "...a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare." He finds "...a deplorable failure, from the outset, by those responsible for BA's detention to recognise the nature and extent of BA's illness."

In *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012) the judge described the Home Office approach as "irrational" and "laissez-faire".

These and similar cases have resulted in very substantial awards of compensation. The 10 highest payments of compensation for unlawful detention in the last three years are set out in the table below, provided by the Home Office on 19 December 2014 in response to a freedom of information request.

| 2012-13 | 2013-14 | 2014-15 |
|----------------|----------------|----------------|
| £ 125,000.00 | £ 155,000.00 | £ 125,000.00 |
| £ 100,000.00 | £ 125,000.00 | £ 115,000.00 |
| £ 92,500.00 | £ 100,000.00 | £ 90,500.00 |
| £ 86,000.00 | £ 100,000.00 | £ 72,500.00 |
| £ 82,000.00 | £ 95,000.00 | £ 68,000.00 |
| £ 75,000.00 | £ 90,000.00 | £ 47,500.00 |
| £ 72,500.00 | £ 85,000.00 | £ 43,500.00 |
| £ 70,000.00 | £ 75,000.00 | £ 42,000.00 |
| £ 70,000.00 | £ 75,000.00 | £ 40,000.00 |
| £ 65,000.00 | £ 70,000.00 | £ 39,000.00 |

Amendments 37 to 39, 40 Baroness Hamwee, Lord Thomas of Gresford, Baroness Ludford, Schedule 1, page 34 lines 27, 28, 30 and 42

Presumed purpose

These amendments deal with the Secretary of State's making provision for those stranded in the UK. Amendment 37 adds to the reference to the person's being unable to leave the UK that any accompanying persons are unable to do so.

Amendment 38 adds to being unable to leave the UK, being unable to take the journey planned (thus for example if a person, having lost their original booking, could not afford to

make a new one so that, although free to leave, they are in practice unable to do so. Amendment 39 includes persons accompanying the principal as persons for whom arrangements must be made. Amendment 40 provides that such arrangements may include payment for accommodation and for alternative travel arrangements.

Briefing

These amendments provide an opportunity to probe how much thought has been given to how the system will work in practice. Not all those whose documents are seized would be holders of British passports and they might only be transiting or visiting the UK. They, or British citizens, may be accompanied by family members. Those family members, including children, may be in no position to make the journey without the principal. Even when persons are told they are free to leave, without their original booking, they may be unable to afford to do so. Or there may be no country willing to receive them or carrier prepared to carry them, including as a result of the UK official's suspicions, even if these later prove unfounded.

Amendment 41 Baroness Smith of Basildon and Lord Rosser, Page 34 line 32

Presumed purpose Makes provision for an annual review of the arrangements made by the Secretary of State for persons unable to leave the UK to be published and laid before each house of parliament. The first of such reports (or the only one? or all of them?) is to be laid within a year of the passing of the Act. Thus were amendments inserting a sunset clause after two years accepted, at least one report would be available at the time when they were debated.

Briefing

A report would allow the arrangements to be scrutinized but, as amendments 37 to 40 demonstrate, a number of problems can already be envisaged and they must be addressed in deciding whether Clause 1 is acceptable in the first place whatever provisions are made for review.

Amendments 42 and 43 Baroness Hamwee, Lord Thomas of Gresford and Baroness Ludford

Presumed purpose: would require the code of practice to make specific provision for equalities training and for police and immigration officers to keep records of their performance of the duties in the Code performance of the functions

Briefing: We are not optimistic as to the impact of any amendments along the lines of these proposals. ILPA said in its submission to the enquiry into immigration by the All Party Parliamentary Groups on refugees and on migration:

“The inquiry needs to isolate how the UK system has been so successful at containing, resisting and defeating improvement and propose how this can be overcome as a precursor to making any recommendations for change.”

Among the evidence offered for that despairing conclusion: repeated breaches of detainees' rights under Article 3 of the European Convention on Human Rights, the prohibition on

torture, inhuman and degrading treatment and punishment.³ The abuse of women in detention.⁴ The operation of an unlawful policy on the use of force on pregnant women and children in immigration detention, including staff tipping up the wheelchair in which a pregnant woman was seated and holding on to her feet.⁵ An 84 years' old frail Canadian man suffering from dementia who died in detention in handcuffs having been kept handcuffed for five hours.⁶ That in 2012 there were 208 incidents of what statistics call "self-harm" requiring medical attention and 1804 detainees formally recognised as being at risk of such harm.⁷ All these are examples of persons with characteristics protected under equalities legislation in addition to race, nationality and ethnic origin.

ILPA's evidence to the detention enquiry also included shortcomings in record keeping. For example the case of breaches of Article 3 of the European Convention on Human Rights. In *BA v SSHD* [2011] EWHC 2748 (Admin) the judge carefully enumerated the shortcomings in the reviews. In *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012) the judge found that

"...under the heading 'Changes in Circumstances' the same words that had been used in the previous two reviews were repeated without in fact any record being given of any changes since the last review..."

In *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012) each review contained the formula "and as there are no medical or compassionate issues highlighted to date" despite the increasing evidence of mental illness.

It is important to make provision for equalities training and for adequate record keeping. But these must not be allowed to deflect attention from the central questions of whether the power is appropriate at all and whether it is appropriate to confer it upon immigration officers as well as police officers.

TEMPORARY EXCLUSION ORDERS

Government Amendment 44 New Schedule after Schedule 1 Urgent temporary exclusion orders: reference to the court etc and new sections Temporary exclusion orders: prior permission of the court and Review of decisions relating to temporary exclusion orders

³ For example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) ; *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (5 August 2011, *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012), *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012); *R(MD) V SSHD* [2014] EWHC 2249 (Admin).

⁴ Yarls' Wood affair is a symptom, not the disease, Nick Cohen, *The Observer*, 14 September 2013.

⁵ *Chen and Others v SSHD* CO/1119/2013.

⁶ *Report of unannounced inspection of Harmondsworth Immigration Removal Centre, 2014*, section 1, paragraph 1.3 available at <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf>

⁷ Response to Freedom of Information of information requests, see <http://www.ctbi.org.uk/96> . See also the evidence of the Association of Visitors to Immigration Detainees to the Home Affairs Select Committee for its report on Asylum, Seventh report of session 2012-2013, HC 71, 8 October 2013 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAfairs_ASY-73.htm . See also HL Deb, 27 June 2012, c71W.