ILPA Briefing for the Counter-Terrorism and Security Bill House of Lords Report Stage 2 February 2015 Amendments tabled to Clause 1 and Schedule 1 Seizure of passports etc from persons suspected of involvement in terrorism and to Part 2

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 and to our committee stage briefings. 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.

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CHAPTER 1 POWERS TO SEIZE TRAVEL DOCUMENTS

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

Schedule 1

Amendment 1 to page 34 line 5 in the names of Baroness Hamwee, Baroness Ludford and Lord Paddick

Purpose: Augments the requirements upon a constable to whom a passport is passed as to what they must tell the person whose passport taken. As the Bill stands the person must be told 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. The amendment would add the requirement to give the person a summary of the reasons for this suspicion.

Briefing

A similar amendment was tabled at Committee as amendment 14 but the version tabled then included a requirement to allow the person the opportunity to make representations. We find

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it rather alarming that it has been felt necessary to excise reference to an opportunity to make representations in these circumstances.
If told the reasons for the seizure of a passport, as this amendment requires, the person's only route of challenge, would be judicial review.

The amendment is concerned with the initial seizure of the passport, rather than an extension of the period for which it is held, and for that reason complements amendments 1A to 1G in the name of Baroness Kennedy of the Shaws, rather than being an alternative to them

Lord Bates response to the earlier version of this amendment at Committee was anything but reassuring. He said

> *I hope that noble Lords will see that while a number of these amendments are helpful on the face of things, they could be damaging to national security if the police are required to justify their reasons for reasonable suspicion. To consider what information can be disclosed without prejudicing national security can take time and cannot be rushed.* (HL Report 20 January 2014 col 1240)

In the speech from which this an extract there was a general appeal to threats to national security as a justification for the measures in the Bill, but very little specificity. Is it intended that these be snap judgments by very junior officers? Rather than instances where the person has been under surveillance for some time but suddenly decides to travel, or is suddenly known to be travelling and ports are alerted? In the latter case there will have been plenty of time to consider what reasons there are for stopping them. If an officer is indeed making a snap judgment unsupported by any intelligence, which would be surprising and of concern, what would they have to say that would put national security at risk?

Amendments 1A to 1G in the name of Baroness Kennedy of the Shaws

Purpose: Amendment 1A introduces the concept of a warrant of further retention which is built on in amendments 1B. The amendments are concerned with an application for judicial authority to retain a warrant beyond 14 days. Amendment 1B places obligations on a senior police officer applying for a warrant. None are to be found on the face of the Bill. Amendment 1B 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 1C 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 1D 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 1E provides an entitlement to representation by a special advocate in any closed procedures for the person whose passport is retained.

Amendment 1F 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 1G 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 were tabled as amendments 24 to 27 and 29 to 32 at Committee. Amendment 1E, unlike its predecessor, Amendment 30 at committee, does not make provision for legal aid.

Please see our briefings for Committee stage and for second reading. The Lord Bates had very little to say in response to these detailed amendments. He said (20 January 2014 col 1239)

> *I reassure noble Lords that the power is already subject to considerable safeguards proportionate to the level of interference.*

But that was the point on which he was being challenged. He went on

> *Crucially, individuals can already challenge the exercise of this power, if they choose to do so, by seeking a judicial review. Given the safeguards and constraints on the use of the power, we believe it is the appropriate form of court scrutiny to which the exercise of the power should be subject.* (20 January 2015n col 1239)

But judicial review is outside the reach of many individuals for it is not a cheap remedy and success generally requires considerable legal expertise because the court is exercising a supervisory jurisdiction only. Add closed material procedures into the mix and it can be seen that even if a challenge is brought, it is extremely unlikely to succeed.

The Joint Committee on Human Rights 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]

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

Baroness Kennedy moving the amendment explained her reasons in depth:

> *…while the Bill provides for a closed material proceeding at the extension hearing, there is no provision for special advocates. … if you are going to have a closed material proceeding, you really must have protections for the person who is having their documents taken. I urge the Government to look at this again because I do not think that Strasbourg is going to think that it is compliant. Strasbourg has accepted the procedure that we have introduced here but one of the things it sees as being an important element is the role of the special advocate. There is a case waiting to come up in Strasbourg—Duffy—but I think we will find that this is going to fall foul of our obligations. Having special advocates involved is a very important element here.* (20 January 2014, col 1237-1238)

Lord Macdonald of River Glaven spoke in support of the amendments, saying:

> *It is because the power is so extraordinary that it is so important, in order to avoid the scenario that the noble Baroness was talking about at the outset of this debate—that we observe the highest degree of procedural fairness.* (20 January 2014, col 1238)

Amendment 2 to 4 in the names of Baroness Hamwee, Baroness Ludford and Lord Paddick

Purpose: Amendment 2 deals with the Secretary of State's making provision for those stranded in the UK. Amendment 2 adds to the reference to the person's being unable to leave the UK that any accompanying persons are unable to do so while amendment 4 includes such persons as persons for whom the Secretary of State may (but not must) make arrangements.

Amendment 3 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).

Briefing

These amendments as amendments 37 and 38 and 40 at Committee stage where they were accompanied by amendments that would have required the Secretary of State to pay for accommodation and alternative travel arrangements.

Lord Bates said in reply to the amendments tabled at Committee state:

> *These amendments would also allow the Secretary of State to provide assistance to those accompanying an individual who had his or her documents seized, or were not resident in the UK and did not have any means to provide for their continued stay in the UK. I am grateful to my noble friends for shining a light on such a circumstance. However unlikely it may be to occur in reality, they have highlighted a potential gap in the current provisions and the Government are committed to considering this issue in greater detail.*

Paragraph 14 provides protections to the individual that would apply during the period that his or her travel documents were retained and he or she was unable to leave the UK. Amendment 38 seeks to alter this to include where a person is "unable to make the journey to which the travel relates". The additional wording is unnecessary, as being unable to make a journey to which the travel relates is captured in the current drafting, which is "unable to leave the United Kingdom". However, as the amendment has raised some interesting points on how this provision could be applied, the Government are committed to considering this issue, too, in greater depth.

I hope that my brief reply has satisfied my noble friend and has done all that is required.

Those tabling the amendments have clearly not been satisfied, as they have tabled them again. They are right not to be satisfied. On its face the Bill contains no powers, let alone duties, to assist those accompanying a person stopped or to assist a person who, while free to leave (because their passport has been returned to them), are unable to do so, for example because they do not have the means. The amendments are stark reminders of the effects of the clause on principals whose passports are wrongly seized and on their family members.

Amendment 5 page 40 line 32 in the names of Baroness Hamwee, Baroness Ludford and Lord Hope of Craighead

Purpose: Provides that training for those exercising these powers will include training in identifying persons intending to leave the United Kingdom for humanitarian purposes and not for the purpose of involvement in terrorism-related activity".

Briefing

This amendment was tabled at Committee as amendment seven. If I am travelling to Syria, is it automatically to be assumed that I am travelling for terrorism related activity, unless I can demonstrate that my purpose is humanitarian? Might I not be travelling to see family, or in the course of my business, even in these difficult times? The amendment provides an opportunity to probe whether, and to what extent, constables and immigration officers will be exercising snap judgments about individuals hitherto unsuspected of any wrongdoing rather that stopping persons on the basis of intelligence gathered over weeks and months, on becoming aware that they are travelling. Lord Bates comments at committee appeared to suggest that snap judgments would be involved:

Lord Bates: *... the police officer would have had to have arrived at a position where he believed that there was a reasonable suspicion, and that the reasonable grounds test had been met. He would then have to justify that to a senior officer of the rank of superintendent or above and then, after 72 hours, that would have to be a chief superintendent and it would have to go to the chief constable…* (20 January 2015: col 1243)

As to those about whom intelligence has already been gathered, leading to their being suspected of wrongdoing, are there any circumstances in which they would be allowed to continue, whatever evidence they produced of their humanitarian motivation for a particular

journey, unless this evidence also addressed those earlier suspicions? If so, in what might training consist? An injunction not to reach a decision on the basis of my religion alone? Instruction in questioning my convictions and whether I have any sympathy for the motivation of those to whom I intend to render humanitarian assistance? The amendment provides an opportunity to probe how the amendment will work in practice and to go behind bland reassurances to the reality of how persons will be treated.

Amendments 6 and 7 in the names of Baroness Hamwee, Baroness Ludford and Lord Paddick

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.

Briefing

These amendments were tabled at Committee stage as amendments 42 and 43.

Lord Ashton of Hyde said in response

> *"…the draft code of practice, currently out for consultation, reminds police officers and Border Force officers exercising functions under Schedule 1 of their existing legal obligations under Section 149 of the Equality Act 2010. This places them under a duty to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity between people who share a protected characteristic and people who do not share it, and to take steps to foster good relations between those persons.*
>
> *The draft code of practice, incorporating the Equality Act duty, already requires the police to monitor the use of this power and to consider in particular whether there is any evidence of it being exercised on the basis of stereotyped images or inappropriate generalisations.* (20 January 2015 col 1251)

If the power is to be exercised on the basis of snap judgments by officers at ports, rather than intelligence gathered over weeks and others, how is it intended that its exercise on the basis of stereotyped images or inappropriate generalizations be avoided? The difference between a risk profile and a stereotype is often difficult to ascertain.

Part 2 Temporary Exclusion Orders

At the time of writing, the amendments below are the only amendments tabled. While both are to be preferred to the t eh text of the Bill they are minor indeed. The Government has provided judicial review of the power, but the question of whether here should be a power to exclude nationals from the UK at all is a matter to which we hope to see the House of Lords return on report. We reiterate some of our main concerns:

- Orders may be placed end to end, with no maximum duration, so that nothing on the face of the Bill prevents orders from being indefinite or lifelong.

- While there is an obligation to issue a permit to return, unless the individual is required to attend an interview with an immigration officer and fails so to do, a permit to return can be revoked, where the Secretary of State considers that it was obtained by misrepresentation or where a subsequent permit is issued.
- The permit may be subject to conditions and nothing on the face of the Bill prevents the Secretary of State revoking and reissuing permits indefinitely.

As to judicial oversight, there remains much work to be done. As the Bill stands:

- The review will be limited to judicial review principles – procedural fairness and reasonableness in the taking of the original decision, not whether it is right or wrong.
- The court will determine these cases, and whether a matter is urgent, on the basis that the decision of the Secretary of State is "obviously flawed". This test does not allow for adequate supervision. "[O]bviously flawed" is a high test, particularly in cases where a party and his/her legal representative, if any, can be excluded from the proceedings and where the use of closed material procedures limits the extent to which material can be tested. In addition, urgent cases will be proceeding at speed and limited to judicial review principles
- The standard of review for the question of urgency is all the more surprising given that on the matter of urgency the Court can give only declaratory relief.
- No provision has been made for legal aid

In other words, you have the theoretical possibility of challenging the decision but the drawback that you are bound to lose. In summary, these amendments provide for judicial supervision but they do not provide for justice.

Clause 4 Temporary Exclusion Orders Supplementary Provision

Amendment 8 in the names of Baroness Hamwee, Baroness Ludford and Lord Paddick

Purpose: Requires that notice of a temporary exclusion order must include a summary of reasons for its imposition.

Briefing

ILPA is unpersuaded, for the reasons set out in our second reading and committee stage briefings, that temporary exclusion orders are necessary or desirable. We share the view of the Joint Committee on Human Rights that "We are opposed in principle to any exclusion of UK nationals from the UK, even on a temporary basis"[2]

This amendment was tabled at Committee as amendment 56. In response, the Lord Bates said

> *It is, of course, important that the individual is informed that they are subject to a temporary exclusion order—after all, that is the point of it—and that they are given some indication of why this is the case. However, I trust your Lordships will understand that it is not appropriate for the individual to be provided with detailed reasoning behind the Secretary of State's decision, which is likely to include sensitive*

[2] HL Paper 86, HC 859, op. cit. para 3.9.

information, the disclosure of which could damage national security and put lives at risk.

Any notice given to the individual would state that the Secretary of State has reasonable suspicion that they have been involved in terrorism-related activity abroad. We believe that this is sufficient disclosure, which informs the individual of the basis for the decision while protecting sensitive information. (20 January 2014, col 1278)

One can well imagine how little information that would provide to the innocent, and how difficult they would find it to marshal evidence to refute it.

Clause 5

Amendment 9 to page 4 line 30 in the names of Baroness Hamwee, Baroness Ludford and Lord Paddick

Purpose: Clause 5 provides that failure to comply with a specified condition of a temporary exclusion order invalidates it. The amendment makes this subject to their being no reasonable excuse for the non-compliance.

Briefing

ILPA supports this amendment which was tabled at committee stage as amendment 58**.** Lord Ashton of Hyde's only response then was to contend that the Government would never get it so very wrong and that a criminal charge could be defended:

I appreciate the rationale behind these probing amendments but I hope I can reassure my noble friends that they are not necessary in this instance.

Conditions will be put into a permit to return where the Secretary of State considers they are necessary in order to protect national security. Any failure to comply with a specified condition will therefore be material, on a common-sense definition of the word. Amendment 58 would have the effect of ensuring that a person is not criminalised by an inadvertent failure to comply, but this is already provided for by the "reasonable excuse" defence in Clause 9 and the amendment is therefore superfluous. (20 Jan 2015: Column 1298)

But mistakes are made and a criminal charge should not be laid at all against a person who has a reasonable excuse for not having complied with a condition.