ILPA briefing for the peers' meeting on the Immigration Bill: Provisions on Driving Licences 22 February 2016

The Immigration Law Practitioners' Association (ILPA) is 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 in 1984, 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 many Government and other consultative and advisory groups.

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Context

On 28 March 2013, the Home Secretary abolished the UK Border Agency. Her reasons for doing should be read in full but an extract gives a flavour:

> *… the performance of what remains of UKBA is still not good enough. The agency struggles with the volume of its casework ... has been a troubled organisation since it was formed in 2008… UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry ...and they often involve paper files … The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies … it will take many years to clear the backlogs and fix the system, ..."*[1]

We agree. Ms Sarah Rapson, Director General of UK Visas and Immigration, told the Home Affairs Select Committee in June 2013 "Is it [the organisation] ever going to be fixed?... I think I answered that question from you earlier. I don't think so."[2]

This complex Bill is the latest stage in the "vicious cycle of complex legislation" described by the Home Secretary. The Bill makes demands that the Home Office is not equipped or able to meet and gives it powers that it cannot be relied upon to exercise properly. It is predicated upon the false assumption that the Home Office gets it right, not most of the time, but all of the time. The Bill will mean that where it exceeds or abuses its powers, or simply fails to do the job, British citizens are denied their entitlements as citizens; persons whose presence in the UK is authorized, and indeed welcomed, are not able to live and work in accordance with the conditions of their authorization, and the rights of all: citizens, persons under immigration control and those with no leave, are put at risk.

The State is shielded from challenge: there will in very many cases be no remedy and no redress. The Bill cannot be read in isolation from the cuts in legal aid.[3] Restrictions on judicial

[1] HC Report 6 Mar 2013: Col 1500.
[2] Oral evidence given on 11 June 2013, published as HC 232-I, response to question 6, see http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc232-i/uc23201.htm
[3] See the Legal Aid, Sentencing and Punishment of Offenders Act 2012

review[4] further against challenges. It is a reasonable assumption that if parliament does not put a safeguard into place it will be considerable time before that safeguard can be put into place through litigation.

We recall the Home Secretary's introduction of the Identity Documents Bill at second reading:

> *The national identity card scheme represents the worst of government. It is intrusive and bullying, ineffective and expensive. It is an assault on individual liberty which does not promise a greater good...We are a freedom-loving people, and we recognise that intrusive government does not enhance our well-being or safety. In 2004 the Mayor of London promised to eat his ID card in front of "whatever emanation of the state has demanded that I produce it."*
> *I will not endorse civil disobedience, but Boris Johnson was expressing in his own inimitable way a discomfort even stronger than the discomfort to be had from eating an ID card. It is a discomfort born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government*[5]

and the words of Anuerin Bevan about the National Health Service in 1952

> *Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified…*"[6]

A wrongful refusal by the Home Office could jeopardise a person's accommodation, bank accounts and driving licence. Lord Bates set the driving licence provisions firmly within this context at Lords' Committee

> **Lord Bates:** … Sometimes there is an overfocus on this particular element, without recognising the wider context of the Bill. This is not being targeted simply through stop-and-search powers but is consistent with the wider aim to reduce the ability of people who are here illegally to live a normal life while in the UK—such as by having bank accounts, being able to rent properties, being able to work and gain employment, or being able to gain a driving licence. In the wider context, it fits, but there are some specific concerns here.

Indeed, "In the wider context, it fits." It is a reminder that the effects of the hostile environment are likely to be felt not only by those present unlawfully but by all persons under immigration control and by British citizens from ethnic minorities.

Driving

A new strict liability criminal offence of driving whilst not lawfully resident in the UK is proposed, Immigration officers and constables will have powers to impound vehicles which are owned by the person suspected of not having leave or vehicles which that person has driven. Vehicles can be disposed of.

Powers that would enable police, immigration officers and other persons (unspecified) authorised by the Secretary of State to enter premises to search for and seize driving licenses

[4] Criminal Justice and Courts 205 Act Part 4.
[5] HC report 9 Jun 2010: Column 345-350
[6] *In Place of Fear*, Bevan, A., (1952), Chapter 5

and to search persons for these would sit as well in the enforcement section of the Bill.. The test is one of reasonable grounds for believing, rather than knowledge that a person is in possession of a driving licence and that the person is not lawfully resident in the UK. Premises owned or occupied by the person could be searched, but so could the premises in which they were encountered, either without prior authorisation from a senior officer. The authorised person could seize and retain driving licences. There is an obligation to return them only where it is decided not to revoke the licence or the person wins their appeal against revocation of the licence. Normal powers to have access to and copy seized material do not apply. The Explanatory Note states that this is so that a person cannot make use of a photocopy to secure goods and services, but there are also questions about whether there can be a fair appeal when a person cannot examine the evidence held against them.

Lord Bates said at Lords' Committee:

> *…the Government are clear that this provision will not undermine reform of police stop-and-search powers and will not undermine community cohesion. The police will first have to have cause to stop a vehicle. …Reasonable suspicion may occur where a vehicle has been stopped for a suspected driving offence, the police have checked the circumstances of the driver, as appropriate, and those checks have revealed a match against a Home Office record. The search is therefore intelligence-led, not a random search of a member of the public. I draw noble Lords' attention to the policy equality statement which accompanies this Bill and sets out very clearly in section 3 what the power to search for UK driving licences means in practice. The cause cannot be based on a person's race or ethnicity. The stop must be for an objective reason. Once a vehicle has been stopped, the police check the circumstances of the driver. The provision will not therefore lead to stop and searches of vehicles in order to check the immigration status of the driver.*
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> *… This is what* [the Home Secretary] *said at the National Black Police Association's conference in October 2015:*
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> > *"We made sure officers are clear what 'reasonable grounds' of suspicion are, so that its use is both legal and reasonable—because Her Majesty's Inspectorate of Constabulary said that over a quarter of stop and searches were unlawful. We brought in much greater transparency and required police forces to record the outcome of each and every stop and search—because only one in ten stop and searches led to an arrest. And we gave communities the ability to hold their police force to account through a 'community trigger', which means that the police must explain how stop and search powers are being used should concerns be raised. And I am delighted that the 43 police forces in England and Wales, plus British Transport Police, have all voluntarily signed up to our Best Use of Stop and Search Scheme".*
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> *Moreover, the use of stop and search fell sharply in 2014-5. It was down by 40%, compared with 2013-14, to 540,870. This continues the recent downward trend. This is the largest year-on-year fall and sees the lowest number of stop and searches in a year since the current series began in 2001-02. The number of Section 60 stops, for which reasonable suspicion is not required, fell by 73%, compared to 2013-14, to 1,082 stops. Moreover, the Government announced a number of measures in 2014. Among them were: commissioning the College of Policing to review national stop-and-search training; including stop and search in the new HMIC PEEL inspections; commissioning HMIC to conduct a thematic inspection into other stop-and-search powers; introducing a strictly voluntary Best Use of Stop and Search Scheme to create more transparent and accountable use of stop and search; revising the PACE code of practice to*

> *make clear what constitutes reasonable grounds for suspicion—the legal basis for stop and search; mapping stop and search on Police.uk; exploring quick and efficient stop and search; and recording on the emergency services network.*[7]

Will the new powers reverse this trend or, indeed, are they a substitute for powers no longer used so extensively? Lord Bates continued

> *A number of noble Lords referred to the comments by Chief Superintendent David Snelling in another place. In his evidence to the Public Bill Committee last year, he indicated that the police would use this power in the context of intelligence-led policing. If police have cause to stop a vehicle, they may then check the circumstances of the driver. If the driver is found to be an illegal migrant, their vehicle may be detained under these powers. In applying these new powers, the police will first have to have cause to stop a vehicle; for example, for a suspected motoring offence. They may then check the circumstances of the driver. There are, therefore, a series of objective steps that will be followed. This clause will not result in the police randomly stopping cars in order to check the immigration status of the driver.* [8]

Lord Alton asked what would be done to monitor the use of the power and whether annual statistics would be published[9]. It would be useful to pursue these points.

Lord Paddick emphasised that a routine check of the Home Office immigration database is not a normal part of a stop check and that Her Majesty's Inspectorate of Constabulary research shows that drivers are being targeted on that basis. He pointed out that police stops of vehicles under the Road Traffic Acts are not routinely recorded[10]. In short he described a receipe for the gains made in the operation of stop and search powers to be reversed.

Amendments tabled at Lords' Committee

Amendment 160 in the names of **Baroness Hamwee and Lord Paddick**
This proposed to limit the ability of an authorised officer other than a constable to enter and search, without warrant, premises occupied or controlled by the person accused of possessing a driving licence without being lawfully resident in the UK, or on which that person was found, without authorisation from a senior officer in writing. The limitation imposed would be that the authorised officer has reasonable grounds to believe the power should be exercised urgently. Even without consideration of n the breath of persons who can be authorised officers the power is so very widely drawn as to create a real risk of intrusive, oppressive and inappropriate searching.

Lord Bates had no response to this amendment. He said only

> *This is unnecessary. Clause 17 provides that before searching premises an authorised officer must obtain the authorisation of a senior officer, unless it is not reasonably practicable to do so*[11].

[7] HL Report 1 Feb 2016 cols 1598-1599.
[8] Hl Report 1 Feb 2016 col 1599.
[9] Ibid.
[10] HL Report 1 Feb 2016, col 1600.
[11] HL Report 1 Feb 2016 col 1597.

Amendment 161 i**n the names of Baroness Hamwee and Lord Paddick**
This proposed to place a limit of one month for the period that the Secretary of State can hold a driving licence before deciding whether or not to revoke it. It would thus ensure that driving licences were not withheld for lengthy periods from persons entitled to them simply because the Home Office had not, whether for reason of lack of resources or otherwise, come to a decision.

Lord Bates said in response to these amendments

> *Amendments 161 and 162 are also unnecessary. The arrangements introduced by the Immigration Act 2014 for the revocation of UK driving licences held by illegal immigrants are well-established and operating effectively. They are not subject to significant delays, which would warrant introducing hard and fast time limits for the retention of seized licences pending revocation action*[12].

This ignores that the Bill increases the situations in which persons, especially persons under immigration control, will need to prove their status. It also provides no detail on what those advising Lord Bates deem to be a "significant delay" and, given that the provisions are new and that backlogs take a while to build, whether delays are increasing. It would be helpful to press for detail on how the 2014 Act provisions are operating.

Amendment 162 in the names of **Baroness Hamwee and Lord Paddick**
New s 25CC(5)(b) provides that a driving licence required to be retained must be retained "if it has been or is subsequently revoked" until the time limit for appealing has expired or until the appeal is determined. The amendment would have removed the words "is subsequently". If the licence is not revoked, how could there be an appeal? The words appear otiose.

Lord Bates did not appear to understand amendment 162. As described above, he called it unnecessary. But then he said

> *This conflicts with one of the main aims of the clause: namely, to remove revoked licences from circulation. It is already a criminal offence under the Road Traffic Act 1988 to retain a revoked licence but, despite this, only a very small proportion are returned.*

This is not what the amendment was asking, it was asking about words that appeared otiose. Someone appears to have alerted Lord Bates' to his misunderstanding for in te middle of separate speech on stop and search powers he suddenly said

> *"The noble Lord, Lord Paddick, asked what "subsequently revoked" means in Clause 17. Clause 17 provides the power to seize unrevoked licences. Subsequently revoked means revoked after seizure."*[13]

This still does not clear up the point that if the licence is not revoked, how could there be an appeal? The question on the drafting has not been answered.

[12] HL Report 1 Feb 2016 col 1597.
[13] HL Report 1 Feb 2016 col 1599.

Offence of driving when unlawfully in the United Kingdom

Amendment 163 in the names of Lord Rosser and Lord Kennedy of Southwark
This proposed a defence to the offence of driving when unlawfully in the United Kingdom where a person had a reasonable belief that he or she had a legal right to remain in the United Kingdom and acted in good faith.

It was unclear to ILPA what the words "in good faith" add to the amendment; if a person has a reasonable belief that s/he has a legal right to remain in the United Kingdom s/he should not be made a criminal. The amendment highlighted that there is no defence on the face of the Bill. Tabling an amendment in identical terms in the Public Bill Committee, Sir Keir Starmer MP said

> *" I use again the example I used last week or the week before, where someone has been sponsored but, unbeknown to them, there is something wrong with the sponsorship. They may therefore find themselves in a position where they do not have the status they should have, although they have a reasonable belief that they have a right to be here and they acted completely in good faith. What is the legal case and the moral case for criminalising a person in that situation?"*[14]

The reply from the Solicitor General gave rise to the following exchange:

> "*…in my view it is very broad and very subjective. It will create scenarios, for example, in which a defendant might claim they had reason to believe they were in the UK legally, simply because they had misunderstood the date on which their leave expired. It would be difficult to prove otherwise and then the purpose of the offence is undermined.*
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> *Let me deal with offences of strict liability in the context of driving. This concept is not new. For example, the offence of driving while disqualified under section 103 of the Road Traffic Act 1988, as amended, is an offence of strict liability, so this is not a new departure, although the defence would be a new departure when it comes to driving offences of this nature.*
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> ***Keir Starmer:*** *I am grateful to the Solicitor General for his explanation. I readily accept that this quasi-strict liability is not uncommon when it comes to driving and disqualification. The difference is that if someone is disqualified, they know they are disqualified. If there were a situation in which somebody, perhaps through sponsorship, genuinely and simply did not know that their status was as it was and would come within this defence, is the Solicitor General's answer that that is just tough?*
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> ***The Solicitor General:*** *Not quite. There are a couple of caveats. First, a person who is prosecuted for this offence has the opportunity before the court issues judgment to put in mitigation about their belief as to whether they were legally present in the UK, and that would affect any sentence that might be passed by the court. Also, the Crown Prosecution Service will have guidance to ensure that migrants are not inappropriately prosecuted for this offence. ...* [15]

Lord Bates reached for the same reliance on prosecutorial discretion

[14] 3 November 2015, col 307ff.
[15] *Ibid*.

> *Where a migrant honestly believes that they have lawful status —for example, because they have been misled by a rogue legal adviser—this will be taken into account in considering whether prosecution would be appropriate in the public interest, and clear guidance to that end will be provided. Should a migrant be able to genuinely evidence that they believed themselves to be legally present, it is highly unlikely that it would be in the public interest to prosecute.*[16]

The most common example of those who believe their presence lawful is perhaps that of those brought from the Caribbean as children, examples of whose cases were described in the Legal Action Group research *Chasing Status: if I am not British then what am I?*[17] As its author, Fiona Bawdon, describes in her article in Legal Action Magazine

> *'Chasing Status' tells the stories of people we describe as 'surprised Brits' because of their shock at finding that their immigration status is being questioned after they have lived, worked and paid taxes in the UK for many decades… are now finding themselves threatened with destitution, unable to work or claim benefits, after being caught out by legislative changes they had no idea applied to them. With legal aid removed for immigration cases, they can no longer get expert legal help to resolve their status;…*
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> *The six oldest 'Chasing Status' interviewees (whose ages range from 53 to 60) have been in the UK a total of 260 years. They entered the UK as children, and were educated, married …here. They have national insurance numbers and driving licences, pay their taxes and (until recently) could work and claim benefits, just like anyone else. Until being asked for proof of their immigration status by employers or the JobCentre, none had any reason to question it. In their interviews, they tell of disbelief at discovering that they are not as British as they thought they were: 'I thought I was going crazy'; 'It felt really strange'; 'I thought it was a joke, at first*[18]*'.*

Lord Bates said

> *Not all those who have entered the UK illegally or attempt to remain illegally in the UK have a history of communication with the Home Office. These are arguably the types of illegal migrant that this legislation is intended to deter. It would be a bizarre outcome should this group be better protected as a result of this amendment than those who have engaged with the authorities*[19]*.*

But this assumes that a defence would be absolute, rather than, as proposed, not allowing a person to hide behind a belief that was not reasonable. Indeed, it did not appear to convince Lord Bates himself, who promised to reflect on the matter before report[20]..

Reliance on prosecutorial discretion is not an adequate answer to an offence that has not been well-drafted. Pleas in mitigation go to the length of sentence, not to whether a person can be prosecuted or not. A criminal record has particularly serious implications for a person under immigration control. Since the coming into effect of sections 148 and 149 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, convictions can never be spent for

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[16] HL Deb 1 Feb 2016 col1604.
[17] Available at http://www.lag.org.uk/media/186917/small_chasing_status.pdf
[18] Fiona Bawdon, Legal Action, October 2014, available at http://www.lag.org.uk/media/184964/immigration_feature.pdf .
[19] HL Deb 1 Feb 2016, col 1604.
[20] Ibid.

immigration and nationality purposes. They must always be declared and can form the basis for refusing a person leave, settlement or citizenship. In these circumstances mitigation of sentence is not enough.

Lord Bates said

> *"..the strict liability nature of this offence is consistent with some similar driving offences. It is an offence, for example, to drive whilst disqualified or drive otherwise than in accordance with a licence, regardless of whether or not you realised that you were committing an offence. Therefore, we believe that that is consistent,…*[21]*"*

But this does not compare like with like. It is the responsibility of a driver to assure themselves that they are qualified to drive before getting behind the wheel. Is it really asserted that each and every one of us should investigate whether we are one of Legal Action Group's "surprised Brits" before we drive?

Amendment 164 in the names of **Baroness Hamwee and Lord Paddick** r

This proposed that where a vehicle has been detained against the possibility of a person's being prosecuted for driving when unlawfully in the United Kingdom, the decision as to whether or not to prosecute must be taken within a month of the arrest. This would prevent indefinite detention of the vehicle. Lord Bates' response did not reassure, instead it suggested that decisions would not normally be taken within this time frame

> *It is right that decisions on whether to prosecute a person for a criminal offence should be taken promptly, but the proposed amendment would introduce an arbitrary time limit and create an additional, and in our view unnecessary, administrative burden on the relevant agencies*[22].

The response also ignores that, were the decision not taken within a month, the vehicle could be released rather than the decision rushed.

Government amendments 165 to 168 in the name of Lord Bates
These corrected the provisions of the Bill on driving offences and the detention of vehicles as they are designed to apply in Scotland. They are further evidence of a Bill drafted in haste and, in particular, without an adequate understanding of the way in which the provisions will work in the devolved areas.

Government amendment 170 in the name of Lord Bates
This allows regulations to specify about the provision of a vehicle to make provision as to "the destination" of payments of costs in relation to the detention of the vehicle and any application for its release, where such payment is a condition of release. The wording is odd, and it is unclear why it is felt necessary to make express provision for this in regulations.

Amendment 169 in the names of Baroness Hamwee and Lord Paddick
This proposed to change the definition of a relevant vehicle for the purposes of their detention to mean a vehicle not under the control of the person accused of driving without lawful excuse.

[21] HL Deb 1 Feb 2016 col 1606.
[22] HL Deb 1 Feb 2016 col 1605.

Lord Bates said in reply

> *Where a person has been convicted of the new offence created by Clause 18, the courts will have the power to order the forfeiture of the vehicle used in the offence. However, a third party with an interest in the vehicle may apply to the court to have the vehicle returned to them*[23].

Amendments 171-173 in the names of Baroness Hamwee and Lord Paddick
These were concerned with the power to enter premises to detain a motor vehicle. They proposed to remove provision for an "all premises warrant" thus requiring that any warrant be issued for specified premises. In his March 2014 report *An inspection of the use of the power to enter business premises without a search warrant*, the Chief Inspector of Borders & Immigration, March 2014 examined powers of entry without a warrant. In 59% of the cases in his sample entry without warrant had been effected when the required justification for entry without warrant was not made out and in a further 12% the evidence on file did not allow him to determine whether it was made out or not. Recording was inadequate.

Failure to comply with guidance was widespread. In only 5% of cases was there evidence that whether to apply for a warrant had been considered. Speculative grounds were replied on and training was inadequate, with managers as well as staff under them not displaying knowledge of the correct procedures.

Lord Bates said in reply

> *Amendments 171 to 173 would significantly reduce the potential success of a search for a motor vehicle by removing the ability to apply for an all-premises warrant to search multiple premises. The power contained in the clause to apply for an all-premises warrant, which allows any premises occupied or controlled by a specified person to be searched, is consistent with the Police and Criminal Evidence Act 1984, which applies in England and Wales, and the equivalent order in Northern Ireland.*
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> *The provisions within the clause and within wider immigration legislation specify that the search power may be exercised only to the extent that it is reasonably required. In order to issue an all-premises warrant, the justice of the peace needs to be presented with reasonable grounds that it is necessary. Limiting the scope of searches to premises specified at the outset of an inquiry negates any possibility of using evidence gained during the initial inquiry that provides reasonable grounds to believe that a further search of additional premises would be successful*[24].

This is incorrect, as an application could be made for a further warrant. Lord Bates suggested that this would be a waste of the officer's time

> *…this might have the perverse effect of preventing officers who have searched one vehicle lock-up from also searching the one next door, despite information suggesting that the vehicle is kept there*[25].

But a little administrative inconvenience is the price for avoiding oppressive powers. The officer could have applied for powers to search all the lock ups had s/he grounds to do so. If they did not, it is right that they must go back before the judge to make the case.

[23] HL Deb 1 Feb 2016 col 1605.
[24] *Ibid*.
[25] *Ibid*.

Government amendments 174 and 175 in the name of Lord Bates

These were further "Oops, we forgot Scotland" amendments. Scots law does not permit even a constable to have an all-premises or multiple entry warrant as Lord Bates pointed out in the debate[26] and the amendments ensure the clauses reflect this. More careful consideration of the position in Scotland might have led to consideration of whether it was appropriate to take the powers at all.

[26] HL Deb, 1 Feb 2016, col 1604.