

ILPA evidence to the Public Bill Committee on the Policing and Crime Bill

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. **For further information please get in touch with Alison Harvey, Legal Director Alison.Harvey@ilpa.org.uk; or Zoe Harper, Legal Officer, on 0207 251 8383, Zoe.Harper@ilpa.org.uk**
2. This briefing covers
 - Part I Chapter 4, *Maritime enforcement powers*
 - Part 9 Miscellaneous and General, Chapter 4 Miscellaneous, Clauses 104 to 106 *Requirements to confirm nationality*

Part I Chapter 4 Maritime Enforcement Powers

3. These provisions give the Secretary of State powers to require ships (of any nationality) intercepted in UK waters to be stopped, detained and/or sent to a port outside the UK. The proposed powers build on what is contained in Part 3 of, and Schedule 2 to, the Modern Slavery Act 2015 and in Part 6 of, and Schedule 14 to, the Immigration Bill currently before parliament in respect of specific offences: offences under sections 1 and 2 of the Modern Slavery Act in respect of the former¹ and offences under sections 25, 25A and 25B of the Immigration Act 1971² in respect of the latter.
4. The proposed powers differ from those contained in the Modern Slavery Act 2015 and in the Immigration Bill currently before parliament which only permit the diversion of ships to UK ports rather than to ports anywhere in the world. We highlight the risk of *refoulement* of refugees and persons in need of international protection on those ships. Article 33 of the 1951 UN Convention Relating to the Status of Refugees provides

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”
5. Non-refoulement is also a requirement of protection under the European Convention on Human Rights.

¹ Modern Slavery Act 2015, Schedule 2 paragraph 2.

² Immigration Bill, Schedule 14, paragraph 2. The offences are assisting unlawful immigration to an EU Member State, helping an asylum-seeker enter the UK, and assisting entry to the UK in breach of a deportation or exclusion order.

6. Transfers of persons seeking asylum between member States are governed by the “Dublin III” regulation³.
7. In *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), a case concerning “pushbacks” of refugees in the Mediterranean to Libya, the European Court of Human Rights found Italy to owe all obligations under the European Convention on Human Rights to those in need of international protection that it had taken onto on a ship flying its flag and under control of its personnel. But in these cases officials will be boarding ships that fly other flags. They have powers to control the ship⁴; although a person is not guilty of the offence in Clause 71 of obstructing an officer in immigration and Wales if they have “reasonable excuse” not to do so and this would appear to give some control back to the Master of the vessel.
8. The reports of the Children’s Commissioner for England and Wales *Landing in Kent* and *Landing in Dover* brought to light the 20 April 1995 “gentleman’s agreement”⁵ between England, Belgium and France allowing for the summary return of those refused entry within 24 hours. Although it was said not to apply to asylum cases after 1 September 1997, it was found to have been applied after that date to unaccompanied children and there was concern that they might not have had an opportunity to articulate a claim for asylum. The same concern applies here, in cases of those with a claim for asylum or victims of forced labour or trafficking.
9. In debates on the Immigration Bill, Ministers emphasised that all those intercepted on board ship would be brought to the UK and that there was thus no risk of non-refoulement⁶. It is of concern that provisions creating a risk of non-refoulement are to be debated in the context of a more general policing and crime bill rather than a specialist immigration bill.
10. As to the rest of this part, we anticipate that it will be said that the provisions are unobjectionable because similar powers have been taken in the two previous bills. This was done in debates on the Immigration Bill by reference to the Modern Slavery Bill⁷. In debates on the two previous bills however, Ministers relied upon the specificity of the offences and the targeted nature of the provisions in justifying them and thus this reasoning cannot be treated as a justification for the powers.
11. The powers to search and obtain information contained in Clause 67 can be exercised on the ship “or elsewhere”. The Home Office Enforcement Guidance and Instructions at Chapter 31 rely on the (dubious) authority of *Singh v Hammond* [1987] 1 All ER 829, [1987] Crim LR 332 as authority for its stop and search operations, for example at tube stations. The Home Office takes the case as authority for the proposition that powers in statute to examine persons ‘who have arrived in the United Kingdom’ can be used not only at port but in-country. Its enforcement guidance and instructions provide at Chapter 3:

³ Regulation (EU) 604/2013 of the European Parliament and Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁴ Clause 66(2)

⁵ <https://www.gov.uk/government/publications/gentleman-s-agreement>

⁶ Public Bill Committee, 13th sitting (am), 10 November 2015, col 468.

⁷ E.g. Immigration Bill Public Bill Committee, 13th sitting (pm) 10 November 2015 col 475 per the Rt Hon James Brokenshire MP “The provision permitting powers to be exercised by accompanying officers reflects existing powers under other legislation—most notably, the powers recently considered by the House in the Modern Slavery Act 2015.”

In Singh v Hammond, the Court held that:

‘An examination [under paragraph 2 of Schedule 2 to the Immigration Act 1971] ... can properly be conducted by an immigration officer away from the place of entry and on a later date after the person has already entered ... if the immigration officer has some information in his possession which causes him to enquire whether the person being examined is a British citizen and, if not, ... whether he should be given leave and on what conditions.’

12. To avoid such creep of powers here, the limitation to port should be specified. Powers of arrest without warrant under clauses 68 and 71 apply both on the vessel and “elsewhere”. We see no justification for permitting arrest without warrant where those concerned are on dry land.
13. Clause 69 of the Bill as drafted is concerned with “protective” searches. It requires the officer to have reasonable grounds to believe that the item for which s/he is searching might be used to cause physical injury etc. but there is no requirement in the Bill that the officer have reasonable grounds to believe that the item is concealed on the person. An officer can search a person for anything which the officer has reasonable grounds to believe the person might use to cause physical injury, cause damage to property or danger the safety of any ship. The first and third are indeed about “protective” searches, the third is about protecting property other than in circumstances where the ship could be endangered and this is not sufficient cause to award an immigration officer additional powers of search without warrant.
14. Clause 70 permits law enforcement officers carrying out searches in accordance with this part to be accompanied by persons who are not law enforcement officers. The persons concerned may be operating on the property of others, the ship. They will have powers of arrest without warrant, of search, of arrest and of seizure. The Bill proposes that persons wholly unspecified may be able to exercise all of these powers, without limitation, under the supervision of law enforcement officers. Any powers under this section should be exercised by law enforcement officers.
15. There are very many safety concerns about the operation of these powers, whomsoever exercises them: for example, about the safety of ordering ships to stop in traffic separation schemes or in circumstances where they might be stranded on an ebbing tide; about diversions to unsuitable ports, for example ports which are too small for merchant ships, or excessively difficult for yachts to reach in the prevailing weather conditions; and about costs associated with unwanted port calls. A Master may be able to defend him/herself from prosecution for refusing to comply with an unsafe order by arguing that s/he had “reasonable excuse” not to do so⁸, but the issue is less an ultimate prosecution than safety on board when an unsafe command is given. A Master may assert that s/he is under no obligation to comply with a particular order but the immigration officer or “assistant” may disagree and the resulting altercation may put the ship in danger.
16. Clause 70 provides that a law enforcement officer is not liable in any criminal or civil proceedings for anything done in the purported performance of functions under the chapter if the court is satisfied that the act was done in good faith, and that there were reasonable grounds for doing it. This is objectionable. It is not only immunity from prosecution, but also

⁸ Clause 71.

from civil suit. It is not only immunity from suit when performing functions under this act, but immunity when acting “in purported performance of functions under this part.

17. Clause 71 creates the offences of obstructing a law enforcement officer in the performance of functions under this part or failing without reasonable excuse to comply with a requirement made by a relevant officer. Given the safety concerns above it a member of a crew must know that they need not to comply with an instruction where they deemed it unsafe and indeed can obstruct that officer where s/he is endangering those on board or in the proximity of the ship.
18. Similar amendments have been debated on the Immigration Bill 2015. The Minister, the Rt Hon James Brokenshire MP, was less than convincing in his defence of the scope of the powers:

*“**James Brokenshire** The power to search in paragraph 3 of new schedule 4A only applies to a search of the ship, anyone on the ship and anything on the ship, as the hon. and learned Gentleman highlighted. The Bill does not limit where the power may be exercised in order to ensure that there are no gaps in the power. He was rightly probing and testing as to the intent of the term “elsewhere”. In part, it ensures that there is provision to arrest a person should they jump overboard to evade enforcement officers. Given the nature of the powers that we are seeking to provide, that could be entirely possible, whether they jump into the water or, if the vessel is in more inland waters, on to land. .. I reassure the Committee that the test in paragraph 3(1) of new schedule 4A to the Immigration Act 1971 connects the exercise of the powers with suspicion regarding the ship. I hope that that connection may be helpful in giving an understanding of what we are trying to get at here.*

***Keir Starmer:** ... there is no power of arrest in the paragraph; there is only a power of search. So sub-paragraph (8) would not help in the circumstance where someone jumps overboard and needs to be arrested. If someone jumped overboard...*

***James Brokenshire:** That is connected to sub-paragraph (3), which states: “The relevant officer may require the master of the ship, or any member of its crew, to take such action as is necessary for the purposes of sub-paragraph (2)(c).” Obviously, the officer would require the ship to be taken to a port. That is connected to the ability to search, ... There may be circumstances, for example, in which someone jumps off a ship and is rescued by officers where a search may be appropriate under the exercise of that power. ...*

Amendments 239 to 244 would ensure that only the officers specified in the Bill can use the powers, and would remove the protection of officers from personal, criminal and civil liability. I will address those two points separately. The provision permitting powers to be exercised by accompanying officers reflects existing powers under other legislation—most notably, the powers recently considered by the House in the Modern Slavery Act 2015. The extension of powers to assistants also exists in general for those working alongside customs officers under section 8 of the Customs and Excise Management Act 1979.

...We have therefore sought to ensure that there is no mismatch between customs powers and immigration powers...

The reason why such powers may be given to assistants is not to permit untrained individuals to exercise those powers, but to ensure effective joint working with partner agencies that have at least a basic level of law enforcement training. The measure permits officers from partner

organisations who may be working alongside enforcement officers, such as fisheries inspection officers, to assist immigration officers. It is important to emphasise the requirement that such persons must still be supervised.

On the protection of officers against civil and criminal liability, the measure extends only to personal liability; it does not prevent a claim for which an employer may be vicariously liable. ... There are many other examples of where law enforcement officers are given equivalent protection. ...

Keir Starmer: ... I wonder aloud how long that immunity provision, however long-standing it is, can survive. The idea that people are immune from criminal law in that way is hard to reconcile with later legislation, ...⁹.

Part 9 Chapter 4 Clauses 104 to 106 Requirements to confirm nationality

19. Clause 104 inserts new sections 43A and 43B into the UK Borders Act 2007. Section 43B will create a new criminal offence which is committed when a person arrested fails to state their nationality when required to do so by an immigration officer or police constable. The maximum sentence for the offence in England and Wales is 51 weeks (six months if the offence was committed before the commencement of s 281(5) of the Criminal Justice Act 2003) and a fine. In Scotland the maximum penalty is 12 months and a fine. The distinction between 51 weeks and 12 months is material. A person sentenced to 12 months or more may be made subject to the “automatic deportation” provisions¹⁰ of the UK Borders Act 2007 and is also treated differently by the Home Office for the purposes of assessing whether their human rights under Article 8 of the European Convention on Human Rights will be breached by deportation¹¹.
20. In contrast to the offence in new section 46C of the UK Borders Act 2007 to be inserted by clause 195, no provision is made for a “reasonable excuse” defence even though the person arrested might be a child, trafficked or enslaved or otherwise acting under duress.
21. The defence under section 45 of the Modern Slavery Act 2015 does not make good the lacuna. The limitations of the s 45 defence were discussed at length during the passage of the Modern Slavery Act. Schedule 4 the Act contains a lengthy list of offences where the defence cannot be used. The addition of a reasonable person test is an extra hurdle for a non-prosecution defence that does not exist in international law. Article 8 of Directive 2011/36/EU¹² sets just two tests for a non-prosecution defence to apply: that a person’s involvement in criminal activities needs to be compelled and a direct consequence of their being trafficked:

Article 8 Non-prosecution or non-application of penalties to the victim

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal

⁹ Immigration Bill, Public Bill committee, 13th sitting (pm) 10 November 2015 col 475-476.

¹⁰ Sections 32 to 39.

¹¹ Nationality, Immigration and Asylum Act 2014 sections 117A to D.

¹² Directive 2011/36/EU of the European parliament and of the council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.

22. New section 43A(2) to be inserted into UK Borders Act 2007 provides that a requirement to state nationality may be imposed only if the immigration officer or constable suspects that the individual may not be a British citizen. What will constitute grounds for such suspicion? There are clear risks of racial profiling or of disadvantage to those who do not possess a national passport a group which includes person too unwell to travel, including some older persons, and also those living in poverty.
23. Clause 105 inserts new sections 46A, 46B and 46C into the UK Borders Act 2007. Section 46B creates a new criminal offence which is committed when a person arrested fails, whether before or after being charged and without reasonable excuse, to produce a nationality document when required to do so. The maximum penalties are as above. A person released following arrest, whether or not on bail, can be required to produce the document within 72 hours of release.
24. Again, a requirement to produce a nationality document may be imposed only if the immigration officer or constable suspects that the individual may not be a British citizen.
25. The definition of “reasonable excuse” excludes the deliberate destruction or disposal of the document and complying with instructions given by a person who offers advice about, or facilitates immigration into the UK, unless not complying would be unreasonable in the all circumstances. This creates risks for those who are afraid of traffickers and smugglers but not actually under their control.
26. New section 46B gives an immigration officer or constable powers to retain a nationality document as defined the immigration officer or constable suspects that the individual to whom the document relates may be liable to removal from the United Kingdom in accordance with a provision of the Immigration Acts, and that retention of the document may facilitate the individual’s removal. There is no requirement that a suspicion be reasonable. In what circumstances would a constable not trained in immigration law be able to retain a nationality document under the provisions of this section?
27. Will proper records be kept of when a document has been retained? The Immigration Bill currently before parliament creates a new power (Part 3, Enforcement, *Powers of Immigration Officers, Clause Search for nationality documents by detainee custody officers etc.*) to carry out strip searches of persons in immigration detention, in which some persons are held on completion of their criminal sentence, to search for nationality documents. It would be unacceptable that such a search were carried out on a person whose document had already been seized under this paragraph.
28. During debates on the Immigration Bill concerns were raised, including by Baroness Lawrence of Claverdon, that the provisions of the Bill would involve the police in immigration enforcement in ways that would undermine community relations¹³. These provisions increase that risk.
29. Clause 106 inserts new sections 86A and 86B into the Courts Act 2003. It applies only in England and Wales. Section 86A creates a new requirement that a defendant in proceedings in a

¹³ HL Report, 1 February 2016 cols 1589-1596.

criminal court must provide his or her name, date of birth and nationality if required to do so at any stage of proceedings by the court. Criminal Procedure Rules are to make more detailed provision. It is a criminal offence to fail, without reasonable excuse, to comply and the sentences are as above.

30. There is a risk that a statement of a person's nationality will contribute to prejudice against them, whether because they are not British or because of stereotypes associated with a particular nationality.
31. The definition of a nationality document in section 46A(7) is vague. First, it encompasses a passport but a passport is defined as a document a document "that can be used (in some or all circumstances) instead of a passport".