

ILPA evidence to the Public Bill Committee on the Investigatory Powers 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, Zoe.Harper@ilpa.org.uk on 0207 251 8383,**
2. This briefing covers:
 - **Clause 44 Interception in immigration detention facilities** in Chapter 2, *Other forms of lawful interception, Interception taking place in certain institutions.*
 - **Clause 96 Power to issue warrants to law enforcement officers** and **Schedule 4 Relevant Public Authorities and Designated Senior Officers**, insofar as they pertain to immigration officers, whether senior or not.
3. We share the concerns expressed by the Don't Spy on Us coalition in its briefing paper¹ as to the haste with which the Bill is proceeding and the lack of clarity in its provisions and its failure to protect the privileged communications between lawyers and their clients.

Clause 44 Interception in immigration detention facilities

4. Immigration detention facilities are dealt with in a part which includes psychiatric hospitals. They are defined to include immigration removal centres, short term holding facilities and the so called "pre departure accommodation" in which families with children are held.
5. Immigration detention is by administrative fiat and is without limit of time. The person detained will not be brought before a court or tribunal to have the lawfulness of their detention or their entitlement to bail considered unless they instigate this. Powers to detain are very broad. They covered the following scenarios:
 - Where a person is waiting for a decision on an application for leave to enter made at port, or
 - has had leave to enter granted overseas suspended, or
 - has had leave to enter refused/cancelled and removal is pending.

¹ https://www.dontspyonus.org.uk/assets/site/dontspyonus/files/investigatory_powers_bill_how_to_make_it_fit-for-purpose.pdf

- Where a person has been served with a Notice to a Person Liable to Removal as an illegal entrant, pending a decision on whether to issue removal directions and then pending removal in pursuance of those directions. In the case of those facing removal under the Immigration Act 2014, the power to detain arises the moment they are refused.
 - Where a person has been served Notice to a Person Liable to Removal for
 - breach of conditions
 - obtained leave to remain by deception
 - family member of such a person
 pending removal in pursuance of those directions.
 - Members of a crew of ship or aircraft who remain beyond the leave granted to enable them to join their ship or aircraft or abscond having unlawfully entered without leave.
 - Where a criminal court has made a recommendation for deportation.
 - Where the Secretary of State has given notice of intention to make a deportation order.
 - Where a deportation order has been signed.
 - While the Secretary of State is considering making an automatic deportation order.
 - Where the Secretary of State thinks that an automatic deportation order can be made, pending the making of that order.
6. Conduct is authorised if it is done in the exercise of any power conferred by or under the Detention Centre Rules and rules for short term holding facilities and pre-departure under accommodation made under s 157 and 157A of the Immigration and Asylum Act 1999 respectively. The latter two sets of rules do not exist.
7. While rules governing the regulation and management of short-term holding facilities were made in 2002² it took until 2006 for draft rules to appear, covering similar ground for short-term holding facilities as do the Detention Centre Rules for Immigration Removal Centres. In 2006 the Home Office consulted on draft rules³. ILPA responded⁴. In 2009 the Home Office consulted on another draft of the rules⁵. ILPA responded⁶. A number of freedom of information requests and parliamentary questions followed⁷. On 30 April 2012 the rules

² The Immigration (Short-term Holding Facilities) Regulations 2002 (SI 2002/2538).

³ See www.ilpa.org.uk/resources.php/14494/home-office-draft-short-term-holding-facilities-rules-2006.

⁴ See also www.ilpa.org.uk/resources.php/1889/home-office-to-ilpa-of-7-august-2006-re-draft-short-term-holding-facility-sthf-rules.

⁵ See www.ilpa.org.uk/resources.php/20183/uk-border-agency-ukba-to-ilpa-re-further-consultation-on-the-draft-short-term-holding-facility-sthf.

⁶ See www.ilpa.org.uk/resources.php/13062/uk-border-agency-further-consultation-of-the-draft-short-term-yxcvbholding-facility-sthf-rules-ilpas-furt See also The Lord Brett, Parliamentary Under Secretary of State to The Lord Avebury of 11 August 2009 re time limits for detention in Short-term Holding Facilities at www.ilpa.org.uk/resources.php/2919/the-lord-brett-parliamentary-under-secretary-of-state-to-the-lord-avebury-of-11-august-2009-re-time ; Refugee Council to Kristian Armstrong, Children's Champion, UK Border Agency of 5 August 2009 re short-term holding facilities and child protection www.ilpa.org.uk/resources.php/2940/refugee-council-to-kristian-armstrong-childrens-champion-uk-border-agency-of-5-august-2009-re-short

⁷ See e.g. https://www.whatdotheyknow.com/request/short_term_holding_facilities_2 , https://www.whatdotheyknow.com/request/short_term_holding_facilities_3 ; Hansard, Written Answers, 30 April 2012, column 1086W at: <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120430/text/120430w0001.htm#12043018000026> ; Lord Taylor of Holbeach to Lord Ramsbotham October 2013 <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/131030w0001.htm>

were described by then Minister, Damian Green MP, as being “still under development”. Neither an apology nor an explanation was offered. On 03 March 2014, during the passage of the Immigration Bill, Lord Taylor of Holbeach gave a commitment to Lord Avebury, who had been chasing the rules since 2006, that rules governing the management and operation of short-term holding facilities and the Cedars pre-departure accommodation would be introduced before the summer recess⁸. Lord Avebury was informed before recess that the commitment would not be met. He continued to pursue this.⁹ Draft rules were finally published on 18 February 2016, almost a decade after the first draft was published and some 14 years after they were envisaged. The wait does not appear to have produced a version markedly different from earlier versions or particularly tailored to short-term facilities. In the circumstances it is very far from clear what powers are being given by the current Bill.

8. In his review of immigration detention¹⁰, Stephen Shaw paid special attention to the problems of short-term holding facilities and to the dreadful conditions in some of them. His concerns lead him to recommend that a discussion draft of the short term holding facility rules should be published as a matter of urgency. Meanwhile, Her Majesty’s Chief Inspector of Prisons has published a damning report on one facility, the Longport Freight Shed in Dover, describing, aside the dire state of the facilities,

*“The Longport freight shed was a wholly unacceptable environment in which to hold people. From 31 August to 3 October 2015, a total of 569 people were detained there, including 90 children I...the longest single period of detention was for 21 hours 25 minutes and was of an unaccompanied child. ... **on various occasions Home Office staff told us that they did not consider Longport to be a place of detention...despite detainees being in possession of legal authority to detain documentation and obviously being unable to leave. At this facility, the normal mechanisms of internal oversight and accountability that should apply to any form of detention were lacking.**”¹¹*

9. Under these circumstances, the notion of the lawful exercise of the powers contained in the Bill appears fanciful.
10. What of Immigration Removal Centres? The latest version of the Detention Centre Rules dates from 2001 (SI 2001/238). They were last amended in 2005/673) to update the name of the Tribunal hearing immigration cases and bail application to the Asylum and Immigration Tribunal, a name itself out of date since 20 October 2014 when it was replaced by the Immigration and Asylum Chambers of the First-tier and Upper Tribunal. The rules contain a broad range of powers, from powers to fingerprint individuals and powers of search, to powers to identify survivors of torture or persons with a mental or physical illness, powers as to medical information and notification of illness and death, powers to segregate and use force and powers to carry out compulsory tests for drugs. There are also rules as to

⁸ HL Deb, 03 March 2014, , Column 1140, at:

<http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140303-0001.htm>

⁹ HL Deb 24 October 2014, Lord Bates to Lord Avebury, Written Answer HL2190 at:

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2014-10-20/HL2190>

¹⁰ <http://www.justiceinspectores.gov.uk/hmiprison/inspections/longport-freight-shed-dover-seaport-and-frontier-house/>

¹¹ <http://www.justiceinspectores.gov.uk/hmiprison/inspections/longport-freight-shed-dover-seaport-and-frontier-house/>

visitors to centres and as to contractors. In other words the rules cover the sorts of matters which would be covered by prison rules, although they apply a different regime. The overall effect is a lack of clarity as to how the powers in the section might be used and to what purpose; why they are needed and what safeguards could possibly operate effectively.

Clause 96 Power to issue warrants to law enforcement officers

11. Clause 96 describes the process and requirements for targeted equipment interference warrants which are applied for by law enforcement officers and issued by law enforcement chiefs. Under the Bill, persons appointed as immigration officers under paragraph 1 of Schedule 2 to the Immigration Act 1971 are among those who can apply for such warrants, for a serious crime which is an “immigration and nationality offences” as defined¹² or where the warrant is considered necessary for the purpose of preventing death or any injury or damage to a person’s physical or mental health, or of mitigating any injury or damage to a person’s physical or mental health.
12. The wording of the clause does not identify which immigration offences are considered to be “serious crimes” or indeed whether they are all considered to be serious crimes. A law enforcement chief or their delegate, where it is not reasonably practical for the law enforcement chief to consider the application, may issue a targeted information warrant if s/he “considers” that the warrant is necessary to prevent and detect serious crime and that the conduct authorised is proportionate ((1) (a) and (1) (b)). Decisions to issue a warrant require the prior approval of a Judicial Commissioner, unless the law enforcement chief or their delegate considers that there is an urgent need to issue the warrant. The process for urgent warrants is covered in clause 98.
13. To issue a warrant a law enforcement chief must be satisfied that satisfactory arrangements are in place to safeguard the material obtained (as detailed in clause 101). This mirrors the provision for warrants issued by the Secretary of State.
14. A law enforcement Chief does not need to be a Chief Immigration Officer but, per Table 1 in Schedule 6 to the Bill is an immigration officer who is a “senior official” (undefined) and who is designated for the purpose by the Secretary of State. In summary, there is no guarantee that a law enforcement chief will issue the warrant and no guarantee that there will be prior approval of a Judicial Commissioner. The circumstances in which the involvement of such persons is not required are not clearly defined.
15. The Government fact sheet says ¹³ the law enforcement agencies listed the Bill are all currently able to carry out equipment interference authorized by the Police Act 1997. It states that “The new legislation maintains law enforcement agencies’ abilities to interfere with equipment, reflecting current practice.” According to the factsheet the Bill “provides greater transparency and strengthens safeguards”. ILPA does not identify that there is transparency in either the current system or that identified in the Bill.

¹² Clause 96(7), 96(12).

¹³ UK Home Office/Ministry of Justice, January 2013, *Crime & Courts Bill: Fact Sheet- Powers of Immigration Officials*, Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98430/fs-mg-pwers-immigration.pdf

Powers in the Crime and Courts Act 2013

16. Powers of immigration officers to conduct intrusive surveillance were expanded by section 55 of the Crime and Courts Act 2013 this Bill, without any attempt being made to address the inadequate provision for training, supervision and regulation in relation to current powers, which include powers of arrest, search and detention.
17. Section 55 amended the Police Act 1997 s 93 to extend the list of "authorising officers" who can authorise applications to interfere with property and wireless telegraphy. The Explanatory Notes to the Bill that became the 2013 Act described the purpose of the provisions as being to provide for immigration officers working in criminal and financial investigation teams in the UK Border Agency to be able to apply to exercise property interference powers equivalent to those already used by customs officials pursuant to section 93(5)(h) of the Police Act 1997. And to enable the UKBA's Chief Operating Officer, then the authorising officer for customs purposes, to be further designated to authorise applications from immigration officers. The section amended section 32(6) of the Regulation of Investigatory Powers Act 2000 to extend the list of "senior authorising officers" who can authorise applications for intrusive surveillance to include a senior official in the department of the Secretary of State by whom functions relating to immigration are exercisable. This was stated to be to enable the UKBA's Chief Operating Officer, who was the "senior authorising officer" for customs purposes, to be designated to authorise applications from immigration officers for immigration crime investigations. "Intrusive surveillance" is defined under the Regulation of Investigatory Powers Act 2000 as covert surveillance carried out in relation to anything taking place on residential premises or in any private vehicle. This kind of surveillance may take place by means either of a person or device located inside the residential premises or private vehicle of the person who is subject to the surveillance, or by means of a device placed outside which consistently provides a surveillance product of equivalent quality product that which would be obtained from a device located inside.
18. The Schedule *Power of immigration officers: further provision* to the 2013 Act made further amendments to Part 3 of the Police Act 1997 to provide for immigration officers to apply for authorisation to interfere with property and wireless telegraphy with the authorisation of a senior immigration officer. Authorization could be granted for the purpose of preventing or detecting an immigration or nationality offence . Provision was made for a deputy to a deputy to authorize urgent applications in the absence of the authorizing officer. The Prime Minister was given powers to exclude from a copy of any report of the Chief Surveillance Commissioner to be laid before Parliament any matters which may prejudice the functions of the Secretary of State relating to immigration.
19. The Explanatory Notes to the Bill stated that "Guidance will be produced by the UK Border Agency in due course stipulating that applications for authorisation for intrusive surveillance are to be made only by immigration officers working in Criminal and Financial Investigation teams." The Bill changed the powers of immigration officers, making provisions for deputies to authorize urgent applications; for a grant, renewal or cancellation of an authorization for intrusive surveillance to be notified to a Surveillance Commissioner; for applications in urgent cases to take to take effect prior to approval by a Surveillance Commissioner and the issuing of written notice of the Commissioner's decision to the person who granted the authorization. Provision was made for a Surveillance Commissioner to quash or cancel and authorization. An authorization by a senior official within the then UK Border Agency was

not subject to the prohibition on authorizations extending to Scotland (paragraph 13). It was stated that guidance would be produced by the UK Border Agency to restrict applications for authorization for intrusive surveillance to those immigration officers working in Criminal and Financial Investigation teams.

Changes

20. The Investigatory Powers Bill 2016 extends the power to issue warrants to ‘law enforcement chiefs’. This is a wider definition than the ‘senior enforcement officers’ of the 2013 Courts and Crime Act, and gives the expanded repertoire of powers for immigration officials under the 2013 Act to new groups of officers.

21. The January 2013 Home Office Factsheet on the Powers of Immigration Offices under the Bill which became the 2013 Act stated:

Clause 36 extends the power to use intrusive surveillance under RIPA and property interference under Part 3 of the Police Act 1997 to those responsible for the investigation of immigration crime within the Home Office, namely immigration officers. ...

As a result, UKBA is currently required to get agreement from other agencies such as the Serious Organised Crime Agency (SOCA) and local Police forces to own jointly immigration investigations, and for those agencies to apply for and authorise the more intrusive techniques. The outsourcing of work to other law enforcement agencies such as the police and NCA will not always be possible for a variety of reasons and the practice does not ensure the appropriate ownership and management of risk. Looking ahead, the NCA will have a legitimate expectation that those tasked to lead on organised immigration crime investigations will do so effectively and promptly.

The overall aim of these provisions is to ensure that immigration officers can deploy a full range of investigative techniques to deal effectively with all immigration crime and are not restricted by virtue of their legacy designation within UKBA. ¹⁴

22. The Investigatory Powers Bill has again expanded the definitions of individuals who can apply and authorize equipment interference powers for immigration purposes. Clause 96 of the Bill refers to an ‘appropriate law enforcement officer’ and Schedule 4 of the Investigatory Powers Bill includes immigration inspectors. These appear to be Home Office staff rather than persons working for the inspectorate of Borders and Immigration for they are described as immigration inspector” “or equivalent” with responsibility for investigations or other functions relating to immigration and border ; security; with responsibility for anti-corruption in relation to investigations or other functions relating to immigration and border security, with responsibility for asylum fraud investigations and with responsibility for security and intelligence in the immigration detention estate/. These descriptions are vague in the extreme.

23. The powers in Clause 96 are wider than those in the 2013 Act, whereby use of the warrant need be necessary only ‘for the purpose of preventing death or any injury or damage to a person’s physical or mental health or of mitigating any injury or damage to a person’s

¹⁴ Home Office, Courts and Crime Bill: Fact Sheet: Powers of Immigration Officers, January 2013, Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/98430/fs-mg-pwers-immigration.pdf

physical or mental health' rather than forming a threat to national security, as required by the corresponding provisions in the Police Act 1997 and the Regulation of Investigatory Powers Act 2000.

Summary

24. The powers are broadly defined and vague. The way in which they could be used, against British citizens as against persons under immigration control, is unclear. There is provision to bypass safeguards and oversight so that these intrusive powers can be exercised by a wide range of staff, at a relatively junior level.