ILPA Briefing for Commons' Report 13 June 2016 Policing and Crime Bill New Clause 54 *Power to seize invalid travel documents* in the name of the Secretary of State the Rt Hon Theresa May MP

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. ILPA's briefing for second reading of the Policing and Crime Bill is available at http://www.ilpa.org.uk/resources.php/32033/ilpa-evidence-to-the-public-bill-committee-on-the-policing-and-crime-bill-06-april-2016.

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Member's explanatory statement from the marshalled list.

"This new clause amends Schedule 8 to the Anti-social Behaviour, Crime and Policing Act 2014 in three main ways.
First, it extends the existing powers of search and seizure under paragraph 3 of that Schedule so that they are exercisable by immigration officers as well as constables.
Second, those powers are further extended so as to be exercisable on the basis of a reasonable belief that a person is in possession of an invalid non-UK travel document. (Currently, those powers are exercisable only on the basis of a reasonable belief that a person is in possession of a cancelled UK passport as defined in paragraph 3(2) of the Schedule.)
Third, it inserts a new paragraph 3A that allows constables to enter and search premises where they reasonably believe that a cancelled UK passport or an invalid non-UK travel document is on the premises."

Briefing

The Immigration Act 2016 was given Royal Assent on 12 May 2016, after the Policing and Crime Bill was presented to parliament. Part 3 *Enforcement* Chapter 3 *Powers of Immigration Officers etc.* comes into force on 12 July 2016.

For example, section 51 *Search for nationality documents by detainee custody officers* of the Immigration Act 2016 gives "detainee custody officers, prison officers and prison custody officers powers to strip search a detainee for "nationality documents", broadly defined as documents "which might establish a person's identity, nationality or citizenship or indicate the place from which the person travelled to the United Kingdom or the place to which a person is proposing to go". Section 52 provides related powers of seizure and section 53 expands the existing offences of assaulting or obstructing a detainee officer, prison officer or prison custody officer to cover obstructing them in the course of exercise of these powers. Section 55 of the

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Immigration Act 2016 and Schedule 9 to that Act create powers and impose duties on other public authorities to supply nationality documents to the Secretary of State.
With the coming into effect of Part 3 of the Immigration Act 2016 immigration officers' will enjoy many of the powers of police officers and Schedule 8 to that Act is designed to ensure that they have many of the powers the police now enjoy under the Police and Criminal Evidence Act 1984. Is this simply a provision that was forgotten in the hasty presentation of the Bill which became the Immigration Act 2016 to parliament?

There were debates during the passage of the Immigration Act 2016 about the risks of increasing the powers of immigration officers. It is of concern that these provisions are to be debated in the context of a general policing and crime bill rather than a specialist immigration bill and that they can therefore not easily be situated and subject to a critique in the context of existing powers.

Extension of powers to encompass non-UK travel documents

The power is to seize "invalid" non-UK travel documents. Schedule 8 paragraph 3 to the 2014 Act defines an invalid document as one that
(a) it has been cancelled,

(b) it has expired,

(c) it was not issued by the government or authority by which it purports to have been issued, or

(d) it has undergone an unauthorised alteration.

The latter two bases of invalidity suggest wrong-doing. The former two do not. Many of us have old British passports, the corner clipped off to show that it has expired, in our possession. Persons under immigration control may keep these, *inter alia,* to demonstrate absence from/presence in the UK for the purpose of meeting residence requirements of nationality or immigration applications.

New paragraph 3(2A) of Schedule 8 to the 2014 Act to be inserted by this bill provides that invalid travel document is "an invalid non-UK travel document" if it is, or appears to be, a passport or other document which has been issued by or for the government of a state other than the United Kingdom.

Under the law of many countries, property in a passport vests in the issuing authority not in the person to whom the passport is issued. **Has the government consulted other states, or their ambassadors to the UK on these new powers? What has been their response?**

Extension of powers of search and seizure to cover non-UK travel documents

The powers are exercisable on the basis of a reasonable belief that a person is in possession of an invalid non-UK travel document. In debates during the passage of the Immigration Act 2016 concerns were raised, including by Baroness Lawrence of Claverdon, that the provisions of search and seizure in the Bill would undermine community relations[1]. **What equality impact assessment has the government carried out of the effect of the provisions?**

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[1] HL Report, 1 February 2016 cols 1589-1596.

New paragraph 3A (1) of Schedule 8 inserted by the Bill provides that the powers may be exercised in relation to "any premises" other than a port on the basis of a reasonable belief that "a cancelled UK passport or an invalid non-UK travel document is on the premises (whether or not in the possession of a person who is also on the premises)". In other words this is a power to search the premises of third parties, without the need for a person suspected to be on the premises.

The case is not made out for new powers of forcible entry and search when such powers already exist when the police already have powers of entry and search in cases where they suspect that a criminal offence has been committed. Unlawful entry, overstaying, are criminal offences, thus it is unclear what gap the new clause is intended to plug.

The limitation to cases in which there is a reasonable belief that the document is on the premises should give us little comfort given the ways in which the term is interpreted by the Home Office. The Home Office Enforcement Guidance and Instructions Chapter 31 give an example of a reasonable belief

> *Reasonable suspicion that an individual may be an immigration offender could arise in numerous ways but an example might be where an individual attempts to avoid passing through or near a group of IOs who are clearly visible, wearing branded Immigration Enforcement clothing, at a location which has been targeted based on intelligence suggesting that there is a high likelihood that immigration offenders will be found there. This behaviour could not necessarily be considered to be linked to, for example, evading payment of the train fare if IOs are wearing body armour or other items of work wear which clearly show which agency they belong to. In such circumstances the IO could legitimately stop the individual and ask consensual questions based on a reasonable suspicion that that person is an immigration offender*

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.

Giving immigration officers the powers of constables

In October 2014, in *R v Ntege et ors*[2], a prosecution of persons accused of arranging sham marriages, His Honour Judge Madge stayed the prosecution because of both bad faith and serious misconduct on the part of the prosecution. He held "I am satisfied that officers at the heart of this prosecution have deliberately concealed important evidence and lied on oath."

[2] See www.ilpa.org.uk/resources.php/30347/r-v-ntege-and-others-on-abuse-of-process-by-immigration-officers-21-october-2014

In *Abdillaahi Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453 the Court of Appeal concluded that the conduct of what was then the Immigration and Nationality Directorate and HM Prison Service in the unlawful imprisonment of Mr Muuse "*was not merely unconstitutional but an arbitrary exercise of executive power which was outrageous*". Indeed, it is clear that each of the Lord Justices considered that the Secretary of State was fortunate to avoid a finding of reckless indifference to legality, which would have established misfeasance in public office.

At paragraphs 73 and 74 of the judgment, Thomas LJ lists the key actions or omissions on the part of the officials and of the department which the Court found to exhibit the outrageous nature of the conduct of the officials and the department in this case. In the paragraphs that follow, Thomas LJ sets out what has been done to address the inevitable concerns arising from the findings of fact in this case. The Court's conclusion, justifying the grant of exemplary damages in the case, was that:

> "*Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in the future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages.*"

Immigration officers are not part of the regular police force yet they, and in many cases persons acting under their supervision, have powers as extensive as those of the police. These powers have been built up over successive pieces of immigration legislation.

The powers of an immigration officer are set out in Chapter 16 to the Home Office Enforcement Instructions and Guidance.[3] It is not a straightforward document to understand if one is not familiar with the powers in the first place but it gives an idea of just how extensive the powers are. MPs of the Committee should request a more detailed version of the tables therein so that they can properly understand existing powers of search, seizure and retention of documents. Immigration Officers have extensive powers to search without warrant in connection with criminal offence, including possession of false documents or illegal entry and under the 2016 Act are given powers of search without warrant in connection with civil infractions also. Multiple entry search warrants, including for searches for the premises of third parties, are permitted under the 2016 Act.

In the Immigration Act 2014 immigration officers were given powers to use reasonable force in carrying out any of their functions. Commenting on that power, Lord Ramsbotham, former HM Chief Inspector of Prisons and former chair of an independent commission on enforced removals said at second reading of the Bill that became the Immigration Act 2014:

> *"I do not believe that paragraph 5 of Schedule 1 which allows untrained and unlicensed immigration officers to use unspecified but allegedly 'reasonable force' when there is such an authentic catalogue of unreasonable force being used by those on Home Office contracts, including a charge of unlawful killing, should be allowed to stand. I go further by suggesting that it would be wholly irresponsible of this House not to try and ensure that current practice is wound up …"*[4]

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[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330367/Chapter16_v6.pdf
[4] Hansard, 10 February 2014: Column 515.

Seeming limitations on the powers are often illusory. For example, Schedule 2, paragraph 2 of the 1971 Act (ostensibly a power dealing with individuals on arrival in the UK for the purposes of determining whether they have, or should be given leave to enter or remain) has been used by the Home Office as justification for conducting speculative, in-country spot-checks involving 'consensual interviews' including with British citizens who have yet to satisfy the immigration officer that they are such citizens.[5] 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 the proposition that these powers can be used to examine persons 'who have arrived in the United Kingdom' can be used not only at port but in-country.

It is against this background that the new clause should be evaluated.

Conclusion

ILPA recommends that the new clause be rejected. No case for this extension of powers has been made out and it has the potential to involve the Home Office in seizing and retaining the property of foreign governments.

The government should be asked to provide its equality impact assessment and information about the consultation it has had with foreign consular authorities and to explain how it fits with the powers under the Immigration Act 2016 coming into effect to inform debates if it wishes to represent it in the House of Lords.

[5] HC Deb 1 December 2015, col 232, debate on amendment 39 at Commons' Report.