

UK Borders Bill

Parliamentary progress:

1. The UK Borders Bill was presented in the House of Commons on 25th January of this year. It is currently continuing its journey through the parliamentary process, having passed through the Commons and received its Second Reading in the House of Lords on 13th June. The Bill has been passed to a Grand Committee in the Lords, so will not be debated on the floor of the House until Report and Third Reading stages. This means it is unlikely that the Bill will receive any significant amendments before then because any amendments can be effectively vetoed by any one dissent.
2. The Bill will receive at least 4 days of scrutiny in committee in the Lords. We understand that this is likely to take the Bill through July meaning it will not receive its final stages in the Lords before October as Parliament is in recess from 26th July until 8th October.

Background to the Bill:

3. In his foreword to the Business Plan 2007/08 of the Border and Immigration Agency (BIA), Liam Byrne, Minister for Immigration, describes the Bill as part of “*an ambitious transformation programme*”, its contribution being:

*“New powers via the UK Borders Bill to strengthen our borders, close down organised crime and strengthen our ability to detect, detain and deport those here illegally.”*¹

4. In opening Second Reading in the Lords, Baroness Scotland, Minister of State at the Home Office, said:

“There are four key principles that have determined the content of the Bill. The first is further to strengthen our borders, with additional powers for front-line staff; secondly, to deter and detect the perpetrators of immigration crime; thirdly, to deport and restrict those

¹ The BIA Business Plan 2007/08 was published on 14 June 2007 and is available online at: <http://www.ind.homeoffice.gov.uk/6353/aboutus/businessplan0708.pdf>

who abuse our hospitality; and, fourthly, to lay a foundation for the Border and Immigration Agency to improve its service to the public.”

5. The Bill is a key element in the reform programme, which John Reid, Home Secretary, announced on 25th July 2006 when presenting *Fair, Effective, Transparent and Trusted: Rebuilding Confidence in our Immigration System*.² The Home Secretary identified four objectives:

“strengthen our borders, use tougher checks abroad so that only those with permission can travel to the UK, and ensure we know who leaves so that we can take action against those who break the rules;

“fast track asylum decisions, remove those whose claims fail and integrate those who need our protection;

“ensure and enforce compliance with our immigration laws, removing the most harmful people first and denying the privileges of Britain to those here illegally; and

“boost Britain’s economy by bringing the right skills here from around the world, and ensuring this country is easy to visit legally.”

6. In 2008, the Government intends to introduce a consolidating and simplification Bill³. The UK Borders Bill, therefore, is the last piece in the legislative jigsaw before the Government seeks to bring what has become an unwieldy mass of immigration legislation together in one Act.⁴
7. A cursory glance at the Bill quickly reveals its role in meeting these objectives – particularly in strengthening borders, enhancing removal powers, enforcing compliance with immigration laws and restricting entry (the flipside of boosting the economy by attracting the skilled and the financially well-endowed).

² available online at: <http://www.ind.homeoffice.gov.uk/6353/aboutus/indrev.pdf>

³ The Home Office is currently consulting on this; the consultation paper is available online at: <http://www.ind.homeoffice.gov.uk/6353/6356/17715/immigrationlawconsultation>

⁴ In fact the Bill will not be the last piece. One item expected in the current Bill was legislation on the Home Secretary’s response to the Home Office loss of the Afghan hijackers appeal, whereby the Home Office had been required to implement its discretionary leave policy by granting status to the hijackers reflecting the findings of a panel of asylum adjudicators in 2004 that returning the hijackers to Afghanistan would breach Article 3 of the European Convention. The Home Office have announced they will include in a forthcoming Criminal Justice Bill a clause introducing a restricted status, whereby certain individuals who cannot be removed because of Article 3 shall be restricted from working and mainstream benefits.

8. In brief, the Bill:

- substantially extends powers of immigration officers, including in certain respects over British citizens as well as foreign nationals
- enables the introduction of a biometric registration and identity card system for foreign nationals
- introduces new or increased powers to prosecute certain immigration offenders
- restricts evidence that may be put forward in support of certain immigration appeals
- introduces a mandatory deportation scheme for many foreign national offenders
- greatly extends powers and responsibilities for the sharing of information between government and other agencies
- introduces a chief inspector of the new Border and Immigration Agency, while empowering that inspector to restrict the inspection and supervisory powers of existing agencies

9. The remainder of this paper provides an overview of these elements of the Bill.

Immigration officer powers:

10. The current Government has increasingly legislated for immigration officers to hold police-like powers. Currently, a focal point of controversy in UK immigration policy is the call from the Conservatives and Liberal Democrats to introduce a UK border police force. Instead the Government has beefed up powers for the immigration service to look more and more like a police force, while extending others' powers to carry out immigration control duties. In several instances, this now includes powers for police officers, customs officials and, most extraordinary, private contractors – including overseas at juxtaposed controls.

11. By this Bill [clauses 1-4], immigration officers will acquire the power to arrest and detain any person (of whatever nationality) at a port of entry (excluding rail terminals at Waterloo and Ashford International⁵) for up to 3 hours where the immigration officer believes the person to be of interest to the police for any criminal offence. This power has nothing on its face to do with immigration control. It is the most explicit example of immigration officers attaining police powers; and is viewed as highly controversial because immigration officers do not receive the same or similar training as police officers and are not subject to similar codes of practice. The Government is to provide draft operating guidance as the Bill passes through committee.

12. The Bill [clause 16] also extends powers to set reporting and residence conditions to immigrants who have only limited leave to remain in the UK. The Government has to date explained that they want these powers so as to keep close contact with convicted foreign nationals or others excluded from Refugee Convention protection by virtue of Article 1F but who cannot be removed because of Article 3 of the European Convention. These individuals are only granted very short periods of stay with a view to early removal if the reasons for the Article 3 risk should pass⁶. Also to be targeted by these new powers are unaccompanied children, who are not granted refugee status but receive a short period of discretionary leave⁷. Essentially, these powers appear targeted at those whom it is intended will be removed in relatively short time. However, the only limitation upon the circumstances in which the clause 16 powers may be exercised is that the individual has only limited leave to remain. Thus, the reporting and residence conditions could be applied to a vast range of immigrants

⁵ It is currently unclear whether these powers will be extended to Scotland. On the face of the Bill, Scotland is exempted and the matter has been left to the Scottish Executive whose original position was that they would not extend such powers to Scotland on advice that the police in Scotland did not need this assistance from the immigration service. Although that position appeared to change before the elections, the election results have left the matter unclear.

⁶ Note also the anticipated restricted status – see fn. 4

⁷ Unaccompanied asylum-seeking children currently receive discretionary leave until they reach 17½ years, unless their asylum claims are accepted. The previous practice of granting discretionary leave to 18 years has been withdrawn, as the Border and Immigration Agency intend that to deal with all further claims and appeals after the expiry of discretionary leave with the expectation that removal can follow close upon the child reaching adulthood.

including visitors, family visitors, students, those on business or working visas and refugees whether or not these individuals are intent on staying permanently.

13. The Bill [clauses 23-25] introduces powers whereby immigration officers may seize and dispose of cash or property of certain immigration offenders. This may have a particularly offensive result for individuals working in the hidden economy, many of whom would be otherwise destitute as they are denied access to lawful employment or welfare and housing support⁸. The Government has estimated there to be anything up to 450,000 people who have remained in the UK following an unsuccessful asylum claim⁹. Many of these, and indeed others, may face cash being seized by immigration officers on the presumption that the cash must be the result of illegal earnings.
14. There are also new powers to search premises for a person's nationality document [clauses 43-45]. There are concerns that these powers will target black and ethnic minorities and aggravate community tensions because the power provided is to search various premises on the suspicion that a person, who is arrested in connection with any offence (whether or not related to immigration), is foreign. The power is evidently aimed at preparing the way for removal or deportation. However, profiles leading to the suspicion regarding nationality are likely to be grounded on such matters are race, colour or language.¹⁰
15. Collectively, these powers significantly extend immigration officer's powers into areas traditionally reserved for policing. They constitute a substantial extension of the capacity of the immigration service to exercise

⁸ There are a number of current campaigns seeking to address the circumstances of this large but undefined group. The Still Human Still Here campaign (www.stillhuman.org.uk) has sponsored an amendment to clause 17 of the Bill seeking to end destitution among failed asylum seekers.

⁹ Last July, the Home Secretary announced a legacy of 450,000 cases, which the Home Office would clear within 5 years. Little progress has been made to date on this legacy casework, which is now the responsibility of the Case Resolution Directorate.

¹⁰ Currently there is a pilot operating in the London Boroughs of Hillingdon, Waltham Forest and Westminster whereby persons arrested and taken to a police station in those boroughs will be asked 3 additional routine questions relating to nationality and possession of a nationality document.

powers within the territory of the UK rather than simply at the border; and in several respects are designed to bear ever more heavily upon those who are present in the UK illegally while maintaining closer scrutiny of others who are lawfully present.

16. ILPA and others have argued that the extension of policing powers to immigration officers should be matched by subjecting these officers to similar training, supervision and codes of practice. Ministerial commitments made on early Bills have not been honoured. So far as supervision is concerned, the extension of powers for the Independent Police Complaints Commission (IPCC) to deal with serious complaints against immigration officers continues to be delayed.¹¹ Much debate on the Bill has focused on the circumstances of children; and their continues to be pressure for the Government to withdraw the UK reservation in respect of the UN Convention on the Rights of the Child and extend statutory duties regard the welfare of children¹² to immigration functions. A safeguarding strategy for children in immigration processes is expected to be announced within 2 weeks.¹³

Biometric immigration document:

17. By this Bill [clauses 5-15], the Government is laying the foundation for introducing a biometric registration scheme for immigrants. It is intended that this will be rolled out for non-EEA immigrants first. In the longer term, this scheme is expected to be the forerunner of a scheme for British citizens further to the Identity Cards Act 2006.
18. The Government intends that the biometric identity document (BID) will replace the various paper documents, with which an immigrant may currently be provided in recognition of their status in the UK. The BID will, therefore, provide access for an immigrant to employment, education

¹¹ Section 41 of the Police and Justice Act 2006 empowered the Home Secretary to extend the remit of the IPCC in this way. An expected consultation remains outstanding.

¹² Section 11 of the Children Act 2004.

¹³ ILPA has seen what we understand to be the first draft of this safeguarding strategy or the principles it is intended to work to. So far as the draft we have seen is concerned, it is remarkably weak on commitments or proactive duties in respect of child safety and welfare.

or welfare entitlements. This is a key element of the Government's strategy on illegal working.¹⁴

19. The provisions in the Bill are highly controversial – as indeed is the wider intent to introduce identity cards for citizens. Particular controversies include:

- lack of detail in the Bill, which leaves so much to be introduced by way of Regulations, which in turn are generally not open to amendment by Parliament
- enforcement of registration, whereby penalties for failing to comply may include refusal to process, or outright rejection of, an immigration claim (including on the face of the Bill an asylum claim)
- discriminatory impact in relation to immigrants *per se* or non-EEA immigrants – there are potential incompatibilities with Articles 8 and 14 of the European Convention, and various provisions of the Refugee Convention
- extraordinarily wide scope for the retention, use and passing on of personal information (whether biometric or otherwise) held under the scheme

Immigration offences

20. The Bill [clauses 28-30] significantly extends offences in respect of people smuggling and trafficking. These provisions allow for prosecution of facilitators and traffickers operating outside the UK, and broaden the scope of offences to include facilitating entry into the UK in addition to arrival, which may include actions in the UK after the individual's arrival.

21. The Bill [clauses 3, 21-22] includes new offences of assaulting an immigration officer or obstructing an immigration officer exercising the power to detain at port. So far as the offence of assault is concerned, this appears to be in line with recent creation of new offences of assaulting

¹⁴ A consultation was announced in May regarding this strategy – see <http://www.ind.homeoffice.gov.uk/6353/6356/17715/preventionofillegalworkinge1.pdf>

specific categories of official. The result is something of a mess, in that there is no obvious reason for these specific offences (common assault being an offence in and of itself); and curiously the specific offence of assaulting a police officer carries a lesser maximum sentence than that in respect of an immigration officer (if only because of the timing of when the offence was introduced)¹⁵.

New evidence on appeal:

22. The Bill [clause 19] will restrict evidence that may be put forward in support of certain appeals. On appeals against refusals of entry clearance or certificates of entitlement under section 10 of the Nationality, Immigration and Asylum Act 2002, the AIT would be restricted to considering circumstances as at the time of the refusal decision.

23. As regards points based scheme¹⁶ appeals, evidence that was not presented to the decision-maker prior to refusal of leave to enter or refusal to vary leave to enter or remain would be excluded on appeal. This would not apply if the evidence was adduced to demonstrate that a document which was before the decision-maker is genuine or valid.

24. Generally, this approach is consistent with that in recent years of restricting appeal rights. The purpose is to encourage good applications, and to avoid the cost and delay caused by appeals. The Home Affairs Committee, who welcome this approach, nevertheless recommend the reintroduction of a minded to refuse stage¹⁷, and it appears the Government has some sympathy with such an approach but does not intend to introduce any formal stage.

¹⁵ cf. section 89(1) of the Police Act 1996, sections 51 and 57 of the Serious Organised Crime and Police Act 2005 and clauses 3 and 21 of the Bill

¹⁶ The Home Office announced the introduction of a points based scheme in March 2006 – see <http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/pointsbasedsystem>. The scheme is to be introduced in stages, and recent changes to the highly skilled migrant scheme constitute steps in that process.

¹⁷ The Chairman of the Home Affairs Committee once again pressed the Minister on this at Second Reading debate – see <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070205/debtext/70205-0010.htm>.

Mandatory deportation:

25. By this Bill [clauses 31-38], the Government seek to act on the Prime Minister's statement at Prime Minister's questions on 5 April 2006 in response to questions about the release of, and loss of contact with, several convicted foreign nationals without consideration of deportation:

"...it is about making sure that that system is radically overhauled so that those who are convicted of a serious criminal offence are deported automatically. If we do not do that, we may consider all the cases in time, but we will not deport all the people who should be deported."

26. The Bill provides two circumstances, where deportation of the individual will be mandated by law (so-called automatic deportation) and neither the Home Office nor any judicial body will have discretion to consider the individual facts of the case. This will be the case where a person has been sentenced to a term of imprisonment of 12 months or more for any offence. It will also be the case where the person has been sentenced to a term of imprisonment for an offence designated by the Particularly Serious Crimes Order 2004/1910. That Order lists various offences including criminal damage and theft.
27. The Government amended these provisions at Report stage in the Commons so that suspended sentences, which would have triggered mandatory deportation but for their being suspended, will trigger it if the sentence or any part of it is later ordered to take effect by a sentencing judge. It should be noted that mandatory deportation will not, under these provisions, be triggered by way of consecutive sentencing.
28. Exceptions to mandatory deportation is provided in five circumstances:
- where the individual is a minor at the date of conviction
 - where deportation would be contrary to either the Refugee or European Conventions
 - where deportation would be contrary to EU law
 - in certain circumstances relating to extradition

- in certain circumstances relating to mental health orders
29. The Bill excludes in-country rights of appeal against a mandatory deportation order, unless on human rights, asylum or EU law grounds. Human rights or asylum grounds may be certified as clearly unfounded so as to preclude an in-country right of appeal.
 30. The Bill also empowers the Home Office to detain indefinitely while considering whether the mandatory deportation provisions apply and whether to make the order. There are serious concerns as to the prospect of prolonged terms in prison of foreign nationals – or indeed those wrongly suspected of foreign nationality. Regrettably, although the Conservatives have been vocal in respect of those concerns, they are currently seeking an amendment to exclude compensation in respect of continued detention/imprisonment beyond the completion of sentence.
 31. Much of the debate on these clauses has focused on serious criminals who cannot be returned to their home country because of the risk of torture contrary to Article 3 of the European Convention. However, these clauses do not address this small category. If implemented in their current form (and there seems every reason to think these clauses will pass without amendment¹⁸), the only means to consider the individual facts of the case (including length of residence in the UK, general character and connections in the UK etc.) will be under Article 8 of the European Convention. No doubt, there will in due course be exploration of the reach of private life in this context.

Information sharing:

32. The Bill [clause 39] empowers HM Revenue and Customs and the Revenue and Custom's Prosecutions Office, as well as anyone authorised

¹⁸ An amendment, which ILPA has pressed for, has been tabled by the Liberal Democrats – see <http://www.publications.parliament.uk/pa/ld200607/ldbills/068/amend/am068-c.htm>. This would restore discretion to the deportation decision-making process though embed a presumption in favour of deportation within the legislation. However, it seems clear that the Conservatives will not support such an amendment. Indeed, in both Houses, their lead speakers have complained at the breadth of exclusions (e.g. on human rights grounds) in the provisions as they currently stand.

to act on their behalf, to share a large variety of information and documentation with the Home Office. It also [clause 42] extends the circumstances in which police information may be shared with the Home Office for the purpose of determining whether an individual is of good character for the purposes of a naturalisation application or consideration of deprivation of citizenship.

33. In addition there are the biometric provisions, previously discussed, which carry the prospect of Regulations allowing for personal information being shared or passed to a variety of agencies.

Chief inspector of BIA:

34. In answer to criticism of the lack of training, supervision and regulation in respect of greatly increased powers exercised by immigration officers, the Immigration Minister informed the Public Bill Committee that he intended to introduce a new, single inspectorate to provide greater scrutiny and transparency with regard to the activities of what was to become the Border and Immigration Agency. The Government duly introduced clauses 47-53. Clause 53 will abolish a number of monitors or panels currently exercising some supervision over certain BIA functions. Clauses 51-52 will allow the chief inspector to refuse to cooperate with, or refuse to allow inspections by, remaining agencies which retain a supervisory role on operational grounds. At Report stage, in answer to questions raised in debate, the Under Secretary provided no comfort at all to those concerned that the likes of HM Chief Inspector of Prisons, the Prisons and Probations Ombudsman or the IPCC¹⁹ may find their ability to carry out their duties curtailed.

Concluding remarks:

35. It can be seen that the Bill does, in several ways, set out to meet the Government's stated objectives; and criticism of the Bill likely reflects

¹⁹ The Under Secretary's remarks in the debate appeared to renege on the commitment to extend the IPCC's responsibilities to serious complaints against immigration officers. However, we understand that the commitment to this extension remains.

wider concern at the general thrust of immigration policy over recent years. General themes behind that policy have been to stress the importance of detecting, preventing or removing those who seek to ‘abuse’ the UK’s immigration laws and ‘hospitality’, while focusing upon the important benefits offered by certain immigrants.

36. For those concerned for asylum and asylum-seekers, the Bill reinforces the general emptiness of immigration policy with regard to refugees and others at risk of human rights abuses. While the capacity for the state to maintain and police borders (including before and after entry) continues to increase, recognition of the difficulties and dangers this presents for those fleeing human rights abuses remains little more than careless afterthought.

37. Beyond this group, the ever increasing cost of immigration control and the greater flexibility Government has taken to pass on such cost²⁰ will it seems greatly exacerbate the disparity of immigration opportunities, which are steadily becoming embedded in UK immigration policy, as between the skilled and the unskilled, the wealthy and the poor. As regards the hundreds of thousands already living hidden, and in many cases, desperate lives in the UK as part of the ‘sans papier’, their prospects too look increasingly precarious.

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²⁰ Clause 20 of the Bill builds on the approach taken in the Immigration and Nationality (Fees) Regulations 2007 and section 42 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.