

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

UK Borders Bill

Liberty briefing for Committee Stage in the House of Commons

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

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Introduction

This briefing sets out Liberty's suggested amendments for the UK Borders Bill. As we have said in our Second Reading Briefing our two main areas of concern are the presumption of deportation for foreign prisoners and the introduction of a biometric identification documents for non EEA residents. The bill also raises a number of other issues particularly in relation to the increase and exercise of police and immigration officer powers.

1) Amendment

Clause 1, page 1, line 12

New subclause 1 (4) 'The Secretary of State may by regulations make provision as to how requirements for designation under section 1 (2) are satisfied.

Effect

This will allow regulation to be made that will set out in greater detail the way in which the requirements of immigration officer designation are satisfied.

Briefing

The designation of immigration officers is limited to those officers determined by the Secretary of State as being those who are fit and proper for the purpose and suitably trained (Clause 1 (2)). This amendment would simply allow for regulations to be passed by negative resolution. Regulations could then set out the criteria that would be applied in order to determine who would be suitable for designation. It is appropriate that determinations are made according to set criteria otherwise the designation process could be arbitrary.

2) Amendment

Clause 2(1), page 1, line 14 after 'an individual' insert 'on an immigration or nationality matter'

New subclause 2 (6), page 2, line 17 'For the purposes of this section "an immigration or nationality matter" means an offence under the Immigration Acts

Effect

This will limit powers of designated immigration officers to detain people under s.24 of the Police and Criminal Evidence Act or under warrant to situations relating only to offences committed under the immigration acts.

Briefing

Once an immigration officer has been designated he or she will enjoy considerable power. These will not only cover detentions but search and the use of reasonable force. Anyone who absconds from a designated immigration officer will commit an offence in doing so. The powers normally available to those who are not constables are contained in s.24A PACE and are more limited. Liberty does acknowledge that there may be occasions where it is appropriate to detain and search when there is no constable present. However we also note that this extension is part of a general trend to grant powers traditionally reserved for the police to those who have not received policing training. The granting of quasi policing powers to immigration officer also conflates crime and immigration. Governments should be wary of sending continuous signals that immigration is criminally suspicious per se.

Of particular relevance is that these powers relate to British nationals. For the first time this seems to bring British nationals within the control of the immigration service. This is of particular concern seeing as there is no need for the suspected offending to be in any way related to border control. If these powers are to be created then they should be limited to situations where the offending behaviour is concerned with immigration. This would still apply to British nationals who were, for example, suspected of involvement in people trafficking. We appreciate that the powers are limited to exercise at a port and that an individual must be present there for travel purposes. However, without further amendment it would still mean that the powers could be used in relation to any type of suspected offending by the person. It is appropriate to ensure that designated immigration officers enhanced powers are limited to situations relevant to their employment.

3) Amendment

Clause 6 (6) (e), page 5, line 7, after ‘Parliament’ insert ‘with or without amendment’

Effect

This amendment will allow Parliament to make amendments to regulations made under new powers requiring non EEA citizens to register for a ‘Biometric Immigration Document (BID)’.

Briefing

Clauses 5 to 15 set out powers for the Secretary of State to make regulations requiring anyone subject to immigration control to apply for the issue of a ‘Biometric Immigration Document’. Persons subject to immigration control are those who require leave to remain in the United Kingdom, whether or not they have leave to remain. This will cover every person who originates from outside the European Economic Area (EEA) including, for example, Commonwealth citizens who have been given indefinite leave to remain in the UK. The explanatory notes to the bill do not give any indication of the policy justification behind the creation of the document. The Home Office press release accompanying the publication of the bill said that the document ‘will help the government prevent fraud and illegal employment, and make it harder for immigrants to adopt multiple identities.’¹ Although not stated as the reason for introduction, biometric registration is effectively the first stage of roll out of the National Identity Card Scheme. This is certainly how roll out towards compulsion was envisaged in the November 2003 Document ‘Identity Cards: The Next Steps’. This identified the first step towards general ID card compulsion as ‘introducing mandatory biometric identity documents for foreign nationals coming to stay in the UK for longer than 3 months.’²

There may be a considerable number of people in the UK who do not have rights of residence or work. However, we do not see the creation of a biometric registration document as being a particularly effective method of dealing with this. When the Bill was published, the Immigration Minister Liam Byrne said that the document would

¹ <http://www.homeoffice.gov.uk/about-us/news/powers-boost-controls>

² Identity Cards: the Next Steps <http://www.archive2.official-documents.co.uk/document/cm60/6020/6020.pdf> Page 5

“make life easier for...businesses by giving them a failsafe, easy method to check whether people are here legally and whether they are who they say they are.”³

Employers already face legal obligations under the Asylum and Immigration Act 1996, to make document checks in order to establish that employees have a right to work in the UK. This will normally be by way of questions in applications and references to passports and other relevant documents. We are not aware that there is a significant problem with employers being *deceived* by fraudulent employees with fake documents. It would be helpful if the Government were to clarify in Committee if there is such a problem. We suspect the real problem of illegal working lies not in the deceiving of honest employers but in the intentional employment of those without immigration status by unscrupulous and exploitative employers. If so, the creation of the document will have no impact as such employers are fully aware (and indeed depend on the fact) that their workers are employed illegally.

More generally we would add that the existence of a biometric identification document is unlikely to have a great impact upon the numbers of people illegally residing in the UK. As stated in the previous paragraph, if there is a significant problem it lies in the exploitation of illegal workers. It follows that the authorities are likely to know where many illegal immigrants might be located. The tragic events in Morecombe bay in February 2004, where 23 Chinese cockle pickers were drowned after being trapped by an incoming tide, show that locating illegal workers is unlikely to present a problem to the authorities. We imagine the problem lies in the ability of the authorities to detain, hold and return illegal immigrants. We say this not by way of comment on the removal process but to illustrate that the existence of biometric registration will be little more than totemic in terms of effectiveness in restricting illegal immigration. For the hundreds of thousands (if not more) non EEA citizens legally present in the United Kingdom, the biometric registration document has the potential to be extremely invasive in allowing extremely broad powers for the collation, retention and dissemination of personal information. We do acknowledge that it represents a useful starting point for a move towards compulsory registration for the National Identity Register (NIR). Members of Parliament who support compulsory registration and moves towards a National ID card might still

³ http://news.bbc.co.uk/1/hi/uk_politics/6300725.stm

acknowledge how important it is that regulations with undesirable privacy or race relations implications are subject to alteration.

Regulations made under the bill can include such open ended obligations as requiring the use of a document where a question arises about a persons status in relation to nationality or immigration (Clause 5 (1)(b)(iii)) and requiring a person who produces the document to provide other information for comparison (Clause 5 (1)(c)) . There is also potentially unlimited scope on what information can be required. Regulations can make provision as to the content of the document - which can include non-biometric information – (Clause 5 (2)(d)) and allow for the document to be combined with other documents (Clause 5 (2)(e)). They can also require the document holder to notify the Secretary of State at any time stipulated by regulations (Clause 5 (2)(h)) and require the surrender of the document or any other documents (Clause 5 (2)(i)(j) and (k)). Sanctions for a failure to comply with any of the regulations can carry severe sanction. While the financial penalty is limited to a £1000 fine (Clause 9 (3)) more drastic steps such as the cancellation of leave to remain in the UK can also be imposed (Clause 7 (2)(c)). Clause 8 provides a direct link between the information contained on the document and the information that will be held on the National Identity Register created by the ID Card Act 2006. This allows regulations to permit the use of information for specified purposes not relating to immigration (Clause 8(2)) and provides that there is no need to destroy information if it is retained in accordance with other enactments (Clause 8(4)).

Regulations can force any non EEA person to provide unlimited information for unlimited purposes. For example, regulations made under clause 5(2)(d) could require that any person required to apply should provide detailed information about their medical history which could then be used for purposes which have nothing to do with immigration by virtue of clause 8(2). Of course the regulations will clarify the scope but the ability of parliament to determine whether that scope is appropriate is limited. Clause 6 sets out the process by which regulations will be made. These will be by the positive resolution procedure so they must be laid before and approved by both Houses of Parliament. However, this does not allow for any variation of the regulations. They will either stand or fall as a whole. It may be that Parliamentarians

feel that while the majority of regulations are reasonable, there are others that go too far.

We believe that such wide ranging regulations should be amendable. There is precedent for allowing amendable regulations. The Identity Card Act 2006 and the Civil Contingence Act 2004 both allow for changes to be made. The lengthy regulations likely to be published here make it extremely appropriate that changes can be made.

4) Amendment

Clause 7, page 5 line 22, new subclause (3) ‘No action taken in accordance with regulations made under subsection (2) shall permit a breach of -

- (a) a person’s convention rights
- (b) the United Kingdom’s obligations under the refugee convention, or
- (c) a persons rights under the Community treaties

Effect

This will ensure that anyone who fails to comply with regulations relation to the registration for BID does not face repercussions so severe as to result in the UK breaching its international obligations.

Briefing

Clause 7(2) set out the scope of regulations that can be made to penalise those who fail to comply with registration regulations. These include provision for financial penalties but are also very open ended as to other consequences. In particular they might result in a person being refused an application for immigration, having their leave cancelled or varied or any other consequence the Secretary of State thinks appropriate.

It is important to ensure that there is a safeguard in the bill to ensure that no consequence could result in the UK breaching its international obligations. In particular no-one should face deportation in breach of the refugee convention or of the Human Rights Act. The relevance of these is considered in detail in relation to the deportation amendment 9) below.

The Government might suggest that this amendment is unnecessary in that all legislation must be interpreted in accordance with the HRA and that no action taken by a UK public authority could result in breach of the refugee convention. However, writing this safeguard onto the face of the bill is still appropriate. It will ensure that regulations are sensitive to the need for international compliance and that any decision to cancel or vary leave to remain is taken with the need for compliance in mind. This argument has already been accepted by the Government in relation to deportations. Clause 29 contains safeguards to ensure that no foreign prisoner can be deported in breach of HRA, refugee convention or the Community treaties.

5) Amendment

Clause 8(2), page 5, line 27 after purposes ‘in accordance with and for the purposes of another enactment’

Effect

This will limit the use of the biometric immigration document for purposes other than relating to immigration

Briefing

Clause 8(2) gives carte blanche for the information contained in regulations to be used for purposes that have nothing to do with immigration. The range of information that can be included in the regulations is practically without limit given the scope provided for in Clause 5 (2) and 5 (3). The combined effect of Clauses 5 (2) and (3) and 8 (2) is that a huge amount of information can be obtained and disseminated for any purpose. As regulations will be unamendable, Parliaments ability to determine the appropriate scope is very limited.

It is clear that the information taken is intended to be used to as a person’s biometric and non biometric entry on the National Identity Register (NIR). Clause 8 is intended to provide the mechanism which will allow this information to be shared. This amendment is intended to limit the scope of information use only to purposes set out in statute by another enactment. Liberty opposes the NIR and will continue to do so. However, if information is to be used for other purposes there should be at least a

limitation to other statutory uses such as for the NIR. Without any limitation on Clause 8(2) the information could be used for any purpose at all.

6) Amendment

Clause 15(1), Page 8, line 44

New subclause 15 (1) (h) ““non biometric information” does not include any sensitive personal data (within the meaning of the Data Protection Act 1998 (c. 29)) or anything the disclosure of which would tend to reveal such data.’

Effect

This would bar the recording of sensitive personal data from the information contained on the biometric immigration document.

Briefing

Information to be kept covers non biometric as well as well as biometric. Again the scope of permissible regulation under clause 5 and the range of use permissible under clause 8 means that there is little restriction on regulation.

This amendment will restrict non biometric information so that sensitive personal data is excluded. Sensitive personal data is defined by Section 2 of the Data Protection Act 1998 as personal data consisting of information as to:

- the racial or ethnic origin of the data subject
- his political opinions
- his religious beliefs or other beliefs of a similar nature,
- whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- his physical or mental health or condition,
- his sexual life,
- the commission or alleged commission by him of any offence
- any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

We cannot imagine that the Government intends that any of the information above might be reasonably contained as part of a person's entry on the register. Unless a justification for recording any of the information listed above is made in Committee we do not see how there could be an objection to this amendment.

7) Amendment

New Clause after clause 15, page 9, line 9

New Clause 'Nothing in this part authorises the making of regulations the effect of which would be to require an individual to carry an biometric immigration document with him at all times'

Effect

This would prevent the impact of regulations being that a person is required to carry their biometric immigration document.

Briefing

Liberty's principal concern over the creation of biometric immigration documents is that they have the potential to be used as a form of internal immigration control. We have expressed concerns before about the way Identity Cards might be used in this manner, despite the ID Card Act 2006 stating that regulations requiring people to carry identity cards cannot be passed. The fact that there is no such restriction on regulations here makes the use of documents for internal immigration control more likely. Immigration officials frequently apprehend people on public transport. In September 2004, *The Guardian* newspaper ran a story claiming that in the previous 15 months, 235 operations had been conducted adding "The figures showed that those arrested included 717 failed asylum seekers but thousands more people have been stopped and questioned by immigration staff using powers which the police are banned from using."⁴ Comments by the then immigration minister, Des Browne, were telling. He said that officials could legitimately question people to determine their immigration status where there is a reasonable suspicion that a person is an immigration offender. Once the documents have been brought in it is easy to see how people who do not 'look like' EEA citizens will be regularly asked to establish their

⁴ Guardian, 15 September 2004 '1,000 illegal migrants arrested in swoops' Alan Travis

status. Those who do not originate from the EEA come from any number of countries and a variety of ethnicities. We are, however, concerned that it will be predominantly black and minority ethnic people who are required to satisfy immigration officers of their status. The creation of the biometric immigration document has the potential to be racially divisive.

At present the bill is silent as to whether people can or cannot be required to carry a BID. However, regulations under, for example, Clause 5 (1) (which permit regulations to require the use of a BID where question arises about a person's nationality or immigration) could allow for a BID to be carried at all times. As regulations cannot be amended, there would be little parliamentarians could do other than reject a tranche of amendments outright.

If this amendment is adopted it would prevent the possibility of requiring BID holders to carry them as a matter of course. There is a similar provision contained in the Identity Card Act 2006.

8) Amendment

Clause 16, page 9, line 17 insert new subclause '() For the purposes of section 3 (1)(c)(v) any condition imposed upon residence must be reasonable in all the circumstances'

Effect

This will restrict the scope for placing residence restrictions on those required granted conditional leave to remain.

Briefing

Clause 16 extends the conditions that can be imposed on people who are given limited leave to remain. The existing restrictions contained in the Immigration Act 1971 cover employment, maintenance without recourse to public funds and a requirement to register with the police. The new restrictions allow for a requirement to report to an immigration officer and conditions on residence. We are not certain why the new restrictions are needed and hope the grounds for imposition will be explained during progress of the bill. It may well be that they are intended to cover specific groups such

as the young who cannot be deported due to their age but who will be deported as soon as they are old enough. We believe a residence restriction could potentially raise issues under the Human Rights Act 1998. A requirement to reside in a particular place could engage Article 8 HRA (The Right to Respect for Family Life) and Article 11 (the Right to Freedom of Association). Any restriction on residence must be for a legitimate reason⁵ and must not be excessive according to individual circumstances. The fact that someone is not a UK citizen does not mean that excessive constrictions can be imposed upon them. As all legislation must be read in a way that is compatible with the HRA⁶, this need for legitimate purpose and proportionality is arguably implicit. However, there has been a legislative tendency in recent years create broad powers and then justify them by reference to human rights protections. The HRA should not be used as an antidote to overbroad drafting. This approach also requires that the extent of protection be tested in the courts. It is preferable to ensure that determination of restrictions is not excessive at the time of imposition by an immigration officer.

9) Amendment

Clause 28, page 14, line 10 delete ‘Automatic’

Clause 28 (5), page 14, line 24 after ‘Secretary of State’ delete ‘must’ insert ‘may’;
after ‘criminal’ delete ‘(subject to section 29)’

Clause 28 (6), page 14, line 26, after ‘Secretary of State’ delete ‘may not revoke a deportation order made in accordance with subsection 5 unless’ insert ‘shall not make a deportation order in accordance with subsection 5 if-’

Clause 28 (6) (b), page 14, line 30 at end insert ‘or’

Clause 28 (6), page 14, line 31 new subclause 6(c) ‘he believes that deportation will cause hardship disproportionate to the severity of the offence’

Effect

These amendments will change the way in which the Secretary of State will order deportation. The requirement that a deportation order must be made and then can only be revoked in limited circumstances is changed. The Secretary of State is given a

⁵ The legitimate reasons contained on Article 8 and 11 HRA and include national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

⁶ Section 3 HRA

general power (but no obligation) to make an order. Subclause 6 is changed so that rather than introducing strictly limited grounds for revoking an order the emphasis is changed. The Secretary of State shall now not make an order if one of the exceptions under clause 29 applies, if the person is out of the country or if to do so would cause undue hardship taking into account the seriousness of the offence.

Briefing

Clauses 28 to 35 creates a system of automatic deportation for any foreign criminal who has been sentenced to a period of custody of 12 months or who is imprisoned for a serious offence listed by order made under Section 74(4)(a) of the Nationality Immigration and Asylum Act 2002. The Order made under this section is SI 2004 No. 1910⁷ which lists a range of statutory and common law offences. The rationale being that any conviction for these offences resulting in imprisonment warrants deportation. As mentioned earlier, the basis for the toughening up of the foreign prisoner deportation regime was the failure to remove (and in many cases even consider for removal) prisoners who could have been deported. Basing a major policy shift on mistakes should always be a cause for concern. It is likely that failure will be compensated for by excess. On 3 May 2006, the Prime Minister said to the House of Commons of the deportation system that *'this system has not worked properly for decades'*⁸ so the inclination to excess is strong. However, passing new laws does not compensate for systemic Home Office failure. Public safety is far better served by ensuring that existing processes work effectively. We do not believe there is any need to change the existing deportation regime. Passing even the most severe laws will make little difference unless they are applied.

Automatic deportation orders can only be revoked if one of a set number of exemptions set out in Clause 29 is satisfied. Of these, the most significant is Clause 29 (2) which bars extradition if to do so would breach a person's convention rights (under the European Convention on Human Rights) or the UK's obligations under the Refugee Convention. The 1951 Refugee Convention does not permit the expulsion of

⁷ http://www.opsi.gov.uk/si/si2004/uksi_20041910_en.pdf

⁸ http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060503/debtext/60503-03.htm#60503-03_dpthd0

a refugee, unless on the grounds of national security or public order (Article 32). It also prohibits return where a person's life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion (Article 33). However, this right cannot be relied upon by any refugee where there are reasonable grounds to regard them as constituting a danger, having being convicted of a particularly serious crime. The ECHR protections are more wide ranging in that they apply to anyone to be deported, not simply to refugees. The specific Articles of the convention likely to be engaged are Article 3 (The Prohibition on Torture and inhuman or degrading treatment or punishment) and Article 8 (The Right to Respect for Privacy and Family Life). There is also a protection for the breach of convention articles generally but these will only be relevant if the violation is likely to be particularly severe⁹. Article 3 is absolute in there are no exceptions permitted to the principle that a person cannot be removed if they are likely to face torture or death upon return a country¹⁰. The Government has stated it wishes to challenge this prohibition, possibly through challenge in the European Court of Human Rights (ECtHR). However, the continuing absolute nature of the prohibition means that there is little additional comment that can be made.

By its nature, an Article 3 protection more likely to apply to those who have sought refuge in the United Kingdom. For those who have been granted temporary or indefinite immigration status a reliance on Article 8 is the most likely source of protection against removal. We would emphasise that Liberty takes no issue with the (safe) deportation of anyone who is not a national for the public safety and security grounds that have until now formed the basis of determinations of removal. The extension will impact predominantly on those who are imprisoned for 12 months or more for non violent offences (such as fraud) or those who receive short custodial sentences (probably implying limited involvement) for an offence listed in the statutory order SI 2004 No. 1910. The offences listed in the order include criminal damage, theft and threatening unlawful violence.

The extent to which Article 8 will offer protection will depend on how caselaw develops once the legislation is passed. It is established under Convention caselaw

⁹ *Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2004] UKHL 26

¹⁰ *Chahal v UK* (1996) 23 E.H.R.R 413

that deportation following conviction for a criminal offence for people who have developed strong ties with a country has been found to be disproportionate in a range of cases¹¹. Article 8 deportation cases are extremely context specific so it is difficult to predict in greater detail how case law will develop, especially as the ECtHR allows a 'margin of appreciation' for member states to interpret convention rights according to the domestic laws passed.

The scope of extension means that anyone who has received a short custodial sentence for theft will be automatically deported. This goes well beyond the existing justifications such as that in Article 33 of the Refugee Convention that the person should be a danger or convicted of a particularly serious crime. The protections offered by article 8 relate to the impact upon family life rather than the severity of the offence (although the severity will be taken into account in determining whether a decision to deport or not is proportionate.) This means that the person receiving the short custodial sentence for theft, whose children have grown up, is likely to be less well protected than the person committing the more serious offence but who has younger, more dependant, children. It also means that a sentencing judge or magistrate might be inclined to avoid imposing a custodial sentence for an offence listed in order SI 2004 No. 1910 or one less than 12 months for other offences. Even if they believe custody is justified they will know that deportation is almost certain to follow and are concerned that this would be an unfair and disproportionate consequence.

We are concerned that the message being sent out by automatic deportation is contrary to the approach traditional to both crime and immigration matters. That is that each case is judged on its merits. It now appears that where foreigners are concerned a one size fits all approach will suffice. Notwithstanding our belief that there is no need to change the existing system Liberty believes it is possible to build some flexibility and discretion into the proposed system while still achieving the government's desire to create a strong presumption in favour of deportation. Rather than make deportation automatic and then revocable in limited circumstances it would be more appropriate to create some leeway.

¹¹ In the UK for example in *Lamguindaz v UK* (1993) 17 EHRR 213

This has been achieved through the suggested amendment by changing the obligation to deport (revocable only if the limited Clause 29 grounds re made out) into a general discretion. The grounds for not making an order have been expanded so that an order will not be made if the secretary of state believes that the person will suffer hardship that is disproportionate to the severity of the offence. It would allow scope for protection of the person who might not have the familial ties necessary to successfully rely on Article 8 but who would suffer hardship if deported that was excessive in comparison to the nature of offence they had committed. Such a determination could also be available to Asylum and Immigration Tribunal when considering appeals under Section 82 of the Nationality Immigration and Asylum Act 2002.

10) Amendment

Clause 31, page 16, line 21, delete ‘an automatic’ insert ‘a’

Clause 31, page 16, line 25 delete ‘an automatic’ insert ‘a’

Clause 31, page 16, line 30 delete ‘an automatic’ insert ‘a’

Clause 33, page 17, line 11, delete ‘automatic’

Clause 33, page 17, line 18, delete ‘automatic’

Clause 33, page 17, line 21, delete ‘automatic’

Effect

These changes will ensure that removal of the requirement for automatic deportation is consistent throughout the bill.

Briefing

Of particular relevance to these changes is clause 31 (3) which inserts a new Section 82 (3A) to the Nationality, Immigration and Asylum Act 2002. This makes deportation under Clause 28 (5) of the Bill subject to appeal to the Asylum and immigration Tribunal. As a consequence the tribunal will be able to determine that an appeal in the basis of the extended grounds (if adopted) for not deporting.

11) Amendment

Clause 40(1), page 21, line 46 at end insert new subclause (c) ‘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’

Effect

This amendment will place an additional requirement on police or immigration officers who wish to enter premises to locate a nationality document. As well as suspecting that the person is not a British citizen and that the premises and that their nationality documents might be present the officer must also believe that the person is liable to deportation from the UK.

Briefing

The scope of Clause 40 is worryingly broad. Most people are likely to keep their main nationality document (their passport) and any other immigration documents at their home. It would be reasonable for any immigration officer to ‘suspect’ (Clause 40 (1)) that their passport will be found there. This will allow any property to be entered in order to seize a passport. The power of entry and search does not require that the immigration officer or constable believe that the person will be liable for removal as that belief only relates to the power of seizure in Clause 41. While there is the need for an authorising senior officer the only thing that they must record is the grounds for suspicion for the search (i.e. that the passport was in the property) and the documents sought. It does not matter what the person has been arrested for. This gives extraordinarily broad powers of entry and search without judicial warrant especially as under Section 110 of the Serious Organised Crime and Police Act 2005 *all* offences are now arrestable. Clause 40 essentially allows the search of premises for the passport of anyone suspected of being not British who is under arrest in order to search for their passport. It is likely that the majority of those against whom the powers are exercised will be from ethnic minority backgrounds. The use of the entry and search powers without additional safeguard against improper use and without added authorisation is likely to prove racially divisive.

This amendment will provide some check upon ability to enter the property. This is necessary as powers to enter property without warrant are, rightly, limited and specific. They generally arise under the Police and Criminal Evidence Act 1984 to,

for example carry out an arrest or capture someone escaped from custody. Powers also exist under specific legislation in order to, for example to search for drugs or firearms. General powers to enter premises of the type proposed here have not been created due to the fact that entry onto property needs specific and legitimate justification. Such a justification might arguably arise if there were a suspicion on the part of the officer that a person might be subject to removal from the United Kingdom. This would at least provide some link between entry onto the property to locate the document and the circumstances of the person arrested. Without some purpose for locating the document written into the Bill a new entry power going far beyond the current law will be created for use against non EEA nationals.

12) Amendment

Clause 41, page 23, line 1 delete 'may' insert 'is necessary to'

Effect

This will allow retention of an immigration document if a police or immigration officer suspects it is necessary to retain to facilitate removal (rather than simply suspecting it may facilitate removal).

Briefing

The powers of seizure in Clause 41 are also excessive in scope. They allow for the passport or other documentation to be seized if they believe the person might be liable to removal under immigration acts and if the seizure will facilitate removal. In the context of the new deportation powers contained in this bill, it would mean that anyone who the police believe might receive a custodial sentence (and therefore become liable for deportation) can have their passport removed until determination of the case against them. This will mean that someone who is on bail (likely to be for a long period if the case goes to crown court) will be without their passport even if the final disposal is acquittal or a non custodial sentence. A passport is not simply a travel document; it is the main identification document that many rely on for accessing goods and services and for establishing our identity. There are occasions where a person surrenders their passport during criminal proceedings. However, this will usually be in unusual circumstances after assessment by a court that they represent a flight risk.

The amendment creates a requirement that seizure of a document is *necessary* to facilitate removal rather than *may* facilitate removal. However, it should be pointed out that even with this amendment removal powers will still be based on the officer's suspicion rather than their knowledge. This means that the person suspected of a serious offence (who would be liable for deportation on conviction) could still have their document taken. The suspicion of commission of the offence would provide sufficient grounds for removal as, if convicted, it would be necessary to have those documents to facilitate the removal.

Gareth Crossman

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