



**THE JOINT COMMITTEE ON HUMAN RIGHTS
COMMITTEE OFFICE
HOUSE OF COMMONS
7 MILLBANK
LONDON SW1P 3JA
Tel: 020 7219 2797
jchr@parliament.uk**

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The Rt Hon Dr John Reid MP
Secretary of State for the Home Department
2 Marsham Street
London SW1P 4DF

UK Borders Bill

The Joint Committee on Human Rights is considering the human rights compatibility of the UK Borders Bill. Having carried out an initial examination of the Bill, the Committee would be grateful if you could provide a fuller explanation of the Government's view that the proposals in the Bill are compatible with the Convention rights guaranteed by the Human Rights Act 1998 in the following respects.

(1) Immigration Officers' powers to detain, search and seize

The Bill enables the Secretary of State to designate Immigration Officers as having the power to detain an individual at a port if the officer thinks that the individual may be liable to arrest by a constable without a warrant, or is subject to a warrant for arrest. The Secretary of State may only designate officers who he or she thinks are fit and proper for the purpose and "suitably trained".

The Explanatory Notes accept that the power of detention engages the right to liberty in Article 5 ECHR, but consider that it is "in accordance with a procedure prescribed by law" as required by Article 5, because the power is set out in legislation which specifies when it can be exercised and the limitations on its use, and the detention falls within the permitted exception in Article 5(1)(c) and may also fall within Article 5(1)(a) where there is an outstanding warrant for arrest. However, the Notes do not contain any explanation of the necessity for the new power to detain.

Q1: Please provide a more detailed explanation of why the new powers to detain, search and seize in clauses 1 and 2 of the Bill are required.

The power of a constable to arrest under s. 24 of PACE is closely regulated by Code G of the PACE Codes of Practice.¹ This Code prescribes a number of important requirements

¹ *Code of Practice for the Statutory Power of Arrest by Police Officers.*

regulating the way in which the powers is exercised, concerning, for example, the information to be given to a person on arrest, and the making of a record of the reasons for arrest. The Bill makes no provision for either this Code or any other code of practice to apply to the exercise of the proposed new power to detain.

Q2: Please provide more information about the limitations on the new power of immigration officers to detain.

Q3: Will the relevant PACE Code of Practice apply?

Q4: If not, why not, and will equivalent requirements apply?

The Explanatory Notes also do not elaborate on what is meant by “suitably trained”.

Q5: What training will an immigration officer receive in order to be eligible for designation by the Secretary of State as having the additional powers of detention, search and seizure?

The Explanatory Notes acknowledge that the powers to search and seize engage Article 8 and Article 1 Protocol 1 ECHR, but in the Department’s view any such interference can be justified. This is because, according to the Notes, the power is for specific and limited purposes, pursues the legitimate aims of public safety, the economic well-being of the country, and the prevention of disorder or crime, and will only be carried out by officers who the Secretary of State has concluded are properly trained and are fit and proper to exercise such powers.

Q6: Will these powers to search and seize be subjected to as rigorous controls as those contained in the PACE codes of practice in relation to the equivalent police powers (Code A)?

(2) Biometric registration of persons subject to immigration control

The Bill enables the Secretary of State to make regulations requiring a person subject to immigration control to apply for the issue of a “biometric immigration document” – a document recording information about his external physical characteristics, including fingerprints and features of the iris or any other part of the eye. A “person subject to immigration control” means a person who requires leave to enter or remain in the UK, whether or not leave has been given. Regulations may require a biometric immigration document to be used for specified immigration purposes, in connection with specified immigration procedures or “in specified circumstances where a question arises about a person’s status in relation to nationality or immigration.” The Regulations must make provision about the use and retention of such biometric information by the Secretary of State, and may permit “the use of information for specified purposes which do not relate to immigration”.

As the Explanatory Notes, acknowledge, these provisions are likely to be an interference with the right to respect for private life, but in the Government’ view the interference is justified and proportionate. The Notes say that the proposals will be “in accordance with the law” because the provisions will be set out in primary and secondary legislation, and the intention is to ensure that the requirements of the regulations are formulated with sufficient precision so that their ambit is absolutely clear, accessible and foreseeable. The proposed powers are

said to be necessary for the maintenance of immigration control by ensuring the integrity of documents which are evidence of a person's immigration status, and which are used to combat illegal working. They are therefore necessary for the economic well-being of the country and the prevention of crime. The Government also believes that requiring those who wish to be in the UK to have a secure, reliable biometric immigration document as evidence of their status is a proportionate way of achieving those objectives.

The Committee notes that this part of the Bill contains extremely open-ended powers capable of being exercised in ways which interfere with Article 8 rights, but there is very little detail on the face of the Bill, or in the Explanatory Notes, to enable it to assess likely compatibility with Article 8.

Q7: Please provide more details about the Government's precise intentions with a view to enabling the Committee to assessing the likely compatibility of the new powers with Article 8 ECHR.

This part of the Bill also contains a power to make the Regulations apply only to a specified class of persons subject to immigration control (e.g. to persons making a specified kind of application for immigration purposes). The Explanatory Notes make clear that the requirement for those subject to immigration control to apply for a biometric immigration document will be rolled out to different categories of those subject to immigration control incrementally. The Notes state that in the Department's view this different treatment is not discriminatory, or, if wrong about this, that any discrimination is justified. It says that the precise order and categories for the phases of implementation are still being developed, but they will be determined by rational criteria, such as which categories present the greatest risk to immigration control. They may also be determined by practical considerations, such as the availability of the necessary technology and resources for particular applicants. In the department's view, such an incremental implementation, according to rational criteria, is in principle compatible with Article 14 ECHR.

Q8: Please provide more information about the "rational criteria" according to which the Government intends to phase the implementation of this requirement.

(3) Deportation of foreign criminals

The Bill gives effect to the Home Secretary's commitment in his statement of 23 May 2006 to create a direct link between deportation and the commission of a crime of the appropriate level of severity. The Committee notes that the Bill provides that the provisions on automatic deportations may be applied to people convicted of offences before the Bill becomes law. The Government argues that this is human rights compatible either because deportation is not a "penalty" within the meaning of Article 7 ECHR (prohibition on retrospective penalties) or there is no retrospectivity because any person liable to automatic deportation under the Bill was also liable to discretionary deportation at the time they were convicted.

Q9: Please provide a more detailed explanation of why, in the Government's view, the provision in Clause 44 does not have retrospective effect.

(4) Reverse onus

The information sharing provisions of the Bill include a reverse onus provision in the statutory defence to the offence of wrongful disclosure of confidential information in clause 38(3).

Q10: Please explain why in the Government's view the reverse onus provision in clause 38(3) is compatible with the presumption of innocence in Article 6(2) ECHR.

Search for evidence of nationality

The Bill includes in clause 40(1)(a) a widely drafted power for an immigration officer or constable to search for evidence of nationality where an individual has been arrested on suspicion of the commission of an offence and the officer or constable "suspects that the individual may not be a British citizen."

Q11: Please explain what safeguards will apply to ensure that the exercise of this power does not involve an undue risk of discrimination against visible minorities.

I would be grateful for your response to these questions by 27 March 2007.

ANDREW DISMORE MP
Chair, Joint Committee on Human Rights