



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Compulsory Identity Cards for Foreign Nationals: UK Borders Act 2007 Consultation Document

Response of the Northern Ireland Human Rights Commission

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ advising on legislative and other measures which ought to be taken to protect human rights,² advising on whether a Bill is compatible with human rights³ and promoting understanding and awareness of the importance of human rights in Northern Ireland.⁴ In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.
2. This response is to the Home Office consultation issued in February 2008 entitled *Compulsory Identity Cards for Foreign Nationals*, concerning ID cards⁵ issued under the UK Borders Act 2007. The Commission has already set out in detail its policy on this matter through written briefings provided to the Joint Committee on Human Rights and House of Lords at Bill stage. This submission draws on that position.
3. We request written feedback on how the points we have raised have been considered and on the questions raised for clarity. We were sent this document for comment but are not listed in the consultee list in Appendix B and would be grateful if this could be remedied in future.

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid.*, s.69(3).

³ *Ibid.*, s.69(4).

⁴ *Ibid.*, s.69(6).

⁵ Previously referred to as Biometric Identity Documents or BIDs.

Commission Policy on National Identity Register Scheme

4. The Commission opposes the specific National Identity Register (NIR) and Identity Card scheme set out in the Identity Cards Act 2006 and relevant sections of the UK Borders Act 2007⁶. The Commission feels the scheme unduly infringes on the right to privacy and that the legitimate aims set out for the scheme do not stand up to scrutiny, will be counter productive and/or are disproportionate. Furthermore, it is the Commission's position that the impacts of the Identity Cards system will be discriminatory particularly for Irish citizens in Northern Ireland and minority ethnic groups, especially Muslims and migrants. Whilst the present consultation does not seek information on our full range of concerns, we are happy to outline them on request.
5. The Commission would like to reiterate concern that such matters are being set out in regulations (secondary legislation) rather than the primary legislation. Primary legislation is subject to a much greater degree of scrutiny which can ensure human rights compatibility. We note that the parliamentary Joint Committee on Human Rights has repeatedly stressed the importance of safeguards being contained on the face of primary legislation when legislation intrudes on privacy rights protected by ECHR Article 8.
6. The principle of identity documents engages ECHR Article 8. The fact that the compliance regime and sanctions set out in the UK Borders Act and Code only apply to non-EEA nationals engages both Article 8 and Article 14 of the ECHR, which prohibits discrimination on the basis of a number of grounds including race or national origin. There are a range of differences between this and the scheme aimed at British citizens including the sanctions set out in the consultation, but also that children will be subjected to the foreign nationals' scheme. This is of grave concern and may amount to punishing children for the parent or guardians' immigration status. Government must be aware of its obligations under the UN Convention on the Rights of the Child whereby policies and legislation affecting children must have the best interests of the child as the paramount consideration.

⁶ Whilst recognising many more limited ID card schemes do raise human rights issues, the Commission does not oppose all ID card schemes per se. There is no international standard to this regard. The Commission does oppose the specific National Identity Register Identity Cards scheme and wishes to see this withdrawn.

Language and Promotion of Scheme

7. Given the severity of the sanctions in this new initiative it is likely that, if proceeding, the Home Office will seek to extensively publicise it in order to inform persons of the regulations they will be subject to, particularly as the sanctions set out for non-EEA nationals apply to those who have been resident in the UK for some considerable time as much as new migrants. Given tackling irregular migration is also a stated aim of the general NIR scheme, we could envisage circumstances where both are promoted in tandem. The Commission would urge that any such publicity is carried out in a manner that does not play on public fears or further stigmatise or demonise migrants. We also urge that any strategy to inform employers of the scheme does not oversimplify, or promote the scheme out of context of existing race relations legislation. Should this be the case, the Commission would be concerned at racial discrimination ensuing from employers declining employment to persons who they wrongly perceive should have the foreign nationals Identity Card, adversely impacting on EEA nationals and minority ethnic British or Irish citizens.
8. The Commission voiced concerns during its passage through parliament that the UK Borders Bill conflates immigration and criminality, and in doing so did nothing to ease existing and potential racial tensions, and the current wave of xenophobia in the media and public discourse. In Northern Ireland, this has coincided with an alarming rise in racially motivated attacks, many of which have been directed at migrant workers. We argued that instead of attempting to educate public opinion as to the context of inward migration, Government gives the appearance of being indifferent or hostile to the rights of migrants and asylum seekers, and this contributes to the negative reporting and negative discourse around migration. We also commented on this matter in our submission to the 'Preventing Illegal Working' consultation, raising contextual matters which had not been sufficiently stressed by government. The first of these being that the vast majority of migrants entering the UK do so lawfully, remain lawfully, and, if applicable, work lawfully. The second being that the vast majority of illegal practices in the labour market do not involve migrants. There are also general concerns that many of those who fall into irregular status do so through factors outside of their control including exploitation or other abuse.

9. Our briefings on the UK Borders Bill also noted that any portrayal of undocumented migrants as unscrupulous individuals coming to the UK to defraud the generosity of the state does not reflect the reality for many. Indeed, a report by the Council of Europe's Committee on Migration, Refugees and Population has stated:

A large number of irregular migrants lose their life when seeking to enter Europe. Once in Europe, many live in a deplorable situation, work in dangerous conditions and are victims of exploitation... It should be noted that as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.⁷

10. In assessing the UK's compliance with its human rights commitments the Council of Europe recently raised concerns that "Negative and inaccurate reporting by sections of the media is contributing to hostile attitudes towards certain groups". It singled out discussion on groups including asylum seekers, migrant workers and Muslims, arguing that sections of the media often discuss such groups "in a manner that is often biased, stereotyped and inaccurate" and raised concerns that this contributes "to a climate of fear and hostility and aggravating community relations". The Advisory Committee recommended to the state party that further resources be directed at raising awareness about, and tackling, inaccurate reporting.⁸
11. Care should be taken that in compliance with this recommendation and other obligations the government's own discourse in promoting the scheme does not contribute to demonization of migrants. Language such as that contained in the Ministerial Foreword to the present consultation, which includes a metaphor comparing tackling irregular migrants to dealing with effluent, is clearly inappropriate.⁹

⁷ Committee on Migration, Refugees and Population (4 May 2006), *Human Rights of Irregular Migrants*, Document 10924, Parliamentary Assembly, Council of Europe.

⁸ Advisory Committee on the Framework Convention for National Minorities second opinion on the United Kingdom published on the 26th October 2007. Paragraphs 18, 112, 115.

⁹ See consultation response document at paragraph one, p 4: "flush out those who evade our rules and laws".

Clarity regarding meaning of 'Compulsory Identity Cards'

12. It is clear that foreign nationals subject to immigration control will be subject to compulsory registration under the measures. However, it is still unclear from the consultation document what the card will be compulsory for. Accordingly, it is often unclear when the sanctions will be applied.
13. The sanctions set out include severe immigration sanctions, namely 'refusal or rejection' of an application to enter or stay in the UK, or a variation (curtailment) or cancellation of a person's existing permission to enter or remain in the UK. There is also the sanction of refusal to issue an identity card, and the issuing of civil penalties.¹⁰
14. The code of practice sets out primary compliance requirements and secondary compliance requirements. Primary compliance requirements can result in immigration sanctions and secondary compliance requirements will 'normally result' in a civil penalty notice. The primary compliance requirements set out matters in relation to compulsion regarding the application process, but also "the requirement to use the card in particular situations". This is listed in the primary requirements as requiring a person to:
 - use an identity card for foreign nationals when required.

However, at no stage in the document are the circumstances to which a foreign national is 'required' to use an identity card set out. Furthermore, the secondary compliance regulations include a requirement to "comply with any other requirement specified in the biometric registration regulations".

15. Circumstances when the 'use' of the identity card for foreign nationals is 'required' could have a number of meanings. It could mean that presentation of the identity card is required on taking employment, or the devolved administration can decide identity cards are a prerequisite for accessing public services including those as routine as GPs or libraries. We are already concerned that British citizens, who do not have the card in such circumstances, could be refused a service. It is grossly disproportionate that a foreign national could face an immigration sanction up to, and including, an obligation to leave the country in the same circumstances.

¹⁰ The basic penalty for initial failure to comply with a primary requirement will be one quarter of the maximum statutory penalty (currently £1,000).

16. The 'compulsory' use of identity cards could also be interpreted as the introduction of a 'papers please' environment whereby foreign nationals compelled to register for the card are expected to carry it with them at all times. A foreign national subject to a card, who forgets to carry it when stopped by police or other agencies, could also be subject to the above sanctions.
17. None of these matters are set out in the consultation document. Should, of course, Government decide that none of these circumstances will 'require' the use of the identity card for foreign nationals, the use of the term 'compulsory' may need to be clarified in public discourse. Otherwise, a culture of suspicion may develop against foreign nationals (or perceived foreign nationals) who do not permanently carry the card on them, even when there is no requirement to do so.
18. At the time of the UK Borders Bills passage through parliament the Commission had already expressed concern that, under clause 5(1) the Secretary of State was to be empowered to make regulations potentially forcing any non-EEA national to provide unlimited information for unlimited purposes. We were concerned as regards who was to be empowered to require such documentation to be produced, and for what purpose. We reiterate the concern that such matters should have been set out in the primary legislation which is subject to a much higher level of scrutiny, rather than in regulations as present.
19. The present regulations set out the detail of sanctions and some but not all circumstances in which they will be applied. We are being asked to feed back on a sanctions regime for 'offences' that have not yet been defined, and which (presumably) will be subject to consultation once the sanctions regime is already in place. This is clearly inappropriate.
20. We reiterate the concern that measures that have such serious implications should have been set out in primary legislation rather than regulations. We are concerned that, once introduced, the present sanctions regime may be extended to further regulations. We request clarity from Government on the full set of circumstances to which the sanctions will be applied.

Clarity regarding meaning of 'Foreign Nationals'

21. The title of the present document: "Compulsory Identity Cards for Foreign Nationals" is itself unclear and potentially confusing. It is left to a footnote (2) to clarify the definition of 'foreign nationals' to persons subject to immigration control requiring leave to enter or remain under the Immigration Act 1971. Amongst others, this definition does not encompass the majority of new migrants to Northern Ireland who are primarily EEA nationals. The title may lead to confusion that migrants in this category are subject to this compulsory scheme. The discourse alluding to the general identity scheme being for British citizens may also create confusion as regards the position of Irish citizens, who constitute a large proportion of the population in Northern Ireland.

Workability and impact of the Scheme in Northern Ireland

22. The Commission is concerned at the direct discriminatory nature of requirements for certain groups, but also at the broader discriminatory impacts the scheme is likely to lead to.
23. Without prejudice to our overall opposition to the scheme, we are concerned by the problems caused by different groups being compelled to register at different times, and hence being subjected to requests to see or use the card. The present scheme is being launched in tandem with much more medium term measures to encourage or compel British citizens to register on the NIR (and offer ID Cards). This is likely to be a much longer term, if not permanent, issue for Northern Ireland given that Irish citizens cannot be compelled to register through the mechanism of British passports. There is always likely to be a large proportion of the population here who are not part of the NIR scheme.
24. It would seem inevitable that individuals who "do not look like" EEA nationals will be asked to produce identity cards more often than those who do. It is not an unreasonable assumption that for the most part then it will be individuals from a minority ethnic background that are likely to be asked to produce identity documents, whether they are legally obliged to hold such documentation or not. If such documentation is not produced when asked for, the question arises of how the relevant agency or employer will ascertain whether the individual in question is an EEA national. This means many persons who are from minority ethnic backgrounds having to face constant questioning or

accusations regarding their status. Disproportionate numbers of stops and searches carried out against individuals from minority ethnic backgrounds may increase racial tensions if those being stopped perceive their right to privacy and family life being fettered because of their ethnicity. Racial profiling is not a human rights-compliant exercise, and making identity cards compulsory for non-EEA nationals is likely to give rise to such practices by those empowered, and expected, to request or demand them.

25. There is evidence of existing problems in Northern Ireland to this regard in relation to perception on basis of accent or skin colour. For example, we are aware of cases here whereby Portuguese citizens of Timorese origin have not been able to register with GP practices who had stated they needed to see their 'work permit' as proof of residency. EU nationals neither require, nor can have, a work permit. Such scenarios are only likely to increase as Identity Cards for foreign nationals are introduced.

Sanctions under immigration legislation

26. In addition to the sanctions set out in the document, the Commission is concerned that existing powers of detention under immigration legislation may be used; for example, when a suspected person does not possess the card 'when required'. This includes persons who do not have to obtain the card being subject to detention until they can otherwise verify their identity. Given the unprecedented level of checks, the overall identity card scheme anticipates in a worst case, but not entirely unrealistic, scenario that the measures could lead to an effective police state for migrants or, more broadly, persons from particular minority ethnic groups (or tourists and other visitors) who are suspected of being migrants. Such actions could enhance racial discrimination and increase alienation as minority ethnic communities feel further harassed and persecuted as they go about their daily lives.
27. The Commission recognises the right of the state to regulate migration, in ways that ensure respect for human rights. It equally recognises the right of the state to regulate the labour market in order to eliminate abuses that harm the economic interests of the state and invariably infringe the rights of workers. However, we do not see the current measures as either proportionate or effective to pursuance of that aim.
28. The introduction of Identity Cards for foreign nationals is more

likely to deter those with irregular status from making any contact with Government agencies, rather than to help Government locate the whereabouts of such persons.

29. In many cases, employers knowingly employ individuals that do not have the necessary documents to work in the UK because of the financial advantage of doing so. Often, undocumented migrant workers are paid well below the minimum wage, work in unsafe conditions, are not in a position to rely on any statutory employment rights and may find themselves entirely at the mercy of unscrupulous employers. It is questionable whether the introduction of Identity Cards and the sanctions regime does anything to address this problem.
30. We are concerned at any sanction that will make the continued enjoyment of basic human rights (such as access to services or employment) dependent on Identity Card registration. It is clearly inappropriate to threaten continued access to basic human rights to coerce registration. It should also not be overlooked that all persons, including migrants with irregular status in the UK, still have human rights.
31. We are also concerned with the potential for many migrants to be trapped in temporary 'limbo' status being unable to work, to access services and potentially facing arrest until identity is proven, in periods whilst they are waiting for the Home Office to process their Identity Card application.

Sanctions

32. In our briefing to the UK Borders Bill the Commission questioned the proportionality of the penalties in relation to registering for documents that appear to serve little useful purpose. The primary aim of Identity Cards for foreign nationals stated in the Ministerial Foreword is for the new cards to confirm both a person's immigration status, entitlement to work and/or access to public funds. Such matters are already set out in Visas stamped in passports.
33. Without prejudice to the many British citizens and others who for reasons of civil liberties will not wish to be forced to register on the NIR, there are particular sensitivities in Northern Ireland in reference to Irish Citizens. We note the British-Irish Parliamentary body recommended that:
 - in implementing the ID card proposals [the British government gives] due consideration to the particular

sensitivities of residents in Northern Ireland – including their rights under the terms of the Good Friday Agreement ...¹¹

34. It is the birthright of most people in Northern Ireland to be British or Irish citizens (or both) and to identify, and be accepted as Irish or British (or both). It is a human rights principle that no disadvantage should result from exercising that right. Many of those who express their national identity as Irish and take Irish Citizenship are likely to be resistant to having to carry British Identity Cards and, by extension, register on the British NIR. We are not aware of any definite proposals from Government to date to address this matter.¹²
35. Given this context, it would not be unreasonable to envisage a scenario whereby there is a considerable proportion of the population conscientiously objecting to registration. Should foreign nationals follow this, the sanctions set out are clearly disproportionate and discriminatory.
36. We welcome recognition that no one can be subject to expulsion should it infringe their rights under the ECHR or Refugee Convention. We welcome the commitment that victims of trafficking will be treated compassionately and appropriately, but would urge that such treatment is extended to victims of exploitation and other forms of abuse.
37. In relation to primary compliance requirements, these include:
 - notify change of circumstances which he knows or suspects affects his leave to remain in the UK and means that he would no longer qualify for leave under the relevant provision of the immigration rules.

Immigration rules are highly complex and the sanctions for breaching primary compliance requirements severe. Particularly, in this context, this clause is far too vague, principally in reference to the individual 'suspecting' a change in qualification.

38. A secondary compliance requirement is to:

¹¹ Report on the Implications for the Common Travel Area of the introduction of British ID Cards.

¹² The British-Irish Parliamentary Body report references indications from the Home Office that Irish Citizens in Northern Ireland 'might' be able avail of a card stating nationality as 'Irish' or without nationality (although this would not be equivalent in status to a British Identity Card).

- notify the Secretary of State when he knows or suspects that information provided in connection with his identity card for foreign nationals was or has become false, misleading or incomplete.

This is vague as to what level of information is to be provided and in what timeframe. We request clarity on this. For example, would a change of address have to be reported? This would involve all non-EEA nationals subject to immigration control being subjected to a new reporting requirement as to their residence.

39. There are a range of other matters; these include issues in relation to due process of the sanctions process. There is a relatively short period of ten working days to respond to a warning letter, which may not be sufficient to cover even the average holiday. In addition, Government needs to ensure the manner in which the warning letter is delivered is human rights-compliant. It is footnoted that a warning letter may be also issued orally by an officer acting on behalf of the Secretary of State. Clearly, as recognised elsewhere in the document, human rights-compliance would include the issuing of such information in a language understood by the person on which it is being served. We are also concerned that there is an exemption to the right of appeal in relation to the sanction of refusing to issue an identity card, given the severe implications this may have.

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