



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

The UK Borders Bill

Briefing to the House of Lords

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. The Commission has already submitted its concerns regarding the UK Borders Bill to the Joint Committee on Human Rights. The Commission has very grave concerns that despite the very serious human rights implications of this Bill, no significant amendments have been accepted before it reaching the House of Lords. It now hopes that peers will be able to influence positively the outcome of a Bill that could potentially have such a serious adverse impact on the human rights of non-EEA citizens, including those already vulnerable to exploitation and destitution, as well as citizens of the UK from minority ethnic backgrounds.

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid.*, s.69(3).

³ *Ibid.*, s.69(4).

⁴ *Ibid.*, s.69(6).

3. As a general point, the Bill conflates immigration and criminality, and in doing so does nothing to ease existing and potential racial tensions in the UK, 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 recently arrived in the region. Instead of attempting to educate public opinion as to the benefits and necessity of inward migration to the UK, 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.
4. The UK Borders Bill proposes extended powers for immigration officers designated by the Secretary of State. Clauses 1 to 4 give immigration officers the power to detain at ports, for up to three hours, people suspected of non-immigration offences pending the arrival of a police constable. These are extraordinary powers for immigration officers to be given and potentially engage Articles 5 and 14 of the European Convention of Human Rights (ECHR). Clause 1 states that the Secretary of State may designate officers who he/she thinks are "fit and proper for the purpose and suitably qualified". Given the nature of the powers that are to be extended to a civilian force, this Commission does not consider that the Secretary of State's opinion is a sufficient criterion. The Commission is at present conducting an investigation into UK Immigration Services and the current practices of immigration officers in detaining asylum applicants and perceived immigration offenders. This Bill, by granting even greater powers to immigration officers, only intensifies the concerns that prompted that investigation.
5. A primary concern is that the Bill does not address the level of training immigration officers will be expected to undergo in advance of exercising such powers. The appropriate benchmark, given the nature of the powers, would be the training undergone by police officers. But detaining individuals who are liable to arrest under the stipulated sections of the Police and Criminal Evidence Act 1984, or the Police and Criminal Evidence (Northern Ireland) Order 1989, should be left to police officers who are also bound by the PACE Codes of Practice, and in this jurisdiction fall under the remit of the Police Ombudsman for Northern Ireland.
6. Clause 4 of the Bill then goes on to state that a "port" includes an airport, a hoverport and any place that a designated

immigration officer “believes” that the individual has gone to for the purpose of embarking on a ship or aircraft, or has arrived at on disembarking from a ship or aircraft. As with much of the Bill, this clause is too vague to be appropriate for legislation. How far does the ship or aircraft have to be from this “port” to justify detention for up to three hours? For example, it is this Commission’s understanding that individuals are routinely stopped and detained at the border between Northern Ireland and the Republic of Ireland by UK Immigration Services and immigration enforcement officials from the Republic of Ireland. Could a designated immigration officer detain at the land border an individual coming under clause 2(1) simply because he/she ‘believes’ the individual in question may embark on, or may have arrived on, a ship or aircraft at a point well inside either jurisdiction?

7. Clauses 1 to 4 of the Bill are not appropriate in Northern Ireland for immigration control or law enforcement. There already is a police presence at airports and ferry ports in Northern Ireland that should be available to deal with the circumstances set out in the Bill. If Government is suggesting that there are currently not enough police officers to carry out law enforcement at ports that problem should be addressed through appropriate strategies and resources for the police service, and not by giving police powers to civilian officials.
8. The Commission does note the moves in the House of Commons at the Committee stage to introduce measures under clauses 47 to 52 to establish a Chief Inspector of the Border and Immigration Agency. However, it would appear that the powers with which this Inspectorate is to operate will be highly unsatisfactory. Under clause 47 (4) the Inspectorate will not have the power to investigate individual cases. The Commission cannot accept that there would be any valid reasons, where the primary concern is for human beings who are at risk of having their human rights abused, for not allowing the Inspectorate to investigate individual complaints as well as wider systemic problems in the operations of the Border and Immigration Agency.
9. Also, under clause 49 (3) the Secretary of State will be able to omit, *before* it is presented to Parliament, any information in the Inspectorate’s annual and other reports if he/she thinks that its publication is undesirable for reasons of national security or might jeopardise and individual’s safety. As the legislation stands there is too great an opportunity for undue and arbitrary censoring from the Secretary of State of the

information presented to Parliament and then beyond. A suitably qualified and experienced Chief Inspector ought to be suitably empowered by Government not to endanger any individual. The Commission is equally concerned about the potentially broad interpretation of the use of “national security”. In particular, the legislation does not specify that any omissions will only be made where there is a real and serious risk to national security but instead refers much more broadly to material that might be deemed “undesirable” for national security. Overall, clause 49 (3) is too broad, has not been used for other inspection bodies, such as Her Majesty’s Inspector of Prisons or the Criminal Justice Inspector in Northern Ireland and therefore should not be included in any legislation relating to the establishment of a Chief Inspector of the Border and Immigration Agency.

10. While on the one hand the Bill aims to inappropriately restrict the powers of the proposed Chief Inspector’s office, on the other it is bestowing wholly inappropriate powers. Clause 52 (1) and (2) allows the Chief Inspector to give a prescribed notice prohibiting an inspection from another body if he/she believes that the prescribed person proposes to inspect any aspect of the work of the Border and Immigration Agency and the inspection may impose an “unreasonable burden” on the Agency. Given, the far reaching powers this Bill is proposing to bestow on immigration officers it is alarming that the criteria for restricting inspections of the Agency would be ‘unreasonable burden’ on the Agency. It is disturbing that Government’s primary concern is with the Agency rather than the individuals with which the Agency works and could potentially cause considerable physical, psychological and financial harm to.
11. This Commission, through the Justice and Security Bill is acutely aware of attempts to restrict its own work because of a perceived or actual inconvenience to statutory agencies that could potentially be endangering people’s well being. It hopes that peers will understand the far reaching implications Clause 52 (1) and (2) might have on the remit of other independent, oversight bodies as well as this Commission and possibly the Commission for Equality and Human Rights and that this Clause will be resisted as it proceeds through the House of Lords.
12. The underlying implication in clause 52 is that independent statutory bodies cannot be trusted to exercise their powers of inspection responsibly. This Commission is not aware of any

evidence that suggests such bodies are exercising their powers when there are not legitimate concerns about the well being of actual and potentially vulnerable individuals and it is this that should be the fundamental concern of the Chief Inspector and not the burden inspections might place on a heavily resourced and funded Government Agency.

13. Under the Bill non-EEA nationals will be required to apply for Biometric Identity Documents (BIDs). The Commission has five concerns in relation to this proposed requirement. First, there is an issue around who is being targeted for compulsory registration for such documents. Second, who will be empowered to require such documentation to be produced? Third, it is not clear what purpose the introduction of biometric identity documents is intended to serve. We are also concerned about the penalties being proposed for those who fail to apply for such documents, and the administrative burden the introduction will place on a number of agencies. These issues are not addressed in the current Bill but under clause 5(1) the Secretary of State will be empowered to make regulations potentially forcing any non-EEA national to provide unlimited information for unlimited purposes. The Commission urges that more consideration be given, at this stage, to the potentially very negative outcomes that the introduction of BIDS in this way could bring.
14. The principle of identity documents engages Article 8 of the ECHR and raises the issues aired in the debate around Government plans to introduce identity cards for all within the UK. The fact that under the UK Borders Bill it is only non-EEA nationals who are being required to apply for BIDS 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.
15. It would seem inevitable that individuals who “do not look like” EEA nationals will be asked to produce biometric identity documents 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 will ascertain whether the individual in question is an EEA national. A 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 biometric identity documents compulsory for non-EEA nationals is likely to give rise to such practices by those empowered to request or demand them.

16. Clause 5(1)(b)(iii) and clause 8(2) indicate that information contained in BIDs could be used for purposes that have nothing to do with immigration. This could mean, for example, that individuals are asked to produce such documentation when trying to access services such as health care or education, or social security benefits. The only purpose that such a policy can serve is to implement internal immigration control. It will essentially mean various Government agencies being expected to take on the task of immigration enforcement.
17. However, Government appears to have overlooked the reality that migrants with irregular status in the UK still have human rights which they will feel inhibited from accessing with the introduction of BIDs. For example, an undocumented migrant needing emergency health treatment may not even attempt to access it for fear that his/her immigration status will become known to the authorities, with deportation as a consequence.
18. In Northern Ireland a young Ukrainian woman suffered so severely from frostbite in December 2004 that she was forced to have both legs amputated. The woman's status in the UK had become irregular, she had no means of subsistence and did not attempt to seek help from the state for fear of the repercussions. In circumstances where indigent persons are at severe risk, the state has positive duties under Article 3 of the ECHR to prevent such persons from undergoing suffering of a kind that could engage Article 3. The UK Borders Bill, however, may actively discourage migrants from accessing potentially life saving treatments. The fact that BIDs will be required of children is of even graver concern and may amount to punishing children for the parent's 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.
19. 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."⁵

20. Empowering and expecting broad groups of service providers to seek clarification of individuals' nationality is only likely to give rise to further accusations of racial profiling and make minority ethnic communities feel further harassed and persecuted as they go about their daily lives.
21. That raises the question of exactly what purpose the introduction of BIDs for non-EEA nationals is intended to serve. The introduction of BIDs is more likely to deter those with irregular status from making any contact with Government agencies, than to help Government locate the whereabouts of such persons.
22. The Home Office press release on the introduction of the Bill stated that by employers could use BIDs as authentication of potential employees' immigration status, to "help the government prevent fraud and illegal employment, and make it harder for immigrants to adopt multiple identities".
23. 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 conditions that pose a serious threat to their physical wellbeing, are not in a position to rely on any statutory employment rights and may find themselves entirely at the mercy of unscrupulous employers. The death of 23 cockle pickers at Morecambe Bay in February 2004 is a tragic illustration of the plight facing undocumented migrant workers in the UK. It is questionable whether the introduction of BIDs

⁵ Committee on Migration, Refugees and Population (4 May 2006), *Human Rights of Irregular Migrants*, Document 10924, Parliamentary Assembly, Council of Europe.

does anything to address that problem. It will, however, come with the serious risk of being unduly invasive for those non-EEA nationals who work legally in the UK, as well as those British nationals from minority ethnic backgrounds and/or non-local accents who are likely to find themselves being asked to produce such documents, and questioned further if they do not have them.

24. It is also of concern that those who in work in a number of different professions are increasingly being required to act as de facto immigration enforcement officials. Government seems to have given little consideration to how much of an extra burden this expectation will put on administrative staff working in, for example, the fields of health and education. How long will it take for a receptionist at an Accident and Emergency ward to check an individual's documents and how will this impact upon those others that are waiting to have their details processed so that they can be seen by a doctor or triage nurse? Many of the professions that Government is suggesting will check for BIDS are already overworked and under-resourced, and the proposal that they assume additional duties in immigration enforcement disregards that reality.
25. The penalties set out in clause 7 for those who fail to comply with the registration procedure for a BID are far-reaching. In particular an individual may have a fine imposed and find that his/her application for immigration is "disregarded or refused", or that his/her leave to enter or remain in the UK is cancelled or varied. This must not lead to a breach of individual rights under Article 2 or 3 of the ECHR whereby individuals are deported or removed to countries where they are at risk of being killed or tortured, as a consequence of having an immigration application refused or leave cancelled.
26. The Commission also questions the proportionality of such penalties in relation to registering for documents that appear to serve little useful purpose.
27. Clause 16 places reporting and residence restrictions on those with limited leave to remain in the UK. There is no explanation why such a measure is needed, when it would restrict individuals' right to privacy and respect for family life under Article 8 of the ECHR, and to freedom of association under Article 11. By requiring individuals to live and remain in certain geographical locations this approach will further stigmatise people who have not committed any crime and

make them easy targets for attacks motivated by xenophobia and racism.

28. Clause 18 of the Bill (new s.109A) further increases the power of immigration officers by allowing them to arrest without warrant persons reasonably suspected of asylum support fraud. Provided the penalty is proportional to the offence the Commission does not question the policy of penalising false claims for asylum support. However, the Commission does question why a warrant to arrest such persons cannot be obtained by the police service instead of by immigration officers. Those falsely claiming asylum support are likely to have done so over a significant period of time and it ought not to be difficult for police to locate such persons prior to and after obtaining a warrant. This is hardly an emergency situation in which the individual targeted represents an immediate threat to others and normal procedures therefore need to be set aside.
29. Clause 23 of the Bill grants immigration officers further powers that until now have been the preserve of the police and officers of HM Revenue and Customs under the Proceeds of Crime Act 2002. If enacted clause 23 would allow immigration officers to seize cash that is reasonably suspected of having been obtained through unlawful conduct, or of being intended for use in such conduct. Clauses 24 and 25 go on to give excessive powers to the Secretary of State to forfeit and dispose of property that has come into the possession of immigration officers in relation to their immigration functions. These powers could be applied in relation to financial gains made by those responsible for trafficking or smuggling, but could equally be applied in relation to any money or property found on an undocumented migrant worker. This may be a paltry amount earned by an individual who has been seriously exploited, rather than through their exploitation of others, and may force such individuals into destitution.
30. Clauses 31 to 38 provide that any person who has been sentenced to a period of custody of 12 or more 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, is automatically deported unless one of a set number of exemptions listed in clause 29 is satisfied. The exemptions would prevent a deportation that would breach the person's rights under the ECHR or the UK's obligations under the 1951 Convention Relating to the Status of Refugees.

31. It is of concern to this Commission that Government is currently challenging the absolute nature of Article 3 through its intervention in the case before the European Court of Human Rights of *Ramzy v The Netherlands*. However, until such time the Court decides otherwise, at present the UK would be breaching its obligation by deporting anyone to a country where they are in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Unlike the 1951 Refugee Convention, that position applies both to refugees and immigrants.
32. What is of concern to this Commission is that persons convicted of crimes that do not necessarily represent a threat to national security or public order could face automatic deportation. This would include, for example, persons convicted of theft.
33. By imprisoning and then deporting foreign nationals, Government is punishing people twice for the same crime. Each case ought to be judged on its merits and this 'one size fits all' approach when non-UK nationals are involved does not appear to recognise the very basic concept of the universality of human rights. Deportation is one of the most serious steps that any state can take against an individual within its territory, and it should not be applied automatically in any circumstance; proper consideration must be given to each case by an impartial judge not motivated by political considerations.
34. Clause 43 of the Bill is worryingly broad and adds even further to the already inappropriate range of powers being granted to immigration officers in the body of this Bill. Clause 43(1) will in effect allow both immigration and police officers to enter any property in order to seize a passport. Most people are likely to keep their passport at home along with any immigration documents they may hold. When an individual is arrested and the immigration or police officer suspects that he/she is not a British national, it would be reasonable for the officer to also suspect that their passport will be found in their home. The Bill if enacted will not require a judicial warrant for these powers to be exercised. In effect, this clause allows raids without warrant on the home or other premises of anyone whom a constable does not know for certain to be British – including all Irish and other EU citizens.
35. Again it is the nationality of people from minority ethnic

backgrounds that an immigration or police officer is likely to question, and who as a consequence will be subjected to practices that engage their Article 8 rights, whether or not they are UK nationals or otherwise fully entitled to be in the state. This makes the powers outlined in clause 43 questionable in terms of their compliance with Article 8 alone, and that Article taken with Article 14.

36. In conclusion, the Commission expresses deep concern at the content of the UK Borders Bill. It gives sweeping powers to a state agency and the plans to create an oversight body are highly unsatisfactory. Much of what is in the Bill appears to be aimed at punishing people simply for not being British nationals, and the overwhelming message in the draft legislation is the criminalisation of migration. That is an unfortunate message for any responsible Government to be sending out and is counter to the very principle of human rights whereby every individual is owed basic protections simply by virtue of being human, not by virtue of their nationality.

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