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The *UK Borders Bill*

Bill 53 of 2006-07

This year's immigration Bill seeks to implement some aspects of the Government's five-year plan for immigration and asylum, its review of the Immigration and Nationality Directorate and its plans for an identity card scheme. It does not propose an integrated borders agency.

Its main provisions would give immigration officers more police powers; require foreign nationals living in the UK to get biometric immigration ID cards which could be compulsorily checked; and provide for automatic deportation orders with limited rights of appeal for foreign national prisoners.

Other provisions would allow residence and reporting conditions to be imposed on foreign nationals in the UK; extend the scope of offences of facilitating illegal immigration and human trafficking; and give immigration officers access to HM Revenue and Customs information.

The Bill is due to be debated on second reading in the House of Commons on Monday 5 February 2007.

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Summary of main points

The *UK Borders Bill*, introduced in the House of Commons on 25 January 2007, seeks to implement aspects of the following initiatives:

- the 2005 five-year plan for immigration and asylum, which proposes a 'Points Based Scheme' for work-based immigration applications and an increased use of biometrics and other technology under an 'e-Borders' programme;
- the 2006 review of the Immigration and Nationality Directorate, which followed the concerns over of the release of over a thousand foreign national prisoners without considering them for deportation and the Home Secretary's diagnosis of the immigration system as "not fit for purpose"; and
- the ongoing plans for an identity card scheme.

The main provisions of the Bill would:

- give immigration officers more police powers, both at ports to help in police operations, and in relation to asylum support offences;
- require foreign nationals living in the UK to get biometric immigration ID cards which could be compulsorily checked (this is expected to be implemented a year before ID cards for British citizens); and
- provide for automatic deportation orders for certain foreign criminals, with limited rights of appeal and increased powers of detention.

Other provisions would allow residence and reporting conditions to be imposed on foreign nationals in the UK, probably those who cannot be deported or removed for human rights reasons; extend the territorial scope of offences of facilitating illegal immigration and human trafficking; and give immigration officers increased access to HM Revenue and Customs information.

The Bill does not propose an integrated borders agency. Nor does it provide any consolidation of the current mass of immigration Acts. Furthermore, because large parts of the Government's current proposals can be implemented through the Immigration Rules or other secondary legislation, or simply by administrative changes, this Bill provides only a small part of the picture.

As immigration is a reserved matter, the Bill applies to the whole of the UK, apart from the provisions on immigration officers' powers to arrest at ports which do not apply to Scotland.

The Bill is due to be debated on second reading in the House of Commons on Monday 5 February 2007. The Government has published Explanatory Notes and a Regulatory Impact Assessment to accompany the Bill.

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I Policy background

The pace of change in immigration law and policy has never been faster. This is the third piece of primary legislation in this area in as many years, and appears even before parts of the previous Acts have been brought into force. In the last six months there has been an outpouring of rule changes, policy papers and proposals on a wide range of immigration-related matters.

Many of the current changes stem from the Home Office's February 2005 "five year strategy for asylum and immigration", entitled *Controlling our borders: Making migration work for Britain*.[1] Its headline aim is to put in place "a fair but practical system of controls",[2] and its proposals were summarised in the accompanying press notice:

> **On migration**
>
> - A transparent points system for those coming in to work or study.
> - Financial bonds for specific categories where there has been evidence of abuse, to guarantee that migrants return home.
> - An end to chain migration - no immediate or automatic right for relatives to bring in more relatives.
> - An end to appeals when applying from abroad to work or study.
> - Only skilled workers allowed to settle long-term in the UK and English language tests for everyone who wants to stay permanently.
> - Fixed penalty fines for employers for each illegal worker they employ as part of the drive against illegal working.
>
> **On asylum**
>
> - Granting refugees temporary leave rather than permanent status to begin with, and keep the situation in their country under review.
> - More detention of failed asylum seekers.
> - Fast-track processing of all unfounded asylum seekers, with electronic tagging where necessary.
> - Strong border controls with fingerprinting of all visa applicants and electronic checks on all those entering and leaving the country.
> - Removals of failed asylum seekers to exceed failed claims.

Few of these changes require primary legislation. Many can be introduced by amendments to the *Immigration Rules* or through regulations, including most aspects of the new points system for workers and students coming to the UK and the changes to who is allowed to settle in the UK. Others need only administrative changes.

The Government has now implemented some of the changes. The *Immigration, Asylum and Nationality Act 2006* contained provisions on:

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1 Cm 6472: http://www.archive2.official-documents.co.uk/document/cm64/6472/6472.pdf

2 Home Office press notice, *Controlling our borders: Making migration work for Britain. Charles Clarke sets out five year Strategy for Immigration and Asylum*, 7 February 2005: http://www.ind.homeoffice.gov.uk/ind/en/home/news/press_releases/controlling_our_borders.html

- removing the rights of appeal against refusal of nearly all types of visa (*not yet in force)*;
- introducing a new civil penalty for employing illegal workers which will allow on-the-spot fines of up to £2,000 *(not yet in force*);
- giving immigration officers the power to carry out biometric checks on passengers with biometric travel documents;
- allowing people leaving the country to be detained;
- giving immigration officers, customs officers and the police wider powers to obtain passenger, crew and freight information from airlines and shipping firms, and a duty to share this information with each other as well as the authority to share it with the security services and foreign law-enforcement agencies; and
- reducing appeal rights for non-EEA[3] nationals being deported on national security grounds.

In addition, the Government has changed the rules on applying for settlement so that workers must have been in the UK for five years rather than four before applying for indefinite leave to remain (ILR). English language tests for everyone applying for ILR are to be introduced on 2 April 2007.[4] Refugees are now granted five years' limited leave when their claim is accepted, rather than indefinite leave.

The New Asylum Model, intended to speed up processing of all asylum claims, is being implemented gradually.[5] Fingerprinting of all visa applicants is expected by 2008 and electronic checks on all those entering and leaving the country by 2014.

However, the Government has not introduced financial bonds, and there has not been an increase in the detention of failed asylum seekers.[6] In the latest quarter, the target for removals of failed asylum seekers to exceed failed claims was not met.[7]

The furore over foreign national prisoners released without consideration for deportation led to the newly-appointed Home Secretary, John Reid, declaring to the Home Affairs Committee on 23 May 2006 that the immigration system is "not fit for purpose":

> I believe that…in the wake of the problems of mass migration that we have been facing our system is not fit for purpose. It is inadequate in terms of its scope; it is inadequate in terms of its information technology, leadership, management,

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3 The European Economic Area (EEA) comprises the 27 EU Member States plus Iceland, Liechtenstein and Norway.

4 Home Office press notice *Introduction of new rules for people applying for settlement*, 4 December 2006: http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/introductionofnewrules

5 See Home Office press notice *The New Asylum Model: swifter decisions - faster removals*, 18 January 2006: http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/nam and Home Office fact sheet, *How is IND increasing the efficiency of the asylum process?* October 2006: http://www.ind.homeoffice.gov.uk/applying/asylum/asylumfactsheet/effciencyofasylumprocess

6 See Home Office *Quarterly Asylum Statistics*, various years: http://www.homeoffice.gov.uk/rds/immigration1.html

7 Home Office, *Public performance target: removing more failed asylum seekers than new anticipated unfounded applications*, 3rd Quarter 2006: http://www.ind.homeoffice.gov.uk/6353/aboutus/tippingpointsresults3.pdf

> systems and processes; and we have tried to cope with this new age, if you like, with a system that has been inherited from an age that came before it.[8]

An internal review of the IND followed. Two days after the Home Affairs Committee published its report on *Immigration Control*,[9] the Government published a policy paper on the IND review, *Fair, effective and trusted: rebuilding confidence in our immigration system*.[10] Many of its proposals repeat or elaborate on those in the five-year strategy, and were summarised in the accompanying press notice:

- introducing exit controls (embarkation) year by year until everyone is counted in and out by 2014;
- extending border checks on people before they travel to this country, targeting high risk routes;
- strengthening the powers of the borders service and make it a more visible uniformed presence, doubling spending on enforcement by 2009/10;
- implementing ID cards, starting with biometric residence permits for foreign nationals in 2008;
- requiring non-EEA nationals to have unique, secure IDs to be able to travel to Britain by 2011, to allow criminality to be checked;
- granting or removing 90 per cent of new asylum claimants within six months by 2011;
- increasing removals and deportation by effective use of detention, tagging and monitoring of asylum claimants;
- improving the effectiveness of deportation arrangements by removing in-country rights of appeal;
- implementing fines for employers, seizing assets of persistent offenders, disbarring company officers who knowingly employ illegal workers and working across Government to stop fraudulent access to benefits;
- establishing IND as an agency on a shadow basis from April 2007;
- radically reforming and simplifying immigration laws, rules and guidance;
- consulting on establishing a new Migration Advisory Committee to advise on migration issues;
- consulting on a new single immigration regulator; and
- introducing regional directors by 2007.[11]

Again, some of these changes require primary legislation but the bulk can be implemented through changes to the Immigration Rules, secondary legislation or administrative practices.

Since then the Home Office has published:

- its reply to the Home Affairs Committee's report (September 2006)[12]

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8 Oral Evidence to the Home Affairs Committee, 23 May 2006, Q 866

9 Home Affairs Committee, 5th Report of 2005-06, *Immigration Control*, HC 775: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/cmhaff.htm

10 25 July 2006: http://www.ind.homeoffice.gov.uk/6353/aboutus/indrev.pdf

11 Home Office press notice *IND Review* 25 July 2007: http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/indreview

12 Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf

- a consultation paper on a new charging regime for immigration and nationality fees (October 2006)[13]
- a consultation paper on establishing a Migration Advisory Committee (November 2006)[14]
- a Strategic Action Plan for the National Identity Scheme (December 2006)[15]
- a Borders, Immigration and Identity Action Plan (December 2006)[16]
- a consultation paper on a single immigration inspectorate (December 2006)[17]

A Bill "to provide the Immigration Service with further powers to police the country's borders, [to] tackle immigration crime, and to make it easier to deport those who break the law" was announced in the Queen's Speech on 15 November 2006.[18] The *UK Borders Bill* [Bill 53 of 2006-07] was duly introduced in the House of Commons on Thursday 25 January 2007.[19] The press notice accompanying the Bill's publication the following day summarised its proposals:

> The key measures in the Bill will provide immigration officers with greater powers, ensure that foreign national prisoners face automatic deportation and tackle illegal working and fraud
>
> The new powers for Immigration Officers will include the ability to:
>
> - arrest people smugglers or traffickers even if their crimes were committed outside of the UK;
> - detain at ports individuals they suspect of having committed a crime, or those with a warrant outstanding against them;
> - arrest those they believe to have fraudulently been acquiring asylum-support, and to exercise associated powers of entry, search and seizure;
> - access Her Majesty's Revenue Customs (HMRC) data to track down illegal immigrants.
>
> Foreign nationals benefiting from living in the UK will face additional obligations, including:
>
> - having to apply for a "biometric immigration document", which will be compulsory biometric ID for those living in the UK from outside the EEA helping tackle fraud, illegal working and multiple identities; and
> - failure to obtain biometric ID will put the person at risk of losing their leave to remain in the UK and/or a civil penalty of up to £1,000.
>
> Under the new legislation foreign national prisoners will:
>
> - face automatic deportation if they have committed a serious offence, such as crimes against children, terrorism or drugs offences and been sentenced

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13 http://www.ind.homeoffice.gov.uk/6353/6356/17715/newfeesconsultation.pdf
14 http://www.ind.homeoffice.gov.uk/6353/6356/17715/macconsultation.pdf
15 http://www.identitycards.gov.uk/downloads/Strategic_Action_Plan.pdf
16 http://www.ind.homeoffice.gov.uk/6353/aboutus/bordersimmigrationactionplan.pdf
17 http://www.ind.homeoffice.gov.uk/6353/6356/17715/faireffecttivetransparentin2.pdf
18 HL Deb 15 November 2006 c2
19 HC Deb 25 January 2007 c1572

to imprisonment or any other offences which resulted in a custodial sentence of 12 months or more; and

- no-longer have the right to appeal from within the UK except under very specific circumstances. [20]

The Bill applies to the whole of the UK, apart from the provisions giving immigration officers powers to arrest suspected criminals at ports which do not apply to Scotland.

The Government has also published Explanatory Notes[21] and a Regulatory Impact Assessment[22] to accompany the Bill.

The 26 January press notice also announced that a four-week trial of new uniforms for immigration officers began on 22 January, and that when the Immigration and Nationality Directorate begins working as a shadow agency on 1 April 2007 it will take the new title of the "Border and Immigration Agency".[23]

II Border controls: clauses 1-4

The first section of the Bill gives immigration officers at ports new powers to detain people suspected of non-immigration offences. It does not contain any suggestion of an integrated border force; instead, it is intended to allow the existing border control authorities to work more closely together.

A. Existing border controls

The UK's borders are currently controlled by a variety of agencies:

- the Immigration Service
- HM Revenue and Customs
- specialist port police forces
- the territorial police (including Special Branch)
- security services

The United Kingdom's Immigration Service is a civilian body that is an integral part of the Immigration and Nationality Directorate of the Home Office and is directly responsible to the Home Secretary. Immigration officers have certain police-like powers of arrest, entry, search and seizure, and are permitted to use 'reasonable force' in carrying out these functions.[24] These powers have been increasing over the years. However, immigration

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20 Home Office press notice, *New powers boost immigration officers power to protect UK borders*, 26 January 2007: http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/ukbordersbill

21 Bill 53-EN

22 http://www.ind.homeoffice.gov.uk/6353/6356/10630/riaukbordersbill.pdf - though this appears to reflect an earlier draft of the Bill

23 Home Office press notice, *New powers boost immigration officers power to protect UK borders*, 26 January 2007, 'Notes to editors': http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/ukbordersbill

24 *Immigration and Asylum Act 1999* Part VII, as amended

officers are not subject to the police codes of practice on search and detention,[25] nor to the Independent Police Complaints Commission.

The role of HM Revenue and Customs (HMRC) in respect of UK borders is to tackle fiscal fraud and smuggling of drugs and other prohibited and restricted goods and to facilitate international trade.[26]

The fragmented nature of ports policing in the UK was raised during debates on the *Railways and Transport Safety Bill* in 2003.[27] Various Government policy papers discuss ports policing, including *Modern ports: a UK policy* (2000),[28] and *Policing: Building Safer Communities Together* (2003).[29]

The Government's 2004 White Paper on organised crime discussed the Government's approach to border security - in particular, how the new Serious Organised Crime Agency would work with the existing UK border agencies. SOCA is an amalgamation of the National Crime Squad (NCS), National Criminal Intelligence Service (NCIS), the part of HMRC dealing with drug trafficking and associated criminal finance and the part of the Immigration Service dealing with organised immigration crime.[30] It was launched on 3 April 2006, with organised immigration crime as its second-top priority, to which it is to apportion approximately 25% of its operational effort.[31]

The White Paper had ruled out the idea of a unified border guard, because border control encompasses a number of issues distinct from organised crime and because SOCA would establish close working partnerships with the existing border agencies. It set out some existing examples of co-operation:

- shared use of freight vehicle scanners, and co-ordinated freight searching operations based on jointly developed intelligence priorities;
- joint intelligence cells at ports comprising officers from the agencies working side by side;
- exchange of liaison officers to improve profiling and targeting;
- shared accommodation and use of interview and search facilities such as the new custody facilities being built at Heathrow;
- the establishment of close links with HM Customs and Excise National Co-ordination Unit, allowing appropriate data sharing opportunities to be maximised to ensure full and effective risk management;
- the establishment of Multi-Agency Threat and Risk Assessments (MATRAs) at major airports; and
- joint operations to interdict suspect vessels.

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25 *Police and Criminal Evidence Act 1984 (PACE) Codes of Practice*: http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/

26 HMRC Annual Report 2005-06 and Autumn Performance Report 2006, Cm 6983, December 2006, pp. 36-8

27 HC Deb 31 March 2003 c699 *et seq*

28 http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/page/dft_shipping_505279-05.hcsp#P360_106633

29 http://www.homeoffice.gov.uk/documents/2004-cons-building-safer-comn/

30 See http://www.soca.gov.uk

31 *SOCA Annual Plan 2006-07*: http://www.soca.gov.uk/downloads/annualPlan.pdf. Its top priority is Class A drugs

However, the paper recognised the need for Revenue and Customs, Special Branches and the Immigration Service to work together "far more effectively". They were asked to develop more closely aligned objectives and priorities within their individual business plans, and report periodically to the Minister of State for Citizenship, Immigration and Terrorism, and the Economic Secretary to the Treasury.[32]

A "border management programme" is intended to improve cooperation between the agencies, and began a number of trials in early 2005 to test various aspects of shared working at the border.[33] A newly-created Joint Border Operations Centre (JBOC), staffed by representatives of the Police, Customs, the Immigration Service and UK Visas, began operations in January 2005. This is part of Project Semaphore,[34] a trial project for the e-Borders programme. An outline of progress with e-Borders is given in the Government's reply to the Home Affairs Committee's report on *Immigration Control*:

> The e-Borders programme aims to modernise and integrate the management of passenger information to expedite the movement of legitimate passengers while helping to safeguard the United Kingdom against serious and organised crime, terrorism and illegal immigration.
>
> At present, the Programme is in the initial procurement stage. Contract award will be in Summer 2007, with significant operating capability planned for July 2008.
>
> The e-Borders solution includes requirements for the capture and analysis of passenger data in advance for passengers arriving in and departing from the UK. An accurate audit trail of passenger movements will support a range of border control activities, including those specifically highlighted by the Committee; informing the consideration of future applications and monitoring a person's compliance with any time restrictions placed on his or her stay in the UK.
>
> The Government accepts the need to ensure that clear strategies are in place to ensure the effective use of data captured under e-Borders arrangements. With this in mind, the information provisions in the Immigration, Asylum and Nationality Act 2006 build on existing data capture and sharing capabilities and pave the way for more comprehensive access to data and enhanced integrated working between the Police, the Immigration Service and HM Revenue and Customs, where the benefits of specified travel-related information can be maximised through the effective capture of data through a "single window" and the routine sharing and joint analysis of pooled information.
>
> The provisions will facilitate the joint working required for e-Borders as well as for the 'Border Management Programme', a joint agency initiative to create more co-ordinated and effective joint working between the border agencies, including in the area of data capture and technology.[35]

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32 *One Step Ahead: a 21st Century Strategy to Defeat Organised Crime*, March 2004, Cm 6167, para. 3.2: http://www.archive2.official-documents.co.uk/document/cm61/6167/6167.pdf

33 HC Deb 12 December 2005 c1708W

34 http://press.homeoffice.gov.uk/faqs/controlling-our-borders/

35 Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*, p.49: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf

B. An integrated border force?

It is often suggested that the UK should bring together its customs, immigration, police and intelligence work into an integrated border force. Several other countries have done so: for example, in 2003 Canada created the Canada Border Services Agency (CBSA) combining the border control functions of a number of different agencies.[36]

The House of Lords European Select Committee has pointed out that most other EU Member States' border guards operate as a uniformed police force and typically possess police powers, though they will not always be the only agency operating at a border post.[37] Those countries with border guards or border police include:

- Austria
- Czech Republic (Alien and Border Police Service)
- Denmark (border control police)
- Estonia[38]
- Finland
- France (the *Police Nationale* includes the *Police de l'air et des frontiers*)
- Germany (the Federal Border Police, *Bundesgrenzschutz*)[39]
- Greece
- Hungary
- Latvia
- Lithuania
- Malta
- Netherlands (*Koninklijke Marechausee*)[40]
- Poland
- Portugal
- Slovak Republic
- Spain (police officers from the *Guarda Civil* can deal with immigration, police and customs controls)

The Conservative Party has proposed that a new force be created to police the borders, tackle people trafficking and deal with overstayers, illegal working and organised criminal activity involving foreigners. David Davies and Damian Green see this as part of the Serious Organised Crime Agency rather than the Immigration and Nationality Directory.[41] The Liberal Democrats have also called for "a wholesale consolidation of the agencies presently responsible for customs, border control and transport policing into one

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36 http://www.cbsa-asfc.gc.ca/agency/menu-e.html

37 *Proposals for a European Border Guard,* 29th Report of 2002–03, HL Paper 133, para 75: http://pubs1.tso.parliament.uk/pa/ld200203/ldselect/ldeucom/133/13308.htm

38 http://www.pv.ee/_eng/

39 http://www.bundesgrenzschutz.de/

40 http://www.marechaussee.nl/

41 David Davis and Damian Green, *Controlling Economic Migration*, November 2006, pp. 26-27: http://www.conservatives.com/pdf/controllingeconomicmigration.pdf

integrated border force"[42] but warned that it would require "new, not just redeployed, resources. It isn't enough simply to shift police officers away from their current duties."[43]

The Home Affairs Committee in its 2001 report on *Border Controls* recommended that border controls would be improved by the creation of a single border agency:

> 109. We recommend that existing border control agencies should be combined into a single frontier force on the basis of secondment and direct employment, but with clear lines of communication back to the parent agencies. Pending the creation of a single frontier force, strategic co-direction of better joint working should be provided by a ministerial group to which the official Border Agencies Directors Group should report at least four times a year.[44]

It set out some of the disadvantages of the current system, such as: lack of access to other agencies' databases; intelligence not being shared as widely as it might be despite statutory gateways for information-sharing; and some officers on duty not having full powers to carry out necessary border control functions on behalf of others.[45] There are inter-agency groups such as the Border Agencies Working Group and the Border Agencies Directors Group, but the Committee found that this did not always result in co-operation on the ground.[46]

Arguments put to the Committee against a single frontier force included: losing links with inland operations; reduction of skills and objectives to a lowest common denominator; and the disruption caused by reorganisation. The then Home Secretary, Jack Straw, told the Committee that he was "very far from persuaded" that there should be a single border control agency because of the "very, very significant problems" that might arise in the relationship between the new force and its former parent agencies (Customs, the Immigration Service and the police).[47] In its reply to the Committee's report, the Government said that it "remained to be persuaded" about a single border force, partly because the cost benefit seemed unclear.[48] At that time the Government was also "unpersuaded" that the issue of entitlement cards should be investigated as the Committee had suggested.[49]

Border control has become an increasingly important topic in the European Union, though the UK has an 'opt-in' provision which allows it to participate only when it

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42 Liberal Democrat press release, *Integration of border control force must go beyond uniforms - Clegg*, 23 July 2006: http://www.libdems.org.uk/news/story.html?id=10654&navPage=news.html

43 Liberal Democrat press release, *We need a truly integrated border force - Clegg*, 21 November 2006: http://www.libdems.org.uk/news/story.html?id=11350&navPage=news.html

44 Home Affairs Committee, 1st report of 2000-2001, *Border Controls*, HC 163-I, 23 January 2001: http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmselect/cmhaff/163/16302.htm

45 *Ibid* para. 91

46 *Ibid* para. 92-95

47 Home Affairs Committee, 1st report of 2000-2001, *Border Controls*, HC 163-II, Q 488

48 Home Affairs Committee, 4th special report of 2000-2001, *Border Controls: Government Reply to the First Report from the Home Affairs Committee HC 163, Session 2000-01*, HC 375, 27 March 2001, para. 44

49 Home Affairs Committee, 4th special report of 2000-2001, *Border Controls: Government Reply to the First Report from the Home Affairs Committee HC 163, Session 2000-01*, HC 375, 27 March 2001, paras 65-69. See also the Westminster Hall debate on the Committee's Report, HC Deb 3 May 2001 cc 295-381WH

chooses to (in general it participates in the measures on asylum and illegal migration, but not those on legal migration). The creation of the European "Schengen" zone with no internal borders,[50] combined with EU enlargement, has led to increased emphasis on strengthening the external border of the EU.[51] This has resulted in the creation of the European Borders Agency FRONTEX, based in Warsaw,[52] proposals for Rapid Reaction intervention teams at external borders, and an emphasis on operational co-operation. The UK is not involved in FRONTEX. In addition the Commission and the Council have mooted the idea of a unified European Corps of Border Guards.[53] This idea is still a long way off, though co-operation and co-ordination between existing agencies has increased in recent years. The UK can choose whether or not to be involved in these plans. The House of Lords Select Committee on the European Union published a report in 2003 on the EU proposals, entitled *Proposals for a European Border Guard*.[54]

C. The Bill

The Bill does not propose an integrated border force. Instead it seeks to make it easier for the various agencies to work together. Firstly, it gives immigration officers the power to detain people wanted by the police (discussed in this section); secondly, it gives HMCE increased powers to share tax information with immigration officers (discussed at section X, page 53). Other clauses of the Bill that give immigration officers police-like powers to seize cash and dispose of property are discussed at section VII below (page 32).

Clauses 1 to 4 give certain immigration officers at ports in England and Wales limited powers to detain people wanted by the police. Immigration officers already have extensive powers to detain people for immigration purposes, but not for general crime-prevention purposes.

Only those immigration officers designated by the Secretary of State would have the new detention powers (**clause 1**). Because these officers would have to be "fit and proper" and "suitably trained", it is likely that there will be some guidance on how immigration officers would qualify for this new role. A parallel can be drawn with the designation of contracted-out staff as "authorised search officers" under sections 40-41 of the *Immigration, Asylum and Nationality Act 2006*. Also a SOCA officer may already be designated to have the powers of an immigration officer if the Director General is satisfied that he or she is capable of effectively exercising those powers, has received adequate training in respect of the exercise of those powers and is otherwise a suitable person to exercise those powers.[55]

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50 see http://www.eurovisa.info/SchengenCountries.htm

51 see http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm

52 http://www.frontex.europa.eu/

53 European Commission Communication, *Towards Integrated Management of the External Borders of the Member States of the European Union* COM (2002) 233, 7 May 2002; European Council *Plan for the management of the external borders of the Member States*, Council document 10019/02, 14 June 2002

54 29th Report of 2002–03, HL Paper 133. It was debated in the House of Lords: HL Deb 8 Jan 2004 cc351-68

55 *Serious Organised Crime and Police Act 2005*, s 43(1)(a), and the *Serious Organised Crime and Police Act 2005 (Application and Modification of Certain Enactments to Designated Staff of SOCA) Order 2006*, SI 2006/987, arts 5, 7(1), 7(2).

A designated immigration officer would be able to detain someone if he thinks that the person is liable to arrest without warrant or is the subject of an arrest warrant (**clause 2**). The officer would presumably be relying on information passed on by the police about criminal suspects. As it is intended to be only a stop-gap measure until a police constable arrives, the immigration officer may detain the suspect only for three hours (clause 2(3); this is the same length of time as that for which an authorised search officer can detain someone under immigration powers until an immigration officer arrives).

The powers could be exercised only "at a port". Ports are defined subjectively rather than by any geographical description (**clause 4**), so any place to which a person has gone in order to embark on a ship or aircraft, or arrived at on disembarking, would count.

The Bill's *Regulatory Impact Assessment* suggests that the cost of training a quarter of port immigration officers in the new powers would be "in the region of £1.5m".[56]

III Biometric immigration documents: clauses 5-15

The Bill contains outline provisions for new compulsory biometric immigration documents to be issued to non-EEA nationals living in the UK, which they would be required to use in certain circumstances. The Government already collects biometric information relating to immigration in a number of contexts: asylum seekers, immigration detainees, visa applicants, and passport applicants. It also requires employers to check potential employees' identification documents for the right to work. The Identity Cards scheme that the Government is introducing includes both ID cards for British citizens and residence cards for foreign nationals which would act as evidence of identity, status and entitlement. Each of these developments is discussed below by way of background.

A. Existing biometric information

Since 2002 asylum-seekers in the UK have been required to provide their fingerprints, which are stored on (and checked against) the Home Office's Immigration and Asylum Fingerprint System (IAFS) and the European Union fingerprint database EURODAC.[57] Asylum seekers are then issued with an Application Registration Card (ARC) containing a chip with fingerprint data, a photograph and a statement of the holder's employment status. Asylum-seekers need to present the ARC in order to access the services provided for them.[58]

Section 141 of the *Immigration and Asylum Act 1999* (as amended) lists the people whose fingerprints can be taken. As well as asylum seekers it also includes people who have been detained or arrested under immigration powers, and their dependants. The fingerprints of children can be taken as long as the child's parent or guardian, or the adult taking responsibility for the child, is present.

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56 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 4

57 See http://europa.eu/scadplus/leg/en/lvb/l33081.htm for information on EURODAC and the

58 Home Office press notice, *Radical reform unveiled for more robust asylum system*, 29 October 2001

The Government is also gradually introducing compulsory fingerprinting for visa applicants to provide fingerprints, on a country-by-country basis. By 2008 this will apply to all visa applicants.[59] Their fingerprints are checked against those of visa and asylum applicants in the IAFS biometric database. In the trial period, between July and December 2005, 321 out of 40,151 visa applicants at nine posts (mostly in East Africa) were refused a visa as the result of a biometric match (0.7%).[60]

Fingerprints are not automatically checked at the border to compare them with the prints given with the visa application, nor against police databases of fingerprints. However, by 2009 the Government is intending to link systems together so that biometric information from a visa applicant can be used at the border to check that person's identity and status.[61] In addition, UKvisas' Biometrics Programme and the Police Information Technology Organisation are developing the "necessary technical solutions to provide checks against Police fingerprint records prior to the issue of a visa".[62]

The UK is involved in discussions on proposals for a new European Regulation which will require member states to issue a biometric residence permit to any third country national who is authorised to stay in its territory for six months or more.[63] Regulation 1030/2002, by which the UK has chosen to be bound, already stipulates a uniform format for residence permits for third-country nationals.[64] EU countries are also introducing finger-scanning in the visa application process under EU regulations which do not bind the UK.

The USA-PATRIOT Act, passed in response to the terrorist attacks of September 11 2001, signalled new requirements for biometric information to be provided by those seeking to go to the US. Under the US-VISIT programme, all visitors travelling to the United States now have their two index fingers scanned and a digital photograph taken to match against their travel documents at the port of entry.[65]

Since October 2006 all new passports issued by the UK Passport Service (UKPS) - now part of the Identity and Passport Service (IPS) - have been biometric.[66] They contain a microchip with what is known as a "facial biometric", which is simply a digitised image of the holder's photograph: applicants do not need to appear in person to have their faces scanned.[67] The chip also stores electronically the biographical information which is

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59 Home Office, *Borders, Immigration and Identity Action Plan*, December 2006, para. 3.2: http://www.ind.homeoffice.gov.uk/6353/aboutus/bordersimmigrationactionplan.pdf

60 Home Affairs Committee, 5th Report of 2005-06, *Immigration Control*, HC 775-I, paras 171-178

61 Home Office, *Borders, Immigration and Identity Action Plan*, December 2006, paras 2.2 and 3.6: http://www.ind.homeoffice.gov.uk/6353/aboutus/bordersimmigrationactionplan.pdf

62 Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*, p.16: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf

63 See Bill 53-EN para. 137

64 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002R1030:EN:HTML

65 http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0006.shtm

66 See Library Standard Note SN/HA/4126, *Biometric passports*, 5 October 2006, available on the Parliamentary Intranet

67 The new standards for passport photographs are set out here: http://www.passport.gov.uk/downloads/PLE_04Eng-Photo.pdf

printed in the passport. It does not contain any information which is not also on the face of the passport. There are plans to introduce 'true' biometrics - iris and/or fingerprint data - in the next generation of biometric passports. IPS anticipates piloting the recording of fingerprints as a second biometric from volunteers in late 2007.[68]

B. Employers' document checks

There is currently no easy way for employers to verify whether or not a person has the right to work in the UK. There is not yet a comprehensive Home Office status-checking service. Instead, employers' duties under section 8 of the *Asylum and Immigration Act 1996* to ascertain whether potential employees are allowed to work in the UK are considered to be met if they check and copy certain documents or combinations of documents.[69] For instance, passports (with an appropriate endorsement if necessary) are enough on their own, but a National Insurance number needs to be accompanied by another document such as a full UK birth certificate. These are explained in full in Home Office guidance.[70] If they do not carry out these statutory checks, employers can be fined up to £5,000 by a magistrates' court for each person they are found to have employed illegally. The Home Office has identified that the use of "insecure, easily forged documents as evidence of immigration status is a real threat to the effective maintenance of immigration control, including the prevention of illegal working".[71]

According to the Home Affairs Committee, the section 8 provisions are "not well understood, applied or enforced".[72] National Insurance numbers appear to cause particular problems.[73] Between 2001 and 2005, 43 persons were proceeded against in magistrates' courts under sections 6 and 8 of the *Asylum and Immigration Act 1996* for employing a person aged 16 and above subject to immigration control, of whom 24 were found guilty:

Persons proceeded against for offences under *Asylum and Immigration Act 1996*
Magistrates Courts

		Proceeded against				
Section	Offence	2001	2002	2003	2004	2005
6 & 8	Employing a person aged 16 and above subject to immigration control	5	2	2	11	23

		Found guilty				
		2001	2002	2003	2004	2005
6 & 8	Employing a person aged 16 and above subject to immigration control	1	1	1	8	13

Source: Home Office *Control of Immigration Statistics*

68 Identity and Passport Service, *Safeguarding Your Identity: Corporate and Business Plans 2006-2016*, p. 30
69 The *Immigration (Restrictions on Employment) Order 2004* SI No.755
70 An outline, along with short and full guidance, is available on the IND website at: http://www.ind.homeoffice.gov.uk/lawandpolicy/preventingillegalworking/
71 Bill 53-EN, para. 136
72 Home Affairs Committee, 5th Report of 2005-06, *Immigration Control*, HC 775-I, para. 459
73 *ibid*, paras 458-467

However, some changes are imminent. Section 8 is soon to be repealed and replaced by a new scheme under the *Immigration, Asylum and Nationality Act 2006* comprising civil penalties for employees who were negligent (with the statutory defence of having checked and copied specified documents) and a new offence of knowingly employing an illegal worker (without such a statutory defence).[74] Following a small initial pilot project,[75] the Home Office is also introducing a new identity-checking service: from April 2007, at the employer's request and with the consent of the potential employee, it will run a check to confirm whether an individual has permission to work.[76]

The IND review commits the Government to a doubling of immigration enforcement resources by 2009-10.[77] On 20 November 2006 the IND announced that 800 "new immigration officers" - including 400 police constables and 40 sergeants - would be starting work from the beginning of 2007.[78] However, it was subsequently reported that ACPO (the Association of Chief Police Officers) had not in fact agreed to second officers to the IND under this proposal.[79]

C. The ID cards scheme

The introduction of some form of identity card for people subject to immigration control as a tool against unlawful employment or access to services, in addition to identity cards for British citizens, has had a long gestation period. The 1995 Green Paper *Identity Cards: a consultation document* mentioned briefly that ID cards might help with identifying people such as foreign visitors who were not entitled to benefit from certain services.[80] At the same time the think-tank IPPR and the human rights organisation Justice published a paper that raised the arguments for and against ID cards as, amongst other things, "devolved immigration control" and as a means of checking eligibility for public services and benefits, noting for example that the process of checking eligibility is more complex than establishing identity or even immigration status.[81] The Home Affairs Committee in its 1996 report on *Identity Cards* concluded that "only an identity card which was either compulsory or one which carried details of immigration status would have an impact on preventing illegal immigration".[82]

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74 For background to this see Library Research Paper 05/52, *The Immigration, Asylum and Nationality Bill, Bill 13 of 2005-06*, 30 June 2005, pp. 26-32

75 Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*, p.53: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf

76 Home Office, *Borders, Immigration and Identity Action Plan*, December 2006, para. 3.13: http://www.ind.homeoffice.gov.uk/6353/aboutus/bordersimmigrationactionplan.pdf

77 Home Office, *Fair, effective, transparent and trusted: rebuilding confidence in our immigration system*, July 2006, p. 12

78 Home Office press notice, *Smarter, larger intelligence led units boost immigration enforcement*, 20 November 2006

79 Times, *Snub for Reid as top police refuse to spare officers for immigration*, 23 December 2006

80 Home Office, *Identity cards: A consultation document*, CM 2879, May 1995, para. 2.29

81 Institute for Public Policy Research (IPPR) and Justice, *Identity cards revisited: a consultation paper*, May 1995

82 Home Affairs Committee, 4th Report of 1995-96, *Identity Cards*, HC 172-I, para. 28

The Home Office's 2002 consultation paper *Entitlement Cards and Identity Fraud* devoted three pages to 'Tackling illegal immigration and illegal working';[83] but the subsequent *Next Steps* paper suggested that "a card would not be mandatory for verification of entitlement to services in the voluntary phase until the appropriate further Parliamentary decision on a move to compulsion".[84]

By 2004 the proposed ID cards scheme had become "primarily… a measure to help deter and control illegal immigration by helping to establish the nationality and immigration status of UK residents" and the Government had set out its plans to introduce mandatory biometric identity documents for all foreign nationals (including EEA nationals) coming to stay in the UK for longer than three months.[85] The Home Affairs Committee's 2004 report broadly supported this approach but stressed that it would not be enough on its own:

> We believe that identity cards can make a significant contribution to tackling illegal working. However, this will need to be as part of wider enforcement measures, including action against culpable employers. We repeat our recommendations that the Government should target employers who deliberately break the law and that the Proceeds of Crime Act should also be used to seize profits made from the employment of illegal labour. We welcome the steps the Government has taken so far, but to be fully effective there must be properly resourced enforcement of existing regulations.[86]

The Joint Committee on Human Rights commented that including in the ID card scheme "designated documents" such as residence cards for foreign nationals would effectively render ID cards compulsory for certain groups of people, raising the potential for interference with Article 8 of the European Convention on Human Rights (respect for private and family life) and for discrimination in breach of Article 14.[87]

After one false start,[88] the legislation was passed as the *Identity Cards Act 2006*. Background to the legislation and the debates surrounding it appear in the Library Research Paper on the *Identity Cards Bill*.[89] It is essentially an enabling measure, setting up the framework for the introduction of the national ID card scheme but leaving the bulk of the detail for regulations to be issued later and the compulsory provisions for a future Act. As well as the ID cards themselves for British citizens, the Act allows other

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83 CM 5557, July 2002, pp. 31-33: http://www.archive2.official-documents.co.uk/document/cm55/5557/5557.htm

84 Home Office, *Identity Cards: the next steps*, Cm 6020, November 2003, p. 7: http://www.archive2.official-documents.co.uk/document/cm60/6020/6020.pdf

85 Home Office, *Legislation on Identity Cards: a consultation*, Cm 6178, April 2004, pp. 12, 19 and 29: http://www.archive2.official-documents.co.uk/document/cm61/6178/6178.pdf

86 Home Affairs Committee, 4th Report of 2003-04, *Identity Cards*, HC 130-I, para. 80. Two members of the Committee, David Winnick and Bob Russell, remained unpersuaded of the need for an ID card scheme and dissented from the conclusions of the report. Their minority report appears as an amendment in the published document.

87 Joint Committee on Human Rights, 5th Report of 2004-05, *Identity Cards Bill*, HL 35, HC 283, paras 18-21

88 An *Identity Cards Bill* was introduced into Parliament on 29 November 2004 (Bill 8 of 2004-05, HC Deb 29 November 2004 c376 - see Library Research Paper 04/93) but fell at the dissolution of Parliament before the General Election.

89 RP 05/43, 13 June 2005

documents such as residence cards for foreign nationals to be designated as ID cards. If a document is designated, anyone applying for one will simultaneously need to apply to be entered in the National Identity Register, unless he is already so registered.[90]

A *Strategic Action Plan for the National Identity Scheme* was published in December 2006,[91] and announced by way of a Written Statement from the Immigration Minister Liam Byrne.[92] One detail of the Plan that attracted media attention was the decision that the National Identity Register, the database underpinning ID cards, is to be held on three existing Government databases, rather than on a new stand-alone database built from scratch as originally envisaged.[93]

At the same time as that Plan, the Government published a *Borders, Immigration and Identity Action Plan*,[94] declaring that it would:

> Screen and store biometric ID for everyone from the 169 nationalities outside the EEA applying to work, study or stay in the UK for more than six months;
>
> Also require biometric ID for people from 108 nationalities applying to visit the UK, even for periods shorter than six months;
>
> Undertake electronic background checks on 30 million people, start checking fingerprints at borders and, increasingly from 2009, count visitors in as they land and count them out as they leave;
>
> Roll out biometric ID progressively to foreign nationals from outside the EEA who are already in the UK and reapply to stay; introduce new identity checking services for employers and other government agencies; and begin to issue a National Insurance Number only when a biometric identity has been established.[95]

What this means is that existing schemes for fingerprinting visa applicants will be extended to apply to all visa applicants, but people will not be issued with biometric identity cards until they apply to extend their stay in the UK.

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90 section 5(2)

91 http://www.identitycards.gov.uk/downloads/Strategic_Action_Plan.pdf

92 HC Deb 19 December 2006 cc138-41WS http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm061219/wmstext/61219m0001.htm#06121936000098

93 See for example *BBC News Online*, 'Giant ID computer plan scrapped', 19 December 2006: http://news.bbc.co.uk/1/hi/uk_politics/6192419.stm

94 http://www.ind.homeoffice.gov.uk/6353/aboutus/bordersimmigrationactionplan.pdf

95 HC Deb 19 December 2006 cc138-41WS http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm061219/wmstext/61219m0001.htm#06121936000098

D. The Bill

Clauses 5 to 15 of the Bill provide a framework for regulations requiring non-EEA nationals[96] to apply for biometric immigration documents (BIDs) and to provide biometric information for the application and for subsequent verification of the BID. BIDs would be the equivalent of identity cards for British citizens. They would be compulsory and could be made mandatory for certain services. A civil penalty would be charged for non-compliance.

The Bill makes no reference to the *Identity Cards Act 2006*.

The Government considers that these proposals are necessary for the economic well-being of the country and the prevention of crime, and are a proportionate way of achieving those objectives.[97]

No draft regulations have yet been prepared to inform the debate, so a great deal of the substance is not yet clear. Some of the main areas of interest are likely to be:

1. the timing of the introduction of compulsory BIDs;
2. in what circumstances they would have to be used;
3. who will be obliged to apply for one;
4. how much they will have to pay;
5. how they will register their biometric information;
6. where that information will be stored and who will have access to it; and
7. the consequences of non-compliance.

Each of these issues is addressed briefly below.

1. Timing

Although the Bill says nothing about when BIDs for foreign nationals will be introduced, Home Office policy documents have announced that this is proposed towards the end of 2008, whereas the first ID cards for British citizens will not be issued until 2009:

> From 2008, non-EEA nationals who have supplied their biometrics already (i.e. asylum seekers and visa nationals) will be issued with a biometric card if they seek, and are given permission, to stay longer in the UK. In addition successful new applicants for work and study in the UK will start having to verify their identity biometrically before being able to take up their entitlement. Biometric travel documents (based on facial images) will be issued to refugees by June 2007. The first identity cards for British citizens will be issued by 2009.[98]

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96 The European Economic Area (EEA) consists of the 27 European Union Member States plus Iceland, Liechtenstein and Norway.

97 Bill 53-EN paras 135-6

98 Home Office, *Identity Cards Act 2006 – First section 37 report to Parliament about the likely costs of the ID Cards scheme*, October 2006, para. 1: http://www.identitycards.gov.uk/downloads/costreport37.pdf

The Explanatory Notes say that different categories of those subject to immigration control will be subject to the measures at different times, and though the precise order and categories of the phases of implementation are still being developed "it is likely that those categories who present the greatest risk to immigration control will be subject to a requirement first. The phases may also be determined by practical considerations, such as the availability of the necessary technology and resources for particular applicants".[99]

The *Regulatory Impact Assessment* on the Bill states unequivocally that this is a trial for ID cards: it would "de-risk ID Cards by trialling similar technology and processes".[100]

The charity Joint Council for the Welfare of Immigrants asserts that requiring foreign nationals to register compulsorily before British citizens "is a recipe for discrimination, both against foreign nationals and ethnic minorities".[101] The parliamentary Joint Committee on Human Rights also raised the question of whether staggered implementation is permissible under human rights legislation.[102] The Government accepts that those subject to immigration control will be treated differently from those who are not, but it does not think this is discrimination because "those subject to immigration control are not in a comparable position to those who are not subject to immigration control". Even if it were held to be discriminatory, the Government believes it is objectively justified and proportionate.[103]

2. Compulsory use

Clause 5(1)(b)(iii) says that regulations could require a BID to be used not just for immigration purposes but "in specified circumstances where a question arises about a person's status in relation to nationality or immigration". This could potentially be very wide, covering for example: employment; access to benefits, NHS healthcare or education funding; arrest or imprisonment. In combination with **Clause 5(1)(c)**, which provides for regulations requiring anyone producing a BID to provide biometric information to see if they are the rightful owner, it could result in foreign nationals being required to provide their fingerprints on demand to employers, DWP officials, doctors, higher education funders and the police (presumably they would have portable fingerprint scanners.) **Clause 5(4)** does not require the person carrying out the verification to be an 'authorised person' (which currently means a constable, an immigration officer, a prison officer, an officer of the Secretary of State authorised for the purpose, or an employee of a contractor running a removal centre).[104]

The emphasis is somewhat different from the equivalent provisions of the *Identity Cards Act 2006*. Section 4 of the 2006 Act creates the power to designate documents for identity purposes - passports being the obvious example, but immigration documents were also mentioned during the passage of the *Identity Cards Bill*. Once a document is

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99 Bill 53-EN, paras 141-2

100 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 5

101 Habib Rahman, letter to the *Guardian*, 'Identity Bias' 1 June 2005

102 Joint Committee on Human Rights, 5th Report of 2004-05, *Identity Cards Bill*, HL 35/HC 283, paras 18-21

103 Bill 53-EN, para. 139

104 These are the people currently authorised to take fingerprints under the *Immigration and Asylum Act 1999* s.141 - see the definition of "authorised person" in **clause 15(1)(e)**

so designated, an application for that document is *ipso facto* viewed as an application to be entered on the National Identity Register (section 5). However, section 7 specifies that further primary legislation will be needed in order to compulsorily enter any individual or any group on the Register. Section 13 creates a power to make the provision of public services conditional on identity checks but also stipulates that such a power cannot be exercised until it is compulsory for the person seeking the service or benefit to be entered on the Register.

The *Borders, Immigration and Identity Action Plan* suggests that biometric immigration documents will be tried out first in the financial, care and educational sectors. It also states that from 2008 the Government will "where appropriate" make biometric ID compulsory for the issuing of a National Insurance number.[105]

Originally the Government had not intended to require employers to check biometric identity documents until there had been public consultation. In September 2006 it had said:

> The Government believes that illegal working provisions in the Immigration Asylum and Nationality Act 2006 provide a legal basis at some point in the future for the Government of the day to require employers to verify the content of an identity card with the NIR. Such a requirement would have to take into account the extent to which employers have access to card readers, and could only be introduced following extensive public consultation.[106]

The *Regulatory Impact Assessment* appears to reflect an earlier version of the Bill under which the government could not have provided for compulsory identity checks on foreign nationals:

> It has been assessed that there will be little impact on the business sector. A requirement for those subject to immigration control to provide their biometric details should place no direct burdens on business, charities or voluntary bodies. There are no provisions in the Bill which will allow the Government to require public sector services, private business, charities or voluntary bodies to make identity checks on foreign nationals using a biometric document scheme. However, many businesses and other groups may choose voluntarily to only accept biometric documents as proof of identity.
>
> It is intended, in the future, to require employers to check whether an applicant or employee has a biometric document with the requisite entitlement enabling them to work.[107]

There is therefore no published assessment of the financial impact on the public or private sectors of compulsory checking of BIDs.

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[105] Home Office, *Borders, Immigration and Identity Action Plan*, December 2006, para. 3.14: http://www.ind.homeoffice.gov.uk/6353/aboutus/bordersimmigrationactionplan.pdf

[106] Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*, p.62: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf

[107] Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 4

3. Scope

Clause 5(2)(a) envisages gradual or limited roll-out of the requirement to apply for a BID. The Government has suggested that cards would be compulsory for foreign nationals only if they are staying in the UK for longer than three months,[108] and that initially they will not be issued with biometric identity cards until they apply to extend their stay in the UK.[109] Depending on the type of visa, this might not be until two, three or four years after they arrive in the UK.[110]

It is not clear how many people this might cover. In 2005 – the latest year for which data are available – there were 565,000 long-term inward migrants[111] to the UK, of whom three-quarters (74%) originated from countries outside the European Union (33% originated from Commonwealth countries and a further 25% from other countries). This number has been increasing rapidly:

International migration to the UK, 1995 to 2005
Nationality/Citizenship *Thousands*

	Total	*Of which:*	
		European Union	Other countries
1995	312	61	251
1996	318	72	246
1997	326	72	254
1998	390	82	308
1999	454	67	387
2000	483	63	420
2001	480	60	420
2002	513	63	450
2003	513	64	449
2004	582	117	465
2005	565	145	420

Source: Office for National Statistics *International Migration statistics*

Clause 6(3) makes it clear that, in contrast to ID cards for British citizens,[112] the Government intends BIDs to be required for children as well as adults.

4. Fees

Although **clause 15(2)(b)** specifies that fees may be charged in connection with BIDs, it is not yet known what these fees might be.

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[108] Home Office, *Legislation on Identity Cards: a consultation*, Cm 6178, April 2004, p. 12: http://www.archive2.official-documents.co.uk/document/cm61/6178/6178.pdf

[109] HC Deb 19 December 2006 cc138-41WS: http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm061219/wmstext/61219m0001.htm#06121936000098

[110] Different periods of leave may be granted under different categories of the Immigration Rules (HC 395 of 1993-94, as amended): http://www.ind.homeoffice.gov.uk/lawandpolicy/immigrationrules/

[111] For the purposes of migration statistics, a long-term migrant is defined as a person who changes their country of usual residence for a period of at least twelve months, so that the country of destination effectively becomes their country of usual residence.

[112] http://www.identitycards.gov.uk/faqs-topten-eligible.asp

The *Regulatory Impact Assessment* says that the costs of BIDs will be incorporated in the statutory six-monthly reports on the costs of ID cards,[113] but the Government's October 2006 costs report specifically excludes the costs associated with foreign nationals which it says will largely be recovered by charging.[114]

The Home Office has recently conducted a consultation exercise on the general issue of charging for immigration applications.[115] The consultation paper announced that fees would be increasing from April 2007 "to take into account additional service enhancements and immigration controls" but said there were too many variables to allow it to give indicative prices then. The Government will announce the actual fee levels early this year, following the results of the consultation exercise and market research it is undertaking "to ensure that our fee levels protect UK competitiveness, understand the value new services will add, and do not impact adversely on any particular community or sector of the economy". Costs and projected volumes for biometric capture were still being finalised.[116]

5. Registration

Clause 5(3)(b) contains the power to oblige people to have their fingerprints or other biometric data taken for a BID. It is not known how or where this registration process will happen. However, it may be that the 69 new passport offices, which have been planned with enough space to allow for the enrolment of biometrics by passport applicants, could be used.[117]

6. Data storage and access

Clause 8 sets out the framework for regulations on the use, retention and destruction of biometric information provided for BIDs. It is quite prescriptive about the content of these regulations, for instance requiring them to state that information must be destroyed if the person proves that he or she is a British citizen or a Commonwealth citizen who has a right of abode in the UK (clause 8(3)(c)).

The data obtained for BIDs would initially be stored on the Home Office IAFS (Immigration and Asylum Fingerprint System) database, which already contains the fingerprints of asylum seekers, immigration detainees and visa applicants. However, it is possible that the information would be transferred elsewhere once the new National Identity Register is up and running.

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113 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 5

114 Home Office, *Identity Cards Act 2006 – First section 37 report to Parliament about the likely costs of the ID Cards scheme*, October 2006, para. 1.4: http://www.identitycards.gov.uk/downloads/costreport37.pdf

115 A consultation paper was published in October 2006 and the consultation period closed on 22 December 2006. Home Office, *A Consultation on a New Charging Regime for Immigration & Nationality Fees*, October 2006: http://www.ind.homeoffice.gov.uk/6353/6356/17715/newfeesconsultation.pdf

116 Home Office, *A Consultation on a New Charging Regime for Immigration & Nationality Fees*, October 2006, Chapter 3, p. 13: http://www.ind.homeoffice.gov.uk/6353/6356/17715/newfeesconsultation.pdf

117 Identity and Passport Service, *Passport Interviews – Proposed Network of Offices*, p. 5: http://www.passport.gov.uk/downloads/Passport-Interview-Network-May2006_new.pdf

Currently only the IND has full access to the IAFS database. However, sections 20 and 21 of the *Immigration and Asylum Act 1999* allow data exchange between the immigration service and the police, National Criminal Intelligence Service (NCIS), the National Crime Squad (NCS), the Serious Organised Crime Agency (SOCA) and HM Revenue and Customs. Section 36 to 39 of the *Immigration, Asylum and Nationality Act 2006* contain further provisions about data sharing between immigration, police and customs officers. Clauses 36 to 38 of the current Bill also relate to exchange of information between immigration and revenue and customs officers (see below, section X, page 53).

Although employers and service providers would be conducting biometric identity checks, portable fingerprint-checking machines would be unlikely to provide more information than "match/no match/invalid".[118]

Concerns over the use and retention of data under the ID cards scheme as a whole, including the possible invasion of privacy and the danger of "function creep", have been raised many times.[119] Particular fears have been expressed that this might in practice result in discrimination against minority ethnic groups. The Race Equality Impact Assessment on the Bill that became the *Identity Cards Act 2006* found that the majority of those polled from the ethnic minorities in 2004 were in favour of the introduction of ID cards in the UK.[120] However, the Identity Project group at the London School of Economics, which examined the Government's proposals on ID cards at length, was sceptical of these poll findings.[121] In a chapter of their report devoted to "Race, Discrimination, Immigration and Policing" they pointed to a UK Passport Service study which found that black, minority and ethnic subgroups were among those most likely to view biometrics as an infringement of their civil liberties.[122]

7. Non-compliance

Under **clause 7**, non-compliance with regulations about BIDs could have immigration consequences or result in a financial penalty. On the one hand, a person's immigration application could be refused or their leave could be cancelled or varied; on the other, the Secretary of State could impose a civil penalty similar to those under the *Identity Cards Act 2006*. A person who disagrees with a civil penalty notice could either object in writing to the Secretary of State (**clause 10**) or appeal to the county court or sheriff (**clause 11**).

The Government has suggested that the civil penalty would be "up to £1,000".[123]

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118 Home Office official, personal communication, 26 January 2007

119 See Library Research Paper 05/43, *The Identity Cards Bill*, 13 June 2005

120 Home Office, *Identity Cards Bill, introduced to House of Commons on 25 May 2005: Race Equality Impact Assessment*, May 2005: http://www.identitycards.gov.uk/downloads/Identity_cards_Bil_Race_Equality.pdf

121 London School of Economics, *The Identity Project: an assessment of the UK Identity Cards Bill and its implications*, June 2005, p133

122 UK Passport Service, *Biometrics Enrolment Trial: report*, May 2005, p161

123 Home Office press notice, *New powers boost immigration officers power to protect UK borders*, 26 January 2007: http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/ukbordersbill

IV Reporting and residence conditions: clause 16

Clause 16 would give the Government the power to imposed reporting and residence restrictions on anyone with limited leave to enter or remain in the UK. This means anyone who is not a British citizen, an EEA citizen or the family member of an EEA citizen, who has not got indefinite leave to remain ('settlement') in the UK.

At the moment, the only conditions that can be imposed on someone's leave are those which:

- restrict his employment or occupation in the UK;
- require him to maintain and accommodate himself and any dependants without recourse to public funds; and
- require him to register with the police when he arrives in the UK.[124]

The clause adds two new possible conditions to this list: to restrict residence and to require regular reporting to an immigration officer or to the police. They reflect the conditions that can be imposed on someone who is liable to be detained but has instead been granted release on a restriction order,[125] which can require the person to live at a particular address and report at regular intervals to the police or an immigration officer at a specified location, time and date. Electronic monitoring may now also be imposed, in the form of telephone reporting, electronic tagging or satellite tracking, depending on the risk of absconding.[126]

Anyone who fails to comply with a residence or reporting requirement commits a criminal offence.[127]

The Regulatory Impact Assessment for the Bill states that "the proposed use is for people who have committed serious crimes in the UK but whose removal would breach international obligations".[128] Some of the people on whom the Government might wish to impose residence or reporting restrictions might be:

- foreign criminals who cannot be deported for asylum or human rights reasons (see section IX C below, page 37)
- suspected foreign terrorists
- people who cannot be kept on temporary admission because of a court order requiring them to be granted leave (for example the Afghan men who hijacked a plane and claimed asylum when they landed at Stansted)
- unaccompanied asylum-seeking children who might be at risk of disappearing.[129]

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[124] *Immigration Act 1971* s. 3(1)(c)
[125] under paragraph 2(5) of Schedule 3 to the *Immigration Act 1971*
[126] Section 36 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*
[127] under section 24(1)(e) of the 1971 Act
[128] Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 3
[129] A recent report published by ECPAT UK found that large numbers of children from abroad go missing from the card of social services: Christine Beddoe, *Missing Out: A Study of Child Trafficking in the North-West, North-East and West Midlands*, January 2007: http://www.ecpat.org.uk/publications.html

The application of these restrictions would have to stay within the bounds of Article 5 ECHR (right to liberty) which, unlike a number of other articles, does not allow for a balancing act with national security, public safety or the economic well-being of the country, etc.

As the Home Affairs Committee found, it is not clear how effective the reporting requirements are: "Some asylum applicants are subject to reporting requirements, but it is not clear what the compliance rate is [Ev 391-2, HC 775-III]. Nor do we know if those subject to reporting requirements are actually more likely to leave the country or be removed than others".[130] The Committee called for increased monitoring of failed immigration applicants until they are granted leave to remain, leave the country voluntarily or are removed (para. 431).

V Asylum support: clauses 17-18

Clause 17 is intended to maintain the Government's current position that asylum support should continue to be paid after a refusal of asylum until all appeals have been exhausted. The courts have recently cast doubt on this position.

The issue is rather technical. The definition of an asylum seeker for support purposes includes those who are appealing against the decision on their claim, but the Court of Appeal held in the case of *Slough v R (M)*[131] that this is not technically accurate because appeals in asylum cases are not actually against the refusal of asylum but against the immigration decisions that may follow an asylum refusal (such as removal decisions). This would mean that an asylum appellant is not within the definition of asylum seekers for support purposes; therefore he or she stops being entitled to asylum support as soon as the asylum claim is refused, regardless of any appeals. The Government has nevertheless always regarded asylum appellants as continuing to be entitled to asylum support (perhaps because to refuse asylum support when appeals are being brought would result in a huge increase in the numbers of applicants for 'hard cases' support under section 4 of the *Immigration and Asylum Act 1999*). It has petitioned the House of Lords for leave to appeal against the Court of Appeal's decision,[132] and in the meantime, it is seeking with this clause to put beyond doubt that entitlement to asylum support continues until all appeals have been exhausted.

Clause 18 is rather different. In relation to the offences of false or dishonest representations to obtain asylum support,[133] it introduces new powers for immigration officers of arrest without warrant, entry, search and seizure. The Government says that asylum-support fraud is a "serious problem"[134] and that these powers are necessary "to take effective action against potentially serious offenders without reliance on the police".[135] To calculate the extent of asylum-support fraud, the IND has looked the

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130 Home Affairs Committee, 5th Report of 2005-06, *Immigration Control*, HC 775-I, para. 429
131 [2006] EWCA Civ 655: http://www.bailii.org/ew/cases/EWCA/Civ/2006/655.html
132 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 3
133 *Immigration and Asylum Act 1999* ss. 105 and 106
134 Bill 53-EN para. 147
135 Home Office, *UK Borders Bill: Regulatory Impact Assessment* p. 8

amount of fraud and error in Income Support and Jobseekers Allowance identified by the Department for Work and Pensions. In 2004/05, fraud and error represented 5.4% of the DWP budget. If fraud and error in IND's total asylum support budget also amounted to 5.4% this would be equivalent to £32.5 million of IND's predicted spend on asylum support in 2006/07. IND estimated that it had identified and recovered only £3 million in 2005/06, rising to £3.3 million in the first seven months of 2006/07:

> In 2005/06 over 15 fraud cases have been identified involving frauds exceeding £10k. The lowest amount being £12K and the highest being £64k. These are significant sums of public money being lost to false representation and dishonesty and it is considered right that such cases should be prosecuted. [136]

The IND has predicted that fraud and error in the asylum budget might be as high as 9%, equivalent to £54 million in 2006/07, and has set out the likely scale of its response:

> In the first year of operation (financial year 2007/08), we expect to conduct approximately 25 prosecutions. There is no additional cost to IND in relation to the commissioning of these prosecutions. This is because IND has Accredited Counter Fraud Investigators in place (similar to DWP) and an Enforcement Unit to undertake those arrests.[137]

VI Late evidence in appeals: clause 19

New procedures under the Points Based Scheme will require applicants to submit all their supporting evidence at the time of their application.[138] The documents required for each type of application will be specified[139] and anyone wanting to send further documents late would have to submit a fresh application. The Home Affairs Committee recently criticised the lack of clarity in the current Immigration Rules and guidance over the documents required for an application, particularly given that applicants are sometimes refused for "vagueness".[140]

Clause 19 is intended to align the immigration appeals system with this, by preventing the Asylum and Immigration Tribunal in most Points Based System appeals from considering evidence from the appellant which was not submitted at the time of making the original application. The Government's Explanatory Notes give more detail.[141]

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136 Personal communication with Immigration and Nationality Directorate Enforcement Policy Unit (January 2007)

137 Home Office, *UK Borders Bill: Regulatory Impact Assessment* p.

138 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, pp. 3 and 10

139 Section 50 of the *Immigration Asylum and Nationality Act 2006* provides that any application or claim in connection with immigration may require the submission of specified information or documents (though this is not yet in force)

140 Home Affairs Committee, 5th report of 2005-06, *Immigration Control*, HC 775-I, paras 98-113

141 Bill 53-EN, paras 56-57

VII Seizing and disposing of property: clauses 20-22

Sections 289-303 of the *Proceeds of Crime Act 2002* allow the police and officers of HM Revenue and Customs to seize cash which is reasonably suspected of having been obtained through unlawful conduct or of being intended for use in such conduct, and **clause 20** would extend these powers to immigration officers in relation to immigration offences. The IND has suggested that "this will provide the UK Immigration Service with the means to target the largest incentive for illegal migration to the UK: money".[142]

The Home Affairs Committee had recommended in its 2004 report on *Asylum Applications* that these powers should be used to seize profits made by people traffickers and those who employ illegal labour.[143] Currently the Immigration Service relies on other agencies to seize cash for it, but it says that "their priorities are not the same as ours in this regard"; it wants to be able to carry out operations independently.[144]

The cash seizure powers are supported by powers of search if the sum is expected to be more than £1,000,[145] the officer is lawfully present (for instance exercising a power of entry to private premises), and prior judicial authority or the approval of a senior officer has been obtained. There is a statutory Code of Practice which sets out how these powers of search are to be exercised,[146] which the Government has said will be amended to apply also to immigration officers.[147] Detention of the cash beyond 48 hours, and forfeiture of the cash, must be authorised by a magistrate.

The Government considers that these provisions are compatible with the ECHR because they do not extend the scope or operation of the powers under the 2002 Act which was itself deemed compatible with the ECHR.[148]

Clause 21 does not give immigration officers further powers, but allows any property that has been used for the purpose of committing, or facilitating the commission of, any immigration- or asylum-related offence to be forfeited to the Secretary of State rather than to the police.

The new power to dispose of property under **clause 22**, for instance by returning it to its rightful owner, selling it or keeping it,[149] would apply to any property that has come into the possession of an immigration officer or the Secretary of State in relation to his immigration functions. This includes vehicles, ships or aircraft which have been used in

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142 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 7

143 Home Affairs Committee, 2nd Report of 2003-04, *Asyulm Applications*, HC 218-I, para. 247

144 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 2

145 *Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006*, SI 2006/1699

146 *Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2002*, SI 2002/3115

147 Bill 53-EN, para. 59

148 Bill 53-EN, para. 156

149 Clause 22(6) says that provisions may be the same as or similar to those in regulations under section 2 of the *Police (Property) Act 1897* which may authorise the sale of property and the application of the proceeds of any such sale, or in certain circumstances allow it to be retained. See the *Police (Property) Regulations 1997*, SI 1997/1908 as amended by the *Police (Property) (Amendment) Regulations 2002*, SI 2002/2313.

clandestine entry to the UK or human trafficking.[150] According to the *Regulatory Impact Assessment*, a proportion of the property forfeited would be returned to all recovery agencies involved in the process by means of a new "incentive scheme".[151]

VIII Facilitation and trafficking offences: clauses 25-27

Clauses 25 to 27 extend the scope of existing facilitation and trafficking offences so that acts committed after a person has arrived in the UK but before they have entered the UK will be covered by the offences, and remove any limits on the territorial application of these offences, so that they will apply to acts committed inside or outside the UK irrespective of the nationality of the person carrying out the Act. The Government's Explanatory Notes provide more detail.[152] It is forecast that these changes might double the number of people convicted of the offences.[153]

The Government is also seeking Counsel's opinion about introducing a new offence of facilitating a breach of entry clearance,[154] but this does not appear in the Bill. The Home Affairs Committee drew attention to the problems of forgery and fraud in entry clearance (visa) applications in its 2006 report on *Immigration Control*.[155]

IX Foreign national prisoners: clauses 28-35

A. Introduction

In April 2006 it emerged that over a thousand foreign national prisoners had been released from prison over the previous seven years (and probably more before that) without the IND considering whether or not to deport them.[156] This lead to the departure of the Home Secretary, Charles Clarke on 4 May 2006, and appearance of his successor, John Reid, in front of the Home Affairs Committee on 23 May. The Bill seeks to address one aspect of the problem by providing for the automatic deportation of foreign nationals in certain circumstances, with restricted rights of appeal and increased powers of detention. Other legislation has already changed the rules regarding prisoner transfers abroad during their sentences (see section IX F below, page 52).

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150 *Immigration Act 1971* s. 25C (as amended)
151 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 7
152 Bill 53-EN, paras. 76-82
153 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 5
154 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 2
155 Home Affairs Committee, 5th Report of 2005-06, *Immigration Control*, HC 775-I, paras 161-170
156 HC Deb 25 April 2006 cc37-38WS

B. Powers to deport

1. General

The two circumstances in which a person[157] can be deported following a criminal conviction are: (1) where the court has recommended deportation and the IND has decided to pursue this; and (2) where the court has not made a recommendation but the IND has nevertheless deemed deportation to be "conducive to the public good". (Foreign criminals might instead be "removed" under less bureaucratic procedures if they entered illegally or have breached conditions of their leave, but in this case there is no formal bar on re-entry.[158]) Such people could come to the attention of the IND's Criminal Casework Directorate (CCD) through referrals from various agencies: the prison service, the courts, the police, local immigration offices, ports or other parts of the IND.[159]

Firstly, then, a criminal court can (but does not have to) recommend deportation as part of the sentence anyone over the age of 17 years who is convicted of an offence punishable with imprisonment.[160] Home Office guidance suggests that the most common reasons for a Court not recommending deportation are that "its attention was not drawn to its powers in this respect or the judge decided to leave the matter to the Secretary of State".[161] A recommendation has no legal effect on its own, as the IND still has to decide whether or not to act upon the recommendation. It is clear that IND will not simply deport all those who are recommended for deportation, for example because the criminal courts will not consider the situation in the offender's country of origin.

Secondly, even if there has been no court recommendation, the Home Secretary can still decide to deport on grounds of public good.[162] This power is usually exercised where a foreign national is engaged in criminal activity[163] or is deemed to be a threat to national security. New guidance exists for both of these circumstances. The rules are different for EEA nationals and their family members on the one hand, and other foreign nationals on the other, so are dealt with separately here.

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157 Certain people cannot be subject to any enforced departure proceedings, including: British Citizens; Irish and Commonwealth citizens who were resident on 1 January 1973 and who have been ordinarily resident in the UK for the five years before the time of the decision; and diplomats, members of the armed forces and others who are exempt from immigration control. *Immigration Act 1971* s. 7, as amended.

158 On 2 October 2000 the *Immigration and Asylum Act 1999* replaced deportation with administrative removal for those who overstayed or breached the conditions of their stay. See *Immigration Act 1971* s33 (1) and Schedule 2 paras 8-10A (as amended), *Immigration and Asylum Act 1999* s10 and *Immigration Rules* (HC 395 of 1993-94) paras 395A-395F

159 Home Office, *Operational Enforcement Manual* ch. 74 para. 74.1

160 *Immigration Act 1971* s3(6) (as long as they are someone who may be deported)

161 Home Office, *Operational Enforcement Manual*, Chapter 13 para 13.2

162 *Immigration Act 1971* s3(5)

163 Home Office, Immigration Directorates' Instructions, ch. 13 s. 4, 'After-entry conviction cases': http://www.ind.homeoffice.gov.uk/documents/idischapter13/Section4.pdf?view=Binary

2. Deportation on 'conducive' grounds: non-EEA nationals (other than family members of EEA nationals)

Where non-EEA nationals (other than family members of EEA nationals) have been convicted of a criminal offence but the court did not recommend deportation, new guidance says that the IND will make a presumption in favour of deportation if they have been given a custodial sentence of 12 months or more, either in one sentence or as an aggregate of two or three sentences over five years.[164] The IND should not generally serve a notice of liability to deportation on a prisoner more than 18 months before his or her release date.[165]

New indicative criteria for deportations on national security grounds were set out following the London bombings of July 2005:[166]

- Writing, producing, publishing or distributing material;
- Public speaking including preaching;
- Running a website; or
- Using a position of responsibility such as teacher, community or youth leader to express views which:
- Foment, justify or glorify terrorist violence in furtherance of particular beliefs;
- Seek to provoke others to terrorist acts;
- Foment other serious criminal activity or seek to provoke others to serious criminal acts; or
- Foster hatred which might lead to inter-community violence in the UK.[167]

The *Immigration Rules* used to provide for the balancing the public interest in deportation against any compassionate circumstances of the case, and set out the factors to be taken into account in deciding whether or not to deport (including age, length of residence in the UK, strength of connections with the UK, character and conduct and employment record, domestic circumstances, previous criminal record, the nature of any offence of which the person has been convicted). A revised paragraph 364 now states that "where a person is liable to deportation the presumption shall be that the public interest requires deportation…it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the [Refugee Convention] to deport".[168] Guidance for

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164 Home Office *Operational Enforcement Manual* ch. 74 para. 74.2 and ch. 75

165 Home Office *Operational Enforcement Manual* ch. 71 para. 71.1. This follows the case of *Chindamo* 00TH2345(TH388300) in which the Tribunal ruled that the decision to deport Chindamo after he had served only two and a half years of a life sentence was unlawful since his release was too far in advance to know what his circumstances would be at the time of release.

166 A consultation on a new list of unacceptable behaviours was announced in the Home Secretary's statement to the House on 20 July 2005. The consultation was launched on 5 August 2005 (Home Office press notice 118-05). The consultation document is available at: www.homeoffice.gov.uk/inside/consults/current/index.html

167 Home Office press notice 24 August 2005: http://www.ind.homeoffice.gov.uk/ind/en/home/news/press_releases/tackling_terrorism.html

168 *Immigration Rules* (HC 395 of 1993-94, as amended), para. 364. This revision was made by a Statement of Changes to the Immigration Rules on 20 July 2006, HC1337 of 2005-06: http://www.ind.homeoffice.gov.uk/lawandpolicy/immigrationrules/statementofchangehc1337

caseworkers however still refers to a very similar list of factors which must be taken into account before a decision to deport is reached.[169]

If the Home Secretary does sign a deportation order, it is possible for anyone to object that deportation would be a breach of his or her rights under the European Convention on Human Rights or the 1951 Refugee Convention. If the Home Secretary does not agree to revoke the deportation order, the person would have an in-country human rights or asylum appeal to an Immigration Judge to determine the issue[170] (unless the appeal was certified clearly unfounded, in which case it could be exercised only from outside the UK).[171]

Those convicted of a "particularly serious crime" may however be deprived of the protection of the Refugee Convention, and the UK has legislated to set out those crimes which, in its view, qualify.[172]

3. Deportation on 'conducive' grounds: EEA nationals and their family members

EEA nationals and their family members may be deported only in the circumstances allowed by European Community law. These have always been tighter than the grounds for other foreign nationals, and have recently become even more so.

Under the new Free Movement of Persons Directive[173] a person can be removed only on grounds of public policy, public security or public health; if the person has a permanent right of residence in the UK then there must be serious grounds of public policy or public security; and if a person with a permanent right of residence has lived in the UK continuously for ten years then he or she can be deported only on imperative grounds of public security.[174] There are also certain circumstances in which these grounds cannot be invoked, which are set out in detail in the UK regulations that reflect the Directive.[175]

Moreover, the decision to deport must be based solely on the personal conduct of the person concerned, so the normal rule that the family member of a person who is being deported will himself or herself be liable to deportation does not apply to EEA nationals and their family members. Any decision that would result in the family being split must consider whether it would interfere with the right to family life under Article 8 of the European Convention on Human Rights.[176]

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169 Home Office *Operational Enforcement Manual* ch. 75 para. 75.3
170 section 82(2)(j) of the *Nationality, Immigration and Asylum Act 2002*
171 section 94 of the 2002 Act
172 *Nationality, Immigration and Asylum Act 2002* s72
173 2004/38/EC, reflected in the *Immigration (European Economic Area) Regulations 2006* SI 2006/1003
174 Home Office *European Casework Instructions* ch. 8 'Enforcement action taken against EEA nationals and family members', section 3
175 *Immigration (European Economic Area) Regulations 2006* SI 2006/1003
176 Home Office *European Casework Instructions* ch. 8 'Enforcement action taken against EEA nationals and family members', section 3 para. 2.3

All deportation action against EEA nationals or their family members will be taken on 'conducive' grounds, even if the court has recommended deportation.[177] Home Office guidance to caseworkers states that EEA nationals and their family members will be considered for deportation if a custodial sentence of 24 months or more has been imposed on them;[178] it also sets out a list of serious offences which "might" constitute serious grounds of public policy or public security[179] or imperative grounds of public security.[180] The guidance goes on to note that "in all cases the person's conduct must also demonstrate a propensity to re-offend", but it suggests – contrary to European caselaw[181] - that a past heinous crime alone might be enough to demonstrate a current threat.[182]

Any deportation must also meet the proportionality test under EC law; the guidance describes how this is interpreted in practice.[183]

Appeals against deportation decisions for EEA nationals and their family members are made under the 2006 Regulations, rather than under section 82 of the *Nationality, Immigration and Asylum Act 2002* which governs non-EEA immigration and asylum appeals.

4. Effects of deportation

There is a power to detain a person who is subject to deportation action, in the *Immigration Act 1971* Schedule 3 paragraph 2. Continued detention must be subject to regular review.

One a deportation order has been signed, any leave to remain is invalidated and the person cannot re-enter without applying to revoke the deportation order. Deportation orders will not normally be revoked for at least three years where there are criminal convictions, and those convicted of certain serious violent or sexual offences may have to wait ten years or more.[184]

C. Deportation and human rights

Even if no human rights claim is made, the Home Office must still consider the ECHR at all stages of the deportation process. Guidance on human rights issues relating to foreign national prisoners is given in Home Office instructions to caseworkers.[185]

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177 Home Office *European Casework Instructions* ch. 8 'Enforcement action taken against EEA nationals and family members', section 3 para. 1
178 Home Office *Operational Enforcement Manual* ch. 74 para. 74.2 and ch. 76
179 Home Office *Operational Enforcement Manual* ch. 75 Annex 5
180 Home Office *Operational Enforcement Manual* ch. 76 para. 76.1.1
181 *R v Bouchereau* [1977] ECR 1999, *Bonsignore v Oberstadtdirector der Stadt Koln* [1975] ECR 297, *Criminal Proceedings Against Calfa* [1999] ECR I -11, *Ministre de l'Interieur v Olazabal* [2002] ECR I – 10981, *Nazli v Stadt Nurnburg* [2000] ECR I - 957
182 Home Office *Operational Enforcement Manual* ch. 76 para. 76.1.2
183 Home Office *Operational Enforcement Manual* ch. 76 para. 76.2
184 Home Office, *Immigration Directorates' Instructions*, Ch 13 s5 Annex A: http://www.ind.homeoffice.gov.uk/documents/idischapter13/section5?view=Binary
185 Home Office *Operational Enforcement Manual* ch. 75

One of the relevant provisions is Article 3 ECHR, on freedom from torture.[186] The case of *Chahal v United Kingdom*[187] established that because the prohibition of torture is absolute, a signatory state cannot deport someone to a country where there is a real risk that he may be tortured even if that person is a risk to its national security. *Chahal* concerned the UK government's attempt to deport Mr Chahal, an Indian national of Sikh origin, to India on the grounds that his alleged involvement in Sikh separatist activities constituted a threat to the national security of the UK. Mr Chahal complained to the European Court of Human Rights (ECtHR) that, if he was sent back to India, he would face torture at the hands of the Indian authorities. The British government had argued that national security considerations should be weighed against the risk to the individual, but these arguments were firmly rejected by the majority of the Court.[188] In the recent case of *N v Finland* the Court reiterated that "as the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of an absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration".[189]

Because Article 3 ECHR cannot be derogated from, even in times of emergency, the rule in *Chahal* prevented the government from deporting foreign nationals it suspected of involvement in Al-Qaeda-related terrorism back to any country where they faced a real risk of torture. This led to the Government's derogation from the right to liberty under Article 5(1)(f) ECHR, in order to detain indefinitely the suspects in the UK under Part 4 of the *Anti-Terrorism Crime and Security Act 2001*, the House of Lords decision that this was unlawful[190] and the subsequent introduction of control orders under the *Prevention of Terrorism Act 2005*.[191]

Since the London bombings of 7 July 2005, the Government has renewed its determination to use deportation as a counter-terrorism measure. It is intervening in a case called *Ramzy v Netherlands*[192] before the ECtHR (due to be heard some time this year). Its argument is that the correct interpretation of Article 3 is that of the minority judgment of seven judges in the 1996 *Chahal* decision, which held that states should be permitted to strike a balance between the threat to national security and the potential ill-treatment of the individual when Article 3 was being applied extra-territorially, in other words when the torture or ill-treatment would occur outside the territory of the state.[193]

It is also negotiating Memoranda of Understanding with governments known to use torture against their citizens to obtain diplomatic assurances from them about their

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186 See House of Commons Library Standard Note SN/HA/4151, *Deportation of individuals who may face a risk of torture*, 2 October 2006

187 [1996] ECHR 54

188 paras 80 and 81

189 *N v Finland,* no. 38885/02, judgment of 5 July 2005

190 *A and others v Secretary of State for the Home Department* [2004] UKHL 56

191 For background to this, see Library Research Paper 05/14, *Prevention of Terrorism Bill (Bill 61 of 2004/05)*, 22 February 2005 and Library Standard Note SN/HA/3438, *Prevention of Terrorism Act 2005*, 13 February 2006

192 Application Number 25424/05

193 [1996] ECHR 54, joint partly dissenting opinion of Judges Gölcüklü, Matscher, Sir John Freedland, Baka, Mifsud Bonnici, Gotchey and Levits, para. 1

treatment of individuals returned there. So far, it has concluded them with Jordan (10 August 2005), Libya (18 October 2005) and the Lebanon (23 December 2005).[194] A similar agreement with Algeria is apparently contained in an unpublished exchange of letters between the Prime Minsters of Algeria and the UK[195] and has led to the departure of a number of Algerian terrorist suspects.[196]

The Committee of Privy Counsellors appointed to review the *Anti-Terrorism Crime and Security Act 2001* noted that: 'Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally'.[197]

Article 3 is not the only relevant provision. In the recent cases of *Ullah* and *Do*, the House of Lords has held that removal from the UK could be challenged even where the anticipated treatment in the receiving state was not sufficiently severe to engage Article 3 ECHR but would breach other articles of the ECHR. However, it held that 'successful reliance on other articles as a ground for resisting extradition or expulsion demanded the presentation of a very strong case'.[198] Such a challenge, if successful, would result in the grant of subsidiary protection rather than refugee status. Home Office guidance for officials on the implications of this judgment is available on its website.[199]

Anyone who has a spouse and/or child who is settled in the UK could argue that removing them from, or refusing to admit them to, the UK is a breach of their rights under Article 8 ECHR (respect for private and family life) because of their need to be together with family members or because of the other connections they have developed with the UK. However, Article 8 does not give an automatic right of residence wherever a person has strong family ties in the UK, as his right to family life must be balanced against the interests of "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".[200]

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194 Foreign and Commonwealth press release, *UK signs Memorandum of Understanding with Lebanon*, 23 December 2005

195 *Guardian*, 'Row as judges back Blair in key terror case', 25 August 2006, reporting on the decision of the Special Immigration Appeals Tribunal in the case of Y (SC/12/2005, 24 August 2006), an Algerian bookshop worker whom the Government wanted to deport as a danger to the UK's national security.

196 See *Independent*, 'Algerian terror suspect deported', 22 January 2007, and Amnesty International UK, *Fears for safety of two men deported from UK after arrests by Algerian security services*, 26 January 2007: http://www.amnesty.org.uk/news_details.asp?NewsID=17244

197 Privy Counsellor Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report*, HC 100, 18 December 2003, para. 195

198 *R (ex p Ullah) v Special Adjudicator; Do v Secretary of State for the Home Department*, House of Lords 17 June 2004, [2004] UKHL 26: http://pubs1.tso.parliament.uk/pa/ld200304/ldjudgmt/jd040617/ullah-1.htm. See also *Independent* Tuesday Law Report, 22 June 2004

199 Home Office, *Asylum Policy Notice 1/2004: Ullah & Do - House of Lords Judgment*: http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/apis/ullah___do_-_house.html

200 ECHR Article 8(2)

The case law interpreting and applying Article 8 in this context is extensive and complex, but the two main questions were set out by the European Court of Human Rights in the case of *Abdulaziz*:[201]

(1) Are there 'obstacles' or 'special reasons' why family life cannot be established elsewhere?
(2) Did the parties to the relationship know that they would not necessarily be able to maintain their family life in the country in which they wish to live at the time family life was established (eg when they got married)?

An unpublished Home Office notice, DP3/96,[202] provides guidance to officials on whether or not removal action is likely to be appropriate in cases of people who are liable to be removed or deported but who have married a person who is settled in the UK. Crucially, it states that deportation or removal should not normally be initiated where the person has "a genuine and subsisting marriage with someone settled here and the couple have lived together in this country continuously since their marriage for at least 2 years before the commencement of enforcement action; and it is unreasonable to expect the settled spouse to accompany his/her spouse on removal". It also notes that if someone has criminal convictions, "the severity of the offence should be balanced against the strength of the family ties." The notice also looks at how to take into account the presence of children with the right of abode in the UK, stating that "the crucial question is whether it is reasonable for the child to accompany his/her parents abroad".

D. Problems

If the IND fails to consider foreign national prisoners for deportation, one of two possible outcomes will follow: either prisoners are detained beyond their release dates, or they are released and stay in the UK despite the potential public interest in their being deported.

A thematic report on foreign national prisoners from HM Inspector of Prisons, published in November 2006, identified "systematic failures in care and management":

> The report begins by analysing the main needs and problems of foreign nationals. It identifies some pockets of good practice within individual prisons. But it also identifies some key failings:
>
> liaison between IND and prisons (Chapter 3)
>
> - there was widespread ignorance, confusion and concern about immigration issues among both prison staff and prisoners;
> - there was extreme frustration at the lack of support and contact from IND; staff found formal channels of communication were ineffective and wasted their time: messages went unanswered, faxes disappeared and there were no clear lines of responsibility;

[201] *Abdulaziz, Cabales and Balkandali v UK*, Series A No 94 (1985) 7 EHRR 471
[202] Home Office, *Marriage Policy*, DP3/96, 13 March 1996, unpublished

- this led not only to prisoners being released without consideration of deportation, but also to prisoners remaining in prisons when they wanted to return home; and
- little independent legal advice was available to prisoners.

identification and provision of support for foreign nationals within the prison system (Chapter 2)

- many prisons did not even know with any accuracy how many, or which, foreign nationals they held;
- poor communication with the courts meant that prisons were sometimes unaware of, or did not record, those prisoners whom the court had recommended for deportation; and
- there was insufficient support for foreign nationals' main needs, which the research identified as language, family links and immigration; many staff were unaware of how serious these problems were.

inadequate preparation for release or removal (Chapter 4)

- most prisons had no figures on how many foreign nationals were released into the community;
- deportation decisions were often made late;
- foreign nationals needed access to appropriate regimes, to reduce the risk of reoffending wherever they were released, but also because safety and security in prisons depend on prisoners being purposefully occupied; and
- essential links with statutory services, such as probation, were often ineffective.

The report recommends:

- a national policy for the management and support of foreign national prisoners, backed by standards, to ensure that each prison has the processes and resources to meet their needs;
- better IND support and liaison; and early and defensible decisions on deportation, taking account of all the circumstances of the case;
- robust systems for supervising those discharged into the UK; and the provision of independent immigration advice in each prison.[203]

A short follow-up report, looking at developments since April 2006, was due to be published in January 2007.

Written evidence from the Home Office to the Home Affairs Committee's inquiry on *Immigration Control* suggested some of the reasons why foreign prisoners are not removed on completion of their sentence:

- the prisoner may be awaiting the outcome of an appeal against the decision to deport him; or

[203] Home Office press notice, *Foreign national prisoners - systemic failures in care and management*, 3 November 2006: http://www.ind.homeoffice.gov.uk/aboutus/newsarchive/foreignnationalprisonerssystemic

- the prisoner may have applied to remain on human rights grounds; or
- late in his sentence, the prisoner may have lodged a further application for leave to remain in the United Kingdom, and the Immigration and Nationality Directorate (IND) is considering that application;
- the Immigration Service may be awaiting the issue of a travel document on which to effect his removal; or
- there may, especially at certain times of the year, be a shortage of seats on aircraft serving a particular destination; or
- there may be other matters that need to be addressed before the deportation can be effected.[204]

Charles Clarke suggested in April 2006 that the failure even to consider foreign national prisoners for deportation had occurred because arrangements for identifying and removing foreign national prisoners had not kept pace with the rise in the foreign national prisoner population (the National Audit Office had reported that consideration of deportation was being started too late to allow preparations for removal to be made before the prisoner was released).[205] He said that increased resources would however allow deportation proceedings to begin twelve months before each prisoner was due for release.[206] The IND's Criminal Casework Directorate is now committed to initiating deportation proceedings six months before the expiry of the custodial part of the sentence by spring 2007;[207] and clauses 40 and 41 of the Bill allow immigration officers and the police to search for evidence of nationality when someone who might not be British is arrested (discussed in more detail at section XI below, page 56).

The number of foreign nationals in prison establishments in England and Wales more than doubled between 1995 and 2005, rising from 4,089 in 1995 to 9,651 in 2005, despite an early removal scheme for foreign national prisoners,[208] prisoner transfer agreements with other countries, including a Council of Europe Convention,[209] and efforts to tackle drug trafficking:[210]

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[204] Ninth supplementary memorandum submitted by the Immigration and Nationality Directorate, Home Office, 3 May 2006, para. 5.6: http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/775awe54.htm

[205] *Report by the Comptroller and Auditor General: Returning Failed Asylum Applicants* HC 76 of Session 2005-06, 14 July 2005, p. 20: http://www.nao.org.uk/publications/nao_reports/05-06/050676.pdf

[206] *Home Secretary's Statement On Foreign Prisoners* Home Office 25 April 2006: http://www.homeoffice.gov.uk/about-us/news/foreign-prisoners-statement

[207] Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 9

[208] See *Report by the Comptroller and Auditor General: Returning Failed Asylum Applicants* HC 76 of 2005-06, 14 July 2005, para. 3.12

[209] *Council of Europe Convention on the Transfer of Sentenced Persons* 21 March 1983 – available on the Council of Europe website at http://conventions.coe.int/treaty/en/Treaties/Html/112.htm

[210] HC Deb 17 November 2005 col 343-4WH

Foreign nationals in prison establishments
England and Wales 30 June

1995	4,089
1996	4,259
1997	4,677
1998	5,133
1999	5,388
2000	5,586
2001	6,926
2002	7,719
2003	8,728
2004	8,941
2005	9,651

Source: Home Office *Offender Management Caseload Statistics*

The average length of time foreign nationals spend in prison has remained broadly constant over the seven years at between 9 and 10 months:

Average time served in prison (including remand time) in months of foreign national prisoners discharged from prison from determinate sentences on completion of sentence or on licence

Year of discharge	months
1999	9.9
2000	10.2
2001	10.2
2002	10.0
2003	10.4
2004	10.7
2005	9.3

Source: HC Deb 04.09.2006, c1827w

Although it is possible to identify the number of foreign national prisoners in prison establishments, it is not possible to identify from the published statistics the nationality of persons arrested. Nor is it possible to identify the nationality of offenders proceeded against and convicted in the courts, as confirmed in an answer to a parliamentary question in February 2006:

> **David T.C. Davies:** To ask the Secretary of State for the Home Department what records are kept of the immigration status of those convicted of crimes in the UK; and whether these records are available to the public. [47161]
>
> **Hazel Blears**: It is not possible to identify the immigration status of offenders on the Court Proceedings Database held by the Office for Criminal Justice Reform as the individual circumstances of offenders is not collected. [211]

The IND recently wrote to the Chairman of the Home Affairs Committee to provide an update on progress in the deportation of the foreign national prisoners who had been

[211] HC Deb 6 February 2002 c946

released without consideration for deportation. The IND confirmed that they had rectified the "original failure to consider deportation action" in all of the 1,013 cases considered. In 745 cases a decision was taken to pursue deportation while in 216 cases the IND decided not to deport. In the remaining 52 cases a decision was taken not to pursue deportation action for the time being since the individual was detained in prison on remand or continued to have remaining time left on their sentence. Of those 745 cases where a decision was taken to deport, 129 persons had been actually deported.[212]

It was alleged in the media and elsewhere that the immigration authorities deliberately did not initiate deportation action against foreign national prisoners, for fear that such action would generate more applications for asylum. At Prime Minister's questions on 3 May 2006, the Prime Minister insisted that this was not so.[213] He suggested that the immigration rules and their interpretation by the courts were preventing the Home Office from deporting some foreign prisoners and that the rules needed to be changed to provide for automatic deportation.[214] Charles Clarke, in what turned out to be his last major announcement as Home Secretary, set out his proposals in detail in a statement the same day, including:

- consultation on a statutory presumption in favour of deportation for all foreign criminals sentenced to imprisonment and other serious offenders
- full use of administrative removal rather than deportation in eligible cases;
- more effective procedures in relation to psychiatric hospitals;
- a new power in primary legislation to detain an individual pending consideration of whether they should be deported or removed as a result of their criminal conviction.
- amending primary legislation so that deportation appeals, save for those raising asylum or human rights issues that are not clearly unfounded, are heard after the individual has been deported from the UK;
- the introduction of an automatic bar on return for all those who are subject to administrative removal due to criminality, as is already the case with those who are deported; and
- consultation on "a more coherent approach to taking criminality into account in decisions on who is allowed into the country, who is allowed to stay, who is granted settlement and who can acquire British citizenship".[215]

The Lord Chancellor, Lord Falconer, was reported as suggesting that it might not be possible automatically to deport all foreign criminals, as some offences would not justify deportation. In the same article, John Reid, who had been appointed Home Secretary on 5 May, was quoted as accusing the courts of frustrating the wishes of the government.[216]

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[212] Letter from Lin Homer, Director General, Immigration and Nationality Directorate, Home Office to Rt. Hon. John Denham MP, Chair, Home Affairs Committee (12 December 2006)
[213] HC Deb 3 May 2006 col 959
[214] HC Deb 3 May 2006 col 964
[215] *Home Secretary Proposes Tougher Deportation Laws* Home Office 3 May 2006: http://www.homeoffice.gov.uk/about-us/news/hs-update-to-house-foreign-pris
[216] 'PM's Pledge to Deport May Be Difficult to Fulfil Says Falconer' *Guardian* 8 May 2006

The consultation never happened. When John Reid took over as Home Secretary, he undertook a review of the IND, the report of which said that the Government's action would include:

- A new cross-cutting approach by the criminal justice agencies to identifying and case-managing foreign national prisoners, and with the health agencies for those with a mental disorder
- Amending the law to make deportation the presumption for foreign national prisoners
- Cross-government action to ensure that more foreign national prisoners are transferred to serve their sentences overseas or otherwise removed from our prisons as early as possible, consistent with punishment and deterrence
- Legislating to remove the requirement for the prisoner to consent to their transfer to their own country to serve their sentence there.[217]

It also said that the Government will "consult on making it easier to deport people under UK law, limiting as far as possible the ability to stop the deportation of those the Government considers it necessary to deport for reasons of national security."[218]

The lobbying group MigrationWatch UK has described current arrangements as haphazard and unsatisfactory and has argued for changes in the law to enable greater use to be made of deportation, based on a 'zero tolerance' approach. [219]

> 6. The present position in law is that the Court must consider whether the accused's presence in the UK is to its detriment.[2] In our view, this is the wrong yard stick. There should be a "zero tolerance" approach to serious criminal behaviour by foreign nationals. This should involve a presumption that deportation will be recommended for any offence that results in a twelve-month prison sentence. On a second conviction the "trigger" level should be a six-month sentence and on a third conviction it should be three months. At present, magistrates may only impose a maximum sentence of six months but this is to be raised to twelve months. Until such a change is made, the approach suggested above would mean that magistrates could only recommend deportation for a second offence.
>
> 7. At present, it is not possible to make deportation part of the sentence. The law should be changed to permit this so as to reduce the amount of time spent by foreign prisoners in Britain's heavily over crowded jails. (In the first quarter of 2005 there were 9,194 foreign nationals among a total of 74,962 prisoners.[3] In 1996, out of 360 court recommendations, only 270 deportation orders were made; statistics of outcomes are, apparently, no longer routinely collected.[4])
>
> 8. To avoid lengthy delays in custody at the end of the period of imprisonment, deportation proceedings should commence on the first day of the sentence.

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[217] Home Office, *Fair, effective, transparent and trusted: rebuilding confidence in our immigration system*, July 2006, para. 2.16

[218] Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*, p.45: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf

[219] *Deportation of foreign criminals – a case for urgent action* Briefing Paper 10.14 MigrationWatch UK 2 January 2006: http://www.migrationwatchuk.org/Briefingpapers/other/deportationOfForeignCriminals.asp

> 9. For so long as the UK remains a signatory of the 1951 Refugee Convention, criminals cannot be denied the option of claiming asylum even after conviction. But any such applicants should remain in detention and should be put through the "fast track" procedure.
>
> 10. A serious weakness of the present system is that there is nothing to prevent criminals returning to Britain under a false identity. To help tackle this, all those convicted should have bio-metric information recorded and held centrally. As bio-metric visas are introduced overseas, visas applicants should be checked against this database. These records would also detect those re-offending under a different identity.
>
> 11. Central records should include the immigration status of all those convicted, the number of recommendations for deportation and the number carried out. The Courts should be informed of the outcome of their recommendations, as they are not at present.
>
> 12. There should also be a presumption that deportation should be recommended for certain classes of offences. These should include drug offences such as importation and supply (but not possession) of drugs, manufacture of Class A drugs, people smuggling offences, forgery of travel documents, serious offences of violence and sexual offences, fire arms, fraud, all sentences involving the handling of the international proceeds of crime and all defined immigration offences
>
> 13. There should be an automatic recommendation of deportation for offenders who are illegal immigrants and a presumption for offenders who are in Britain on a temporary basis, for example for work or study.

The National Coalition of Anti-Deportation Campaigns, however, has argued that it is discriminatory and unfair to deport foreign nationals who have been convicted of crimes and that such deportations represent a double punishment:[220]

> NCADC have always opposed the deportation of foreign nationals who because of the crime they have committed have been ordered to leave the UK because the Secretary of State deems their presence in the UK is not conducive to the public good.
>
> Breaking the law is not acceptable but the law must be fair and seen to be fair in how it punishes someone who breaks the law. Sentencing must be consistent and not discriminatory. To sentence a UK citizen to 10 years for a crime and when the person has served the sentence is released back into the community with appropriate safeguards is correct, however to sentence a foreign national to 10 years for the same crime and when the person has served the sentence deport them from the UK is discriminatory and unjust.
>
> **Double Punishment**
>
> It is a fundamental principle of UK law that a person cannot be punished twice for

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[220] *Much 'Ado' About Deportation of Foreign Nationals* National Coalition of Anti-Deportation Campaigns April 2006: http://www.socialistunitynetwork.co.uk/news/crime01.htm

> the same offence. However this does not apply to foreign nationals living in the UK, irrespective of how long they have been living in the UK or that they have established ties with their families and communities. If they commit a crime and are sentenced to imprisonment they can also face a secondary punishment of deportation.
>
> […]
> Deportation following conviction can be irrespective of how long a person has lived in the UK, irrespective of their family ties in this country. In many cases the Home Office will argue that to keep the families together, partners and children of convicted foreign nationals can uproot themselves and go and live abroad often in countries they may have never been to, this amounts to constructive deportation.
>
> However the courts in these cases can often disagree with the Home Secretary when he tries to deport someone with family ties in the UK. Article 8 of the European Convention on Human Rights provides that everyone has the right to respect for his private and family life. At times it would not be feasible, realistic, practicable, reasonable or sensible for the whole family to uproot and leave the UK because of the conviction of the head of the family. In one particular case where the Home Secretary's intention to deport was rejected the adjudicator said: "... deportation at the end of a ten year sentence may indeed come close to a double punishment - and one that would appear to be, largely, reserved for persons from the ethnic minorities."
>
> NCADC call for an end to the practice of Double punishment of foreign nationals as it is discriminatory and unjust.

Writing to the *Guardian*, a number of Queen's Counsel and other lawyers and human rights experts said that the UK's international obligations rightly prevented it from sending deportees to countries where there is a real risk of torture or death and that any foreign national prisoner who could prove that he was at risk of persecution in his own country should not be deported.[221]

The Home Affairs Committee extended its inquiry into immigration control to look at the issue of deportation of foreign national prisoners. It did not see the benefit of court recommendations for deportation, and recommended that they should be abolished: "All deportations should be considered by the Home Office solely on the grounds of whether deportation is conducive to the public good".[222] It supported the Government's proposal to create a presumption in favour of deportation of foreign nationals who are serious criminals, whilst recognising that in practice there will be those for whom deportation is inappropriate, "for example those whose offences may only just cross the threshold of seriousness but who have lived otherwise law-abiding lives in this country for a long time and who have an established family in the United Kingdom".[223]

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[221] Letter to the *Guardian* 5 May 2006
[222] Home Affairs Committee, 5th report of 2005-06, *Immigration Control*, HC 775-I, para. 532
[223] Home Affairs Committee, 5th report of 2005-06, *Immigration Control*, HC 775-I, para. 535

E. The Bill

Clauses 28 to 35 of the Bill seek to implement the proposals first announced by Charles Clarke when he was Home Secretary for:

- automatic deportation of some foreign criminals;
- removal of the in-country right of appeal except for human rights and asylum claims which are not certified clearly unfounded; and
- powers to detain foreign criminals pending consideration of whether they should be deported or removed.

The "automatic" deportation is subject to a number of exceptions, notably on human rights and asylum grounds and in order to comply with European Community law. People who are excepted from the automatic deportation procedures could nevertheless be considered for deportation under existing powers. The Bill does not contain any provisions on administrative removal of foreign criminals, nor does it abolish the system of court recommendations for deportation although the Government had originally indicated that it would do so.[224]

1. 'Foreign criminals'

Although **clause 28(1)(a)** says that the provisions on foreign criminals will relate to all non-British citizens, in practice EEA nationals and their family members will not be affected by most of the automatic deportation provisions because of the limited circumstances in which European law allows them to be deported (see section IX B 3 above, page 36). **Clause 29(4)** ("exception 3") confirms that the automatic deportation provisions will not apply if they would breach the person's rights under European Community law.

Clause 29(1)(b) maintains the existing exemption from deportation for Irish and Commonwealth citizens who were living in the UK on 1 January 1973 and who have been ordinarily resident in the UK for the past five years, as well as for seamen, aircrew, diplomats and members of the armed forces, under sections 7 and 8 respectively of the *Immigration Act 1971*.

Importantly, there is an exception for anyone whose rights under the Refugee Convention or the ECHR (see section IX C above, page 37) would be breached: **clause 29(2)** ("exception 1"). In addition there is an exception for foreign criminals in respect of whom a valid extradition request has been received: **clause 29(5)** ("exception 4"). However, **clause 29(7)** is designed to ensure that foreign criminals who are exempt from the new automatic deportation procedure may still be deported under existing powers if

[224] The Government's reply to the Home Affair's Committee's report said "We will be considering the position of court recommended deportations in the context of this revised statutory framework. Our starting position, however, is to agree with Recommendation 122 that there will be no need for the current system of court recommended deportations under the new framework as it will provide clear criteria for what criminality will trigger deportation action." Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*, p. 57: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf

appropriate. Clause 29(7) also provides generally that the application of an exception will not result in an assumption that deportation of the person concerned is or is not conducive to the public good. However, the deportation of foreign criminals falling within exceptions 1 and 4 will be regarded as conducive to the public good for the purpose of section 3(5)(a) of the *Immigration Act 1971*. In contrast, in cases where exceptions 2, 3 or 5 apply the Secretary of State would have to make a separate decision on conduciveness in deciding whether deportation under the non-automatic procedure is appropriate.

It may be that foreign criminals who cannot be deported would be made subject to the new reporting and residence requirements under **clause 16** of the Bill (discussed in section IV above, page 29).

The automatic deportation provisions would not apply to children who were aged under 18 on the date of the conviction (**clause 29(3)**) ("exception 2").

2. Trigger offences

Any foreign criminal sentenced to imprisonment anywhere in the UK for twelve months or more (**clause 28(2)**), or for any period if convicted of a specified 'serious' offence (**clause 28(3)**), will automatically be subject to a deportation order.

Clause 34(1)(a) and (2)(a) explains further that suspended sentences would not count for either limb.

Certain mental health orders could trigger automatic deportation. **Clause 34(1)(c) and (2)(b)** states that "a period of imprisonment" as referred to in clause 28(1) and (2) will include a sentence, order or direction for detention in hospital or a young offenders institute. **Clause 29(6)** exempts people subject to certain mental health orders and directions, but other disposals exist which could see a foreign criminal sentenced to time in such an institution (for example interim hospital orders under section 38 of Mental Health Act 1983). **Clause 34(3)**, however, states that a person found not guilty by reason of insanity, or found to be under a disability and that he did the act or made the omission charged against him, is not considered to have been convicted of an offence for these purposes.

The twelve-month sentence could not be made up by aggregating shorter consecutive sentences (**clause 34(1)(b)**).

The list of 'serious' offences is the same as that under the *Nationality, Immigration and Asylum Act 2002* which would exclude a person from the protection of the Refugee Convention in the UK.[225] The list includes crimes of violence, sexual offences, crimes against children, drugs offences and terrorism offences. However, there are some serious offences that are not included in the list. Murder, for example, is not included, but because it carries a mandatory life sentence it will always come under the first limb of the

[225] *Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004*, SI 2004/1910: http://www.opsi.gov.uk/si/si2004/20041910.htm. See also the Explanatory Memorandum at: http://www.opsi.gov.uk/si/em2004/uksiem_20041910_en.pdf.

test. In contrast to the provisions here, under the 2002 Act conviction for any other non-listed offence requires a sentence of two years' imprisonment to result in exclusion from the Refugee Convention.[226]

Clause 44(4)(d) envisages that even people convicted of an offence before the new provisions come into force could be subject to automatic deportation as long as they are still in custody at the time of commencement. This raises issues of compatibility with Article 7 of the European Convention on Human Rights (ECHR):

> […] Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The Government's pre-emptive defence is set out in the Explanatory Notes to the Bill, at paragraphs 164-5. In summary, it considers that automatic deportation is not a penalty for the purposes of article 7 as it is "essentially preventative and not punitive"; even if it were considered to be a penalty, making deportation mandatory rather than permitted does not in the Government's view amount to a heavier sentence.

In any case, automatic deportation would not be allowed if it would breach a person's rights under the ECHR or the Refugee Convention (**clause 29(2)**).

3. Appeals

The Government's Explanatory Notes (at paragraph 94) give a clear exposition of the effect of **clause 31(2)**, which is to change the normal appeals process to allow automatic deportation orders to be made while an in-country immigration appeal is pending or could be brought.

Clause 31(3) ensures that an automatic deportation order counts as an immigration 'decision' against which an appeal can be brought to the Asylum and Immigration Tribunal.

Clause 31(4) and (5) makes most appeals against automatic deportation orders 'non-suspensive' - in other words, they can be brought only once the foreign criminal has left the UK. The only exceptions are appeals on asylum or human rights grounds that have not been certified by the Secretary of State as "clearly unfounded".

4. Detention

Clause 32 provides for increased powers to detain foreign criminals. Some foreign criminals are already detained in prison or in immigration removal centres beyond their sentence pending removal or deportation, but the Bill allows anyone who has been imprisoned to be detained under immigration powers at a much earlier stage: when the Secretary of State is considering whether automatic deportation applies and pending the making of a deportation order. The Explanatory Notes recognise that this might result in an increased burden on prison places: "further modelling is being carried out to assess

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[226] *Nationality, Immigration and Asylum Act 2002* s. 72(2) and (3)

the impact on the Prison Service".[227] However, other provisions of the Bill which are intended to allow deportation to happen more quickly "could alleviate pressure on the immigration detention estate by up to 800 beds, and on the prison estate by up to 500 beds".[228]

As part of a package to try to reduce the prison population, the Home Secretary announced in October 2006 that the Government would for the time being stop contesting appeals against deportation by EEA national prisoners, and that it was introducing an incentive scheme to persuade prisoners from outside the EEA to return voluntarily to their own country.[229] The latter is called the Facilitated Returns Scheme, and went live on 12 October. It was due to run for 12 months initially, with a review after six months, and consists of reintegration assistance in kind in their home country such as education or training courses or support for setting up new businesses.[230]

Article 5(1)(f) of the ECHR provides that immigration detention is permissible only to prevent unauthorised entry or where "action is being taken with a view to deportation or extradition. There has been considerable litigation over the years about what this means in practice, for instance the action the Government must be taking to enforce the person's departure, the fact that deportation must in fact be possible and the length of detention which will be considered reasonable.[231]

5. Family

The *Immigration Act 1971* section 3(5)(b) allows the deportation of a person just because they are the family member of someone else who is being deported on 'conducive' grounds. As noted above, this does not apply to EEA nationals and their family members because under EC law deportation must be based on personal conduct only.

At the moment, this type of deportation order cannot be made more than eight weeks after the principal deportee has left the UK. **Clause 33** changes this time limit in automatic deportation cases so that it starts running not when the person has left the UK but only once the time limit for appeal has expired or when the appeal is no longer pending (in most cases the appeal could only be brought once the person has left the UK).

6. Other foreign criminals

Other foreign criminals who are not subject to automatic deportation would still be subject to the existing rules on deportation: in other words, a court might recommend deportation (even if it did not impose a sentence of imprisonment) or the Home Office might decide to deport on 'conducive' grounds. The existing guidelines would

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227 Bill 53-EN, para. 126
228 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 7
229 HC Deb 9 October 2006 c34
230 Letter from Christine Stewart, Director, Offender, Law and Sentencing Policy, Home Office, to Juliet Lyons, Prison Reform Trust, 9 October 2006
231 See Joint Council for the Welfare of Immigrants, *Immigration, nationality and refugee law handbook*, 2006 edition, pp. 919-932

presumably still apply, so for instance there would be a presumption of deportation for a person who has accumulated a custodial sentence of 12 months or more as an aggregate of two or three sentences over five years, none of which relates to a 'serious' offence, would still be considered for deportation. However, in these cases the increased detention powers and restricted appeal rights would not apply.

F. Prisoner transfers

[Pat Strickland, Home Affairs Section]

The UK Government has signed international agreements that allow British prisoners to be transferred from certain countries to the UK to serve their sentences, and similarly for foreign prisoners in British jails to be transferred to prisons in their own countries. The principle international agreement is the 1983 *Council of Europe Convention on the Transfer of Sentenced Persons*, to which 57 states including all the Member States of the European Union and the United States, are party. The Convention provides for the transfer of prisoners convicted abroad to the country of which he is a national, but it does require the consent of that prisoner.

In the United Kingdom, this convention was incorporated into law by the *Repatriation of Prisoners Act 1984*. Section 1 of this allowed for the transfer of prisoners where this is covered by an international agreement between the UK and the country in question, and both the prisoner and the Governments of each state concerned agree.

The July 2006 policy paper which followed the IND review stated the Government's intention to change this:[232]

> We will seek to strengthen, extend, and, where appropriate, renegotiate prisoner transfers and will legislate to remove requirements for the consent of the prisoner.

A Government amendment was agreed to during the Lords Report Stage of the *Police and Justice Bill*[233] and the provision is now contained in section 44 of the *Police and Justice Act 2006*, although it is not yet in force.[234] When it is, the requirement to obtain the prisoner's consent will only apply where the international agreements require this. Introducing the amendment, the Home Office Minister, Baroness Scotland of Asthal explained that amending the 1984 Act in this way would enable the United Kingdom to ratify and conclude prisoner transfer arrangements that do not require prisoner consent:[235]

> This amendment will enable the United Kingdom to start negotiations with like-minded countries to put in place prisoner transfer agreements that do not require prisoner consent. The Government will also enter into discussion with those countries with which they already have an agreement with a view to removing the

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[232] Home Office, *Fair, effective and trusted: rebuilding confidence in our immigration system*, 25 July 2006, page 11
[233] HL Deb 10 October 2006 cc238-43
[234] The Act received Royal Assent on 8 November
[235] HL Deb 10 October 2006 c 239

> requirement for consent. Their intention would be to transfer those prisoners who have no links with the United Kingdom and those who, in any event, may face deportation at the end of their sentence. Often prisoners, such as drug offenders will have entered the United Kingdom solely to commit a criminal offence. In those circumstances, the Government believe that it is right that the prisoner should serve his sentence in his own country where he can also receive support from family, friends and the community aiding his chances of rehabilitation.

The European Union is also considering a proposal for a framework decision on prisoner transfer between member states, which would enable prisoners to be transferred without consent.[236] This was discussed at the EU Justice and Home Affairs Council 4/5 December 2006, although agreement has yet to be reached.[237] The European Scrutiny Committee considered the proposal in its Second Report, in which it raised concerns about the possibility of British nationals, convicted abroad, being transferred back to the UK against their will, and imprisoned here for conduct which was not criminal in this country.[238]

X Information sharing: clauses 36-38

[Antony Seely, Business and Transport Section]

One of the new powers that the Bill would provide for Immigration Officers, highlighted in the Home Office's press notice on the Bill, is the ability to "access her Majesty's Revenue & Customs (HMRC) data to track down illegal immigrants."[239] The ability of the Immigration Service to gather information on illegal immigrants was discussed in the report on immigration control by the Home Affairs Committee, mentioned above:

> There are various ways in which the immigration authorities might come to know of people who are living in the UK in breach of the immigration laws. The police can ask people for evidence of immigration status or might receive anonymous information; marriage registrars are under a duty to report suspicious marriages or civil partnerships to the Home Office; local authorities, employers and tax authorities may be required to provide information to the immigration authorities; and the police and immigration officers have the power to enter premises to search for immigration offenders. Members of the public might also contact the Home Office with allegations, and these go to the Managed Migration Intelligence Unit for investigation … Even more information will be available to [the Immigration and Nationality Directorate – IND] in the future. Employers and

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[236] EU Council 13080/06, 21 September 2006, http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/EUROPEAN_SCRUTINY/European%20Document/ES%2027840.doc

[237] EU Justice and Home Affairs Council 4/5 December 2006 Press Release, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/91997.pdf

[238] HC 41-ii 2006-07, 29 November 2006 http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-ii/4106.htm

[239] Home Office press notice, New powers boost Immigration Officers power to protect UK borders, 26 January 2007. See also Home Office *UK Borders Bill: Regulatory Impact Assessment* January 2007 p. 6. See also Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 6

> colleges will be under a duty to tell IND about people who leave their job or course; and electronic embarkation controls … could be used to provide automatic alerts of people whose leave has expired but who are not shown as having left the UK.[240]

The Committee went on to recommend that "the employment of illegal workers should be one of the main targets for action against illegal migrants who are already living illegally in the UK":

> Tackling tax and national insurance evasion should become a central feature of the drive against the employment of illegal labour, and the tax authorities must make much greater efforts to tackle these in the informal economy. Enforcement work on tax and national insurance should take place in conjunction with all the other legal measures available to tackle abuse in the informal labour market.[241]

In its response to the report, the Government described the work being carried out by the revenue authorities in this area:

> The Government agrees that the use of illegal migrant workers distorts the labour market and that effective action should be taken against businesses evading tax by employing them. Her Majesty's Revenue & Customs (HMRC) has a key role in disrupting the activity of such employers. The Government has established a Joint Workplace Enforcement Pilot which seeks to develop closer working between departments responsible for enforcing workplace regulations and to exploit synergies in enforcement and compliance activity. HMRC is a key partner in these pilots. Over the last four years, HMRC has steadily increased the resources it applies to tackling the compliance of labour providers who use illegal migrants. During 2005-06, 167 HMRC staff dedicated to improving compliance across all areas of labour provision recovered £38 million that had been evaded or paid late. In the last two years HMRC has identified 92 previously unregistered labour providers and taken action against them to recover underpaid tax and National Insurance.

It went on to note the department's role in passing on information to the IND:

> HMRC will always act on reliable information about tax evasion and has specific arrangements for members of the Association of Labour Providers to report cases directly. HMRC also works closely with the Immigration and Nationality Directorate and where HMRC compliance teams come across information which indicates that migrant workers may be employed illegally, they pass that on.[242]

The disclosure of information held by HMRC is subject to strict statutory control. Indeed it is a criminal offence to disclose information relating to the tax affairs "of any identifiable person", other than disclosure of information made:

a) with a lawful authority

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[240] *Fifth report: Immigration Control*, 23 July 2006 HC 775 2005-06 paras 450-1
[241] HC 775 2005-06 paras 453, 455
[242] Cm 6910 September 2006 pp 51-2

b) with a consent of any person in whose case the information is about a matter relevant to tax, or
c) which has been lawfully made available to the public before the disclosure is made.[243]

This provision predates the creation of HMRC from the merger of the Inland Revenue and HM Customs & Excise in April 2005, though the legislation to integrate the two departments widened the ambit of the existing offence, and ensured that it covered all functions of the new organisation.[244] The merger had been announced the year before, at the time of the 2004 Budget. At the time the Government proposed to present a "short early Bill" to Parliament, to contain those provisions essential to create the new department and permit it to function effectively.[245] In December 2005 HMRC began a consultation exercise on establishing a new legislative framework for tax administration and this work is on-going.[246]

This history is relevant when one comes to consider the statutory controls which permit HMRC to disclose information, as in some cases the legislation which permitted the Inland Revenue, or HM Customs & Excise, to pass information to a particular organisation remains in place.

Clause 36 of the Bill consolidates the two statutory gateways under which Customs and the Revenue are empowered to pass information to the Secretary of State. In Customs' case this is provided by section 20(1)(d) of the *Immigration and Asylum Act 1999*. Section 20 of the Act permits information to be supplied by a list of persons/bodies, including Customs, "for use for immigration purposes." The term "immigration purposes", as defined by section 20(3), is quite broad; for example, it includes "the administration of immigration control under the Immigration Acts", the "prevention, detection, investigation or prosecution of criminal offences under those Acts" and "the provision of support for asylum seekers and their dependants under Part VI [of the Act]". In similar fashion, Clause 36(1) of the Bill states that HMRC, and the Revenue and Customs Prosecutions Office "may each supply the Secretary of State with information" for a wide variety of purposes, which includes "administering immigration control under the Immigration Acts" and "preventing, detecting, investigating or prosecuting offences under those Acts", as well as "doing anything else in connection with the exercise of immigration and nationality functions".

There is a marked contrast with the current arrangements for the Inland Revenue to pass information. Under section 130 of the *Nationality, Immigration and Asylum Act 2002* the Revenue may supply information "for the purpose of establishing where a person is" if the Secretary of State "reasonably suspects" that this person has neither leave to be in the UK nor work here, or that they have worked in breach of conditions of leave or temporary admission. The Revenue may also supply information to the Secretary of

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[243] under section 182 of the *Finance Act 1989*
[244] under section 19 of the *Commissioners for Revenue and Customs Act 2005* (*Explanatory Notes: Commissioners for Revenue and Customs Act 2005 (chapter 11)* p 18).
[245] The background to the merger is discussed in Library Research paper 04/90, 6 December 2004.
[246] *Pre-Budget Report* December 2005 para 5.89. HMRC's website gives full details at: http://www.hmrc.gov.uk/nma/index.htm

State for the purpose of determining whether an applicant for naturalisation under the *British Nationality Act 1981* is of good character and for verifying whether a sponsored entry clearance applicant meets the maintenance and accommodation requirements of the Immigration Rules.[247] Notably there is no reference here to the Revenue providing material in a proactive fashion, rather than in response to a specific request about a named individual.

The different scope of these two gateways posed a risk when the departments were merged; this is recognised in the legislation integrating the two, specifically part 2 of schedule 2 of the *Commissioners for Revenue and Customs Act 2005*:

> *Part 2 of Schedule 2* makes modifications to the terms of various provisions that authorise the supply of information to and by the existing Commissioners and their officers (provisions termed "statutory gateways"), so that they can be applied to the new department. In most cases the information to be supplied is itself specified by the gateway provision, or is in practice specific to the functions of one or other of the predecessor departments. Most gateway provisions, therefore, fall to be converted for use by the new department by a simple change of name of the body authorised to supply or receive it, as the case may be, and that is achieved by the working of section 50 (1) and (2). So, for example, the reference to the Commissioners of Customs and Excise in section 8 *Finance Act 1988* (power for those Commissioners to disclose to interested parties the consignee and description of imported goods) becomes a reference to the Commissioners for HMRC, and the power thereby devolves on them, without any change in subject matter.
>
> But there are a few gateway provisions, such as section 20 *Immigration and Asylum Act 1999*, where the information to be supplied to the Home Secretary is described at large only as "information held" by the Commissioners of Customs and Excise. By contrast, the Commissioners of Inland Revenue are authorised under section 130 *Nationality, Immigration and Asylum Act 2002* to supply only address details of persons thought to be present or working in the United Kingdom in breach of immigration control. To prevent an inadvertent widening of the scope of these gateways by the integration of the predecessor departments, specific provision is made by paragraphs 15 to 20 to limit the scope of six outward gateway provisions where this might be an issue. In paragraphs 15, 16, 18, and 20, the gateways are inherited from the Commissioners of Inland Revenue, and the limitation is to information obtained or held in exercise of functions related to former Revenue matters, as defined in section 7. In paragraphs 17 and 19, the gateways in question are inherited from the Commissioners of Customs and Excise, and the limitation is to information other than that held solely in the exercise of functions related to former Revenue matters. This reflects the fact that information may now be held for multiple purposes, such as an address held on a common name and address file used for a number of functions, and updated from any of them.[248]

Clause 36(6) of the Bill repeals these two gateways and the provision made in the 2005 Act for them to work in parallel.

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[247] *Explanatory Notes: Nationality, Immigration and Asylum Act 2002 (chapter 41)* p 53
[248] *Explanatory Notes: Commissioners for Revenue and Customs Act 2005* (chapter 11) pp 47-8

Wrongful disclosure of information is covered by **clauses 37 and 38** of the Bill. The Explanatory Notes provide background information as well as the Government's argument that the new offence is compatible with the ECHR.[249]

XI Nationality information: clauses 39-41

Clause 39 adds to the situations in which the police may supply information to the IND in relation to nationality decisions. They can already do so to help determine whether or not an adult applying for naturalisation as a British citizen is of "good character". Although there is no definition of "good character" in the *British Nationality Act 1981* and no statutory guidance as to how this requirement should be interpreted or tested, the Home Office website explains that:

> Character checks will be carried out in all such cases. These will include, but are not restricted to, enquiries of the police, Security Service and HM Revenue and Customs. Any outstanding police action must be notified to the Home Office while an application for naturalisation is under consideration.[250]

The Home Office *Nationality Instructions* suggest that an unspent criminal conviction might result in summary refusal of a naturalisation application, and that involvement or suspected involvement in crime, or "notorious" activities, might also cause an applicant to fail the good character test.[251]

As of 4 December 2006, not only adults but also most applicants for registration as a British citizen aged 10 and over are now subject to the statutory requirement to be of good character.[252] **Clause 39** therefore extends the powers of the police to supply information about such applicants. It also allows them to supply information in connection with a Home Office decision about depriving someone of citizenship, the rules on which have recently been changed.[253]

Clauses 40 and 41 introduce more substantial new powers for immigration officers, the police and civilian investigating officers[254] to enter premises and search for evidence of the nationality of a person arrested for a criminal offence whom they suspect might not be British. The IND has estimated that this would result in about 1,000 searches per year: this assumes that 1.1million people per year are charged with an offence, 10% of these (100,000) are foreign national prisoners, and 1% of those would not comply and would require a search.[255]

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249 Bill 53-EN para. 166-8
250 http://www.ind.homeoffice.gov.uk/applying/nationality/
251 Home Office Nationality Instructions, volume 1, Annex D to Chapter 18: http://www.ind.homeoffice.gov.uk/documents/nichapter18/ch18annexd?view=Binary
252 *Immigration, Asylum and Nationality Act 2006* s. 58
253 s. 4(1) of the *Nationality, Immigration and Asylum Act 2002* substituted new sections 40 and 40A of the *British Nationality Act 1981*
254 clause 40(6)
255 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 7

This provision appears to arise from the problems in identifying criminals' nationality which were uncovered during the investigations into the failure to consider foreign national prisoners for deportation. At the moment, the onus is on the Secretary of State to provide evidence that the person is someone who is liable to be deported; but if the person refuses to provide evidence to establish nationality then, and the IND has made reasonable effort to obtain that information, it will proceed with deportation action.[256]

The difficulties of deporting people with no travel documents led to a new provision in section 35 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004*, under which a person can be required to take a specified action with a view to obtaining a travel document, and if they do not comply they commit an offence.[257] In addition, the Foreign Office Minister Lord Triesman has recently been appointed the "Prime Minister's Special Envoy on Returns", as recommended by the IND Review,[258] to help remove barriers to redocumentation.[259] The *Borders, Immigration and Identity Action Plan* says that links between the immigration and criminal justice systems are being improved:

> We will also progressively link biometric and biographical information held on foreign nationals in different parts of the criminal justice and immigration systems, starting by establishing cross-links between existing ID records held on different systems. We will shortly be launching a pilot in partnership with the police, where we will start the verification process of a person's nationality for the first time.
>
> Over time, we will develop common 'identifiers' which we can use to establish a single identity for someone and track them individually and securely through our systems. […][260]

XII An single Immigration Inspectorate?

Although not mentioned in the Bill, the *Regulatory Impact Assessment* refers to the possible establishment of a single inspector for the IND and its successor, the Border and Immigration Agency.[261]

This idea originated in a proposal from the Home Affairs Committee in its 2006 report on *Immigration Control* which was critical of the fact that there is "very little independent oversight of the immigration system, and what exists is fragmented, under-funded and with very limited powers".[262] The Committee recommended that the Government establish:

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256 Home Office *Operational Enforcement Manual* ch. 64 para. 64.5, 'Identity'

257 see Home Office *Operational Enforcement Manual* ch. 85

258 Home Office, *Fair, effective, transparent and trusted: rebuilding confidence in our immigration system*, July 2006, para. 2.18

259 Foreign and Commonwealth Office press release, *Lord Triesman appointment*, 15 January 2007: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1168623428545

260 Home Office, *Borders, Immigration and Identity Action Plan*, December 2006, paras 3.20-3.21: http://www.ind.homeoffice.gov.uk/6353/aboutus/bordersimmigrationactionplan.pdf

261 Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 3

262 Home Affairs Committee, 5th Report of 2005-06, *Immigration Control*, HC 775-I para. 599

> An Independent Immigration Inspectorate with oversight of every stage of immigration control: overseas, at the border, in-country, enforcement (including detention) and appeals. It should be looking for high-quality decision, active management, clear lines of responsibility and effective and non-distorting targets, excellent customer service and promotion of good race relations. The Inspectorate must be independent, properly resourced and with the authority to make recommendations to which the Government has to respond.[263]

The Government accepted this recommendation,[264] saying that:

> A single body reporting to Parliament on IND could help drive continuous improvement, simplify the existing fragmented regulation and inspection regimes, and give an independent and consistent perspective on the performance of IND as a whole.[265]

On 18 December 2006 it issued a consultation paper on a new immigration inspectorate entitled *Fair, effective, transparent and trusted – Rebuilding confidence in our immigration system: An independent and transparent assessment of immigration*.[266] As proposed, it would not take in the whole immigration system: it would cover only the IND and not the visa operation overseas nor the appeals system.

The deadline for responses is 16 February 2007, and it may be that the results of the consultation will inform a decision on whether to include provisions on this as Government amendments to the Bill.[267]

XIII Reactions

Given that the Bill was published only three working days ago, there has not been any detailed reaction to it yet. However, there have been a few comments.

The Conservative immigration spokesman, Damian Green, is reported as being disappointed that the Bill did not create a single border control force, and doubting if the "tough rhetoric will translate into effective action this time".[268]

The Liberal Democrat home affairs spokesman, Nick Clegg, said:

> Whilst some of the measures in this bill are welcome, we are concerned about the government's continuing desire to create new legislation, rather than tackle administrative incompetence.

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[263] *Ibid* para. 603
[264] Home Office, *The Government Reply to the Fifth Report from the Home Affairs Committee, Session 2005-06 HC 775, Immigration Control*, p.62: http://www.ind.homeoffice.gov.uk/6353/aboutus/Cm6910.pdf
[265] Home Office, *Fair, effective, transparent and trusted: rebuilding confidence in our immigration system*, July 2006, para. 3.10
[266] http://www.ind.homeoffice.gov.uk/6353/6356/17715/faireffecttivetransparentin2.pdf
[267] Home Office, *UK Borders Bill: Regulatory Impact Assessment*, January 2007, p. 3
[268] Guardian, *Officers to be given powers of arrest and detention*, 27 January 2007

> There may be a case for adding some new powers to the statue book, but questions remain as to why existing powers – notably against unscrupulous employers of illegal workers – are being so poorly enforced.[269]

Shami Chakrabati, the director of the civil liberties organisation Liberty, raised concerns about both biometric immigration cards and automatic deportation in an interview on Radio 4's *Today* programme:

> If this is now about, not border control, but in-country immigration control, people stopped in the streets, as they are in other European countries on occasion, to make good their immigration status, their nationality, that is racially divisive[…]
>
> [Presumptive deportation] would be in clear violation of every principle of natural justice that we've ever had in this country, let alone various human rights standards.[270]

John Cridland, deputy director-general of the CBI, is reported as saying that the ID system "should help employers by simplifying the current system of checks".[271]

The Immigration Advisory Service, a charity providing representation and advice in immigration and asylum law, thought that the Bill could provide an opportunity to introduce a regularisation scheme for illegal workers and a temporary immigration status for failed asylum seekers who cannot be returned to their country of origin for the time being. It also called for consolidation of immigration legislation:

> IAS continues to call for an overarching consolidation or simplification Bill which will bring together all the confusing different legislation which has been introduced over the last few years – nine major Acts of Parliament affecting immigration in the last fourteen years. Even the immigration judiciary declares itself to be confused and the plethora of legislation has created a complexity which means that anyone now needs to take competent legal advice. We expect to see such legislation announced in the Queen's Speech in November.[272]

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269 Liberal Democrats press release, *Government legislating rather than tackling incompetence - Clegg*, 29 January 2007: http://www.libdems.org.uk/news/story.html?id=11812&navPage=news.html

270 Politics.co.uk, *Liberty: ID cards could be racially divisive*, 26 January 2007: http://www.politics.co.uk/issueoftheday/domestic-policy/civil-liberties/identity-cards/liberty-id-cards-could-be-racially-divisive-$464343$464323.htm

271 Mirror, *Foreign visitors ID rules*, 27 January 2007

272 Immigration Advisory Service press release, *Borders Bill gives Government opportunity: IAS looks to a further consolidation Bi*ll, 25 January 2007: http://www.iasuk.org/C2B/PressOffice/display.asp?ID=352&Type=2