

Counter-Terrorism and Border Security Bill - Paragraph 2, Schedule 3, Border Security Powers: A CAJ Briefing Note

Would the ‘precursor’ passport control power on the Northern Ireland Border Area end the Common Travel Area (CTA)?

Second Reading, House of Lords, 9 October 2018

About CAJ

The Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ is the NGO partner in the [BrexitLawNI](#) project with the law schools of Queen’s University Belfast and Ulster University, and co-convenes the Equality Coalition in Northern Ireland (NI) with UNISON.

Summary

- The Bill would extend the existing Port and Border Control powers in Schedule 7 of the Terrorism Act 2000 (TACT) to cover ‘hostile acts’ on behalf of a foreign government. However, **separate to this the Bill also contains an additional power, to conduct a passport examination on the Northern Ireland land border area, for the sole purpose of checking whether persons in the area are crossing the border**
- **This power can be exercised by police or border force without any reasonable suspicion, requires a person to give on request a valid passport or other identity document**, and risks essentially ending free movement within the CTA, insofar as it relates to the land border
- The statutory basis of the CTA is found in the Immigration Act 1971 which provides that journeys within the CTA are not subject to passport control. It is well documented that UK Border Force (UKBF) are requesting passports in CTA journeys without a statutory power to do so, and such checks are raising serious concerns about racial profiling
- Whilst government Brexit policy documents are limited to stating that there will be no ‘routine’ passport controls in the CTA, the Minister, Lord Duncan of Springbank gave undertakings to the house during the passage of the EU Withdrawal Act that there would be *“no checks whatever for journeys across the land border”*. This proposed power in the current bill entirely conflicts with this statement
- The power is unlikely to be used as a fixed control, rather it will be used selectively, and risks further operating on the basis of racial profiling. There are already significant concerns as regards unexplained use of the existing Schedule 7 TACT powers in Northern Ireland which have been used over 12,000 times in recent years without a single TACT detention, with the concern these emergency-type powers are being used for routine immigration control

The proposed power under the current bill

1. Section 21 of the bill, as introduced to the Lords, provides for border control powers which are set out in schedule 3. The explicit purpose of these powers set out in paragraph 1 of this schedule is provide for stop and examination powers in relation to ‘hostile acts’ by another state.
2. However, there is a second power under paragraph 2 of the schedule vested in police and immigration officers which applies only to the ‘border area’¹ (the mile long strip along the Northern Ireland land border and cross border train stations), which provides that:

An examining officer may question a person who is in the border area for the purpose of determining whether the person’s presence in the area is connected with the person’s entry into, or departure from, Northern Ireland. (Sch3, paragraph 2)
3. Whilst the Explanatory Notes explain this power as “essentially a pre-cursor power” to establish whether the “entering or leaving the UK” condition is met in order to trigger the “hostile activity” power, the powers of examination are the same as the hostile act power and include that a person (P) questioned must (*inter alia*):
 - give the examining officer any information in P’s possession that the officer requests;
 - give the examining officer on request either a valid passport which includes a photograph or another document which establishes P’s identity;
4. Officers are also empowered to stop a person or vehicle and detain a person. Essentially this provision provides for a power, purely targeted at persons for crossing the border, to request a passport, and to submit to questioning akin to passport examination. Whilst it does not *per se* require a person to carry a passport, in practice if persons are expected to produce one targeted ‘suspect communities’ are likely to end up having to carry passports. This is likely to disproportionately affect ethnic minorities, will conflict with the Belfast/Good Friday Agreement and essentially end the CTA as a passport free movement zone.

Conflict with proposed power and the CTA and stated Brexit Policy

5. The statutory basis for free movement in the Common Travel Area (CTA) is provided for by s1(3) of the Immigration Act 1971 which precludes the use of (passport/border) control for local journeys within the CTA. The UK Brexit ‘Northern Ireland and Ireland Position Paper’ is limited to ruling out ‘routine’ passport controls within CTA it states:

*The development of our future immigration system will not impact on the ability to enter the UK from within the CTA free from routine border controls.*²
6. Whilst there was a lack of clarity as to how ‘non routine’ controls would operate, this matter was drawn out in the House by peers during the passage of the EU Withdrawal Act. Further to amendments tabled by Baroness Kennedy of the Shaws in the Lords at Committee and Report stages the Minister, Lord Duncan of Springbank, at Report stage,

¹ Schedule 3, paragraph 57(6), interpretation.

² HM Government: Northern Ireland and Ireland Position Paper, 16 August 2017, paragraph 32 (emphasis added).

drawing on statements made during the Committee debate, for the first time ruled out racial profiling and checks on the land border or Irish Sea as follows:

I am very happy to reinforce the clear statement that there can be no racial profiling at a border, whether it be routine, quixotic or even accidental. That cannot be the policy or the direction; there cannot be even a hint of that going on at the border...

There will be no checks whatever for journeys across the land border between Ireland and Northern Ireland, nor between Northern Ireland and Great Britain. As I said earlier, this includes any aspect of what those checks might look like or be interpreted to look like. That is not what will be happening. [[HL Hansard 25 April 18, clm 1609](#)]

7. Whilst not doubting the Minister's sincerity in articulating this policy objective there is a considerable gulf between these assurances and even the present reality. This is highlighted by an incident on the same day this Report Stage debate was taking place when a lawyer, Jules Gnezekora, a dual Ivorian and British citizen who has lived in the UK since 1994 and now resides in Northern Ireland was taking the ferry from Scotland back to Northern Ireland. On all four of the occasions he embarked and disembarked at the respective ports in Belfast and Cairnryan he was singled out by immigration or police officers and asked for a passport or ID, and questioned as to movements despite showing his British passport. In so far as he could see on each occasion he was the only black person in the queue and the only person singled out; Mr Gnezekora's experience has been widely reported in the media (for example see [here](#) and [here](#)).
8. In responding to the [media](#) about Mr Gnezekora's experiences the Home Office stated that:

Immigration Officers speak to members of the travelling public using these routes, regardless of appearance, and a consensual request for photographic ID can form part of that conversation.
9. As per this statement there is clearly no statutory power to conduct such internal immigration checks on CTA routes, and the suggestion such checks are 'voluntary' is not clear to passengers. The above experiences are not an isolated incident.³

Concern over existing misuse of Schedule 7 powers:

10. There is currently unexplained high use of Terrorism Act (TACT) Schedule 7 port and border control powers in Northern Ireland, without any resultant TACT detentions. The powers were used in Northern Ireland 12,479 times from 2013-2016 without one single resultant detention under TACT. The usage is many times greater than its proportionate number of passenger journeys compared to Great Britain, where the powers in recent years have resulted in between 1,522 and 1,760 TACT detentions annually.⁴ The current Independent Reviewer of TACT powers Max Hill QC refers to his predecessor David Anderson QC's assessment of the Northern Ireland pattern as 'remarkable' and worthy

³ The Equality Commission, for example, has supported a previous case, where the Home Office settled a claim (for £2000 without admission of liability) brought by a British woman who was stopped at Belfast City Airport by an immigration officer. The victim, who was not even a passenger but was dropping off a relative in the airport, reports she was told by the immigration officer she had been singled out as she 'looked foreign and not from here'. In her view she was stopped because she is black. This case was reported in the BBC [here](#).

⁴ The Terrorism Acts in 2016, Report of the Independent Reviewer Max Hill QC, Paragraph 5.17

of further investigation. The PSNI subsequently highlighted to the Northern Ireland Policing Board that whilst none of the persons examined under Schedule 7 were detained under TACT for over an hour, not all were released as they were of interest and referred to other agencies such as immigration and HMRC.⁵

11. The concern is therefore that this emergency type ‘counter terrorism’ power may be being misused for routine immigration purposes. A number of parliamentary questions have been tabled in relation the matter, these have ascertained that the powers are being solely used by PSNI and no records are kept of the number of referrals the PSNI have made to UKBF for immigration purposes following exercise of the powers.⁶

Conclusion

12. CAJ ultimately urges amendment of the bill to remove these additional powers, that conflict entirely with governments own policy assurances that there will be no passport control on the land border. CAJ urges peers at Second Reading to press Ministers for an explanation of the origin of this additional power and how government considers it compatible with the CTA assurances.
13. It would be remiss not to mention that the deployment of such powers, in addition to resultant racial discrimination, would significantly risk destabilising the peace process.⁷ We would draw attention to the media and political attention the proposed power has invoked in Northern Ireland.⁸

CAJ, October 2018

⁵ The Terrorism Acts in 2016, Report of the Independent Reviewer Max Hill QC, Paragraph 5.17-5.18.

⁶ Baroness Suttie Terrorism: Northern Ireland: Written question - HL8741

⁷ In general, see the recent BrexitLawNI Report on the implications of Brexit on the peace process, [here](#); and a BrexitLawNI paper on Border Controls [here](#).

⁸ See for example the Irish News front page “Brexit plans could see mile-wide stop and search zone along border” 10 August 2018 , [here](#).