

SECOND READING BRIEFING ON THE NATURALISATION PROVISIONS IN THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL BY JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

Introduction

1. The Joint Council for the Welfare of Immigrants is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, we provide legally aided immigration advice to migrants and actively campaign for changes in the above areas. Our aim is to promote the rights of migrants within a human rights framework.

2. We have briefed extensively on a number of aspects of this Bill. Parliamentarians are therefore referred to our parliamentary briefings which contain a number of case studies to aid understanding, and our citizenship submissions are available from www.jcwi.org.uk This short submission simply performs a brief legal audit in relation to part 2 of the Bill and the naturalisation provisions for conformity with the UK's international treaty based obligations together with European norms. These 'European norms' are primarily located in the only international treaty dealing exclusively with minimum standards on nationality law, the 1997 European Convention on Nationality ("ECN"). Whilst the UK has neither signed nor ratified this, it remains an important document on account of its reflection of European practice in this area, and through its articulation of the European consensus about common decency, and minimal standards in the realms of nationality law.

3. This paper is split into three sections. In section one on account of the somewhat cavalier attitude displayed in the Bill to naturalisation, we highlight briefly why this is of fundamental importance to migrants. In the second part of the briefing we identify the general problem with the Bill from the perspective of conformity with international obligations, and in the third part we address by reference to international standards and norms specific problems with the Bill. We do so in the following order:

- i. The duty to facilitate naturalisation - Article 34 of the 1951 Convention Relating to the Status of Refugees/Article 6(4) ECN;
- ii. No residence period in excess of a decade/facilitation of naturalisation for spouses- Article 6 (3) ECN;
- iii. Requirement for legal certainty and the problem with the discretionary power of waiver for the “continuous employment” and “90 day” requirements - Article 8 1950 Convention for the Protection of Human Rights (“ECHR”)
- iv. The right to leave a country and the problem with the “90 day” requirement – Article 12 (3) of the 1966 International Covenant on Civil and Political Rights (“ICCPR”);
- v. The right to equal treatment in remuneration and working conditions and the “continuous employment” requirement - Article 19.7 of the European Social Charter (“ESC”)
- vi. No discrimination in relation to rights within the ambit of an ECHR right and volunteering – Article 14/8 ECHR
- vii. No discrimination in relation to welfare and access to services for probationary citizens – Article 9 of the International Covenant on Social, Economic and Cultural Rights (“ICESCR”).
- viii. Legal certainty and transitional provisions- Article 8 ECHR

1. Why naturalisation matters?

4. It is worth reiterating at the outset of this submission that the conferral of nationality is a matter of fundamental importance to migrants given that the following benefits and rights attach to it:

- i. The right to vote;
- ii. Unrestricted access to the labour market;
- iii. Full access to the welfare state;
- iv. Residential stability i.e. the *right* of abode (the ability to come, remain and go freely)

5. Its significance is to become far greater given the Government's intention to abolish indefinite leave (which carries some of the above entitlements) as a step on the pathway to citizenship.

2. The key problem with the naturalisation provisions

6. Our key concern about the generality of part two of the Bill is noted in the House of Commons Research Paper 09/47. In a nutshell the naturalisation provisions are vague enabling provisions which provide for subsequent, more precise provisions on matters fundamental importance, engaging fundamental rights to be contained in guidance, immigration rules and statutory instruments at some future point in time. This secondary legislation will by its nature receive inadequate parliamentary scrutiny. It does in our view therefore represent the chief threat to securing compliance with legal obligations and generally accepted human rights norms. By way of example, and in order to highlight this point it is worth noting that the following matters which are central to the naturalisation scheme are to be dealt with by delegated legislation at some point in the future:

- i. the effects of failure to fulfil the criteria to move from probationary citizenship to British Citizenship i.e. removal or resetting the clock for naturalisation purposes;

- ii. the categories of ‘migrant worker’ who will be eligible for probationary for British citizenship through the gateway of probationary citizenship;
- iii. the categories of migrant who have a ‘family association’ for the purpose of facilitated access to naturalisation;
- iv. the nature and duration of the “activity condition”, together with the circumstances in which the power of waiver will be employed;
- v. the circumstances in which discretion is to be exercised in cases where the “continuous employment” requirement is not fulfilled;
- vi. the circumstances in which the discretionary power of waiver will be employed in relation to the “90 day” requirement;
- vii. the circumstances in which the discretionary power to waiver is to be employed for the purposes of possession of qualifying leave;
- viii. transitional arrangements
- ix. changes to the qualifying periods which would permit lengthier qualification periods with no upper limit.

7. The aim of further amendments in general **must be firstly to clarify the exact effects of non-compliance with the various requirements given that this is not at all clear.** They should also focus on the provisions with a view to tightening up the clauses in order to avoid arbitrary exercise of executive power, and to ensure compliance with international obligations, and norms

2. Specific problems

Article 34 of the 1951 Convention Relating to the Status of Refugees/ Article 6(4)(g) ECN - the duty to facilitate naturalisation

8. Article 34 of the Refugee Convention obliges the UK to *facilitate* the naturalisation of refugees in so far as this is possible. The Bill is deficient in this respect for two reasons:

- i. there is absolutely no facilitative mechanism contained within the naturalisation scheme. Refugees are treated in an identical way to other migrants;
- ii. the scheme actually works to the detriment of refugees through the exclusion of temporary admission as qualifying immigration status.¹

9. In our view refugees and others with human rights based protection should as a matter of principle be eligible for permanent permission immediately on recognition. A middle ground however would be to apply the expedited naturalisation provisions available for family members to refugees and others with human rights based protection. This would have the added benefit of simplicity. Additionally, compliance with the above duty means that **all** periods spent on temporary admission/release or in detention should **always** count towards the qualifying period in cases where applicants go on to be recognised as a refugee or granted human rights based protection.²

1. Clause 40(11)

2. We note Lord Brett's comments that discretion would normally be exercised where there is undue delay not attributable to the applicant and that more than six months would amount to undue delay- this goes some way to resolving the problem but is still inadequate

Article 6 of the 1997 European Convention on Nationality (“ECN”) – no residence period exceeding a decade

10. The European view reflected in Article 6(3) of the ECN is that: (i) naturalisation residence periods should not exceed ten years; and (ii) naturalisation should be *facilitated* for spouses given the strength of their link with the territory through marriage.

Residence periods should not exceed a decade

11. The Bill is inconsistent with the text/spirit of the above for several reasons some of which are dealt with below:

- i. there are various forms of lawful leave that will not be qualifying leave for the purpose of naturalisation. This clearly opens up possibility of naturalisation residence periods exceeding a decade;³
- ii. failure to fulfil the 90 day per annum residence requirement⁴ may reset the naturalisation clock back to zero an infinite number of times;
- iii. failure to fulfil the continuous employment requirement⁵ may also reset the clock back to zero an infinite number of times;
- (iv) there is a power by delegated legislation to increase the qualifying periods.⁶

3. Clause 40(11)

4. Clause 40(2)(b) and clause 41(3)

5. Clause 40(2)(e)

6. Clause 42 (2)

12. In relation to (i) we believe that all lawful leave should be count towards naturalisation qualification purposes and in relation to (iv) the power to amend the qualifying periods through secondary legislation should simply not exist. This would go some way to averting the possibility of qualifying periods exceeding a decade. We deal with the other issues as they arise in the context of this paper.

Spouses/Partners

13. By clause 41(3)(2)(c) the expedited naturalisation procedure will only be available to spouses in circumstances where they have had a “relevant family association” for the whole of the qualifying period. For those spouses who came to the UK in a different capacity, who subsequently switch into a spouse based capacity, the effect of this will be to discount leave preceding the qualifying period. This will nullify any facilitative measure. By analogy the same is true for a civil partnership.

14. In our view in order to reflect European norms, the position should simply be that all lawful leave should count towards the qualifying period for the purposes of the expedited naturalisation procedure.

Article 8 ECHR - no arbitrary interference with private and family life

15. Article 8 ECHR requires that there is no arbitrary interference by the state with private and family life. Conferral of status can engage Article 8⁷ as can removal where private and family life is established.

16. By clauses 40(2) and 41(3) migrants are required not to have left the territory during the qualification period for more than 90 days per annum. Further, clause 40(2)(e) requires that migrants granted probationary citizenship status for work

7. The proposition that status engages Article 8 was accepted by the Government in *S and Others v Secretary of State for the Home Department* [2006] EWCA Civ 1157. See also the Grand Chamber judgment in *Sisojeva v Latvia* App. No 60654/00 and See also admissibility decisions in *Slivenko and others v Latvia* App. No. 48312/99 and *Karrassev and Family v Finland* App. No 31414/96 confirming that arbitrary denial of citizenship may breach Article 8 ECHR.

purposes must show that they have been in ‘continuous employment’ for its duration. There is a discretionary power of waiver in each case⁸, though the circumstances in which it will be employed are not set out on the face of the Bill.

17. Article 8 ECHR requires any interference with rights are prescribed in law. This simply reflects the principle of legality requiring laws to be clear, precise and accessible so that so that individuals are able to clearly foresee the consequences of their actions. The circumstances governing the discretionary power of waiver in each of the above cases are to be set out in guidance issued at some later date. Whilst we note that an ECHR declaration of compatibility as required has been made in relation to this Bill, it is simply impossible to assert in any meaningful way that these provisions are Article 8 ECHR compliant given that fundamental details central to the assessment are simply missing. The engagement of *a recognised human right* makes it absolutely essential that details of the circumstances in which the discretionary power of waiver is to be exercised in both cases are made available at this stage and ideally are reflected on the face of the Bill in a non exhaustive manner.

Article 12 (3) ICCPR- no arbitrary interference with the right to leave a country

18. Article 12 (3) of the ICCPR requires that no arbitrary restrictions are placed on the ‘right to leave a country’. The very nature of migration means that migrants will have interests in more than one country, and indeed in an era of globalisation there are number of reasons that migrants would wish to leave the UK for more than 90 days in one year. These include work reasons, family bereavement, legal proceedings, accidents etc. From the perspective of Article 12 (i.e. the need for legal certainty/establishment of a legitimate aim) clauses 40(2) and clause 41(3) also raise cause for concern.⁹ Indeed it is presently impossible to assert that they are compliant with Article 12. We believe the provisions should be deleted. If not, the Bill should set out the circumstances when the power of waiver will be employed in a non-

8. clauses 40(7) and 40(4)

9. General Comment 12 (1) makes clear that this applies to legal rules and administrative practice by states and to nationals and non nationals. Whilst the UK has entered a reservation against every human rights provision in the ICCPR for non citizens/those without the right of abode it is anticipated that it would only be necessary to apply this from ‘time to time’ and it is also subject to a test of ‘necessity’.

exhaustive manner.

Article 19.7 of the 1961 ESC- equal treatment of migrant workers to remuneration/working conditions and ‘continuous employment’

19. Article 19.7 of ESC requires the UK to ensure that migrant workers are not treated less favourably than nationals in relation to remuneration and working conditions. The ‘continuous employment’ requirement in clause 40(2)(e) will, upon interaction with restrictions on access to welfare, the labour market and the ability to change employer, undermine the ability of migrant workers to claim their contractual, statutory and human rights (see for example the poignant case study contained in JCWI’s House of lords committee stage briefing at www.jcwi.org.uk concerning the female employee who was raped and assaulted by her employer as an example of how this could operate in practice.) This would be inconsistent with the spirit of the ESC.

20. Additionally the above clause is likely to lead to indirect discrimination on grounds of race, gender or age in a way that is inconsistent with Articles 14 (no discrimination in relation to Convention rights) and 8 ECHR given its propensity for disproportionate impacts on women who most obviously may need to take time out of the labour market due to pregnancy and child-care responsibilities, or certain ethnic groups (and women) and the disabled given their greater tendency to be located in insecure employment as a result of labour market discrimination.¹²

21. In view of the serious consequences that the “continuous employment” requirement has from the perspective of the above, and in view of the fact that it has limited economic benefits (for which see the comments of the economist Philippe Legrain in our Committee stage briefing) we believe that it should be deleted.¹¹ If not, it should be aligned with the position of an EEA worker rather than someone under the points based system. The rationale for this is that the migrant would be half way through their journey as a migrant and a full citizen. Accordingly, accepting the view

11. <http://www.jcwi.org.uk/Resources/JCWI/PDF%20Documents/Policy/Parliamentary%20Briefings/JCWI%20Briefing%20in%20support%20of%20Amendment%20No.%2051%20Clause%2037%20Continuous%20Employment%20Provision.pdf>

12. Women tend to assume caring responsibilities, be inclined greater job insecurity and discrimination in the work place and the average incomes of certain ethnic groups tend to be lower.

that citizenship carries rights and responsibilities, they should be granted the most favourable set of provisions available to migrants.

Article 14 and 8 ECHR – no discrimination in relation to matters falling within the ambit of a Convention right and Article 4 ECHR

22. By clause 42 the qualifying periods for citizenship are capable of ‘reduction’ in the event that ‘an activity condition’ performed without remuneration is fulfilled. We do not have details of the activity condition. There is to be a power of waiver though no indication on the face of the Bill about when this would be employed.

23. Article 14 ECHR prohibits discrimination in relation to matters that fall within the *ambit* of a Convention right. There are a number of migrants who may potentially struggle with an ‘activity condition’ including:

- i. Migrants with health problems;
- ii. Migrants with disabilities;
- iii. Migrants with learning difficulties;
- iv. Elderly migrants;
- v. Migrants with personality disorders;
- vi. Migrants who work long hours;
- vii. Migrants who undertake shift work;
- viii. Migrants on low incomes;
- ix. Single parents and other migrants with caring responsibilities;
- x. Female migrants who for ‘cultural reasons’ are ‘prohibited’ by their spouses and families from participating in public domains.
- xi. Victims of domestic violence

24. Given that a grant of citizenship status is arguably within the ambit of Article 8, this is cause for concern. Indeed it is once again in our view presently impossible to assert that these requirements are compliant with the above obligations when key aspects of it that would permit the assessment are missing.

25. We would want to see these provisions in their current form deleted. If they are not the Bill should have written onto its face a non exhaustive list of the circumstances in which in which migrants will be treated as having participated in the activity condition together with the prescribed, number of hours that will fulfil the activity condition.

Probationary citizenship/access to contribution based benefits- inconsistency with common standards including the 1966 International Covenant on Economic, Social and Cultural Rights ICSECR

26. The scheme overall envisages at minimum (a) one additional year to which migrant workers and spouses are to be subject to a public funds restriction and (b) three additional years to which other family members are subject to a public funds restriction. At maximum, it envisages three additional years to which (a) will be subject to a public funds restriction and five additional years for (b), or possibly no upper limit for both in the event of a failure to fulfil both existing and new requirements.

27. The effect of the above will be that some migrants will be precluded from accessing most welfare benefits (i.e. contribution based benefits such as Housing Benefit/ homelessness assistance) for very lengthy and possibly indefinite periods. As we document in our committee stage briefings, the absence of the availability of non-contribution based welfare tends to lock both migrant workers and family members into highly exploitative and undesirable conditions with particularly acute effects for women and certain ethnic groups.¹² Indeed the UK was heavily criticised by United Nations CEDAW Committee for the application of its public funds restriction given its role in trapping women into situations of spousal violence.¹³

13. Concluding Observations of the Committee on the Elimination of Discrimination Against Women CEDAW critiqued the UK on the basis that this was inconsistent with the duty to promote equality. CEDAW/C/gbr/co/6 UK41 st session July 2008, at para.47

28. The requirement is also arguably inconsistent with Article 9 of ICESCR which recognises the *right of everyone* to social security, *and* requires this to be provided on ‘*a non discriminatory basis*’ (extending to grounds of national origin or status) to the ‘maximum of its available resources.’¹⁴ It is also inconsistent with European approaches¹⁵ to ‘integrating migrants’ which recognise the importance of equal treatment in relation to social and economic rights in facilitating integration¹⁵ and participation in economic and social spheres of society. Additionally as the JCHR points out, it also raises compatibility issues with Article 14 and Protocol 1 ECHR.¹⁶

Transitional measures – Article 8 ECHR

29. Given that conferral of citizenship/removal from the territory *engages a fundamental right* i.e. Article 8 ECHR, and given that any interference with it must be in accordance with the law, we believe that it is of crucial importance that the transitional provisions the Government are proposing are available for parliamentary scrutiny whilst this Bill is under consideration in the House of Commons.

In the event of any further queries about this paper or for copies of Bill briefings please contact Hina Majid who is the legal policy director at JCWI. Her e mail address is hina.majid@jcw.org.uk and her phone number is 0207 553 7463. She will be out of the office from 4th June and will return on 26 June. In her absence please contact Habib Rahman who is the chief executive of JCWI. His e mail address is habib@jcw.org.uk and his direct line is 0207 553 7456

14. The UK has not entered a reservation based on immigration in relation to Article 9 and is therefore bound by this.

15. The sixth principle of the *EU Common Basic Principles for Immigrant Integration Policy in the European Union* recognise that ‘Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration’.

16. Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC 375 2008-09, para 1.38

