

BORDERS, CITIZENSHIP AND IMMIGRATION BILL 2009

PARLIAMENTARY BRIEFING

House of Lords

Second reading 11 February 2008

1. PURPOSE OF THE BILL

The Borders, Citizenship and Immigration Bill takes forward some key proposals contained within its Green Paper *'The Path to Citizenship: Next Steps in Reforming the Immigration System'*. It also implements some preparatory steps towards the appeals proposals detailed in the consultation paper *'Immigration Appeals Fairs Decisions Faster Justice'* whilst additionally giving effect to the Government's commitments made during the passage of the Children and Young Persons Bill 2008. The Bill's provisions include:

a. New arrangements for acquiring British citizenship by migrants

Part 2 of the Bill proposes the following:

- Generally increased waiting times for naturalisation for applicants. It is proposed that the norm will be 8 years for those seeking to naturalise on the basis of residence in contrast to the existing 5 years, and 5 years for those seeking to naturalise on the basis of marriage in contrast to the existing 3 years.¹ The journey towards naturalisation could be considerably longer in cases involving migrants with refugee/human rights based leave² and also in those cases where leave is precluded from counting towards the qualifying period.³ In both cases there exists the possibility that that the total journey to naturalisation could exceed a decade;
- Given that the citizenship proposals are to fit within the new 'pathway to citizenship structure'⁴ which envisages a new 'probationary citizenship status' the ultimate effect of this will be to delay both the acquisition of residential stability and full access to the welfare state for those who seek to naturalise through work based routes by a minimum of 1 year and a maximum of 3 years, and potentially in the case of other family members, by 5 years.⁵

1. Clause 39

2. Clause 37(2)(c), (11) and clause 45(3). Temporary admission which is most frequently given to asylum seekers pending determination of their claims does not appear to be qualifying immigration status. There are some cases where refugees would have been on temporary admission for several years

3. Clause 37(2) and 45(3)

4. See *The Path to Citizenship: Next steps in reforming the immigration system*, Home Office, UK Border Agency, February 2008

5. Currently parents and grandparents subject to satisfaction of the Immigration Rules would expect to receive Indefinite Leave to Enter, see para. 317 HC 395

- The introduction of an unpaid community service scheme.⁶ The detail of this is to be left to secondary legislation. Unpaid community service is to act as a mechanism to reduce naturalisation/residential stability time frames to the ‘minimum time frames’ of 6 years for migrants other than spouses, and 3 years in the cases of the spouses of British citizens;
- The ability to legislate for the future exclusion of certain categories of migrant/leave counting towards naturalisation;⁷
- The introduction of a requirement that migrant workers demonstrate a period of ‘continuous employment’ before being able to naturalise⁸;
- The abolition of the preferential ‘alternative’ naturalisation provisions for those who undertake Crown Service which absolve applicants of the need to fulfil the detailed residence/status requirements and replacement with less generous provisions.⁹

b. The removal of the existing statutory bar to transfer of judicial review cases relating to immigration and nationality to the ‘Upper Tribunal’¹⁰

c. The introduction of a new power to restrict the studies of migrants for those with limited leave.

Part 3, clause 47 permits any condition to be imposed ‘restricting a migrant’s studies’ in circumstances where migrants have limited leave. As such, changes in courses or institutions at which students chose to study that are not authorised by UK Borders Agency are to result in the migrant’s actions being criminalised¹¹ and could also potentially result in their removal from the UK.¹²

d. The introduction of the duty to safeguard and promote the welfare of children who are in the UK.¹³

6. See clause 39

7. See clause 37(2) and clause 45(3)

8. Clause 37(2)(e) there is a discretion to treat the applicant as though they were by clause 37(7) but the circumstances in which this would be the case are unclear

9. See clause 37(1) and(9). Under Schedule 1 para. 1(3) subject to satisfaction of the good character, life/language in the UK tests and the intention requirements an applicant who was serving outside of the UK in Crown Service under the Government of the UK was eligible to naturalise as British. Under clause 37(9) he will now only be able to do so if there are exceptional circumstances of a particular case.

10. Immigration/asylum and nationality judicial review cases are currently dealt with by judges sitting in the High Court. There is power to transfer judicial review applications in the High court to the ‘Upper tribunal’ in certain other areas which have been subject to tribunalisation. under the Tribunals Courts and Enforcement Act 2007 (‘TCEA 07’) There however exists a statutory bar on the ability to do this in relation to immigration, asylum and nationality matters. Clause 50, Part 4 of the Bill would now allow for the transfer of judicial review cases to the Upper tribunal. Whilst the Asylum and immigration Tribunal has not yet been integrated into the tribunal structure, the Government’s intention is that it will be in due course

11. Section 24(1)(b)(ii) Immigration Act 1971

12. Section 10, Immigration and Asylum Act 1999

13. Part 4, clause 51 of the Bill introduces a statutory requirement that the Secretary of State makes arrangements with a view to ensuring that the UK Border Agency, and those exercising Immigration Act/customs functions discharge their duties with regards to the need to safeguard and promote the welfare of children.

2. GENERAL VIEW

JCWI welcomes the introduction of a statutory duty to safeguard and promote the welfare of children together with the correction of some of the historical injustices reflected in the laws governing British nationality. We do however have four key concerns about the Bill. These are as follows:

- The new provisions for naturalisation;¹⁴
- The removal of the existing bar on the transfer of immigration or nationality judicial review functions;¹⁵
- The introduction of powers to restrict the studies of migrants;¹⁶
- The shortcomings with the provision regarding the duty to safeguard and promote the welfare of children.¹⁷

PART 3. SPECIFIC POINTS

NATURALISATION PROPOSALS - PART 2 CLAUSES 37-39

a. Inadequate detail

Acquisition of nationality, and therefore naturalisation is a question of fundamental importance given that nationality not only formally links individuals to the state in a world divided into nation states, but also provides individuals with domestic and supranational rights within the European Union, whilst also linking them with international law.

Given the above, we believe that it is wholly inadequate that much of the detail that would give the proposed scheme for naturalisation meaning is in fact missing. In particular, there are no immigration rules that set out the consequences of failure to fulfil the criteria to progress from probationary to British citizenship nor the criteria that is to determine acquisition of the alternative option of ‘permanent residence’. Further, there are no draft regulations that would set out key details of the scheme such as: (a) the nature of the volunteering requirement, (b) the categories of individual excluded from naturalising, and (c) the circumstances in which the ‘continuous employment’ requirement for naturalisation will be treated as fulfilled.

14. Part 2, clauses 37-39 and clause 45

15. Part 4, clause 50

16. Part 3, clause 47

17. Part 4, clause 51

b. Inconsistency with international legal obligations

The UK is bound by the 1951 Refugee Convention. Article 34 of that Convention requires states to 'facilitate naturalisation' for refugees.¹⁸ We note that there are no facilitative naturalisation measures within this scheme for refugees. On the contrary, the proposals would appear to place refugees in a *less* favourable position than is presently the case given that they appear to exclude the possibility of including periods which in some cases may amount to several years, spent on temporary admission from counting towards the naturalisation period.¹⁹

Depending upon the way in which the system of volunteering operates, and the extent of the activity required, it is not hard to imagine that certain classes of individuals e.g. poor migrants, single mothers or the disabled may struggle to acquire citizenship and the associated rights it brings. This raises the possibility that such a scheme *may* discriminate in relation to status in a way that raises compatibility concerns with the right to not to be discriminated against in relation to the enjoyment of private and family life (i.e. Article 14 and 8 of the European Convention on Human Rights 'ECHR').²⁰

c. Inconsistency of the provisions with clause 51 of the Bill / 1989 UN Convention on the Rights of the Child ('CRC 89') - safeguarding children and promoting their welfare

It is ironic that at a point in time that the Government: a. is enacting clause 51 which a. requires the Secretary of State to safeguard and promote the welfare of children and b. has removed its reservation to the duty to promote the best interests of the Child under CRC 89 that its naturalisation proposals contained within this Bill risk harming children in the UK. Indeed the indirect effect of the scheme for naturalisation when read in conjunction with the broader citizenship/settlement proposals means that migrants are likely to remain subject to immigration control, and therefore the public funds restriction for lengthier periods. The effect of this will be that migrant families will potentially have deferred access to the full range of welfare benefits to which they contribute including Child Benefit and local authority housing. This will be harmful from the perspective of alleviating child poverty and may in extreme cases even lead to the constructive removal of *British* children in households with mixed immigration statuses.²¹

18. Article 34 of the 1951 Convention Relating to the status of Refugees states 'The Contracting States shall as far as possible facilitate the assimilation of refugees...'

19. Currently certain periods of temporary admission can count for the purposes of naturalisation as they are neither treated as absence under s.9 BNA 1981 nor constitute a breach of immigration law. For the periods that can be taken into consideration see Annex B, chapter 18 of the Nationality Instructions.

20. Article 14 of the European Convention on Human Rights prohibits discrimination in relation to matters falling within the ambit of a Convention right. Status engages Article 8 see *Sisojeva v Latvia* App. No. 60654/00

21. See Sawyer, C, *Not Every Child Matters: The UK's Expulsion of British Citizens*, 2006, The International Journal of Children's Rights, Vol. 14 p.157-148

d. Inconsistency with European consensus and human rights standards

We believe that the measures and the approach adopted in part 2 of the Bill are at variance with standards and practice embraced by our European neighbours. Specifically we note that roughly half of the states within the EU require residence periods of 5 years or less in non marital cases²² Other European norms with regards to nationality can be found in the following:

(i) The 1997 European Convention on Nationality which lays down minimum standards in the realm of nationality. Whilst this has not been signed by the UK it has been signed by 28 other European states and ratified by 18 of these. The European Convention:

- Requires that states provide in their internal law for the possibility of naturalisation of persons lawfully and habitually resident within the territory;²³
- Imposes an upper limit of 10 years lawful residence for naturalisation purposes;²⁴
- Requires facilitation of naturalisation for refugees;²⁵
- Requires the facilitation of the acquisition of nationality for spouses of its nationals.²⁶ Resolution (77) 12 on the Nationality of Spouses of Different Nationalities of the Ministers of the Council of Europe also recommend that nationality should be acquired on more favourable terms.

(ii) EU Common Basic principles for Immigrant Integration Policy in The European Union – The sixth principle states that

‘Access for immigrants to institutions, as well as to public and private goods and services on a basis equal to national citizens and is a non-discriminatory way is a critical foundation for better integration.’²⁷

(iii) The Long Residence Directive (2003/109/EC). The UK has not opted into this. The Directive reflects European practice that 5 years residence in an EU state should be sufficient to provide third country nationals with a measure of residential stability.²⁸

The proposals outlined in section 1 a of this briefing in particular; a. the length for naturalisation, b. the limited welfare rights entitlements up until the point of naturalisation, c. the treatment of refugees, and also arguably the obscuring of the benefits of spouse status for naturalisation purposes (particularly given the possibility of discounting certain types of leave for naturalisation purposes), and d. the potential

22. Baubock at al *Acquisition and Loss of Nationality Volume 1: Comparative Analyses policies and trends in 15 European countries*, 2006, Amsterdam; Amsterdam University Press p. 447

23. Article 6(3)

24. Article 6(3)

25. Article 6(4)g)

26. Article 6(4)(a)

27. EU Common Basic Principles for Immigrant Integration Policy in the European Union COM (2005) 0389

28. There are a number of aspects of Directive 2003/109/EC that we consider to be problematic however we commend this element of the approach

ramifications that are to flow from failure to demonstrate fulfilment of the criteria to progress from probationary citizenship to British nationality i.e. removal,²⁹ all appear to be at variance with standards embraced by our European partners.

e. Diversion of ‘skilled labour’

Settlement and naturalisation schemes are increasingly viewed globally as relocation packages which exert influence on the choice of destination by the so called ‘skilled/wealth generating migrant labour’ that governments frequently seek to attract. Given the above naturalisation time frames within the EU of 5 years or less, given that the US permits naturalisation after 5 years,³⁰ Canada permits naturalisation after 3 years, and given that non of these schemes appear to build unpaid community service into their scheme, these measures risk diverting the very kinds of labour that the UK seeks to attract to its shores.

f. Inefficacy in securing policy objectives- hindering Integration

The key policy objective behind these measures is to facilitate integration. Firstly, we note that there is no evidence in the Government policy papers that precede the Bill suggesting that migrants are not on the whole integrating, nor less likely than the indigenous population to undertake voluntary works. Assuming however that there is a problem, it is unlikely that subjecting migrants to longer periods of residential insecurity, generating greater anxiety about their future, locking them into employment situations which may be oppressive through the imposition of the continuous employment requirement, excluding certain categories of migrants from the ability to naturalise, and denying them access to welfare benefits to which they not only contribute, but subsidise,³¹ will assist in this respect. Indeed, it is not clear why or how the imposition of less favourable conditions for naturalisation for Crown servants furthers this policy objective (or indeed any socially useful objective). If anything, uncertainty about status is likely to ‘freeze’ integration attempts by migrants. Additionally, exclusion from rights entitlements (e.g. welfare available to British citizens), and the imposition of far more exacting standards from prospective citizens than those demanded from existing citizens seems likely to engender a sense of injustice, exclusion, isolation, and in some cases poverty.

29. Alan Boyd of the Earned citizenship team confirmed to JCWI at least in relation to the Draft (Partial) Immigration and Citizenship Bill that this was the intention behind the underlying provisions.

30. See www.visabureau.com/?/America/citizenship.aspx

31. See para. 184-6 *The Path to Citizenship: Next steps in reforming the immigration system*, Home Office, UK Border Agency, February 2008

PROPOSALS ALLOWING FOR THE TRANSFER OF IMMIGRATION AND NATIONALITY JUDICIAL REVIEW CASES TO THE UPPER TRIBUNAL – PART 4 CLAUSE 50

a. Lack of expertise

We are concerned about the clause enabling the future transfer of immigration and nationality judicial review cases to the Upper Tribunal³² given that there is as yet no indication as to what proportion of transferred judicial review cases would be heard by High Court judges in the Upper Tribunal. The Tribunal at its upper levels possesses (or will possess with transfer of personnel from the present Asylum and Immigration Tribunal) valuable knowledge of immigration and asylum law and practice, but no such knowledge of constitutional or administrative law. This expertise is particularly important as (i) immigration and asylum cases often tend to be those in which precedents in constitutional and administrative law tend to be established and (ii) the procedures in question are the means by which the adherence of the United Kingdom to its international obligations under the 1951 Refugee Convention and the European Convention on Human Rights and Fundamental Freedoms (“ECHR”), including the right to life (art 2 ECHR), the prohibition on torture or inhuman or degrading treatment and punishment (art 3 ECHR); and the right to liberty and security of person (art 4 ECHR) is secured.

b. Bias/apparent bias in rulemaking

Presently judicial review proceedings in the Administrative Court are bound by the Civil Procedure Rules. The appeals proposals which surprisingly emanate not from the Department for Justice, but from the United Kingdom Border Agency (the agency whose decisions are considered during the course of litigation), are that the procedural rules for the tribunal in immigration matters should be settled not by the Tribunal Procedure Rules Committee but by the Lord Chancellor- who as indicated by the sponsorship of the consultation paper appears to have devolved his own powers upon the Home Office despite the evident risk to objectivity and impartiality this carries. If extended to judicial review cases, which would presumably be the case were they subject to common rules of procedure in the Upper Tribunal, this would represent a shift from independent professionally considered procedural rules for judicial review matters to the application of rules designed by one of the parties to every appeal in the tribunal. This would also potentially raise issues of conformity with the right to a fair trial (Article 6 ECHR).

32. See *Consultation: Immigration Appeals Fair Decisions: Faster Justice*, UK Borders Agency, 21 August 2008

c. Risk of limitation on access to higher courts in judicial review proceedings

We note with concern that that Home Office's present proposals would allow for the potential limitation on the rights of appeal from the Upper Tribunal to the Court of Appeal.³³ If this same provision is brought to bear not only upon "*tribunal*" work but also upon judicial review work transferred from the Administrative Court, then it would bar recourse to the Court of Appeal even where there had been a fairly clear error of law by the Upper Tribunal in a Refugee Convention case (invoking the United Kingdom's duty to protect from persecution) or the right to life or freedom from torture or inhuman or degrading treatment under ECHR. The interpretation of a test such as that proposed is can be seen in a past decision of the Court of Appeal- in which Dyson LJ indicated that "*it is unlikely that the court will find that there is a compelling reason*" for granting permission unless it considers "that the prospects of success are very high". He continued by saying that "*the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason*", albeit he did accept that there might be cases where there is a compelling reason notwithstanding a slightly lower prospect of success, especially in cases involving procedural irregularity.³⁴ The effect of this is that a case may potentially be considered in the Tribunal on appeal and/or on judicial review involving matters critical to the subject and to the United Kingdom's satisfaction of its obligations, but that an apparently erroneous decision may not give rise to any effective right of recourse to the Court.

d. Premature action

As the Immigration Law Practitioners Association points out in its second reading briefing, the removal of the statutory bar is premature, given that its *raison d'être* - i.e. a period over which to assess its performance and suitability for contentious jurisdictions - has not been satisfactorily completed.³⁵

33. Section 13 Section 13(6) of the 2007 Act empowers the Lord Chancellor by order to provide that permission to appeal from the Upper Tribunal to the Court of Appeal in cases where (i) the proposed appeal raises some important point of principle or practice, or (ii) there is some other compelling reason for that appeal to be heard.

34. Para.24 *Uphill v BRB Residuary Ltd* [2005] 1 WLR 2070

35. See briefing by the Immigration Law Practitioners available at <http://www.ilpa.org.uk/>

PROPOSALS RELATING TO THE PROMOTION OF THE WELFARE OF CHILDREN (PART 4, CLAUSE 51)

a. Inconsistency with obligations and the spirit of the United Nations Conventions on the Rights of the Child (1989) due to the inadequacy of breath of protection

Clause 51 applies those children who are ‘within the UK.’ The effect of it will be to potentially exclude:

- Those who are in the UK with ‘temporary admission’ as they are not deemed to have entered the UK;
- Children at entry clearance posts;
- Children at airports who may be prevented from boarding flights on the instruction of the state;
- Children who are on flights/ships other vehicles travelling either to or from the UK;
- Those removed to ‘safe’ third countries where there are no arrangements for their care.

This is unsatisfactory firstly because many of the above situations will occur in circumstances where the UK will be exercising effective or de facto jurisdiction by virtue of acting upon instructions emanating from the state. The effect of this will be that the UK will arguably be acting in a way that is inconsistent with its duties, but also the spirit of the Convention on the Rights of the Child.

36. Clause 51(1)

37. Section 11 Immigration Act 1971

38. Article 3.1 of the Convention states that ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration

POWERS TO IMPOSE CONDITIONS RESTRICTING STUDIES TOGETHER WITH CORRESPONDING CRIMINALISATION AND A POWER OF REMOVAL FOR BREACHES- CLAUSE 47

a. Potential diversion of students to other countries

The Prime Minister's Initiative launched in 2006 recognised that international education is:

- A source for the generation of employment and increasing GDP. Indeed the UK student industry is worth in the region of 10 billion pounds;³⁹
- Conducive to facilitating trade, investment, political influence and enhancing 'intellectual capital'.

On this basis, the initiative aimed by 2011 to significantly increase British intake of international students (who will of course be paying considerably higher fees than their domestic counterparts).⁴⁰

It is not unusual for students to decide during the course of their studies that they have made an unwise choice of course or that they would like to study at an alternative institution due to poor teaching. This is an important entitlement, and even more so in the case of international students given the expense and hardship that they may have incurred on entering the UK for studies.⁴¹

It is highly likely that the uncertainty generated by the proposal together with the possibility of restriction of choice, criminalisation and ultimately removal will not prove an attractive selling point to international students. As such, we would expect this measure to divert international students to other countries who also seek to attract them to their shores for similar reasons. This would appear to run counter to the targets and objectives identified by the Prime Ministers Initiative.

b. Human rights issues – Article 2 of Protocol 1- (no denial of the right to education) and Article 8 (right to private life) of the European Convention on Human Rights

The measure may potentially raise various human rights issues. Firstly, unless the circumstances in which this discretionary power is to be exercised are identified in Advance, a restriction on the ability to change course, or preventing continuation of studies altogether may constitute an interference with private life (Article 8 ECHR).

39. <http://www.britishcouncil.org/eumd-pmi2-overview.htm>

40. By way of comparison a Home student on an undergraduate course at the LSE could expect to pay £3, 225 where as an international student could expect to pay £12,840. For further fees details see the London School of Economics fees section of their website available at <http://www.lse.ac.uk/collections/tableOfFees/2009-10.htm>

41. In addition to their more expensive course fees, they will also have been required to have saved sufficient funds i.e. £800.00 per month for each month up to 12 months, and £533.00 per dependant in order to satisfy an entry clearance officer that they will be able to maintain themselves in the UK.

This is because both of the circumstances identified above are potentially covered by the ‘private life’ limb of Article 8 ECHR, for an interference with this right to be lawful, it would need to be deemed ‘in accordance with the law’, however absence of information about the circumstances in which the power would be deployed may result in the failure to satisfy this test. Even however if such interference is in accordance with the law, the two scenarios identified above may engage, and in certain cases breach Articles 2 of Protocol 1, and Article 8.⁴²

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42. Where the action is considered ‘disproportionate’ to the relevant aim. *Leyla Sahin v Turkey* App. No 44774/98 10 November 2005 confirms that higher education is protected by the Article.

