



## **THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL**

### **PARLIAMENTARY BRIEFING IN SUPPORT OF AMENDMENT 45**

**House of Lords - Committee stage**

#### **1. Amendment 45**

Before Clause 37

Insert the following new Clause—

#### **"Probationary citizenship leave"**

(1) A person with probationary citizenship leave shall be treated as a person settled in the United Kingdom for the purposes of all regulations made under-

- (a) the Health Services and Public Health Act 1968\*;
- (b) the Education (Fees and Awards) Act 1983;
- (c) the Education and Libraries (Northern Ireland) Order 1986
- (d) the National Health Services (Charges to Overseas Visitors), Regulation 1989\*;
- (e) the Teaching and Higher Education Act 1998
- (f) the Education (Student) Support Regulations (Northern Ireland) 1998;
- (g) the learning Skills Act 200-;

- (h) the Higher Education Act 2004; and
- (i) the Higher Education (Northern Ireland) Order 2005

(2) In Section 115 of the Immigration and Asylum Act 1999 (c.33) (exclusion from benefits), in subsection (9) after “EEA state” insert “or a person with probationary citizenship leave.”

## **2. Presumed purpose of amendment**

With the exception of those who have protection based leave, migrants possessing the new probationary citizenship (to be interposed between temporary leave and British citizenship) will not have access to further and higher education at home rates for its duration of 1-3 years, or possibly longer.<sup>1</sup> Additionally, they will have no access to the non contribution based benefits that many of them will have indirectly contributed to (including housing for homeless persons, social housing, child benefit, housing benefit, council tax benefit, income based jobseekers allowance, income support, tax credits and carer’s allowance.)<sup>2</sup> This amendment is designed to ensure that they do\*and elicit some indication as whether there would be any limitation on the period for which probationary citizens are precluded from access to welfare.

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1. See the effect of the operation of clause 37(2)(b) which would stop the clock running for the naturalisation qualifying periods but also of course the possibility arises that migrants may not be able to fulfil the relevant criteria thus meaning that they may remain on probationary citizenship for even longer periods of time.

2. Additionally migrants with probationary citizenship will not be eligible for income related allowance under Part 1 of the Welfare Reform Act 2007, attendance allowance, state pension credit, severe disablement allowance, disability living allowance, carers allowance, social fund payments;

\* Whilst we note that the intention is that probationary citizens will have access to health-care, without an express provision referred to above there is a slight risk that probationary citizens who are not in the UK for the purpose of work, or who have traveled out of the country thus breaking the year of lawful residence may not be eligible to access free secondary or primary healthcare on a free basis. This could lead to a situation where the provision conflicts with the UK’s obligations under Article 12 of the International Covenant on Social Economic and Cultural Rights. This recognises the ‘the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health.’ This right is also to be provided on a non-discriminatory basis (extending to grounds of national origin or status) and to the maximum of a state’s available resources. The amendment would safeguard against that possibility.

\* We note that the amendment does not include housing for the homeless under Part vi Housing Act 1996 however this is classified as public funds and we advocate that this should be accessible by probationary citizens.

### **3. Detailed reasons for supporting this amendment**

#### **Three reasons further and higher education at 'home rates' should be accessible to probationary citizens;**

##### **a. Enhancing economic performance**

The demands of the British economy in today's globalised setting are constantly changing. If the British economy is to remain competitive, employers will require a flexible skills base that they are able to draw upon at short notice in order to reflect changing economic demands. Preventing or discouraging 'skilled migrants' who are already working in the UK, and indeed other economically inactive migrants who have been out of the labour market, from being able to retrain in a way that furthers British economic interests is not conducive to enhancing economic performance.

##### **b. Encouraging 'active citizenship' – the ostensible objective of 'earned citizenship'**

The ostensible rationale behind 'the earned citizenship scheme' outlined in this Bill is to integrate migrants and encourage societal participation. An important way in which participation and integration can be facilitated is through the use of education. As the United Nations Economic and Social Council so succinctly puts it when discussing the importance of higher/further/primary education:

*'...education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.'*<sup>3</sup>

Discouraging or preventing migrants with probationary citizenship from accessing further or higher education through the imposition of prohibitive non home rate fees is likely to be harmful from the point of view of securing the underlying objective behind these proposals.<sup>3a</sup>

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3. General Comment 13, Committee on Economic, Social and Cultural Rights E/C.12/1999/10, 08.12.99  
3a. For a comparative purposes the LSE charge foreign students between £21,000-£28,000 for a taught Masters degree and between £6192.-£18048 (save for MSc finance which is £22, 464)

### c. Complying with human rights obligations – Article 13 of the International Covenant on Social, Economic and Cultural Rights (ICESCR) and Article 14 and protocol 1 European Convention on Human Rights (ECHR)

The ICSECR has been signed and ratified by the UK. Article 13 requires states to make further and higher education *equally accessible to all*.<sup>4</sup> This duty extends to *all* those present within the territory, though there is an exemption for developing countries. Consequently refusal to provide further and higher education at home rates is arguably inconsistent with this obligation.

Additionally, Article 2 of Protocol 1 of the European Convention on Human Rights (ECHR) provides '*No person shall be denied the right to education...*' The 'right' to education is to be interpreted against the ICESCR (see above).<sup>4</sup> Article 14 ECHR prohibits discrimination on grounds of status which includes immigration status in relation to matters falling within the ambit of a Convention right.<sup>5</sup> Given that the difference between home and overseas fees can be very significant, and can in practical terms block access to education or vocational training necessary for a particular job/promotion/salary increase, and given that the justification for this proposal is linked to dealing with public misconceptions about migrants, reinforcing the distinction between temporary and permanent migrants, and ensuring that migrants do not become a burden on the state (they will not through the charging of home fees),<sup>6</sup> failure to provide education at home fee rates may arguably in these circumstances also be inconsistent with this obligation.<sup>7</sup>

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4. Article 13 states '1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity...2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:(b) Secondary education (which covers further education) in its different forms, including technical and vocational secondary education, shall be made generally available **and accessible to all by every appropriate means...**(c) *Higher education shall be made **equally accessible to all, on the basis of capacity, by every appropriate means...***

5. Not all differences in treatment amount to discrimination. Difference in treatment will be discriminatory where either the aim is not legitimate, or there is no reasonable relationship of proportionality between the means employed and the objective sought.

6. *The Path to Citizenship: Next Steps in Reforming the Immigration System*, UK Borders Agency, February 2008, para.186, p.33. There is no reason of course that charging probationary citizens home fees would place them in a position where they are a burden upon the state.

7. Whilst there is no obligation on the state to establish at their own expense, or to subsidize, education of any particular type or at any level in the case of *Belgium (Belgian Linguistic Case (No.2))*, Judgment of 23 July 1968, Series A, No. 6; (1979-80) 1 EHRR 252 the Court notes that Article 2 guaranteed the right in principle to 'avail themselves of the means of instruction existing at a given time. The case of *Leyla Sahin v Turkey* App. No. 44774/98 confirms that higher education is protected by Article 2 of Protocol 1.

## ***Seven reasons that non-contribution based benefits should be available to probationary citizens***

### **a. Integration and fostering 'active citizenship'**

The key rationale behind the 'earned citizenship' scheme is the facilitation of migrant integration (in political, economic and social domains) and the development of a 'sense of citizenship'. Limiting state assistance through the denial for longer periods of welfare is likely to achieve the very antithesis for the following reasons:

- Denial of benefits such as Housing Benefit, Child Benefit and council tax credit as well as social housing will simply result in poverty, and clustering of migrants in more affordable areas where they can rely upon mutual support networks within their own communities;
- The negative impact of poverty on rates of civic participation for nationals is well documented. As the Joseph Rowntree Trust note in their research on poverty and social exclusion '*people in poverty find it hard to participate in society, because they lack the resources to do so.*'<sup>8</sup> There is no reason to think that the impact would be any different for migrants;
- Given that migrants are *net contributors* to welfare benefits, exclusion from them for long periods of time is likely to generate a sense of resentment, alienation and exclusion, rather than foster the sense of membership that any pathway to citizenship should seek to establish in its potential members;
- Denial of welfare can lock migrant workers, and those subject to familial abuse into oppressive situations.<sup>9</sup> The effect of this is to relegate the importance of community participation and integration pending resolution of these more immediate and pressing concerns.

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8. *Where poverty interacts with social exclusion Evidence and Features of Solutions* , Donald Hirsch, Joseph Rowntree Foundation, September 2006 at p.4

9. For which see below together with our briefing on the continuous employment clause

**b. The 1989 Convention on the Rights of the Child- promoting the best interests of the child and eliminating child poverty**

Article 3(1) of the Convention requires:

*'1. 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.'*

It is Government policy to eradicate child poverty by 2020. The attachment of a *public funds restriction* to probationary citizenship status would run counter to the above for the following reasons:

- It is likely to lead to comparatively lower incomes in households with children. This will have a particularly marked effect on communities that tend to experience higher rates of poverty for a variety of reasons;
- Contrary to the Government's assertions, these provisions *will* also to impact upon children of migrant workers given that the emerging evidence in relation to the operation of the points based system would seem to suggest that employers are routinely making false representations about income to the UK Borders Agency, and actually paying migrants lower salaries and/or finding alternative ways to recoup monies. Of course, the possibility always remains that migrants could lose their employment particularly in the midst of a recession;
- The restriction will make more prevalent a situation where *British children* in single parent families (in which the foreign parent is the primary carer)<sup>10</sup> who would otherwise enjoy access to contribution based benefits were it not for their lack of capacity, would be ineligible for welfare entitlements including housing as a homeless persons. In extreme cases this could result in the child's 'constructive removal.'<sup>11</sup>

**c. Gender based discrimination/equality- Complying with obligations imposed by the Convention on the Elimination of All Form of Discrimination Against Women and municipal law**

Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women imposes an obligation on states to 'embody the principle of

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<sup>10</sup> A child will be British if born in the UK with one parent who is either British or settled.

<sup>11</sup> See Sawyer C, *Not Every Child Matters: the UK's expulsion of British Citizens*, 2006, The International Journal of Children's Rights Vol. 14, p157-185

*equality* of men and women' in legislation not yet incorporated. Additionally it requires states to take steps to eliminate discrimination against women. This duty is somewhat replicated in municipal law.<sup>12</sup> A lengthier restriction on the entitlement to non contribution based welfare entitlement is likely to have a disproportionate impact upon women for the following reasons:

- Women on average earn considerably less than men. Even though the Points Based System makes use of specified salaries (as noted above) the anecdotal evidence is that employers are not honoring their representations and are finding ways to recoup the expenses entailed by employing migrants. This disproportionately appears to effect women;
- Women are often located in less secure employment;<sup>13</sup>
- Women overwhelmingly assume familial caring responsibilities. As well as affecting their needs for welfare, this affects the level of national insurance contributions and therefore entitlement to contribution-based benefits;
- Non work based migration is feminised, and women are more susceptible to domestic violence.<sup>14</sup>

The UN Committee on the Elimination of Discrimination Against Women who in 2008 who examined the UK's compliance with the Convention in their concluding observations criticised the Government in relation to *the existing* public funds restriction let alone an extension of it. Their comments appear below:

*'The Committee is concerned at the situation of immigrant women... who may be subject to multiple forms of discrimination with respect to education, health, employment and social and political participation... It also notes that women in insecure immigration status are not allowed to access public funds, particularly health case services, public housing and social security benefits, with particularly negative consequences for victims of violence.'*<sup>15</sup>

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12. Section 76(A) of the Sex Discrimination Act requires that the UK Border Agency has *due regard* to the need amongst other things to: a. eliminate unlawful discrimination and b. *promote* equality of opportunity between men and women

13. See Annual Survey of Hours and Earning, Office for National Statistics available at [www.statistics.gov.uk/pdffdir/ash1107.pdf](http://www.statistics.gov.uk/pdffdir/ash1107.pdf).

14. Figures show 68% of migrants joining families in the UK in 2005 were female compared with only 41% of economic migrants who were female. See *International Migration: Migrants entering or leaving the UK and England and Wales, 2005, 2007*, Office for National Statistics: London

See generally Equal Opportunities Briefing report 2002/2003 p.1-7 available at [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

15. Concluding Observations of the Committee on the Elimination of Discrimination Against Women CEDAW/C/gbr/co/6 UK41<sup>st</sup> session July 2008, at para.47

So far restrictions on access to non-contribution based benefits such as Housing Benefit *and housing for homeless people* goes, the role this plays in locking women into domestic violence has been well documented by Amnesty International and Southall Black Sisters. Case studies from their report 'No Recourse to Safety' are reproduced below:

'We are really concerned about a woman, let's call her Yasmin, who came to us a few months ago. Yasmin left her husband after months of violence, physical, psychological and sexual violence, she had attempted suicide twice. We took her and her two children to the different council departments, including housing and social services, but they all said that they wouldn't help because she wasn't entitled. There was already a woman with no recourse to public funds staying at our refuge so we couldn't take her on and neither could anyone else. The housing department told us to take Yasmin to claim asylum, this is what we did but when we took her she was detained by the Home Office in Liverpool. They wouldn't listen to us about the support and help she needed and because we had nowhere else we didn't know what to do. We then lost touch with her, the mobile number she had no longer worked. Then at the beginning of this month [October 2007] we got a call from a man who claimed to be Yasmin's husband, seemingly she had gone back to him, but has fled again with the two children. No one knows where she is and we are really worried about her. We knew that Yasmin and her children were at risk but we were stopped from helping.' Interview with refuge worker, 19 October 2007<sup>16</sup>

'On 1 March 2006, Southall Black Sisters received a call for advice from Rochester Police stating that they had rescued a woman from domestic violence perpetrated by her husband and in-laws, and were desperately seeking alternative accommodation for her. She had no family or friends in the UK and under immigration and benefit rules, she could not access emergency housing or claim any benefits. No refuge was prepared to accept her, as she could not pay rent or support herself. Local charitable organisations including the Sikh temple were not prepared to accept her. Out of desperation, the police stated that they were minded to contact the Home Office to detain her. The police did not want to be responsible for sending her back to her matrimonial home to face what they considered to be 'certain death'.<sup>17</sup>

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16. *No Recourse to Safety*, Southall Black Sisters and Amnesty International, 2008 p.21  
17. *No Recourse to Safety*, Southall Black Sisters and Amnesty International, 2008 p.3

#### **d. Migrant workers- respecting international standards and preventing exploitation**

Welfare entitlements in the form of non-contribution based benefits are intimately linked with human dignity, and the ability to claim other statutory / contractual and other human rights. Examples of this relationship, and the way in which restrictions on access to welfare may affect migrant workers with probationary citizenship are set out in the box below.

B is from the Philippines and is working in the UK as a care worker in Suffolk. She has two young children. Her employer is paying her considerably below the terms of her contract (and less than her employers represented to the UK Borders Agency under the points based scheme they would pay her). Her trade union have offered to intervene on her behalf however, despite understanding that this represents a breach of contract she refuses to allow their intervention because of the possible implications this will have for her. She will have no accommodation or means of looking after her two children in the likely event that her employer terminates her contract on account of this. She will therefore continue to tolerate these conditions until such time as she is able to locate alternative employment. (UNISON)

A was a young Indian woman who was employed as a domestic worker in a private household. She was required to work around the clock, not paid and was psychologically bullied by her employer. She finally left her employer (and her accommodation which was tied to her job). As she was ineligible on account of her immigration status to access housing as a homeless person, she had to make her own arrangements. A managed to befriend some people. They spoke the same language as her, and this generated a misplaced sense of trust. They subsequently agreed to accommodate her, but whilst residing with them A was sexually abused. Kalayaan tell us that lack of eligibility for housing for homeless people often means the difference between fleeing exploitation and abuse and being prevented from doing so given that their employment is often tied to their accommodation. (Kalayaan)

The International Covenant on Social, Economic and Cultural Rights (ICESCR) which the UK is bound by 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'.<sup>18</sup> Further, the Council of Europe Convention on Migrant Workers requires contracting state parties to provide housing and the right social security to migrant workers and their families *on par with nationals*.<sup>19</sup> It was the view of the House of Lord's own\_\_

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18. Article 9

19. Articles 13 and 18

European Union Subcommittee in relation to the Convention that the UK should ratify this Convention ergo that non contribution based benefits should be extended to migrant workers. The case for extending these to 'demi'/ 'probationary citizens' who will have built up a significant relationship with the UK is surely even stronger.<sup>20</sup>

#### e. No harmful impact on the welfare state

Many migrants would have entered the UK in a work-based capacity, and in some familial cases will be paying: Income tax, National Insurance, VAT and Council Tax. The UK Borders Agency correctly notes in its Green paper preceding the Bill:

*'There is widespread public perception that migrants in general are a major burden on public service. In reality this is not the case- migrants are on average net fiscal contributors'*<sup>21</sup>

*'We must be clear that the average migrant make a greater contribution to the provision of public services than the average non-migrant. On average migrants pay more tax than non- migrants and consume fewer public services.'*<sup>22</sup>

A number of academic studies that have followed *immigrants* more generally over time have also concluded migrants and their descendants tend to pay more into welfare states that they take out.<sup>22</sup> There are a range of reasons for this, but certainly in the case of migrant workers, they tend generally to be young, healthy and without dependants.<sup>23</sup> In the light of this, it becomes difficult to justify denying full welfare entitlements to migrants *who would otherwise under the present structure and scheme be entitled to these benefits.*

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20. HL Paper 58, 14<sup>th</sup> Report of Session 2005-2006. The Subcommittee concluded '[The Council of Europe Convention including Articles 13 and 18 on the provision of housing and social welfare on par with nationals] floor of rights provides a sound basis for the treatment of all migrant workers admitted to a State. **We urge the Government to reconsider the case for acceding to this Convention.**'

21. *The Path to Citizenship: Next Steps in Reforming the Immigration System*, UK Borders Agency, February 2008, para. 183, p.33

22. See *Is Free Migration compatible with a European- style welfare state?*, Expert report nr.11 to Sweden's Globalisation Council, P Legrain, 2008 at p.18

23. See *Is Free Migration compatible with a European- style welfare state?*, Expert report nr.11 to Sweden's Globalisation Council, P Legrain, 2008 at p.2

**f. Negating the positive benefits of migration for donor states and eliminating global poverty**

The *Government's own* Department for International Development has discussed the use of migration as a tool for global poverty reduction (through remittances) but notes that the benefits to donor countries are likely to be diminished as a result of poor protection of the rights of migrants (including those under ICSECR) in recipient states. They note *'Without protection, migrants can find themselves facing harassment, violence, debt and increased poverty.'*<sup>24</sup> Accordingly, we believe that a restriction of this kind, which does not sit comfortably with the ICESCR is likely to be harmful to donor states, and is therefore not conducive to the UK's commitment to securing the Millennium Development Goals.<sup>25</sup>

**For further information about this briefing please contact Hina Majid who is a lawyer and the Legal Policy Director at the Joint Council for the Welfare of Immigrants. Her e-mail address is [hina.majid@jcwi.org.uk](mailto:hina.majid@jcwi.org.uk). Her phone number is 0207 553 7463**

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24. *Moving out of Poverty- making migration work better for poor people*, Department for International Development, March 2007 see.p.30 and p.47

25. The Millennium Development Goals are eight international development goals that reflect the commitment of the international community to human rights principles of human dignity and non discrimination. 189 UN member states including the UK have agreed to achieve the goals by 2015. These include a commitment to eradicate extreme poverty and hunger, the promotion of gender equality, the development of a global partnership for development and the reduction of child mortality. See 6. Millennium Declaration agreed at the UN Millennium Summit, September 2000

