



THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL
PARLIAMENTARY BRIEFING IN SUPPORT OF
AMENDMENT NO.51

House of Lords

Committee stage

1. Amendment – No.51

In Clause 37

Page 27, leave out lines 15-19

2. Summary

This amendment is designed to delete the new requirement for naturalisation¹ that migrant workers demonstrate that they have been in 'continuous employment'² for the duration of their 'probationary citizenship.'

Currently the general position is that is that migrant workers will be eligible for settlement (indefinite leave to remain 'ILR') after 5 years lawful residence in the UK. ILR provides its recipients with residential stability. Additionally, once

1. Which is to be tied to residential stability

2. In a telephone conversation of 16.02.09 between Neil Parkin, UK Borders Agency and Hina Majid, JCWI it was confirmed that continuous employment would require a period of unbroken employment save for in circumstances in which discretion is exercisable

acquired, there are no ongoing immigration stipulations in relation to employment limitations in relation to accessing the labour market or limitations on switching employment. The exact requirements for settlement differ according to the status the migrant worker is accorded. For non EU workers under the Points Based System, workers are required amongst other things to show that they are required for further work, and that they have remained in the UK lawfully.³ They will subsequently be eligible to naturalise as British 1 year after this.⁴

What is proposed by this Bill is the imposition of a further extended period of temporary leave called 'probationary citizenship' between temporary leave as a migrant worker and British citizenship. This will last for 1-3 years (or possibly longer).⁵ Following completion of this period, subject to satisfaction of various requirements including 'continuous employment'⁶ a migrant worker will be eligible to naturalise as British. The intention is that '*subject to international obligations those who are unable to fulfil the new requirement will be removed from the country*'.⁷

2. Our purpose for supporting this amendment

The purpose of this amendment is to;

- Prevent gender/race/disability discrimination and promote equality;
- Prevent further exploitation of migrant workers;
- Ensure that seasonal and agency workers who already enjoy limited employment protection are not penalised in securing residential stability/acquiring British nationality
- Ensure that the UK complies with the text and spirit of the various human rights treaties it has ratified including the European Convention on Human Rights;
- Ensure that active 'citizenship' is not discouraged;
- Ensure that migrant labour is deployed in the optimum way, and in a way that is not likely to hinder economic recovery;

3. For the detailed rules see 245ZH, 245E, 245N, 245U of HC 395. If employment is for example terminated during the course of that period in the case of tier 2 for example it is UKBA policy that leave *may* be curtailed to 60 days, though if the migrant has less than 6 months leave remaining leave will not be curtailed. An applicant can however subject to satisfaction to finding employment under the points based system, apply to extend leave on the basis of this.

4. Schedule 1 of the British requires that there must have been no restriction on leave for the 12 months preceding the application. Applicants must simply satisfy a good character, residence, no breaches of immigration law, and language/cultural testing requirements.

5. See the effect of the operation of clause 37(2)(b) which would stop the clock running for the naturalisation qualifying periods, but also failure to fulfil other requirements e.g. language and cultural testing may mean that probationary citizenship lasts considerably longer than this.

6. 'Continuous employment' is not defined within the Bill however in a telephone conversation on 16.02.09 between Neil Parking and Hina Majid it was confirmed that continuous employment 'means what it says on the tin, and as such continuous and unbroken employment is required unless discretion is exercised'

7. Confirmed in a telephone conversation between Hina Majid, JCWI and Neil Parkin from the Simplification Team, UK Borders Agency on 10.02.09

4. Detailed reasons for opposing the introduction of a condition requiring ‘continuous employment’ as a prerequisite for naturalisation

a. Race/gender and disability based discrimination

It is uncontroversial that there is widespread discrimination in the labour market against women, ethnic minorities, and the disabled. This tends to be more acute in times of economic downturn. A prominent employment/discrimination lawyer told us:

*We have been dealing with an increased number of redundancy cases recently. There is a groundswell of evidence that suggests that employers are manipulating the redundancy process so as to wrongfully select women, BME staff, “trouble-makers” and “deadwood” for termination. It seems to be the case that when times become hard, old prejudices return to the fore both for employees (see for example, the recent no foreigners wildcat strikes) and for employers. This new trend exacerbates an already difficult situation in which discrimination in the workplace remains under-reported and widespread”.*⁸

The effect of the introduction of a measure allowing for the removal of migrant workers who have not been in ‘continuous employment’ beyond their five years initial leave will provide employers with more extensive scope to discriminate on grounds of gender, race and disability. Employers will after all be aware that a. insecure status militates against the ability of migrants to take any action for unlawful discrimination in the first place⁹ and that b. that even if they attempted to do so, enforcement of their labour rights would in practice be very difficult given the inherent difficulties of pursuing a legal action from another country. Viewed more cynically, this measure might at best been seen as pandering to the demands of right wing groups, and others who have more recently been advocating the removal of foreign workers with a renewed vigour. At worst, it might be viewed as indirectly perpetuating and tolerating discrimination on objectionable grounds. Additionally, the effect of such a requirement in the absence of the exercise of discretion would be to clearly discriminate against women who chose to take time off from work because they wish to give birth, or look after their children.

8. Interview with Lawrence Davies principal solicitor at Equal Justice, London on 13.02.09

9. See below

Clause 37(2)(e) also raises important issues about compliance with discrimination law. Specifically, the UK Borders Agency ('UKBA') is under a legal duty to eliminate unlawful race/sex/disability discrimination. Additionally it is required to 'promote good relations between different racial groups' and equality of opportunity between men and women and between disabled persons.¹⁰

The use of equality impact assessments is the key vehicle employed by the UK Borders Agency ('UKBA') to achieve the above. It is UKBA policy that it will impact assess 'what is proposed' where this represents 'a new or significant change to existing policy.'¹¹ It is not clear from the equality impact assessment that the race, gender and disability implications arising from this particular clause have been considered at all in the context of the above obligations, and if they have, how such measures discharge the relevant obligations.¹² This raises a possibility that UKBA may not have acted in a way that is consistent with these duties.

b. Exploitation of migrant labour and toleration of unlawful activities

The effect of the 'probationary citizenship' scheme itself will be to extend the period for which migrants possess insecure status by between 1-3 years (or possibly more). The result of this is that there will continue to be limitations on the ability of many migrant workers to change employer or occupation.¹³ The imposition of a 'continuous employment' requirement in this context is likely to increase the risk that migrants will be locked into exploitative/unlawful working conditions, given that extricating oneself from exploitative working conditions would potentially render a migrant worker vulnerable to removal from the territory (in the absence of the exercise of discretion under the Bill). We have provided a selection of case studies drawing upon the present experience of migrants to exemplify the above point, and to demonstrate how this requirement is likely to exacerbate the existing difficulties migrants face.

10. See Section 71(1) of the Race Relations Act 1976, Section 76(A) of the Sex Discrimination Act and Section 49(A) of the Disability Discrimination Act 1995

11. Para. 45 Race, Disability and Gender Equality Scheme

12. See Equality Impact Assessment Report available at www.ukba.homeoffice.gov.uk, at p.4

13. For example, under tier 2 there is no *right* to switch employer/occupation. Migrants are required to make formal applications to switch employment or occupation and are confined to making applications to licensed employers only. They are required in their applications to switch employment to demonstrate that they have the necessary points to permit such changes. Points are for example awarded for the level of salary which must exceed a specified minimum or those occupations appearing on the shortage list.

X is a young woman from the Philippines. She was employed in the UK as a care worker. She was raped and beaten by her employer on several occasions. X refused to take any action against her employer because of the implications this would have for her ability to remain in the UK. On the last occasion she was assaulted by her employer, colleagues reported the incident to the police. Her union subsequently became involved in the case. She issued proceedings against her employer and left her job. The mental trauma generated by her experience, together with her employer's refusal to provide her with a reference meant that she has not been able to find employment for over a month. Under current proposals, X may never have left her employer in the first place due to the potential repercussions this would have for her. She is therefore likely to have continued to remain with her previous employer until eventually locating alternative employment or completing the additional probationary period. Additionally, in the absence of the exercise of discretion, were she have to left her employment in the midst of her probationary citizenship, it is likely that she would fail the 'continuous employment' requirement (in the absence of an exercise of discretion) and be removed from the country. (UNISON)

D is an Indian male domestic worker who came to the UK in 2004. His employers beat him; shouted at him; made him work 16-17 hours per day and would prevent him from leaving the house. They also withheld his passport and refused to pay him for his work. As a result of this constant abuse, he eventually fled from his employers and sought help from Kalayaan in March 2005. His visa was valid until early February 2006. His limited English and his gender meant that he struggled to find employment as a domestic worker in private household. He received offers to work on building sites and in restaurants however all of these were outside the terms and conditions of his visa so he had to reject them and rely upon the charity of friends and support of Kalayaan whilst looking for work. After 4 months he eventually found new employment in a private household where he has remained in to date. D is paid £2.88 per hour which is far below the National Minimum Wage of £5.73. Domestic workers are protected by UK employment law which includes the NMW. He has stayed in this job because his employer is 'good'. He doesn't shout at him; he doesn't beat him; he lets him take one full day off, and he pays tax and NIC. D has just submitted his application for indefinite leave to remain (ILR) in the UK which is likely to be successful. He is looking forward to securing residential stability and enjoying the same labour rights as other settled people. Under the new proposals, it is likely that D will remain in a position where he cannot claim his labour rights in order to fulfil the 'continuous employment' condition for an additional 1-3 years, or possibly longer. In the event that he fled from his employer during the currency of his probationary citizenship, in the absence of the exercise of discretion, under the proposals he would be removed from the UK. (KALAYAAN)

G is a Sri Lankan domestic worker who left her abusive employers. She secured further employment through an agency. The terms of her contract were that she was to be paid £300 net per month plus an additional £50.00 for

work on Saturdays. She was to have her own private bedroom. G has been employed for one year. Her employer has never given her a payslip. He has significantly reduced her salary, and she is required to sleep on the floor of the girl's bedroom. Her employer refuses to discuss any of these points with her. She was advised by Kalayaan that the above is unlawful and that they could assist her with action against her employer, but that she will need to find a new job to be within the terms and conditions of her visa.

G has limited English and has looked for other jobs but has had no success in locating a new one. Ultimately, she is afraid of leaving a job with an employer who she knows will renew her visa. She worries that a new employer might not support her and this will have devastating repercussions for her immigration status. Under the current proposals she will continue to live in fear of proving her 'continuous employment'. During this time it is likely that she will effectively forfeit her labour law rights for an additional 1-3 years or possibly longer. Additionally, when it comes to applying to naturalise as British, if she remains with the same employer given the absence of wage slips, she will struggle to demonstrate her 'continuous employment' and may in any event be removed from the country. Kalayaan inform us that the failure by employers to provide wage slips is *frequently* encountered in the case of domestic workers. The only remedial action available to X would be to report her employer to the Inland Revenue. Were X to do this, it is likely that she would lose her job and thus fail the continuous employment test. (KALAYAAN)

A, B, and C were non-EU care workers employed in Scotland. Their work permits were extended by UKBA following the employer's false representation that under the terms of their contract they would receive £7.02 per hour. Following this they were paid only £6.00 per hour. UNISON offered to intervene on their behalf, however A, B and C rejected the offer of assistance as they were concerned about losing their job and ultimately their status in the UK. Under current proposals if they are unable to locate alternative employment, they too are likely to continue to forfeit their labour rights in order to fulfil the 'continuous employment' requirement for an additional 1-3 years or possibly longer (UNISON)

D is a male non EU migrant worker who was employed in the care sector for a few years. He was assaulted by his colleagues and hospitalised. He was subsequently dismissed from his job. He was unaware that he was eligible to bring a claim for unfair dismissal. His employer has since refused to give him a reference and he has been unable to find another job for a few months. Under current proposals, if this were to happen in the currency of probationary citizenship, in the absence of the exercise of discretion in his favour, he would be removed from the country as he would not have been 'in continuous employment'. (UNISON)

E, F and G were young female workers from New Zealand who were at different times employed in a city property company in London. They were all sexually harassed by their employers at different times but would not complain about this due to fear of losing their employment and their status in

the UK. They were dismissed on account of refusing sexual advances and consequently pursued a claim for unfair dismissal. It was only at this point that they revealed the sexual harassment to which they had been subject to in the context of unfair dismissal proceedings lasting several months which were ultimately settled in their favour. Under current proposals if this were to happen in the currency of probationary citizenship, in the absence of the exercise of discretion, they would have been removed from the UK. (LONDON DISCRIMINATION UNIT)

c. Penalising agency workers

There are up to 1 million people in the UK who are agency workers. As the Guardian points out; i. agency working is now no longer confined to specific sectors but is 'endemic across the economy' and b. ii. in times of recession this figure is likely to increase as employers look for 'flexible workers', with reduced basic rights and entitlements¹⁴ Given that these individuals may for example work very lengthy hours one week and may not be required for a few weeks thereafter, a 'continuous employment requirement' presents real problems for them. Additionally, as T & G Unite inform us, agency workers are often not provided with contracts or wage slips, and a requirement to establish 'continuous employment' would represent a significant barrier to naturalising as British and acquiring residential stability.¹⁵ It is also unclear how the condition would be applied in the case of self-employment.

d. International obligations

European Convention on Human Rights

Article 14 requires states not to discriminate in relation to matters that fall within the *ambit* of a Convention right on various grounds including 'other status'. Article 8 requires states to respect for private and family life. Removal from the territory and conferral of status are within the ambit of Article 8.¹⁶ Clearly if the continuous employment requirement is implemented in the terms suggested to us, it arguably discriminates against agency workers in a way that may be incompatible with Article 14 in conjunction with 8 ECHR.

14. There is nothing casual about unemployment', Felicity Lawrence, Comment is Free, Guardian, 18.12.08 www.guardian.co.uk/commentisfree/2008/dec/18/casual-workers-agency-staff-unemployment

15. Donna Reeve, T & G UNITE, London

16. The Government accepted that conferral of status engages Article 8 ECHR in *S and Others v Secretary of State for the Home Department* [2006] EWCA Civ 1157. See also *Sisojeva v Latvia* App. No. 60654/00 and *Slivenko and others v Latvia*, App. No. 48312 and *Karrassev and Family v Finland*. App No. 31414/96

Additionally, Article 6 requires that individuals are entitled to a fair and public hearing which may include the ability to cross-examine witnesses. Further Article 19.7 of the European Social Charter requires that workers within a territory should not be accorded less favourable treatment than that of their own nationals in relation to legal proceedings relating to matters covered by the article which include municipal law on remuneration, employment and working conditions, membership of trade unions etc.¹⁷ If as stated, the effect of a failure to demonstrate that an individual has been in 'continuous employment' is removal, this will present obvious difficulties from the point of view of pursuit of an employment law claim, and will engage, and generate consistency issues with Article 14 in conjunction with 6.

European Social Charter 1961

The UK has signed and ratified the European Social Charter 1961. Article 19.7 stipulates that migrant workers are not treated less favourably than nationals in relation to;

- i. remuneration/employment and working conditions;
- ii. membership of trade unions; and
- iii. collective bargaining.

Additionally the UK has signed and ratified the International Covenant on Economic, Social and Cultural Rights and various ILO Conventions which all oblige the UK to ensure that basic labour rights are extended to those within their territory. The enactment of this 'continuous employment' provision in the knowledge of its practical impact upon the ability of migrants to claim these rights would be contrary to the spirit of these obligations.¹⁸

e. Enhancing 'citizenship'

One of the key objectives behind the naturalisation provisions including the continuous employment requirement is as Lord Goldsmith put in during the second reading debate in the House of Lords is to encourage '*participation in the community in a stronger and more active way...*' and for people to develop a '*much greater sense of what citizenship means*'¹⁹.

17. See approach of the European Court of Human Rights in using the European Social Charter as a tool for interpreting Convention rights in *Sidibras v Lithuania* App. No.55480/00 27.10.04

18. See above

19. Hansard, 11.02.09: Column 1145

Clearly migrants can 'participate in communities' and be 'active citizens' in a number of different ways. One of the principal ways in which this could be achieved would be through democratic participation. Research by the Working Lives Institute suggests that the *one of the key factors militating against democratic/community participation is insecure status*. The Institute examined through the use focus groups one aspect of this i.e. trade union involvement by migrant workers. It was noted:

'Many of those in the focus groups felt that it was difficult for those who did not have citizenship to be active in a trade union because they are worried about immigration status'. One of the focus group members summarised the position in this way:

'Once you've had your indefinite [leave to stay], or become a citizen, then that obviously changes the whole picture. So it is very hard, I will struggle to see a situation where you have somebody who is still in a work permit, actively campaigning and representing people without looking over their shoulders'²⁰

The imposition of a 'continuous employment' requirement in the context of extended waiting times for residential stability is likely to engender greater anxiety about securing settled status, and in so doing is likely to hinder democratic participation not only in trade unions but also more widely.

f. Enhancing British economic performance

A leading economist, and the former advisor to the World Trade Organisation, Philippe Legrain succinctly summarised the economic case against this clause for JCWI:

'The "continuous employment" requirement for probationary citizens appears sensible, but is in fact deeply flawed. It would make the labour market less flexible, and thus damage the economy as a whole. Under the terms of their "probationary citizenship", many migrants' ability to change jobs according to labour-market needs would be restricted. Some would have to remain in unsuitable jobs, others to settle for inappropriate ones if they lose their existing ones. This would limit their productivity and hamper economic efficiency. Inevitably, some would be forced to leave the country, depriving British businesses of settled workers whose skills and experience could prove invaluable when the economy recovers. At a time when the economy is undergoing

20. E mail correspondence from Sian Moore, author of the research to Hina Majid JCWI 02.11.09

wrenching change, not only because of the recession but also because of the need to rebalance it away from dependence on housing and finance towards other activities, gumming up the labour market is the last thing it needs.²¹

4. Assurances/concessions

In the event that this clause is to remain part of the Bill, we seek the following:

1. Given that probationary citizens:
 - a. Would have travelled significantly down 'the pathway to citizenship' and developed a significant nexus with the UK through:
 - i. Residence of between 5/8 years or possibly longer;
 - ii. Significant contributions to public finances and through the payment of income tax, council tax, and VAT;
 - iii. Having brought family over to the UK;
 - iv. Having established and built up lives in the UK through developing friends, familial, and other community ties as well as property ownership
 - b. Will not have access to most benefits,

as 'demi-citizens' they should be subject to a definition of 'continuous employment' which is less favourable than the circumstances in which an EU national will continue to remain a 'worker' under EC law. As such, in order for a migrant to be treated as though they have been in 'continuous employment' they should not be required to show that they have, on average, over the entire period in question been employed for more than 'most of the year'. *In other words **they should be required to establish no more than having been in employment on average of 51% of each year (26 weeks)***. This will ensure that agency workers are not penalised and will also reflect the economic reality of the recession.

2. In order to protect agency/seasonal workers the period should be capable of being accrued at any point in any way during the period and should not be consecutive;
3. In order to reflect employment law the following should be classified as periods of 'continuous employment':
 - a. All authorised absences either expressly or by custom including maternity/paternity leave, illness, temporary cessations of work,

21. Philippe Legrain is an economist and the author of *Immigrants: Your Country Needs Them*. He is a visiting fellow at the London School of Economics and a freelance journalist who writes for the Financial Times and the Guardian.

and sabbaticals should count as periods of 'continuous employment';

b. Transfer of employment between employers together with transfer of undertakings;

c. Breaks in employment not exceeding 6 months in circumstances where migrants are not at fault including but not limited to circumstances where they:

- i. Are made redundant;
- ii. Lose their employment as a result of the employer's loss of licence;
- iii. Are unable to continue with employment due to changes in the Immigration Rules;
- iv. Are unfairly/constructively dismissed (the case studies should exemplify that employers decisions to dismiss employees are not always honourable- dismissal will cover cases);
- v. Leave work because of breaches of contract or unlawful discrimination.²²

c. Periods of involuntary unemployment duly recorded by an employment agency or office for a period of 6 months after which the onus is on the individual to establish that they are 'continuing to seek employment and that [the have] genuine chances of being engaged'.²³ This reflects the position in EC law concerning the circumstances in which an individual will continue to be treated as a worker even though they are out of employment. It also is also not dissimilar to the way in which tier 2 workers can be treated in circumstances where they lose their employment prior to securing ILR.

22. Reinstatement is the expected remedy in law for point a, and may be possible through settlement of legal actions in points b and c . To do otherwise would deter migrants from claiming lawful rights for fear of non compliance with the 'continuous employment requirement'

23. See Directive 2004/58/EC Article 7(3) (c) and see *ex parte Antonissen* [1991] 2 CMLR 373 ECJ,

24. See footnote 3

5. Points over which we require clarification:

1. The definition of the term 'continuous employment';
2. How it is intended that self employed migrants or those in agency work will demonstrate 'continuous employment' given that many employees will have difficulty in producing wage slips, and no real means of compelling their employers to produce this?
3. The particular risk of abuse and exploitation that domestic workers employed in the private domain tend to be subjected to is well documented. What steps will be taken to comply with Liam Byrne's commitment²⁴ to minimise *any* risk of abuse and exploitation to domestic workers in the light of the continuous employment clause?
4. Whether all the existing work based limitations e.g. restrictions on switching for PBS migrants will continue to attach to probationary citizenship status?
5. Whether probationary citizenship granted for the 'purpose of taking work in the UK' will be given to migrant workers under the Points Based System and work based routes under the Immigration Rules? If not, which other categories of migrant is it intended that this would be granted to?

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24. 'See para 4.3 in UKBA's consultation document 'Visit Visa' <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/visitorsconsultationpaper/visitorsconsultationrespon.PDF>

