



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

### **PARLIAMENTARY BRIEFING IN SUPPORT OF AMENDMENTS 46, 47 and 58**

#### **House of Lords - Committee stage**

### **1. Amendments**

46. Page 27, line 6, after first 'the' insert "average"

58. Page 29, line 13, after first "the" insert "average"

47. Page 27, line 10, at the end insert "save that periods during which A was in the UK with leave other than that conferring qualifying immigration status shall be disregarded for the purpose of considering whether A had qualifying immigration status for the whole period"

### **2. Presumed purpose**

To ensure that:

- (i) Permitted absences during the qualifying period for naturalisation on both residence and family grounds are calculated as an average over the qualifying period;<sup>1</sup>
- (ii) To ensure that periods of lawful leave are taken into consideration when calculating whether an individual had a qualifying immigration status for the whole period.

---

1. Presently the period is calculated on an average basis with a requirement that individuals must not have been absent for more than 90 days on the day in question. See Schedule 1, para. 2(a)-(b) and para 3(a)-(b) British Nationality Act 1981

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

#### ***Permitted absences***

##### **1. Acknowledging the reality of migration in a globalised era**

International migration is an activity that creates legal, political and social relations between individuals and two or more states. It must be acknowledged that migrants continue to have interests in receiving states but also, their countries of origin. There are a number of situations in which a migrant may, during the course of a several year period, need or indeed want to remain outside of the UK for more than 3 months. Circumstances in which this might occur include:

- (a) Bereavement;
- (b) Medical treatment/illness;<sup>2</sup>
- (c) Legal proceedings<sup>3</sup>
- (d) Civil disturbances
- (e) Internal employment transfers
- (f) Transaction of business
- (g) Research purposes
- (h) Cases where passports have been lost or double bookings have occurred.<sup>4</sup>

The proposal for permitted absences of 90 days per annum is extremely restrictive and fails altogether to recognise the reality, range and nature of migration and human circumstances in today's era.

##### **2. Human rights**

The precise effect of clause 37(2)(b) is unclear. In the absence of the exercise of discretion, it may lead to three distinct possibilities:

- The rejection of a naturalisation application and possibly the removal of a migrant from the territory on grounds of non compliance (given the new structure of citizenship/settlement proposed);
- The discounting of further time accruing towards the qualifying period for naturalisation from the date of the breach. The effect of this would be that an individual who has remained outside of

---

2. We are aware of clients who have travelled out of the UK to pay for private operations such as kidney transplants. Equally clients have sometimes been taken ill during their travels.

3. Migrants sometimes possess land and property over which they litigate or have litigation action brought against them. They may be required to give evidence or may be prohibited pursuant to an order of court from leaving the country see *Agyen-Frempong* [1986] Imm AR 108

4. Various clients from South Asia that JCWI have dealt with have booked flights, arrived at the airport and discovered they are not able to fly.

the country for 91 days in their second year, could find that residence they have subsequently built up is discounted for qualification purposes when they come to apply in year 8. Conversely, an individual who remains outside of the country for 81 days in the 7<sup>th</sup> year of their qualifying period may find that this nullifies the previous 6 years in terms of the qualification period ;

- The discounting of the year in which the breach occurred from the qualifying period.

### *European Convention on Human Rights – Article 8 (the right to private and family life)*

Clearly, the first of these possibilities is extremely alarming from the perspective of a migrant, given that a migrant would have been in the country for several years and built up substantial ties with this country. Ties that a migrant will have established with this country, through residence, work and family, may well be sufficient to establish 'private and family life' for the purpose of Article 8 (the right to private and family life) of ECHR. If the discretionary power in clause 37(2)(4) is in fact to be exercised, the absence of a clearly identified set of circumstances that it would be employed may render the provision inconsistent with Article 8 of the European Convention on Human Rights on grounds that it is not in 'accordance with the law'. Alternatively, removal may arguably not be considered in pursuit of a legitimate objective, or proportionate to the objective in such circumstances.<sup>5</sup>

### *European standards- The 1997 European Convention on Nationality*

If the second possibility is what is contemplated, this too is also problematic from the point of view of human rights standards and European practice as it could result in qualifying periods that could exceed a decade and the corresponding denial of full access to the welfare state and the labour market for some migrants. (See our briefings welfare and continuous employment).

The 1997 European Convention on Nationality has been signed by 28 Council for Europe member states (though not the UK). It provides a useful indication of European state practice and a base line beyond which a state's actions in relation to nationality might be considered to conflict with a basic commitment to human dignity. Article 6(3) of that Convention states:

*'Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.'*

---

5. The objectives are national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others.

Given that the effect of this provision is to potentially open up the possibility of naturalisation periods *exceeding a decade*, it would appear to be at variance with the base line standards set out in the European Convention on Nationality.

### *International Covenant on Civil Political and Cultural Rights 1966 (ICCPR)*

All of the possibilities may also be problematic from the point of view of the standards contained within ICCPR. The UK has signed and ratified this and has not entered a reservation in relation to Article 12. Article 12 provides a *right to leave the country*.<sup>6</sup> The effect of the proposed restrictions would be to arguably interfere with this right, and therefore engage Article 12. Given that interference is not permissible unless it is in accordance with the law (see above comments about the exercise of discretion, pursues specified objectives, and is proportionate to those objectives, the above would appear to raise some concerns about conformity with this obligation.

### **3. Integration**

Given that part 2 of the Bill has largely been justified by reference to facilitation of integration, these measures would again appear to achieve the opposite result through potentially making the naturalisation period even lengthier. The effect of this may very well result in:

- Exclusion of larger numbers of individuals in the UK from the political process as they will not be able to vote. This will hamper their participation in the political sphere (and its harmful from the point of view of democratic legitimacy);
- Reduced participation by migrants in the economic sphere as employers are less likely to employ migrants with insecure status as opposed to those individuals who are naturalised and migrants themselves will continue to be subject to labour market restrictions<sup>7</sup>;
- Reduced participation by migrants on account of the generation of poverty resulting from the attendant exclusion of entitlement to full access to the welfare state pending acquisition of naturalisation or permanent residence.

---

6. Article 12 (2) states Everyone shall be free to leave any country, including his own. Article 12. 3 states the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

7. See Baubock et al *Acquisition and Loss of Nationality Volume 1: Comparative Analyses Policies and Trends in European Countries*, 2006, Amsterdam; Amsterdam University Press, p.433-434

### *Including periods of lawful leave for qualification purposes*

By clause 37(2)(c) migrants are required to possess a 'qualifying immigration status for the whole of the qualifying period.'<sup>8</sup> The definition of qualifying immigration status will only include temporary residence leave in the event that it is given *for a purpose by reference to which a grant of probationary citizenship leave may be made* would appear to exclude the possibility of leave in the following categories from counting towards the qualifying periods<sup>9</sup>: a. leave as a student, b. leave in tier 1 post study work and c. leave acquired through long residence under the long residence rules. The effect of this could for example be that an individual who has acquired permanent residence/ILR after 14 years residence in the UK or secured settlement with a combination of some of the above statuses, may well need to complete an additional 8 years before being able to naturalise, thus rendering their total naturalisation journey somewhere in the region of 22 years! This is problematic for the same reasons identified above i.e. it is at variance with European practice and human rights standards; specifically Article 6(3) of the European Convention on Nationality<sup>10</sup> and is not conducive to integration.

#### **4. Assurances sought**

If the above provisions are to remain part of this Bill, we seek the following assurances:

- That possession of a qualifying immigration status for the 'whole of the qualifying period' should not be a requirement for those currently in possession of ILR/permanent residence as this would be retrospective in effect;
- The requirement that an individual cannot have been absent from the UK for more than 90 days each year should not be applicable to those with ILR/permanent residence as this would also have retrospective effect.

**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@jcw.org.uk](mailto:hina.majid@jcw.org.uk). Her phone number is 0207 553 7463**

---

8. See clause 37(11)

9. Clause 45(3).

10. See above

