

THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL AMENDMENT BRIEFING BY THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

Introduction

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

1. Proposed amendment (now tabled)

In Clause 49

Page 43, after line 42, insert the following new sub-clause:

“(10) The following periods of absence from the labour market shall be disregarded for the purposes of establishing whether an applicant is or has been in ‘continuous employment’:

- (a) periods of *involuntary* unemployment duly recorded by an employment agency or office lasting no more than 6 months;
- (b) all authorised employment absences either expressly or by custom including maternity/paternity leave, illness, temporary cessations of work and sabbaticals.
- (d) other periods of unemployment in circumstances where they have not resulted in the cancellation or refusal of an applicant’s immigration leave.

2. Purpose

This amendment seeks to define “continuous employment” – which is a new requirement for naturalisation purposes. The Bill does not define the term and instead adopts an approach which leaves the question of satisfaction of the requirement largely to executive discretion. It is important that there is legal certainty about the term given that its application could result **in the removal** of an employed migrant worker.¹

1. Confirmed in a conversation between Hina Majid, JCWI and Neil Parkin from the Simplification Team, UK Borders Agency on 10.02.09 and reiterated again on 01.06.09.

3. Explanation of the proposed clause

The proposed clause defines the term in a way that broadly corresponds to the Points Based System. It is current policy that tier 2 workers with remaining leave lasting just under 6 months i.e. 5 months, 31 days will not have their leave curtailed in circumstances where employment is terminated. In cases where remaining leave exceeds 6 months the power to curtail leave to 60 days (in which an applicant has the opportunity to locate work and apply for further leave) is merely discretionary- in other words there is already scope for periods of unemployment of approximately 6 months or longer under the Points Based System.² Provisions are yet more generous in the case of tier 1 workers who can also remain out of the labour market for more than 6 months as tier 1 individuals do not need a job offer in order to secure entry to the UK, and are specifically granted leave to come to the to *seek* work as it is acknowledged that their skills and potential ability to contribute to the British economy make this flexibility desirable.

There is wider consensus in the form of European law, that employment breaks of 6 months at a time should not be treated as damaging status as a worker. Indeed under European law breaks in employment of 6 months will not damage status as a worker. Indeed periods extending *beyond* 6 months will not break this either providing an individual is able to show that they are actively seeking work and there is a realistic chance of securing this. The point emerging from this is that it is widely accepted that a 6 month period to seek employment is consistent with labour market realities in Europe.³

4. Benefits of this new clause

The advantage of this particular clause is as follows:

- i. It creates legal certainty and is simple. Given that removal appears to be the result of non compliance with the new continuous employment requirement, it is essential that there is clarity about how this provision will work. As a matter of basic fairness migrants must be able to foresee the exact consequences of their actions for the purposes of ongoing leave. It should simply not be the case that a migrant who has progressed down the pathway to citizenship for some 7 1/2 years should discover that unemployment lasting one month that took place two years ago – at the earlier stage of probationary citizenship, will lead to the rejection of their application for citizenship/settlement. It is also worth noting that the Government's

2. Para 87, p.13 Tier 2 of the Points Based System- Policy Guidance UKBA <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/pbs/tier2guidance.pdf> - see Annexe 1

3. See Directive 2004/58/EC Article 7(3)(c) , and the Immigration (European Economic Area) Regulations 2006, and *ex parte Antonissen*, [1991] 2 CMLR 373 ECJ)- Under EC law those who are unemployed beyond 6 months can still be classified as workers if they are able to show that they are seeking work and there is a realistic chance of them being engaged in this.

own simplification project cites predictability, simplicity and reduction of discretion as key principles that future legislation should be based upon. The clause in its current form fails therefore even if assessed by reference to the Government's own measure of success.⁴

- ii. It leaves intact the Government's desire for a continuous employment clause and therefore from its perspective the ability to maintain 'public confidence' in the system.
- iii. Whilst it is not identical to the Points Based System- it broadly corresponds with it but generates clarity and extra flexibility for those migrants who become involuntarily unemployed through for example redundancy, or unfair/unfair constructive dismissal but continue to seek work.
- iv. It entails no additional public expenditure. These categories of migrant will already be required to maintain themselves as part of the conditions of their leave.
- v. It reduces the scope for unlawful practices and exploitation of migrant workers in the work place, and in so doing is in keeping with the spirit and standards enshrined in the European Social Charter 1961 – the UK has signed and ratified this.⁵ By way of example, if a migrant worker who is in an abusive employment situation is aware in advance that involuntary periods of absence from the labour market for 6 months will not jeopardise their ability to remain in the UK, they can take steps to extricate themselves from an exploitative situation through leaving employment. Additionally they are less likely to be deterred from legally enforcing their employment rights through the tribunals as they will have the comfort in advance that if they are dismissed on account of this, there will be a definite grace period in which to locate work, and their ultimate status will not be affected. This has particular implications for women, the disabled and certain ethnic groups given their greater vulnerability to discrimination in the labour market and in the work place. A number of other trade unions and organisations have provided us with case studies exemplifying the impact of the above- for which see JCWI's second reading briefing in the House of Lords.⁶
- vi. It is more consistent with Article 8 ECHR (right to private and family life). If removal is the intended effect of non compliance with the continuous employment provision this can engage Article 8 ECHR. Interference with Article 8 ECHR through removal will be unlawful

4. *Simplifying Immigration Law, Responses to the Initial Consultation Paper*, UKBA p. 39 at para 223

5. See Article 19.7 under which migrants are not to be treated less favourably than nationals in relation to employment and working conditions, membership of trade unions and collective bargaining.

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

unless it is 'in accordance with the law' i.e. it must be sufficiently clear and foreseeable. We note that a declaration of compatibility with the Human Rights Act has been made in relation to this Bill-yet it is at this stage quite simply impossible to confirm that these provisions are compatible with Article 8 given the absence of information about the circumstances in which those out of work will be treated as fulfilling the relevant requirements.

- vii. It is consistent with an employment law framework through for example provisions on maternity leave.

5. Assurances sought

In the event that the above amendment is not passed we seek the following assurances:

1. The clause will at a minimum mirror identically the current provisions in relation to employment that apply under the points based system- see annexe. At Committee stage the assurance given by the immigration minister that he would consider applying the discretion where the total number of days of unemployment is 60 days or less simply does not mirror the current arrangements under the Points Based System.⁷
2. Any migrant worker who reaches the end of their path to citizenship without having had leave withdrawn/not extended should be treated as fulfilling the requirement in circumstances where there have been brief periods of unemployment. It would be grossly unfair to allow a migrant to progress down the path to citizenship for several years, and subsequently refuse a citizenship/settlement application as a result of a brief period of unemployment that took place a few years ago for which leave was not revoked or withdrawn.
3. All authorised absences from work expressly or by custom should be treated as periods of continuous employment.
4. Those probationary citizens who do not fulfil the continuous employment requirement will be eligible, subject to meeting the relevant requirements, to switch into a points based system category.

For further details about this amendment please contact Hina Majid who is the legal policy director at JCWI on 0207 553 7463. Her e-mail address is hina.majid@jcw.org.uk

⁷.Hansard HC, 11 June 2009: Column 107

ANNEXE 1

Extract from UKBA Tier 2 policy guidance

“Termination of employment

87. If an applicant’s employment ends before his/her period of leave, we may curtail his/her leave to 60 days. If the applicant has less than 6 months of his/her leave remaining, we will not curtail this leave. An applicant may wish to make a further application for leave.”