

**MEMORANDUM OF EVIDENCE TO THE HOME AFFAIRS
COMMITTEE ON THE BORDERS, CITIZENSHIP AND
IMMIGRATION BILL ON BEHALF OF 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. Our aim is to promote the rights of migrants within a human rights framework.

Whilst we have a number of concerns about the Borders, Citizenship and Immigration Bill, we set out below only our key concerns. These are articulated primarily by reference to international human rights obligations that the UK has assumed, but also by reference to human rights norms more generally, as these provide an effective indicator of the most pressing areas of concern together with internationally accepted standards against which to measure this Bill.

Part 1 : Border Functions

1. The Government has confirmed that it will make an order pursuant to clause 23 to replace and consolidate the Immigration PACE Codes of Practice with a view to applying these to certain immigration functions. ‘Administrative immigration processes’¹ such as immigration detention and removal would remain outside of its scope.

2. Arbitrary detention, inhumane treatment and wrongful refoulement during the above processes are now well documented.² Given the inadequacy of existing

1. *Hansard*, HL Committee 25 February 2009: Col. 267

2. See for example *Outsourcing Abuse the use and misuse of state sanctioned force during the detention and removal of asylum seekers*, Medical Justice, Birnberg Peirce and Partners and National Coalition of Anti- Deportation Campaigns, 2008 www.medicaljustice.org.uk. See *Asylum Seekers Riot At Detention Centre*, Nigel Harris, Independent 15 March 2007.

‘safeguards’,³ the application of the more exacting PACE standards⁴ would be an effective mechanism through which to ensure compliance with obligations under the European Convention on Human Rights (‘ECHR’) including Article 3 (no inhumane or degrading treatment) and Article 5 (right to liberty and security). They could also contribute to averting the kind of rioting witnessed more recently.⁵

Part 2: Naturalisation

3. The conferral of nationality is matter of fundamental importance given that the right to vote, and therefore participate in national life attaches to it.⁶ It is also an important source of rights⁷ particularly given the Government’s intention to link it with economic entitlements, and residential stability.

4. Our key concern about the generality of part two of the Bill is that it shares the characteristics of most 21st century immigration legislation. It is vague enabling legislation^{8**} which provides for subsequent, more precise provisions on matters of fundamental importance to be contained in guidance, immigration rules and statutory instruments at some future point in time. This secondary legislation will by its nature receive inadequate parliamentary scrutiny and does therefore in our view represent one of the chief threats to securing compliance with legal obligations and generally accepted human rights norms and principles. Additionally, from the point of view of furthering integration, the risk as a result of this of developing in migrants a sense of injustice, and exclusion will do little to foster in them the sense of membership that integration requires. Our more specific concerns which largely flow from the above are set out below:

3. See Immigration Directorate Instructions Ch. 31 Section 1, March 09

4. Code C which creates for example rights of access to healthcare and a lawyer for example.

5. For which see footnote 2.

6. With the exception of Commonwealth and citizens of the Republic of Ireland non nationals are unable to vote or stand for elections, and may also have greater restrictions placed on their political activities.

7. An unconditional right of entry and departure, EU Citizenship and the associated rights of free movement, security of residence, consular protection, an expectation of diplomatic protection.

8**. The following will be left to secondary legislation (i) the effects of failure to fulfil the criteria to move from probationary citizenship to British Citizenship; (ii) the categories of ‘migrant worker’ who will be eligible for probationary citizenship and therefore British citizenship; (iii) the categories of migrant who would have a ‘family association’ for the purpose of facilitated access to naturalisation; (iv) the nature of the ‘activity condition’; (v) the circumstances in which discretion is to be exercised in cases where the ‘continuous employment’ or ‘90 day’ requirement is not fulfilled, and indeed the definition of ‘continuous employment’ itself, (vi) transitional arrangements (vii) changes to the qualifying periods which would permit lengthier qualification periods.

(i) Article 34 of the 1951 Convention Relating to the Status of Refugees – the duty to facilitate naturalisation

5. Article 34 of the Refugee Convention requires the UK to *facilitate* the naturalisation of refugees in so far as this is possible. Whilst the existing scheme is already deficient in this respect, it will now be exacerbated by clause 37(11).

6. By clause 37(11) periods spent on temporary admission, release and detention pending determination of immigration/asylum applications will all be discounted for the purposes of the naturalisation qualification period.⁹ Those who seek human rights/refugee based protection are most likely to possess this status for some time given that 40% of cases still presently take over half a year to conclude.¹⁰ There are also remaining unresolved cases in which refugees will have held temporary admission for several years. This measure would therefore penalise them for inefficiency of the UK Borders Agency.¹¹

(ii) Article 6 of the 1997 European Convention on Nationality (“ECN”) – limits on residence requirement for naturalisation

7. Whilst the UK has not signed or ratified the ECN¹², the European view and associated practice as reflected in Article 6(3) of that convention is that naturalisation residence periods should not exceed ten years. Furthermore, naturalisation should be *facilitated* for spouses.¹³

9. Currently some of these periods are capable of counting towards the qualification period for which see para 8.7, Annexe B, Chapter 18 Nationality Instructions

10. See *Hansard* HL Committee 2 March 2009: Col.537

11. Whilst we note that Lord Brett confirmed during the course of committee proceedings that the Government would table an amendment to provide discretion to waive the requirement. He also stated 'that it would be used only in a limited number of cases' and that 'we do not propose to go as far as permitting any time spent [in those capacities]... to count towards the qualifying period'. See *Hansard* HL Committee 2 March 2009: Col.537

12. This has been signed by 18 European states

13. Article 6(4)

(a) Maximum residence periods

8. By clause 37(2)(c) migrants must possess a ‘qualifying immigration status’ for the *whole* of the ‘qualifying period.’ Qualifying immigration status will only include temporary leave in the event that it is given for a purpose by reference to which a grant of probationary citizenship leave may be made. We do not have the draft immigration rules governing this, however the overall effect of this is that it would exclude various types of *lawful temporary leave* including leave as a student, long residence leave and temporary admission from counting towards the relevant period. A tier 2 worker therefore who has been in the UK for five years who switches into the student category as a result of being made redundant, and then switches back to tier 2 would have to restart the qualification period again. Additionally, the effect of failure of the continuous employment requirement (see below), or remaining outside of the UK for more than 90 days (see below) would also appear to reset the clock to zero for qualification purposes. This will result in a residence period that considerably exceeds a decade in the case of some migrants.

(b) Spouses

9. By clause 38(3) the expedited naturalisation procedure will only be available in circumstances where there is a ‘qualifying immigration status’ *based on possession of a relevant family association*.¹⁴ Its effect will be to nullify facilitative measures for naturalisation of spouses to whom it applies given that leave preceding the acquisition of leave on this basis will be discounted.¹⁵

14. Presently one need only establish the existence of the relationship and time runs from the residence in the UK rather than the date of the grant of leave

15. A related but separate problem revolves around the right of abode. Whilst those with the right of abode will be included within this category as a result of a Government amendment, there is ambiguity about who is deemed to have the ‘right of abode’ for which see *Hansard* HL Committee 02 March 2009: Col 521

(iii) Article 8 of the 1950 Convention for the Protection of Human Rights (“ECHR”) - no arbitrary interference with private and family life

11. Article 8 ECHR requires that there is no arbitrary interference by the state with private and family life. Conferral of status can engage Article 8 as can removal where private and family life is established.¹⁶

12. By clauses 37(2) (b) and 38(2)(b) migrants cannot not have left the territory during the qualification period for more than 90 days per annum. Further, clause 37(2)(e) requires that migrants granted probationary citizenship status for work purposes must show that they have been in ‘continuous employment’ for its duration. There is a discretionary power of waiver in each case¹⁷ though the circumstances in which this is to be exercised are not set out, nor is the definition of ‘continuous employment’. From the point of view of Article 8 ECHR (i.e. the need for legal certainty/establishment of a specified legitimate aim) this is cause for concern. Indeed it is presently impossible to assert that these provisions are Article 8 compliant.

(iv) Article 12 (3) of the 1966 International Covenant on Civil and Political Rights (“ICCPR”)- no arbitrary interference with the right to leave a country

13. Article 12 (3) of the ICCPR requires that no arbitrary restrictions are placed on the ‘right to leave a country’.¹⁸ The very nature of migration means that migrants will often have interests in more than one country. In an era of globalisation there are number of reasons that one might expect a migrant to leave the UK for more than 90 days in one year. These include work reasons, family bereavement, legal proceedings, accidents etc. From the perspective of Article 12 (i.e. the need for legal certainty/establishment of a legitimate aim) clauses 37(2) (b) and 38(2)(b) also raise

16. The proposition that status engages Article 8 was accepted by the Government in *S and Others v Secretary of State for the Home Department* [2006] EWCA Civ 1157. See also the Grand Chamber judgment in *Sisojeva v Latvia* App. No 60654/00 and See also admissibility decisions in *Slivenko and others v Latvia* App. No. 48312/99 and *Karrassev and Family v Finland* App. No 31414/96 confirming that arbitrary denial of citizenship may breach Article 8 ECHR.

17. Clause 37(4)(7) and 38(4)

18. General Comment 12 (1) makes clear that this applies to legal rules and administrative practice by states and to nationals and non nationals. Whilst the UK has entered a reservation against every human rights provision in the ICCPR for non citizens/those without the right of abode it is anticipated that it would only be necessary to apply this from ‘time to time’ and it is also subject to a test of ‘necessity’.

cause for concern. Indeed it is presently impossible to assert that they are compliant with Article 12.

(v) Article 19.7 of the 1961 European Social Charter (“ESC”) - equal treatment of migrant workers to remuneration/working conditions

14. Article 19.7 of the European Social Charter requires the UK to ensure that migrant workers are not treated less favourably than nationals in relation to remuneration and working conditions. A ‘continuous employment’ requirement in the terms that the Bill team suggest under clause 37(2)(e)¹⁹ will, upon interaction with restrictions; on access to welfare, the labour market and the ability to change employer, undermine the ability of migrant workers to claim their contractual, statutory and human rights. This would be inconsistent with the spirit of the ESC. Additionally it may lead to indirect discrimination on grounds of race or gender in a way that is inconsistent with Articles 14 (no discrimination in relation to Convention rights) and 8 ECHR given its propensity for disproportionate impacts on women who most obviously may need to take time out of the labour market due to pregnancy and child-care responsibilities, or certain ethnic groups (and women), given their greater tendency to be located in insecure employment as a result of labour market discrimination.

(vi) Article 14 and 8 ECHR – no discrimination in relation to matters falling within the ambit of a Convention right and Article 4 ECHR – prohibition on compulsory labour

15. By clause 39, the qualifying periods are capable of ‘reduction’²⁰ in the event that ‘an activity condition’ performed without remuneration is fulfilled. We do not have details of the activity condition.

19. Continuous employment’ is not defined within the Bill however in a telephone conversation on 16.02.09 between Neil Parking, UK Borders Agency and Hina Majid it was confirmed that continuous employment ‘means what it says on the tin, a continuous unbroken period of employment in the absence of the exercise of discretion.’

20. They are still however longer qualification periods for residential stability than at present

16. Article 14 ECHR prohibits discrimination in relation to matters that fall within the *ambit* of a Convention right. We can think of a number of migrants who may potentially struggle with an ‘activity condition’ including:

- (a) Migrants with health problems (including mental health problems)
- (b) Migrants with disabilities;
- (c) Migrants with learning difficulties;
- (d) Elderly migrants;
- (e) Migrants with personality disorders;
- (f) Migrants who work long hours;
- (g) Migrants who undertake shift work;
- (h) Migrants on low incomes;
- (i) Single parents and other migrants with caring responsibilities;
- (j) Female migrants who for ‘cultural reasons’ are ‘prohibited’ by their spouses and families from participating in public domains.

17. We note that by clause 39(5) there is a discretionary power of waiver though no indication of when this will be applied. We do not yet have details of the activity condition. Accordingly, given that a grant of citizenship status is arguably within the ambit of Article 8, this is cause for concern. Indeed it is presently impossible to assert that these requirements are compliant with the above obligations.

18. Additionally, Article 4 ECHR prohibits the performance of ‘compulsory labour’. A scheme requiring voluntary works in order to secure residential stability and welfare entitlements more swiftly could arguably be considered ‘compulsory labour’ given that it arguably does not part of ‘normal’ civic obligations in the UK. Accordingly this is also cause for concern given that it is impossible to confirm that this requirement is compliant with Article 4 ECHR

(vii) Probationary citizenship/access to contribution based benefits- inconsistency with common standards including the 1966 International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

19. The scheme overall envisages at minimum (a) one additional year to which migrant workers and spouses are to be subject to a public funds restriction and (b) three additional years to which other family members are subject to a public funds restriction. At maximum, it envisages three additional years to which (a) will be subject to a public funds restriction and five additional years for (b), or possibly no upper limit for both in the event of a failure to fulfil both existing and new requirements.²¹

20. The effect of the above will be that some migrants will be precluded from accessing most welfare benefits (i.e. contribution based benefits such as Housing Benefit/ homelessness assistance) for very lengthy and possibly indefinite periods. As we document in our committee stage briefings, the absence of the availability of non-contribution based welfare tends to lock both migrant workers and family members into highly exploitative and undesirable conditions with particularly acute effects for women and certain ethnic groups.²² Indeed the UK was heavily criticised by United Nations CEDAW Committee for the application of its public funds restriction given its role in trapping women into situations of spousal violence.²³

21. The requirement is also arguably inconsistent with Article 9 of ICESCR which 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.*’²⁴ It is also inconsistent with European approaches²⁵ to ‘*integrating migrants*’ which recognise the importance of equal treatment in relation to social and economic rights in facilitating integration and

21. None of this is explained in the Bill or the notes but has been confirmed by the Bill team.

22. Women tend to assume caring responsibilities, be inclined greater job insecurity and discrimination in the work place and the average incomes of certain ethnic groups tend to be lower.

23. Concluding Observations of the Committee on the Elimination of Discrimination Against Women CEDAW critiqued the UK on the basis that this was inconsistent with the duty to promote equality. CEDAW/C/gbr/co/6 UK41 st session July 2008, at para.47

24. The UK has not entered a reservation based on immigration in relation to Article 9 and is therefore bound by this.

25. The sixth principle of the *EU Common Basic Principles for Immigrant Integration Policy in the European Union* recognise that ‘Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration’.

participation in economic and social spheres of society.²⁵

Part 3: Restrictions on studies

(i) Article 2 of Protocol 1 ECHR- the right to education/Article 8 ECHR

22. Article 2 of Protocol 1 requires that there is no arbitrary interference with the *right* to education. Education can also form a part of private life under Article 8 ECHR.²⁶

23. By clause 47, a new discretionary power to impose upon *anyone* with temporary leave *any 'condition* restricting [their] studies in the UK' is introduced with a view to averting abuse of tier 4. Non-compliance with a condition attached to leave can in certain circumstances amount to a criminal offence attracting a sentence of up to 6 months and/or a level 5 fine²⁷ together the possibility of removal. The power is required to avert immigration based abuse of tier 4.

25. The breadth of this clause, and scope for arbitrary interference with the right to education of all migrants raises concerns from the point of view of Articles 2 and 8 ECHR. With the precise circumstances to be set out in the Immigration Rules, it is impossible at this stage to assert that the clause complies with Convention rights.

26. *GOO & Ors v Secretary of State for the Home Department* [2008] EWCA Civ 747

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

Part 4:

A. Transfer of judicial review

26. By clause 50 the Administrative Court is empowered to transfer immigration, asylum and nationality judicial review cases to the Upper Tribunal.²⁸ Additionally, the effect of this would be that:

- (a) The Lord Chief Justice with the agreement of the Lord Chancellor could specify a class of case that must be transferred into the Upper Tribunal;²⁹
- (b) The Lord Chancellor could by order require that leave to appeal from the Upper tribunal to the Court of Appeal is only granted in cases where *(a) the proposed appeal raises some important point of principle or practice, or (b) there is some other compelling reason for the appeal to be heard;*

27. Our concerns about this are as follows:

(i) Limited expertise and reducing the standard of protection of fundamental rights

28. Whilst 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, this does not extend to expert knowledge of constitutional or administrative law, of civil liberties, or of judicial review law and practice. This expertise is important because:

28. Section 20 Tribunals Courts and Enforcement Act 2007 ("TCEA 2007")

29. Section 13(6) TCEA 2007

- (i) Immigration and asylum cases often tend to be those in which precedents of wider application in constitutional and administrative law are established and;
- (ii) The procedures in question are the means by which the adherence of the United Kingdom to its international obligations under the Refugee Convention/Citizens Directive and the ECHR including the right to life (art 2 ECHR), (art 3 ECHR); and the right to liberty and security of person (art 4 ECHR) is sought to be ensured.

29. If a scheme of this kind is to apply it is therefore essential that there is (i) some appropriate mechanism in place to identify the kinds of cases suitable for hearing by a High Court Judge possessing administrative and constitutional law expertise and (ii) to ensure that where this expertise is necessary, such cases are dealt with by a High Court judge.

29. The power to direct that all cases or any specified class of immigration and nationality judicial review *must* be transferred to the Upper Tribunal is inconsistent with the requirement for a reasonable process of selection separating those cases which are suitable for transfer to the Upper Tribunal from those which are not. The difficulty is magnified by absence of clarity as to how many High Court judges would sit in the Upper Tribunal and how, and at what level it would be decided within the Tribunal whether any particular case should be heard by a High Court judge.

(ii) Limitations on access to the Court of Appeal and compliance with ECHR and other international obligations

30. Our key concern lies in the risk of limitation on the right of appeal to the Court of Appeal. Currently leave to appeal will be granted where the contemplated appeal would have *a real prospect of success* without the need to show an important point of law of principle or practice or compelling reason for the appeal to be heard. **If Section 13 (6) of the TCEA 2007 is brought to bear upon judicial review work transferred**

from the Administrative Court, it would bar recourse to the Court of Appeal even where there has 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 in a serious human rights case (invoking the right to life or freedom from torture or inhuman or degrading treatment under ECHR)³⁰ With appeals procedures not ensuring this either, the risk of critical injustice and non-compliance with international obligations would be greatly magnified in the event that the same eligibility test is imposed in the judicial review cases.

31. The application of the above test would also be contrary to the spirit of Article 13 (right to a remedy) ECHR given that it would lead to refusal of a remedy for breach of Convention rights that would otherwise be available in non- immigration cases.

B. Duty to promote the welfare of children

(i) 1989 Convention on the Rights of the Child ('CRC')- child's best interests as the primary consideration

32. Article 3(1) of the CRC³¹ requires a child's 'best interests' to be the primary consideration in all UK state actions concerning children. Article 2(1) requires respect for CRC rights without discrimination on grounds of status or national or ethnic origin.

33. By clause 51, a new duty to promote and safeguard the welfare of children 'in the UK' is introduced. Its scope would not however extend to children:

- i. With 'temporary admission';
- ii. At entry clearance posts;
- iii. At juxtaposed controls (with British immigration officers);

30. See *Uphill v BRB (Residuary) Ltd* at para. 24 for the application of proposed test.

31. The UK has signed and ratified this.

- iv. In circumstances where they are escorted to third safe countries for their care;
- v. In cases where there is a dispute about age.

Given that in all of the above cases the UK Border Agency will arguably be exercising jurisdiction, the provision is arguably inconsistent with the spirit and legal requirements imposed by the CRC .

British nationality and the right of abode

34. A word should be said about British nationals without the right of abode. It is arguably a principle of customary international law that states are under an *obligation* to admit their nationals. Articles 12(4) of the ICCPR and Protocol 4 ECHR represent the legal concretisation of this.³²

35. Given that this Bill is primarily concerned with citizenship we believe that it should finally seek to resolve the position of British nationals without the right of abode. This could be achieved either through simply restoring the right of abode to them; or if this is not favoured through a modified version of the model recommended by Lord Goldsmith.³³

32. The ICCPR has been signed and ratified by the UK though a reservation has been entered to cover British nationals without the right of abode. Protocol 4 has been signed though not ratified by the UK.

33. For which see P Goldsmith, *Citizenship: Our Common Bond*, 2007, p.172-74. The proposal is for a time limited registration system and the abolition of these categories all together. We note that Lord Goldsmith QC concludes that a registration system for British Nationals Overseas would be in breach of commitments made between China and the UK in the 1984 Joint Declaration on the future of Hong Kong. It is worth noting however that the Foreign Affairs Committee when examining the same point concluded 'To grant full British Citizenship, however, would contradict the British memorandum on nationality attached to the Joint Declaration. *This memorandum is not part of the Joint Declaration and to go against it would not constitute a breach of the Treaty*' Page xviii, Foreign Affairs Committee: Hong Kong, Second Report, 1988/1989 HC281. There would however also be other alternatives such as registration for an entitlement to ILR/permanent permission or renegotiation of the treaty. See generally the detailed submissions/bill briefings of the ILPA on British nationals without the right of abode available at www.ilpa.org.uk

36. Finally, given that this Bill is primarily concerned with enhancing the value and significance of citizenship, we would urge the Committee in the light of the Government's clear intention to abolish the single most important right attaching to British citizenship (i.e. the right of abode)³⁴ in a way that opens up frightening possibilities and is wholly inconsistent with international norms, to seek a clear commitment from the Government that the *right of abode* for British citizens will be retained.³⁵

In the event of any further queries about this paper or for copies of Bill briefings please contact Hina Majid who is the legal policy director at JCWI. Her e mail address is hina.majid@jcw.org.uk and her phone number is 0207 553 7463

34. See clause 1 (1) (2) of the Draft (Partial) Immigration and Citizenship Bill under which entry/residence or departure of a British citizen will be ' **subject to any requirement or restriction imposed by or virtue of this Act or ant other enactment**'

35. We believe that other existing right of abode holders should also continue to retain their status.

