

**BORDERS, CITIZENSHIP AND IMMIGRATION BILL – HL BILL 15****HOUSE OF LORDS COMMITTEE****PART 2 CITIZENSHIP****CLAUSE 38 ABSENCES AND FAMILY ASSOCIATION****Clause 38**

LORD AVEBURY

BARONESS FALKNER OF MARGRAVINE

**Amendment 58** Page 29, line 13, after first "the" insert "average"**Amendment 59** Page 29, leave out lines 16 to 18**Amendment 61** Page 29, line 22, after "6(2)" insert "or has a Commonwealth right of abode or a permanent EEA entitlement and the relevant family association referred to in section 6(2)"**Amendment 62** Page 29, line 50, after "partner" insert "or dependent relative"**Amendment 63** Page 30, line 1, after "leave" insert "or has a right of abode in the United Kingdom within the meaning of section 2 of the Immigration Act 1971, or a permanent EEA entitlement"**Purpose and note on government amendments :**

**Amendment 58:** This would maintain the current position whereby maximum permitted absences during the qualifying period for naturalisation are calculated in terms of an average over the qualifying period. The amendment mirrors that tabled in the name of Lord Avebury and Baroness Falkner of Margravine on clause 37 – see ILPA briefing on clause 37 (90 days absence and qualifying immigration status).

**Amendment 59:** This would remove the requirement that a person must have had a relevant family association throughout the qualifying period.

**Amendment 61:** This would allow those with the Commonwealth right of abode and a permanent EEA entitlement to progress to citizenship along the family path if they have a relevant family association.

**Amendment 62:** This will allow peers to probe the Government as to who will be prescribed as having a 'relevant family association' enabling them to progress to citizenship along the shorter family path.

**Amendment 63:** This would ensure that those whose UK-based partners have a right of abode in the UK or have acquired permanent entitlements to reside in the UK under European law can progress to citizenship on the basis of those relationships in the same way as they could if the UK-based partner is a British citizen or has permanent residence. It will also allow peers to probe the Government as to its intentions for those with the right of abode.

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These amendments should be read with **amendments 64 to 76** laid in the name of the Lord West of Spithead. The Government amendments broaden the range of people who can benefit from the shorter route to naturalisation on the basis of a family relationship. They subdivide those who can naturalise on the basis of a family association. They accept the proposition put forward by the Lord Avebury and the Lord Wallace in **amendment 61** that those with a Commonwealth right of abode (defined in Clause 45) and a relevant family association should be able to naturalise without the Commonwealth right of abode having to be based on a family relationship. They accept the same principle for those with their new CTA entitlement (defined in the proposed government amendment). They do not accept that this should be the case for EEA nationals as **amendment 61** had proposed.

The other amendments laid by the Lord West in the group appear to be necessitated by this splitting of the shorter route to naturalisation into two groups, those whose leave must depend on the relationship, and those where this is not required. One new addition **amendment 76** to insert a new paragraph in place of lines 17 to 31 on page 21, viz. that provided that the same two people have remained in a relationship that counts as a relevant family association for the required period the relationship may have changed over time (e.g. fiance, prospective civil partner or unmarried partner to spouse/civil partner).

#### **Briefing:**

This Briefing is subdivided by reference to the five amendments, which have been grouped here on the same briefing because they have been grouped on the order paper.

#### **First Amendment:**

The amendment is to ensure that people, including those who are absent for over 90 days due to travel on business, a family crisis or illness abroad, do not have to start the qualifying period for citizenship all over again. It addresses one example in the Bill of the problem identified by Baroness Hanham at Second Reading of migrants who:

*“...will end up in a game of snakes and ladders, by which they may fall down and have to start the process all over again.” (Hansard, HL 11 Feb 2009 : Column 1135)*

Currently, a migrant can avoid having to start all over again because the route to citizenship allows absences to be averaged out over the qualifying period. The requirement in the current route to citizenship is explained in the Nationality Instructions. Appendix 1 to this briefing is the relevant extract from those Instructions. This means that an exceptional absence for business or family reasons in one year may be mitigated by fewer absences in other years.

Clause 38 changes this<sup>1</sup>. It requires that absences must exceed no more than 90 days in each qualifying year. Thus, if the 90 days is exceeded, the clock must be reset and the route to citizenship started all over again.

We have been informed that the Government is not attracted to averaging absences because it believes that requiring no more than 90 days absence in each year will promote integration. However, what is the evidence for this assertion? Under the current route to citizenship, absences can be averaged and this has been the

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<sup>1</sup> New paragraph 4(2)(b), Schedule 1 to the British Nationality Act 1981

position for very many years. What is the evidence that those who have relied upon averaging absences to mitigate a lengthy absence in any one or two years (as in the case studies) are any less integrated than those who have kept within the 90 days in each year? The following case study highlights how this may affect migrants.

**Case Study A**

A is living in the UK with his civil partner and is on the path to citizenship. However, he returns to his home country to attend to his sick and dying mother. After her death he must attend to the funeral and other family arrangements. Ultimately, A is out of the UK for in excess of 90 days. Accordingly, he must reset the clock to zero and start all over again.

The effect is to require those who cannot avoid an exceptional period of absence to have to start the route to citizenship all over again, during which second progression along the route to citizenship they will once more be excluded from benefits and services. This could mean, depending on when someone needs to take an exceptional period of absence, he or she is required to spend as long as 5 or more years (as opposed to the normal 3 years) before becoming a British citizen (even having done whatever may be required under the activity condition – see ILPA briefing on clause 39). In the meantime, should he or she (or his or her partner) be made redundant or taken ill, there would be no state support for the migrant even where he or she has been paying taxes throughout this time; and even though he or she may have far exceeded the time after which it is normally anticipated such services and benefits would be available.

None of this promotes integration. Rather, it promotes marginalisation and exclusion.

**Second Amendment:**

Currently a migrant in the UK with temporary leave, who marries or enters a civil partnership with a British citizen, could apply for citizenship so long as he or she had indefinite leave to remain and had been in the UK for three years without absences of more than 270 days over that period (and no more than 90 days in the last of those years).

Under the Bill, a migrant in this position would not be able to use the family path to citizenship unless he or she spent the whole of the qualifying period for that path (minimum three years) as the partner (not necessarily as spouse or civil partner – this is left to regulations) of that British citizen.

The amendment will allow peers to probe the Government as to why there is a need for a change.

**Third Amendment:**

The Government has responded to this amendment by tabling amendments to clause 38 (and with consequential amendments). The Government's amendments to clause 38 are reproduced as appendix 2 to this briefing.

The amendment in the name of Lord Avebury and Lord Wallace of Saltaire would allow those with the Commonwealth right of abode and a permanent EEA entitlement to progress to citizenship along the family path if they have a relevant family association.

The Government's amendments accept the proposition advanced in the amendment of Lord Avebury and Lord Wallace that those with a Commonwealth right of abode (defined in clause 45) and a relevant family association should be able to naturalise without the Commonwealth right of abode having to be based on a family

relationship. The Government accepts the same principle for those with the new CTA entitlement (defined in the proposed Government amendment). It does not accept that this should be the case for EEA nationals.

The Government's amendments to clause 38 are complex. However, the complexity appears to be necessitated by the splitting of the shorter family route to naturalisation into two groups, those whose leave must depend on the relationship throughout the path to citizenship, and those where this is not required. It is not required where the person has a Commonwealth right of abode of the new CTA entitlement.

In her Foreword to the *Path to Citizenship* Green Paper, February 2008<sup>2</sup>, Jacqui Smith MP, Home Secretary, said :

*"We want to make the journey to citizenship clearer, simpler and easier for the public and migrants to understand."*

Baroness Howe of Idlicote aptly summed up the path to citizenship set out in Part 2 of this Bill as it appeared at Second Reading :

*"The addition of a probationary citizenship period, which can be lengthened on shortened according to behaviour, makes the naturalisation process even longer, costlier and more confusing for migrants."*

The Baroness might have added that the proposed path to citizenship was more confusing for others too. With the introduction of the Government amendments, we appear rapidly to be getting to the situation where there are as many types of probationary citizenship leave as there are categories of leave under the immigration rules, again raising the question of why the government has introduced probationary citizenship leave at all. Any suggestion that these provisions are clearer, simpler and easier to understand is surely impossible.

#### **Fourth Amendment:**

This will allow peers to probe the Government as to who will be prescribed as having a 'relevant family association' enabling them to progress to citizenship along the shorter family path. Currently, the meaning of relevant family association is left to be prescribed<sup>3</sup>.

The Delegated Powers and Regulatory Committee in its Third Report, session 2008-09, has commented<sup>4</sup>:

#### ***"Clause 38(2) — British Citizenship by naturalisation***

*11. At present, section 6 of the British Nationality Act 1981 provides for two routes by which a person may be granted a certificate of naturalisation, including provision in subsection (2) for a person who is married to, or the civil partner of, a British citizen. By virtue of clause 38(1) and (2) of the Bill, section 6(2) would apply instead to a person "who has a relevant family association", that is to say he has a prescribed connection with a person of a prescribed description (both to be prescribed in negative regulations).*

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<sup>2</sup> The Green Paper is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/>

<sup>3</sup> New section 6(3), British Nationality Act 1981

<sup>4</sup> <http://www.publications.parliament.uk/pa/ld200809/ldselect/lddelreg/29/2903.htm#a2>

12. *Although this new power does not affect the right to naturalisation itself, but only the eligibility for following a shorter route to naturalisation, we are conscious that the effect of clause 38(1) and (2) is to replace a condition now set out on the face of the 1981 Act with a power to make (potentially wider) provision in regulations, whose exercise could well prove controversial. We acknowledge that (as is explained in paragraph 44 of the memorandum) the negative procedure already applies to regulations under the Immigration and Asylum Act 1999 which make rather similar provision about who is to be regarded as the dependant of an asylum seeker. **But we nevertheless draw clause 38(2) to the attention of the House so that it may consider whether in this particular instance it is satisfied that the negative procedure affords an adequate level of parliamentary control.***

**Fifth Amendment:**

This would ensure that those whose UK-based partners have a right of abode in the UK or have acquired permanent entitlements to reside in the UK under European law can progress to citizenship on the basis of those relationships in the same way as they could if the UK-based partner is a British citizen or has permanent residence.

It will also allow peers to probe the Government as to its intentions for those with the right of abode. The draft (partial) Immigration and Citizenship Bill, published in July 2008 and now removed from the UK Border Agency website, had proposed the removal of the right of abode altogether. ILPA is opposed to that proposal<sup>5</sup>. Appendix 3 to this briefing sets out extracts from the Explanatory Notes that were published to the draft (partial) Bill.

The Government's intentions are not clear. Is it still determined to strip the right of abode from people? If so, why? What will it do to ameliorate their position? Are they to get any permission by order? It was said the draft (partial) Bill would allow for this, but guaranteed that it would be done. If they are to get permission by order, will this be permanent or temporary permission? Again, it was said that this could be done, but no guarantee was given.

ILPA's briefing to the Joint Committee on the withdrawal of the right of abode concluded:

*"No explanation has been provided as to why the Government intends to strip the right of abode from this group of Commonwealth citizens to whom the UK recognised and made a commitment when revisiting UK nationality laws by the introduction of the British Nationality Act 1981. This decision, which is presented by the draft (partial) Immigration and Citizenship Bill without previous warning or consultation, is an arbitrary one. The Government's Impact Assessment makes no reference to the right of abode whatsoever. The human rights impact assessment in the Explanatory Notes also makes no direct reference to the right of abode."*

This remains the position; and we would welcome Government assurances that the proposal to withdraw the right of abode has been scrapped.

***For further information please contact:***

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<sup>5</sup> see our October 2008 briefing to the Joint Committee on Human Rights on the withdrawal of the right of abode, available in the briefings section at [www.ilpa.org.uk](http://www.ilpa.org.uk)

## APPENDIX 1

Extract from UK Border Agency, Nationality Instructions, Chapter 18  
<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter18/chapter18?view=Binary>

*“18.2.2.2 The residence requirements referred to in 18.2.2.1 above are that the applicant:*

- a. was in the UK at the beginning of the period of 3 years ending with the date of the application; and*
  - b. was not absent from the UK for more than 270 days in that 3 year period; and*
  - c. was not absent from the UK for more than 90 days in the period of 12 months ending with the date of the application; and*
- ...”*

Here we have a qualifying period of 3 years. No more than 90 days absence is allowed in the last 12 months period. However, subject to that stipulation, the 270 days of absences (3 x 90days) may be spread around the 3 years period. Even where someone was required to take an exceptional absence in the last year of their qualifying period, they would only be required on their return to complete a 12 months period with less than 90 days absence – rather than, as under the path to citizenship that would be provided by this Bill, start the journey all over again.

## APPENDIX 2

### Clause 38

LORD WEST OF SPITHEAD

Page 29, leave out lines 16 to 18 and insert—

"(c) that, subject to sub-paragraph (5)—

- (i) A had a relevant family association for the whole of the qualifying period, and
- (ii) A had a qualifying immigration status for the whole of that period;"

Page 29, line 19, leave out from "application" to "and" in line 22 and insert "—

- (i) A has probationary citizenship leave, or permanent residence leave, based on A's having the relevant family association referred to in section 6(2), or
- (ii) A has a qualifying CTA entitlement or a Commonwealth right of abode;"

Page 30, line 1, leave out from "leave" to end of line 3 and insert "—

- (a) the requirement specified in sub-paragraph (2)(c)(i) is fulfilled only if A was that person's partner for the whole of the qualifying period, and
- (a) for the purposes of sub-paragraph (2)(c)(ii), A can rely upon having a qualifying immigration status falling within paragraph 4A(1)(a), (b) or (c) only if that partnership is the relevant family association upon which the leave to which the status relates is based."

Page 30, line 9, at end insert—

"(7) For the purposes of sub-paragraph (5), the relationship by reference to which A and the other person are partners need not be of the same description for the whole of the qualifying period.""

Page 30, leave out lines 21 to 25 and insert—

"( ) treat A as fulfilling the requirement specified in paragraph 3(2)(c)(i) (including where it can be fulfilled only as set out in paragraph 3(5)) where a relevant family association of A's has ceased to exist;"

Page 30, line 27, after first "3(2)(c)" insert "(ii)"

Page 30, line 27, after second "3(2)(c)" insert "(ii)"

Page 31, line 2, leave out "A" and insert "Subject to paragraph 3(5), a"

Page 31, line 4, at end insert "based on a relevant family association"

Page 31, line 5, leave out "; or" and insert "based on a relevant family association;"

Page 31, line 6, at end insert "based on a relevant family association;

- ( ) a qualifying CTA entitlement; or
- ( ) a Commonwealth right of abode."

Page 31, leave out lines 7 to 9 and insert—

"( ) For the purposes of paragraph 3 and this paragraph. the leave

mentioned in sub-paragraph (1)(a), (b) or (c) is based on a relevant family association if it was granted on the basis of the person having a relevant family association."

Page 31, line 12, leave out "based on" and insert "and"

Page 31, line 15, leave out "rely on" and insert "have"

Page 31, leave out lines 17 to 21 and insert—

- "( ) Where, by virtue of sub-paragraph (3)(a), a person relies upon having more than one qualifying immigration status falling within sub-paragraph (1)(a), (b) or (c)—
- (a) subject to paragraph 3(5), it is not necessary that the leave to which each status relates is based on the same relevant family association, and
  - (b) in a case where paragraph 3(5) applies, the relationship by reference to which the persons referred to in paragraph 3(5) are partners need not be of the same description in respect of each grant of leave."

### APPENDIX 3

Extracts from Explanatory Notes published to the draft (partial) Immigration and Citizenship Bill, published July 2008:

***“Clause 1: British citizens***

*47. ...This clause provides that British citizens are free to enter, leave and stay in the UK. They do not need permission to do so... Those with the right of abode will now require permission to enter or stay in the UK. The intention is to confer that permission by order under clause 8 of the Bill...*

***“Clause 8: Grant of immigration permission by order***

*57. This clause provides for the power of the Secretary of State to grant permission by order... A grant of permanent permission by order could make provision for Commonwealth citizens with the right of abode as described in paragraph 47 above.”*