

**ILPA GENERAL BRIEFING
SECOND READING (LORDS)
February 2009****BORDERS, CITIZENSHIP AND IMMIGRATION BILL**

ILPA is a professional association with some 1000 members (individuals and organisations), who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-government organisations working in this field are also members. ILPA aims to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on numerous government, court and tribunal stakeholder and advisory groups.

Introduction:

This briefing addresses discrete issues within our expertise under distinct heading in the order in which these matters arise in the Borders, Citizenship and Immigration Bill. A separate briefing is available on the transfer of judicial review (clause 50). All ILPA briefings on this Bill are available at <http://www.ilpa.org.uk/briefings.html>

Part I – Border functions:

Part I contains provisions, which relate to the regulation, monitoring and supervision of the UK Border Agency and its private contractors.

PACE Codes of Practice

Part I includes provisions relating to the Police and Criminal Evidence Act (PACE) 1984 Codes of Practice.¹ The power for the Secretary of State to extend PACE provisions to cover immigration officers was provided by the Immigration and Asylum Act 1999². It has been little used³, despite the fact that in the 1999 Act and in each subsequent immigration Act (in 2002, 2004, 2006 and 2007) there have been significant extensions of immigration officers' powers of a policing and police-like nature – most recently in the UK Borders Act 2007 to detain British citizens at UK ports on suspicion that they may be of interest to the police.⁴ The Bill repeats the inadequacy of the 1999 Act. In giving a mere power to the Secretary of State to extend PACE provisions, the Bill leaves the Home Office free to continue to fail to do so. This Bill should be used to replace the power to extend PACE provisions with a duty to extend them, not just to customs officers but to all UK Border Agency staff and private contractors.

Chief inspectorate

This Part includes provision to extend the remit of the Chief Inspector of the UK Border Agency to cover customs functions⁵. The Chief Inspector's current remit, established by the UK Borders Act 2007, is extensive, and reflects the role that Parliament was promised the Chief Inspector would perform:

¹ Clause 22

² Section 145

³ There are the Immigration (PACE Codes of Practice) Directions 2000, which were said to be under review in 2004 – see *Hansard* HC Standing Committee B, 15 January 2004 : Column 211 (Beverly Hughes MP)

⁴ See sections 1-4, UK Borders Act 2007. It is these provisions that what is now clause 49 of this Bill would extend to Scotland.

⁵ Clause 26

- providing “*much stronger oversight*”⁶ of what was then the Border and Immigration Agency, now the UK Border Agency; and
- ensuring “*Parliament can scrutinise the work of the new [now UK Border] agency*”⁷ including by way of reports that are to be presented to Parliament⁸.

Assurances are needed that the Chief Inspector will receive adequate additional resources to perform what will be an extended role.

Complaints and misconduct

Also included are provisions relating to the Independent Police Complaints Commission (IPCC) role in investigating complaints of misconduct.⁹ Having regard to the need for much stronger oversight of the UK Border Agency¹⁰, it is a significant omission that the IPCC role still does not extend to immigration powers exercised by private contractors and at ‘juxtaposed controls’ (where UK immigration control operates overseas). The immigration detention role of the Prisons and Probation Ombudsman is also important. While the both have remits covering a wider jurisdiction, it would be helpful in establishing a clear framework for the relationship between the immigration roles and remits of the IPCC and the Ombudsman, and ensuring comprehensive coverage of officials and private contractors, if the Ombudsman were placed on a statutory footing.

Part 2 – Citizenship:

Part 2 is to introduce the Government’s proposals on naturalisation as a British citizen first set out in the *Path to Citizenship* Green Paper of February 2008¹¹. This briefing provides some analysis of the naturalisation provisions, highlights key concerns, and deals with one correction to the previous briefing (our initial briefing, January 2009).

Naturalisation is the way by which migrants to the UK may become British citizens. Not all migrants are entitled to naturalise or have access to routes that would allow them to do so. For those that may naturalise, there is a route to do so. The migrant must make a formal application, pay a fee and satisfy certain requirements at each stage allowing, before the migrant is permitted to progress to the next stage, for English language testing, checks on criminal records and compliance with immigration conditions. Currently naturalisation involves three stages:

- A period of temporary (or limited) leave¹². During this period, a migrant’s access to services and benefits may be restricted.
- A period of indefinite leave to remain, during which a migrant’s access to services and benefits is no longer restricted.
- Finally, British citizenship.

The Government’s intention, as explained in last year’s Green Paper and their response to the consultation on that Green Paper, is that there will continue to be three stages. As now a formal application, fee and satisfying certain requirements will be required to progress from one stage to the

⁶ Liam Byrne MP, Minister for Immigration, Citizenship and Nationality *Hansard*, HC UK Borders Bill Committee, Fifth Sitting 6 Mar 2007 : Column 142

⁷ Joan Ryan MP, Parliamentary Under-Secretary of State for the Home Department *Hansard*, HC UK Borders Bill Committee, Tenth Sitting 13 Mar 2007 : Column 313

⁸ See section 50, UK Borders Act 2007

⁹ Clause 28

¹⁰ See fn. 4

¹¹ The Green Paper and related documents are available at:

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

¹² For those joining British or settled family members, this period is currently 2 years. For those on economic migration routes or refugees, this period is currently 5 years. However, it should be noted that many refugees spend lengthy periods in the UK on temporary admission prior to recognition and this will not count towards the 5 years.

next. English language testing, criminal record and immigration history will continue to be relevant. The new three stages are to be:

- A period of temporary (or limited) leave. As now, a migrant's access to services and benefits may be restricted; and this period will be of the same duration as now¹³.
- Another period of temporary leave. This is, however, given a new name – probationary citizenship.
- Finally, British citizenship or permanent residence.

As can be seen there is much in the proposed new route that is similar to the current route. What is new about the proposed route is:

- The second stage is a continuation of the first. It is more temporary leave. In this respect the second stage is unnecessary, and might simply be abandoned. However, by extending the period a migrant spends on temporary leave, this will exclude migrants from access to services and welfare for a longer period.
- The third stage constitutes an alternative – British citizenship or permanent residence. Permanent residence is essentially indefinite leave to remain by a new name – the Bill expressly states that indefinite leave to remain is permanent residence. Thus it will take longer for a migrant to reach the stage of what is now known as indefinite leave. Moreover, the migrant will have passed through an additional stage and, therefore, have had to pay an additional fee.
- The intention is that migrants should be compelled towards citizenship rather than permanent residence. Thus, as explained in the Green Paper, the migrant who does not want or cannot take British citizenship (e.g. the person whose current nationality precludes dual nationality) will spend two years longer in the second stage than the migrant who can and does naturalise as British¹⁴.

Much of this cannot be seen on the face of the Bill. By contrast, the “activity condition”, which would require a person to have undertaken some voluntary or other approved activity or be exempted from the requirement in order to progress along the route at the usual speed, is made plain on the face of the Bill. Failure to satisfy this condition may delay progress from the second to the third stage by up to two years¹⁵. The activity condition raises concerns as to whether certain migrants may be penalised because they cannot undertake approved activity (e.g. because they have child or other carer responsibilities); and how approved activity will be regulated or monitored.

Critical issues arising from that which cannot be seen on the face of the Bill include:

- The extended length of time, anything from one year to several years, during which migrants may be excluded from services and benefits.
- What services and benefits is it intended to exclude them from – social security, housing, home student rates, NHS treatment, all of these and for how long?
- For those that cannot or do not wish to take British citizenship, which may include those who are precluded from dual nationality and those who simply cannot afford a further fee, the length of time excluded from services and benefits may be particularly extended.
- How will any of this promote integration of migrants, who are entitled to stay in the UK, rather than marginalize and penalise the most vulnerable who cannot afford the considerable and ever-increasing fees?

ILPA's initial briefing raised concern about the future for those who are currently settled in the UK. We have since noted that clause 45(3) will treat those who now have indefinite leave as having the proposed new “permanent residence” status, from which it will be possible to apply for citizenship. We understand from the Green Paper that the intention is that those with this status will continue to have

¹³ See paragraphs 146-148 of the Green Paper *op cit*

¹⁴ See paragraphs 122-123 and the table at page 31 of the Green Paper *op cit*

¹⁵ Clause 39(1) – cf. new paragraph 4B(3) & (4). Note that regulations may remove this distinction: see clause 39(3) and new subsection (1C)

access to services and benefits as now¹⁶. However, the complexity of the provisions, and with so much left to regulation and guidance, means that assurances regarding this group are still required.

Part 3 – Immigration:

Common Travel Area

It includes provision for the extension of immigration controls on a routine basis in respect of travel within the Common Travel Area between the UK and the Republic of Ireland by aircraft or ship, thus in effect the end of the Common Travel Area. The case for change is not made out¹⁷. The Impact Assessment on this provision¹⁸ estimates that the changes will cost the tourism industry £43.5 million, most of which is in the first year. It is unclear how these figures have been calculated and worth probing on this point.

Studying in the UK

There is provision to impose conditions on a person's limited leave to enter or remain that would restrict their studies. This would, e.g., allow the UK Border Agency to prevent any migrant, without indefinite leave to remain, from studying at all; or restrict them to a particular college or course of study. The Explanatory Notes do not explain the need for this new power, merely providing an example of when it might be used:

*“to stipulate an educational institution at which a student is granted leave to study, with the result that any change of institution would require an application to the UK Border Agency for variation of condition”.*¹⁹

The impact assessment on the Bill indicates the purpose of this provision relates to students under Tier 4 of the Points Based System (PBS)²⁰. The need for it has not been demonstrated. The Court of Appeal recently judged that such a requirement “*might well be arbitrary or unnecessary in the absence of case-specific reasons*”²¹). Even were the Government to produce a justification for Tier 4, this provides no justification to restrict other migrants studying in the UK. At a minimum, the clause should be restricted to the PBS group for which it is said to be intended, rather than left to allow interference with the right to study (including taking an English language course) by other migrants.

The human rights impact section²² of the Explanatory Notes is silent on clause 47 yet restricting a person's studies may interfere with his or her private life, thereby engaging Article 8, European Convention on Human Rights (right to private and family life)²³. Absent justification showing any interference to be necessary and proportionate, the imposition of conditions under clause 47 may not be human rights-compliant and the provision requires a human rights assessment.

Links to UK Borders Act 2007 – retention of personal data, automatic deportation and detention at ports

The remaining two provisions in Part 3 would:

- extend the fingerprinting powers contained in the Immigration and Asylum Act 1999 to include those made subject to a mandatory (“automatic”) deportation order under the UK Borders Act 2007²⁴; and

¹⁶ See paragraph 198 of the Green Paper *op cit*; see also page 21 of the Government response to the consultation on the Green Paper (available at the link at fn. 9)

¹⁷ See ILPA's response to the August 2008 Home Office consultation, which is available in the 'Submissions' section of our website at www.ilpa.org.uk

¹⁸ Impact assessments on the Bill are available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/border-cit-imm-bill/>

¹⁹ See paragraph 177

²⁰ See page 3 of the Impact Assessment on Parts 3 & 4, in particular the second bullet point under the heading “Policy Objectives”; this is available at the link at fn. 16

²¹ See *GOO & Ors v SSHD* [2008] EWCA Civ 747

²² See paragraphs 202 *et seq*

²³ See *AO (Nigeria) v SSHD* [2008] EWCA Civ 82 where the refusal of leave to remain was found to breach Article 8 by reason of the disproportionate interference with the Appellant's studies in the UK.

²⁴ Clause 48

- extend the powers of detention at ports in the UK Borders Act 2007 to Scotland²⁵.

The extension of fingerprinting powers provides an opportunity for the Government to make clear how it will comply with the ruling of the European Court of Human Rights in *Case of S & Marper v UK*²⁶ on the unlawful retention of personal data. That case concerned retention by police forces of personal data of individuals subjected to police investigations. The personal data being amassed by the UK Border Agency on migrants to the UK, and existing powers to take, retain and use this data provided e.g. in the UK Borders Act 2007, are extensive.

This provision also provides opportunity to reflect upon the introduction of the mandatory deportation regime in the 2007 Act²⁷. Among the several problems with that regime, indefinite administrative detention, without automatic judicial oversight, of migrants who have served prison sentences in the UK is particularly pressing. The recent report of the London Detainee Support Group *Detained Lives*²⁸ highlights the human and financial cost of this, and the recent judgment in *R(Abdi & Ors) v SSHD* [2008] EWHC 3166 (Admin)²⁹ revealing how the Home Office has, in the face of repeated internal advice from its lawyers, maintained a secret and unlawful detention policy for over 2 years, demonstrate the need for urgent reconsideration of these powers.

The extension of the powers to detain at port once again highlight the extent to which immigration officers now exercise both police-like and policing powers; and the pressing need for improved regulation, monitoring and supervision.

Part 4 – Miscellaneous:

Transfer of judicial review

The Bill³⁰ would allow for transfer of judicial review applications relating to immigration or nationality from the High Court to the Upper Tribunal. This very important and unwelcome provision is addressed in our separate briefing on transfer of judicial review.

Welfare of children

Part 4 also contains provision to introduce a statutory duty upon the UK Border Agency to safeguard and promote the welfare of children³¹. ILPA is a member of the Refugee Children's Consortium and endorses the Consortium's second reading briefing which addresses this provision. The effect of the clause on migrant children who are not refugees is also a concern – e.g. the restriction of the duty to children “in the United Kingdom”³² will mean it does not apply to an overseas post processing an application for a visa for a child, including an application made by those who intend to exploit the child on arrival in the UK. If this provision is to achieve what Parliament had called for in 2008 during the passage of the Children and Young Persons Bill – adoption by the UK Border Agency of the same duty that is shared by other agencies under section 11, Children Act 2004 – it is necessary that:

- the provision in this Bill provides for guidance that will mirror now and in future the guidance given under section 11; and
- the reach of the duty extends to all children who are subjected to decisions and actions or omissions of the UK Border Agency and its private contractors including outside the UK.

General Conclusion:

²⁵ Clause 49

²⁶ ECtHR, Application Nos. 30562/04 and 30566/04

<http://cmiskp.echr.coe.int//tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=74847&sessionId=19003322&skin=hudoc-en&attachment=true>

²⁷ See sections 32-39, UK Borders Act 2007; section 36 of detention

²⁸ <http://www.detainedlives.org/wp-content/uploads/detainedlives.pdf>

²⁹ <http://www.bailii.org/ew/cases/EWHC/Admin/2008/3166.rtf>

³⁰ Clause 50

³¹ Clause 51

³² Clause 51(1)(a)

As regards much of this Bill, it should be noted that it constitutes a holding position. Parliament had originally been led to expect consolidating legislation on immigration, and late in the day that has been delayed. In the meantime, the Government has introduced this Bill on the basis that legislation is needed now regardless of the further complication necessarily caused by adding to the already extensive and complex mass of legislation in this area. There is simply no case for this urgency in respect of many of the provisions, which could be better considered in the context of the wider consolidation and simplification that is to come. As highlighted in our initial briefing, more pressing matters that the Home Office could and should be attending to include:

- the acute situation of destitute asylum-seekers, refused asylum-seekers and others without lawful leave, many of whom have been in the UK for very many years; and
- the plight of Zimbabweans who have been left in limbo in the asylum system, in many cases for many years, unable to work, in or facing destitution and homelessness, and many of whom on the recent ruling in *RN (Zimbabwe)* [2008] UKAIT 00083 are entitled to be recognized as refugees.

Finally, please note that ILPA's briefing on Baby Trafficking is available at <http://www.ilpa.org.uk/briefings.html>

Immigration Law Practitioners Association

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