

ILPA Submission to the Home Affairs Committee

March 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL

1. 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:

2. ILPA has to date produced several briefings on the Borders, Citizenship and Immigration Bill. Many of these relate to discrete provisions in the Bill, and amendments that have been tabled to those provisions. These briefings are available in the 'Briefings' section on our website at www.ilpa.org.uk and several of them are highlighted in the body of this submission so that Committee members may choose to consider briefings on specific areas of interest to them.
3. In this submission, we highlight in short form outstanding matters of interest and concern, which have been raised in the debates to date on the Bill – particularly at Committee stage in the House of Lords¹.

Regulation, oversight and accountability of UK Border Agency powers:

4. When establishing the agency status of what was the Immigration and Nationality Directorate, the Government insisted on the need for its powers to be matched by “*much stronger oversight*”², “*transparency*”³ and “*accountability*”⁴. In this Bill, the Government is introducing revised powers to be able to apply PACE Codes of Practice to immigration officials⁵. However, it first took such powers in 1999⁶

¹ The Bill was due to have, and almost, completed Committee stage on Wednesday, 4th March 2009.

² Liam Byrne MP, Minister for Immigration, Citizenship and Nationality *Hansard*, HC UK Borders Bill Committee, FiFth Sitting 6 Mar 2007 : Column 142

³ Lord Bassam of Brighton, Minister of State *Hansard*, HL Grand Committee 2 Jul 2007 : Column GC57

⁴ Liam Byrne MP, Minister for Immigration, Citizenship and Nationality *Hansard*, HC Second Reading 5 Feb 2007 : Col 591

⁵ Clause 22, HL Bill 15

⁶ Section 145, Immigration and Asylum Act 1999

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and has barely acted upon these. The application of PACE to officials exercising extensive policing and police-like powers is long overdue, and since private contractors increasingly exercise some of these powers PACE should be extended to them.

5. The Government has stated that it intends to make an order under powers in the Bill “to bring together in one place the PACE powers and safeguards to be applied in relation to the UK border force and its immigration functions”⁷. However, the Government says that contractors would be excluded, as would certain “administrative immigration processes”⁸. If the Government’s previously stated commitments to ensuring stronger oversight and accountability are to be achieved, it is high time that those exercising policing and police-like powers are subject to police-like standards.
6. Related concerns arise in connection with this Bill as to the role and remit of the Independent Police Complaints Commission⁹ and resourcing of the Chief Inspector of the UK Border Agency¹⁰. Independent investigation of serious complaints needs to be fully extended throughout the UK and to places overseas where the UK Border Agency operates, including at juxtaposed controls.
7. For further information please see ILPA Committee stage (HL) briefings on:
 - Part I Clause 22 (*Police and Criminal Evidence (PACE) powers*)
 - Part I Clause 22 (*complaints and misconduct, IPCC jurisdiction*)

Naturalisation:

8. The Government is proposing to introduce complex provisions to make unnecessary changes to the current naturalisation provisions¹¹. Committee stage has not provided any greater clarity as to the purpose or meaning of several of the terms and provisions in the proposed new naturalisation clauses. Key problems include:
 - a. The proposed new ‘probationary citizenship’ stage is unnecessary and adds complication since it is nothing more than a new name for ‘temporary leave’ which is also a stage on the route to citizenship.
 - b. Those who do not wish or cannot (e.g. because their current citizenship prohibits dual nationality) naturalise as British citizens would be subjected to extended delays on their route to ‘permanent residence’.
 - c. The length of time it would take for a migrant to complete the route to citizenship would, for many, be made more lengthy, variable and very

⁷ Lord West of Spithead, Minister of State *Hansard*, HL Committee 25 Feb 2009 : Column 263

⁸ Lord West of Spithead, Minister of State *Hansard*, HL Committee 25 Feb 2009 : Column 267

⁹ Clause 28, HL Bill 15

¹⁰ Clause 26, HL Bill 15 gives a much extended remit to the inspectorate, but it has not been made clear that the inspectorate is to be adequately resourced: see exchange between Baroness Hanham and Lord West of Spithead at *Hansard*, HL Committee 25 Feb 2009 : Column 292

¹¹ Part 2, clauses 37-39, HL Bill 15

uncertain. This uncertainty would be compounded by the proposal to extend the point before which migrants can access benefits and services (relating to welfare, education and housing).

- d. The provisions contain extensive powers for the Government to substantially lengthen the route to citizenship by regulations¹².
9. Stated objectives of the Government in creating a new naturalisation process (ensuring migrants seeking citizenship speak English, obey the laws and pay taxes¹³) do not require any change to the current process. Despite this, the Government is currently insisting on making changes by this Bill that are very complex, and with Government amendments during Committee stage¹⁴ have become even more complex.
10. For further information please see ILPA Committee stage (HL) briefings on:
 - New Clause before Clause 37 (*probationary citizenship*)
 - Clause 37 (*probationary citizenship*)
 - Clause 37 (*absences*)
 - Clause 37 (*continuous employment*)
 - Clause 37 (*temporary admission and pending refugee/human rights claims*)
 - Clause 38 (*absences and family association*)
 - Clause 39 (*qualifying period: activity condition*)
 - Clause 39(2) (*qualifying period: Henry VIII clause*)

British nationality:

11. The need to address longstanding anomalies in British nationality law remains pressing, and in significant part was highlighted by the Lord Goldsmith *Citizenship: our common bond* enquiry last year¹⁵. However. The next step after this Bill is to be immigration simplification, so the Bill is likely to provide the last opportunity for some considerable time to address a range of anomalies and injustices. The Government has indicated that it would, before Report, be looking closely at several of these to see if it was possible to address them now¹⁶.

12. For further information please see ILPA Committee stage (HL) briefings on:

- Part 2 Clauses 40 and 42 (*children born to members of armed forces*)
- Part 2 Before Clause 41 (*British National (Overseas)*)
- Part 2 Clause 41 (*descent through the female line*)
- Part 2 (*the Ilois: Chagos Islanders*)

¹² Clause 37, HL Bill 15

¹³ see Home Secretary's Foreword to *The Path to Citizenship: next steps in reforming the immigration system*, July 2008, p4

¹⁴ Amendment Nos. 50, 53, 57, 60, 64-76 and 106-108 on the Marshalled List for HL Bill 15 in Committee

¹⁵ See <http://www.justice.gov.uk/docs/citizenship-report-full.pdf>

¹⁶ See Lord Brett, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 737; the Minister gave similar responses to a number of amendments tabled on nationality law during that same debate.

- Part 2 (*stateless children of British nationals*)
- Part 2 (*stateless children of British citizens*)
- Part 2 (*acquisition by registration: minors*)
- Part 2 (*section 4B: modalities of registration*)
- Part 2 (*acquisition by registration: British nationals, Amendment 95*) [see also briefing listed below]
- Part 2 (*legitimacy*)
- Part 2 (*acquisition by birth or adoption: children of British nationals*)
- Part 2 (*acquisition by registration: British nationals, Amendment 101*) [see also briefing listed above]
- Part 2 Clause 43 (*good character: war wives and widows*)

Common Travel Area:

13. The Government insists that it is maintaining the Common Travel Area¹⁷, yet it is unclear what it means by that. Currently, the Common Travel Area is established in immigration law by the provision that “*a local journey*” within the Common Travel Area “*shall not be subject to [immigration] control*”¹⁸. The Bill would remove this provision¹⁹.

14. For further information please see ILPA Committee stage (HL) briefing on:

- Part 3 Clause 46 (*Common Travel Area*)

Restrictions on studies:

15. The Government says that it needs to tie foreign national students, who have come to the UK on Tier 4 of the points-based system, to a particular educational institution²⁰. It says this is necessary to manage sponsorship and other arrangements of the system so as to avoid abuse of Tier 4²¹.

16. However, the provision in the Bill²² goes much wider than this. It would allow any other restrictions on studies to be imposed. It would allow these restrictions to be imposed on any migrant with limited leave to enter or remain. For instance, workers, family members and refugees, who wished to undertake studies, could have this restricted. The Government’s opposition to amendments to limit the power in the Bill is simply that: “...*it is usual practice for the overall architecture of the immigration system to be set out in primary legislation, with the Immigration Rules containing the detail of how the power will apply. ...the ability to amend the Immigration Rules, rather than having to amend primary legislation, is an essential tool which is vital to ensure that necessary legislative changes can be implemented quickly and effectively...*”²³. However, this suggests that the provision

¹⁷ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 765

¹⁸ Section 1(3), Immigration Act 1971

¹⁹ Clause 46, HL Bill 15

²⁰ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 777

²¹ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 777

²² Clause 47, HL Bill 15

²³ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 777

needs to be implemented via the Immigration Rules; and that is not correct. Hence the need to expressly constrain the power in the Bill.

17. For further information please see ILPA Committee stage (HL) briefing on:

- Part 3 Clause 47 (*Students*)

Transfer of judicial reviews:

18. The Bill would allow for immigration and nationality judicial reviews to be transferred from the High Court to the Upper Tribunal²⁴, which is the second tier of the tribunal regime established in November 2008 under the Tribunals, Courts and Enforcement Act 2007. This could mean that judicial reviews are heard by judges who do not sit in the High Court. The Bill would allow for a mandatory direction by the Lord Chief Justice and Lord Chancellor whereby a class of cases were required to be transferred, and this would allow for a position whereby all immigration and nationality judicial reviews must be heard in the Upper Tribunal.

19. The provision in the Bill is premature, coming as it does before there is any opportunity to review the capacity and competence of the tribunal to whom it is intended to allow for transfer of judicial reviews. This is contrary to the agreement reached between Government and Parliament on what became the Tribunals, Courts and Enforcement Act 2007. In the words of one, among several peers who have made similar points: “*I regard [the provision] as a straightforward breach of faith with your Lordship’s House*”²⁵. The Court of Session judiciary in Scotland also regards the provision as premature.

20. For further information, please see ILPA Committee stage (HL) briefings on:

- Part 4 Clause 50 (*Judicial Review: Mandatory Transfer*)
- Part 4 Clause 50 (*Judicial Review: Nationality*)

Duty to safeguard and promote the welfare of children:

21. The efficacy of the provision in the Bill²⁶ is seriously constrained by the inclusion of the words “*in the United Kingdom*”²⁷, which would excuse UK Border Agency staff and private contractors from the duty to safeguard and promote the welfare of children in carrying out their duties overseas. The Government’s explanation for this is confused and inaccurate.

22. The Minister stated, referring to the duty and guidance under it, that: “*Clearly, when it comes to something such as getting a visa, or anything else that applies in this*

²⁴ Clause 50, HL Bill 15

²⁵ Lord Kingsland *Hansard*, HL Committee 4 Mar 2009 : Column 794; other peers supported the position that the clause is premature (Lord Thomas of Gresford, Lord Lloyd of Berwick and Lord Cameron of Lochbroom – see *Hansard*, HL 4 Mar 2009 : Columns 792, 796 and 798 respectively).

²⁶ Clause 51, HL Bill 15

²⁷ Clause 51(1)(a) and 51(4)(a), HL Bill 15

country, all these rules will apply”²⁸. This may, for instance, be significant in relation to trafficking cases, where a visa application is made to an overseas post for the purposes of trafficking a child. However, the plain wording of the provision in the Bill contradicts the Minister’s statement. Similarly, he said: “As for escorting children overseas, when it is carried out by UKBA staff or contractors, the duty will apply”²⁹. Again, that is contradicted by the plain words of the provision.

23. On the other hand, the Minister said: “What we cannot do is require the duty to apply on the soil of another country”³⁰. This too is inaccurate. The duty requires that the UK Border Agency, when exercising its functions shall have regard to its duty to safeguard and promote the welfare of children. The duty does not, as the Government has repeatedly made clear, introduce additional functions on the UK Border Agency. It can only, therefore, apply to children, in respect of whom the UK Border Agency is exercising functions, and only to the extent and in the context of those functions. It is no different to where one of the agencies, subject to the similar duty in section 11, Children Act 2004, escorts a child overseas, in which the agency (e.g. a local authority, police, probation) would still be required to exercise its functions towards the child having regard to its duty to safeguard and promote the welfare of that child.

24. For further information, please see ILPA Committee stage (HL) briefing on:

- Part 4 Clause 51 (*Children: ‘in the UK’*)

25. At Committee stage, peers expressed profound concern at the news that, just as the Government’s provision to safeguard and promote the welfare of children was being debated, the Government was withdrawing funding from the Refugee Council’s Children’s Panel³¹. The Minister stated: “We have agreed to fund [the Panel] to carry out substantially the same services as in previous years; the only significant change is that we will no longer fund it to liaise with local authorities on age assessment”³². The reason given was that the UK Border Agency will deal direct with social workers. The UK Border Agency already deals direct with social workers on age assessment; and this has caused significant problems in relation to age assessment as explained in the ILPA report *When is a child not a child?*³³, which report also explains the need for independence in age assessment which cannot be provided by local authorities³⁴. Without the Panel, many children wrongly assessed by social workers and the UK Border Agency, and held in

²⁸ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 822

²⁹ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 821

³⁰ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 821

³¹ See Baroness Hanham *Hansard*, HL Committee 4 Mar 2009 : Columns 830 and 834; other peers raised similar concerns (Lord Avebury, Earl of Listowel, Baroness Howe of Idlicote and Baroness Miller of Chilthorne Domer, *Hansard*, HL Committee 4 Mar 2009 : Columns 831, 832, 832 and 835 respectively).

³² Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 834

³³ A full copy of the report and an executive summary are both available in the ‘Publications’ section of the ILPA website at www.ilpa.org.uk

³⁴ One of the key points highlighted in the executive summary to *When is a child not a child? op cit* is the “potential conflict of interest between the requirement of social service departments to undertake age assessments and the obligation to provide services to children in need.”

detention, would not have had their wrong age assessment challenged. This would leave children detained, and wrongly treated as adults.

26. For further information on age disputes, please see ILPA Committee stage (HL) briefing on:

- Part 4 Clause 51 (*Children: age disputes*)

Trafficking:

27. The offence of trafficking in UK law³⁵ is inadequately drafted as it does not capture the trafficking of babies and young children. The Government acknowledges this³⁶, but has suggested that correcting this lacuna can be left to the Immigration Simplification Bill³⁷, which is expected in October 2009 but only in draft. There is no good reason why this lacuna should not be filled now.

28. For further information, please see:

- ILPA Second Reading (HL) briefing on Baby Trafficking: Borders, Citizenship and Immigration Bill
- ILPA further submission to Home Affairs Committee Enquiry into Trafficking (March 2009)³⁸

29. At Committee stage, peers also pressed the Government about the plight of children trafficked to work in cannabis factories in the UK. The Minister's response was: "*If the police were to encounter children in that situation, they would pursue the culprit who was doing and safeguard the children they found*"³⁹. However, this needs further attention because, despite CPS guidance, trafficked children have continued to be prosecuted in these circumstances⁴⁰.

Immigration Law Practitioners' Association

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³⁵ Section 4, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

³⁶ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 827

³⁷ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 827

³⁸ This submission is available in the 'Submissions' section of the ILPA website

³⁹ Lord West of Spithead, Minister of State *Hansard*, HL Committee 4 Mar 2009 : Column 828

⁴⁰ see <http://www.newstatesman.com/law-and-reform/2008/11/cannabis-farms-children>