ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

BORDERS, CITIZENSHIP AND IMMIGRATION BILL (Bill 115)

HOUSE OF COMMONS REPORT STAGE July 2009

ILPA BRIEFING on CITIZENSHIP

INTRODUCTION

ILPA provided a detailed briefing on citizenship for Second Reading of this Bill (which remains available in the 'Briefings' section at www.ilpa.org.uk). The focus of this briefing is upon discrete matters that were the subject of discussion during Committee stage. These are addressed under the following distinct headings (and Ministerial assurances which may usefully be sought are highlighted):

- Transitional protection
- Continuous employment
- Absences
- Active citizenship

Thereafter, there is an overview of the competing aims and principles, which the Government has advanced in relation to citizenship, so as to provide a broader context for considering the Bill's provisions and the discrete matters addressed here.

TRANSITIONAL PROTECTION

The House of Lords had introduced some transitional protection by inserting a new clause (clause 39, Bill 86), which aimed to maintain the current path to citizenship for those migrants who were already progressed well along the path when the Bill's provisions to amend the path are commenced. The Government moved for that clause to be removed at Committee, at which stage the Minister stated his intention that "*there shall be a new clause 39 or equivalent so that the House can agree with the principle* [under which transitional protection will be provided in the eventual Commencement Order]". Earlier the Minister gave clear assurances that those with ILR and those with outstanding applications for ILR will have two years in which to apply under the pre-existing requirements when the Bill's provisions are commenced; and outstanding applications for citizenship will be considered under those pre-existing requirements[1]. As regards those with temporary leave, who are yet to make an ILR application, the Minister said only:

> "*The transitional arrangements that we will put in place need to take on board the tests of reasonableness and fairness without moving the goalposts of legitimate expectation of the person with temporary leave.*"[2]

That appears to be a thinly veiled statement that the Government intends there shall not be transitional protection for migrants who are yet to make an ILR application when the Bill's provisions are introduced, excepting those who had been admitted under the Highly Skilled Migrants Programme (HSMP). As the Minister explained, the Government does not consider that the legitimate expectation (it now accepts for HSMP migrants) extends to non-HSMP migrants[3].

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[1] *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Columns 99-100
[2] *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 101
[3] The Minister stated that there "*is not necessarily a read-across to other temporary routes*" – *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 98

This should trouble those Members who share the concern expressed by Gwyn Prosser MP at Committee regarding[4]:

> "*…the intrinsic unfairness of using legislation and rule changes retrospectively, particularly where it affects individuals' real lives*"

Legitimate expectation is a significantly greater hurdle than fairness. In its 2008 judgment, the High Court reached its conclusion that the relevant changes to HSMP should not be imposed retrospectively because to do so would constitute "*conspicuous unfairness*" and "*an abuse of power*", which was not outweighed by "*any sufficient public interest*", and in doing so rejected the Government's argument that the issue before the Court was of such a "*macro-political*" nature as to exclude intervention by the Court[5]. The Court concluded this was not so because the numbers affected were small. Given the far greater numbers that would be affected by retrospective changes to the path to citizenship, the Government would be likely to renew its argument that the macro-political point did apply. In any case, if any transitional protection is limited to legitimate expectation, as explained by the Court in the HSMP cases, the degree of unfairness that may need to be shown before the protection is provided may well exclude very many of those whom Members have indicated should be protected.

Assurances sought:

The Minister has not yet made available the 'new clause 39', without which it is difficult to predict what assurances or amendments may or may not be needed. However, transitional provisions should provide protection on the basis of what is fair and reasonable (not merely what may meet the legitimate expectation hurdle); and, at a minimum should take account of the length of time individuals have been in the UK, delays that their applications may have been subjected to and any statements that have applied to them set out in letters or policies as to their being able to apply for citizenship or indefinite leave to remain in the future.

CONTINUOUS EMPLOYMENT

The Bill includes a new requirement of 'continuous employment'.[6] In response to concerns regarding those who may be made redundant or face a choice between harassment or exploitation at work and resignation, the Minister stated at Committee[7]:

> "*The Bill includes a power for the Secretary of State to treat people as meeting the continuous employment requirement even where that is not literally the case. Our view is that we should mirror the time period allowed under the points-based system for migrants to secure alternative employment. In other words, we would consider applying discretion where the total number of days of unemployment for the duration of the probationary citizenship period is 60 days or less. In some circumstances, we would consider applications where the total is more than 60.*"

Under the points-based system for migrant workers, someone who loses his or her job is at risk that his or her temporary stay is curtailed or not renewed. The guidance indicates that where he or she is able to find alternative employment within 60 days, these risks should be avoided. So why the need for any continuous employment requirement in this Bill? The Minister's response provides no answer. If a migrant's temporary stay were curtailed or not renewed, he or she would no longer be on the path to citizenship. If it is decided that his or her temporary stay should not be curtailed or should be renewed, why ought the migrant face a further risk that later (perhaps, months or years) down the line the Secretary of State may choose not to exercise his discretion?

Assurance sought:

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[4] *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 95
[5] *HSMP Forum v SSHD* [2008] EWHC 664 (Admin), paras. 58-61; and essentially the same points were made by the High Court in *HSMP Forum Ltd v SSHD* [2009] EWHC 711 (Admin)
[6] see new paragraph 1(2)(e) to be inserted by clause 39(2), Bill 115
[7] *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 107

The Minister should make clear that where it has been decided to renew or not to curtail a migrant's temporary stay by reason of a period out of work, e.g. because the period out of work is within the 60 days under the points-based system, then such a period out of work will not, of itself, be relied upon to refuse citizenship on the basis of the new 'continuous employment' criteria.

ABSENCES

The Bill changes the way in which absences from the UK may affect the path to citizenship[8]. Absences of 90 days are relevant under the current provisions and under the measures the Bill will bring in. The difference is that, currently, absences (except in the last 12 months before an application is made) may be averaged out over the qualifying period for citizenship. The Bill would preclude 90 days absence in any year over the qualifying period. This means if someone was posted abroad by their employer for more than 90 days or had to return to their home country for reasons of family crisis for such a period, he or she must start the qualifying period from the beginning (possibly causing several years' delay). Under the current regime, the ability to average out absences avoids this; and even if a 90 days absence is necessary in the last 12 months of the qualifying period, this will normally delay the qualifying period by less than a year.

Once again, the Minister's answer to legitimate concerns was that the Secretary of State would consider exercising discretion to waive the requirement[9]. However, even this was tempered by the indication that absences later in the qualifying period would be less likely to be waived than absences earlier in that period. In other words, the migrant worker who suffers a family crisis or is posted abroad in the first year of the qualifying period may avoid what would be a year or so delay; whereas the migrant worker who is absent for similar reasons in the sixth year of the qualifying period will likely be required to being the qualifying period all over again. In any event, unlike now, the migrant will not be able to predict what impact any absence may or may not have upon his or her path to citizenship unless or until he or she reaches what is (or what he or she had thought would be) the end of the qualifying period.

Assurance sought:

The Minister should make clear that where lengthy absences from the UK are necessitated by factors outside a migrant's control, such as a family bereavement or serious illness or such as a UK-based employer posting the migrant overseas, the fact that such absences occur close to the end of the qualifying period for citizenship will not of itself preclude the exercise of discretion to waive the requirement that the migrant ought not to be absent from the UK for more than 90 days in any 12 months period.

ACTIVE CITIZENSHIP

ILPA is opposed to the introduction of this requirement. It will introduce what is in essence a form of compulsory service, because of the consequences of significantly delaying the migrant's path to citizenship if he or she fails to comply; and it entails substantial risks to the detriment of migrants, the voluntary sector and the wider public by reason of bureaucracy, discrimination, exploitation and people being compelled into service for which they may be unsuited or, at heart, unwilling. These concerns have been developed in previous briefings and in the ILPA submission to the February 2008 consultation.[10]

A further complication arises from the combination of the active citizenship requirement and the Government's intention to introduce new (e.g. continuous employment) or change existing (e.g. absences) requirements such that migrants can no longer make reasonable predictions about the impact of events (e.g. redundancy, resignation due to exploitation and harassment at work, absences due to postings abroad or family crises overseas); and must wait until what is, or what they may expect to be, the end of the qualifying period before finding out whether discretion will be exercised in their case. For

[8] see new paragraphs 1(2)(b) and (3(2)(b) to be inserted by clauses 39(2) and 40(3), Bill 115
[9] *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 109
[10] The ILPA submission is in the 'Submissions' section at www.ilpa.org.uk dated May 2008; and briefings on the Citizenship provisions are in the 'Briefings' section – these latter include a June 2009 briefing for House of Commons Second Reading and significant parts of the January 2009 initial and February 2009 House of Lords Second Reading briefings.

example, the migrant worker who has undertaken voluntary work (on top of normal employment, and on top of caring for children or another family member) is likely to be justified in feeling very unfairly treated if and when informed that, despite this voluntary work, he or she must start the qualifying period all over again because discretion is not to be exercised in his or her case.

AIMS AND PRINCIPLES

In June 2007, the Government published an initial consultation on its project to simplify immigration law[11]. The consultation document set out various aims and principles that the Government considered key to any changes to immigration law. In February 2008, the Government published a further consultation on the simplification project, including in particular plans for changes to the path to citizenship[12]. That document restated the aims and principles set out in the earlier document.

Jacqui Smith MP, then Home Secretary, explained in her foreword to the February 2008 document that:

> "*We want to make the journey to citizenship simpler, clearer and easier for the public and migrants to understand. Our proposals to achieve this aim are an integral and central part of our wider work to overhaul the legal framework for immigration.*"

Aims and principles that were set out include[13]:

- to maximise transparency for applicants and the wider public
- to maximise clarity and predictability for applicants
- to maximise public confidence in a comprehensible system
- to minimise the need for decision-makers to exercise discretion

The February 2008 document also identified what the Government considered to be the three problems that changes to the path to citizenship should address[14]:

- the complexity of the path to citizenship
- lack of clarity as to the three stages of the path to citizenship
- insufficient incentive for migrants to complete the path to citizenship

At Second Reading of the Bill, however, Jacqui Smith MP was asked by Frank Field MP[15]:

> "*Will she have a chance this afternoon to develop the ideas that the Government clearly have in mind to encourage people to come here to work but to break the link whereby people who do so automatically become citizens?*"

In responding that she would take the opportunity to "*develop that argument*", the then Home Secretary announced that the Government would be introducing proposals "*on how to introduce a points-based system for the path to citizenship*".[16] At Committee stage, Phil Woolas MP, Minister for Borders and Immigration, developed this further where he said:

> "*The strategy is to try to break the automatic link that is in some people's minds, and in some cases in statute, between temporary stay and automatic right to citizenship, and to help the migrant to integrate.*"[17]

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[11] The 2007 *Simplifying Immigration Law* consultation documents are available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/

[12] The 2008 *The Path to Citizenship* consultation documents are available at: http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/

[13] see e.g. the June 2007 *Simplifying Immigration Law* (*op cit*), p 10; and the February 2008 consultation document (*op cit*), pp 8 & 39

[14] February 2008 *The Path to Citizenship* (*op cit*), p19

[15] *Hansard* HC, Second Reading, 2 Jun 2009 : Column 170

[16] *Hansard* HC, Second Reading, 2 Jun 2009 : Column 176

[17] *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 97

The Minister continued by emphasising that several problems identified by Members of the Committee were answered by the retention of discretion by the Secretary of State to waive the requirements that the Government seeks to introduce to the path to citizenship.[18]

What is now being said by Ministers exacerbates fundamental problems with the Government's proposals on citizenship. There is no automatic link between obtaining any type of temporary stay in the UK and having a right to citizenship[19]. The Government's consultation did not suggest any such link, and made no proposals for breaking any such link. What is now being advanced by Ministers is inconsistent with the aims and principles that were originally advanced and on which the consultation exercise was based. The likely result will be to introduce greater complexity, uncertainty and arbitrariness into the path to citizenship.

In conclusion, two years ago, the Government indicated that it valued a system that was transparent and provided clarity and predictability for migrants and public alike; and under which the need for discretion would be kept to a minimum. The following year, it reiterated these points and added that it intended to create a path to citizenship that was simpler and easier to understand and which would encourage migrants on that path.

What is being offered in this Bill is not simpler or easier to understand. Nor is it transparent. Nor does it provide clarity or predictability. Instead, under such a system migrants will be invited along a path to citizenship that contains several new pitfalls, which may severely delay their completion of that path. But to add to the uncertainty they will face, the Government intends that they should be invited to carry on along the path until what would ordinarily be its conclusion before it is revealed whether discretion may be applied in their favour or whether they will be asked to start the path again or extend it by several more years or denied the opportunity to continue on the path altogether. This uncertainty is compounded by the Government's intention that migrants should face longer and less predictable periods (i.e. all the time up until the point they may be given citizenship) during which they and their families will be excluded from services and benefits.

For further information, please contact:
Alison Harvey, General Secretary, alison.harvey@ilpa.org.uk 020-7251 8383
Steve Symonds, Legal Officer, steve.symonds@ilpa.org.uk 020-7490 1553

[18] see e.g. *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Columns 107 & 109

[19] Currently to naturalise as a British citizen, a migrant must first obtain indefinite leave to remain (ILR). Many forms of temporary stay do not provide any route to ILR. For those that do, the migrant must still satisfy the requirements of the Immigration Rules to obtain ILR; and in addition there are English language and knowledge of life in the UK requirements, and the migrant's applicant may be refused if he or she has committed any offence in the UK or breached the immigration laws. If a migrant is granted ILR, he or she may be able to apply for citizenship after one year; but any application must satisfy the requirements set out in the British Nationality Act 1981, including as to periods of absence from the UK, knowledge of the English language and life in the UK, compliance with immigration laws and being of good character. Moreover, in certain circumstances, a migrant may be deprived of either ILR or British citizenship – e.g. following a criminal conviction.