



**ILPA Proposed Amendments
Borders, Immigration and Citizenship Bill**

PART 2 (CITIZENSHIP)
Naturalisation – path to citizenship (clauses 39-42)

House of Commons Committee Stage

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.

ILPA is happy to assist Members of Parliament in considering and/or drafting other amendments of interest to them.

PROPOSED AMENDMENTS

Part 2 Citizenship *Acquisition of British Citizenship by naturalisation*

...

Page 29 line 3, leave out 'Acquisition of British Citizenship by naturalisation'

Leave out Clause 39

Leave out Clause 40

Leave out Clause 41

Leave out Clause 42

Purpose

To remove from this Bill those clauses that change the route to naturalisation as a British citizen. While further work would be needed to tidy up the Bill were these clauses removed, the amendments should be sufficient at this stage to indicate the decision of Parliament that these changes are premature.

Briefing Note

It was clear from the government amendments and the debates in the Lords that Government drafting and thinking on these amendments is not as far advanced as it ought to be and that Parliament was, in sum, being asked to buy a pig in a poke. With the Bill's introduction to the Commons, the Home Secretary revealed even more of the extent to which Government thinking is incomplete when announcing at Second Reading that *'...the Government will bring forward proposals before the summer recess on how we can take the next steps towards a points-based system for the path to citizenship...'* (*Hansard*, HC 2 Jun 2009 : Column 175 *per* Jacqui Smith MP). This provoked concern from all sides of the House (e.g. *Hansard*, HC 2 Jun 2009 : Column 177, 182, 195-196, 231-232 *per* Neil Gerrard MP, Chris Grayling MP, Chris Huhne MP and Damian Green MP). Given that the Government proposes to bring forward a draft bill in October, there is an opportunity to return to these provisions when thinking is more advanced and proposals are sufficiently developed for parliament to scrutinise them. This seems all the more appropriate given our understanding that the Government's current intention is to commence these provisions in December 2010.

PROPOSED AMENDMENT

New Clause before Clause 40

'(1) A person with probationary citizenship leave shall be treated as a person settled in the United Kingdom for the purpose of all regulations made under the –

- (a) the Health Services and Public Health Act 1968 (c. 46);
 - (b) the Education (Fees and Awards) Act 1983 (c. 40);
 - (c) the Education and Libraries (Northern Ireland) Order 1986 (SI 1996/594 (NI 3));
 - (d) the National Health Service (Charges to Overseas Visitors) Regulations 1989 (SI 1989/306);
 - (e) the Teaching and Higher Education Act 1998 (c. 30);
 - (f) the Education (Student Support) Regulations (Northern Ireland) 1998;
 - (g) the Learning Skills Act 2000 (c. 21);
 - (h) the Higher Education Act 2004 (c. 8); and
 - (i) the Higher Education (Northern Ireland) Order 2005 (SI 2005/1116 NI 5));
- (2) Section 115 of the Immigration and Asylum Act 1999 (c. 33) is amended as follows.
- (3) In subsection (9), after 'EEA State' insert 'or a person with probationary citizenship leave'.

Purpose

To ensure that if there is to be a probationary citizenship leave (a measure ILPA opposes as introducing unnecessary complications into the law) then those on this leave are treated as citizens on probation and have the rights and entitlements of citizens to education at home student rates, to health care as for a settled person and to be benefits.

Briefing Note

The provisions set out in subparagraph (1) of the amendment would need to be expanded to ensure full access throughout the UK. However, the amendment is sufficient to raise the issue of access to services and benefits, and to highlight that without access to services and benefits there is no substance in the creation of a new status (probationary citizenship leave). The importance of access to services and benefits is made all the more important in view of the ‘snakes and ladders’ effect (referred to in the Lords, *Hansard*, HL Second Reading 11 Feb 2009 : Column 1134 *per* The Baroness Hanham) whereby other measures to be introduced will risk that migrants may spend very lengthy times on probationary citizenship, e.g. by being unable to undertake the activity condition which will extend the probationary period or by being required to commence the entire ‘qualifying period’ for citizenship all over again – e.g. because of an absence of more than 90 days or a break in employment (see amendments, below).

Section 115, Immigration and Asylum Act 1999 defines ‘a person under immigration control’ and then provides that such a person shall not have access to listed benefits. Section 115(9) sets out who is excluded from the definition.

PROPOSED AMENDMENT**Clause 40 Application requirements: general**

...

Page 29, line 23 before “number” insert “average”

Purpose

To 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. 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.

RELATED PROPOSED AMENDMENT**Clause 41 Application requirements: family members etc.**

...

Page 31, line 36 before “number” insert “average”

Purpose

To 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. 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. The difference between this and the proposed amendment to Clause 40 above is that this clause is dealing with naturalisation by family members.

PROPOSED AMENDMENT

Clause 40 Application requirements: general

...

Page 29 line 27, after period insert

‘, save that periods during which A was in the United Kingdom with leave other than that conferring qualifying immigration status shall be disregarded for the purpose of considering whether A had qualifying immigration status for the whole period’

Purpose

To ensure that where a person spends two periods of time in the UK with a qualifying immigration status but in between is lawfully in the UK with an immigration status that is not a qualifying immigration status, the two qualifying periods can be aggregated. For example a worker who ceased to work and did a full time degree (for example a Masters of Business Administration) would thus be able to aggregate the two periods as a worker. Without this amendment, the clock would reset to zero when the person ceased to have a qualifying immigration status and they would have to start qualifying all over again, although during that time they were in the UK with lawful leave.

PROPOSED AMENDMENT

Clause 40 Application requirements: general

...

Page 29, line 28 leave out “probationary citizenship leave” and insert “limited leave to enter or remain”

Purpose

To *probe* what probationary citizenship leave adds to the path to citizenship. It is no more and no less than limited leave to remain, everything that can be done with probationary citizenship leave could be done with limited leave to remain, so it is not at all clear why it is needed. While consequential amendments would be needed to remove the concept, this is enough to raise the point in debate.

ALTERNATIVE PROPOSED AMENDMENT

Clause 40 Application requirements: general

...

Page 29, line 28, leave out subsection (d)

Purpose

To *probe* what probationary citizenship leave adds to the path to citizenship. With the abolition of indefinite leave to remain, and with it the concept of settlement first, citizenship second, it is not at all clear why it should matter what type of leave a person has at the date of application. While consequential amendments would be needed were this amendment accepted, this is enough to raise the point in debate.

PROPOSED AMENDMENT

Clause 40 Application requirements: general

...

Page 29, line 32, leave out subsection (e).

Purpose

To remove the requirement that a person granted probationary citizenship leave be required to be in continuous (not defined) employment throughout the currency of that leave. Although clause 40(7) provides an opportunity to waive this requirement it remains a problem. It will induce uncertainty in employees and may lead to people remaining in situations of exploitation, or vulnerable to such exploitation, because of fears that the discretion will not be exercised in their favour. There is particular concern about Migrant Domestic Workers. At the moment their visa allows them to change employer, but they are limited to changing to another job as a Migrant Domestic Worker. Given the particular vulnerability of this group to exploitation and abuse there is particular concern at the implications of the provision for them. Also an opportunity to probe the government's intentions on creating different types of 'probationary citizenship leave'. If they want a whole range of types, surely that is what they have in the current different forms of limited leave.

ALTERNATIVE PROPOSED AMENDMENT

Clause 40 Application requirements: general

...

Page 29, line 34, leave out 'been in continuous employment' and insert 'not been in breach of the conditions of that leave'.

Purpose

To *probe* the notion of 'continuous' employment. Also to *probe* why the condition is felt to be necessary.

Briefing note

A person granted limited leave for employment purposes will have terms and conditions attached to that leave. For example, a worker under Tier 2 will have their leave curtailed if out of employment for more than 60 days, unless they have less than six months leave left to run. There are strict rules on changing job. This is time in which they can find another job. A EEA A8 or A2 national in his/her first year in the UK, by contrast, is only considered to be in continuous employment if they are in employment with breaks of no more than 30 days, although for A8 nationals there is nothing to stop them changing jobs.

PROPOSED AMENDMENT

Clause 40 Application requirements: general

...

Page 30, line 44 after 'entitlement' insert –

“;

(g) a pending application for leave to remain pursuant to an asylum claim, a human rights claim or in reliance on Council Directive 2004/83/EC; or

(h) leave to remain outside the immigration rules

(1A) An asylum claim and a human rights claim have the meaning given in section 113 of the Nationality, Immigration and Asylum Act 2002. A pending application is one that has not yet been determined or that is the subject of a pending appeal within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002.

Purpose

To ensure that time spent by refugees or those claiming on human rights grounds prior to determination of the application and any appeals, where the outcome of the claim is that the person is given leave in the UK, counts as part of the qualifying period for citizenship. Such people may have had to wait years for a decision. Why should the delay in deciding asylum claims slow down their route to citizenship? Such people would still be required to satisfy the requirement that they were not at any time during the qualifying period in the UK in breach of the immigration laws. A refugee is a refugee once the criteria in the 1951 UN Convention Relating to the Status of Refugees are met; the asylum determination procedure is one of recognition. Under that Convention, a refugee is not to be penalised for having been forced to use false documents to flee.

PROPOSED AMENDMENT

Clause 41 Application requirements: family members etc.

...

Page 31, line 39, leave out subsection (c)

Purpose

To ensure that those who have probationary citizenship leave other than as a family member and subsequently change to being a family member can aggregate their qualifying periods of leave.

Briefing

For those naturalising other than as a family member it is possible to aggregate qualifying periods of leave. The same is not true for a person naturalising as a family member. Thus, for example, a person in the UK as a worker who gave up work to marry or form a civil partnership would have to start the qualifying period for naturalisation all over again. This will disadvantage some people. For example a person who has probationary citizenship leave as a worker, with the requirement that s/he remain in 'continuous employment' (see clause 40(2) inserting new paragraph 1(2)(e)) could not fulfil this condition if s/he gave up work on marriage to have children. S/he could no longer pursue that route to naturalisation and would have no choice but to start the qualifying period all over again. A particular disadvantage of this is that under the *Path to Citizenship* proposals, the person would be denied access to services for a longer period because s/he had formed a relationship with a British Citizen or person with permanent residence leave.

PROPOSED AMENDMENTS

Clause 42 The qualifying period

...

Page 34, line 30, leave out subparagraph (3).

Page 34, line 34, leave out the words "In the case of an applicant who meets the activity condition".

Page 34, line 38, leave out subparagraph (5)

Page 34, line 43, leave out subclauses (2) to (5)

Purpose

This group of amendments remove all reference to the activity condition and thus remove it from the Bill. Also an opportunity to *probe* whether a person will be permitted to fulfil the activity condition at any stage during the qualifying period. If so, the case for ‘probationary citizenship leave’ is weakened still further and the case against it as a wholly unnecessary complication is strengthened.

PROPOSED AMENDMENT

Clause 42 The qualifying period

...

Page 34, line 40 leave out “otherwise than for payment”

Purpose

To *probe* the government’s intentions as to the activity condition and in particular to highlight

- a) that it is inimical to the character and culture of volunteering
- b) that it disadvantages those who work long hours in their jobs (for example migrant domestic workers) and thus have difficulty in complying with the condition thus assisting in making the case for the removal of the activity condition.

PROPOSED AMENDMENT

Clause 42 The qualifying period

...

Page 35, line 3 leave out “different’ and replace with ‘lower’

Purpose

To constrain what is an Henry VIII power. The possibility of lengthening the time that it takes for people to qualify for citizenship is unconstrained. There is nothing to prevent the Executive lengthening to a period well beyond the average person’s lifetime. In the light of the *Path to Citizenship* proposals, a possibility of denying that person access to services (such as education at home student rates, health care and access to welfare benefits). This could be used to starve people out of the country. Given the breadth of its eventual implications and the attendant risks of breaches of the common law and of human rights law, as well as interference with the laws on public health etc. this power should not be delegated from parliament to the Executive.

PROPOSED AMENDMENT

Clause 54 Commencement

...

Page 47, line 29 at end insert

‘and must

- (c) make provision for those who on the appointed day have leave to enter or remain in the United Kingdom
 - (i) in a category in which an application for indefinite leave to remain may be made under the Immigration Rules HC 395 as in force on the appointed day
 - (ii) as refugees and persons with humanitarian protection, or as persons with a pending application for leave to remain pursuant to an asylum claim or a human rights claim provided that when the application is no longer pending the person is granted leave to enter or remain in the UK to make an application for indefinite leave to remain in accordance with the provisions of those rules as in force on the appointed day or as a refugee or person with humanitarian protection.
- (d) An asylum claim and a human rights claim have the meaning given in section 113 of the Nationality, Immigration and Asylum Act 2002
- (e) A pending application is one that has not yet been determined or that is the subject of a pending appeal within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002.’

Purpose

To ensure that those who are currently in the UK with leave in a category that currently leads to settlement (to Indefinite Leave to Remain) will be able to progress to Indefinite Leave to Remain and at that point be deemed to have Permanent Residence (under new paragraph 11(4) of Schedule 1 to the British Nationality Act 1981 inserted by the Bill).