



BORDERS, CITIZENSHIP AND IMMIGRATION BILL (Bill 86) HOUSE OF COMMONS SECOND READING 2 June 2009 ILPA BRIEFING - GENERAL

Introduction

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 has provided several briefings on the Bill during its passage through the House of Lords. These remain available in the 'Briefings' section on our website at www.ilpa.org.uk

This briefing addresses the provisions of the Bill in order. A separate briefing on Citizenship addresses those provisions in Part 2 which are intended to make changes to the path to citizenship for migrants in the UK who wish to naturalise or to settle in the UK.

A general failing of the Bill is the attention given to matters, which are not urgent and are insufficiently thought through, which may be contrasted with longstanding and ongoing failures – including the failure to address the widespread problem of destitution among refused asylum-seekers¹ and others who are present without leave to enter or remain and refusal to face up to responsibilities in relation to asylum-seekers from Zimbabwe² and other countries where it is clear that removal is neither safe nor practicable³.

Part I Border Functions

Information and data sharing

The UK Border Agency replaced the Border and Immigration Agency in April 2008. In so doing, the new agency took responsibility for customs at the UK border. Part I extends the powers of the Agency to enable its officers to perform a range of immigration, customs and revenue functions. During the Bill's Second Reading debate in the House of Lords, the Lord

¹ For further information please see www.stillhuman.org.uk

² Including most recently the issue of a policy instruction to UK Border Agency decision-makers not to follow the current Asylum and Immigration Tribunal (AIT) country guidance, despite there being no change in the relevant country conditions on which the AIT's guidance was given; and despite the Secretary of State having informed the Court of Appeal immediately prior to the instruction that the AIT guidance was to be followed – ILPA has written to the Secretary of State on this matter on 14 April 2009, and a response remains outstanding

³ The official asylum statistics continue to show substantial numbers of refusals in respect of particular countries, despite widely recognised human rights abuses, markedly higher success rates on appeal and no or very few returns – e.g. for 2008, the figures in respect of Eritrea show 2,280 asylum claims were made; only 315 claims were refused for reasons other than that the claimant should return to another EU Member State to pursue the asylum claim there; of all appeals determined, 50% were successful; no returns to Eritrea, and only 45 removals of refused asylum claimants (all to other EU Member States)

West of Spithead, Parliamentary Under-Secretary to the Home Department, explained that there has been substantial and increasing cooperation between officers at the border exercising these various powers over the last 12 months⁴. However, the Bill would allow for individual officers to be designated to perform all of these functions⁵. Thus, the powers that are available to certain individual officers may be greatly extended; and protections against unnecessary disclosure of information between officers exercising different functions removed.

PACE Codes of Practice (clauses 22 et seq):

In 1999, the Lord Williams of Mostyn first assured Parliament that PACE Codes of Practice would be adapted and introduced to cover immigration officers in the exercise of their police-like powers⁶. Successive Acts since that time have increased the powers available to immigration officers; and the Bill will extend such powers further. In the intervening time, the Government has introduced little in pursuance of the assurance given by the Lord Williams⁷, though from time to time Parliament has been given further promises that the application of PACE is under further consideration⁸. There is an urgent need for PACE Codes to be applied in this area. What was originally introduced as a power to apply these codes should now be made a duty. If immigration officers are insufficiently trained or competent to be made publicly accountable to standards that apply to police exercising similar powers, they ought not to be exercising such powers at all.

Short-term holding facilities (clause 25)

This clause would amend the statutory definition of a short-term holding facility. These facilities are currently used to detain people immediately on arrival at a port, pending consideration of their application for leave to enter the UK, or immediately prior to removal from the UK. They include 'holding rooms' at ports, where people may be detained for no more than 24 hours. The current definition limits these facilities to places where people are held under immigration powers only and for no longer than seven days⁹.

The new definition would allow for people to be held in these facilities under any (including non-immigration) powers of detention, and for periods in excess of seven days. There are three problems with the new definition, none of which has been adequately addressed by the Government during the Bill's passage to date:

- These facilities are not designed to hold people for in excess of seven days (or 24 hours, in holding rooms).
- They are not designed to hold a mix of people for varying periods and under varying powers.
- The new definition would potentially include a range of places (e.g. prisons, police cells and immigration removal centers) within it because these may hold someone under immigration powers for less than seven days, and it would be unclear what would be the relevant rules or guidance in respect of the treatment and welfare of people held in such places¹⁰.

The clause was introduced into the Bill at Committee stage in the House of Lords. The Minister then described himself to be "*a little confused*"¹¹ over short-term holding facilities

⁴ *Hansard* HL, Committee 25 Feb 2009 : Column 213 *et seq*

⁵ clauses 3 & 11

⁶ *Hansard* HL, Report 28 July 1999 : Columns 1592-3 (Immigration and Asylum Bill)

⁷ Two Orders have been made: The Immigration (PACE Codes of Practice) Direction 2000 and Immigration (PACE Codes of Practice No. 2 and Amendment) Direction 2000 (on taking, retention and destruction of fingerprints).

⁸ *Hansard* HC, Standing Committee 15 Jun 2004 : Column 205 *per* Beverley Hughes MP

⁹ section 147, Immigration and Asylum Act 1999

¹⁰ The UK Border Agency has recently consulted on Rules for short-term holding facilities

¹¹ *Hansard* HL, 25 Feb 2009 : Column 290

and said he would write to peers. At Report stage, by which time the Minister had not written, he twice referred to “*confusion*” in relation to the period of time for which someone might be detained at a port¹² and said he would write. Ultimately, his letter was not sent until after Report stage¹³. This clause was not considered at Third Reading in the House of Lords.¹⁴

Chief Inspector of UK Border Agency (clause 28)

The Inspectorate was recently established under powers introduced by the UK Borders Act 2007¹⁵. The remit of the Inspectorate is to be significantly extended by the Bill; and it is vital that additional resources are made available to the inspectorate commensurate with that extension of remit.

Independent scrutiny of serious misconduct allegations (clause 30)

This clause would allow the Secretary of State to extend the remit of the Independent Police Complaints Commission to investigate complaints of serious misconduct by the UK Border Agency and private contractors in the exercise of immigration, customs or revenue functions.

There remain gaps and inconsistencies in the provision for independent investigation of complaints of serious misconduct against the UK Border Agency and private contractors. There is no provision where misconduct occurs overseas – e.g. at juxtaposed controls¹⁶ or in the course of enforced removals. Provision for independent investigation is not uniform throughout the UK¹⁷. The Lord West of Spithead said that consideration was being given or should be given to various of these matters¹⁸, but this remains outstanding.

Part 2 Citizenship

The first four clauses of Part 2 relate to naturalisation. Please see ILPA’s separate Second Reading briefing on Citizenship.

The remainder of Part 2 concerns other aspects of British nationality law. Last summer, in publishing the draft (partial) Immigration and Citizenship Bill, the Government had indicated an intention to produce a single consolidating piece of legislation in relation to immigration and nationality law matters. However, the consolidating (referred to as a ‘simplification’) Bill that is to be published in draft before the end of this year will only concern immigration law¹⁹. The current Bill is, therefore, likely to provide the last opportunity for some considerable time to address anomalies and injustices in British nationality law.

Anomalies and injustices, which have been raised and to which ILPA has briefed during the passage of this Bill include:

- The denial of British citizenship to Chagos Islanders born in exile

¹² *Hansard* HL, 25 Mar 2009 : Columns 697 & 698

¹³ Report stage was concluded on 4 April 2009. The Minister’s letter, dated 7 April, is available at <http://deposits.parliament.uk/>

¹⁴ The Bill was considered between 5.50pm and 6.20pm – see *Hansard* HL, 22 April 2009 : Column 1535 et seq

¹⁵ sections 48 et seq

¹⁶ Where UK officials and private contractors exercise immigration powers at EEA ports with the agreement of the relevant foreign government

¹⁷ As was highlighted in the House of Lords, there are different provisions for Northern Ireland and Scotland, see *Hansard* HL, Committee 25 Feb 2009 : Columns 300-301

¹⁸ *Hansard* HL, Committee 25 Feb 2009 : Column 295 (viz. juxtaposed controls) and Column 297 (viz. escorted removals)

¹⁹ *Hansard* HL, Second Reading 11 Feb 2009 : Column 1207 (per the Lord West of Spithead)

- The exclusion from passing of citizenship by British fathers to their illegitimate children
- The denial of British citizenship to certain stateless children born to persons of British nationality other than British citizenship
- The application of good character requirements for children and Hong Kong war wives and widows

Part 3 Immigration

Common Travel Area (clause 51)

This clause was substituted by an opposition amendment at Report stage for a provision that would have allowed for the introduction of immigration controls on journeys by air and sea within the Common Travel Area (i.e. journeys between the UK, Ireland, Guernsey, Jersey and the Isle of Man). The new clause prevents the introduction, by an Order in Council, of immigration controls on journeys by land (i.e. across the Ireland-Northern Ireland border), at the same time as removing from the Bill the power to introduce such controls on air and sea journeys.

The Government's explanation of why it has sought the power to introduce immigration controls on air and sea journeys within the Common Travel Area (CTA) is inadequate and confused. The Lord West of Spithead sought to explain that the original clause, empowering the introduction of these controls, would not effectively dismantle the CTA²⁰. He also said that it was necessary to include power to introduce such controls on routes to and from the Crown dependencies (Guernsey, Jersey and the Isle of Man) because to introduce power on some routes within the CTA and not on others would prejudice "*the status of the CTA*"²¹. However, he indicated that there was no need for controls on these routes²². He also indicated that the key routes where controls were needed were across the Ireland-Northern Ireland border²³ – which, of course, is a land border (so not relevant to controls imposed on air and sea journeys). He also suggested that the key routes in need of scrutiny were between Northern Ireland and the remainder of the UK²⁴ – which, of course are journeys within the UK (so not relevant to controls on CTA journeys).

The CTA has lasted throughout the period of the conflict in Northern Ireland, and is valued, in particular, by many Irish families who live and travel between Ireland and the UK. Nothing the Government has said or published gives any cause for dismantling or undermining the CTA now.

Restrictions on studies (clause 52)

The Government seeks the power to impose requirements that migrant students, in the UK under tier 4 (students) of the points-based system, must remain with the educational institution which is their sponsor under that system, unless they have sought and been granted permission by the UK Border Agency to change their sponsor to a new institution.

However, the clause would provide the UK Border Agency with the power to impose any restriction on the studies of any migrant (whether or not he or she is here for the purpose of studying under the points-based system). The clause is an example of the Government taking unnecessarily wide powers, which extend far beyond a defined and narrow aim. The Minister's explanation for legislating in this way is that this is "*usual practice for the overall architecture of the immigration system to be set out in primary legislation, with the Immigration*

²⁰ Hansard HL, Committee 4 Mar 2009 : Column 765

²¹ Hansard HL, Committee 4 Mar 2009 : Column 766

²² Hansard HL, Committee 4 Mar 2009 : Column 766; Report 1 Apr 2009 : Column 1111

²³ Hansard HL, Committee 4 Mar 2009 : Column 769

²⁴ Hansard HL, Committee 4 Mar 2009 : Columns 768-69

Rules containing the detail of how the power will apply”²⁵. However, that approach was broken when the Government introduced what is now section 16 of the UK Borders Act 2007²⁶.

Further anticipated problems are that, whereas it is accepted that students must be able to change institutions in appropriate circumstances (e.g. where a course is discontinued at a particular institution or the relevant tutor moves to another institution), there needs to be a system for students to apply to the UK Border Agency to change their sponsor which is neither slow nor costly. The Government has provided no direct answer to these concerns²⁷.

Miscellaneous and General

Transfer of judicial reviews (clause 55)

The Government lost a vote in the House of Lords which meant that this clause was substituted at Report stage for a provision that would have allowed for the transfer of all immigration and nationality judicial reviews from the High Court to the new Upper Tribunal, where these judicial reviews could in future be dealt with by judges (including immigration judges) other than judges who sit in the High Court.

ILPA is opposed to the transfer of these judicial reviews²⁸. The current clause would allow for some judicial reviews to be transferred, but limited to judicial reviews in relation to fresh claims for asylum²⁹.

The current clause would also ensure that the Lord Chancellor could not exercise his power under section 13(6) of the Tribunals, Courts and Enforcement Act 2007 to restrict asylum and immigration appeals from the Upper Tribunal to the Court of Appeal³⁰. ILPA supports this aspect of the clause without which the Court of Appeal could be prevented from rectifying an error of law in the decision of the Upper Tribunal.

Trafficking (clause 56)

At Report stage, the Government agreed an amendment to include this clause in the Bill³¹. The clause will amend section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and close the current lacuna whereby trafficking in babies and very young children may escape prosecution under the trafficking offence there provided. ILPA welcomes this clause.

Duty regarding the welfare of children (clause 57)

This clause provides for a duty upon the UK Border Agency to have regard to the need to safeguard and promote the welfare of children. It is unduly restricted by the inclusion of the words “*who are in the United Kingdom*”. The duty applies only when the functions specified by the clause are being discharged.

²⁵ *Hansard* HL, Committee 4 Mar 2009 : Column 777

²⁶ allowing for reporting and residence conditions to be imposed on any person with limited leave to remain

²⁷ The Minister’s response at Committee stage was that the system “*should be very straightforward*”, but he provided no direct assurance regarding either timescales or fees, see *Hansard* HL, 4 Mar 2009 : Column 780

²⁸ See our February 2009 House of Lords Second Reading briefing on Transfer of Judicial Reviews available on the Briefings page of www.ilpa.org.uk

²⁹ This compromise was advanced after the Lord Chief Justice had written to peers indicating that it was these judicial reviews which he and the judges of the Administrative Court were most concerned about

³⁰ clause 55(4)

³¹ *Hansard* HL, 1 Apr 2009 : Column 1137 et seq

If the UK Border Agency is exercising functions in respect of a child, who is outside of the UK (e.g. at an entry clearance post, at juxtaposed controls³² or in the course of an escorted removal), there is no good reason why the relevant officials should not also have regard to this duty. Indeed, failure to do so may have results as harmful to the child as any failure in respect of a child in the UK, including granting a visa enabling a child to be trafficked to or via the UK or handing a lone child over to authorities in another country who have made no arrangements for the child's welfare (and/or are not even aware of the child's age)³³.

ILPA is a member of the Refugee Children's Consortium and supports the Consortium's briefing on this clause/

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³² see footnote 15

³³ e.g. see http://www.bindmans.com/fileadmin/bindmans/user/News_stories_-_PDFs/Deported_asylum_seeker_BBC201207.mht