

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

### **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 works 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](http://www.ilpa.org.uk)

This briefing addresses Part 2 of the Bill on Citizenship, and specifically those provisions in Part 2 which are designed to introduce the new path to citizenship.

The new path to citizenship offers nothing of value which is new. The stated aims of the Government are largely, and better, met by the existing path. This Bill offers complication, bureaucracy and uncertainty. A preferred response would be to reject what is on offer, giving the Government an opportunity to improve on these proposals in time for the long-promised Immigration Simplification Bill<sup>1</sup>. Failing this, there is an urgent need for Parliament to ameliorate or cause the government to abandon some of the most detrimental aspects of what is proposed.

### **The path to citizenship**

The path to citizenship consultation opened in February 2008<sup>2</sup> and the Government's response was published in July 2008. In her Forewords to both documents, the Home Secretary, stated:

*"We want to make the journey to citizenship clearer, simpler and easier for the public and migrants to understand."*

The Executive Summary to the consultation set out the intention of encouraging the take-up of citizenship for the purpose of promoting integration by migrants<sup>3</sup>. In her Foreword to the Government's response the Home Secretary described the proposed system as:

*"...one in which the expectation will be on newcomers to 'earn' the right to stay by learning English, paying taxes, obeying the law and contributing to the community."*

The proposed changes were stated to form part of the Government's immigration simplification project<sup>4</sup>. The key principles of this project have been described by the Government as being to maximise:

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<sup>1</sup> Frequent reference has been made to this Bill; and at Third Reading in the House of Lords, the Lord West of Spithead once again confirmed the intention to publish it in draft in the coming autumn, see *Hansard* HL, 22 Apr 2009 : Column 1542

<sup>2</sup> The original consultation document and Government's response are available at: <http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/>

<sup>3</sup> It said: "We want to encourage people with the right qualifications and commitment to take up citizenship so that they can become fully integrated into our society."

<sup>4</sup> The initial consultation on simplification and Government's response are available at: <http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/>

*“transparency, for staff within the [UK Border] Agency, for applicants, for other stakeholders and the wider public...efficiency, with a system friendly to all its users, within which it is quicker and easier to make the most appropriate decision...clarity and predictability for applicants...plain English...public confidence in a comprehensible system”<sup>5</sup>*

The Bill will not deliver on the stated aims or principles. The Bill and the changes it would introduce, are not easier to understand and are technical and complex. The new path to citizenship would be unpredictable, unfriendly to users and difficult for anyone to understand.

### **Probationary citizenship**

Under the provisions of the Bill<sup>6</sup>, this will be the new, second stage on the path to citizenship. But the probationary citizenship Emperor is without any clothes.

The question was put clearly at Second Reading in the House of Lords, by the Baroness Hanham:

*“The Bill also includes a completely new terminology of ‘probationary citizenship’, rather than the better understood phrase, ‘limited leave to remain’. It is not at all clear why this change has been made or what its implications are. ... one of the rationales put forward is that probationary citizenship will be an explicit stage which recognises that migrants are on a journey and need to continue earning the right to become British citizens, which is very much what the Minister said. But ‘limited leave to remain’ was also a stage on a journey, so what is the great difference that makes this part of the legislation worthwhile?”<sup>7</sup>*

The Lady Hanham’s question remains unanswered. The reason is simple. There is no need for probationary citizenship. It adds nothing to the path to citizenship. It is no more than a continuation of how the path will start for all migrants – a period of limited leave. If the intention is merely that migrants should spend longer on limited leave, nothing but confusion is served by disguising this by dividing the extended period of limited leave into two identical parts but with differing names.

The terminology adopted may be understood to imply that the migrant is on a trial period of citizenship or has done something wrong and at risk of being deprived of his or her citizenship. Neither implication is correct. A migrant at the probationary citizenship stage envisaged by the Bill will not have the entitlements of citizenship nor any greater responsibilities or entitlements than the migrant still at the first stage of the path to citizenship (limited leave).

### **Access to services and benefits**

A person on probationary citizenship will not have full access to services and benefits but will be treated as a person on temporary leave. Thus access to services such as education at home student rates, social welfare entitlements and free health care will be delayed by a minimum period of one additional year as compared to the current path and in many cases very much more, as explained below. The period during which migrants, and their families, may be at risk of deprivation (e.g. following redundancy, or accident or injury) under the proposed new path to citizenship is variable, potentially extensive and highly unpredictable. For those who continue to come to the UK, this cannot promote integration and may result in increased marginalisation.

### **Active citizenship – the activity condition**

The Bill would introduce an activity condition such that migrants will be required to undertake voluntary work or face substantial delays before an application for citizenship can be made, during which delays full access to services and benefits will continue to be denied.

Introducing the Bill to the House of Lords, the Lord West of Spithead, Parliamentary Under-Secretary at the Home Office, described this aspect of the proposed new path to citizenship as “*complex*”<sup>8</sup>. The Bill’s

<sup>5</sup> These principles are listed at page 10 of the initial consultation on simplification and as Annex A to the Government’s response to that consultation

<sup>6</sup> see, e.g., new paragraph 2(2)(d) & (e), Schedule 1, British Nationality Act 1981 to be introduced by clause 40(2)

<sup>7</sup> *Hansard* HL, 11 Feb 2009 : Column 1135

<sup>8</sup> *Hansard* HL, Second Reading 11 Feb 2009 : Column 1131

passage through the House of Lords has not ameliorated any complexity. The design group to which the Minister referred<sup>9</sup> when highlighting the complexity at Second Reading in early February has not in the intervening months resolved this.

A fundamental objection to the activity condition that it effectively compels 'voluntary' work. If the activity condition is not met, a migrant must spend a minimum of two additional years before he or she can apply for citizenship and gain full access to services and benefits. During these additional two years, the migrant's position remains precarious since the risks built into the proposed new path to citizenship of having to start the path all over again (see below viz. 'Qualifying period') continue. In addition to these concerns, active citizenship entails a number of serious risks including that:

- Its establishment, maintenance and regulation will lead to bureaucracy, and thereby delays and expense.
- The compulsion to meet the activity condition will expose vulnerable migrants to exploitation.
- The activity condition will impact disproportionately on certain groups, with the potential for discrimination on grounds of age, race and sex.
- The most marginalised will be among the least able to satisfy the condition, accentuating their marginalisation by delaying their citizenship.
- Child and other care responsibilities will be subordinated to the need to satisfy the condition.

### **Permanent residence**

In essence, this is to be the new name for what is now called indefinite leave to remain. However, under the Bill<sup>10</sup> it ceases to be a stage on the path to citizenship and becomes an end point; an alternative to citizenship.

Currently, indefinite leave to remain is a stage on the path to citizenship, and usually a migrant will be able to apply for citizenship after one year of indefinite leave to remain. Not everyone does. Some people do not see their long-term future as being in the UK or are undecided. For others, their country of origin does not allow dual nationality. Others simply cannot afford the substantial fee (e.g. £720 for an adult; £1,180 for a parent and one child; £1,310 for husband and wife and one child) to apply for citizenship<sup>11</sup>.

Under the Bill, permanent residence would not be a stage on the path to citizenship. It would be an alternative to citizenship; and it would take at least two years longer to obtain permanent residence than to obtain citizenship. Thus it would have the following effects:

- Any migrant whose nationality precludes dual citizenship will either have to abandon his or her original citizenship or be excluded from full access to services and benefits for at least two years longer than other migrants (and at least three years longer than would be the case on the current path to citizenship).
- Similarly for any migrant who cannot afford to pay the fees to apply for citizenship.
- Refugees, who under current policy may apply for indefinite leave to remain without payment of a fee, will in future be required to pay a substantial fee in order to acquire any settled status<sup>12</sup>.

### **Qualifying period**

This is a question of how long it takes to qualify for citizenship or permanent residence.

- The qualifying period will be longer for permanent residence than for British citizenship
- The qualifying period will be variable depending on fulfilling the 'activity condition'
- The length of the period can be extended, without limit, by regulations<sup>13</sup>.

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<sup>9</sup> *Hansard* HL, Second Reading 11 Feb 2009 : Column 1131

<sup>10</sup> See new paragraph 2A(1)(c), Schedule 1, British Nationality Act 1981 to be introduced by clause 40(11)

<sup>11</sup> The fees current from 6 April 2009 are given at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/britishcitizenship/feesfrom060409>

<sup>12</sup> The current Government thinking, as explained at the National Asylum Stakeholders Forum on 14 May 2009, is that refugees and others granted a protection status should (as now) have to pay the fee if applying for citizenship

<sup>13</sup> see new section 41(1)(bc), British Nationality Act 1981 to be introduced by clause 42(2)

- The period will be unpredictable and the chances of qualifying at the end of it precarious because of requirements that must be met throughout the period as described below. This was described in the House of Lords as akin to a game of ‘snakes and ladders’<sup>14</sup> (on closer inspection, the board seems bereft of ladders and covered with snakes).

### **Qualifying period – absences**

The new path to citizenship would require that a migrant is not absent from the UK for more than 90 days in any 12 months. lengthy periods during the qualifying period<sup>15</sup>. Of itself, this is not new. The critical difference from the current position is that the Bill would preclude averaging out any absences over the qualifying period. Currently, at the time of an application for citizenship, a migrant must not be absent for more than 90 days during the last 12 months; and must not be absent for greater than an average of 90 days during the entirety of the qualifying period. Under the Bill, any period of absence of greater than 90 days during each 12 months’ period during the qualifying period will stop the clock and mean a person has to start qualifying all over again. This could be because a person is required to work overseas (see example 1) or where the death or illness of a relative overseas may require an extended absence.

These consequences for migrants on the new path to citizenship could only be avoided by the exercise of discretion to waive the requirement regarding absences. However, the Government’s intention is revealed by the Lord Brett’s response:

“...we will not examine that requirement too closely where the absences take place in the early part of the qualifying period...”<sup>16</sup>

This is of barely any comfort. The further along the path to citizenship, the more draconian the impact of applying the requirement rigidly.

#### **Example 1**

Andrea is on the current path to citizenship. She is granted permission to come to the UK to work. Her work requires her to spend time overseas. She completes five years limited leave to remain as a worker. She applies for and is granted indefinite leave to remain. During the last four of these years, she is absent from the UK for a total of 300 days (within the 90 days average). During the first 12 months of her indefinite leave to remain, however, she is required to be overseas for her employer for 110 days. The current path to citizenship does not allow her to average out this absence in the final 12 months. Although she has completed the current qualifying period, she must wait until she has completed a 12 months period during which she has not been absent for more than 90 days. Her application for citizenship is delayed, but assuming she is not required to be overseas for further, very substantial periods, the delay is likely to be relatively short (less than one year). In any case, she has reached the point of having a settled status in the UK.

Belinda is on the new path to citizenship. She is also granted permission to come to the UK to work. She too is required by her employer to spend time overseas. In addition to her work, she manages to undertake sufficient ‘voluntary’ work to satisfy the activity condition. The total qualifying period for her to make an application for citizenship would, therefore, ordinarily last no longer than Andrea. Unfortunately for Belinda, during the sixth year of her qualifying period, her employer also requires her to spend 110 days overseas. She cannot average out any absences. She must start the entire qualifying period all over again. Although this is the only year during which her employer requires her to be overseas for in excess of 90 days, her qualifying period is extended by almost six years. Moreover, throughout this time, Belinda has not reached the point of having a settled status. Thus she takes nearly twelve years to qualify (or up to 14 or 15 if she does not fulfill the activity condition, 18 or 19 years if she is seeking permanent residence) compared to Andrea’s nearly seven years to qualify.

### **Qualifying period – continuous employment**

Currently, a migrant who is permitted into the UK to work is required to continue to be here for that purpose. If the migrant loses his or her job, the rules grant a short period during which he or she can

<sup>14</sup> Hansard HL Second Reading 11 Feb 2009 : Column 1135 per the Baroness Hanham

<sup>15</sup> see new paragraphs 1(2)(b) and 3(2)(b), Schedule 1, British Nationality Act 1981 to be introduced by clauses 40(2) and 41(3)

<sup>16</sup> Hansard HL, Committee 2 Mar 2009 : Column 513

continue to be here while looking for new employment<sup>17</sup>. The Bill does not propose to change this. But it would introduce a new requirement of ‘continuous employment’<sup>18</sup>. Loss of a job could mean that the migrant is required to start qualifying all over again.

**Example 2**

Charlie is on the current path to citizenship. He is granted permission to come to the UK to work. After four years’ employment, however, his employer’s business folds and he is made redundant. However, Charlie is able to find work within one month and, under the current rules, Charlie’s permission to be in the UK is unaffected. This is important because if Charlie remains out of work for too long, his permission may no longer be valid or may be curtailed so that his presence in the UK is no longer lawful (and he may be required to leave the UK). After a further year, Charlie can apply for indefinite leave to remain and then for citizenship after a further 12 months.

Daniel is on the new path to citizenship. He is also granted permission to come to the UK to work. He too is made redundant after four years’ employment because his employer’s business folds. Under the rules (assuming these are not changed), his permission to be in the UK is unaffected. This is important for the same reasons it is important for Charlie. However, while Daniel’s presence in the UK remains lawful, unlike Charlie, Daniel’s short time out of work may still affect his path to citizenship. His employment has not been continuous, so the new ‘continuous employment’ requirement may mean he must start the qualifying period all over again.

**Qualifying period – qualifying immigration status**

The requirement of ‘lawful’ presence during the qualifying period is not new<sup>19</sup>. Under the Bill, in addition, a migrant must have a particular type of immigration status, a ‘qualifying immigration status’ throughout the qualifying period<sup>20</sup>. Having a different type of immigration status at some stage could set the clock to zero again.

**Example 3**

Elizabeth is on the current path to citizenship. She is granted permission to come to the UK to work. However, after three years, she and her employer concur that it would be beneficial to both for her to have a study break in order to undertake an MBA. She, therefore, switches her immigration status to a student status for one year. Afterwards, she returns to work and switches back to a worker status. After five years she may apply for indefinite leave to remain; and after a further one year for citizenship.

Freda is on the new path to citizenship. She is also granted permission to come to the UK to work. She too takes a study break for one year’s study for an MBA, and returns to her employer after that year. Her immigration status also switches like Elizabeth’s. However, Freda has broken her period of qualifying immigration status. On her return to work after attaining her MBA, unlike Elizabeth, Freda must start the qualifying period for citizenship all over again.

**Refugees**

Two discrete matters were raised in the House of Lords regarding the impact of the new path to citizenship upon refugees and others granted protection in the UK. Neither has been adequately addressed by the Government.

Refugees generally spend a substantial period (of several months, and in some cases of many years) in the UK prior to entering the first stage along the path – a grant of limited leave. Effectively the qualifying

<sup>17</sup> e.g. UK Border Agency sponsor guidance, indicates that 60 calendar days will be given to secure new employment for a migrant under the points-based system (tier 2) in specific circumstances contemplated in the guidance; this guidance is available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pbsguidance/guidancefrom31mar09/sponsorapplicationsguidance.pdf?view=Binary>

<sup>18</sup> see new paragraph 1(2)(e), Schedule 1, British Nationality Act 1981 to be introduced by clause 40(2)

<sup>19</sup> see new paragraphs 1(2)(f) and 3(2)(e), Schedule 1, British Nationality Act 1981 to be introduced by clauses 40(2) and 41(3)

<sup>20</sup> see new paragraphs 1(2)(c) and 3(2)(c)(ii), Schedule 1, British Nationality Act 1981 to be introduced by clauses 40(2) and 41(3)

period for refugees is, therefore, substantially longer than for others because of the time (usually spent on temporary admission) before the person is recognized as a refugee. As was put to the Government in the House of Lords, time spent on temporary admission (or in detention) pending a successful resolution of an asylum claim ought to count towards the qualifying period as it does now<sup>21</sup>. Under the new path to citizenship it will not count because temporary admission is not a qualifying immigration status<sup>22</sup>.

Some refugees are prosecuted and convicted of immigration offences, which they could not avoid in order to get to the UK to claim asylum and for which they are often sentenced to significant terms of imprisonment. This continues to occur in circumstances which are in breach of the Refugee Convention<sup>23</sup>. Such convictions and imprisonment ought not to prejudice the path to citizenship.

### **Transitional arrangements**

A matter which was, to a limited extent, addressed by an opposition amendment in the House of Lords is the question of transitional arrangements<sup>24</sup>. Many migrants are on the path to citizenship now. Some of these will still be on the path to citizenship when the Bill takes effect, and others will by then have joined them on that path. The opposition amendment seeks to protect those who have either reached the stage of Indefinite Leave to Remain or are within 12 months of being able to apply for Indefinite Leave to Remain at the time the Bill takes effect. At Third Reading in the House of Lords, the Lord West of Spithead indicated the Government would return to this matter in the House of Commons<sup>25</sup>. However, the Government has not given any detail of what transitional arrangements it proposes to introduce<sup>26</sup>.

### **For further information, please contact:**

Alison Harvey, General Secretary, [alison.harvey@ilpa.org.uk](mailto:alison.harvey@ilpa.org.uk) 020-7251 8383

Steve Symonds, Legal Officer, [steve.symonds@ilpa.org.uk](mailto:steve.symonds@ilpa.org.uk) 020-7490 1553

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<sup>21</sup> This was the intention behind Amendment 24 moved by the Lord Hylton at Report, see *Hansard* HL, 25 Mar 2009 : Column 712 *et seq*

<sup>22</sup> see new paragraphs 2A and 4A, Schedule 1, British Nationality Act 1981 to be introduced by clauses 40(11) and 41(5)

<sup>23</sup> One example of this was highlighted last year by the judgment of the House of Lords in *R v Asfaw* [2008] UKHL 31; and in March 2009, ILPA, Refugee and Migrant Justice and Asylum Aid wrote jointly to the Attorney General's Office and CPS in relation to others wrongly prosecuted in similar circumstances

<sup>24</sup> Clause 39 was introduced by opposition amendment

<sup>25</sup> *Hansard* HL, 22 Apr 2009 : Column 1537

<sup>26</sup> At Committee, the Lord Brett indicated that the Government accepted a need for transitional provisions but refused to explain what would be provided or who would be protected, and said that no decision would be taken until the commencement order giving effect to the Bill was produced, see *Hansard* HL, 2 Mar 2009 : Column 540

**ANNEX A**  
**(The current and proposed new path to citizenship)**

The following is taken from the Home Affairs Committee's Fifth Report of Session 2008-09 *Borders, Citizenship and Immigration Bill*, 21 April 2009 HC 425 and is itself an extract from an earlier ILPA briefing:

*Currently naturalisation involves three stages:*

- *A period of temporary (or limited) leave<sup>27</sup>. 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 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 now.*
- *Another period of temporary leave. This is, however, given a new name – probationary citizenship.*
- *Finally, British citizenship or permanent residence.*

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<sup>27</sup> 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.