

BORDERS, CITIZENSHIP AND IMMIGRATION BILL – HL BILL 29**HOUSE OF LORDS REPORT****PART 2 – Naturalisation
(in particular, clauses 39 to 41)****Introduction:**

Part 2 (clauses 39 to 41) provides for new provisions in respect of naturalisation. These provisions are to implement the new path to citizenship, which the Government first outlined in the February 2008 Green Paper and consultation document *The Path to Citizenship*¹.

Part 2 also makes provision in respect of other discrete matters of nationality law. These are not addressed in this briefing. However, ILPA has provided separate briefings in respect of amendments that have been tabled for Report stage.

This briefing is designed to provide some further background to the short briefing notes provided in respect of the amendments [nos. **23 to 41**] tabled for Report stage, which notes are set out in ILPA's annotated list of amendments to Parts 1 & 2 of the Bill. Those amendments concern the naturalisation provisions in Part 2.

ILPA briefings are available in the 'Briefings' section at www.ilpa.org.uk

General – the path to citizenship:

In the Foreword to the UK Border Agency's July 2008 response to *The Path to Citizenship* consultation², Jacqui Smith MP, Home Secretary, explained the Government's intentions in introducing changes to naturalisation. She said:

*"...we will implement the next phase of reform: creating a new **path to citizenship**, 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."*

She summed up the general purpose of the Government's proposals:

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

The provisions in clauses 39 to 41 should, therefore, be assessed against this general purpose of making naturalisation easier to understand. This can be put to

¹ Available at:

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/>

² see fn. 1

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the test by both considering the specific detail of the provisions and the responses that have been provided by Ministers in the debate to date, particularly at Committee stage. It is clear that clauses 39 to 41, which are long and complex, do not satisfy the Government's intentions. The debate at Committee stage has not provided clarity. The 'journey to citizenship' proposed in this Bill is not easy or easier to understand.

This is no small matter. If naturalisation is made complex, the prospect that migrants on the path to citizenship misunderstand what is expected of them and get into needless difficulties is accentuated. Such difficulties may cause delays to their progress to citizenship, or require them to start their progress all over again. This is the warning that was given by the Baroness Hanham at Second Reading – that migrants:

“will end up in a game of snakes and ladders, by which they may fall down and have to start the process all over again.”³

This will cause injustice to them and their families. It will also undermine the aim of “*greater integration*”, which was highlighted by the Lord Brett at Committee stage⁴. Some of these difficulties may be alleviated by discretion to waive requirements for naturalisation in individual cases. However, while this may prove necessary, it will not contribute to a greater understanding of naturalisation on the part of migrants or the public.

In any event, peers are seriously disadvantaged in considering the naturalisation provisions in Part 2 as it is clear that so much is to be left to later guidance and regulations. It is only possible to speculate as to whether such guidance and regulations will bring greater or lesser clarity, but the starting point set out in this Bill is not promising.

There is or should be no urgency in forcing through these provisions. The aims set out by the Home Secretary – that migrants should learn English, pay taxes, obey the law and contribute to the community – are already integral parts of the naturalisation, with one exception. The exception is that the 'activity condition' (clause 41) in the Bill is new.

A further overview of the provisions on naturalisation in this Bill is provided in our January 2009 Initial Briefing and February 2009 Second Reading Briefing. These remain available on our website.

Probationary citizenship:

ILPA has briefed to the difficulties inherent in this concept – see our February 2009 briefing on (what was) “Clause 37 (probationary citizenship)”. This remains available on our website.

Probationary citizenship is no more than another name for temporary or limited leave. As such it contributes to the complexity of the Government's naturalisation proposals because it gives the impression of being something new and different when it adds nothing of substance; and compounds this by use of the terms 'probationary' and 'citizenship' which on their face have strong and suggestive connotations. Under the Government's proposals, what is it that would be required of migrants during their

³ *Hansard*, HL 11 Feb 2009 : Column 1135

⁴ *Hansard*, HL 2 Mar 2009 : Column 510

second period of temporary or limited leave that is renamed 'probationary citizenship' that would not be required of them during their first period of temporary or limited leave that is not so renamed? What is it, that is part of the naturalisation process that the Government wants to introduce, that cannot be introduced without renaming the second period of temporary or limited leave as 'probationary citizenship'?

Continuous employment:

This requirement would be introduced into naturalisation by these provisions, yet the Government has to date failed to explain what 'continuous employment' means. ILPA has briefed to the difficulties inherent in this concept – see our February 2009 briefing on (what was) "Clause 37 (continuous employment)". This remains available on our website.

The failure by the Government to explain what is meant by 'continuous employment' or why the requirement is necessary, increases the prospect that this requirement will contribute significantly to the "*snakes and ladders*" experience of migrants in the future on the journey to citizenship.

Activity condition:

ILPA has briefed to the difficulties inherent in this concept – see our February 2009 briefing on (what was) "Clause 37 (qualifying period – activity condition)". This remains available on our website.

At Committee stage, the Lord Brett said:

*"...there is no mandatory requirement for any migrant to undertake active citizenship; migrants who are unwilling to undertake any form of active citizenship can simply choose not to do so. They are not prevented from qualifying for citizenship but it will take them two years longer than for those who choose to undertake citizenship activities."*⁵

But it is not so straightforward. While the activity condition is not mandatory, a two years delay (meaning it may take someone 8 years before acquiring citizenship; or if they cannot take a second nationality 10 years to acquire permanent residence) is very substantial. As was raised by peers in debate, the prospect is that migrants are compelled into undertaking prescribed activities.

Refugees and those granted humanitarian protection:

At Committee stage, peers raised two particular concerns regarding those recognised as refugees or granted humanitarian protection:

- that time spent waiting for a decision on their asylum claims should be counted towards the qualifying period for naturalisation; and
- that refugees prosecuted on account of illegal entry, or related offences, where they were effectively compelled to offend since there was no lawful means available to them to escape persecution and enter the UK in order to claim asylum should not have their qualifying period delayed or their naturalisation prohibited on account of that prosecution.

⁵ *Hansard*, HL 2 Mar 2009 : Column 560

In respect of the first of these matters (time spent in the UK pending resolution of an asylum claim), the Lord Brett indicated during the debate that the Government would table its own amendments at report⁶. Amendments nos. **28-30** and **33-34** are the amendments now brought forward. However, these amendments merely provide for discretion whereby in exceptional circumstances the period during which the claim was pending may be counted towards the qualifying period. Since refugees (with the exception of the small number of Gateway refugees) and those granted humanitarian protection cannot obtain leave to enter the UK before arriving here, the path to citizenship for these groups is effectively longer than for others – by however many months (or years) that it may take for their asylum claims to be resolved and their status recognised.

In respect of the second of these matters (prosecution relating to method of entry to the UK), the Lord Brett misunderstood the point that was raised in the debate or misunderstood the naturalisation provisions being brought forward. He said:

“...on the question of penalties for refugees, the Bill does not penalise them... Their qualifying period does not start until they are granted leave as a refugee. Therefore, the requirement not to be in breach of immigration laws does not become relevant for naturalisation until later, when that period has begun – in other words, beyond the point at which the status has been given.

The UK Border Agency's July 2008 response to *The Path to Citizenship* consultation⁷ states (at page 16):

“we will stop any migrant from progressing towards citizenship if they have received a custodial sentence...”

“we will slow down the progress through the system by one year for all individuals convicted of crime resulting in a non-custodial sentence unless there are truly exceptional circumstances...”

(emphasis in the original)

Refugees continue to be prosecuted and imprisoned for offences related to their method of entry to the UK, including in circumstances where that prosecution and sentence is contrary to the UK's obligations under Article 31.1 of the Refugee Convention, which provides that:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened..., enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

Indeed, the House of Lords judgment in *R v Asfaw* [2008] UKHL 31 reveals an example of how the UK law and practice has expressly denied the protection of Article 31.1 to some refugees.

The general point is that many refugees have no choice but to use illegal methods of travel and entry in order to escape persecution. The naturalisation provisions may introduce a further penalty on top of the wrongful prosecution of these refugees by denying them any prospect of naturalisation or delaying this. Moreover, those who

⁶ *Hansard*, HL 2 Mar 2009 : Column 538

⁷ see fn. 1

are fleeing similarly serious harms, but harms which fall outside the reach of the Refugee Convention, do not have the protection of Article 31.1 (even in theory). Yet these individuals, who qualify for humanitarian protection, may have no more choice than the refugee in the methods to which they resort to escape torture or other serious harm.

Conclusion:

This briefing is intended merely to supplement the observations set out in our general briefing on those amendments to Parts 1 & 2 which have been tabled for Report stage. In particular, these supplement our observations on amendments nos. **23 to 41**.

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