



Borders, Citizenship and Immigration Bill
House of Lords Committee
Part 2 Citizenship
Clause 39 The qualifying period
Amendment to Clause 39(2)

ILPA supports the following amendment, laid in the names of the Lord Avebury, the Baroness Falkner of Margravine, the Baroness Hanham and the Viscount Bridgeman:

Amendment 84 Page 31, line 43, leave out subsections (2) to (5)

ILPA supports the following amendment, laid in the names of the Lord Avebury, the Baroness Falkner of Margravine:

Amendment 85 Page 32, line 3 leave out “different” and replace with ‘lower’

PURPOSE

Amendment 84 would remove the Secretary of State’s power to make regulations pertaining to the activity condition. It would thus mean, *inter alia*, that the government could not change the qualifying period for citizenship.

Amendment 85 would ensure that the government could only reduce the qualifying periods for citizenship, not lengthen them.

BRIEFING

Clause 39(2) is a Henry VIII power: it enables the amendment of primary legislation by secondary legislation. It is made subject to the affirmative procedure. But those familiar with parliamentary proceedings will be aware that the affirmative procedure is not the panacea for all delegations. Secondary legislation attracts less attention from the public and scrutiny in the Commons is often in a small committee off the floor of the House. The Hansard Society in its 2008 Report *Law In the Making* noted:

*“...the scrutiny of delegated legislation was considered by many to be relatively weak...As Baroness O’Neill of Bengarve surmised, delegated legislation ‘intimidates and is ignored in equal measure’”*¹

¹ *Laaw in the making : influence and change in the legislative process*, Alex Brazier et ors, The Hansard Society, 2008, page 196.

The possibility of lengthening the time that it takes for people to qualify for citizenship is unconstrained on the face of the Bill.

The Home Office discusses the provision in its memorandum to the House of Lords Committee on Delegated Powers and Regulatory Reform². This Memorandum highlights the dangers of presenting the citizenship provisions in isolation from the government's proposals to curtail access to services during the qualifying period.

Nowhere in the Explanatory Notes to this Bill or the Memorandum to the Delegated Powers Committee does the government draw attention to its proposals, set out in the *Path to Citizenship* consultation, that a person be denied access to services (such as education at home student rates, health care and access to welfare benefits).³ Nor does it draw attention to the wider implications of having limited leave rather than settled status: for example that a child born to parents on probationary citizenship will not be born British, unlike a child born to parents with Indefinite Leave to Remain.

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 placed in secondary legislation.

The Home Office Memorandum to the Delegated Powers Committee says

*'Clause 39(2) inserts new section 41(1)(bc) into the BNA 1981, under which regulations may be made which amend the length of the qualifying time period - both the default qualifying period, and the period by which it may be reduced for those who meet the activity condition;'*⁴

No mention of lengthening these periods, but both could be lengthened. The qualifying periods set out in the clause are in any event not the longest time a person could wait to apply for citizenship. If a person is absent from the UK for more than 90 days in any one year s/he will have to start the qualifying period, at whatever length that period is set, all over again.

Article 6 of the 1997 European Convention on Nationality⁵ provides

"Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application."

² House of Lords Delegated Powers and Regulatory Reform Committee, Third Report of session 2008-2009 Appendix 1 Borders Immigration and Citizenship Bill HL

www.publications.parliament.uk/pa/ld200809/ldselect/lddelreg/29/2904.htm

³ The *Path to Citizenship: next steps in reforming the immigration system*, Home Office February 2008, Chapter 5

⁴ [www.publications.parliament.uk/pa/ld200809/ldbills/015/en/09015x-b.htm#index link 43](http://www.publications.parliament.uk/pa/ld200809/ldbills/015/en/09015x-b.htm#index_link_43)

⁵ CETS 166, see

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=166&CM=&DF=&CL=ENG>

In the words of Andrea Eagle MP, then Parliamentary Under-Secretary of State for the Home Department, speaking during debates on what became the Nationality, Immigration and Asylum Act 2002,

*'...the 1997 European convention on nationality, which the UK was instrumental in negotiating and we wish to ratify and sign.'*⁶

The UK has neither signed nor ratified the Convention, and its enthusiasm for doing so has faded over time, although it was not dead in 2006 when Tony McNulty MP, Minister of State said during the passage of what became the Immigration, Asylum and Nationality Act 2006,

*"We have not yet ratified and we shall have to reflect, in the light of all the nationality legislation in this Bill, on whether it will be possible to do so. There may be a reservation in respect of our powers of deprivation. There may well be scope to ratify, but we shall have to look."*⁷

The Convention, which came into force on 1 March 2000 and has been ratified by 18 European member States, including Austria, Denmark, Germany, The Netherlands and Portugal, and signed by a total of 28 (signature, under the Vienna Convention on the Law of Treaties 1969⁸, prohibiting introducing terms less favourable in matters covered by a Convention than those that prevailed at the date of signature) sets out common aspirations for European States. In this clause, the government wants to take powers that would allow it to extend the qualifying period beyond the ten years.

The Committee on Delegated Powers and Regulatory Reform pointed out another anomaly in the clause. The powers to change the period with, and the period without, the activity condition independently of each other, could

*14. ... leave paragraph 4B making separate but identical provision for persons who had, and for persons who had not, satisfied 'the activity provision', without any advantage conferred on the former over the latter in terms of the qualifying period. While the delegated power in clause 39(3) might not necessarily be inappropriate on that ground, its exercise would seem to produce a somewhat odd result which is not explained in either the Notes or the memorandum. **We therefore draw attention to this aspect of the power, so that the House might press the Minister for more details of the circumstances in which it might be used.'***

In the *Path to Citizenship* consultation paper⁹, the government said

'98(2) There is not enough incentive for migrants to complete the journey to citizenship.'

One would need incentive indeed to battle through all the hurdles to naturalisation created by this Bill. There should be no delegated power to make them more onerous.

⁶ House of Commons Committee Stage, Nationality Immigration and Asylum Bill , 30 April 2002, cols 55 – 61

⁷ Session 2004-2005, Standing Committee E, 7th sitting, 27 October 2005 am, col. 272

⁸ The UK has signed and ratified that one – see www.fco.gov.uk/en/about-the-fco/publications/treaties/vienna-convention-law

⁹ *The Path to Citizenship : next steps in reforming the immigration system*, Home Office February 2008, page 19, paragraph 98(2)

The amendment would give the government power, subject to the affirmative procedure, to make the periods shorter. No wider power should be given.

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