ILPA BRIEFING
20th January 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL

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.

Introduction:

The Borders, Citizenship and Immigration Bill contains a disparate number of additions and amendments to the UK's customs, immigration and nationality laws, while the promise of consolidating immigration legislation, which the Government accepts to be urgently needed, remains outstanding.

This initial briefing addresses discrete issues within our expertise and of particular concern, being:

- Part 2 – Citizenship
- Part 4 – Judicial review (clause 50)
- Discrete further questions and concerns

Part 2 – Citizenship:

There are three ways to become British. By birth, by registration, and by naturalisation. This Part is concerned with all three, by amending the British Nationality Act 1981, but the main focus is on naturalisation: becoming British when an adult because of ties to the UK developed during a person's lifetime.

ILPA is pleased that the government is now doing what we urged them to do in 2002 and allowing those born overseas to British mothers to register as British, regardless of their date of birth[1]. Registration is thus the mechanism by which those still living will be able to address the gender historic discrimination that treated those born to British mothers differently from those born to British fathers.

The Bill would also introduce opportunities for the children born to British armed forces personnel, whatever the nationality of their parents, to register as British. However, it is intended that this would apply only to children born after the relevant

[1] Clause 41 Descent through the female line. See also *Hansard* HC Report 30 March 2008 *Ms Deborah Philips* col 602ff

clauses[2] have come into force. In addition there is discretion for the Secretary of State to waive certain requirements for naturalisation for individual members of the armed forces or for other people who have performed 'exceptional' 'Crown Service'[3]. More detail in the Explanatory Notes might have contributed to the better understanding of these provisions.

At the moment people move, via tests including knowledge of life and language and residence requirements, from temporary leave in a particular category, to Indefinite Leave to Remain (settlement) in the UK. They can then, if they wish, make an application to naturalise as British, at which point they must satisfy further tests including tests of 'good character'[4]. Partners of British citizens can qualify for naturalisation after three years, those in other categories after six years (five years temporary leave and a year of settlement). There are related provisions for those in the service of the Crown overseas[5].

The Bill would change the current law, and thus begin to implement the Government's *Path to Citizenship* proposals[6]. Parliament is at a disadvantage in scrutinising the proposals in this Bill because the changes in the Bill appear isolated from the wider agenda for change to follow in this area – most notably, that those who are not British citizens (or in the new category of permanent resident described below) will be denied access to a range of services (for example education at home student rates, social welfare benefits and possibly health care)[7]. This Part is also testimony to how, without consolidation, clauses are so unintelligible on their face that any scrutiny requires an advanced degree in immigration and nationality law.

The proposal is that people will pass from temporary leave to a new temporary category, mis-named *probationary citizenship* leave[8]. The tests for passing from temporary leave to probationary citizenship mirror those that currently apply to pass from temporary leave to Indefinite Leave to Remain. As this is a temporary category, those with probationary citizenship will not, unless express provision is made, enjoy the access to services enjoyed by those who are now settled here, or are British citizens. Nor is probationary citizenship as general as the current Indefinite Leave to Remain. A worker may have that permission provided they

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[2] Clauses 40 and 42. On both clauses, see the Ministry of Defence Command Paper of July 2008, *The Nation's Commitment: Cross-Government Support to our Armed Forces, their Families and Veterans* www.mod.uk/NR/rdonlyres/415BB952-6850-45D0-B82D-C221CD0F6252/0/Cm7424.pdf

[3] Defined in s 50 of the British Nationality Act 19081: service of the Crown whether in Her Majesty's dominions or elsewhere.

[4] See s 6 of, and Schedule 1 to, the British Nationality Act 1981.

[5] See, for example, s 6 of, and Schedule 1 to, the British Nationality Act 1981.

[6] See the documents at www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/ . See also the short and easy to read *Making Change Stick*, at www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/makingchangestick.pdf. This was the document that accompanied the Draft (partial) Immigration and Citizenship Bill. The draft clauses have been changed from those set out in that Draft (partial) bill. An important reference document is the Lord Goldsmith's review *Citizenship Our Common Bond* see www.justice.gov.uk/docs/citizenship-report-full.pdf

[7] The clearest explanation is to be found in *Making Change Stick Op. cit* - www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/makingchangestick.pdf

[8] See clause 37 inserting new paragraph 2(2)(d) into paragraph 2 of Schedule 1 to the British Nationality Act 1981.

continue (without interruption) in employment. A family member may have that permission provided that the family relationship does not break down. They can then apply to naturalise as British citizens, or, if there are reasons why they do not want to do this (for example they wish to retain their nationality of birth and their country of birth does not allow dual nationality) to become permanent residents, although this is not described in any detail in the Bill. The tests for those wishing to become British citizens or permanent residents are broadly the same with the important exception that it appears that family members must continue to have the family relationship and workers to work[9]. There is provision for people to aggregrate probationary citizenship leave in different categories[10], but of course they must qualify in one category or another. Thus, for example, a person who had lived here for many years but whose relationship had broken down, or a person unable to continue working because of age or infirmity, might find themselves in difficulty. So much is left to secondary legislation that it will be hard for Parliament to get to the bottom of what is intended, and, of course, nowhere more than in immigration, intentions may change.

The current provision that partners of British citizens can naturalise more quickly than other people will be replaced by a power to describe in regulations those with a 'relevant family association'[11] who can benefit from the quicker route. The minimum time periods to qualify as British will be as now (three years for those with a relevant family association, five years for others[12]) but only those who participate in 'prescribed activities'[13], to be defined in regulations, will benefit from those minimum periods, others must add two years to the period it will take them to become British citizens (or enjoy the new permanent residence status). This is the much-discussed 'earned citizenship'. How this will, or could, be established, monitored and verified in practice has yet to be explained. People with permanent residence will be able to change their minds at a later stage and apply to become British citizens, and there will also be provision for European nationals to become British citizens.

Importantly, there is no protection on the face of the Bill for those currently settled in the UK, some of whom may have lived here all their lives. The question of their becoming, as has been mooted, permanent residents, is left for future secondary legislation. Thus a question-mark hangs over their continued entitlement to services.

Is this the brave new world of 'earned citizenship' or mere re-branding? A bit of both, it seems. It is unclear why it is felt necessary to have 'probationary citizenship' at all, rather than have people pass from their temporary category, passing the relevant qualifying tests, to British citizenship. It is arguable that denial of access to services will marginalise people rather than strengthen their ties to this country. If it is desired that people become British citizens, why not reduce the fee (currently £655 plus fees for the life in the UK test and for the Citizenship cermony, followed

[9] For family members see clause 38 inserting new paragraph 2(2)(e) into paragraph 3 of the Schedule 1 to the British Nationality Act 1981For workers see clause 37 inserting new paragraph 2(2)(e) into paragraph 2 of Schedule 1 to the British Nationality Act 1981
[10] See eg Clause 27 inserting a new a paragraph 2(11) into schedule 2 to the British Nationality Act 1981.
[11] Clause 38(2).
[12] Clause 39
[13] Clause 39

by a fee for a British passport if desired) for applying to do so, and redouble current efforts to ensure that people can learn English and meet the qualifying requirements?

Part 4 – Judicial review:

The Bill[14] would allow for the transfer of judicial review applications relating to immigration or nationality law from the High Court to the Upper Tribunal. The Upper Tribunal is the second tier of the new Tribunal regime established under the Tribunal, Courts and Enforcement Act 2007. That regime brings together a range of tribunals under a single structure. Many immigration and nationality judicial reviews concern the lawfulness detention for periods of several months or years, or the lawfulness of an imminent removal of someone from the UK to a place where their life and limb may be at risk. These judicial reviews are made complex by the political context of Government decisions and policy in this area; the frequent difficulties facing legal representatives in obtaining full or adequate disclosure from the Home Office; and the inherent difficulties faced in representing those in detention, especially where timescales may be extremely short.

However, the immigration and nationality jurisdiction of that Tribunal is yet to be established. The Asylum and Immigration Tribunal (AIT) remains separated from that regime. During the passage of the Tribunal, Courts and Enforcement Bill, Parliament was concerned at the prospect of transfer of immigration and nationality judicial review applications to the Upper Tribunal in view of the complex and contentious nature of many of those applications[15]. The Government broadly agreed with that position, which is why that Bill contained an exclusion of immigration and nationality from those judicial reviews which it allowed to be transferred. However, the Government included in that Bill, as originally drafted, power for the executive to remove the exclusion. Parliament was not satisfied with this, and ultimately the Government amended that Bill so that the exclusion could not be removed except by primary legislation. Parliament's concern was that it wanted to be able to review the performance and capacity of the new Tribunal regime before approving the transfer of such a contentious jurisdiction. Parliament was particularly concerned that judicial reviews ought to be heard by High Court judges, whether sitting in the High Court or in the new Upper Tribunal.

In this Bill, the Government now seeks to reverse this position. There is not yet any evidential basis on which Parliament can assess the performance and capacity of the new regime in relation to the proposed transfer. The Home Office has recently conducted a consultation[16] in relation to the future of the Asylum and Immigration Tribunal, in which it proposed to remove the exclusion. Responses to the consultation have been published[17]; the government's views in the light of these have not. The Bill would give effect to the proposal to remove the exclusion.

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[14] Clause 50

[15] In debate, these were described by The Lord Lloyd of Berwick as "*at the most sensitive end of judicial review*"; and The Baroness Ashton of Upholland acknowledged that sensitivity in her response – *Hansard* Lords, Grand Committee 13 December 2006 : Columns GC68-69.

[16] *Immigration Appeals: fair decisions, faster justice* is available at: http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/

[17] see link at fn. 17

ILPA opposes the proposal. The recent consultation on the future of immigration appeals was a Home Office-led consultation; as was the working group between judiciary and Home Office which led to the consultation. The consultation suggested two primary aims of the proposals – to reduce the burden of immigration work upon the senior judiciary, particularly the High Court, and to assist the Home Office in its immigration work, particularly in relation to the speed with which asylum claims are dealt with.

A principled objection is that the Home Office, whose decisions are at stake and who is a party to litigation in this area, should have the lead for proposing and legislating for change in the way it and its decisions are subject to judicial scrutiny, as opposed to the Ministry of Justice, which has responsibility for the Tribunals Service. That principled objection is supported by practical objections. As recognised by both the Government and Parliament during the passage of the Tribunals, Courts and Enforcement Bill, immigration and nationality judicial reviews may be especially complex or contentious. It continues to be the case that this complexity and contention is often, in significant part, a product of the failure by the Home Office as litigant to show proper respect for procedure in the courts and for the rule of law, as witness the ongoing delay in implementing the decision of the House of Lords in *SSHD v R(Baiai & Ors)* [2008] UKHL 53[18] on certificates of approval for marriage where one partner is not British nor a European Economic Area national.

The very recent case of *R(Abdi & Ors) v SSHD* [2008] EWHC 3116 (Admin)[19] is of particular relevance since, at the commencement of litigation in the case of each of the claimants, the conduct on the part of the Home Office in introducing an unlawful policy and keeping it secret for over 2 years, despite recognising their to be profound concerns as to the lawfulness of the policy and its being kept secret, could not have been known to the claimants or the Administrative Court. Had the claimants' judicial review applications been transferred to a Tribunal, where it might have fallen to be dealt with by a specialist immigration judiciary without the public law experience and expertise or seniority and standing of a High Court judge it must be questioned whether the Tribunal would have had the capacity to reveal this conduct. Without the revelation of the nature and degree of the unlawfulness the particular importance of the case might not have been identified. The risk is that removing the exclusion would lead to a situation where cases such as *Abdi* may be routinely transferred resulting in inadequate judicial scrutiny of the Home Office in an area where the political pressures on that department continue to tempt it into practices that are unlawful.

As regards the workload of the courts, it remains the case that a substantial part (many hundreds of cases) of that workload is comprised of the cases of Zimbabweans, whose cases have been stayed behind test cases in the courts since 2005. Many of those cases could and should have been reviewed by the Home Office long before now since factual findings in individual cases demonstrate a risk to the individual even on the basis that the Home Office has more recently advanced in the test cases. Some of these cases are in the courts by reason of Home Office applications for reconsideration or appeal. By facing up to and acting on its responsibilities towards Zimbabweans, particularly in the light of the most recent

[18] http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/rhome.pdf
[19] http://www.bailii.org/ew/cases/EWHC/Admin/2008/3166.rtf

decision of the Asylum and Immigration Tribunal in 2008, the Home Office could significantly reduce the burden which it relies upon to justify in part the proposals advanced, including as to the removal of the judicial review transfer exclusion, in the department's consultation.

Discrete further questions and concerns:

There are several further questions and concerns that arise out of the provisions that are included and those that are not included in this Bill; and these are briefly highlighted below:

- The introduction of yet another immigration Bill, with the ongoing failure to consolidate immigration legislation, will increase complexity and impair the opportunities for parliamentary scrutiny and the prospects for good administration.

It is arguable that if it is indeed essential to have another discrete piece of legislation before consolidation, some are more urgent than many of the provisions in the Bill currently before Parliament.

- The Bill does not address the acute situation of destitute asylum-seekers, refused asylum-seekers and others without lawful leave, many of whom have been in the UK for very many years. The Government's continued failure to address the situation of destitute people from Zimbabwe, who are denied the rights to work, to study at home student rates or at all, and to access social welfare entitlements, despite the most recent, November 2008, decision of the Asylum and Immigration Tribunal in *RN (Zimbabwe) v SSHD* [2008] UKAIT 00083 CG[20], is an example of ongoing policy failure in this area. Many Zimbabweans have been left to atrophy in limbo despite the acknowledged impropriety of removals to that country almost continuously since January 2002 and enormous public sympathy for their plight.

- The provisions relating to the safeguarding and welfare of children[21] do not address
    - the continued detention of children and families;
    - the longstanding failure to exercise the power to repeal section 9 of the Asylum and Immigration Act 2004 whereby families may be made destitute and children taken into care;
    - the substantial number of children whose age is disputed resulting in their being detained, unsafely accommodated and their cases being inadequately considered in the asylum process;
    - the need for children's guardians in this area of law; and
    - the inadequate drafting of the trafficking which means that it has not proved possible to prosecute all those who traffic babies (a matter that could be addressed in this Bill or in the Policing and Crime Bill).

- The provisions relating to investigations and detention[22] which merely provide a power to, rather than a duty upon, the Secretary of State to extend

[20] http://www.bailii.org/uk/cases/UKIAT/2008/00083.rtf
[21] Clauses 32 and 51

PACE Codes of Practice to officials of the UK Border Agency. Substantial police-like and policing powers have been given to those officials, yet previous powers to extend the PACE Codes have hardly been used. The power to extend the PACE Codes to all exercise of police-like or policing powers by immigration officials should be replaced by a duty to do so.

- The provisions relating to inspection and oversight[23] of the UK Border Agency pass substantial new responsibilities to the newly established Chief Inspector of the UK Border Agency. This needs to be matched by the provision of additional resources.

- The extension of the powers of the Independent Police Complaints Commission to cover customs officials should be complemented with an extension of their powers to cover private contractors and at juxtaposed controls outside the UK.

- The re-imposition of border controls between the UK and the Republic of Ireland is a matter deserving of parliamentary scrutiny.

- The Explanatory Notes provide no justification is provided for the new power to impose a condition on a person's limited leave restricting their studying in the UK[24]. These are also silent on the human rights compatibility of the provisions despite the interference with private life (Article 8) which may be caused by imposing such a restriction.

- The Bill contains discrete provisions on fingerprinting and detention, which relate to the 'automatic deportation' regime introduced by the UK Borders Act 2007[25]. That regime is in need of reconsideration in light of its introduction in August 2008 and the development of Home Office policy and practice on deportation and detention since April 2006.

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[22] Clauses 22 (clause 23 relates to the distinct position in Scotland)
[23] Clauses 26 to 28
[24] Clause 47
[25] Clauses 48 and 49