

3 December 2008

BRIEFING

House of Commons debate the Queen's Speech – Home Affairs Borders, Immigration and Citizenship Bill 4 December 2008

ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

Introduction:

The Borders, Immigration and Citizenship Bill is to include provisions to:

- Increase the powers of the UK Border Agency in relation to customs and immigration work at the UK border;
- Introduce the proposals originally put forward in the Path to Citizenship Green Paper¹ on naturalisation as a British citizen;
- Remove the 1961 cut-off point by which those born overseas to British mothers have been excluded from British citizenship;
- Introduce a duty upon the UK Border Agency to safeguard and promote the welfare of children.

The draft (partial) Immigration and Citizenship Bill, published in July 2008, includes provisions relating to naturalisation (Part 3 of that draft Bill) and the duty to safeguard and promote the welfare of children (clause 189 of that draft Bill). The other proposals have not yet appeared in any draft. Other proposals in the that draft Bill, and the accompanying document outlining what would be in a full bill, notably proposals to consolidate and 'simplify' the whole of immigration law have not been prefigured in the Queen's Speech.

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

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What has happened to the consolidation project?

When the Government published the draft (partial) Immigration and Citizenship Bill, this was intended to be the first stage in a consolidation and simplification of immigration law. Successive Acts (in *inter alia* 1981, 1988, 1993, 1996, 1997, 1999, 2002, 2004, 2006, 2007 and 2008) have piled amendment after amendment upon the Immigration Act 1971. MPs, their researchers and caseworkers will be familiar with the problems this creates, not least the problem of identifying the law in force. Consolidation is desperately needed, for UK Border Agency officials, for the immigration judiciary and the judiciary, and for representatives. If parliamentary time is short, the government could, as suggested by ILPA and others in response to the *Path to Citizenship* consultation, pass a consolidating act consolidating existing provisions of immigration law and then use that as the basis to simplify the law in subsequent parliamentary sessions. The laws on citizenship have not been amended since the British Nationality Act 1981: it is difficult to accept that there is an urgency about the measures proposed comparable to the urgency of consolidation. Meanwhile, yet more new legislation will distract from what is needed within the UK Border Agency: a focus on improving operations, procedures and practice.

Customs and immigration powers

We are yet to see what is proposed. We note here that ILPA has long pressed for the introduction and publication of Codes of Practice, equivalent to those relating to police under the Police and Criminal Evidence Act 1984 (PACE), for when immigration officials are exercising police-like powers. There are duties in the Immigration and Asylum Act 1999 to follow such codes if they are made, but only powers, not duties, to make them. UK Border Agency staff are now exercising a wide panoply of police and police-like powers, and in the immigration context there is neither the framework nor the accountability that exists under PACE. This concern remains outstanding.

The 1961 cut-off excluding children of British mothers from British citizenship

ILPA welcome the decision to remove this historical discrimination. This is but one aspect of the present-day effects of historical nationality law that requires attention, as outlined by the Lord Goldsmith QC in *Citizenship: our common bond*. The question of the rights of British nationals other than British citizens, who enjoy no rights to enter and remain in the UK, should be addressed. That a national should have such rights in the State of which s/he is a national is a human rights standard set out in Protocol 4 to the European Convention on Human Rights, a Protocol that, because the treatment of its citizens falls short of international standards, the UK has neither signed nor ratified.

Safeguarding and promoting the welfare of children

In September², in a joint statement with the Secretary of State for Justice and the Secretary of State for Children, Schools and Families, the Home Secretary announced that the UK was to lift its reservation to the UN Convention on the Rights of the Child relating to immigration. However, the reservation has not yet been lifted³. We would welcome early steps to implement the Government's decision.

² http://www.dcsf.gov.uk/pns/DisplayPN.cgi?pn_id=2008_0209

³ see *Hansard*, HC Report UN Convention on the Rights of the Child, 20 Nov 2008 : Column 789W

As regards the duty to safeguard and promote the welfare of children, the current draft of which is contained in clause 189 of the draft (partial) Immigration and Citizenship Bill, we are pleased to note that the Government has indicated that it intends that this duty should subject the UK Border Agency, and its private contractors, to the same duties which apply to public authorities, such as local authorities, the police and prisons service, under section 11 of the Children's Act 2004. However, there are important unresolved inadequacies in the current draft clause 189:

- Section 11 importantly adopts detailed guidance to which the public authorities, bound by the section 11 duty, are also subject. Clause 189 has no equivalent.
- If clause 189 is improved to incorporate guidance, and if that guidance accurately reflects the guidance under section 11, there will remain the difficulty that, by having a distinct statutory regime for the UK Border Agency, any developments to the section 11 guidance will not automatically be reflected in any guidance to which the UK Border Agency is subject.
- Clause 189, as currently drafted, is restricted to children "*in the United Kingdom*". However, there are important instances where UK Border Agency staff and its private contractors deal with children outside the UK. This includes at entry clearance posts, juxtaposed controls and in the course of any escorted removal. UK officials, or those to whom immigration powers are delegated, ought to be required to be alive to the safety and welfare of all children in all their dealings with children (e.g. when presented with information indicating a risk that a child is a victim of trafficking) whether in the UK or not.

Naturalisation

Certain immigrants to the UK are currently entitled to apply to become British citizens. Many immigrants to the UK do not have any entitlement to apply; and no immigrants have an automatic right to become British citizens.

The Path to Citizenship Green Paper asserted that the current naturalisation laws were complex; and suggested that changes were needed to ensure that citizenship is "earned". However, several of the key elements in what is proposed for naturalisation are not new:

- The proposed changes **do not** introduce a new requirement to speak English. This has been a requirement since at least 1949 and has been recently extended.
- The proposed changes **do not** introduce for the first time requirements that immigrants shall be excluded from public funds and services; although ILPA is concerned that current exclusions may be extended. The Immigration Rules currently include such requirements.
- The proposed changes **do not** introduce a new requirement that immigrants who come to the UK because of a family relationship (e.g. as a spouse, civil partner or dependant child of someone who is British or settled in the UK) must do so on the basis of a genuine relationship. This has long been a requirement of UK immigration law. However, it is proposed that when applying for citizenship, a person will need to show that his or her relationship is ongoing. This would preclude individuals from citizenship and require them to leave because, although they have come to the UK and settled in the UK on the basis of genuine relationships, their relationships have broken down or ceased including for reasons

for which they are in no way culpable. This is unjust. It may lead to significant human rights challenges where people have established private and family life in the UK (Article 8, Human Rights Act 1998). It may force victims of abusive relationships to continue to suffer abuse in a relationship for fear of the effect upon their immigration status if they do not do so.

- The proposed changes **do not** introduce a new requirement that immigrants may be excluded from citizenship if they have a criminal record. This has applied for several decades.

The proposals would make some changes. The provisions currently in Part 3 of the draft (partial) Immigration and Citizenship Bill would:

- Introduce into UK law the complexity of equations, with fixed and variable integers, into primary legislation⁴.
- Remove the indefinite leave to remain stage from the current naturalisation route. Those immigrants who may apply for British citizenship under the current arrangements, must first apply for and be granted indefinite leave to remain. They are required to be on this status for at least 12 months before applying for citizenship. Instead the proposals would make indefinite leave to remain (it is suggested to rename this permanent residence) one of two possible outcome of the route (the other outcome being citizenship) rather than a stage of the route to citizenship. However, it is proposed that it should take at least two years longer before someone could apply for indefinite leave to remain than it would take before that person could apply for citizenship. The Government indicates that it wants to promote citizenship. However, some migrants may not want to become citizens and others cannot become citizens without abandoning their own nationality. The proposals here discriminate against migrants whose countries of original nationality do not allow for dual citizenship. This is particularly serious because while someone is on a route to either citizenship or indefinite leave to remain, it is proposed they he or she will be excluded from welfare services and other benefits. They will gain access to these services or benefits only if and when granted citizenship or indefinite leave to remain. For the immigrant, who is precluded from taking British citizenship, the length of time he or she, and his or her family, may be excluded from essential welfare services and benefits is prolonged for at least two years.
- Introduce a requirement that immigrants must demonstrate “*active citizenship*” or face substantial delay before they can apply for citizenship or indefinite leave to remain⁵. This would require an immigrant to demonstrate some community or voluntary work in order to progress to citizenship in the normal timeframe. It is unclear what work will suffice, and how this will have to be evidenced, or whether it will in practice prove to be available. It risks placing immigrants in situations where they may be exploited for free or cheap labour. It risks disrupting family or work life, because immigrants may need to spend time in voluntary work rather than attending to the employment or their child, elderly or disabled dependants.

⁴ see clause 34 of the draft Bill

⁵ see the references to the “*activity condition*” in clause 34 of the draft (partial) Immigration and Citizenship Bill

Criminality has long been a relevant matter in considering an application to naturalise as a British citizen. However, ILPA does not consider that it is appropriate to automatically exclude someone from citizenship merely because he or she has received a custodial sentence. It may result in some people who have strong and longstanding links to the UK being precluded from citizenship, or indefinite leave to remain, and hence excluded from welfare services and other benefits, this approach risks increasing marginalisation of certain individuals and families in the UK; including in circumstances where because of a risk of serious harm in their countries of origin or because of established family and private life in the UK these individuals and families cannot be removed from the UK.

The Government also intends to introduce new charges on immigrants to the UK. We note that since 2004, the Government has successively extended fees on immigration applications far above the cost of processing these applications. There is no justification for further new and increased charges upon immigrants. Introducing such charges may cause substantial hardship, including where immigrants are to be excluded from services and benefits available to others for extended periods of time under the proposed naturalisation changes.

Immigration Law Practitioners Association

3rd December 2008