

**Briefing to the Joint Committee on Human Rights on the withdrawal of the Right of Abode as provided by the draft (partial) Immigration and Citizenship Bill:**

1. This briefing is provided in view of the oral evidence session before the Committee with the Secretary of State for the Home Department on Tuesday, 28th October 2008.
2. The draft (partial) Immigration and Citizenship Bill removes all reference to the 'right of abode'. The right of abode was originally a common law concept, the freedom to enter and remain in one's own country being part and parcel of being a citizen. At the time of the British Nationality Act 1948 the right of abode was part and parcel of being a British national, whatever form of British nationality a person held. The Commonwealth Immigrants Act 1962 introduced derogations from the common law right of abode. The Immigration Act 1971 recreated the right of abode as a statutory provision, so that all British Citizens have the right to come and go to and from, and to remain in the UK by virtue of a statutory provision that could, in theory, be altered by Parliament. Under the Immigration Act 1971, apart from British citizens, certain Commonwealth citizens retained the right of abode. Such people are free from immigration control and are treated as British citizens by the Immigration Act 1971.
3. It is because not all British nationals enjoy a right of abode in the UK that the UK has been unable to ratify Protocol 4 to the European Convention on Human Rights which provides that no one be deprived of the right to enter the territory of the State of which s/he is a national nor be expelled from that State (Article 3), and provides for rights of free movement within the State and the right to leave it (Article 2).
4. Those who currently enjoy the right of abode in the UK are:

- a. all British citizens
  - b. Commonwealth citizens who had a right of abode immediately before the British Nationality Act 1981 came into force.
5. The Draft (partial) Immigration and Citizenship Bill proposes to change the law so that only a British citizen will remain “*free to enter and leave, and to stay in, the United Kingdom*”<sup>1</sup>. Anyone else, except for European Economic Area (EEA) entrants<sup>2</sup>, “*may enter or stay in the United Kingdom only if the person has immigration permission*”<sup>3</sup>.
  6. By these provisions, the draft Bill would strip all Commonwealth citizens who had retained the right of abode following the changes made in nationality law by the British Nationality Act 1981 of that right. The Committee has previously found that the current power, contained in section 2(2), Immigration Act 1971 (as amended by section 57, Immigration, Asylum and Nationality Act 2006), to deprive these individuals of the right of abode “*gives rise to a substantial risk of incompatibility with Articles 3, 5 and 8 ECHR*”<sup>4</sup>. The Committee expressed concern at the low threshold at which a person may be deprived of the right. The Committee, however, observed that the right of appeal in relation to deprivation provided a “*sufficient guarantee*”.
  7. The Explanatory Notes to the draft (partial) Immigration and Citizenship Bill state:

*“...Those with the right of abode who are not British citizens will now require permission to enter and stay in the UK. The intention is to confer that permission by order under clause 8 of the Bill...”*<sup>5</sup>

*“A grant of permanent permission by order could make provision for Commonwealth citizens with the right of abode as described in paragraph 47 above.”*<sup>6</sup>

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<sup>1</sup> clause 1(1)

<sup>2</sup> defined in clause 3

<sup>3</sup> clause 2(1)(a)

<sup>4</sup> Committee’s Third Report for the Session 2005-06, paragraph 170

<sup>5</sup> paragraph 47, Explanatory Notes on clause 1

<sup>6</sup> paragraph 57, Explanatory Notes on clause 8

8. There are several inadequacies with this position:
- a. Firstly, there is no requirement that the intention is fulfilled. Indeed, the Explanatory Notes cited here expressly indicate that provision ‘may’ be made not ‘will’ be made. Even if the intention to grant permission is fulfilled, it is not clear whether that will be by way of permanent or temporary permission.
  - b. Secondly, even if fulfilled, what is proposed is expressly to make subject to immigration control those who are currently not subject to immigration control. This includes that the person may be subjected to significant conditions or restrictions upon their permission (e.g. reporting or as to residence)<sup>7</sup>, whether at the time permission is granted or anytime thereafter<sup>8</sup>.
  - c. Thirdly, the powers to cancel permission, which would then apply to those from whom the right of abode had been stripped, as expressed in the draft (partial) Immigration and Citizenship Bill would provide no threshold whatsoever before the power was exercised<sup>9</sup>.
  - d. Fourthly, where the person remained outside the UK for a period of 2 years, permission would automatically be cancelled<sup>10</sup>.
  - e. Fifthly, any cancellation (unless occurring on the arrival of a person in the UK) could not be appealed while the person was in the UK<sup>11</sup>.
9. The Committee, when expressing concerns at the introduction of the power to deprive individuals of the right of abode (see paragraph 3, above), was concerned at the scope for arbitrary deprivation of the fundamental entitlement of a particular group of Commonwealth citizens who retained the right of

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<sup>7</sup> clause 10; this would not apply if permission granted was permanent rather than temporary

<sup>8</sup> clause 11

<sup>9</sup> clause 14

<sup>10</sup> clause 13(1)

<sup>11</sup> clause 171

abode and freedom from immigration control (as British citizens) in 1983; and that the exercise of that power could result in violations of Articles 3, 5 and/or 8 of the ECHR. The Committee was satisfied that the right of appeal provided sufficient safeguard at that time.

10. However, the draft (partial) Immigration and Citizenship Bill would strip individuals of the right of abode without any recourse to an appeal or other judicial remedy. Inevitably, there would be no threshold at which the individual would be stripped of this right. Interferences with the individual's human rights would or may include:
  - a. the arbitrary and/or disproportionate interference with the individual's established family and/or private life (Article 8) in the UK by subjecting the individual (and in many cases, family members) to immigration control and thereby making less secure their formal status in the UK;
  - b. the potential – not fully disclosed since the draft (partial) Immigration and Citizenship Bill does not reveal the detail of the Government's intention to “*limit access to services*”<sup>12</sup> – that individuals may in becoming subject to immigration control have access to education, health, housing and welfare services, which they have enjoyed for many years, arbitrarily removed or restricted thereby interfering with their private and family life (Article 8) and/or subjecting them to homelessness and destitution which places them in circumstances reaching an inhuman or degrading threshold (Article 3);
  - c. the risk that deprivation in such circumstances, by subjecting the individual to immigration control, might lead to their and/or their

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<sup>12</sup> see pages 4-5 & 9 of *Making Change Stick: an introduction to the Immigration and Citizenship Bill*, published by the UK Border Agency in July 2008 along with the draft (partial) Immigration and Citizenship Bill; see: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/makingchangestick.pdf?view=Binary>

family's detention under immigration powers that was itself arbitrary and disproportionate (Article 5); and

- d. the risk that loss of the right of abode in the UK might lead to the individual's and his/her family's enforced removal to circumstances where they or their family might face torture, inhuman or degrading treatment; or be subjected to conditions which reached such a threshold (Article 3).

11. No explanation has been provided as to why the Government intends to strip the right of abode from this group of Commonwealth citizens to whom the UK recognised and made a commitment when revisiting UK nationality laws by the introduction of the British Nationality Act 1981. This decision, which is presented by the draft (partial) Immigration and Citizenship Bill without previous warning or consultation, is an arbitrary one. The Government's Impact Assessment<sup>13</sup> makes no reference to the right of abode whatsoever. The human rights impact assessment in the Explanatory Notes also makes no direct reference to the right of abode<sup>14</sup>.

***12. As highlighted by the Committee when considering the current power to deprive individuals of the right of abode, the wholesale withdrawal of this right risks incompatibility with Articles 3, 5 and 8, ECHR. Indeed, the wholesale withdrawal of this right from certain Commonwealth citizens who have enjoyed this right since 1983 may of itself constitute a violation of Article 8, while substantially increasing the risk previously highlighted by the Committee of violations of Articles 3, 5 and 8.***

27 October 2008

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<sup>13</sup> published in July 2008 as the Partial Impact Assessment of the draft (partial) Immigration and Citizenship Bill, see: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/immigrationandcitizenshipbill/draftbill/billpartialimpactassessment.pdf?view=Binary>

<sup>14</sup> paragraph 414 refers to a wider group of "those who are, under the IA 1971, exempt from immigration control by virtue of having a particular status, such as diplomats and crew members"