

What is the Borders, Citizenship and Immigration Bill and what can be done about it?

1. This note accompanies a discussion at the Kanlungan AGM on 25th April 2009.
2. The greater part of the information given here directly relates to the Bill. However, some more general information is provided in response to other questions that have been highlighted in advance that concern wider questions of immigration law. Particular attention is given to the new naturalisation provisions which the Bill will introduce.
3. **Please note:** Neither I nor ILPA can provide advice or representation on individual cases. At the end of this note some brief information is provided about how legal advice may be obtained.

What is a Bill?

4. A Bill is the forerunner of an Act of Parliament. An Act is the highest piece of written law in the UK legal system. To become an Act, a Bill must be considered and approved by both Houses of Parliament – the House of Lords and the House of Commons. Bills must pass through a multi-staged process in both Houses, and there are several opportunities for Parliament to make amendments. Most Bills are introduced to Parliament by the Government, and it is rare that a Bill that is not introduced by the Government will succeed in becoming an Act.
5. A Bill is not, therefore, law. It is proposed law. If Parliament approves a Bill, it will become law when it is enacted – i.e. when it becomes an Act.

6. However, this is not quite so straightforward. An Act contains many provisions, and for these to take effect in law they must be implemented (commenced). The Act will state when and how the provision is to be commenced. Some provisions may take effect on the passing of the Act. Usually, provisions will require a Commencement Order before they take effect. A Commencement Order is a lesser piece of written law, made by the Government. It does not require the same degree of scrutiny to become law as does an Act. A Commencement Order will set out which provisions of which Act enter into force at what time.

Borders, Citizenship and Immigration Bill – and how to influence it

7. This Bill was introduced to Parliament in January 2009. It has now been considered by the House of Lords. This has involved several stages, during which the Bill's provisions have been discussed and debated; and during which changes (amendments) to the Bill have been proposed and made. Some of these changes have been made by the Government, some have been made by others. It is possible that the Government will seek to reverse the changes that it does not want when the Bill is considered by the House of Commons.
8. The Bill is likely to be considered by the House of Commons in May, June and/or July. It will pass through several stages in the House of Commons, during which MPs will discuss and debate the provisions in the Bill; and during which amendments may be proposed and made.
9. One way to seek to influence the Bill, therefore, is to influence MPs. Concerns about particular provisions in the Bill can be most easily addressed to your local constituency MP. You can write to your MP, or arrange to see the MP at his or her constituency surgery. If so, it is important to have a clear idea what provision or provisions you are concerned about; what are the particular concerns or

problems with these; and what changes you would like to see and why. If arranging to see an MP in his or her constituency surgery, it may be possible to go as a small delegation. It may help if the MP understands that the concerns you have are not simply your own personal concerns, but concerns of a wider number of his or her constituents. Sometimes it can help if a recognised community leader or other widely respected member of the local community is willing to support you – including being part of any delegation.

Borders, Citizenship and Immigration Bill – what is in it?

10. There are a range of provisions in the Bill. It is divided into four Parts as follows:

Part 1: This contains provisions that mainly relate to customs and other powers that can be exercised at the UK border. However, it includes provisions relating to independent investigation of serious misconduct by the UK Border Agency, and private contractors; independent oversight of the UK Border Agency; and standards, in particular codes of conduct, that are to apply when the UK Border Agency exercises its immigration and customs powers. Generally, there are concerns that these provisions for independent investigation and oversight, and appropriate standards, are inadequate because they are either not strong enough or don't cover all of the UK Border Agency's activities and powers.

Part 2: This contains provisions relating to British citizenship, and in particular how someone can become a British citizen. The greater part of these provisions relate to naturalisation – how a migrant in the UK may be able to become a British citizen. These provisions are addresses further below.

Part 3: This contains four discrete provisions relating to immigration. These include a power to impose on any migrant who has only limited leave (to enter or remain in the UK) a condition

restricting access to courses of study in the UK. The Government has indicated that this power will only be used in respect of student migrants to the UK under the points-based system (tier 4); however, the Bill does not restrict the power in this way. Also included is a provision to prevent the Government from introducing immigration controls on journeys within the Common Travel Area (UK, Ireland, Guernsey, Jersey and Isle of Man). This provision is a change that has been imposed on the Government. Originally, the Bill contained a provision to introduce immigration controls on these journeys. It may be that the Government seeks to reverse the defeat it has suffered on this point when the Bill is considered in the House of Commons.

Part 4: This contains various provisions. One of these relates to access to the High Court and Court of Appeal. Originally, the Bill contained a provision to allow the High Court to transfer judicial reviews, relating to immigration or nationality law, to the tribunal system, where the judicial review may be dealt with by a High Court or a tribunal judge. Tribunal judges have not previously dealt with these judicial reviews, which are currently always heard in the High Court. The Government has suffered a defeat on this, and it may be that it will seek to reverse that defeat in the House of Commons. This part also contains a statutory duty upon the UK Border Agency, and private contractors, to have regard to the need to safeguard and promote the welfare of children. It also contains a change to criminal law on trafficking, to make sure that those who traffic babies or young children (e.g. for benefit fraud) may be prosecuted as traffickers.

Borders, Citizenship and Immigration Bill - naturalisation

11. The Bill contains provisions to change the way in which migrants in the UK may become British citizens (naturalise). The provisions contain new terms and requirements. A short explanation of these is given below. These new terms and requirements are:

- Qualifying immigration status
- Relevant family association
- Qualifying period
- Probationary citizenship
- Continuous employment
- Active citizenship/activity condition
- Permanent residence

12. Currently, any migrant to the UK may naturalise as a British citizen if *but only if* he or she is able to and does obtain indefinite leave to remain (ILR). Some migrants have no route to ILR and are, therefore, excluded from British citizenship. For those who have a route to ILR, the process of naturalisation is in three stages. During the first stage the migrant will undergo a period of limited (or temporary) leave. Migrants, who have a route to ILR, usually must spend up to 5 years on limited leave (in family cases – e.g. where someone has permission to join their spouse or civil partner in the UK – the period is 2 years), before he or she can apply for ILR. The second stage will be the period on ILR. After one year on ILR, the migrant can apply to become a British citizen.
13. To progress along this route, the migrant will usually need to abide by any conditions placed on the limited leave that he or she is given; and generally abide by the laws. Usually he or she will be precluded from accessing welfare services or benefits unless and until he or she is granted ILR. If convicted of a criminal offence this may mean that he or she will not be allowed to progress; and may be considered for deportation. He or she will also have to show some competency in the English language. Subject to completing a form, paying a fee and attending a citizenship ceremony, he or she may become a British citizen.

14. The Bill will make changes, though much that has been described here will remain the same. Migrants will still have to undergo a period of limited leave. However, the next stage will be probationary citizenship (see below). The timeframe may vary (see below – qualifying period). After a period of probationary citizenship, the person may be able to apply for British citizenship or permanent residence (see below). The timeframe for this stage is different (longer) for those who wish to apply for permanent residence rather than British citizenship. The requirements set out in the preceding paragraph will still apply (abiding by immigration conditions, no criminal convictions, English language, forms, fee and ceremony). However, there may be additional requirements (continuous employment and activity condition – see below). It will still be the case that only some migrants can progress to citizenship. This will depend on whether they have a qualifying immigration status (see below).
15. Key terms are described below. It should be noted that the Home Office will retain discretion to waive many of the requirements that are explained in this note. The circumstances, in which the Home Office may agree to waive a requirement, cannot be set out here because these are is not known. When the new provisions come into force, it is to be expected that there will be guidance published which gives more information on when discretion may be exercised.
16. **Qualifying immigration status:** This new term, in part, reflects the current naturalisation provisions in that not all migrants have a route to ILR or citizenship. For example, someone now coming to the UK as a student does not have a route to citizenship. In the future, this will be reflected by the fact that the immigration status he or she will be given to come to the UK will not be a ‘qualifying immigration status’. However, the new term has important implications. The provisions in the Bill require that the person has a qualifying immigration status throughout the qualifying period (see below).

Currently, someone may be granted ILR if he or she has lived in the UK continuously and lawfully for 10 years. After one year of ILR, he or she may apply for citizenship. This will not work in future because the person would not have had a qualifying immigration status before that one year. Similarly, in some circumstances, a student may be able to switch onto a different status that does currently provide a route to citizenship. However, under the provisions in the Bill, time spent as a student would not count towards the qualifying period (unless the Government changes its policy) because this limited leave as a student will not be a qualifying immigration status.

Essentially, the use of this term in the Bill means that those whose status is regularised after a long period of time in the UK (or are accepted onto a migration route that allows the person to become a citizen) will have to begin the qualifying period from the start – rather than e.g. from the point at which he or she first entered the UK, or was first granted some form of status in the UK. In future, some people who are eventually permitted to become British citizens or obtain permanent residence may have to spend very many more years in the UK before this is allowed.

17. **Relevant family association:** This new term works in a similar way to qualifying immigration status. It means that someone who wishes to become a British citizen, or obtain permanent residence, on the basis of a family relationship (e.g. marriage to a British citizen) will need to have maintained that relationship (or a relevant relationship with that person, e.g. as a fiancée then spouse to the British partner) throughout the qualifying period.
18. **Qualifying period:** This term refers to the period of time a person must have a qualifying immigration status (see above) before he or she can become a British citizen or obtain permanent residence

(see below). The period of time will vary. Firstly, for those who can become citizens because of a relevant family relationship (see above), the qualifying period will be a minimum of 3 years. For those who can become citizens because they are on another accepted route to citizenship (e.g. refugees, or certain workers), the minimum period will be 6 years. Secondly, for those who wish to become permanent residents rather than British citizens, the minimum periods will last an additional 2 years. Thirdly, for those who do not meet the activity condition (see below), the qualifying period may last an additional 2 years. Fourthly, for those convicted of a criminal offence, if they are still permitted to become citizens or permanent residents (if they have been sentenced to prison, it is particularly unlikely that this will be permitted), the qualifying period may also be delayed.

19. **Probationary citizenship:** This new term refers to what will be the second stage of the new naturalisation process. However, it is really nothing more than a continuation of the first stage – i.e. more limited (or temporary) leave. The important result, therefore, is that migrants will be excluded from welfare services or benefits throughout the qualifying period – potentially for many years longer than they are excluded from these services or benefits under existing provisions. **Note:** refugees and others granted a protection status will continue to have access to these services and benefits.

20. **Continuous employment:** For those who are on a work-based route to citizenship, this provision will require that the person is in continuous employment throughout the qualifying period. No satisfactory explanation has yet been given as to why this new requirement is being introduced or what it will mean in practice. Under current provisions, someone who has been given leave to be in the UK for the purpose of work (under tier 2 of the points-based scheme) may be in breach of his or her immigration conditions if he or she is out of work for more than 60 days. The use of this term in

the provisions appears to indicate a more strict requirement that those who are given leave for the purpose of work stay in work throughout the qualifying period. However, no guidance is available as to what in practice this requirement will mean.

The continuous employment requirement may be particularly problematic for domestic workers. Currently, domestic workers may change jobs but only to another domestic worker position. Finding such a position at short notice may be very difficult, in which case there may be a greater chance that a domestic worker who loses or is forced to leave his or her current job will not be able to meet the continuous employment requirement.

21. **Active citizenship/activity condition:** This is a completely new provision. By this provision, migrants who wish to become British citizens or permanent residents will be required to undertake some community or voluntary work. If they do not do so, the qualifying period that applies to them may be extended by up to 2 years. It has not been made clear what sort of work will be required (other than it must not be for pay). Nor has it been made clear how much of this work the migrant will need to do, nor for how long nor how this will be monitored or reported to the UK Border Agency.

22. **Permanent residence:** This will be the new term for indefinite leave to remain. However, as explained in the explanation of the qualifying period, it is important to note that the period of time before which someone could obtain permanent residence will be significantly extended. This may be particularly important for those whose current nationality precludes dual citizenship. Unless they are prepared to abandon their original nationality, these migrants will have to spend longer (an additional 2 years) before they can become permanent residents than others will spend to become British citizens; and will continue to be excluded from welfare services or benefits until that time.

23. A further significant change relates to absences from the UK. Under the current naturalisation provisions, someone who wishes to become a British citizen must not have been outside the UK for more than 90 days during the 12 months immediately prior to applying for citizenship. He or she must also not have been out of the UK for an average of more than 90 days during the 5 (or in marriage/civil partnership cases 3) years immediately prior to applying. This means that a very long absence (e.g. to attend to a sick relative overseas) can be averaged out; and, if it happens close to when the migrant is reaching the point when a citizenship application can be made, he or she will not have to delay an application for more than 12 months (provided there is not a second lengthy absence). Under the new provisions, it will not be possible to average out absences. This means that any absence of more than 90 days in a 12 months period will require the migrant to start the qualifying period all over again.
24. Currently the requirement about absences can be waived at the discretion of the Home Office. Under the new provisions there would still be discretion to waive it. However, during the debates on the Bill, Ministers have said that while a lengthy absence towards the beginning of the qualifying period might be waived, a lengthy absence towards the end of the period will likely not be waived. But it is the absence towards the end of the period that is the most problematic. The qualifying period (see above) will be between 3 and 10 years. Having to start this period all over again is more of a problem if someone is near to completing the period than if he or she has just begun – if you have only done one year and have to begin again, that may be a problem; but compared to someone who has done 9 years and has to start again, the problem is likely much less significant. However, circumstances that may require someone to be absent from the UK for a lengthy period may arise at any time.

Further information and getting legal advice

25. There is further information available on the ILPA website:
- the 'Directory' section lists information and contact details of ILPA members who provide legal advice.
 - the 'Info service' section contains information sheets (and other information papers) on discrete items of immigration law and practice.
 - the 'Briefings' section contains ILPA briefings including briefings on the Borders, Citizenship and Immigration Bill; and the 'Submissions' section contains ILPA responses to consultations.
26. The website is at www.ilpa.org.uk
27. If you are, or think you may be entitled to free legal advice, another source of legal advice is: www.clsdirect.org.uk/ (Community Legal Service Direct) or call 0845-345 4345.

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