

## **Borders, Citizenship and Immigration Act 2009 – the new provisions for naturalisation**

1. This note accompanies a discussion among Kanlungan members about the provisions in the new Act concerning naturalisation (how a migrant may become a British citizen, sometimes referred to as the route to citizenship), and the consultations that have been opened following the passing of the Act. The discussion will take place at a meeting on 12<sup>th</sup> September 2009 at Praxis in East London.
2. A key purpose of the discussion is to assist Kanlungan, and members, with their wish to lobby Government on the implementation of the naturalisation provisions.

### **Opportunities to influence**

3. The Act was passed on 21<sup>st</sup> July 2009. It might be thought, therefore, that opportunities to influence the new route to citizenship, which is to be introduced by the Act's naturalisation provisions, have now gone. However, that is not so.
4. Although the Act has now been passed, the naturalisation provisions in it have not been commenced – that is, they have not become law in the UK. The Act gives the Government power to implement the naturalisation provisions. Until they do so, there may still be opportunities to influence whether and how these are to be implemented.
5. It is important to note that the Government has stated that it does not intend to implement the naturalisation provisions until July 2011. There must be General Election in the UK no later than May/June 2010. This means that there will be a General Election before the naturalisation provisions are implemented. It is possible, therefore, that there may be a change of Government before these provisions are implemented. This is important because it means it is possible that, depending upon the result of the General Election, it may be Labour, the Conservatives or the Liberal

Democrats who are in a position to influence or decide whether or how these provisions are to be implemented.

6. In the meantime, the UK Border Agency has published two consultations, both of which provide an opportunity to influence the Government and the UK Border Agency in relation to aspects of the naturalisation provisions. These consultations are:

- **Earning the right to stay: A new points test for citizenship**

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/221878/earning-the-right-to-stay/>

Responses to this consultation must be received by 26 October 2009

- **Charging for immigration and visa applications**

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/221878/charging09/>

Responses to this consultation must be received by 1 December 2009

7. The remainder of this note provides further information, first, about the naturalisation provisions contained in the Act; and, second, about the two consultations.

### **The naturalisation provisions in the new Act**

8. As indicated above, these provisions of the Act have not been commenced. The law in the UK on naturalisation (how a migrant may become a British citizen) has not, for the moment, changed. The Government's stated intention is that these provisions will not be commenced until July 2011.
9. Further information is provided under separate subheadings below.

#### ***General change to the route to citizenship – probationary citizenship***

10. The current route to citizenship: Generally, a migrant in the UK must pass through three stages in order to become a British citizen – First, a migrant

will generally have a period of limited leave (to enter/remain). Second, a migrant will need to have indefinite leave to remain for at least one year. Third, a migrant may obtain British citizenship. To pass into each of these stages, the migrant will have to satisfy specified criteria.

11. The route to citizenship under the Act's provisions: Generally, a migrant in the UK will still need to pass through three stages in order to become a British citizen – First, (as now) the migrant will generally have a period of limited leave (it is proposed to rename this as temporary leave). Second, the migrant will need to be a probationary citizen (this is different; and the length of this period may vary, as is discussed below). Third the migrant may obtain British citizenship. To pass into each of these stages, the migrant will have to satisfy specified criteria.
  
12. The different second stage is an important feature of the route to citizenship to be introduced by the Act. Most migrants, other than those granted refugee leave or humanitarian protection leave, are excluded from various services and benefits<sup>1</sup> unless and until they obtain indefinite leave to remain. The change in the second stage (from indefinite leave to remain to probationary citizenship) means that the period during which a migrant may be excluded from these services and benefits will be extended. The period of probationary citizenship, which must be undergone before an application may be made for British citizenship, is variable – it may last between one and three years. This means that the period of time during which a migrant (and his or her family) may be excluded from these services and benefits could be increased by up to three additional years. Moreover, some of the other changes to be introduced by the Act mean that a migrant may, in certain circumstances, have to start the route to citizenship from the beginning again. In such a case, the period of time excluded from services and benefits could exceed three years – possibly by several more years.

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<sup>1</sup> These include various welfare, housing and education services and benefits. Thus, a migrant with limited leave to enter or remain will usually be excluded from being able to go to a British university on home student rates (overseas student rates are very much more expensive). He or she will also usually be excluded from income support and housing benefit.

13. For those migrants who do not want to become British citizens, or cannot (without giving up their original nationality), there will be an option of applying for permanent residence. However, a migrant who wished to apply for permanent residence would under the Act's provisions need to pass through the first two stages. Also, the probationary citizenship stage would, in this case, last between three to five years. The Government has explained that it believes that, by making it take longer (by two years) before a migrant can obtain permanent residence, this will encourage migrants to become British citizens, and that this will promote integration.

***Varying the length of probationary citizenship – active citizenship***

14. As explained above, under the Act's provisions a migrant would need to pass through a period of probationary citizenship before he or she could apply for British citizenship (minimum one year) or before applying for permanent residence (minimum three years). This period of probationary citizenship may vary – i.e. for some migrants, it may take up to two additional years beyond the minimum. In order to avoid spending more than the minimum period as a probationary citizen, a migrant will be required to meet the active citizenship requirement.
15. Active citizenship means doing community or other 'voluntary' work. However, since this is required or compulsory (in order to avoid spending up to two additional years beyond the minimum period as a probationary citizen), it is not strictly accurate to call such work 'voluntary'. The Government has not yet worked out what community or 'voluntary' work will count. It has not worked out how active citizenship will be regulated, in order to test that a migrant has indeed done the type and amount of community or 'voluntary' work that is required.
16. There are many people who have questioned whether this idea of the Government is simply a bad idea. Their concerns include:
- it may lead to excessive and costly bureaucracy

- it may leave migrants open to exploitation
- it may prejudice or discriminate against migrants who have disabilities or carer responsibilities
- charities and other groups may not have sufficient resources to offer community or ‘voluntary’ work to everyone who seeks to do this
- charities and other groups may not want ‘volunteers’ who are not truly volunteers (as opposed to people compelled into the work)

17. Before the Act was passed, the Conservative Shadow Immigration Minister (Damian Green MP) said:

*“The underlying problem is that the proposals for earned citizenship will rapidly create fairly big bureaucracies... Small charities and volunteering organisations are the least able to cope with onerous bureaucracy... Other people have expressed considerable and legitimate fears as to what will happen. There are those... who object in principle that the scheme is discriminatory and exploitative... Associated with that is the general point that whereas some migrants will find it easy to contribute, and their lifestyle, skills, work and family position may make it fairly easy for them to take on extra voluntary work,... that will not be true of others. At that point, it is quite hard to argue that it is not discriminatory...”<sup>2</sup>*

18. The Conservative party has not committed itself either to abandoning the active citizenship scheme or to implementing it. However, they have expressed several reservations about the proposal. The Liberal Democrats have also expressed reservation; as have several Labour backbenchers.

***Other new or amended requirements – absences, continuous employment, relevant family association and qualifying leave***

19. Currently, during the qualifying period (that is the period of time required to be spent before an application for citizenship may be made), a migrant must satisfy various conditions. These include that his or her presence in the UK must be lawful, and that he or she must not be absent from the UK for a period of more than 90 days in the 12 months immediately before

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<sup>2</sup> *Hansard* HC, Public Bill Committee, Fourth Sitting, Thursday, 11 June 2009 (Afternoon), columns 111-113

applying and not absent from the UK for more than an average of 90 days per year throughout the qualifying period. The provisions in the Act will change the requirements about absences and add new requirements regarding the migrant's presence in the UK during the new qualifying period.

20. Under the Act's provisions, migrants will no longer be able to average out absences over the qualifying period. This will mean that a migrant must not be absent from the UK for more than 90 days during any year of the qualifying period. This may be a particular problem for those who must return home because of a death in the family or other family crisis, and for those whose work may require them to be posted overseas for long periods. The Government has said that it recognises these potential problems, but considers that the best way to deal with them is to leave open the possibility that in an individual case discretion to waive the requirement may be exercised. The problem with this is that a migrant will not be able to know whether the discretion will be exercised unless and until he or she has gone all along the route to citizenship (i.e. completed the qualifying period) and made the application for citizenship. Up until this point, the migrant will simply have to live with the uncertainty that if, for whatever reason, he or she is absent from the UK for more than 90 days in a 12 month period, this may mean that an application for citizenship is refused. He or she may then be required to leave the UK, or to begin his or her route to citizenship again. The only thing that is clear is that the situation for the migrant will be very uncertain.
21. Under the Act's provisions, a migrant who was on the route to citizenship as a migrant worker would have to be in continuous employment throughout his or her period of probationary citizenship. A migrant who was on the route on the basis of his or her family relationship (e.g. marriage to a British citizen) would have to have a relevant family association throughout the qualifying period. These requirements have led to particular concerns for migrant workers. The Government has

suggested that a 60 days period out of work might not lead to a refusal of citizenship. However, again, the Government considers that this is a matter best left for discretion at the time of the application for citizenship. This means that a migrant on probationary citizenship, who was facing exploitation or harassment, even if he or she hoped to find another job within 60 days, could not be sure that leaving the current job would not lead to a refusal of citizenship. Concerns have also been expressed about migrants whose family relationships come to an end because of bereavement or domestic violence. Again, the Government's response is that discretion may be exercised.

22. The Act's provisions will also require a migrant to have a qualifying immigration status through the qualifying period. Generally speaking, a migrant who has been granted permission to be in the UK in order to work, join (but not visit) family or because of protection needs (e.g. asylum) will have an immigration status that is a qualifying status. However, a migrant who has been granted permission to be in the UK in order to study will not have a qualifying status. Some students may, at the end of their studies, be able to switch to be in the UK as workers. However, the period of time they have spent here as students will not count towards the qualifying period for citizenship.

#### ***Commencement & transitional protection***

23. As stated above, the provisions in the Act are not intended to be implemented until July 2011.
24. The Act also makes provision for transitional protection – i.e. some protection for some migrants who are already in the UK on the route to citizenship at the time the provisions of the Act are implemented. The following protections will apply:
- someone who has an outstanding application for citizenship at that time will have the application considered under the current (not the new) provisions

- someone who has indefinite leave to remain at that time will have 24 months in which to apply for citizenship under the current (not the new) provisions
- someone who has an outstanding application for indefinite leave to remain at that time will, if he or she is granted indefinite leave to remain, be able to make an application for citizenship under the current (not the new) provisions at any point up to 24 months after the provisions of the Act are implemented

25. This transitional protection will protect some migrants from the changes to be made by the provisions in the Act. It will not protect everyone. However, the Government is not prevented from making further transitional protection available at the time of implementing these provisions. Phil Woolas MP, the Minister for Immigration confirmed this before the Act was passed:

*“The [transitional protection in the Act] prevents us from doing anything more restrictive in the commencement order regarding those individuals whom it covers. It does not prevent us from extending the protection by making further transitionals for other groups.”<sup>3</sup>*

### **Consultation - Earning the right to stay: A new points test for citizenship**

26. This consultation proposes that a points test should be introduced. A migrant would have to meet the points test to pass from one stage of the route to citizenship to the next stage. The consultation suggests that the test would apply at the stage where a migrant applied for probationary citizenship (i.e. was seeking to move from the first to the second stage). However, the consultation invites views as to whether the points test should be applied at the stage of applying for citizenship. It should be noted that the emphasis on points may be confusing or misleading. The key issue under any points test would be whether the migrant could satisfy whatever requirements were set (in order to be awarded the necessary points).

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<sup>3</sup> *Hansard* HC, Report Stage, 14 July 2009 : Column 233



27. At paragraph 8 of the executive summary of the consultation document, it states:

*“A points based test would need to capture the requirements for probationary citizenship which already exist within the earned citizenship system. For family members and refugees, sufficient points to pass the test would be awarded on the basis of their continuing family relationship or protection needs.”*

28. As regards family members, it can be seen from the discussion of ‘relevant family association’ earlier in this note that the provisions of the Act will expressly provide that the relevant family association (relationship) must be continuing. However, what is said in this paragraph about refugees is of concern. Currently, those granted refugee leave and humanitarian protection leave for five years do not usually have to show that they still need protection when applying for indefinite leave to remain (i.e. applying to move to the second stage on the current route to citizenship)<sup>4</sup>. The consultation suggests that this will change. However, other recent statements from the UK Border Agency suggest that there will be no change<sup>5</sup>. The position is not clear.

29. At paragraphs 9 & 10 of the executive summary of the consultation document it states:

*“For those on the work route, however, a points system would allow for a more flexible test to be applied, with the threshold being levered up or down depending on the needs of the UK. Attributes for which points could be awarded might include:*

- *Earning potential;*

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<sup>4</sup> There are exceptions: (1) where the UK Border Agency has reason to suspect that the person obtained refugee or humanitarian protection leave by deception; (2) where the person is considered to have acted in a way that demonstrates they are no longer a refugee or are excluded from refugee protection; (3) where the person’s conduct (e.g. criminal convictions) gives reason for the UK Border Agency to wish to deport the person; and (4) where the Government has announced that circumstances in the person’s country of origin have changed such that it was intended to review the refugee or humanitarian protection leave granted to everyone from that country.

<sup>5</sup> At a meeting between the UK Border Agency and members of the National Asylum Stakeholders’ Forum on 18 August 2009, a powerpoint presentation by the UK Border Agency included: ‘*Refugees will be expected to apply for Probationary Citizenship one month before their five years’ refugee leave expires. For the vast majority of cases, it will not be necessary to conduct an in-depth review at this stage to determine whether the individual is still a refugee.*’

- *Special artistic, scientific or literary merit;*
- *Qualifications;*
- *Shortage occupation;*
- *English (over existing requirements); and*
- *Having lived and worked in a part of the UK in need of further immigration, e.g. Scotland.*

*“Points might also be deducted for failure to integrate into British life; for criminal or anti-social behaviour, or in circumstances where an active disregard for UK values is demonstrated.”*

30. A number of questions may be asked about these proposals. As regards the proposal that *“the threshold [be] levered up or down depending on the needs of the UK”*, this would create profound uncertainty for migrant workers. It would mean that a migrant worker who satisfied all the requirements that were known to him or her, throughout the five years that he or she had limited (or temporary) leave, could be refused to progress to the second (probationary citizenship) stage because the tests had changed (i.e. the threshold had been levered up) at the last moment. As regards the relevant attributes, it may be questioned whether these should include requirements that were not considered relevant to the test of whether the migrant should be permitted to come to and remain in the UK previously. As regards deducting points, there may be considerable scope for arbitrariness in how the factors suggested would be applied; and it is not clear why there is any need to go beyond the current position under which those whose conduct is thought to be ‘not conducive to the public good’ may be deported.
31. The consultation also makes proposals for local authorities to be involved in the ‘active citizenship’ requirement (see above). One suggestion is that local authorities may regulate this by checking whether a migrant has performed active citizenship (i.e. relevant community or ‘voluntary’ work). This part of the consultation provides an opportunity, despite there being no specific question, to raise general concerns at the active citizenship proposal. Indeed, given that there are still no clear proposals as to what will or won’t count for the purposes of active citizenship, it may be questioned how responses to the consultation can reasonably be

expected to assess whether local authorities can or cannot play a role in this.

32. The consultation includes several other proposals and questions, including questions relating to English language and knowledge of life in the UK requirements. The UK Border Agency has indicated that those granted refugee or humanitarian protection leave may be required to take ESOL or Life in the UK tests before applying for probationary citizenship and before applying for British citizenship. Although, failing to pass the test at the probationary citizenship application stage would not lead to refusal of probationary citizenship, failure at the British citizenship application stage would lead to a refusal of citizenship (or if they were applying for permanent residence)<sup>6</sup>.

#### **Consultation - Charging for immigration and visa applications**

33. This consultation includes questions on immigration fees generally, and questions relating to fees for applications on the route to citizenship – e.g. applications for probationary citizenship, for British citizenship and for permanent residence. In relation to this, it is noteworthy that those granted refugee or humanitarian protection leave may currently apply for and obtain indefinite leave to remain without payment of a fee. The consultation does not make clear what is proposed for refugees under the new route to citizenship. The UK Border Agency has previously stated that a fee would not be charged for refugees applying for probationary citizenship, but would be charged for an application for British citizenship<sup>7</sup>. It is not clear, but appears to be intended, that refugees would have to pay a fee to apply for permanent residence. If so, this constitutes a significant change, since currently there is a settled status that refugees may apply for without paying a fee.
34. The consultation includes various other questions – some of which do not relate to naturalisation. These include proposals to:

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<sup>6</sup> This was included in the powerpoint presentation at the 18 August 2009 meeting – see earlier footnote.

<sup>7</sup> This was said at a meeting of the National Asylum Stakeholders Forum on 14 May 2009.

- charge additional fees for when migrants miss appointments
- set higher fees in parts of the world where the UK Border Agency says it incurs greater costs in order to meet security requirements
- charge dependants on in-country applications just as they are charged on out-of-country applications
- charge additional fees on applications made by migrants who have overstayed
- charge for ‘administrative reviews’ (that is the system whereby the UK Border Agency can be requested to review its decision made overseas to refuse a migrant permission to come to the UK, in circumstances where there is no right of appeal)

### **Concluding remarks**

35. The consultations that are referred to here are not discussed in full. These include set questions, which individuals and organisations who wish to respond are invited to answer. However, it should be remembered that it is not a requirement, when responding to a consultation, that the response should answer all the questions or should be restricted to answering questions. Where a point does, however, relate to a particular question, it may be helpful to make that clear. Nonetheless, sometimes the question itself presumes a particular position. If that position is disagreed with, it is both acceptable and reasonable to make clear that the presumption contained in the question is not accepted.
36. As regards influencing the current or future Government, it remains the case that concerns regarding the citizenship provisions in the Act and proposals in these consultations may be raised with individuals’ and organisations’ constituency MPs.

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