
# Borders Citizenship and Immigration Bill

## Briefing for House of Commons Second Reading

## June 2009

**For further information contact**

Eric Metcalfe, Director of Human Rights Policy

email: emetcalfe@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

## Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. In mid-2008, the partial Draft Immigration and Citizenship Bill was published. Among other things, it held out the prospect of consolidating legislation that would, for the first time since the 1971 Immigration Act was passed, provide a comprehensive legal framework for immigration and asylum in the UK. In JUSTICE's view, consolidation is both essential and long-overdue as the current law is now spread across numerous Acts and exceedingly complex, contributing to poor quality decision making by immigration officials as well as a general lack of transparency and legal certainty.

3. As it was, the draft Bill itself was deeply flawed, containing much that would further erode appeal rights and increase arbitrary decision-making by immigration officials. In its place, the government has opted for a two-stage approach: the introduction of the Borders Citizenship and Immigration Bill containing a relatively narrow range of measures and an Immigration Simplification Bill towards the end of the current parliamentary session that would consolidate all existing immigration legislation into a single Act.

4. JUSTICE regrets that Parliament should be invited to consider a smaller range of immigration measures at this time, measures that in themselves do not seem to demand any urgency, while the far more important goal of consolidation is deferred until later. If enacted, it will be the seventh Act of Parliament dealing with immigration in the last ten years.[1] The goal of consolidation is not served by creating additional Acts to consolidate.

5. The Bill itself contains measures to allow immigration officers to exercise revenue and customs functions (Part 1), new provisions relating to citizenship and nationality (Part 2), and provisions relating to immigration and asylum (Parts 3 and 4). This short briefing focuses upon the latter provisions.

6. In particular we urge Members of Parliament to confirm the amendments made to the Bill by the House of Lords, especially those in relation to judicial review and the common travel area.

---

[1] The others are the Immigration and Asylum Act 1999, the Nationality Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants etc) Act 2004, the Immigration Asylum and Nationality Act 2006, the UK Borders Act 2007, and the Criminal Justice and Immigration Act 2008.

**Part 2 - Citizenship**

7. Part 2 is intended to implement several of the government's proposals first set out in its Path to Citizenship consultation,[2] as well as those in Lord Goldsmith's review of citizenship.[3] Measures on probationary citizenship were previously included in Part 3 of the partial Draft Bill published last summer. Although we are pleased to see some of the most egregious features of that Part have not been carried over into this Bill, problems remain with the concept and application of probationary citizenship set out in clauses 39 to 42. Far from simplifying arrangements, the status of probationary citizen seems to us an unnecessarily complex addition to the current law, one that will lead to confusion among both officials and applicants. A great deal will also depend on the detail of the regulations to be made under the provisions, e.g. the 'activity condition' contained in clause 42(1) (inserting paragraph 4B(5) into the 1981 Act, which may in turn be dispensed with by the power in clause 42(3). More generally, we question the appropriateness of addressing citizenship and nationality in a Bill concerned chiefly with border control and immigration.

8. We do, however, welcome the long-overdue provision in clause 46 removing the discriminatory provisions of the British Nationality Act 1981 that prevented persons born abroad prior to 1961 acquiring British citizenship from their British mother.

**Part 3 - Immigration**

*Clause 51 – Entry otherwise than by sea and air: immigration control*

9. In the House of Lords, peers voted to remove a clause that would have imposed immigration controls for all persons travelling between the UK and the Republic of Ireland by air or ship, displacing the longstanding arrangements for the Common Travel Area following the Anglo-Irish Treaty in 1921,[4] and most recently recognised in the Treaty of Amsterdam 1999. In its place, clause 51 prevents powers under the Immigration Act 1971 being used to impose immigration controls on any land border, namely the border with the Republic.

10. In JUSTICE's view, insufficient evidence has been put forward by the government to justify the introduction of immigration controls on air and sea links after a period of unrestricted travel that has lasted the better part of a century. The proposed measure was particularly anomalous

---

[2] Border and Immigration Agency, *Path to Citizenship: Next Steps in reforming the immigration system* (February 2008) .

[3] *Citizenship: Our Common Bond* (October 2007).

[4] The Common Travel Area was first established by way of informal agreement between the British and Irish authorities, formalised in the UK by the Alien Orders of 1923 and 1925: see B Ryan, 'The Common Travel Area between Britain and Ireland' (2001) 64 *Modern Law Review* 855-874.

given that immigration controls will continue to be absent from the land border between the UK and the Republic – the one border that is easiest to cross. Given the historic links and close ties between the UK and the Republic and the general importance of the right to freedom of movement under Article 12 of the International Covenant on Civil and Political Rights (which both states have ratified), we consider that immigration controls should only be introduced into a previous common travel zone where a case of strict necessity (rather than mere administrative convenience) can be made out. We therefore urge members of the House to support clause 51 and resist any attempt on the part of the government to reintroduce restrictions on the Common Travel Area.

*Clause 52 – Restriction on studies*

11. Clause 52(1) enables the Secretary of State to impose on a person 'a condition restricting his studies in the United Kingdom' as part of a grant of temporary leave to enter or remain. Clause 52(2) allows the Home Office the power to attach such a condition to any existing grant of temporary leave.

12. In JUSTICE's view, if leave has been granted to a person to pursue their studies in the UK, we can see no basis for the Home Office to have a power to restrict those studies. The problem of bogus colleges being used as a pretext to gain a student visa is not a problem that is addressed by imposing restrictions on a student's course of study. The UK Borders Agency has many competencies, but there is no evidence that an expertise in education is among them. Accordingly, we consider the Home Office institutionally ill-placed to be imposing conditions on a person's studies, and that this restriction is only likely to result in unnecessary and likely arbitrary interference with academic freedom and the right to an education under Article 2 of Protocol 2 of the European Convention on Human Rights.

13. If there are doubts about an applicant's ability or sincerity in pursuing a course of study in the UK, this should be determined either at the point of granting leave or at the point that variation of the student visa is sought, not in setting conditions on the studies that can afterwards be undertaken. We think it particularly useful to note, in this context, the comments of Lord Justice Sedley delivering the judgment of the Court of Appeal in *OO and others v Secretary of State for the Home Department* in July 2008:[5]

> [I]t is relevant to recall that the admission of foreign nationals to study here is not an act of grace. Not only does it help to maintain English as the world's principal language of commerce, law and science; it furnishes a source of revenue (at rates which, by virtue of an exemption from the Race Relations Act 1976, substantially

[5] [2008] EWCA Civ 747 at para 4, emphases added.

exceed those paid by home students) of frequently critical budgetary importance to the United Kingdom's universities and colleges as well as to many independent schools. ***We therefore find it unsurprising that the legislation and rules, correctly construed, do not place arbitrary or unnecessary restrictions on what foreign students can study here.*** It does not require evidence to remind us that it is not uncommon for a student to realise that he or she has made an unwise choice, or perhaps is being poorly taught, and to change courses or institutions with beneficial results. ***A rule preventing students from making such a change might well be arbitrary or unnecessary in the absence of case-specific reasons.***

*Clause 48 – Fingerprinting of foreign criminals liable to automatic deportation*

14. This provision expands upon the provisions for deportation of foreign criminals in ss 32-39 of the UK Borders Act 2007, allowing the power to take fingerprints under section 141 of the Immigration and Asylum Act 1999 to be exercised in such cases. The 2007 provisions were, of course, a response to the failure of the Home Office to consider the eligibility of foreign prisoners for deportation at the conclusion of their sentence. Consequently, the fingerprinting measure is an addendum to a wholly makeshift scheme that was devised in response to operational errors, rather than any defect in the existing law governing deportation. The more responsible act of Parliament should be to question the continuing need for the 2007 provisions, rather than to add to them.

*Clause 54 – Extension of sections 1 to 4 of the UK Borders Act 2007 to Scotland*

15. Sections 1 to 4 of the 2007 Act extend a detention power to designated immigration officials in cases where they believe a person is liable to be arrested by police. We note that although section 145 of the Immigration and Asylum Act 1999 allows the Home Secretary to apply the provisions of the PACE Codes to immigration officers exercising police-like powers, there has been little use of that provision thus far. Parliament should refuse to extend the powers under sections 1 to 4 of the 2007 Act to Scottish immigration officials until the government has taken the necessary steps to ensure that immigration officials exercising police-like powers are bound by the relevant PACE provisions (including the corresponding provisions in Scotland).

**Part 4 – Miscellaneous and general**

*Clause 55– Fresh claim applications*

16. Clause 55 was a compromise amendment introduced in the House of Lords as an alternative to the government's plans to transfer judicial reviews from the High Court in immigration and asylum cases to the Upper Tribunal.

17. At present, an asylum seeker who has previously been refused asylum may make a fresh claim to stay in the UK (either on Refugee Convention grounds or human rights grounds) where new information has come to light or if there has been a material change in their circumstances.

18. Rule 353 of the Immigration Rules requires the Home Office to consider an asylum seeker's fresh claim if the change of circumstances or new information would give rise to a realistic prospect that the claim would succeed before the Asylum and Immigration Tribunal.[6]

19. If the Home Office refuses a fresh claim application, then the asylum seeker can seek permission to judicially review the refusal in the High Court. We understand that concerns have been expressed by High Court judges as to the large number of fresh claim applications that are refused, resulting in increased delays and resource problems in the Administrative Court.

20. The new clause 55(1) would require the Secretary of State to make an order for all applications for judicial review of a fresh claims decision to be transferred to the Upper Tribunal instead of the High Court.

21. Furthermore, clause 55(2) gives the Administrative Court the discretion to decide if any other immigration and asylum judicial review constitutes a fresh claim application. If so, the claim would automatically be transferred to the Upper Tribunal.

22. Although we have concerns about the level of scrutiny that the Upper Tribunal would apply to immigration and asylum claims, we believe that clause 55 is a proportionate and workable compromise to the concerns about the current judicial review workload of the High Court.

23. When the Tribunal was first created under section 19 of the Tribunal Courts and Enforcement Act 2007, Parliament insisted that all immigration, asylum and nationality judicial reviews must remain with the High Court for two reasons.[7] First, unlike many other areas of administrative law, immigration judicial review frequently engages fundamental rights such as freedom from torture, inhuman and degrading treatment and the right to liberty. The consequences of error for an asylum seeker include return to a country where they may face serious persecution or death. As such, judicial review by a High Court judge is often an essential safeguard for basic rights in this area. Secondly, the sheer volume of poor quality administrative decisions by

---

[6] See e.g. the recent decision of the Court of Appeal in *ZO (Somalia)* v *Secretary of State for the Home Department* [2009] EWCA Civ 442.

[7] See section 31A of the Supreme Court Act 1981, as amended by section 18 of the 2007 Act.

immigration officials raises serious doubts about the capacity of an untested tribunal to provide the necessary degree of judicial scrutiny.

24. No evidence has been put forward by the government to address the concerns that originally led Parliament in 2007 to prevent the transfer of immigration cases to the Upper Tribunal. In the meantime, judicial scrutiny by the Administrative Court has continued to reveal an array of disturbing practices by immigration officials: see for example the decision of Mr Justice Davis in the case of *Abdi and others v Secretary of State for the Home Department* in December 2008 in which he found that the Home Office had, in effect, operated for two years an undisclosed and unlawful policy of automatic detention for foreign prisoners pending deportation.[8] Cases such as *Abdi* are indicative of serious and continuing flaws in immigration and asylum operations and policy. Indeed, the fact that the Home Secretary lost four out of five of the immigration cases that reached the House of Lords in 2008[9] shows something of the extent of the problem. In JUSTICE's view, now is clearly not the time to transfer immigration and asylum cases *en masse* from the Administrative Court to an administrative tribunal untested in such matters.

25. We therefore support the compromise amendment set out in clause 55 and urge Members of Parliament to resist the government's attempt to transfer immigration and asylum judicial reviews from the High Court on any other basis.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
1 June 2009

---

[8] [2008] EWHC 3166 (Admin) at para 205: 'While the Home Office has, to put it mildly, not covered itself in glory in this whole matter … I think the failings were in essence one of failing, promptly and directly, to confront and address a perceived legal difficulty: whether through concerns at being bearers of unwelcome news to the Ministers or through an instinct for ducking an apparently intractable problem or through institutional inertia or some other reason, I cannot really say. I am not prepared, however, to conclude on the material before me that there was a conscious decision within the Home Office to operate tacitly an unpublished policy, known to be highly suspect, in the hope it would not be uncovered or, if it was uncovered, against a plan, if the courts intervened, to present that reversal as being due solely to the courts or the Human Rights Act'.

[9] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; *Chikawamba v Secretary of State for the Home Department* [2008] UKHL 40 ; *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; *EM(Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64;