Borders Citizenship and Immigration Bill

Briefing for House of Lords Second Reading

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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. Clearly any consolidating legislation will require a very large amount of parliamentary time to consider, yet the time available for that task is now substantially reduced for the sake of the current Bill. In our view, there is little in the Bill before the House that warrants the apparent priority that has been given to it. Nor do the explanatory notes offer any reason why these measures, if indeed necessary, could not have been included in the Simplification Bill itself. 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.

[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

6. 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 37 to 39. 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 39(1) (inserting paragraph 4B(5) into the 1981 Act, which may in turn be dispensed with by the power in clause 39(3). More generally, we question the appropriateness of addressing citizenship and nationality in a Bill concerned chiefly with border control and immigration.

7. We do, however, welcome the long-overdue provision in clause 41 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 46 – Common travel area

8. Clause 46 introduces 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. The introduction of immigration controls in this clause implements the proposals first set out in the UK Border Agency consultation in mid-2008.[5]

9. 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. This measure is particularly anomalous given that

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[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.

[5] UKBA, *Strengthening the Common Travel Area* (July 2008). See also the government's response to the consultation, released 15 January 2009.

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.

Clause 47 – Restriction on studies

10. Clause 47(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 47(2) allows the Home Office the power to attach such a condition to any existing grant of temporary leave.

11. 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 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. If there are doubts about an applicant's ability or sincerity in pursuing a course of study in the UK, this should be determined at the point of granting leave, 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:[6]

> [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 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

[6] [2008] EWCA Civ 747 at para 4, emphases added.

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

12. 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 of Parliament should be to question the continuing need for the 2007 provisions, rather than to add to them.

Clause 49 – Extension of sections 1 to 4 of the UK Borders Act 2007 to Scotland

13. 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 50 – Transfer of immigration or nationality judicial review applications

14. Clause 50 seeks to amend section 31A of the Supreme Court Act 1981. This section, as amended by section 19 of the Tribunal Courts and Enforcement Act 2007, blocks the transfer of any immigration or nationality judicial review to the Upper Tribunal created by the 2007 Act.

15. This restriction was imposed at the time of the 2007 Act for two main reasons. 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 immigration officials raises serious doubts about the capacity of an untested tribunal to provide the necessary degree of judicial scrutiny.

16. 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:[7]

> 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.

17. That UK Border Agency was operating an unlawful policy of detention for two years as a result of institutional inertia rather than some malign intent is hardly comforting. 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[8] shows something of the extent of the problem. In JUSTICE's view, now is clearly not the time to transfer immigration cases from the Administrative Court to an administrative tribunal untested in such matters.

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[7] [2008] EWHC 3166 (Admin) at para 205.

[8] *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;