



Joint Parliamentary Briefing from the British Refugee Council, the Scottish Refugee Council and the Welsh Refugee Council:

Borders, Citizenship and Immigration Bill 2009

House of Lords Second Reading, 11th February 2009

Contents

Introduction

1. Citizenship (Part 2)
2. Welfare of children (Part 4)
3. Judicial review (Part 4)
4. Common Travel Area and Access (Part 3)
5. Extension of sections 1 to 4 of the UK Borders Act 2007 in Scotland (Part 3)
6. Missed opportunities

Conclusion

Introduction

This briefing focuses on the elements of the Borders, Citizenship and Immigration Bill (BCI Bill)¹ that are of most significance for refugees and asylum seekers. The British, Scottish and Welsh Refugee Councils' primary concern is the protection of refugees: those who are in the UK, as well as those who have been prevented from entering. We believe that refugees should have access to a fair asylum determination procedure and should never be forced to return to situations where they face persecution. We believe that those who are recognised as refugees should enjoy the full benefits of the Refugee Convention, and be granted permanent settlement immediately.

In June 2007, the UK government announced its intention to review all of the existing immigration legislation which, since 1971, has become increasingly complex. Following consultation on how it should do this, the government published a draft (partial) Immigration and Citizenship Bill in July 2008.² This was accompanied by a broader policy document *The Path to Citizenship* which addressed additional proposed measures that were not included in the Bill as published.³

The British Refugee Council briefing on the draft (partial) Immigration and Citizenship Bill and related documents, with a summary of our main concerns, can be found on our website.⁴

One of our major concerns about the UK government's proposed approach to simplifying immigration legislation was that it attempted to do too much in too tight a timescale. We strongly recommended that the government should first consolidate existing legislation, before attempting to change or simplify it. The government, however, has continued with the larger Simplification Project, but its original timetable

¹ See <http://www.ukba.homeoffice.gov.uk/managingborders/borderscitizenshipbill/> (Accessed 21/1/09)

² See <http://www.ukba.homeoffice.gov.uk/managingborders/simplifying> (Accessed 21/1/09)

³ See: <http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/> (Accessed 21/1/09)

⁴ See <http://www.refugeecouncil.org.uk/policy/briefings/2008/immigrationandcitizenship.htm>

has slipped. A new large immigration bill to enact the key proposals in the government's simplification agenda is not now expected until October 2009.

As a result of the delay, the government claim that there are some measures that they need to introduce as a matter of urgency before a larger bill is introduced. These measures are contained in this new BCI Bill, which is thus limited in scope and does not address the main concerns we had about the previous Bill. Some elements of the BCI Bill, for example those relating to citizenship, are less clear than in the earlier proposals. We are concerned that, by taking a piecemeal approach to implementing the simplification proposals, the current Bill adds to the existing complexity of asylum and immigration law rather than reduces it, and reduces opportunities for proper parliamentary scrutiny of the whole simplification programme.

The key issues for refugees and asylum seekers in this Bill are:

1. Citizenship (Part 2)

These clauses begin to enact some of the proposals outlined in *The Path to Citizenship*. Clauses 37 - 45 amend the requirements for people applying for naturalisation. At the time of application, those applying must have some form of leave (Clause 37 (2)) and satisfy a qualifying period of either eight or five years (the shorter period being for family applications from partners), depending on the basis on which they are applying (Clause 39). These periods can be reduced to six or three years if the individual satisfies the "activity condition" (that is, if s/he engages in some form of approved voluntary activity).

Our comments and concerns:

The Refugee Councils believe that a person recognised as a refugee by the UK should receive permanent residence from this date, and not be forced to endure the uncertainty of an initial period of temporary leave. Refugees arriving in the UK through the Gateway Protection Programme receive permanent residence immediately, and we believe that the same should apply to all those who are granted refugee status in the UK. Permanent residence helps a refugee to begin to rebuild their life in the UK.

We are disappointed that a key recommendation of Lord Goldsmith's broad review of citizenship⁵, for the UK government to review this policy, was not considered in the development of the Path to Citizenship proposals.

In the scheme outlined in *The Path to Citizenship*, if refugees did not wish to apply for citizenship they would be forced to wait a further two years for permanent settlement. There is no reference to this in this Bill but we assume this remains the intention. We thus remain concerned that refugees who wish to settle, but not become UK citizens, would be further penalised by having to wait a further two years before becoming eligible for permanent settlement in the UK.

We are concerned that UKBA has issued no clear structure as to how the review of a refugee's status (likely to be in the fifth year of temporary leave for those granted status after August 2005) relates to the probationary citizenship period. This review is pivotal to the whole new citizenship 'architecture' being proposed. Refugees who receive a positive review but who do not meet the entry requirements for probationary citizenship (i.e. ESOL Entry level 3 and knowledge of life in the UK or ESOL with citizenship context) will need to receive successive periods of temporary leave until they do meet the entry requirements. This is unacceptable for refugees who are unable to return home and who are in most need of secure future in the UK.

⁵ See <http://www.justice.gov.uk/docs/citizenship-report-full.pdf> (accessed 02/2/09)

The Refugee Councils have expressed strong reservations about the implications for refugees of the routes to citizenship proposals⁶. Our primary concern is that we believe the language of 'earning the right to stay' in the UK and 'probationary periods' runs counter to the spirit of the UK government's commitment to fulfil its obligations under the Refugee Convention and the European Convention on Human Rights. Granting long-term, secure protection to refugees who have fled persecution cannot be something that refugees have to earn, and the government's routes to permanent status should reflect this.

We do not think the requirement for refugees to engage in voluntary work within the probationary citizenship period is either necessary or fair. We believe that everyone in the UK should be encouraged and supported to live as active citizens. At present, many refugees and asylum seekers contribute actively to life in the UK in a variety of ways. However, we are opposed to the linking of naturalisation and permanent residence to active citizenship. There are many different reasons for volunteering, but being required to take part in order not to prolong the passage to citizenship risks undermining the voluntary nature of the activity. Making volunteering such a core component of the process could also be discriminatory, as people with illnesses and disabilities, women and single parents may find it difficult to find suitable volunteering opportunities.

The Refugee Councils believe that refugees and others with international protection needs should be exempt from fee charges for naturalisation or permanent residence. They should be exempt whether these charges are imposed directly, through the application process, or indirectly as a result of requirements to take the English for Speakers of Other Languages with a Citizenship Context or the Life in the UK test.

The Refugee Councils are concerned that restricting access to public funds, including home fee status for further and higher education, for those with temporary residence will impact negatively on refugees. Although UKBA's initial guidance on routes to citizenship notes that refugees remain eligible, this is not consistently stated throughout. We know of confusion amongst service providers who have interpreted the guidance as meaning that refugees are also excluded during the probationary citizenship period. Including refugees within processes designed for managed migration lends itself to confusion about the particular and distinct entitlements of refugees. The Refugee Councils also believe that people who are granted Discretionary Leave to Remain and Indefinite Leave to Remain as part of Case Resolution should continue to enjoy full access to public funds, to home student status and be afforded the same entitlement to family reunification as refugees.

We also remind the UK government of the competences of the Scottish Government in areas such as health, education and volunteering and urge them to be fully cognisant of the authority of the Scottish Government to legislate in these areas.

We are additionally concerned that the "qualifying period" to become eligible for probationary citizenship only starts once leave has been granted and therefore that periods of temporary admission do not apply. Given the time it takes for some asylum applications to eventually be resolved, in many cases several years, many refugees will, in practice, wait considerably longer than the minimum of six years before being able to settle permanently.

Finally, the Refugee Council is concerned for persons refused asylum but granted Exceptional, Discretionary or Indefinite Leave to Remain. Those with Exceptional Leave to Remain (ELR) and Discretionary Leave to Remain (DLR) should be granted Indefinite Leave to Remain (ILR) outside of the probationary citizenship model. It is unreasonable for them to face successive periods of temporary leave beyond the current four (ELR) and six (DLR) year provisions for making an application for ILR. In addition, we believe that all people in the above categories wanting to apply for citizenship should continue to have access to public funds during the probationary citizenship period.

⁶ See <http://www.refugeecouncil.org.uk/policy/responses/2008/citizenship.htm>

Our recommendations:

- All refugees and those granted protection under the ECHR should be granted permanent residence at the time that status is granted in order to enable them to rebuild their lives. They should not be required to overcome further hurdles in order to be able to settle permanently.
- Refugees and those granted Humanitarian Protection, Discretionary Leave to Remain or Exceptional Leave to Remain should not be charged for receiving ILR.
- Refugees should not be required to perform voluntary activities in order to speed up their passage to citizenship or permanent permission to stay in the UK.
- Refugees and others with international protection needs should be exempt from fee charges for naturalisation or permanent residence
- Refugees, once granted ILR, should be supported to apply for citizenship outside of the probationary citizenship period.
- Any qualifying period for citizenship or settlement should include periods of temporary admission.
- Those granted DLR and ELR should be eligible for ILR after a set period of years outside of the probationary citizenship period.
- Those refused asylum but granted DLR, ELR or ILR who wish to apply for citizenship should continue to be eligible for public funds during the probationary citizenship period.

2. Duty Regarding the Welfare of children (Part 4)

Clause 51 imposes a duty on the Secretary of State to ensure that there are adequate arrangements in place in relation to immigration and nationality functions to safeguard the welfare of children.

Our comments and concerns:

This measure is welcome and brings immigration officers into line with other public bodies by replicating exactly the wording of Section 11 of the Children Act 2004. However, there is the need to ensure that the associated regulations do ensure the protection of children as intended and pay regard to the particularities of child protection systems in Scotland and Northern Ireland. Clarification is needed on the purpose and meaning of the addition of 'children who are in the United Kingdom' in 51 (1) (a), as some UKBA staff work outside of the UK. Assurances are needed that any updated guidance issued under the aforementioned Children Act duty will automatically update the guidance under this clause, without the need for the Secretary of State's intervention.

Although the duty itself is welcomed there is nothing in the Bill to address wider concerns regarding the welfare of children, such as the continuing practice of detaining families with children, the problem facing children whose age is disputed, those faced by trafficked children and those facing destitution.

3. Judicial Review (Part 4)

Clause 50 provides the power to allow the transfer of judicial review applications from the High Court to the Upper Tier of the Tribunal Service, which was established by the Tribunals, Courts and Enforcement Act 2007.

Our comments and concerns:

Judicial review by a High Court judge has frequently proved a crucial safeguard for refugees facing the threat of unlawful detention or removal. The proposal to allow the transfer of these cases to Other Refugee Council publications are available at www.refugeecouncil.org.uk

the new Tribunal, currently prohibited for immigration cases, was part of a UKBA consultation on immigration appeals in August 2008.⁷ A joint response by the Refugee Council and the Refugee Legal Centre, which outlines the concerns that we have about this, is available on our website.⁸ In summary, we are concerned that although the UK government has given assurances that the Upper Tier would be accorded the status of the High Court, it is far from clear what this would mean in practice. It does not appear to mean that a High Court judge will be present at every such case, which we would regard as a minimum requirement. In addition, the UK government signalled its intention to retain responsibility for writing the Procedural Rules for the Tribunal, unlike in other jurisdictions where the Tribunal writes its own Rules. Thus it is highly questionable whether this Tribunal will in fact have the status and independence of the High Court and hence whether this contentious area of law will continue to receive the anxious scrutiny it requires.

In any event we believe that it is premature to be legislating for this power in advance of the immigration jurisdiction itself being transferred to the new Tribunal and without any evidence of how it is functioning.

We are concerned, from a Scottish perspective, that various related on-going debates in Scotland⁹ on the future of the tribunals system have not been properly considered prior to this legislation being drafted. In particular it is important to stress the need to fully respect the recommendations of the Administrative Justice Steering Group under Lord Philip¹⁰. This included an option to create a new Scottish Tribunals Service to support both GB/UK tribunals within Scotland (including the Asylum and Immigration Tribunal) and Scottish tribunals.

Moreover, we consider that this wholly contradicts the 2005 concordat between the UK government and the then Scottish Executive which states that:

*'In reforming and unifying the administrative structure for the tribunals administered by central government, the DCA will as far as possible avoid making decisions which would have the effect of precluding new and different arrangements being created in the future for Scotland, including the possibility that at some future date the Scottish Ministers may wish to create a unified tribunal administration in Scotland embracing both central government and devolved tribunals. The creation of such an administration would require the agreement of the Lord Chancellor and the Scottish Ministers.'*¹¹

Our recommendation:

- Judicial Review in the High Court should be retained for immigration cases.

4. Common Travel Area

The UK proposes to introduce immigration checks on passengers in sea and air routes between the UK and the Republic of Ireland, including the use of e-borders.

⁷ See

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/>
(Accessed 21/1/09)

⁸ See

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/>

⁹ See: Lord Gill's review of Civil Courts in Scotland

¹⁰ Options for the Future Administration and Supervision of Tribunals in Scotland: A report by the administrative justice steering group, October 2008

¹¹ See http://www.dca.gov.uk/concordat/concord_scot_a.htm

Our comments and concerns:

The Refugee Council is concerned that there is no provision for refugees who may be travelling between the UK and the Republic of Ireland.¹² There is no reference to the primacy of the 1951 Convention relating to the Status of Refugees, including the obligation on states to receive refugee claims. We are particularly concerned with regards to the treatment of vulnerable refugees at border posts such as children and recommend that they are treated appropriately, including where they may be returned under the Dublin II Regulation.

Our recommendations:

- The Refugee Councils recommend that the UK government makes provisions for documentation used by refugees and others with protection needs such as stateless persons and those with humanitarian protection by including these in the list of acceptable documentation.
- We recommend that monitoring the CTA border controls be included in the remit of the Chief Inspector of the UKBA to ensure transparency.

Case Study of the effects of the CTA proposals:

The UK and Ireland plan to resettle a group of refugees from refugee camps in Tanzania. These refugees have been selected on the basis of their vulnerability. The group will be resettled in a cross border project in the Republic of Ireland and Northern Ireland.

The group are likely to want to visit fellow community members across the border. We have concerns that they will be more likely to be checked in the planned 'intelligence-led' operations at the land border between the Republic of Ireland and Northern Ireland. Further, they will be travelling on Refugee Travel Documents which are not provided for in the list of acceptable identification documents, and may encounter problems as a result. It is also unclear whether, as visa-nationals, they will need a visa for cross border travel.

5. Extension of sections 1 to 4 of the UK Borders Act 2007 in Scotland (Part 3)

Clause 49 gives immigration officers in Scotland the same power to detain at ports for non-immigration offences as their counterparts in England and Wales.

Our comments and concerns:

Whilst this power may affect everyone, it is an expansion of the police-like powers of immigration officers in Scotland, which include enforcement powers for immigration purposes such as the powers to enter, arrest and detain asylum seekers.

When increased police-like powers of immigration officers were introduced in England and Wales, the then Immigration Minister Liam Byrne stated that:

"Before these powers are introduced it is important that effective oversight arrangements are in place. On 26 July 2007, therefore, I announced the publication of a consultation document on matters related to the implementation of measures in the Police and Justice Act 2006 to extend the Independent Police

¹² See the response to the UK Border Agency's Consultation on 'Strengthening the Common Travle Area' by the Refugee Council, Welsh Refugee Council and the Scottish Refugee Council (October 2008)

*Complaints Commission's jurisdiction to cover the Border and Immigration Agency's enforcement functions.*¹³

The Scottish Refugee Council raised concerns in its response to this new jurisdiction of the IPCC that UKBA staff's enforcement powers in Scotland would not be subject to the same degree of scrutiny and accountability as in England and Wales as asylum seekers and others subject to enforcement powers in Scotland would not have parity of recourse to an independent and direct complaints mechanism.

Despite assertions by the then Minister that: *"similar oversight provisions are currently being developed for Scotland and Northern Ireland"* we await any public announcement of what these similar oversight provisions are and how complaints about the abuse of enforcement powers by immigration officers in Scotland can be made.

Our recommendation:

- Section 54 (11) states that an order to commence this section can only be made if Secretary of State has consulted the Scottish Ministers. We would urge Scottish Ministers to refuse this request until it is clear what independent and parallel routes of complaint are open to those subject to this new power and other enforcement or 'police-like' powers of immigration officers in Scotland.

6. Missed opportunities

This Bill is being brought forward ahead of the rest of the simplification project on the premise that it contains urgent matters that require immediate legislation. However, the Refugee Councils believe there are many more pressing issues that need to be urgently addressed, in particular: the plight of destitute asylum seekers at the end of the process; the continued restrictions on permission to work; and ensuring that UK overseas border controls contain adequate protection safeguards for refugees

Destitution: All single refused asylum seekers who have had their appeals rejected have their Section 95 accommodation and support withdrawn as soon as a final decision is made. As they are not permitted to work, this leaves them destitute. Many of these people are unable to return home, in many cases because it simply isn't safe. Indeed, in 2007, nearly 50% of all refused asylum seekers were from Zimbabwe, Iran, Iraq, Sudan, Afghanistan, Somalia, the Democratic Republic of Congo and Eritrea – all countries where there is conflict, generalised violence and/or well documented human rights violations.

Failed asylum seekers at the end of their process who cannot be returned home but are complying with reporting requirements are able to obtain very limited help from the Home Office. This support is known as 'Section 4' or 'hard case' support and is in the form of accommodation and weekly vouchers worth £35 which can only be used in certain stores and on particular essential goods. In many cases, vouchers cannot be used to buy clothes, shoes, nappies, sanitary items, pens, aspirin, paracetamol or to get a haircut. As of September 2008, just over 10,000 asylum seekers were receiving Section 4 support. There are many thousands more who receive no support at all.¹⁴

Despite UKBA policy on the matter, where refused asylum seekers have concerns about their safety, they will not be coerced into leaving the UK by the withdrawal of support, forcing them to subsist on vouchers or denying them access to healthcare. Further, the Home Office's own research has concluded that there is very little evidence that those seeking asylum are deterred by the prospect of harsh treatment in a country of asylum because they have little knowledge of UK asylum procedures before

¹³ Hansard, HC Written statement, 4 February 2008, Col. WS63

¹⁴ The British Red Cross estimate that at least 26,000 destitute asylum seekers are receiving support from the Red Cross in the UK

they arrive, nor of entitlements to benefits, nor of how UK policies compare to those of other EU countries.

We believe that the policy of deliberately forcing asylum seekers into destitution is inhumane, unacceptable and should be abandoned as a matter of urgency.

Asylum seekers and work: Prior to 23 July 2002, asylum seekers who had been waiting for more than six months for an initial decision from the Home Office were allowed to apply for permission to work. Since February 2005, the government has been required to allow asylum seekers to apply for permission to work if they have waited 12 months for an initial decision on their claim and the delay was not of their making. This is as a result of the European Directive on reception conditions for asylum seekers. The Home Office has full discretion on whether permission is granted. There is no right to appeal.

The government has resisted allowing asylum seekers to work, believing this would be a 'pull factor' that would attract people to claim asylum in the UK. However, there is absolutely no evidence to support this belief.

Exclusion from legal paid employment forces asylum seekers to live on sub-poverty levels of state support, or in destitution, or be forced into informal illegal working arrangements. Giving them the opportunity to work would enable them support themselves and their families without depending on government handouts. Exclusion from work means asylum seekers become socially isolated, deskilled and it damages their ability to integrate.

The British Refugee Council is currently leading a campaign to grant all asylum seekers the right to work if they have been waiting longer than six months for a full resolution on their asylum claim, or if a claim for asylum is refused, but they are unable to return home immediately and are complying with reporting restrictions (this includes people eligible for Section 4 support).

Ensuring the UK's borders are protection sensitive: The Refugee Councils are concerned that the UK's extra territorial border controls do not contain adequate protection safeguards for refugees. As a result, refugees who encounter them are blocked from reaching safety and may even be sent back to the country in which they fear persecution. We believe the UK government should address as a priority its legal obligation to ensure the protection of refugees, wherever its officials operate interception measures.¹⁵

Conclusion

The British, Scottish and Welsh Refugee Councils have serious concerns about the implications of some elements of the BCI Bill for refugees and refugee protection. Our key concerns are:

- Refugees whose need for protection is recognised by the UKBA should immediately be given permanent rights of settlement so they can rebuild their lives. They should not be faced with further hurdles such as extra years of 'probationary citizenship' and should not be made to fulfil additional obligations such as doing voluntary work.
- Whilst the Refugee Councils welcome the duty to safeguard the welfare of children, assurances are needed that any updated guidance made to the Children Act duty will automatically update the guidance under this clause, without need for the Secretary of State's intervention.

¹⁵ See Refugee Council's recent report 'Remote Controls: how the UK's border controls are endangering the lives of refugees' (December 2008)

http://www.refugeecouncil.org.uk/policy/position/2008/remotecocontrols/remote_controls.htm

- Judicial Review in the High Court should be retained for immigration cases.

The Refugee Councils regret that important and urgent issues, such as the destitution facing many asylum seekers at the end of the process and the loss of talent and dignity resulting from restrictions on entitlement to work, have not been addressed in this Bill. However, the long title of the Bill is sufficiently broad to allow amendments to be tabled on these key issues.

We urge the Government to put refugee protection at the heart of its vision for the future immigration system in the wider simplification Bill that it will publish in October 2009.