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Borders, Citizenship and Immigration Bill [HL]

Bill 86 2008-09

This Bill would deal firstly with the transfer of border customs functions to the new UK Border Agency. It would also introduce new naturalisation requirements and deal with various other citizenship issues. The Bill as it was introduced in the Lords would have provided for immigration control to be introduced on air and sea routes within the Common Travel Area (the UK, Ireland, the Isle of Man and the Channel Islands), but these controversial provisions were defeated in the Lords. Originally the Bill would also have restricted the involvement of the higher courts in immigration and nationality cases, but a Lords amendment limited the scope of this restriction. The Bill would introduce a new duty on the UK Border Agency to safeguard the welfare of children and make provisions in relation to trafficking babies and children for exploitation.

Several opposition amendments in the House of Lords mean that the Bill no longer entirely reflects the Government's wishes. However, the Government has indicated that it wishes to return to these issues in the House of Commons.

The comprehensive consolidating immigration Bill which had been expected will now be published in draft in the autumn of 2009.

Arabella Thorp and Gabrielle Garton Grimwood

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Summary

The *Borders, Citizenship and Immigration Bill [HL]* is the latest in a long line of Bills to seek to amend the law on immigration, asylum and nationality. It includes the citizenship and child protection aspects of the large *Draft (Partial) Immigration and Citizenship Bill* which was published for consultation in July 2008, and incorporates aspects of other consultation exercises on the Common Travel Area and on immigration appeals, as well as covering other areas on which there has been no consultation. Some provisions in the Bill, whilst appearing small, have nevertheless provoked considerable controversy and raised important points of principle

Part 1 of the Bill is largely administrative. It would allow for certain functions to be transferred from HM Revenue & Customs (HMRC) to officials of the recently-created UK Border Agency. The new customs role of the UK Border Agency will focus on border-related matters, while HMRC will retain responsibility for revenue and customs functions inland.

Part 2, on citizenship, would implement the Government's proposals for a new 'path to citizenship' by amending provisions of the *British Nationality Act 1981* on naturalisation as a British citizen. The main changes would be to:

- extend the basic qualifying period for naturalisation from five years to eight (or from three years to five, for applicants with a family connection to a British citizen);
- keep most applicants on temporary (limited) leave with restricted access to benefits during the qualifying period by introducing a new stage called 'probationary citizenship';
- reduce the additional qualifying period by two years for taking part in voluntary activities; and
- require applicants to have 'qualifying immigration status' throughout the qualifying period.

An opposition amendment introduced a 'grace period' during which the new rules would not apply to applicants who are already close to qualifying for naturalisation under the current rules, but the Government has indicated that it intends to return to this issue in the House of Commons. Other nationality amendments in Part 2 include clauses on the children of foreign and Commonwealth members of the armed forces, children born abroad to British mothers, children born abroad to parents who are British citizens by descent and certain Hong Kong residents.

Part 3 of the Bill deals with immigration control. As introduced in the Lords, it would have introduced immigration control for air and sea journeys within the Common Travel Area (which comprises the UK, the Channel Islands, the Isle of Man and the Republic of Ireland). These provisions have proved controversial, as journeys within the CTA are not currently subject to immigration control. An amendment to remove this clause from the Bill was agreed on division in the Lords, but again the Government intends to return to the issue in the Commons. Other changes in this part relate to restrictions on studying in the UK, powers to take fingerprints, and detention at ports in Scotland.

Part 4 covers a variety of issues. It would originally have allowed any judicial review application in immigration and nationality cases to be heard by immigration judges in the new Upper Tribunal, instead of by High Court judges in the Administrative Court (the Upper Tribunal was established in November 2008 as part of the new two-tier unified tribunals service under the *Tribunals, Courts and Enforcement Act 2007*, to which the Government

intends to move the Asylum and Immigration Tribunal at the end of 2009). However, this clause was seen as another controversial attempt to 'oust' the jurisdiction of the higher courts from immigration cases, leading to an amendment being agreed on division in the Lords which would limit the transfer to 'fresh claim applications' and prevent immigration appeals from the Upper Tribunal to the Court of Appeal from being restricted. As with the other major opposition amendments, the Government has said it intends to return to this clause in the House of Commons. Part 4 would also introduce a new duty on the UK Border Agency to safeguard the welfare of children. Some further measures – including those against trafficking of children – were added during consideration of the Bill in the Lords.

A further draft Immigration Bill, implementing the Government's proposals for the consolidation and 'simplification' of immigration and asylum (but not nationality) legislation, is expected in the autumn.

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I Introduction[1]

The Government has been making a wide range of changes to the immigration control of people coming to the UK from outside the EEA[2] (migration within the EEA is largely determined by European free movement rules rather than by domestic policy). As well as administrative and management reforms, this has required a striking number of changes to the law, of which the current *Borders, Citizenship and Immigration Bill* is the latest. There has been a new Immigration Act every year or two since 1997 and hundreds of changes to secondary legislation, the Immigration Rules, guidance and administrative arrangements. Some themes of these reforms and a list of the current primary legislation on immigration and asylum are given in a Library Standard Note.[3]

Following many calls for consolidation of this legislation, the Government has been planning a major 'simplification' Bill. Following an initial consultation in June 2007 on *Simplifying Immigration Law*,[4] the Government's May 2008 Draft Legislative Programme for 2008-09[5] contained a proposal for a very broad *Citizenship, Immigration and Borders Bill*. This was intended to "replace all existing immigration legislation with a simplified, clear and coherent legal framework" and provide new rules on acquiring UK citizenship through naturalisation. A substantial *Draft (partial) Citizenship and Immigration Bill*[6] containing the naturalisation proposals and about half of the proposed immigration simplification measures was then published for consultation in July 2008. This is discussed in two Library Standard Notes, one on the background to the draft Bill and the other analysing it.[7]

To some surprise, the immigration Bill that appeared in the Queen's Speech in December 2008 made no mention of the immigration simplification proposals. It was limited to "A bill […] to strengthen border controls, by bringing together customs and immigration powers [and to] ensure that newcomers to the United Kingdom earn the right to stay". The ensuing *Borders, Citizenship and Immigration Bill*, introduced in the House of Lords on 14 January 2009, was therefore relatively short. Far from consolidating the existing complex set of legislation, it sought further amendments to the current immigration, asylum and nationality Acts. The only measures from the draft (partial) Bill to have reappeared were those on citizenship and on the duty to protect children. The rest of the Bill contained an assortment of provisions on border functions (as a result of the UK Border Agency taking on border customs functions), the Common Travel Area (following a consultation),[8] judicial review (again following a consultation)[9] and more.

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1 by Arabella Thorp

2 The European Economic Area (EEA) comprises the EU Member States plus Iceland, Liechtenstein and Norway. Switzerland benefits from similar arrangements.

3 *Background to the draft (partial) Immigration and Citizenship Bill*, SN/HA/4824, 28 August 2008

4 Home Office Border and Immigration Agency, *Simplifying Immigration Law: an initial consultation*, June 2007

5 *Preparing Britain for the future: the Government's draft legislative programme 2008-09*, Cm 7372, 14 May 2008

6 Cm 7373, July 2008

7 *Background to the draft (partial) Immigration and Citizenship Bill*, SN/HA/4824, 28 August 2008 and *Draft (partial) Immigration and Citizenship Bill: an analysis*, SN/HA/4872, 20 October 2008

8 UK Border Agency, *Strengthening the Common Travel Area*, 24 July 2008

9 UK Border Agency, *Immigration appeals: fair decision, faster justice*, 21 August 2008

Despite its relative brevity, and cross-party support for some of the policies behind the Bill, several matters – including what the Bill does not do – have caused concern. It was debated at length in the House of Lords: on second reading on 11 February 2009; for four days in Committee from 25 February to 10 March; on Report on 25 March and 1 April; and on third reading on 22 April. It was also the subject of a very large number of letters from Ministers to Members who took part in the debate, which have been deposited in the House of Lords Library.

Overarching concerns were that the Bill differed enormously from the draft simplification Bill, and added to the existing complexity of immigration law rather than reducing it, yet did not contain enough context or detail to judge the proposals properly. Lord Morris of Handsworth described it as a "coat-hanger Bill, on which the opportunity is provided to hang large swathes of regulations in the longer term".[10] Furthermore, it was argued that although the extensive reliance on discretion would provide flexibility, it would be at the cost of certainty.

Particular areas of controversy included:

- the extension of the qualifying period for naturalisation and the details of the voluntary activity provision which would allow this period to be reduced;
- the introduction of immigration control on air and sea routes between the UK, the Republic of Ireland and other parts of the Common Travel Area;
- the transfer of immigration and nationality judicial review cases from the High Court to the new Upper Tribunal; and
- the scope of the child protection measures where the House of Lords wanted more to be done to protect babies and children who had been trafficked.

Several issues that do not appear in the Bill, particularly on asylum, were judged to be more urgent candidates for reform (in advance of the simplification Bill) than those topics selected by the Government.

The Government made some substantive amendments to the Bill during its passage through the Lords, including several new clauses on aspects of nationality law and another to tackle trafficking of people (and especially babies and children) for exploitation. The Government was also defeated on several issues, with opposition amendments being passed on division and now forming part of the Bill. These were clauses on transitional arrangements for the new naturalisation provisions, on the Common Travel Area and on the transfer of judicial review cases to the new Upper Tribunal. In each case the Government has indicated that is intends to return to the issue in the House of Commons.

Several parliamentary Select Committees have scrutinised the Bill. The Joint Committee on Human Rights published a legislative scrutiny report on it between the Committee and Report stages in the House of Lords, which criticised aspects of the naturalisation proposals and the proposed transfer of judicial review functions to the Upper Tribunal.[11] These issues were also the focus of a report by the House of Commons Home Affairs

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[10] HL Deb 11 February 2009 c1176

[11] Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC 375 2008-09

Committee published in April 2009.[12] The House of Lords Select Committee on the Constitution examined the implications of Parts 1 and 3 of the Bill, considering in particular the implications of the transfer of functions from HMRC to the UKBA for the principle of insulating individuals' revenue affairs from ministerial influence[13] and the implications for the Crown Dependencies on the proposals to impose immigration controls on air and sea routes within the Common Travel Area.[14]

After its passage through the Lords, the Bill was introduced in the House of Commons as Bill 86 on 23 April 2009. It is accompanied by the Government's Explanatory Notes and a series of impact assessments. These include some analysis of the human rights impact of parts of the Bill. The Minister has stated that the Bill is in his view compatible with the rights under the European Convention on Human Rights.

Most of the Bill extends to the whole of the UK, because immigration is a reserved subject. The clause concerning detention powers at ports in Scotland was the subject of a legislative consent motion debated by the Scottish Parliament on 19 March 2009 and passed by 118 votes to 2.[15] There is a power to extend many of the provisions of the Bill (other than the border functions in Part 1 and the judicial review section) to the Channel Islands and the Isle of Man.

The provisions on border functions and on study restrictions would come into force immediately on the day the Bill becomes law. The other provisions would come into force on dates chosen by Ministers (in the case of the detention powers at ports in Scotland, in consultation with Scottish Ministers).

A full draft simplification Bill is expected to be published for consultation in the autumn of 2009, before the end of the 2008-09 parliamentary session. It is likely to be a very large document, but will not cover citizenship and nationality measures.[16] The timing of a subsequent Bill is likely to depend on the general election.

II Border functions[17]

Until 2007, the Home Office's border control functions were carried out by the Immigration and Nationality Directorate (previously known as the Immigration and Nationality Department). That became the Border and Immigration Agency, an executive agency of the Home Office, on 1 April 2007. Further change came in April 2008, when the UK Border Agency (UKBA) was created as a shadow executive agency of the Home Office, this time subsuming (from Her Majesty's Revenue and Customs) customs detection work at the border and the work of UK Visa Services (previously part of the

12 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09
13 House of Lords Select Committee on the Constitution *Part 1 of the Borders, Citizenship and Immigration Bill: Report*, 26 February 2009, HL 41 2008-09
14 House of Lords Select Committee on the Constitution *Part 3 of the Borders, Citizenship and Immigration Bill: Report*, 12 March 2009, HL 54 2008-09
15 SP OR 19 March 2009 c 16064-74 and c 16086-8
16 Lord West of Spithead, HL Deb 11 February 2009 c1207
17 by Gabrielle Garton Grimwood

Foreign and Commonwealth Office). As of 30 June 2008, more than 1,020 UKBA front-line officers had been given both immigration and customs powers at the UK border.[18]

Full agency status was reached on 1 April 2009.[19] This necessitated a review of UKBA's powers, the results of which are reflected in the Bill.[20]

A. The border functions of HM Revenue and Customs[21]

Her Majesty's Revenue and Customs (HMRC) is responsible for administering the UK tax system, collecting revenue and paying entitlements. The Department was formed in April 2005 when the Inland Revenue merged with HM Customs and Excise, following the O'Donnell review.[22] Legislation to effect the merger, and to create a new prosecutions office to prosecute HMRC cases in England & Wales, was introduced in 2005.[23]

In general terms the Revenue had responsibility for collecting direct taxes (such as income tax and corporation tax) and Customs had responsibility for collecting indirect taxes (such as VAT and excise duties). In addition Customs had the separate responsibility for administering border controls against all forms of smuggling – an aspect of its work that goes back to the inception of a nationally organised Customs service in the early 13th century. In assessing the case for a merger, O'Donnell compared the two departments' main revenue-related operational activities – for example, data capture and processing – but gave relatively little attention to Customs' frontier responsibilities.[24]

The merger coincided with the creation of the Serious & Organised Crime Agency (SOCA), which took over, among other powers, Customs' investigation and intelligence responsibilities in tackling serious drug trafficking and recovering related criminal assets. *O'Donnell* noted that the Government had decided that HMRC would retain Customs' frontier role, rather than have it pass to the new agency, but said that SOCA would need to establish close links with the UK's border authorities.[25]

In a statement to the House on national security on 25 July 2007, the Prime Minister announced the establishment of a new unified border force, including the relevant activities of HMRC:

> To strengthen the powers and surveillance capability of our border guards and security officers, we will now integrate the vital work of the Border and Immigration Agency, Customs and UKVisas overseas and at the main points of entry to the UK, and we will establish a unified border force. I have asked the Cabinet Secretary to report back by October on the stages ahead in implementation and whether there is a case for going further while ensuring value for money, but as a

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18 HC Deb 1 September 2008 cc1597-8W

19 See Home Office UKBA, *UK Border Agency reaches full agency status and publishes framework agreement and business plan,* 1 April 2009

20 Home Office UK Border Agency, *Making change stick: an introduction to the* Immigration and Citizenship Bill, July 2008, p6

21 by Antony Seely

22 HM Treasury, *Financing Britain's future: review of the revenue departments*, Cm 6163 March 2004

23 Specifically, the *Commissioners for Revenue & Customs Act 2005*. Background on this issue is given in the Library paper written for the Bill's second reading (Library Research paper 04/90, 6 December 2004).

24 For example, see Cm 6163, March 2004, p143 (para B.2)

25 Cm 6163, March 2004, p22

> result of our announcement today, the first change that people will see is that, starting from next month when arriving in Britain, they will be met at the border—either sea port or airport—by a highly visible, uniformed presence, as over the next period we move, for the first time, to one single primary checkpoint for both passport control and customs.[26]

The Cabinet Secretary's report was published on 14 November that year, and gives a short explanation of this aspect of HMRC's border-control work:

> 2.22 HMRC's border responsibilities relate to all goods entering or leaving the UK, whether carried by freight, passengers or any other method such as post. HMRC combines tax gathering, regulatory control and law enforcement. It ensures the legality of the flows of goods in and out of the UK, facilitates trade in both directions across the border, and carries out law enforcement operations against the illegal import and export of goods, including those associated with serious organised crime and terrorism. HMRC operates as an integral part of the EU effort for the collection of customs duty and enforcement of international trade agreements between the EU and other nations. EU legislation also governs third country customs controls operated by HMRC at the border.
>
> 2.23 Annually, HMRC collects over £22 billion in customs duties, excise and import VAT from legitimate international trade activities. It facilitates the movement of £600 billion worth of goods, processing around 22 million import declarations and 5 million export declarations (using the Customs Handling of Import and Export Freight (CHIEF) system). As well as facilitating legitimate trade and collecting tax, HMRC operate revenue controls at the border (relating to alcohol and tobacco products for example) which result in significant numbers of seizures of illegal product each year, with a corresponding protection of the excise duty regimes. For example, there are over 65,000 seizures of excise goods at the border each year. Seizures in 2005-2006 totalled 1.2 billion cigarettes, 600 tonnes of hand rolling tobacco and 238,000 litres of spirits (Source: HM Revenue and Customs)
>
> 2.24 Working in partnership with other enforcement partners (e.g. the police, Trading Standards and Animal Health) and licensing authorities (Home Office and the Department of Business, Enterprise and Regulatory Reform), HMRC is also responsible for enforcing a range of prohibitions and restrictions that apply to freight, passenger and postal traffic into and out of the UK. In total, HMRC has more than 30 assigned matters for which it operates a range of anti-smuggling and regulatory controls at the border (for example drugs and radioactive materials). These underpin a range of regulatory measures designed to protect public and animal health, prevent crime, and fulfil the UK's EU and wider international obligations.
>
> 2.25 HMRC's work at the border is risk and intelligence led. It has a permanent presence at major ports and airports, supplemented by flexible, intelligence-led mobile detection teams and maritime operations patrolling the coastline. In addition, it deploys officers to the main postal depots, such as Coventry and Mount Pleasant, overseas (such as fiscal crime liaison officers) and inland (criminal investigation, detection and compliance officers) in support of its work.

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[26] HC Deb 25 July 2007 cc842-3

> 2.26 HMRC is headed by a Permanent Under-Secretary of State. Ministerial accountability rests with the Chancellor of the Exchequer and the Financial Secretary to the Treasury.[27]

Further details on the department's frontier control and border management are given in a report by the HM Inspectorate of Constabulary (HMIC) published in June 2008.[28] Following a reorganisation within HM Customs & Excise in 2001, all anti-smuggling and other detection activities had been brought together into a Detection Directorate. HMIC's report gives a short description of the way staff within this part of the department have been deployed:

> As at 1 April 2007, Detection had approximately 4,500 personnel located across the UK in the four Detection regions. Permanent staff are to be found at the busiest transport hubs such as Dover, Felixstowe, Heathrow Airport, Gatwick Airport and Manchester Airport, however a large proportion of staff resource is deployed through mobile teams. The aim was to be able to react to changes in risk, but it also enabled HR issues to be addressed when permanent manning was withdrawn in a number of locations. There is also the National Strike Force (NSF) which comprises a number of mobile teams that can be deployed to any location. Similarly, certain Detection Regions have Regional Strike Forces (RSF) which are similar to the NSF but only deploy within their own region. The NSF and RSF are often used for intensification efforts on hub locations.
>
> Detection is headed by a Director and is divided into four regions: North, Central, South and London and a National Operations branch, each headed by a Senior Civil Service (SCS) Grade manager (Deputy Director). North Region includes Scotland and Northern Ireland. London Region covers the area inside the M25 motorway (including Waterloo, and now, St. Pancras International Rail Terminal), the major airports at Heathrow, Gatwick, Luton, Stansted and has responsibility for a number of smaller airports and airfields outside the M25 such as Blackbushe and Farnborough.[29]

The report also provides some analysis of the particular challenges faced by the department in controlling goods crossing the UK's borders – looking first at developments in the global marketplace:

> The challenge facing border agencies across the globe is to balance the economic imperative of facilitating the flow of trade, whilst protecting the country from fiscal and social harms caused by illicit goods being imported through a multitude of entry points across a variety of modes of transport. The enormity of this is exacerbated still further by the volume of freight, the complexities of globalised international trade supply chains and the unprecedented levels of international passenger travel.

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27 Cabinet Office, *Security in a Global Hub - Establishing the UK's new border arrangements*, November 2007, pp 33-34

28 As part of the creation of HMRC, the Government extended HMIC's remit to scrutinise the new department's law enforcement procedures and practice (HM Revenue & Customs, *Annual Report 2004-05,* Cm 6691, December 2005)

29 HMIC, *Customised for Control: An inspection of the Detection Directorate of HM Revenue and Customs and considerations for its realignment to meet the challenge of their role within the new Border structure*, 19 June 2008, p10

> The volume of foreign freight traffic entering the UK has increased dramatically during recent years. During 2006, 279 million tonnes 1 of foreign maritime imports entered the UK – a 47% increase since 1995 … The increase in maritime trade is surpassed by the continued growth in international air travel. The past 14 years has witnessed a dramatic increase in flights and passengers arriving in the UK … These increases … were not only witnessed in the major international airports; the greater challenge manifests itself in the growth of international traffic into UK regional airports … The opening of the Channel Tunnel in 1994 provided a new route into the UK for smugglers to exploit. … In addition to the volume of traffic, the tunnel created its own particular set of challenges, including juxtaposed customs controls.
>
> The UK's geography presents other particular challenges. The 7,758 mile coastline is the third longest in Europe and its close proximity to other countries has, for centuries, provided smugglers with an almost limitless array of suitable locations to facilitate their practices. There are more than 650 ports with statutory harbour authority powers, and many more wharves, marinas and moorings dot the coastline.
>
> The UK only has a relatively short land boundary compared to other European Union (EU) Member States, however the security issues relating to the 224 mile border with the Republic of Ireland disproportionately militate against Detection's ability to manage that frontier. Furthermore, across the UK there are 60 commercially active Civil Aviation Authority (CAA) reporting airports, 142 licensed aerodromes and several hundred unlicensed aerodromes and landing strips, which can be used legally as points of entry by legitimate traffic and equally be exploited by the criminal fraternity.
>
> There has also been a growing complexity in the range of challenges facing customs authorities during recent years. The continual growth of large scale commercial counterfeiting and the trade in counterfeit goods estimated to be US$200 billion in 20058, represents one of the major evolving threats at this time. […][30]

The report goes on to discuss the European context for HMRC's work at the border:

> The UK's membership of the EU also poses particular challenges to HMRC and the UK Border Agency, associated with operating within a broader European framework. The free movement of capital, services, goods and people enshrined under EU legislation restricts the range of border enforcement activity customs authorities can employ on intra-EU movements. Moreover, the continuing enlargement of the EU – which currently has a 7,730 mile external land border and 43,491 miles of coastline - and the inconsistencies of Member States' tax regimes and levels of enforcement provide greater opportunities for intra-EU smuggling.
>
> As responsibility for the external border of the EU is laid to the European Commission, it has been developing a package of measures to facilitate trade and strengthen the external border.
>
> This will introduce new measures which, by 2009, will:

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[30] HMIC, *Customised for Control …* , 19 June 2008, pp12-13

- "propose a redistribution of tasks between customs offices on the external border and those inside the Community's customs territory. Border checks should focus on the security aspects while commercial and fiscal checks can be carried out elsewhere;
- call for improved co-operation and exchange of information between all services responsible for goods crossing the EU's external borders;
- establish a strategy for the simplification and rationalisation of customs regulations and procedures, maximising the use of information technology and supported by improved risk analysis and advanced auditing;
- propose a way to meet security requirements whilst, at the same time facilitating trade; and
- propose legislative changes to incorporate security interests, including pre-notification of import and export declarations, defining risk management and introducing the concept of "authorised economic operator."[31]

These will have an impact on all EU Member States' customs services, as they will have to conduct compulsory risk assessments on goods at the first point of entry in the EU, irrespective of whether they are being transhipped to another Member State. This will enable importers or agents to lodge customs declarations in one country for clearance of the goods in another. There may be a consequent impact on numbers of imports to be assessed in the UK (although there are no realistic estimates at this time). HMRC are not bound to accept the risk assessments made by other Member States and UK controls for prohibited goods or security matters will continue.[32]

Following the launch of the UKBA in April 2008, HMRC introduced provisional arrangements, prior to the formal transfer of its border staff to the agency. Details were given in its 2008 Annual Report, from which the following is taken:

The UK Border Agency (UKBA) was launched on 1 April 2008 … The agency is currently operating in interim form until the formal transfer of customs powers and responsibilities from HMRC …

During interim running, staff from the Border and Immigration Agency, UKVisas and HMRC are coming together into a single organisational structure and will operate – so far as possible – as a unified border presence. Until customs powers and responsibilities are transferred to the new agency, all HMRC staff working within the UKBA will continue to be employed by us and remain accountable to the Commissioners of Revenue and Customs.

The UKBA will deliver three strategic objectives:

- protect our border and national interests;
- tackle border tax fraud, smuggling and immigration crime;
- implement fast and fair decisions.

It is also responsible for delivering a number of wider cross-government objectives for border enforcement, in particular those set by HM Treasury and HMRC.[33]

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31 European Commission, *Developing the New Approach in the Customs Field*, 2007
32 HMIC, *Customised for Control …* , 19 June 2008 pp13-14
33 HM Revenue & Customs, *Annual Report 2008* Cm 7402 July 2008 pp 31-2

Further details of these arrangements are set out in a partnership agreement between the department and the Home Office.[34] At the time of the Pre-Budget Report in November 2008, HMRC published a joint counter-tobacco smuggling strategy with UKBA.[35] The department has published a "refreshed" strategy on tackling alcohol duty fraud, in conjunction with UKBA, alongside the 2009 Budget.[36]

B. Powers of immigration officers

The UKBA website describes the range of the agency's work:

> **Working for us**
>
> The UK Border Agency has around 17,200 staff in the United Kingdom (including agency, casual and consultants) of which 500 are at any one time on secondment to British diplomatic posts or in other jobs overseas. We have large offices in Croydon, Liverpool and Sheffield and smaller ones around the country. Several thousand staff work as immigration officers at air and sea ports nationwide ranging from Heathrow, Gatwick and Dover to other smaller locations throughout the country.
>
> **What we do**
>
> Under Home Office Aim 6 we are responsible for managing immigration in the interests of Britain's security, economic growth and social stability. The range of work this encompasses is huge and includes:
>
> - considering applications from people who want to come to the United Kingdom to work or study;
> - determining asylum applications;
> - facilitating the arrival of passengers to the United Kingdom; and
> - deciding applications for citizenship.
>
> Within these areas there is a tremendous variety of roles from operational to casework, and policy and support roles in finance, IT, procurement and human resources. Working for the Agency is interesting and challenging, and provides an opportunity to deliver results that will make a real difference to people's lives.

The work of assistant immigration officers and immigration officers is described in more detail on the website's careers page:

> **Assistant immigration officers (AIOs)**
>
> AIOs are responsible for the control of persons entering the United Kingdom, deciding on their admissibility and, where applicable, refusing entry and effecting the removal of those who have entered or attempted to enter in breach of the immigration laws. Some officers are responsible for identifying those already in the

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34 HMRC, *Partnership agreement … on Interim Arrangements and Frontier Delivery Requirements for the UKBA in 2008-09*, September 2008. See also HMRC Customs Information Paper JCCC CIP (08) 56, 9 September 2008

35 HMRC/UKBA, *Tackling Tobacco Smuggling Together*, November 2008

36 HMRC/UKBA, *Renewal of the "Tackling Alcohol Fraud" Strategy*, April 2009

> United Kingdom in breach of the immigration rules, and then taking steps to remove them. (…)
>
> **Immigration officers (IOs)**
>
> The immigration service aims to maintain effective entry controls with minimum inconvenience to the travelling public. Immigration officers based at ports of entry examine documents and interview people to establish their eligibility for entry to the United Kingdom. Immigration officers need to be courteous and fair and at the same time objectively evaluate the information presented. Their duties may also include caseworking, surveillance, forgery detection and evidence gathering, and arranging for passengers to be removed from the United Kingdom. All new recruits undergo an initial period of specialist training lasting 9 weeks in total. The initial classroom-based training programme is nearly five weeks, followed by an operational coaching period of four weeks. Candidates will need to be available for the duration of this training period. Courses are usually held in the Dover area, Manchester, Stansted, near to Heathrow airport or at Gatwick airport. (…)

Section 4(1) of the *Immigration Act 1971* vests in immigration officers the power to give or refuse leave to enter the UK. The law already provides for customs and excise officers to exercise immigration powers by arrangement. Part 1 of Schedule 2 to the Act provides that

> 1.—(1) Immigration officers for the purpose of this Act shall be appointed by the Secretary of State, and he may arrange with the Commissioners of Customs and Excise for the employment of officers of customs and excise as immigration officers under this Act.

Since April 2007, UKBA's operations have been organised on a regional basis.[37] Each region has a director who, according to UKBA, "has the freedom to put local delivery and relationships with local stakeholders at the heart of our work".[38]

Amongst other things, the *UK Borders Act 2007* gave the new UKBA increased powers to police the border and tackle immigration crime. The powers of immigration officers are now wide-ranging. In April 2008, the Home Secretary, Jacqui Smith, listed 50 offences for which an immigration officer could arrest and detain a person at a UK port. These offences included knowingly, for gain, facilitating the entry into the UK of an asylum seeker, obstruction of an immigration officer, not having at a leave or asylum interview an immigration document which is in force and satisfactorily establishes the person's identity and nationality/citizenship and using or attempting to use an altered card with intent to deceive.[39] Designated immigration officers at ports in England, Wales and Northern Ireland may also (for a maximum of three hours) detain any individual who the officer thinks is subject to a warrant for arrest or may be liable to arrest by a constable for any offence, pending arrival of a constable.

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37 The six regions are London and the South East, Midlands and the East, North East, Yorkshire and the Humber, the North West, Scotland and Northern Ireland and Wales and the South West

38 UKBA *Organisation Structure* [undated, viewed 20 May 2009]

39 HC Deb 28 April 2008 cc91-2W

C. Strengthening borders

Nonetheless, the need to strengthen the UK's borders has been a recurrent theme of Government announcements on security and immigration.[40] The Cabinet Office report *Security in a Global Hub* set out the benefits of integrating immigration and customs functions at the border:

> **Organisational integration**
>
> 5.11 The analysis of previous chapters has highlighted the potential benefits that could be achieved through increased integration of work at the border. These include:
>
> - exploiting commonality of process;
> - better management of the flow of people and goods at the frontier;
> - improved relationships with partners;
> - more flexible distribution of resources at a national level; and
> - the effective and efficient deployment of resources on site.

The report argued that "organisational practicalities" were impeding progress. More radical change - specifically, a single command and control structure providing greater consistency - was needed:

> 5.16 The scope of the new organisation should extend to both passengers and goods. Whilst there is a clear delineation between a passenger on the one hand and an unaccompanied container on the other, in practice the work related to people and goods overlaps, with goods being accompanied by people in a variety of forms whether by way of luggage, the content of car boots, or even vans and HGVs. (…) Integrating the border work of BIA with the frontier detection work of HMRC in relation to freight and goods would provide a coherent command structure and a flexible workforce at key points of entry that have significant flows of both people and goods. [41]

The UKBA was (as previously noted) set up as a shadow agency of the Home Office on 1 April 2008.[42]

The Government published its business plan, *Enforcing the Deal: Our Plans for Enforcing the Immigration Laws in the UK's Communities,* in June 2008. In the foreword, the Home Secretary, Jacqui Smith described the "reorientation" of the UKBA's approach to enforcement of immigration controls and the "deal" to which newcomers to the UK were expected to adhere:

> Newcomers come to the UK for employment and family reasons, or to flee war, persecution and torture. In doing so, they enter into a deal with the UK – to work hard, to play by the rules, and to earn their right to stay.

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40 See, for example, DirectGov, *New powers boost Immigration Officers' power to protect UK borders,* 26 January 2007 [viewed 16 April 2009]

41 Cabinet Office, *Security in a Global Hub - Establishing the UK's new border arrangements*, November 2007 pp 63

42 It became fully an agency a year later.

Two months later, the Government set out its plans for a further shake-up of border control which would, the Home Secretary said, go beyond the reorganisation brought about by the creation of the UKBA and would entail new powers.[43] The Government intended to build on its early successes: action would be quick and aggressive.[44] The paper went on to describe how border controls would be strengthened by "tough new powers". These powers included the arrest of anyone "up to no good":

> With tough customs, immigration and police-like powers, UK Border Agency officers are better equipped than ever to guard our ports and airports, protecting the country from illegal immigration, organised crime and terrorism. These powers include:
>
> - The power to board and search vehicles, planes, trains and vessels to search for people or goods.
> - The power to stop and question.
> - The power to detain an individual.
> - The power to arrest either with or without a warrant an individual who we believe is up to no good.
>
> The new force is already making the best use of its current powers and the new powers we introduced in the UK Borders Act 2007. But we will not stop there. We will make these changes stick through more comprehensive legislative reform in 2009. We will legislate to build the UK Border Agency and to ensure our officers and staff have the powers they need to do their job in the modern world. We will legislate to move responsibility for customs work at the border from HMRC to the Agency. We will do this in a way which maintains three established principles:
>
> - We will maintain taxpayer confidentiality.
> - We will ensure that tax decisions continue to be taken at arm's length from Ministers.
> - We will establish robust protections for information.

These powers would be combined with new technology which would, the Government argued, benefit all travellers and support trade.[45]

D. The Bill

Part 1 of the Bill deals with border functions. These would include:

- provision for the functions of the Commissioners of HMRC relating to general customs matters (as defined) to be exercised by the Secretary of State concurrently with the Commissioners;
- an ability for the Secretary of State to designate an immigration officer or other official of the Home Office as a general customs official or as a customs revenue official (although only, respectively, in relation to general customs matters or customs revenue matters);

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43 Home Office, *A Strong New Force at the Border,* August 2008
44 *Ibid* p9
45 *Ibid* pp16 - 17

- a requirement for the Secretary of State to designate an official in the Secretary of State's department as Director of Border Revenue;
- provision for the functions of HMRC that relate to customs revenue matters to be exercised by the Director of Border Revenue concurrently with the Commissioners;
- a power for HM Treasury to make orders to add, modify or remove matters from the list of customs revenue matters; and
- provisions relating to the use and disclosure of information, including an **offence** of wrongful disclosure.

The Explanatory Notes to the Bill as first introduced set out the Government's rationale for these provisions and how it is envisaged that they will be operated:

> 5. It is intended that the customs role of the UKBA will focus on border related matters, such as the importation and exportation of goods and HMRC will continue to exercise revenue and customs functions inland. The latter includes inland checks on excise goods and customs checks and audits at business premises. The processing of customs freight declarations and the collection of duties is a centralised function which will remain with HMRC. Certain non-revenue regimes which are business-based will also remain with HMRC such as strategic export controls and protecting intellectual property rights. The UKBA will carry out physical examinations at the frontier although some of those interventions may be carried out at the request of HMRC, for example, HMRC may ask UKBA to examine a consignment suspected to contain counterfeit goods to ensure the goods are legitimate. Responsibility for overall revenue and customs policy will stay with HMRC.

E. Issues and concerns

A selection of the themes and concerns which emerged in the House of Lords debates, and in other commentary on the Bill, is outlined below.

a. The border as a barrier or meeting place? The language and tone of the Bill

One theme emerging during the second reading debate was that of the language in which the Bill was expressed and the inferences that might be drawn about the UK's attitude towards migrants. The Bishop of Lincoln suggested that it might be difficult to "welcome" the Bill, as it placed so much emphasis on keeping people out rather than welcoming them in:

> I wish to dwell a little on some of the fundamental principles that will pertain to any debate around such issues as borders, citizenship and immigration. After all, what is a border? Is it a barrier or is it a meeting place? I imagine that most of us want to believe that a border can be a meeting place. Therefore, I imagine that most of us would rather not be debating a Bill which is predicated on a pathology of suspicion and a predetermination towards exclusion rather than welcome. (…)
>
> If the Minister can convince us that these measures are absolutely necessary—I believe that in the present state of our troubled world he may well be able so to do—let us take no pleasure in supporting them. Perhaps they do strengthen our borders, but at great cost to our sense of a shared humanity with those who live

> alongside us in the global village but against whom we erect barriers which make it all the more difficult for us to meet them and so be mutually enriched.[46]

Later in the debate, Lord Morris of Handsworth made similar observations about what he described as the unwelcoming and off-putting language of the Bill.[47] Other Members of the House of Lords, though, endorsed the need for greater security (see, for example, the contribution of Lord Patten, referred to later).[48]

b. The constitutional implications of the transfer of HMRC functions

The House of Lords Select Committee on the Constitution examined the implications of the transfer of functions from HMRC to the UKBA, considering in particular the principle of insulating individuals' revenue affairs from ministerial influence.[49]

The Committee noted that the principle that ministers should remain at arm's length from individuals' revenue affairs was well-established:

> 3. The principle of insulating the revenue affairs of individuals from ministerial influence was debated during the passage of the bill that became the Revenue and Customs Act 2005. That legislation, enacted in order to bring about a merger between Her Majesty's Customs and Excise and Her Majesty's Inland Revenue to create Her Majesty's Revenue and Customs (HMRC), was careful to put in place institutional arrangements to buttress this principle. First, core functions of HMRC are expressly excluded from the operation of the Ministers of the Crown Act 1975 so that these functions cannot be transferred to ministers by order. Secondly, the HMRC is a non-ministerial department and as such enjoys a degree of autonomy from detailed ministerial direction. Thirdly, Commissions of HMRC are Crown Appointments under Letters Patent on the recommendation of the Civil Service Commission. Fourthly, under the 2005 Act, the Commissioners appoint staff – officers of Revenue and Customs – who work under their direction rather than that of a Minister.[50]

The Committee was not convinced that the Bill embodied this principle, noting remarks by Lord West of Spithead (Parliamentary Under Secretary of State at the Home Office) that the Bill "does not deliver the same model of constitutional independence as that which HMRC enjoys".[51] The Committee observed that the Bill offered "significantly weaker guarantees that individual revenue affairs will be ring-fenced from ministerial involvement, actual or perceived".[52]

Lord West of Spithead had assured the committee that "preserving the long-standing convention that the administration of revenue-related affairs of individuals is kept at

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46 HL Deb 11 February 2009 cc1142-44
47 HL Deb 11 February 2009 cc1176-77
48 HL Deb 11 February 2009 c1148
49 House of Lords Select Committee on the Constitution *Part 1 of the Borders, Citizenship and Immigration Bill: Report*, 26 February 2009, HL 41, 2008-09
50 House of Lords Select Committee on the Constitution *Part 1 of the Borders, Citizenship and Immigration Bill: Report*, 26 February 2009, HL 41, 2008-09, para 3
51 Lord West of Spithead, Letter to Lord Goodlad, 11 February 2009 (included as an appendix to HL Paper 41)
52 House of Lords Select Committee on the Constitution *Part 1 of the Borders, Citizenship and Immigration Bill: Report*, 26 February 2009, HL 41 2008-09, para 7

arm's length from Ministers has been a fundamental objective throughout the development of these provisions".[53] Even so, the committee was not encouraged by what it knew of how the Bill might be implemented:

> 8. (…) The Commissioners of Revenue and Customs Act 2005 created a simple, easily understood model for preserving the principle of no intrusion by ministers into the revenue affairs of individuals. The bill proposes to replace that with something that is—from a constitutional perspective—complex and opaque. A system in which the head wears two hats (as Chief Executive and Director of Border Revenue), and the staff may wear three (immigration officer, general customs official, customs revenue official) risks undermining the limited formal guarantees of separation between ministers and individuals' revenue affairs that appear on the face of the bill.[54]

During the Committee stage, Lord West of Spithead explained how the Government intended to maintain the arm's length principle:

> [C]ustoms functions will not be vested in the Secretary of State. By convention decisions on tax liability, including customs duties and tax administration generally, are kept at arm's length from Ministers. The Bill therefore puts in place a different arrangement for dealing with customs revenue matters than that relating to general customs matters. (…) Clause 6 creates within the Home Office the position of Director of Border Revenue. The customs revenue functions of the UK Border Agency will be vested in the director and those customs revenue officials will be designated to her.[55]

Discussion of the role of the Director of Border Revenue tended to concentrate more on how that post would be filled than on the Director's part in keeping tax and customs matters at one removed from ministers. Nonetheless, some Members of the House of Lords sought clarification of precisely what powers would be conferred on the Secretary of State. At Committee stage, Baroness Hanham tabled probing amendments to test what customs functions and powers were to be passed to the Secretary of State and who, apart from immigration officers, might exercise those powers.[56] Viscount Bridgeman likewise sought to probe what customs and revenue jurisdiction was to be transferred.[57]

At Report stage in the Lords, a Government amendment to "clarify that the functions of the commissioners of HM Revenue and Customs, which may be exercised concurrently by the Director of Border Revenue (…) do not include those functions that were formerly vested in the commissioners of Inland Revenue"[58] was agreed.[59]

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53 Lord West of Spithead, Letter to Lord Goodlad 11 February 2009 (appendix to HL Paper 41)

54 House of Lords Select Committee on the Constitution *Part 1 of the Borders, Citizenship and Immigration Bill: Report*, 26 February 2009, HL 41 2008-09, para 8

55 HL Deb 25 February 2009 c218

56 HL Deb 25 February 2009 c231

57 HL Deb 25 February 2009 c244

58 Lord West of Spithead, HL Deb 25 March 2009, c672

59 Amendment 14 HL Deb 25 March 2009, c685

c. Appointment of the Director of Border Revenue

At Committee stage in the Lords, Baroness Hanham suggested that the appointment of the Director of Border Revenue should be open to competition:

> I find it absolutely inconceivable that (…) there will be no choice other than that of the Secretary of State.[60]

Lord West of Spithead explained that the current chief executive of UKBA would be appointed as Director of Border Revenue but a civil service competition might be used for future appointments.[61] The amendment was withdrawn.

Returning to this issue at Report stage, Baroness Hanham moved an amendment which would require the designation of the Director of Border Revenue to be approved by both Houses.[62] Lord West of Spithead argued that giving Parliament a right of veto would be unusual and inappropriate; this post was not one of those key public appointments for which the Government had agreed with the Liaison Committee that there should be pre-appointment Select Committee hearings.[63] The amendment was withdrawn.

d. Powers at the border

The campaign group Liberty has expressed concern about "the roll out of invasive customs powers to untrained and unaccountable immigration officials".[64]

Introducing the Bill at second reading, Lord West of Spithead asserted that, in the Government's view, giving both customs and immigration powers to the UKBA was essential to strengthening the border and protecting the public.[65] He described the Bill's provision for a combined immigration and customs service and outlined why, in the Government's view, the police should work closely with the UKBA but not be a part of it:

> There are some very real operational downsides, not least in managing the potential dislocation from local policing that might result from the creation of a new national entity. Moreover, I am sure that now is not the time to contemplate the costs and risks involved in and the organisational upheaval entailed by such a fundamental further change to the way in which we control our border.[66]

The opposition spokesperson for Home Affairs in the Lords, Baroness Hanham, observed at second reading that officers of UKBA would have some police-like powers and this would raise many issues, such as the confidentiality of information.[67] Lord Patten, a former Home Office minister, suggested that the global economic downturn might relieve some of the pressures on the immigration system. Even so, he said, there

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60 HL Deb 25 February 2009 c242
61 HL Deb 25 February 2009 c243
62 HL Deb 25 March 2009 c682
63 HL Deb 25 March 2009 c683
64 Liberty *Liberty's Committee Stage Briefing on the Borders, Citizenship & Immigration Bill in the House of Lords* February 2009
65 HL Deb 11 February 2009 cc1128-9
66 HL Deb 11 February 2009 c1130
67 HL Deb 11 February 2009 c1134

would still be a need to secure our borders against new and old threats, whilst not harming the economy or resorting to nationalism or protectionism.[68]

In responding to the ensuing debate, Lord West of Spithead confirmed that the proposals were not aimed at reducing staff numbers, but would enable a better deployment of staff. Specialisms and "operational tasking" would, though, remain.[69] This point was made again on the first day of Committee, when Lord West of Spithead outlined how the people and functions would be brought together, and what the divisions of responsibility would be, and again referred to Ministers keeping at a distance from revenue customs matters:

> We intend to move across to the border agency functions such as collecting duty at the red channel, catching tobacco smugglers and charging duty on postal packets, which are already on the border. HMRC will still do all the deep revenue things within the country, totally separately from any of this.
>
> However, because we do not allow Ministers to get closely involved in those revenue customs matters, we have to set up a division of responsibility whereby the officer in the Home Office responsible for the agency actually has another hat, which allows her to be responsible to the Treasury for these particular matters.[70]

A related issue raised during the Committee stage was the coverage of the UKBA. Some small ports have no permanent immigration or customs presence and Lord Brooke of Sutton Mandeville asked whether the effect of the Bill would to designate all airports as international with a customs presence. Lord West of Spithead intimated that, by increasing flexibility, the new arrangements might make it easier to cover more of these ports, but there would still be some gaps.[71]

e. Detention: short term holding facilities

New provisions were inserted by the Government on amendment during the Committee stage. **Clause 25** of the Bill brought from the Lords amends the definition of "short term holding facility" in section 147 of the *Immigration and Asylum Act 1999.* The existing definition is "A place used solely for the detention of detained persons for a period of not more than seven days or for such other period as may be prescribed." This would become instead "A place used for the detention of detained persons for a period of not more than seven days or for such other period as may be prescribed (whether or not it is also used for the detention of other persons for any period)."

ILPA (the Immigration Law Practitioners' Association) was not persuaded by Lord West of Spithead's arguments for these provisions and was concerned at the prospect of using the same facilities to hold different types of detainee for different lengths of time:

> The mixing of persons detained under these various [police] powers in facilities designed to hold immigration detainees raises questions as to the suitability of holding such persons together. (…)

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68 HL Deb 11 February 2009 c1148
69 HL Deb 12 February 2009 c1206
70 HL Deb 25 February 2009 c220
71 HL Deb 25 February 2009 c222

> [The] amendment … goes further than allowing current short-term holding facilities to be used for other purposes beyond immigration detention. It also re-designates other places in which people are held under immigration detention powers for periods of seven days or less. This would include police cells. It could include prisons – e.g. where a person is retained in the prison under immigration powers on the completion of sentence pending transfer to an immigration removal centre. It may include holding cells at courts and tribunals.[72]

The merging of HMRC and UKBA will mean that staff may have powers to detain for different periods, depending on which function or role they are exercising: HMRC officers may currently detain for six hours in line with PACE but immigration officers may detain for 3 hours. At Report stage in the Lords, the Government resisted an amendment by Baroness Hanham – later withdrawn – which would, in applying PACE orders, have limited a person's detention in an office of the UKBA to 3 hours and in a police cell to 5 days.[73] Lord West of Spithead conceded that there was some confusion, which needed to be resolved:

> [The] Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 currently allows a person to be detained, following arrest, for a maximum of six hours in a non-designated office of HMRC.
>
> (…)
>
> The three-hour limit is the power in Section 2 of the UK Borders Act 2007 for a designated immigration officer, but the six-hour limit comes in the Police and Criminal Evidence Act, as I have stated. (…) Those involved have argued with me that they need six hours because in that time they could clear up a problem and send someone on their way without a problem. The shorter period of time would cause them problems as they might not be able to resolve the issues.[74]

f. Oversight, inspection and PACE Codes

According to the Home Office website, the *Police and Criminal Evidence Act 1984* and its accompanying PACE Codes of Practice "provide the core framework of police powers and safeguards around stop and search, arrest, detention, investigation, identification and interviewing detainees". There are eight codes of practice, covering a range of topics including

- the exercise by police officers of statutory powers to search a person or a vehicle without first making an arrest
- the need for a police officer to make a record of a stop or encounter
- police powers to search premises and to seize and retain property found on premises and persons
- the requirements for the detention, treatment and questioning of suspects in police custody by police officers
- the audio and/or visual recording of interviews with suspects in the police station

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72 ILPA, *Briefing: Borders, Citizenship And Immigration Bill – Hl Bill 29: House Of Lords Report: Part 1 – Border Functions (In Particular, Clauses 23, 25, 28 & 30)* March 2009

73 HL Deb 25 March 2009 cc694-6

74 HL Deb 25 March 2009 c697

Section 145 of the *Immigration and Asylum Act 1999* gave a power to the Secretary of State to extend PACE provisions to immigration officers.[75] There has been much debate about the extent to which these powers have been exercised; commentators such as ILPA have argued that they have been under-used and the powers within the Bill would better be replaced by a duty.[76] The Minister's undertaking to make orders under the 1999 Act did not (in ILPA's view) go far enough.[77] The Equality and Human Rights Commission pointed to the potential implications for human rights of leaving this to the Secretary of State's discretion.[78] The Joint Committee on Human Rights[79] also welcomed the application of PACE safeguards to investigations conducted (and persons detained) by immigration officers and customs officials, albeit the Government's intentions were still more limited than the Committee might have hoped.[80]

In its report on the Bill, the Home Affairs Committee reported on its pre-legislative scrutiny of the draft (partial) Immigration and Citizenship Bill, putting it into the context of this more limited Bill.[81] The Committee observed that the Bill would extend the responsibility of the chief inspector of the UKBA, to cover all those exercising customs or immigration functions, and expressed concern at the burden which this might represent.[82]

ILPA argued in its initial briefing on the Bill that additional resources needed to be provided, to support the new responsibilities being given to the Chief Inspector of the UK Border Agency, and that the extended powers of the Independent Police Complaints Commission to cover customs officials should also encompass private contractors and juxtaposed controls[83] outside the UK.[84] ILPA has argued for independent oversight.[85]

ILPA returned to this theme at Report stage, when it questioned how the Government would - as Lord West of Spithead had promised - ensure independent investigation of complaints which fell outside the IPCC's or Ombudsman's jurisdiction, such as those relating to misconduct overseas by officials or contractors at juxtaposed controls or during escorted removals. Reference was also made to the position in Scotland and Northern Ireland.[86]

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75 To apply the provisions of a specified code of practice (in England and Wales, the code of practice of the *Police and Criminal Evidence Act 1984*) to an immigration officer or other authorised person who is exercising specified powers to arrest, question, search, take fingerprints, enter and search premises or seize property.

76 ILPA *General Briefing: Second Reading (Lords): Borders, Citizenship And Immigration Bill* February 2009

77 ILPA *Briefing: Borders, Citizenship And Immigration Bill – Hl Bill 29: House Of Lords Report: Part 1 – Border Functions (In Particular, Clauses 23, 25, 28 & 30)* March 2009

78 Equality and Human Rights Commission *Parliamentary Briefing: Borders, Citizenship and Immigration Bill February 2009* [viewed 21 April 2009

79 Joint Committee on Human Rights *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, HL 62/HC 375 2008-09, p3

80 *Ibid* paras 1.20-21

81 Home Affairs Committee *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09

82 *Ibid* p24

83 Juxtaposed controls are those where UK immigration officers are located abroad at points of departure for the UK (for example at Eurostar terminals and at Calais)

84 ILPA *Briefing: Borders, Citizenship and Immigration Bill,* 20 January 2009

85 ILPA *Borders, Citizenship And Immigration Bill – Hl Bill 15 House Of Lords Committee: Clause 28* February 2009

86 ILPA *Briefing: Borders, Citizenship And Immigration Bill – Hl Bill 29: House Of Lords Report: Part 1 – Border Functions (In Particular, Clauses 23, 25, 28 & 30)* March 2009

At Lords Committee stage, Lord Avebury (a Liberal Democrat spokesperson for Home Affairs) and Lord Roberts of Llandudno tabled an amendment which would enable complaints to be made to the IPCC about the conduct of customs officials, immigration officials and their private contractors both within and outside the UK. The Government tabled an amendment (subsequently agreed) on similar lines but restricted to the UK, for reasons which Lord West of Spithead set out:

> The Government do not believe that the amendment is necessary as officials working at our diplomatic posts overseas do not exercise enforcement powers. At our juxtaposed controls in France and Belgium, UK Border Agency officials are exempt from prosecution under French or Belgian law for acts committed in the UK control zone in the course of their duties. Under the terms of the treaties in place for juxtaposed controls, any complaints are investigated by the authorities of the host state and all evidence gathered is handed over to the relevant authorities in the UK for consideration under UK law.
>
> The Government are considering whether an independent oversight system can be put in place for matters arising at the juxtaposed controls that do not warrant criminal investigation but do constitute serious misconduct. Currently such matters would be investigated by the agency's professional standards unit but are not subject to independent oversight.[87]

Lord Avebury moved an amendment at the Report stage which, again, would have enabled provision to be made for complaints in respect of immigration and customs functions to be made to the IPCC, whether those functions were discharged in the UK or overseas. He challenged the Government to explain – if they would not accept the amendment – how they would ensure that misconduct overseas by officials or contractors (especially at juxtaposed controls or during escorted removals) would be investigated.[88] Lord West of Spithead argued that the Prisons and Probations Ombudsman was already able to oversee complaints about detention and escorting:

> In essence the Prisons and Probation Ombudsman investigates deaths in detention and also considers complaints where detainees are not content with the response they receive from the border force or the contractor. This oversight is not restricted by geographical boundaries and therefore the type of escorting work I have just described can be referred to the Prisons and Probation Ombudsman if the complainant is not satisfied with the border force's handling of their complaint. This oversight ensures that there is suitable scrutiny of matters arising while immigration subjects are detained, escorted and removed from the UK.[89]

The amendment was withdrawn.

g. Training for UKBA officers

At second reading, Lord Kirkwood of Kirkhope stressed that training for UKBA officers should reflect the different tax system in Scotland.[90] Lord West of Spithead assured

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87 HL Deb 25 February 2009 c295
88 HL Deb 25 March 2009 c700
89 HL Deb 25 March 2009 c700
90 HL Deb 11 February 2009 c1189

Members of the House of Lords that HMRC and immigration officers in Scotland were used to working with Scottish law and were trained on the Scottish legal system.[91]

The Lords returned to issues of training at Committee stage. Concerns were raised about the training of UKBA staff, particularly those who might be from a customs background but now undertaking immigration work. At Report stage, Baroness Miller of Chilthorne Domer tabled a probing amendment on the definition of "adequate training". The explanation in Committee had not, she considered, been adequate and it was necessary to specify the training need on the face of the Bill.[92] In reply, Lord West of Spithead described the training provision at more length:

> Existing immigration officers of the UK Border Agency will be trained to exercise customs functions where required for the role that they are undertaking. The training that they receive will depend on the customs functions that they are to carry out. The skills and knowledge covered by existing HMRC training will continue to form the basis of the training for those in the agency who are required to exercise customs functions. Once adequately trained, immigration officers will be designated as customs officials, subject to them meeting the other designation criteria. Some immigration officers are already trained to carry out questioning for customs purposes at the primary checkpoint and search freight for customs purposes.
>
> Finally, let me say a little about new recruits to the UK Border Agency. A new UK Border Agency training programme for operational staff working at the border is currently under development.[93]

III Nationality[94]

A. Introduction

Part 2 of the Bill covers several nationality issues: major changes to the rules on naturalisation; nationality of children born to foreign and Commonwealth members of the armed forces; historic rules on children born overseas to British mothers; nationality of children born overseas to parents who are British citizens by descent; and the citizenship rights of various other limited categories including certain Hong Kong residents. It does not attempt to 'simplify' or consolidate British nationality law.

This Bill is likely to provide the last opportunity for some time to address questions of nationality and citizenship, as the Government does not intend to return to nationality issues in the forthcoming draft immigration simplification Bill.

This part of the Bill was subject to an opposition amendment on transitional measures for naturalisation applicants, which the Government intends to revisit in the Commons.

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91 HL Deb 11 February 2009 c1212
92 HL Deb 25 March 2009 cc685-6
93 HL Deb 25 March 2009 cc687-8
94 by Arabella Thorp

B. Naturalisation

1. Overview

The current framework for naturalisation, which is the process followed by most adults who wish to become British citizens,[95] has been in force since 1983.[96] There have however been some significant amendments since then, notably a new requirement to prove 'knowledge of life in the UK', the introduction of formal language tests and citizenship ceremonies, and changes to how criminal convictions are treated.

Following a consultation exercise, the Government now wants to introduce a new 'path to citizenship'. **Clauses 39 to 42** and **49 to 50** of the Bill would implement proposals for 'earned' or 'active' citizenship by changing requirements for adults applying for British citizenship by naturalisation. The changes would increase the length of time for which applicants must live in the UK without access to benefits, but provide a discount for voluntary activity. The Government considers that these measures will aid the integration of immigrants.

Several aspects of these proposals have been controversial. The 'retrospective' effect on migrants who are already in the UK and near the end of their qualification period under the old rules led the House of Lords to vote in favour of an opposition amendment providing a 'grace period' before the new rules would apply to such applicants. The House and a variety of organisations were also concerned about lengthening the qualifying period through a 'probationary citizenship' stage during which migrants would not have access to certain public funds or services; how the voluntary activity option would work; the extensive reliance on discretion; and the effect on refugees.

2. Current rules

Naturalisation as a British citizen is not available as a right, even to those who have lived in the UK for many years or who are married to British citizens. Currently, applicants must meet requirements on:

- age and mental capacity
- residence in the UK (or Crown service etc. abroad)
- good character
- language and knowledge of life in the UK
- future intention to live in the UK (or enter or remain in Crown service etc.)[97]

Successful applicants must also attend a citizenship ceremony. More information is available in a Library Standard Note[98] and on the UK Border Agency website's citizenship pages.

Under the current residence requirements, applicants must have been in the UK for five years before they apply for naturalisation (or, if married to a British citizen, three years).

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95 There is another process called registration which applies in certain defined circumstances.
96 The *British Nationality Act 1981* was commenced on 1 January 1983.
97 *British Nationality Act 1981* s6 and schedule 1, as amended
98 Standard Note SN/HA/3232, *Naturalising as a British citizen*, 25 June 2008

They must also be without any restriction on the period for which they can remain in the UK, which for most people means that they must have Indefinite Leave to Remain (ILR, sometimes called settlement) or Permanent Residence under European free movement rules. Not all immigration routes lead to ILR, and those that do have different time periods: spouses can get ILR after two years, most skilled work-based routes and the refugee/protection routes lead to ILR after five years, and long-term residents in any category can apply for ILR after 10 years' legal residence or 14 years' residence in any capacity. With some exceptions, applicants must pass an English language/life in the UK test in order to obtain ILR (fewer exceptions to these tests apply to people seeking citizenship). ILR offers several advantages to migrants. For example, before obtaining ILR most migrants are prevented from obtaining certain public funds, but once ILR has been granted all conditions on their leave are lifted and they are subject only to the same rules on access to benefits as other UK residents. Furthermore, there are few circumstances in which ILR can be cancelled. Approximately 60% of migrants granted ILR choose to naturalise.[99]

The "good character" requirement for naturalisation was tightened up following the furore over foreign national prisoners.[100] Since 1 January 2008, applicants will normally fail the good character test if they have been convicted of a criminal offence and the conviction has not yet become 'spent' in accordance with the *Rehabilitation of Offenders Act 1974*.[101] Only some minor unspent convictions will not disqualify applicants.[102]

3. The 'path to citizenship' green paper

The first indication that further changes to naturalisation requirements were planned came in the Government's June 2007 "initial consultation" on *Simplifying Immigration Law*.[103] Though the paper gave little idea of what was envisaged, two of the consultation questions indicated that the "path to citizenship" would be reformed and said that settlement and citizenship should be "earned". The summary of responses said that 58% of respondents thought nationality law should be consolidated separately from immigration law, and some suggested that nationality law should be simplified in addition to being consolidated. The comments on the Government's proposals for 'earned citizenship' were overwhelmingly negative, and included fears that they would undermine social cohesion and contradict international practice and EU policy.[104]

In February 2008 the Government published a green paper entitled *The path to citizenship: next steps in reforming the immigration system*.[105] It was billed as part of the

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99 Border and Immigration Agency, *The path to citizenship: next steps in reforming the immigration system*, February 2008, para 122

100 For more information on the foreign national prisoners issue, see Library Standard Note SN/HA/3879, *Deportation of foreign prisoners*, 21 December 2007

101 Home Office press notice, *Home Secretary today sets out plans to manage migration and protect British values*, 5 December 2007

102 Home Office, *Nationality Instructions* Annex D to chapter 18, 'The Good Character requirement' [undated; viewed 18 May 2009]

103 Border and Immigration Agency, *Simplifying Immigration Law: an initial consultation*, June 2007

104 Border and Immigration Agency, *Simplifying Immigration Law: responses to the initial consultation paper*, December 2007, pp14-15

105 Border and Immigration Agency, *The path to citizenship: next steps in reforming the immigration system*, February 2008

wider work on citizenship being conducted across Government, including the Goldsmith review of citizenship,[106] and proposed new rules and requirements for those wishing to acquire British citizenship, as well as proposals to address the impacts of migration on public services. In it the Government set out its intention "to make the journey to citizenship clearer, simpler and easier for the public and migrants to understand" and "to encourage people with the right qualifications and commitment to take up citizenship so that they can become fully integrated into our society".[107] Despite the earlier criticisms, the paper maintained the central tenet that citizenship must be "earned" in additional ways. The Government's view is that this would increase community cohesion.[108]

The main proposed changes to the current law were:

- permanent residence (the proposed replacement for ILR) would no longer be the stage before citizenship for most applicants;
- a new time-limited immigration status called 'probationary citizenship', with restricted access to public funds, would be introduced before either citizenship or permanent residence;
- the time taken to progress to citizenship or permanent residence would be longer for almost everybody, but would still vary by category as at present;
- the period of probationary citizenship would be reduced by two years for those who demonstrated some form of community involvement;
- any period of imprisonment (not just for 'serious criminal convictions') would result in refusal of probationary citizenship, permanent residence or citizenship, and criminality below that level would result in having to spend at least one more year in probationary citizenship, or two for a repeat offence.

The Government also considered refusing probationary citizenship, permanent residence or citizenship to those who had committed a crime involving violence, drugs or a sexual offence even if it did not attract a prison sentence. A more radical proposal in the green paper was to refuse or delay citizenship or permanent residence for those whose children committed criminal offences.

The green paper proposed that the restrictions on access to public funds that currently apply only to those with limited leave would be extended to the probationary citizenship stage. This was a significant change: currently the stage between limited leave and naturalisation is ILR, which is not time-limited and cannot have conditions attached to it.

The proposed English language requirements for those seeking probationary citizenship were substantially the same as they are at the moment for people applying for ILR.[109] A requirement to prove economic contribution or self-sufficiency appeared new but was not very different from the current requirements.

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106 *Ibid*, introduction

107 *Ibid*, introduction and para. 5

108 *Ibid*, para 45

109 See UK Border Agency website, *Knowledge of language and life in the United Kingdom* (undated) and, for background, Library Standard Note SN/HA/4283, *Immigration: new language and "life in the UK" requirements for settlement*, 15 March 2007

The paper envisaged limited exceptions to the probationary citizenship requirement for: (a) those discharged from HM Forces who have completed four years' service; (b) victims of domestic violence who were admitted as a partner of a British citizen or permanent resident; and (c) bereaved spouses and partners – i.e. those who were admitted as the spouse or partner of a British citizen or permanent resident but whose sponsor died during the two-year temporary residence period.[110]

The proposals were presented as a response to the views of the public, which were summed up as "a genuine desire to be welcoming, tempered by a belief that the welcome should not be unconditional":

> Several clear themes emerged during the ["public listening"] sessions as the most commonly and strongly held views:
>
> - Speaking English: by far the most important factor to assist integration.
> - Paying your way: working and paying tax is seen as an essential precursor to acquiring citizenship.
> - Obeying the law: the need for newcomers to obey the law, consequences should follow for those who don't.
> - Support for the idea of 'provisional citizenship' – a period during which the right to stay could be removed if a serious crime was committed.
> - Support for a system which requires newcomers to demonstrate commitment to the community before they can become British citizens, balanced with a strong sense that it would be unfair to ask them to do more than we do ourselves.[111]

The green paper highlighted a number of other countries which are introducing language and integration requirements for new citizens and long-term residents.[112] None of those countries appears to be going as far as the UK in this area.

4. Responses to the consultation

The consultation period on the *Path to Citizenship* green paper ended on 14 May 2008, and the Government published its response to the consultation[113] along with an analysis of consultation responses[114] on 14 July 2008.

The analysis of consultation responses included the results of Home Office/Ipsos MORI interviews.[115] Whether this poll really "showed strong public backing for the Government's proposals"[116] or simply public support for current rules and procedures is debatable. The questions were very general, and only two requirements that attracted

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110 Border and Immigration Agency, *The path to citizenship: next steps in reforming the immigration system*, February 2008, para 126-8

111 Border and Immigration Agency, *The path to citizenship: next steps in reforming the immigration* system, February 2008, paras 38 and 68

112 *Ibid* paras 84-96

113 UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to consultation*, July 2008

114 UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Analysis of consultation responses*, July 2008

115 *Ibid* pp6-8, 25, 29, 32 and 42-45

116 *Ibid*, July 2008, p6

the support of over half the participants were "obey the UK's laws" and "have a good standard of English", both of which already apply.

The consultation paper itself was very much more specific than the Ipsos/MORI poll, and responses were generally more negative. 'Probationary citizenship' was unpopular– even of the British respondents, only 38% supported the idea – and requiring proven 'active citizenship' to keep the period on probationary citizenship to a minimum was particularly controversial (only 30% of respondents agreed with the Government's proposals). The proposed timescales for progressing to citizenship or permanent residence attracted mixed views. However, the Government's proposals on the effects of criminality were strongly supported (77% of respondents indicated that committing a crime attracting a custodial sentence should either stop or slow down progression to permanent residence), though a significant number of respondents (41%) raised concerns about slowing down or stopping a parent's progression to citizenship on the basis of their child's criminality.[117]

Writing in the *Journal of Immigration, Asylum and Nationality Law*, Ann Dummett (a founder of the Joint Council for the Welfare of Immigrants) argued that the proposals in *The Path to Citizenship* would impose a "regime of unprecedented harshness and insecurity" on migrants already in the UK.[118] The *Path to Citizenship* was, she suggested, wordy, pretentious, bossy and contradictory: "we want people to become British citizens, but we intend to make acquisition more difficult than before".

The Government response made very few changes to the green paper proposals following the consultation. The main changes relating to citizenship were to limit the suggested effect of criminality in slowing down the path to citizenship.[119]

5. The draft (partial) Bill

On 14 July 2008, along with its response to the Path to Citizenship consultation, the Government published for consultation a *Draft (partial) Immigration and Citizenship Bill*. Its main purpose was to consolidate and 'simplify' nearly four decades of immigration legislation, but it also contained the naturalisation proposals, as well as other measures including a duty on immigration officials to promote the welfare of children and provisions for a new 'transitional impacts of migration fund' paid for by increasing immigration fees.

Part 3 of the draft (partial) Bill, containing the naturalisation provisions, was by no means simple – indeed, it was more complex than the existing provisions, containing for example a complicated table of formulae for determining the qualification period. The concept of earned citizenship survived the hostile reception it got from all quarters, as did

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[117] Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to consultation*, July 2008, pp16-17; *The path to citizenship: next steps in reforming the immigration system – Analysis of consultation responses*, July 2008, pp29-31

[118] Ann Dummett 'Changes to Citizenship', *Journal of Immigration, Asylum and Nationality Law*, vol.22 no.3, 2008, pp213-7

[119] Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to* consultation, July 2008, p17

the term 'probationary citizenship' (although in a Demos paper on citizenship, Liam Byrne, then Minister for immigration, recognised that the latter term was problematic).[120]

A large number of responses to the draft (partial) Bill have been published by the Joint Committee on Human Rights[121] and the Home Affairs Committee.[122]

6. The Bill

The Government's naturalisation proposals now appear in clauses 39 to 42 and 49 to 50 of the *Borders, Citizenship and Immigration Bill*. These provide an intricate set of amendments to the *British Nationality Act 1981* covering the qualifying period and other requirements for adults to naturalise as British citizens. The Government's Explanatory Notes summarise the naturalisation provisions and their proposed effect. The thrust of these provisions would be largely the same as in the previous proposals:

- extend the basic qualifying period for naturalisation from five years to eight (or from three years to five, for applicants with a family connection to a British citizen);
- keep most applicants on temporary (limited) leave with restricted access to benefits during the qualifying period by introducing a new stage called 'probationary citizenship';
- reduce the additional qualifying period by two years for taking part in voluntary activities; and
- require applicants to have 'qualifying immigration status' during the qualifying period.

Some of the detail has changed since the earlier proposals. Two substantial changes are that the complicated mathematical formulae of the draft (partial) Bill have gone and that criminal activity would no longer lengthen the qualifying period for citizenship (though it would, as now, be a relevant factor in deciding whether to grant citizenship).

Because the naturalisation provisions are now being taken forward before any broader immigration and citizenship reforms, they have been described as "dots of paint on a canvas […] it is not yet possible to see what the full picture will be".[123] For example, the clauses refer to, but do not establish, the proposed 'probationary citizenship' status and 'permanent residence' status which are integral to the Government's proposals; these are likely to be created by changes to the Immigration Rules.[124] Nor do they provide any detail on the voluntary activity proposal. They include a great deal of scope for Ministerial discretion (increased during the Bill's passage through the Lords), which would help some cases that do not fit within the rules, but which does not bring clarity to the Government's intentions.[125] This part of the Bill has therefore been characterised as "vague enabling legislation which provides for subsequent, more precise provisions on

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120 Liam Byrne, *A More United Kingdom,* Demos 2008
121 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC375 2008-09
122 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09
123 Lord Goldsmith, HL Deb 11 February 2009 c1145
124 HC 395 of 1993-94 as amended
125 See for example HL Deb 2 March 2009 cc524-545

matters of fundamental importance to be contained in guidance, immigration rules and statutory instruments at some future point".[126]

7. Issues and concerns

Several themes and concerns emerged in the House of Lords debates and in other comments on the Bill. A selection of these is outlined below.

a. Probationary citizenship

Probationary citizenship is central to the proposed naturalisation scheme. It would replace ILR as the stage between temporary leave and naturalisation for most non-EEA applicants (and it would also be the precursor to permanent residence for those who do not wish to naturalise). However, probationary citizenship is not established by or defined in this Bill, which simply mentions it as a "qualifying immigration status" for the naturalisation applicants. Given its proposed position as a 'gateway' to citizenship or permanent residence, the requirements for obtaining probationary citizenship are crucial to understanding the impact of the Government's proposals on naturalisation.

Probationary citizenship would be a form of limited leave to remain in the UK rather than settlement, and would thus give fewer rights and entitlements than ILR. For example, those on probationary citizenship would be unable to access certain public funds: the Government has provided a list of the 15 different types of non-contributions-based benefits that can currently be claimed by those on ILR but could not be accessed by a person with probationary citizenship.[127] Furthermore, the overseas rate of fees in further and higher education would apply to those on probationary citizenship (except for courses in English for speakers of other languages).

The probationary citizenship proposals are controversial. 68% of all respondents to the *Path to Citizenship* green paper did not think they were a good idea, compared with 21% who did; and even amongst the British individuals who responded, only 38% supported the proposals.[128] Concerns included:

- This stage is unnecessary as the temporary residence stage is already probationary;
- It could lead to more confusion by adding to an already complex system of citizenship, each with different rights;
- It might discourage rather than encourage integration, particularly as the word "probation" is associated with the criminal justice system; and
- There was no need to lengthen the timescale for obtaining permanent status.[129]

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126 Joint Council for the Welfare of Immigrants, *Memorandum of evidence to the Home Affairs Committee on the Borders, Citizenship and Immigration Bill* [March 2009], highlighting seven areas of the new naturalisation provisions which would be left to secondary legislation.

127 Income-based jobseekers' allowance; income-related allowance under Part 1 of the *Welfare Reform Act 2007*; attendance allowance; state pension credit; severe disablement allowance; disability living allowance; carer's allowance; income support; tax credits; a social fund payment; child benefit; housing benefit; council tax benefit; social housing; and homelessness assistance.

128 Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Analysis of consultation responses*, July 2008, pp10-12

129 Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to consultation*, July 2008, p9

Debates in the House of Lords addressed both the particular term 'probationary citizenship' and also the substance of the proposal.

The Labour peer Lord Goldsmith, who was responsible for a report produced for the Government in 2008 called *Citizenship: Our Common Bond*, supported the term 'probationary citizenship'. He felt that there was merit in making it clear that the person was working towards citizenship but would not obtain it if he did not do what was expected of him by his fellow citizens.[130]

Others argued that introducing yet another status called citizenship which did not give the rights normally associated with citizenship was damagingly confusing, and at odds with the general move away from the various forms of British nationality which do not give full rights.

Lord Avebury, a Liberal Democrat spokesperson for Home Affairs, asked the Government to explain "what is added to the process of getting a permanent migrant to the point of applying for citizenship by having two stages of temporary leave, one after the other, called by different names but in practical terms adding nothing but a layer of bureaucracy and complexity to the process. […] There is no argument in the [*Path to Citizenship* green paper] to demonstrate how changing the name of temporary leave part of the way through the period of waiting to become a citizen would contribute integration, to British society or to clarity, which are said to be the three main aims of the legislation."[131] He did not argue about the need to 'earn' citizenship but said that two stages were not necessary to do so.[132]

Lord Brett replied that the Government was not wedded to the word "probation" and that it was open to other suggestions.[133] However, he rejected all of the alternatives suggested during the debates (including 'limited leave to remain', 'interim leave to remain' and 'qualifying citizenship').[134] He also disagreed with the suggestion that the new status added nothing to the system other than to complicate it:

> We would argue that it supports our aim to make the path to citizenship clearer for migrants and the public. Our proposals set out a much clearer architecture than exists at present, by simplifying the multiplicity of routes to citizenship and replacing them with three clear routes—the work route, the family route and the protection route—and three clear stages: temporary residence, probationary citizenship and British citizenship or permanent residence.[135]

The Home Affairs Committee heard from migrants and migrants' rights groups that the proposals on probationary citizenship would be unlikely to encourage greater take-up of British citizenship, which was one of the Government's stated aims. It called on the

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130 HL Deb 11 February 2009 c1146
131 HL Deb 2 March 2009 c516
132 HL Deb 2 March 2009 c519
133 HL Deb 2 March 2009 c518
134 HL Deb 25 March 2009 c732
135 HL Deb 25 March 2009 cc731-2

Government to "ensure that policy is based on consultation with the specific groups it seeks to incentivise – in this case migrants – rather than on its own assumptions".[136]

It is not clear yet what might happen to those people who reach the end of their period of limited 'probationary citizenship' leave without having qualified for citizenship. The Joint Council for the Welfare of Immigrants understood that:

> the intention is to remove, subject to international obligations, those migrants from the territory who are unable to demonstrate that they fulfil the necessary criteria to progress from probationary to British citizenship. This represents a significant departure from existing practice where there is no threat to residential stability in cases where applicants cannot demonstrate that they cannot fulfil the naturalisation criteria.[137]

As the Liberal Democrat spokesperson for Home Affairs, Baroness Miller of Chilthorne Domer, pointed out, there is likely to be another opportunity to debate the probationary citizenship proposals in the autumn when the draft immigration simplification Bill is published, as probationary citizenship would be an immigration status rather than a nationality status.[138]

b. The lengthened qualifying period and permitted absences

A major aspect of the Government's proposals is that the basic qualifying period for naturalisation would be increased from five years to eight (or, for applicants with a family connection to a British citizen, from three years to five) (**clause 42**).

The extended timescales for progressing to citizenship or permanent residence attracted mixed views from respondents to the Government's consultation. For each of the three categories of migrant (economic migrants, family members and those needing protection) more respondents thought the proposed timescales were too long than thought they were too short, but over a third thought they were about right.[139]

Lord Avebury felt that there was no need to lengthen the timescale. In response to his question on why the Government considers a longer qualifying period to be a better way of getting people to settle in the community, Lord Brett replied only that "the Government believe that we need to have greater integration of citizens and provide both a strengthening of the route and an incentive to accelerate it".[140] The Joint Council for the Welfare of Immigrants (JCWI) argues that "if anything, uncertainty about status is likely to 'freeze' integration attempts by migrants".[141]

Combining a longer qualifying period with the introduction of probationary citizenship as limited leave would mean that many non-EEA migrants would be subject to a 'public

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136 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09

137 Joint Council for the Welfare of Immigrants, *Memorandum of evidence to the Home Affairs Committee on the Draft (Partial) Immigration and Citizenship Bill*, 17 September 2008 p2

138 HL Deb 25 March 2009 c730

139 Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Analysis of consultation responses*, July 2008, pp16-19

140 HL Deb 2 March 2009 c510

141 Joint Council for the Welfare of Immigrants, *Borders, Citizenship and Immigration Bill 2009: Parliamentary briefing, House of Lords - second reading* [February 2009], p6

funds restriction' for several more years than at present. The JCWI has set out its understanding of the implications:

> The scheme overall envisages at minimum (a) one additional year to which migrant workers and spouses are to be subject to a public funds restriction and (b) three additional years to which other family members are subject to a public funds restriction. At maximum, it envisages three additional years to which (a) will be subject to a public funds restriction and five additional years for (b), or possibly no upper limit for both in the event of a failure to fulfil both existing and new requirements.[142]

The reason it would have a greater effect on family members is that currently those who come to the UK for settlement as family members (other than spouses) are granted indefinite leave straight away, to which no public funds restriction can be attached. In the JCWI's view, the change would "tend to lock both migrant workers and family members into highly exploitative and undesirable conditions with particularly acute effects for women and certain ethnic groups" and is arguably inconsistent with Article 9 of the 1966 *International Covenant on Economic, Social and Cultural Rights*.[143] It considers, moreover, that limiting state assistance for longer periods is "likely to achieve the very antithesis" of developing a sense of citizenship.[144]

The Joint Committee on Human Rights accepted that the Bill itself makes no change to the underlying position on migrants' eligibility for benefits, but was concerned that the effect of the Bill would be to extend the time for which restrictions on access to benefits and services apply. It recommended that the Government reconsider its position on access to benefits and services for people with probationary citizenship leave.[145]

In addition to lengthening the qualifying period for naturalisation, the Bill would restrict the permitted absences during that period by limiting them to 90 days in each year (**clause 40(2)**). Lord Avebury called on the Government to maintain the current position whereby the maximum permitted absences from the UK during the qualifying period are calculated as an average over the whole of that period. The Government rejected this amendment, relying on **clause 40(4)** which provides that discretion can be exercised where the applicant is out of the UK for longer than the permitted period. Lord Brett said in the House that "we will not examine that requirement too closely where the absences are in the earlier part of the probationary period",[146] and in a letter sent to members of the House of Lords he set out some of the circumstances that would be covered in guidance on this exercise of discretion:

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142 Joint Council for the Welfare of Immigrants, *Memorandum of evidence to the Home Affairs Committee on the Borders, Citizenship and Immigration Bill* [March 2009], p8

143 *Ibid*

144 Joint Council for the Welfare of Immigrants, *Borders, Citizenship and Immigration Bill 2009: Parliamentary briefing in support of Amendment 45, House of Lords – Committee stage*, p5

145 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC375 2008-09, para. 1.43

146 HL Deb 2 March 2009 c512

- If the applicant has exceeded the 90 day limit by only a few days we would look to ignore this, particularly if there was evidence or an explanation as to why, and especially where there is also evidence which demonstrates that a person has a close link with the United Kingdom by establishing their home, family and a large part of their estate here.

- If a person was unable to travel back to the UK due to poor weather conditions or ill-health whilst abroad, and this took them over the limits, we would look to waive the excess absences where there was evidence to support this.[147]

c. The voluntary activity condition

The proposals for using voluntary activity as an incentive to speed up naturalisation (**clause 42(1)**) have attracted quite a degree of support, but many objections have also been raised, some on principle and others practical.

As the Conservative Home Affairs spokesperson Baroness Hanham pointed out, "this would be the first national scheme in which the state directly rewarded people for volunteering".[148] She agreed with the Government that voluntary service could be a useful contribution to citizenship, though she objected to its "virtually compulsory nature".[149] Supportive comments also came from Baroness Falkner of Margravine, who thought that an incentive to volunteer might be beneficial to newcomers, particularly women, who might otherwise remain segregated:

> Newcomers, particularly from my part of the world, are often ghettoised. If you are a woman, you will be ghettoised in your home and with your extended family, many of whom live with you. You will be expected to perform conventional forms of daughter-in-lawship or sister-in-lawship, or whatever else are the bases of your being there. You are seldom permitted time away from those duties, which I consider often to be unpaid domestic chores, even to do English lessons. You will live in a street full of people similar to you and you will have very few opportunities to go out of your ambit, which is often that of the village from which you previously came, and interact with other people.
>
> An incentive to volunteer might convince your husband that you might be let out of the house to do it. You might be given a bit of rope to be an adult and make up your own mind about what you wish to do. You might even learn a few words of the language while you are at it. From volunteering in a legal advice centre or a women's refuge, you might discover how the law works in the country for which you are applying for citizenship. Having spoken to men and women who live in those communities, I only wish that we could create the avenues for them to go out and volunteer, because it is quite often the community that holds them back and keeps them segregated. [150]

Some of the witnesses to the Home Affairs Committee's enquiry on the Bill also welcomed the principle of community volunteering, and the Committee itself considered

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147 Lord Brett, letter to Lord Avebury and others regarding questions asked at during Committee Day 2 on clauses 37 and 38 of the Borders, Citizenship and Immigration Bill, 19 March 2009, DEP 2009-0898

148 HL Deb 2 March 2009 c552

149 HL Deb 25 March 2009 c744

150 HL Deb 2 March 2009 c569

that the concept of 'active citizenship' is "essentially a fair one", whilst adding that it must be applied in a fair, proportionate and non-discriminatory manner.[151]

Requiring proven "active citizenship" to keep the period on probationary citizenship to a minimum was unpopular amongst respondents to the *Path to Citizenship* consultation paper. 59% of respondents rejected the idea entirely, and 81% said that it should not be a mandatory requirement. Concerns included:

- Voluntary activities should not be forced on people
- Migrants should not have to do more than British citizens
- The difficulties of finding time to undertake activities, particularly for those with work and family commitments
- How to conduct an objective assessment of whether the test was met
- The impact on voluntary organisations who might have to demonstrate the active citizenship of large numbers of migrants.[152]

The "volunteering purists"[153] argued that this could be seen as fundamentally at odds with the notion of volunteering. The Bishop of Lincoln suggested that whilst it could be "a brilliant idea for furthering and enhancing participation in local or community life", it might instead be "a cynical abuse of the voluntary sector, with an emphasis placed on passing a test rather than making a difference. The trouble is that as the Bill stands, we do not know which it is".[154] Others went further and described it as "a form of coercion",[155] "blackmail",[156] "nonsense"[157], "a penalty"[158] and "demeaning the whole concept of volunteering".[159]

Another issue was its place in the wider questions of citizenship. Lord Goldsmith was particularly concerned that the proposals might distract attention from the need to encourage a greater sense of citizenship among British-born nationals, and called for a government-wide approach to citizenship rather than a Home Office Bill on citizenship.[160] Lord Wallace of Saltaire, speaking for the Liberal Democrats, said:

> The citizenship agenda needs active discussion across the parties on how we are going to re-define British citizenship for current citizens as well as for applicants for citizenship. It needs to be taken slowly and gently. We on these Benches, therefore, are not at all sure that this is the right place to introduce one small part of a very large number of issues.[161]

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151 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, paras 39 and 43
152 Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Analysis of consultation responses*, July 2008, pp26-27
153 Baroness Falkner of Margravine, HL Deb 2 March 2009 c558
154 HL Deb 11 February 2009 c1143
155 Earl of Sandwich, HL Deb 11 February 2009 c1152
156 Baroness Hanham, HL Deb 2 March 2009 c550
157 Lord Patten, HL Deb 2 March 2009 c554
158 Lord Morris of Handsworth, HL Deb 2 March 2009 c555
159 Lord Judd, HL Deb 2 March 2009 c567
160 HL Deb 11 February 2009 cc1144-6
161 HL Deb 2 March 2009 c553

Others, including the cross-bencher Baroness Howe of Idlicote, suggested that "requiring potential citizens to do more for our country than actual citizens, while many are receiving less in terms of benefits and services, is more likely to undermine social cohesion and impede, rather than foster, integration".[162] She would have been much keener to support compulsory volunteering in the form of national service for everyone, "as it would not create two distinct classes of citizenship".[163] Lord Judd, a Labour peer, considered that there is "plenty of evidence [that volunteering] is not the prevailing culture in our society".[164] The JCWI suggested that requiring migrants to volunteer would indirectly communicate to the host community that migrants are failing to integrate and that the responsibility for this failure lies exclusively with migrants.[165]

In response to these general concerns, Lord Brett offered the following:

> The advantage of what we are seeking to do is that it will bring contact between migrants and the wider community; it will show British citizens and those who seek to join them are earning their citizenships by participating in British life; and it will encourage those who want to become citizens by opening up to them new experiences and life-long rules. [The purpose of active citizenship] is to incentivise a positive attitude towards Britain.[166]

As well as issues of principle, many questions have been raised about the practicalities of the voluntary activity provisions. Very little detail appears in the Bill. The Government has set up a design group, including local authority and voluntary sector representatives, to look at the details of how it would work, but its recommendations have not yet been published. A document outlining the group's emerging findings has, though, been placed in the Library of the House of Lords.[167] The questions about how the voluntary activity option would work include:

- *What kind of voluntary activity would count?* The Home Affairs Committee said that "the question of which activities will count is of key importance in the fair operation of the new architecture".[168] A general requirement is that the activity must be unpaid,[169] though this raises the possibility that those seeking naturalisation might not be paid for work which should attract pay ("one person's volunteering activities can be somebody else's paid employment")[170] or might be exploited.[171] More detail would be provided in secondary legislation,[172] which the Home Affairs Committee considered should be made under the "super-affirmative resolution procedure" to allow for

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162 HL Deb 11 February 2009 c1190
163 HL Deb 2 March 2009 c556
164 HL Deb 2 March 2009 c568
165 Joint Council for the Welfare of Immigrants, *The Borders, Citizenship and Immigration Bill: Parliamentary Briefing in support of tabled amendments 77 and 79 – House of Lords Committee stage*
166 HL Deb 2 March 2009 c560
167 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898
168 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 44
169 **Clause 42(1)**
170 Lord Morris of Handsworth, HL Deb 2 March 2009 c566
171 Baroness Miller of Chilthorne Domer, HL Deb 25 March 2009 c746
172 **Clause 42(5)**

scrutiny and the suggestion of amendments.[173] The Government indicates that the permissible activities would be either 'formal volunteering' (giving unpaid help as part of groups, clubs or organisations to benefit others or the environment) or 'civic activism' (including undertaking specific responsibilities in the community).[174] Examples include conservation work, lunch clubs for the elderly and being a school governor.[175] If the organisation were not a registered charity, it would need to be validated by the local authority, the CSV (Community Service Volunteers: the UK's largest volunteering and training charity) or a larger registered charity acting as an umbrella monitor.[176] Trade union activity[177] and party-political activities[178] might not be seen by everyone as appropriate to meet the requirement, but would in some circumstances be acceptable.[179] There does not seem to be any provision for applicants to check whether the voluntary activity they have chosen would be acceptable.

- *How much voluntary activity would be required?* There is no minimum period required on the face of the Bill, but there are suggestions from the design group of a minimum of 50 hours.[180] Lord Brett suggested that would be up to a referee to decide whether the "criteria for sustained volunteering" have been met.[181] The voluntary activity could take place at any point during the qualifying period: it would not have to be during probationary citizenship.[182] This provides flexibility but arguably diminishes the relevance of having a separate period called probationary citizenship.

- *Would there be any exceptions?* Some people, such as parents with small or disabled children, may find it impossible to meet the voluntary activity condition. Others might require support for additional needs. Several respondents to the consultation suggested that making volunteering a core component of the naturalisation process may therefore be discriminatory. Lord Brett said that "discretion is built into the system to allow such circumstances to be taken into account",[183] referring to the power which allows the Secretary of State to treat a person as though they have participated in 'prescribed activities'. However, the Government is currently considering exempting only those with medical evidence of a mental and/or physical impairment that makes them unable to take part. It has decided against general exemptions for carers, workers, families, those in

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173 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 44

174 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898

175 See HL Deb 2 March 2009 c561 and *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898

176 HL Deb 2 March 2009 c562

177 HL Deb 2 March 2009 cc564-72

178 HL Deb 2 March 2009 cc552 and 570

179 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898

180 Baroness Hanham, HL Deb 25 March 2009 c744

181 HL Deb 2 March 2009 cc590-91

182 Lord Brett, HL Deb 2 March 2009 c561

183 HL Deb 25 March 2009 c750

professions which contribute to society and those over 65.[184] The Home Affairs Committee called on the Government to make an explicit exemption for certain abused groups, "including refugees, victims of domestic violence and human trafficking".[185]

- *What would be the impact on the third sector?* The Conservative Home Affairs spokesperson Baroness Hanham estimated that there would be about 160,000 people trying to do voluntary activity in order to naturalise more quickly, compared with 190,000 registered charities and probably about the same number of unregistered ones.[186] The Home Affairs Committee warned of a "glut of poorly regulated 'volunteers' [which] could place undue and unwanted pressure on the voluntary sector".[187] The Government envisages that a network of volunteer centres could direct migrants to organisations looking for volunteers, but does not say who would run these centres or pay for them.[188] Organisations would incur costs in certifying voluntary activity, for instance in connection with Criminal Records Bureau (CRB) checks; but according to the Government they have been supportive of the proposals and "have not raised major concerns" about cost.[189] However, the design group has raised concerns about the costs and burdens of the proposals.[190] The UKBA is not planning to offer any direct funding to organisations that choose to be involved in active citizenship, but is looking to see whether the European Integration fund and the new Migration Impacts fund might be able to assist.[191]

- *Who would certify that the activity had been done?* As well as validation of the organisation, mentioned above, a referee from that organisation would be required to certify that the applicant had done sufficient voluntary activity. The Government envisages that the applicant would fill in a form about their voluntary activity, with relevant evidence, and the referee would simply confirm this; there would be criminal penalties for making or supporting false statements.[192] Lord Brett said that "our current proposal is that a referee should be defined as someone in a supervisory capacity with personal knowledge of the applicant's active citizenship".[193] Baroness Miller of Chilthorne Domer picked up on concerns about how hard it would be to check on what exactly is a voluntary activity, and argued that "we do not want to have a whole new bureaucratic system dealing with voluntary activities when, by their very

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184 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898

185 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 57

186 HL Deb 2 March 2009 c550

187 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 46

188 HL Deb 2 March 2009 cc562-3

189 HL Deb 2 March 2009 c562

190 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898

191 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898

192 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898

193 HL Deb 25 March 2009 c750

nature, those activities should be voluntary".[194] The Earl of Sandwich voiced his opposition to the voluntary sector being "roped in to police a scheme".[195]

Once the design group has completed its work, the Government would put the detail of the proposals in secondary legislation subject to the affirmative resolution procedure (**clause 42(5)**).

The Joint Committee on Human Rights is concerned that the wide powers in this part of the Bill to make regulations have the potential to interfere with the right to respect for private life and the right not to be discriminated against in the enjoyment of that right. It considered that the community activity requirement could have a discriminatory effect on groups who are unable to undertake such activity for various reasons, such as physical or mental disability, caring responsibilities, or being in full-time work. It was not reassured by the power to make regulations that treat specified types of persons as having fulfilled the activity condition even though they have not, and called instead for exemptions to be included on the face of the Bill.[196]

A further aspect of the Government's proposals which does not appear on the face of the Bill is its wish to make all applicants use local authority Nationality Checking Services (NCSs). NCSs currently check the details of citizenship applications (for a fee paid by the applicant) and pass the applications to the UKBA for a decision. The Government would in future like all naturalisation applications, particularly those with an 'active citizenship' element, to be submitted through NCSs, thus "enabling providers to use their local knowledge to assess and verify evidence" and allowing the UKBA to process applications more quickly.[197] However, the Government also proposes that applicants could use any NCS in any local authority regardless of where they live. The new requirements would also mean that all applicants incur an additional fee, which is likely to rise to cover the cost of verifying 'active citizenship'. However, there are not enough NCSs yet for this to be practicable, so in the meantime the Government is thinking of encouraging the use of NCSs by providing a fast-track route for applications submitted through them.[198]

d. The impact of criminality

Lord West of Spithead explained that the proposals in the Bill on the effect of criminality do not make major changes:

> Migrants will, as now, need to be of good character and we will normally refuse those who have unspent convictions. We will refuse applications from those who persistently and repeatedly commit minor offences. We will normally refuse applications from those given custodial sentences and seek to deport those convicted of serious offences.[199]

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194 HL Deb 11 February 2009 c1201
195 HL Deb 25 March 2009 c747
196 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC 375 2008-09, para. 1.49
197 *Document made available to the House to illustrate the Government's emerging thinking on active citizenship*, 19 March 2009, published as Annex A to Lord Brett's letter to Lord Avebury, DEP 2009-0898
198 *Ibid*
199 HL Deb 11 February 2009 c1131

There is no mention of criminality extending the qualifying period for nationality, as proposed in the *Path to Citizenship* green paper. The Government's proposals in that paper had largely been supported, but a significant number of respondents raised concerns about the practicality and fairness of slowing down or stopping a parent's progression to citizenship on the basis of their child's criminality.[200] In the Government's response it had indicated that truly exceptional circumstances might prevent minor criminality from slowing down the path to citizenship and that children's criminality might not after all affect their parents' path to citizenship, depending on the results of a cross-government working group which would look at how those proposals interacted with other measures on youth crime.[201]

e. The (retrospective?) effect on people who are already in the UK

A major concern raised about the new naturalisation proposals is the way they would affect those already in the UK who have gone some way down the path to citizenship in the expectation that they would be able to qualify for naturalisation under the existing rules.

The Joint Committee on Human Rights, which in 2007 had expressed its "concern about the injustice done by retrospective changes to the rules which affect migrants' eligibility to settle in the UK" in a report on the Highly Skilled Migrant Programme (HSMP),[202] emphasised the need for transitional provisions:

> We urge the Government not to repeat the unedifying spectacle of riding roughshod over migrants' legitimate expectations of settlement, which undermined many migrants' faith in the UK's commitment to basic fairness. We recommend that clear transitional provisions are made which meet the legitimate expectations of those already in the system.[203]

Baroness Hanham, the Conservative spokesperson for Home Affairs, led the pressure for an amendment to protect those already near to qualifying under the existing rules on naturalisation:

> The people who have faithfully adhered to the current rules and thought that they were firmly established on the road to citizenship should not now have the rug pulled from beneath their feet. They have an expectation of a timescale in which their naturalisation will be fulfilled. Since the last debate in Committee, I have been inundated, as I am sure have other noble Lords, with letters and messages from people in categories that my amendment would help. They have movingly and eloquently expressed their worry, anger and distress that the Government are prepared to muck them about yet again. The Government have already changed the highly skilled migrant programme and applied that retrospectively, even though

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200 Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to consultation*, July 2008, pp16-17; *The path to citizenship: next steps in reforming the immigration system – Analysis of consultation responses*, July 2008, pp29-31

201 Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to* consultation, July 2008, p17

202 Joint Committee on Human Rights, *Highly Skilled Migrants: Changes to the Immigration Rules*, 9 August 2007, HL 173/HC 993 2006-07

203 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC 375 2008-09, para. 1.52

> there is a court case against that, so they must take note of what is happening to those on what used to be called limited leave to remain.[204]

In the Government's response to the *Path to Citizenship* consultation, it undertook to continue to examine the effects of the current proposals on those who may already be in the system, including any transitional measures, in advance of making the changes.[205] Lord Brett indicated in a letter dated 19 March 2009 that some transitional measures for those who already have ILR or limited leave to enter or remain in the UK were being considered, but that these would not be finalised until the summer of 2009 at the earliest.[206] He went through various categories of applicant who would benefit from transitional arrangements of one sort or another:

- Any application for naturalisation which is received by UKBA [the United Kingdom Border Agency] before the earned citizenship clauses are commenced but which remains undecided, will be considered under existing section 6 and Schedule 1 of the British Nationality Act 1981, i.e. the application will not be affected by the earned citizenship proposals.
- Any migrant who has ILR in the UK will be deemed to have permanent residence leave for the purposes of the earned citizenship clauses. They will not need to make an application to be recognised as a permanent resident, or pay any sort of fee and they will continue to have full access to benefits and services, subject to the general eligibility criteria.
- Migrants with ILR when the earned citizenship clauses in the Bill are commenced will be able to apply to naturalise under existing section 6 and Schedule 1 of the British Nationality Act 1981 provided they apply within a set period after the clauses have been commenced. Although we have not yet confirmed this period, it is likely to be for between 18-24 months after the clauses are commenced. We think a period such as this would be fair given that the aim behind our proposals is that we want to encourage more people to become British citizens.
- Migrants who are currently in the UK and have existing limited leave to enter or remain which is regarded, under the new earned citizenship system, to be a qualifying immigration status, will be able to count that time towards the qualifying period for naturalisation as a British citizen. For example a person here under Tier 2 of the Points-Based System before the earned citizenship clauses in the Bill are commenced will be able to count that time as a type of qualifying temporary residence leave, and therefore count this towards the revised qualifying periods for naturalisation.[207]

The proposed 'transitional arrangements' for migrants who have only limited leave when the new provisions are commenced would simply allow existing leave to contribute towards the qualifying period for naturalisation. The Government wants such migrants to apply under the new rules, including the longer qualifying period, rather than under the rules that were in force when they arrived in the UK.[208] The Government's position is

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[204] HL Deb 25 March 2009 c705

[205] Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to* consultation, July 2008, p8

[206] Lord Brett, Government Spokesperson for the Home Office, letter to Lord Avebury, 19 March 2009, DEP2009-0898

[207] *Ibid*

[208] *Ibid*

that "a migrant's only legitimate expectation is to be assessed under the rules in force at the time of their application".[209]

This did not satisfy the House. Baroness Hanham repeated her view that "it is inherently unfair to people who have started on a process to change it suddenly midway", and divided the House. Her amendment sought "to ensure that those in the closing stages of limited leave to remain do not get caught up in the transitional arrangements". It was passed by 171 to 110 votes[210] and now appears as **clause 39** of the Bill.[211] The Government has indicated that it will return to this matter in the House of Commons.[212]

The Government may have to reconsider its position in the light of a High Court judgment of 6 April 2009 on legitimate expectation.[213] In that case the court ruled that it was unlawful to increase the qualifying period for ILR from four to five years for people who were already in the UK on the Highly Skilled Migrant Programme (HSMP). Mrs Justice Cox found that there was "a substantive, legitimate expectation that the terms on which you joined the HSMP would be the terms on which you qualified for settlement". She was "unable to identify a sufficient public interest which justifies a departure from the requirement of good administration and straight forward dealing with the public, or which outweighs the unfairness that the increase in the qualifying period visits upon those already admitted under the scheme" and was concerned about the Home Office's "developing pattern of refusal to acknowledge the clear evidence of hardship and disadvantage".[214] The Home Office will apparently not appeal,[215] and is currently analysing the details of the judgment "to determine the wider impact, if any, on the UKBA".[216]

f. The use of discretion

A major feature of this part of the Bill is the degree to which discretion is built into the system. This provides a degree of flexibility, but also of uncertainty. It might be argued that this contrasts with the Government's wish in the immigration simplification project to limit the use of discretion.[217]

Several members of the House of Lords had **general reservations about the use of discretion**, for instance:

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209 Lord Brett, HL Deb 25 March 2009 c709
210 HL Deb 25 March 2009 cc709-712
211 Some minor amendments to ensure that the clause fulfilled the House's intentions were made on Third Reading in the House of Lords: HL Deb 22 April 2009 cc1535-7
212 Lord West of Spithead, HL Deb 22 April 2009 c1537
213 *R (HSMP Forum (UK) Ltd.) v Secretary of State for the Home Department* [2009] EWHC 711 (Admin), 6 April 2009
214 *Ibid* paras 55 and 77-78
215 Richard Ford, 'Migrant rule change was unfair on skilled workers', *Times* 7 April 2009
216 Lord West of Spithead, HL Deb 22 April 2009 c1536
217 See UKBA, *Simplifying immigration law: an initial consultation*, June 2007, para. 31: the simplification process should minimise "the need for decision-makers to exercise discretion".

- "How will having a broad discretion make the system work better, rather than lead to yet more arguments and perhaps more litigation and thus slow the whole thing down?"[218]
- "Like so many things in the Bill – we have discussed this before – everything will be left to guidance so that noble Lords and another place will have no say in what the final solution is to be. […] we have to take it on trust that what comes out in the end, weeks after the Bill receives Royal assent, would have been agreed by Parliament if we had been able to look at it. That is not a satisfactory way to legislate and makes a mockery of the idea that Parliament exercises control over the Executive."[219]

Moreover, in the courts it is not always possible to rely on a Minister's statements. The case of *Pepper v Hart*[220] approved recourse to Hansard as an aid to construction only where legislation is ambiguous. A February 2009 judgment from the House of Lords[221] on the limits of this doctrine clarified that unless the legislation is ambiguous, a Ministerial assurance is irrelevant even where the content of that assurance concerns matters of torture.

One of the instances of the statutory use of discretion would be in relation to **permitted absences** during the 90-day period (**clauses 40(4) and 41(4)**). As noted in section ***b*** above, the Government has provided some indication of what the guidance on this discretion might provide.

Another example is **clause 40(7)**, which provides statutory discretion to waive the requirements for applicants to have been in **continuous employment** throughout the qualifying period. Lord Brett indicated that changing job or type of job or self-employment during the qualifying period would not break the 'continuous employment' requirement.[222] But he could not confirm how short breaks in employment would be treated.[223] Other rules on continuous employment provide for instance that 60 days' unemployment is allowed for migrants granted leave under tier 2 of the points-based system (skilled workers). Lord Brett later added that guidance on the use of this discretion would allow officials to take into account "factors such as the person's overall employment record whilst in the UK; the length of time they have been out of work; the economic situation in the UK and any explanation and/or evidence which may be offered by the individual", and that "we would carefully consider the exercise of discretion in the case of an overseas domestic worker who has left their employment due to abuse", but that "any discretion will be used sparingly and only in truly deserving cases".[224]

The Home Affairs Committee considered that "for those migrants who abide by the conditions of their leave, short periods of joblessness, particularly in the current economic climate, should not automatically restart the clock on their qualifying period to citizenship". It called on the Government to be "more transparent by setting out a

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[218] Lord Lester of Herne Hill, HL Deb 25 March 2009 c718
[219] Lord Avebury, HL Deb 25 March 2009 c733
[220] [1993] AC 593
[221] *RB (Algeria) and ors v Secretary of State* 2009 UKHL 10, paras 80-82
[222] HL Deb 25 March 2009 cc734-5
[223] HL Deb 25 March 2009 cc736-7
[224] Lord Brett, letter to Lord Avebury and others regarding questions asked at during Committee Day 2 on clauses 37 and 38 of the Borders, Citizenship and Immigration Bill, 19 March 2009, DEP 2009-0898

specific time period within which individuals can be between jobs without breaking the continuous employment requirement for citizenship."[225]

The JCWI was concerned that the continuous employment requirement would provide employers with scope to discriminate on grounds of gender, race and disability, increase the risk of locking migrants into exploitative or unlawful working conditions, penalise agency workers and risk breaching various international obligations. It was told by the economist Philippe Legrain that the proposal would also make the labour market less flexible and thus damage the economy as a whole.[226]

Armed forces and exceptional Crown service cases would be decided under a discretionary clause allowing any or all of the requirements for naturalisation to be waived (**clause 40(9)**). Currently the Home Office *Nationality Instructions*[227] provide for armed forces or Crown service to take the place of the residence and status requirements for naturalisation.[228] Lord Brett's letter of 19 March indicated that the new discretion would be exercised more restrictively than before:

- quality of service would be the paramount consideration – applicants would normally have to hold a responsible post and have performed their duties to an exceptionally high standard;
- connections with the UK would be the next most important consideration, with a key factor being past residence in the UK (the longer and more recent the better); and
- length of service alone would not be sufficient, but at least 10 years' service would normally be required.[229]

Lord Wallace of Saltaire suggested that interpreters working for the British Army in Iraq and Afghanistan should qualify.[230] In response to Baroness Hanham's probing amendment on this issue, Lord Brett said that the Government would be defining the "broad parameters" of the discretion, and also offered the following examples:

> we would be likely to use the discretion when a Crown servant had demonstrated exceptional service by, for example, representing Her Majesty's Government in a senior position such as vice-consul, or by demonstrating service significantly above and beyond the call of duty that has directly benefited the United Kingdom and its interests.[231]

The provisions for a faster route to citizenship for applicants with a '**relevant family association**' (broadening the scope of the current provisions which apply only to spouses of British citizens) contain not only the power to set out in regulations which categories of person would fall within that definition (**clause 41(2)**) but also the discretion

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225 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL]*, 29 April 2009, HC 425 2008-09, para 33

226 Joint Council for the Welfare of Immigrants, *Borders, Citizenship and Immigration Bill 2009: Parliamentary briefing in support of amendment no 51, House of Lords – Committee stage*

227 ch. 18 Annex B(i) [undated; viewed 7 January 2009]

228 See Library Standard Note SN/HA/4399, *Immigration: settlement and British citizenship for discharged Gurkhas and Commonwealth members of the armed forces*, 28 April 2009

229 Lord Brett, letter to Lord Avebury and others regarding questions asked at during Committee Day 2 on clauses 37 and 38 of the Borders, Citizenship and Immigration Bill, 19 March 2009, DEP 2009-0898

230 HL Deb 11 February 2009 c1160

231 HL Deb 2 March 2009 c534

to waive the requirement altogether (**clause 41(4)**). Again, Lord Brett's letter[232] provides some elucidation. 'Relevant family association' is likely to include the following groups:

- spouses of British citizens and permanent residents
- unmarried and same-sex partners of British citizens and permanent residents
- bereaved spouses and civil partners, unmarried and same-sex partners of British citizens and permanent residents
- victims of domestic violence by British citizens and permanent residents, and
- persons exercising rights of access to a child who is living in the UK.

The Government proposes that people in the third and fourth categories would be granted permanent residence immediately without a period of probationary citizenship. It is also considering whether to include in the list further groups such as elderly dependant relatives. One example of where discretion may be exercised beyond these groups is where a person had separated from his or her British citizen partner shortly before they were due to complete their qualifying period under the family route.[233]

There would also be a power to exempt applicants from the **voluntary activity option** (**clause 42(1) and (2)**).

Further discretionary powers were introduced by the Government as the Bill went through the House of Lords, including the discretion to waive the requirement to have had a **qualifying immigration status** for the whole of the qualifying period (**clause 40(5) and 41(4)**). This was intended to address concerns about particular vulnerable groups such as refugees (see below) and abused domestic helpers who would not fall within the rules as proposed. Again, the Government provided an indication of two circumstances in which it would envisage exercising this discretion: (1) where a person would qualify for naturalisation but for a short period of overstaying in the qualifying period; and (2) to allow refugees and those with humanitarian protection to count time spent in the UK before their claim was decided, but only in exceptional circumstances such as where there had been undue delay in deciding the claim.[234] However, this did not satisfy those who were looking for certainty about how such vulnerable groups would be affected.

The Government's response to the *Path to Citizenship* consultation said that it would consult on whether a more sophisticated framework of guidance was needed on the use of discretion.[235]

g. The effect on refugees

The extended qualifying periods for naturalisation proposed in the Bill would apply to all refugees and those granted humanitarian protection[236] (the only difference would be that

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[232] Lord Brett, letter to Lord Avebury and others regarding questions asked at during Committee Day 2 on clauses 37 and 38 of the Borders, Citizenship and Immigration Bill, 19 March 2009, DEP 2009-0898

[233] *Ibid*

[234] Lord Brett, letter to Lord Avebury, *Borders, Citizenship and Immigration Bill – Report Day 1*, DEP 2009-1118, 6 April 2009

[235] Home Office UK Border Agency, *The path to citizenship: next steps in reforming the immigration system – Government response to consultation*, July 2008, p16

they would continue to have full access to benefits and services as soon as they are recognised as being entitled to protection). The Joint Committee on Human Rights is concerned that the provisions would have a disproportionate impact on refugees and those with humanitarian protection.[237]

The UN Refugee Agency UNHCR has said that it would be inappropriate for recognised refugees, especially those resettled in the UK under the Gateway Protection Programme, to spend more than five years in the UK before being able to apply for naturalisation.[238] The 1951 Geneva Convention on the Status of Refugees requires host states to "facilitate the assimilation and naturalisation of refugees" and in particular to "make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings".[239]

The Refugee Legal Centre and others supported an amendment which would have allowed the qualifying period for refugees to begin on the date of a well-founded application for asylum rather than on the date of recognition as a refugee.[240] The amendment was based on the fact under international law people are refugees as soon as they meet the requirements of the 1951 Refugee Convention, rather than when a government decides to recognise them as such.

The Government rejected it but tabled its own amendments instead, which now appear as **clauses 40(5) and 41(4)**. These do not refer specifically to refugees, but provide for discretion to waive the requirement to have had a qualifying immigration status for the whole of the qualifying period for naturalisation. Lord Brett said that "in the case of refugees, we would normally expect to exercise [this discretion] where undue delay has occurred in determining an asylum application or where the delay was not attributable to the applicant".[241] When pressed further on what would amount to "undue delay", he suggested that more than six months would be appropriate as that is the Government's new target for resolving all fresh asylum claims.[242] He added that guidance would be developed on the use of this discretion.[243] The Home Affairs Committee welcomed this amendment, but recommended that "the Government should set out on the face of the Bill that this discretion will apply to refugees, unless there are exceptional circumstances why it should not."[244]

A further concern was that refugees might fall foul of the requirement not to have been in breach of the immigration laws at any point in the qualifying period. Lord Brett said that "The requirement not to be in breach is relevant only to those whose qualifying period has started and, as I said, in the case of those seeking protection the qualifying period

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236 Humanitarian Protection is temporary leave granted to those who are unable to demonstrate a claim for asylum but who would face a serious risk to life or person arising from the death penalty, unlawful killing, torture or inhuman or degrading treatment or punishment if returned to their home country: *Immigration Rules*, HC 395 of 1993-94 as amended, para 339C

237 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC 375 2008-09, para 1.55

238 United Nations High Commissioner for Refugees, *Borders, Citizenship and Immigration Bill Parliamentary Briefing - House of Lords Second Reading,* February 2009, para. 9

239 Article 34

240 HL Deb 2 March 2009 c537

241 HL Deb 25 March 2009 c717

242 HL Deb 25 March 2009 cc718-9

243 HL Deb 25 March 2009 c719

244 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 58

will normally start only when they are granted leave on that basis".[245] He added that the use of discretion would be extended where necessary:

> In those cases where we choose to exercise the new discretion—for a delay, or whatever—to count periods before the date of leave being granted towards the qualifying period, we will also apply discretion to waive the requirement not to be in breach, where that is a necessity.[246]

The Refugee Council suggested also that refugees should be granted permanent residence or citizenship without engaging in voluntary activity and without the probationary citizenship period. The Government did not consider this necessary, pointing out that those recognised as refugees will continue to be eligible for benefits as soon as their refugee status is recognised,[247] and that those accepted for resettlement under the Gateway Protection Programme (who are already recognised as refugees by the UNHCR before arriving in the UK) will continue to be granted permanent residence when they first arrive in the UK.[248]

C. Children born to members of the armed forces

Over 7,000 Commonwealth nationals and over 3,500 Gurkhas serve in the Regular Forces as part of the British Armed Forces.[249] They and their family members are entitled to British citizenship only in some circumstances.[250] For instance, if they have children who are born in the UK, the children are automatically British, but only because of a policy under which the parents are treated as 'settled' in the UK even though technically they are not. If their children are born abroad they are not entitled to British citizenship.

Questions of nationality for foreign and commonwealth members of the armed forces and their families have been raised in various contexts recently. One of these was the Armed Forces green paper of July 2008, *The Nation's Commitment: Cross-Government Support to our Armed Force, their Families and Veterans*, which amongst other things promised "as soon as practicable" to:

- Treat F&C Service personnel on operations or postings outside […] the UK at the start of the residential qualifying period for naturalisation as a British citizen as though they had been in the UK at that time;
- Modify the content and delivery of the Life in the UK Test for F&C Service personnel on operations or postings outside the UK to facilitate their naturalisation as a British citizen
- Allow children born outside the UK to F&C Service personnel on operations or postings overseas to be able to acquire British citizenship where this has the consent of both parents. [251]

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245 HL Deb 25 March 2009 c719
246 *Ibid*
247 HL Deb 11 February 2009 c1209
248 HL Deb 2 March 2009 c515
249 HL Deb 11 February 2009 c1131
250 See Library Standard Note SN/HA/4399, *Immigration: settlement and British citizenship for discharged Gurkhas and Commonwealth members of the armed forces*, 7 January 2009
251 Ministry of Defence, Cm 7424, July 2008, para 2.43

Clause 43 of the Bill clarifies and puts on a statutory footing the existing arrangements under which children born in the UK to a foreign or Commonwealth parent serving in the armed forces are British from birth.

A different arrangement is proposed for children born abroad to such parents: instead of being British from birth, **clause 47** proposes that they would be entitled to register as British. Lord Brett set out the Government's reason for the distinction:

> We have elected to provide that citizenship be acquired by registration under the proposed Section 4D because we believe that it is right to enable foreign and Commonwealth nationals who are not themselves British citizens to determine whether they wish their child to acquire British citizenship where that child is born outside the UK. This will enable those parents to consider, first, for example, whether acquisition of British citizenship would lead to the loss of another citizenship that they feel is more important for their child to acquire. Secondly, even if there is no conflict in regard to dual nationality and the domestic law of another state, it is still possible that the parents may nevertheless not wish their child to acquire British citizenship. As a result, it is right that the parents of those born overseas decide what citizenship their child acquires.

Lord Thomas of Gresford sought to remove the discrepancy by allowing the children born abroad also to be British automatically rather than by registration.[252]

Baroness Howe of Idlicote supported the Immigration Law Practitioners' Association's view that these clauses should apply to children born both before and after the clauses come into force,[253] which would avoid the kind of criticism that arose in relation to the nationality of children born overseas to British mothers and which is being addressed elsewhere in this Bill (see part D 2 of this paper, below). Lord Thomas of Gresford put down amendments in Committee that sought to remove the date limitation entirely and also to allow an application for registration to be made under these provisions even when the child has grown up.[254] In response, Lord Brett explained that the existing provision for children born in the UK would continue to be applied until the clause is commenced (in late 2009, he hoped), meaning that no child should miss out on British citizenship through lack of retrospectivity of this clause.[255] However, this did not address the start date for the clause on children who are born abroad, who do not have any current right to British citizenship.

The Government also resisted an attempt to have these clauses brought into force immediately on Royal Assent, saying that both were dependent on a definition of 'member of the armed forces' based on sections of the *Armed Forces Act 2006* that would not be commenced until late 2009.[256]

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252 HL Deb 4 March 2009 cc746-50
253 HL Deb 11 February 2009 c1190
254 HL Deb 2 March 2009 cc593-7
255 Lord Brett, HL Deb 2 March 2009 cc595-6
256 Lord Brett, HL Deb 1 April 2009 c1150

D. Other nationality issues

1. Introduction

The labyrinthine complexities of British nationality legislation over the years have given rise to many apparently anomalous or unfair situations in which certain – sometimes very small – categories of people cannot get British citizenship. Lord Avebury has long campaigned on these issues, and this Bill gave him and his colleagues on the Liberal Democrat benches the opportunity to raise them once more – possibly the last opportunity for some time, as the proposed immigration simplification Bill will not be addressing nationality issues. In Committee, the Government offered to hold discussions with Lord Avebury and his colleagues before Report. This led to a number of Government amendments being tabled on a variety of nationality issues, but they did not always go as far as Lord Avebury would have wished.

The Bill does not resolve the general issue that there remain several categories of British nationality that do not give the right of abode in the UK. Lord Goldsmith's 2007 report on citizenship recommended a time-limited registration system for people with this status, followed by the abolition of these categories altogether.[257]

Nor does the Bill did not tackle other aspects of nationality law, such as acquisition of British citizenship by birth or descent or by registration. The main framework for this will remain the *British Nationality Act 1981*, with its many amendments.

The Bill does not attempt to simplify British nationality law, which presents a different set of problems from immigration law. Its undeniable complexity is largely the result of Britain's changing attitudes to its colonial past and a desire to fit nationality law to changing immigration policy, meaning that for many people previous British nationality acts and nationality law in other countries continue to be relevant in determining their status. Simplification of the current legislation would therefore have a limited effect in reducing the continuing historical complexities. On the other hand it could be argued that the current state of nationality law does not provide a good basis for reform, especially that which further merges immigration and nationality law. Liam Byrne, a former Immigration Minister, has suggested that the citizenship reforms are the "unfinished business" of UK immigration reform since the Second World War.[258]

2. Children born overseas to British women

a. Background: discrimination and partial reform

Before the *British Nationality Act 1981* came into force on 1 January 1983, British mothers could not pass on their citizenship in the same way as British fathers. This meant that a child born overseas to a British woman who was either unmarried or married to a foreign national could not inherit the mother's nationality. Nationality could

[257] Lord Goldsmith, *Citizenship: Our Common Bond*, 2007, pp172-4
[258] Liam Byrne *A More United Kingdom* Demos 2008, p47

be passed on only through the male line, and only when the father was married to the mother.[259]

To counter this inequality, the Home Office announced on 7 February 1979 that children born overseas to British women before 1983 would be able to register as British citizens. Under the terms of the policy, applications by mothers whose children were still under 18 would be granted provided that the father (if the parents were married) had no well-founded objection.

Then from 30 April 2003 a new legislative provision in the *Nationality, Immigration and Asylum Act 2002* gave some people born abroad to British citizen women before 1983 the right to register as a British citizen, if they were born between 7 February 1961 and 1 January 1983 and they would have become British citizens if women had been able to pass on citizenship in the same way as men at that time.[260] The reason given for choosing these dates was that the new provision was intended to cover only those who would have benefited from the 1979 concession but had not applied when they were under 18.[261]

b. Clause 46 of the Bill

Clause 46 of the Bill now seeks to remove the 1961 cut-off date. However, it also introduces a new exception to the right to register for the children of women who were British citizens by descent, which would apply to those born either before or after 7 February 1961. The reason for the distinction is that before 1983, children born abroad to men who were British citizens by descent could become British if the birth was registered at the local British consulate, whereas the foreign-born children of British women had no such right and so were not registered. The 2002 Act simply allowed the children of women who were British by descent or otherwise than by descent to become British. Now, however, the Government does not wish to assume that a mother would have taken the necessary action to enable her child to acquire British citizenship had she been able to pass on her citizenship status by descent.[262] This would leave the foreign-born children of women who were British by descent with no entitlement to British citizenship under these provisions, thus perpetuating a degree of discrimination.

The Government also wants to exclude from registration the children of a person who would himself or herself have been entitled to register as the child of a British mother but for his or her death:

> It is wrong to assume that the parent would have wanted to register as a British citizen under Section 4C before their death. It is also wrong to assume that the parent would have met the requirements of registration under Section 4C, including after 2006 the requirement to be of good character.[263]

Lord Avebury proposed amendments to broaden the scope of this right to register. Lord Brett felt that they should be withdrawn because they would benefit only a very small

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259 Either at the time of the child's birth, or if the couple married subsequently.
260 *British Nationality Act 1981* s4C, inserted by the *Nationality, Immigration and Asylum Act 2002*, s13(1)
261 HL Deb 21 March 2007 cWA192
262 Lord Brett, HL Deb 2 March 2009 c608
263 HL Deb 2 March 2009 c609

number of people, to which Lord Avebury replied, "If only a small number of children are involved in this matter, why go to such lengths to exclude a few of them"?[264]

The Government intends to commence this provision not immediately on Royal Assent but two or three months later, once the necessary administrative changes have been made.[265]

3. Children born overseas to British citizens by descent

Parents who are British citizens by descent are unable to transmit British citizenship automatically to children born outside the UK. However, current provisions allow such children to register as a British citizen if the application is made before the child is 12 months old.

Baroness Miller's and Lord Avebury's concerns on this issue formed part of the discussions proposed by the Government between the Committee and Report stages in the House of Lords.[266] The Government accepted that "in view of the changing employment and residence patterns over time, the 12-month requirement set out in 1981 is now too stringent".[267] As a result, Government amendments were made to the Bill on Report.[268] These would replace the 12-month time-limit for such applications with a requirement that the application be made before the child is 18 years old (**clause 44**), and as a result introduce a "good character" requirement for all those over the age of 10. The Government did not, however, go as far as Lord Avebury would have wished in putting all grandparents holding British citizenship otherwise than by descent on an equal footing.[269]

The existing requirement that the parent in question has lived in the UK for three years before the child's birth (other than where the child was born stateless)[270] remains.

4. Children born to unmarried British men

Another Liberal Democrat peer, Baroness Falkner of Margravine, raised the issue of discrimination against children born in the UK to unmarried British men. From 1 January 1983 such children could no longer become British automatically unless their mothers were either British or settled in the UK. Similar discrimination applied to those born overseas, both before and after 1983. The Secretary of State can use his general discretion to register such children as British,[271] but this applies only while the child is under 18.

Although section 9 of the *Nationality, Immigration and Asylum Act 2002* amended the law to allow unmarried British men to pass on their citizenship if they could prove paternity,

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264 HL Deb 2 March 2009 c610
265 Lord Brett, letter to Lord Avebury, *Borders, Citizenship and Immigration Bill – Report Day 1*, DEP 2009-1118, 6 April 2009 and HL Deb 1 April 2009 c1151
266 See HL Deb 4 March 2009 cc737-40 and cc742-745
267 Lord Brett, HL Deb 1 April 2009 c1082
268 HL Deb 1 April 2009 cc1081-2 and c1093
269 HL Deb 1 April 2009 cc1082-5
270 *British Nationality Act 1981* s3(2)
271 *British Nationality Act 1981* s3(1)

this change affected only people born after 1 July 2006. Lord Brett explained that "the change was not made retrospective as it was felt that this could create difficulties for those affected in relation to any other citizenship they held".[272]

The Government accepts that those who were born illegitimately to British men were at a disadvantage compared with those whose parents were married, and acknowledges that there is no power to register them as British once they are adults. It has therefore agreed to consider the issue further.[273]

5. Hong Kong residents

a. Background

At the handover of Hong Kong to China in 1997, only ethnic Chinese residents of Hong Kong were accepted by China as its nationals and the UK made only limited provision for other Hong Kong residents. British Dependent Territories Citizens (BDTCs)[274] from Hong Kong lost that status at the handover, but a special status called British National (Overseas) (BN(O)) had been introduced in 1986 for people who were BDTCs by connection with Hong Kong and who applied for this status before 1997. Being a BN(O) does not automatically carry the right of abode in the UK. BDTCs who had not registered as BN(O)s and who had no other nationality or citizenship on 30 June 1997 automatically became British Overseas Citizens (BOCs) on 1 July 1997 - another category of British nationality without the right of abode.

This left some of Hong Kong's ethnic minorities in an uncertain position, because only ethnically-Chinese people were accepted by China as its nationals. The British Government eventually allowed them to register as full British citizens, with the right of abode, if they would otherwise be stateless and met a residence requirement.[275]

b. Non-Chinese Hong Kong residents

Lord Avebury has for many years campaigned on behalf of the few hundred members of Hong Kong's ethnic minorities who had only BN(O) status and, because they could not meet the 'ordinary residence' test[276] were effectively left stateless after the handover. The test had not been referred to in various Government assurances on the issue, and a similar residence test was abolished for otherwise-stateless people with other subsidiary forms of British citizenship when they were allowed to register as British citizens.[277]

Lord Avebury's proposed amendments on this issue were rejected in Committee by Lord Brett, who said that those who had failed the residence test would have established themselves elsewhere in the world and would thus have a route to another citizenship.[278]

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272 HL Deb 1 April 2009 c1092
273 Lord Brett, HL Deb 1 April 2009 c1093
274 British Dependent Territories Citizenship was a subsidiary form of British nationality with no right of abode in the UK, and is now called British Overseas Territories Citizenship
275 *British Nationality (Hong Kong) Act 1997*
276 *British Nationality (Hong Kong) Act 1997* s1
277 Section 4B of the *British Nationality Act 1981*, as inserted by the *Nationality, Immigration and Asylum Act 2002*
278 HL Deb 2 March 2009 c602

This assertion was rebutted by Lord Avebury, who gave examples of people who had failed because they were absent on short-term assignments, were studying abroad or were children whose parents had taken them out of the country.[279]

However, on Report, Lord Brett did "recognise that such persons are at a disadvantage" and proposed giving them a route to British citizenship.[280] This now appears as **clause 45** of the Bill.[281] Lord Avebury welcomed the amendment, but remained concerned that it did not go far enough.[282]

c. Hong Kong war wives and widows

Another nationality issue on which Lord Avebury pressed for an amendment was the good character requirement for Hong Kong war wives and widows who wish to register as British. This relates to the 53 women who received a letter from the Secretary of State confirming that, in recognition of their husband's or late husband's service in defence of Hong Kong during the Second World War, they could enter the UK for settlement at any time. In 1996 these women were given the right to register as British citizens.[283] In 2006 the good character requirement was imposed on those still wishing to register,[284] though the Government has discretion to waive this test. There have been no applications under this provision for the past eight years,[285] and there may now be only one of these women left alive.[286]

The Government reconsidered the issue between the Committee and Report stages in the House of Lords, but decided not to remove the good character requirement as it "would set a precedent for removing it from other sections where we think it is an important requirement for potential citizens to fulfil". Instead, the Government has decided that if a Hong Kong war wife or widow applied, discretion would be operated in her favour.[287] Lord Avebury felt that, as there was agreement about the principle, the requirement should be removed from the legislation as it was "an indignity to which she should not be submitted".[288]

6. Chagos Islanders

Between 1968 and 1973 the British Government cleared the entire Chagos Archipelago of its inhabitants as part of moves to build a US military base on the biggest island, Diego Garcia. A Library Standard Note provides brief background information on the

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279 HL Deb 2 March 2009 c604
280 HL Deb 1 April 2009 cc1085-6
281 HL Deb 1 April 2009 cc1085-8
282 HL Deb 1 April 2009 cc1086-8
283 *Hong Kong (War Wives and Widows) Act 1996*
284 *Immigration, Asylum and Nationality Act 2006*
285 Lord Brett, HL Deb 1 April 2009 c1095
286 HL Deb 1 April 2009 c1094
287 Lord Brett, HL Deb 1 April 2009 c1095
288 HL Deb 1 April 2009 c1096

forced removal of the Islanders and legal challenges in the British courts,[289] though it was written before the House of Lords decision in the Government's favour.[290]

Lord Avebury sought in Committee to give Chagos Islanders and their descendants the right to full British citizenship.[291] He withdrew his amendments following Lord Brett's offer of further discussions on this and his other nationality concerns before Report. However, in this instance the Government decided not to make an amendment to this effect, citing "ongoing discussions with the Foreign Office on the sensitive issues surrounding the Chagos Islands" and the view of the all-party Chagos Islands group that "the principle concern of the Chagossians must be the issue of their right to return to British Indian Ocean Territory at some point in the future.[292]

IV Common travel area[293]

The UK, Ireland, the Channel Islands and the Isle of Man are members of a Common Travel Area (CTA) within which all nationals of those countries can currently travel freely. (Although there is no passport control, nationals of other countries must have the relevant permission for each country).

The Crown Dependencies are the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man. The Bailiwick of Guernsey includes the separate jurisdictions of Alderney and Sark and is responsible for the administration of the islands of Herm, Jethou and Lihou. The island of Brecqhou is part of Sark. Jersey, Guernsey and the Isle of Man are not part of the UK but are self-governing dependencies of the Crown. This means they have their own directly elected legislative assemblies, administrative, fiscal and legal systems and their own courts of law. The Crown Dependencies are not represented in the UK Parliament and UK legislation does not extend to them. The Crown Dependencies have never been colonies of England or the UK. Nor are they Overseas Territories, like Gibraltar, which have a different relationship with the UK. [294]

A. Current law and policy

Section 1(3) of the *Immigration Act 1971* provides that

> (3) Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as "the common travel area".

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289 SN/IA/4463, *The Chagos Islanders,* 8 October 2007

290 *R (Bancoult) v Secretary of State For Foreign and Commonwealth Affairs*, [2008] UKHL 61, 22 October 2008

291 HL Deb 4 March 2009 cc734-7

292 Lord Brett, HL Deb 1 April 2009 cc1089-90

293 By Gabrielle Garton Grimwood

294 Department of Constitutional Affairs *Background briefing on The Crown Dependencies: Jersey, Guernsey and the Isle of Man* June 2006

B. The need for change?

The Government now believes that "the principle of movement without controls regardless of nationality in the [CTA] is out of date".[295] In July 2008 the UKBA published a consultation document on the Common Travel Area along with an impact assessment.[296] It proposed four significant changes for routes between the Republic of Ireland and the UK:

- introduction of full immigration controls for non-CTA nationals on all sea and air routes by 2014;
- new measures to verify the identities of UK, Irish and Crown dependency nationals on the same air and sea routes;
- monitoring of all air travel between the UK and the Republic of Ireland by April 2009 and sea travel by late 2010 using our e-Borders watch list checks; and
- introduction of Carriers' Liability (CL)[297] on the same routes.

It specifically did not suggest fixed immigration controls on the land border between Northern Ireland and the Republic of Ireland or on traffic from the Crown dependencies to the UK.[298]

The Government's proposals for new arrangements for travel to or from Ireland, the Isle of Man and the Channel Islands are laid out on the UKBA website.[299]

C. The Bill

As it was first introduced, the Bill[300] would have made provision for immigration control on air and sea routes within the Common Travel Area, but this aspect of the Bill has proved particularly contentious. The Government was defeated in the Lords by a wide margin and as a result this part of the Bill has undergone significant change.

D. Issues and concerns

The human rights and law reform group Justice cast doubt on the Bill's original proposals:

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295 Home Office UK Border Agency, *Making change stick: an introduction to the* Immigration and Citizenship Bill, July 2008 p6

296 UKBA *Strengthening the Common Travel Area: Consultation* Paper 24 July 2008. The consultation period closed on 16 October 2008

297 Under section 40 of the *Immigration and Asylum Act 1999*, a charge may be imposed on the owner, agent or operator of a ship or aircraft if they bring into the UK a person requiring leave to enter who does not possess a valid passport and (if necessary) the required visa. [UK Border Agency *Border Force Operations Manual: Carriers' Liability* updated 18 September 2008]

298 The Government was, however, considering increasing ad hoc immigration checks on vehicles in order to target third-country nationals on the Northern Ireland side of the land border. For routes from outside the CTA to the UK and the Republic of Ireland, the UK and Irish Governments were exploring the possibility of a common (short stay visit) visa or mutual recognition of two national visas issued to the same standards.

299 *Proposed arrangements for travel between the Republic of Ireland and the United Kingdom* [Viewed 7 May 2009]

300 HL Bill 15

> 9. (…) 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.[301]

The Equality and Human Rights Commission, meanwhile, has expressed concern at the potential discriminatory impact on some ethnic groups,[302] whilst ILPA has offered its own critique of the Bill and remarked on some of its possible consequences:

> One imagines, given that the Republic of Ireland is part of the European Union, that henceforth travel from the UK to the Republic of Ireland, or vice versa, will be like travelling to another EU country. As far as non-EU nationals are concerned, there is already within Europe the Schengen system, which the UK and Ireland are not part of, which has travelled in the opposite direction to clause 46, reducing controls between the Schengen states so that a visa for one allows a third country national to travel to the others.[303]

a. The abolition of the CTA?

From the Liberal Democrat benches at second reading, Lord Smith of Clifton expressed concern that the Bill would in effect abolish the CTA. Such changes would, he argued, be very sensitive and potentially damaging, particularly in Northern Ireland. He went on to argue that the case for the changes had not been made, especially as the land border would still not be policed.[304]

Responding, Lord West of Spithead asserted that the Government was not abolishing the CTA, although action was (he said) required because criminals and traffickers were using the Republic of Ireland as an access route into the UK.[305]

At Committee stage in the Lords, Lord Shutt of Greetland moved an amendment which would have exempted from immigration control arrivals in the UK by land from the Republic of Ireland.[306] He pointed out that the CTA had been maintained even at the height of the Troubles in the 1970s and 1980s and had been suspended only during the second world war; there was, therefore, no clear need for the changes made by the Bill, especially as intelligence-led operations might well prove to be discriminatory.[307] Lord West of Spithead reiterated that there was no intention to abolish the CTA, but it presented a loophole which the Bill had to close. Controls would, he said, not be based

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301 Justice *Borders Citizenship and Immigration Bill: Briefing for House of Lords Second Reading* February 2009

302 Equality and Human Rights Commission *Parliamentary Briefing: Borders, Citizenship and Immigration Bill* February 2009 [viewed 21 April 2009]

303 ILPA *Borders, Citizenship and Immigration Bill: House of Lords Committee: Part 3: Clause 46 Common Travel Area Citizenship* March 2009

304 HL Deb 11 February 2009 c1166

305 HL Deb 11 February 2009 c1210

306 HL Deb 4 March 2009 c752

307 HL Deb 4 March 2009 c754

on racial profiling.[308] Domestic journeys between Northern Ireland and Great Britain would not be part of the reforms.[309]

The second marshalled list of amendments to be moved on Report included one by Lord Smith of Clifton and Lord Avebury which would have made it one of the general principles of the *Immigration Act 1971* that arrivals in the UK by land from the Republic of Ireland would not be subject to immigration control and this could not be amended by Order in Council. ILPA described this amendment (which was not moved) as a precaution against "mission creep".[310]

At the Report stage in the Lords, Lord Glentoran tabled an amendment which would, in effect, delete the clause – which he described as a "massive hit operation" - from the Bill.[311] Northern Ireland, he pointed out, was as integral a part of the UK as Yorkshire or Lancashire; free travel worked well. He did not accept the Government's statement that the Bill did not abolish the CTA.[312] The amendment also received support from (amongst others) Lord Pannick – who suggested that the House should not approve excessive powers for Ministers, even if they had given assurances that the use of those powers would be limited[313] – Lord Hylton and Lord Cope of Berkeley. Lord Rowlands (also a member of the Constitution Committee) expressed concern on behalf of the Crown dependencies, particularly as to whether Ministers in the future might wish to alter the passport arrangements between the UK mainland and the Channel Islands, even though Ministers were saying that they had no wish to do so.[314]

Lord West of Spithead reiterated that the clause was necessary, to defeat serious organised crime, and gave examples of how the CTA was being exploited:

> We are aware that traffickers of all kinds are beginning to focus on the common travel area as a weakness in our system, and again this is something that SOCA is focusing on in particular because trafficking is a crime very high on its agenda. We know also that the common travel area is being exploited by illegal immigrants. Our evidence shows that around 8,000 immigration offenders travel unlawfully between the UK and the Republic of Ireland on the air and sea routes alone, but that figure represents probably just the tip of an ever-growing iceberg. We also have examples of people of international counter-terrorism interest entering the United Kingdom having initially landed elsewhere in the common travel area.[315]

He also sought to counter what he described as "confusion and wild speculation':

> The changes to legislation that Clause 48 would bring about will mean that travellers by air and sea to the UK from the Republic of Ireland must carry a passport or national ID card, not least because of the need to capture and analyse

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308 HL Deb 4 March 2009 cc757-58
309 HL Deb 4 March 2009 c759
310 ILPA *Borders, Immigration and Citizenship Bill: PARTS 3 & 4: House of Lords Report Stage: ILPA Notes on amendments forming part of the Second Marshalled List to be moved on Report* [undated]
311 HL Deb 1 April 2009 c1097
312 HL Deb 1 April 2009 cc1097-8
313 HL Deb 1 April 2009 c1104
314 HL Deb 1 April 2009 cc1107-8
315 HL Deb 1 April 2009 c1111

> passenger, service and crew data within our e-borders programme. These data are provided by the carriers. But there will be no fixed controls and, again, only intelligence-based operations around those data once we have them. As regards the land border, we do not intend to impose controls and there will be no requirement for a passport or identity card. There will be a growth in intelligence-based operations that will be clearly legitimised by the Bill.
>
> I state categorically that the Bill will have no impact on journeys from Northern Ireland to the mainland, which are of course domestic journeys within the United Kingdom.[316]

Lord Smith of Clifton at Report stage also voiced concern at the risk that the CTA might no longer be a passport-free zone and pointed to the costs of implementation, which the Government had estimated at up to £76 million over 10 years.[317] The requirement to prove one's identity would, he suggested, be a de facto requirement to produce an identity document.[318]

b. The land border between Northern Ireland and the Republic

At second reading, Lord Smith welcomed the Government's commitment not to reintroduce permanent checkpoints at the land border, but questioned how, in that case, the controls would work. He expressed concern at how mobile checks might be deployed, to avoid any disproportionate adverse impact on people from ethnic minorities, and concluded that it would be better to strengthen the CTA by making travel between the UK and Republic of Ireland easier.[319]

Lord Sheikh, however, welcomed the provisions on the CTA, although he too questioned how the control of the land border between the UK and Republic of Ireland could be managed:

> We may, however, consider having tighter border controls between Northern Ireland and the Republic of Ireland, as there are a number of tiny lanes with no visible borders.[320]

A similar view was later offered by the crossbencher Lord Kilclooney, who expressed concern about non-EU citizens entering the UK through the Republic of Ireland:

> I briefly place on record my view that the Bill does not adequately address the problem of non-European Union citizens arriving in the Republic of Ireland and then moving freely into the United Kingdom through the common travel area. Until Her Majesty's Government get the agreement of the Republic of Ireland to apply the same controls of entry into the Republic of Ireland that now apply at airports and ports in the United Kingdom, the gap will still exist.[321]

Lord Glentoran, the opposition spokesman for Northern Ireland, suggested that the Bill's provisions on the CTA were a "sledgehammer being used to crack the nut of the UK-

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316 HL Deb 1 April 2009 cc111-2
317 HL Deb 1 April 2009 c1099
318 HL Deb 1 April 2009 c1101
319 HL Deb 11 February 2009 cc1165 - 67
320 HL Deb 11 February 2009 cc1172-73
321 HL Deb 22 April 2009 c1541

Ireland border'[322] and that the Government had confused Great Britain with the UK.[323] He went on to argue at the Report stage that the Garda Siochana and the Police Service of Northern Ireland and the respective security agencies were doing a good job in managing the land border and there was no need for a border agency presence there.[324]

c. The extension of controls

During the Committee stage in the Lords, Lord West of Spithead indicated areas where there might be further change in the future, such as extending the police's power to require carriers to provide passenger data on specified domestic air and sea routes. That power could be extended to cover routes between Great Britain and Northern Ireland. [325]

d. The constitutional relationship with the Crown Dependencies

The Lords Select Committee on the Constitution considered part 3 of the Bill, with particular focus on the CTA and the implications for the Crown Dependencies.[326] It identified three main issues:

> (a) Whether there has been adequate consultation between the United Kingdom Government and the governments of the Crown dependencies before the bill was introduced.
>
> (b) Whether the wide scope of the proposed power to subject travel to and from the Crown dependencies to control under the Immigration Act 1971 is necessary in the light of the United Kingdom Government's statements about the proposed limited use of the new power.
>
> (c) Whether the proposed changes in the CTA would affect the constitutional relationship between the United Kingdom and the Crown dependencies.[327]

It summarised the existing constitutional arrangement thus:

> 10. Acts of Parliament may be extended to the Islands by Order in Council, with the consent of the Islands. In his letter to us, Lord West explained that "While the main provisions of United Kingdom immigration legislation up to and including the provisions of the 2006 Act have been extended to the Isle of Man, the legislation has not been extended to Guernsey and Jersey since the Immigration and Asylum Act 1999". Lord West told us that the immigration systems of the Crown dependencies "are in practice closely aligned and operationally integrated with that of the United Kingdom, but that need not always be so". The Chief Minister of the Isle of Man told us that, in relation to border security, "the Isle of Man has been invited, with the Channel Islands, to join the UK e-Borders programme, thus forming the extent of the UK virtual border; officers in the Island are currently working closely with colleagues from the Borders Agency on the legislative requirements to share data for e-Borders".

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[322] HL Deb 11 February 2009 c1184
[323] HL Deb 11 February 2009 cc1183-84
[324] HL Deb 1 April 2009 c1098
[325] HL Deb 4 March 2009 cc768-9
[326] House of Lords Select Committee on the Constitution *Part 3 of the Borders, Citizenship and Immigration Bill: Report,* HL Paper 54 2007-08
[327] *Ibid* para 5

> 11. In the late 1960s, the Crown dependencies decided not to be included in the United Kingdom's accession to the European Community. Protocol 3 to the 1972 Treaty of Accession put them within the Common Customs Area and the Common External Tariff, but other provisions of European Union law do not apply. The European Convention on Human Rights applies to the Crown dependencies and in recent years each of them has enacted legislation similar to that of the United Kingdom's Human Rights Act 1998.

The Committee concluded that there had been no open, effective and meaningful inter-governmental consultations with the insular authorities; the limited consultation suggested scant appreciation of the constitutional relationship.[328] It went on:

> 25. It is clear to us that the policy-making process that has led to clause 46 (now clause 48) has not been informed by any real appreciation of the constitutional status of the Crown dependencies or the rights of free movement of Islanders.[329]

Nor, in the Committee's view, was the breadth of the proposed amendment to the CTA commensurate with the relatively modest policy aim.[330]

Discussion during debate on the Bill in the House of Lords also touched on the extent to which the Bill's proposals would affect the Crown Dependencies, and whether they had been adequate consultation with them. Lord Goodlad, the chair of the Lords Select Committee on the Constitution, suggested at Report stage that there had not been adequate consultation with the Crown dependencies; such consultation as there had been was "muddled and tardy, showing little appreciation of the constitutional relationship between the United Kingdom and the Crown dependencies".[331] He went on to quote the Chief Minister of the States of Jersey as stating that

> [The] government of Jersey cannot accede to a position in which British citizens resident in one part of the British islands could be treated as if they were nationals of a foreign state such as the Republic of Ireland. If the text of the proposed Bill is adopted, it sets out such a distinction in substantive legislation to which we are strongly opposed.
>
> You maintain the UK government has no intention of changing the constitutional relationship with the Crown Dependencies but clause 48 does precisely that. The unwritten constitutional relationship is founded upon Charters which have been renewed on many occasions by successive sovereigns until 1688 when they (and many other charter rights of English citizens) were definitively affirmed. I cannot imagine that the UK government would ever contemplate peremptorily withdrawing the constitutional rights of citizens of the United Kingdom.[332]

Rejecting Lord Glentoran's amendment deleting the clause, Lord West elaborated on why the Government considered that it did not change the constitutional relationship:

> Prior to the Immigration Act 1971, a third country national coming to the UK from another part of the CTA did not require leave to enter. However, it was possible to

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328 *Ibid* para 16
329 *Ibid* para 25
330 *Ibid* para 20
331 HL Deb 1 April 2009 c1101
332 HL Deb 1 April 2009 c1102

> alter or abolish this right simply by making a statutory instrument subject to the negative resolution procedure. The 1971 Act provided that, in general, control was not exercisable over the movement within the common travel area, but that Act retained the power to contract or abolish the common travel area by subordinate legislation if that ever became necessary. Under Section 9(5) an island can be excluded from the common travel area if it appears necessary to do so by reason of any difference in the immigration laws of the island and the UK. Therefore, to suggest that the power in Clause 48 to control immigration between the UK and the islands is totally new and a change in the constitutional relationship is incorrect. I asked my officials to look at whether constitutional concerns were raised about Section 9(5) when it was debated. None was, when the question of whether to put it in place was debated under the last Conservative Government. They have not yet found any reference to any such concerns anywhere. We do not believe that the 1971 Act changed the constitutional relationship, and therefore nor does this amendment.[333]

Guernsey and the Isle of Man, he said, supported the clause, though Jersey did not.[334]

e. The defeat of the Government's proposals

In concluding the debate on his amendment, Lord Glentoran remarked that he did not want to "pass the buck" to the Commons.[335] The Minister had not addressed his doubts and had not (in Lord Glentoran's view) focused on the right target, so he wished to take the view of the House.[336] On division, the amendment was agreed, with 193 Contents and 107 Not-Contents.[337]

A further amendment by Lord Smith of Clifton was also agreed on division and now forms **clause 51** – *entry otherwise than by sea or air: immigration control* – of the Bill. The Explanatory Notes summarise its effects thus:

> Clause 51 amends section 10 of the IA 1971 (entry otherwise than by sea or air) by inserting subsection (1AB), which prevents an Order in Council under subsection (1) of that section from including provision relating to immigration control in relation to persons entering, or seeking to enter, the UK other than by sea or air.

Lord West of Spithead indicated that the Government intended to return to this clause:

> I could not agree more with the noble Lord, Lord Kilclooney, about the risk posed by the CTA loophole. I am sure that we will come back to that after the Bill is considered again in the other place. We have only to look at the risk that we face.[338]

Lord Avebury has suggested that it would be a "major battle-ground" in the Commons.[339]

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333 HL Deb 1 April 2009 c1114
334 HL Deb 1 April 2009 c1114
335 HL Deb 1 April 2009 c1116
336 HL Deb 1 April 2009 c1116
337 An analysis of the division is available on the website of the Constitution Unit at University College London [viewed 7 May 2009]
338 HL Deb 22 April 2009 c1543
339 Lord Avebury, "Circumspect at the Arrival Gate", *The House Magazine*, 13 April 2009, p17

V Judicial review[340]

A. Overview

The Government has for some years been trying to speed up immigration and asylum appeals and to reduce the large volume of immigration and asylum appeals and judicial review cases (which challenge the lawfulness of administrative action or inaction).[341] Its latest plan is to move the Asylum and Immigration Tribunal into the new two-tier unified Tribunal Service and to transfer immigration and nationality judicial review cases from the High Court to the new Upper Tribunal. It issued a consultation paper to this effect in the summer of 2008, included a clause on the judicial review proposal in Part 4 of the Bill, and published its response to the consultation in May 2009.

There was considerable support for the idea that the Upper Tribunal could deal with some immigration judicial review cases. However, serious concerns about the clause, including suggestions that it amounted another 'ouster clause' similar to that roundly condemned in the 2003-04 immigration Bill,[342] led the House of Lords to vote to remove it and replace it with a much more limited clause on transferring only one particular type of judicial review, referred to as 'fresh claim applications'.

B. Background

1. Increasing pressure on the courts

In April 2000 Sir Jeffery Bowman's report on judicial review identified immigration and asylum cases as the "single greatest source of applications for permission to seek judicial review".[343] They had increased from 29% of applications in 1994 to 56% in 1999.[344] This, along with increasing numbers of immigration and asylum cases going to the Court of Appeal, led the Government to attempt drastic measures. In the Bill that became the *Asylum and Immigrants (Treatment of Claimants, etc) Act 2004*, it sought not only to replace the two-tier system of immigration appeal adjudicators and Tribunal with a single-tier Asylum and Immigration Tribunal (AIT), but also to abolish the jurisdiction of higher courts in nearly all immigration and asylum cases and severely limit the circumstances in which judicial or statutory review relating to such cases was possible.[345] Such was the outcry amongst lawyers and judges and others against this 'ouster clause' that the Government was forced instead to create a second stage, where the AIT or the appropriate higher court can be asked for an order that the AIT reconsider its original decision. The end result was what the leading immigration lawyer Ian MacDonald QC described as:

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340 by Arabella Thorp

341 See the brief history at pp19-22 of Library Standard Note SN/HA/4872, *Draft (partial) Immigration and Citizenship Bill: an analysis*, 20 October 2008

342 The *Asylum and Immigration (Treatment of Claimants, etc.) Bill* 2003-04

343 Sir Jeffery Bowman, *Review of the Crown Office list: a report to the Lord Chancellor*, March 2000, DEP 00/681, p29

344 *Ibid*

345 See Library Research Paper 03/88, *Asylum and Immigration: the 2003 Bill*

> a somewhat complicated and cumbersome system of one-tier appeals by one- to three-judge panels, review and onward appeal which will require very careful calibration to achieve the desired combination of efficiency and fairness.[346]

The changes did not reduce the pressure of immigration cases on the courts; indeed they "significantly increased the workload of the Administrative Court",[347] and the Government now recognises the problems caused by the complex reconsideration process.[348] In 2005 3,396 reconsideration applications came to the Administrative Court from the AIT, and by 2007 this number had gone up to 3,749, 90% of which had no merit in law. Furthermore, 4,357 out of the total of 6,694 judicial review claims in 2007 – about two thirds – concerned asylum or immigration. The total of immigration and asylum cases in the Administrative Court in 2007 was therefore 8,106, which is nearly three quarters of the total number of cases lodged.[349] Many of these cases are heard not by High Court judges but by deputy High Court judges, reflecting their "lack of complexity".[350] Lord Phillips of Worth Matravers (then Lord Chief Justice and now the senior law lord) drew attention to these problems and the resulting "unacceptable delays" in his March 2008 review of the administration of justice in the courts.[351]

The 2004 Act has also significantly increased the number of asylum and immigration cases reaching the Court of Appeal. Lord Phillips identified the increase in AIT matters as the principal reason for overall growth in the workload of the Court of Appeal:

> The legislation has also had a profound impact on the resources of the Court of Appeal both in terms of staff and judicial time. It continues to place an enormous burden on the resources of the Court, representing 28.8% of all appeals and 22.8% of all permission to appeal applications in the last year. There has been a 47% increase in the asylum and immigration workload of the Court since the creation of the AIT.[352]

2. New Tribunal Service

The future of the AIT now lies in the new unified Tribunals Service created by the *Tribunals, Courts and Enforcement Act 2007*. This new service is bringing together most of the existing tribunals in England and Wales as well as those with cross-UK jurisdiction.

The new service has two tiers: (1) the First-tier Tribunal and (2) the Upper Tribunal which deals with appeals from, and enforcement of, decisions of the First–tier Tribunal. Both the First-tier Tribunal and the Upper Tribunal have several specialised chambers, the first of which began work on 3 November 2008.

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346 *MacDonald's Immigration Law and Practice*, 7th edition, 2008, p1341

347 *The Lord Chief Justice's Review of the Administration of Justice in the Courts*, HC 448, March 2008, para 5.75. The Administrative Court is the part of the High Court that hears judicial review cases.

348 Lord West of Spithead, HL Deb 4 March 2009 c801

349 All figures come from *The Lord Chief Justice's Review of the Administration of Justice in the Courts*, HC 448, March 2008, paras 5.70-5.71

350 Lord Pannick, HL Deb 4 March 2009 c798

351 *The Lord Chief Justice's Review of the Administration of Justice in the Courts*, HC 448, March 2008

352 *The Lord Chief Justice's Review of the Administration of Justice in the Courts*, HC 448, March 2008, para 5.101

The Upper Tribunal is a superior court of record, meaning that its decisions are binding on the tribunals below it and that it has the power to enforce its own procedures and those of the First-tier Tribunal. The Government also hopes that decisions of the Upper Tribunal would therefore not be subject to judicial review (other than in exceptional cases),[353] but has left this matter to the courts to decide.[354]

The Senior President of Tribunals is a Court of Appeal judge, and each chamber of the Upper Tribunal is presided over by a High Court judge. High Court judges and other court judges may sit in the Upper Tribunal, and former legal chairs of the appellate tribunals that have been incorporated into the new structure (such as the Social Security and Child Support Commissioners) are judge members of the Upper Tribunal. There would normally be only one judge sitting on a case, but expert members may sit with the judge members.

The 2007 Act allowed most judicial review cases to be transferred from the Administrative Court to the Upper Tribunal, which may grant the same kinds of remedy as the Administrative Court in such cases.[355] The Bill which became the 2007 Act was amended to require judicial review cases in the Upper Tribunal to be presided over by a High Court judge (or equivalent) unless the Lord Chief Justice (or his counterpart in Scotland or Northern Ireland) agrees otherwise with the Senior President of Tribunals.[356]

An appeal lies from the Upper Tribunal to the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, if either the Tribunal or the relevant appellate court to grant permission. The test for granting permission is not the normal 'real prospect of success' but a higher one requiring that:

> (a) the proposed appeal would raise some important point of principle or practice; or
>
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal.[357]

It was always envisaged that that AIT would be transferred into the new system.[358] This could be done without further primary legislation, though some secondary legislation will be needed.

Transfer of immigration, asylum and nationality judicial review cases to the new Tribunal was however excluded by the 2007 Act,[359] following concerns expressed in Parliament.[360] This was on the grounds that those cases are "at the most sensitive end

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353 UKBA, *Immigration appeals: fair decisions; faster justice*, 21 August 2008, p6

354 UKBA and Tribunals Service, *Immigration appeals: response to consultation*, 8 May 2009, p7

355 ss19 and 20

356 *Tribunals, Courts and Enforcement Act 2007* s18(8)

357 *Tribunals, Courts and Enforcement Act 2007* s13(6) and the *Appeals from the Upper Tribunal to the Court of Appeal Order 2008* SI 2008/2834

358 Baroness Ashton of Upholland, HL Deb 13 December 2006 c71GC

359 *Tribunals, Courts and Enforcement Act 2007* ss19(1) and 20(5), which specify the applications cannot be transferred if they call into question any decision made under (a) the Immigration Acts, (b) the British Nationality Act 1981, (c) any instrument having effect under those Acts (which includes the *Immigration Rules*), or (d) any other provision of law which determines British citizenship.

360 See for example HL Deb 13 December 2006 c68-69GC

of judicial review"[361] as they often give rise to disputes over internationally-binding principles concerning the right to liberty and freedom from torture or inhuman or degrading treatment or punishment. The Government accepted that the 2007 Act's statutory bar on these types of cases should not be lifted until there had been an opportunity to review how the Upper Tribunal was working.

3. Immigration appeals consultation

Even before the first chambers of the new Tribunals service began work, the UKBA published proposals to transfer the AIT to the new two-tier tribunal system and lift the statutory bar on transferring immigration, asylum and nationality judicial reviews to the Upper Tribunal. The proposals, in a consultation paper called *Immigration appeals, fair decisions; fairer justice*,[362] were in part intended to respond to continued requests from the judiciary to address the issue of immigration and asylum cases in the higher courts. The consultation paper followed the recommendations of a working group whose members were representatives of judicial offices, Ministry of Justice and UKBA staff and which was jointly chaired by the UKBA Chief Executive (Lin Homer) and a Court of Appeal judge (Lord Justice Richards).[363]

It was not clear why the UKBA took the lead on this issue rather than the Ministry of Justice, when the Ministry of Justice is responsible for both the Asylum and Immigration Tribunal and for the new Tribunals Service, whereas the Home Office (the UKBA's parent department) is a party to all such appeals. There was no representative of applicants on the working group.

The consultation paper proposed that the AIT be transferred to the unified Tribunals system and split once again into two tiers: an asylum and immigration chamber within the First-tier Tribunal and a specialised asylum and immigration chamber of the Upper Tribunal.[364] However, the AIT would not be fully incorporated into the new system: the Government wanted to make various immigration and asylum exemptions from the normal unified Tribunal rules and procedures. It proposed that the First-tier Tribunal's power to review its own decisions[365] be excluded through procedure rules (made by the Government rather than by the Tribunal Procedure Committee) in respect of immigration cases.[366] The only way to challenge a First-tier Tribunal decision would thus be an appeal to the Upper Tribunal. The Government wished to limit this further to cases where the Upper Tribunal granted permission to appeal, rather than allowing the First-tier Tribunal also to grant permission.[367] The Upper Tribunal could deal with the appeal on the papers or remit it to the First-tier Tribunal for a rehearing, but the Government wanted the outcome of most appeals to be a substantive decision by the Upper Tribunal

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361 Lord Lloyd of Berwick, HL Deb 13 December 2006 c68GC
362 21 August 2008
363 UKBA, *Equality Impact Assessment Report*, 14 January 2009
364 *Ibid* p5
365 *Tribunals, Courts and Enforcement Act 2007* s9
366 UKBA, *Immigration appeals: fair decisions; faster justice*, 21 August 2008, p7
367 *Ibid* p7

without remittal. Under the 2007 Act, further appeals to the Court of Appeal could (and indeed have been) be limited by order of the Lord Chancellor.[368]

The Government considered that it made sense also to remove the existing statutory bar to transferring immigration, asylum and nationality judicial reviews to the Upper Tribunal. It did not envisage these cases being transferred until the Upper Tribunal was well established, in order to ensure that the new body had sufficient capacity. The Government also considered that it would be necessary "to consider the best use of judicial time, the desirability of allocating cases to the appropriate level of judiciary, and the impact on judicial resources within the higher courts and the Upper Tribunal".[369]

The other way in which the Government sought to reduce the workload of the Administrative Court was through legislation to specify that decisions of the Upper Tribunal could not be challenged by way of judicial review.[370]

Taken together, these proposals would result in limiting the number of possible stages in immigration, asylum and nationality appeals more than for other Tribunal cases, and severely limiting the involvement of the higher courts in both appeals and judicial review challenges, which would be heard within the Tribunals system by judges who were likely to have come from the AIT rather than the High Court.

The UKBA has published in full the responses to the consultation.[371] The following paragraphs give a flavour of the responses.

Senior judges in England and Wales very much supported the transfer of immigration, asylum and nationality judicial reviews to the Upper Tribunal, in principle, as did some other respondents. Some judges also welcomed restricting onward appeals to the Court of Appeal.

However, other groups (including judges of the Court of Session in Scotland and Designated Immigration Judges of the AIT) were less supportive of the proposals. Many NGOs and lawyers, whilst welcoming the two-tier structure in principle, considered the proposals were an unwelcome attempt to oust the jurisdiction of the higher courts. They felt it was essential to have judicial review carried out by a High Court judge (whether in the Upper Tribunal or in the Administrative Court) and to keep the jurisdiction of the Court of Appeal. They suggested that the main causes of delay and continued appeals were in fact the underlying problems in the immigration and asylum consideration and appeals systems rather than applicants' refusal to accept the decisions of the AIT. Respondents also strongly criticised the fact that the proposals had been designed by a group consisting of judges and officials, with no-one representing the interests of the appellants. They challenged the evidence (or lack of evidence) about the need for and effectiveness of the proposals, particularly the unsourced and perhaps misleading statement that "of all asylum applicants less than 2% will benefit by being granted a

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368 A general order has indeed been made imposing a higher test than normal on permission to appeal from the Upper Tribunal to the Court of Appeal in England and Wales and the Court of Appeal in Northern Ireland: the *Appeals from the Upper Tribunal to the Court of Appeal Order 2008* SI 2008/2834

369 *Ibid* p10

370 *Ibid* p6

371 UKBA, *Immigration appeals: fair decisions; faster justice – consultation responses from organisations* and *Immigration appeals: fair decisions; faster justice – consultation responses from individuals*, undated

reconsideration order by a higher court",[372] and the fact that the paper failed to mention any inefficiencies or inadequacies on the part of the Home Office.

Other comments included the lack of consideration for Scotland, the lack of coherence of the new system if there were separate provisions for immigration, the suggestions that the two-tier system would simply replicate the problems of the old pre-AIT system and that an inquisitorial system would be better than an adversarial one, and the desire for a period of stability rather than further change.

Views were divided on whether the proposals would or would not increase the quality of immigration judges' decisions; whether immigration, asylum and nationality cases should be heard in the Upper Tribunal's Administrative Chamber or in a new separate Chamber; and whether the Upper Tribunal should remit cases to the First-tier Tribunal for substantive decisions or not.

One matter on which there was no disagreement between respondents was that procedure rules should be made by the Tribunal Procedure Committee rather than by the Government. Several judicial and NGO respondents also thought that there should be some process for the Upper Tribunal to review decisions to refuse permission to appeal. Several respondents considered it at best unclear whether simply designating the Upper Tribunal a superior court of record would prevent judicial review of its actions.

The Government published its response to the immigration appeals consultation on 8 May 2009, over six months after the consultation closed and several weeks after the current Bill had finished its House of Lords stages.[373] It plans to move the AIT into the new structure in early 2010, following consultation on the necessary secondary legislation.[374] It has decided to create a separate chamber of the Upper Tribunal for immigration, asylum and nationality cases,[375] to lift the statutory bar on transferring immigration, asylum and nationality judicial review cases to the Upper Tribunal,[376] and to apply the restriction on onward appeals to the Court of Appeal.[377] However, it has dropped some of the proposals, so will no longer be seeking to legislate to prevent judicial review of the Upper Tribunal,[378] to prevent the First-tier Tribunal from giving permission to appeal to the Upper Tribunal[379] or to have the procedure rules made by the Government.[380] It has also recognised that the Senior President of the Tribunals has the primary role in guidance on when appeals should be remitted to the First-tier Tribunal rather than having a substantive hearing in the Upper Tribunal.[381] The paper does not give any indication of when the Government plans to start the transfer of immigration, asylum and nationality judicial review cases to the Upper Tribunal.

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372 UKBA, *Immigration appeals: fair decisions; faster justice*, 21 August 2008, p3
373 UKBA and Tribunals Service, *Immigration appeals: response to consultation*, 8 May 2009
374 *Ibid* p14
375 *Ibid* p7
376 *Ibid* p11
377 *Ibid* p13
378 *Ibid* p7
379 *Ibid* p9
380 *Ibid* p10
381 *Ibid* p9

C. The Bill

1. The Government's original clause

The Bill as originally introduced in the House of Lords would have lifted the statutory bar in the 2007 Act to allow the transfer of any immigration, asylum and nationality judicial review cases to the new Upper Tribunal.[382] Transfer would have been mandatory in any class of case designated by a direction issued by the Lord Chief Justice, and otherwise it would have been at the discretion of the judge hearing a particular case to determine whether the application should be transferred.

The Government's intention was to bring the judicial review clause into force when the Asylum and Immigration Tribunal was moved into the new tribunals system.[383]

2. The Lords amendment

There was widespread agreement in the House of Lords that many immigration, asylum and nationality judicial review cases could indeed be transferred satisfactorily to the Upper Tribunal, as an effective means of reducing the pressure on the administrative court.

However, concerns (discussed below) about the timing of the proposals, about which cases would be transferred and about possible restrictions on onward appeals to the Court of Appeal led to a Government defeat.[384] The Government's clause was thereby removed from the Bill and substituted by an opposition amendment which now appears as **clause 55**. It would limit the transfer of immigration, asylum and nationality judicial review cases to one category that was held to be appropriate, and provides that the power in the 2007 Act to limit appeals from the Upper Tribunal to the Court of Appeal would not apply to asylum and immigration cases. Unlike the original Government clause, clause 55 specifies that it would not come into force until the AIT had been transferred to the unified tribunals system.

D. Issues and concerns

a. Ousting the jurisdiction of the higher courts

The strongest objection to the Government's proposals was the concern that they "would seek to achieve by the back door the very objective of cutting down access to the higher courts which [in 2004] met with fierce and principled opposition from a particularly wide variety of sources".[385] The Home Affairs Committee recognised the "very real problem of overburdening in the courts" and did not object in principle to cases "which are not highly significant or complex being considered in the Upper Tribunal", but it concluded that "failings on the part of the Home Office must not be compensated for by a lessening of

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[382] HL Bill 15 of 2008-09, clause 50
[383] HL Deb 11 February 2009 c1133
[384] HL Deb 1 April 2009 cc1121-37
[385] Administrative Law Bar Association, Response to *Fair decisions, faster justice*, 2008

appeal rights in those complex cases which do engage human rights issues or constitutional principles".[386]

The Immigration Law Practitioners' Association said that "it plainly cannot be argued that the proposal will effect some fundamental change in the nature of the tribunal hearing these appeals which will justify shutting off the constitutional right of access to the High Court and severely restricting access to the Court of Appeal".[387] In a similar vein, the Administrative Law Bar Association argued that "the proposed limitation of access to the higher courts does not begin to be outweighed by the prospect of a limited increase in High Court judge participation in the work of the new tribunal". The Home Affairs Committee called for significant and complex cases to be heard by a High Court judge, either in the Upper Tribunal or in the High Court,[388] but Migration Watch pointed out that if High Court judges were going to hear judicial review cases in the Upper Tribunal rather than the Administrative Court, the lack of capacity would remain.[389]

The March 2000 report of the Bowman Review had set out some reasons why immigration and asylum judicial review cases should be dealt with by High Court judges who specialised in public and administrative law:

> […] immigration and asylum cases often involve important points of principle and fundamental human rights and are of vital importance to those involved. For that reason, the courts are required to give asylum cases '*anxious scrutiny'* in the exercise of their judicial review function. The High Court is also the appropriate place for challenges that involve decisions of a Minister rather than of a local public body.[390]

Whilst most of those who took part in the debate agreed that some or even most immigration and asylum judicial review cases could be transferred to the Upper Tribunal, there was a general view that the jurisdiction of the High Court should not be ousted altogether. Lord Lloyd of Berwick, a cross-bencher and retired law lord, suggested in Committee that what was needed was a way of "sifting out those cases that must be dealt with by High Court judges in the administrative court" from "those cases that could be transferred by the administrative court to the Upper Tribunal".[391] This became the main focus of opposition to the Government's proposals.

Baroness Butler-Sloss saw the important issue as "not which court, but which judge, should deal with the case", and said that they should be carefully selected and trained.[392] It is likely that the Senior Immigration Judges of the AIT would be allocated to such cases.[393] They would bring with them their knowledge of immigration and asylum law

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386 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 77

387 Immigration Law Practitioners' Association, Response to *Fair decisions, faster justice*, 2008, para 16

388 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 78

389 Migration Watch, Response to *Fair decisions, faster justice*, 2008

390 Sir Jeffery Bowman, *Review of the Crown Office list: a report to the Lord Chancellor*, March 2000, Dep 00/681, p32

391 HL Deb 4 March 2009 c796

392 HL Deb 11 February 2009 c1174

393 Section 5(d) of the *Tribunals, Courts and Enforcement Act 2007* allows the President, Deputy President and Senior Immigration Judges of the AIT to be judges of the Upper Tribunal.

and practice, but some commentators have argued that they might not have the expert knowledge of constitutional and administrative law, civil liberties and judicial review law and practice that is necessary for judges in judicial review cases.[394] It is not yet clear how many High Court judges would sit in the Upper Tribunal or how it would be decided whether any particular case should be heard by a High Court judge.

The JCHR accepted that many immigration and asylum judicial reviews do not raise issues of any great difficulty or complexity and could therefore be transferred to the Upper Tribunal. However, the Committee was uneasy about the cases that raise the most important issues and human rights concerns:

> We remain concerned, however, that immigration and asylum cases which raise complex issues of fact and law, or in which human rights such as life, liberty or freedom from torture are at stake, should continue to be decided by judges of the standing of a High Court Judge. The Bill's transfer of immigration and nationality cases to the Upper Tribunal does not guarantee this: a High Court judge *may* sit on the Upper Tribunal, but this is not guaranteed.[395]

It recommended that a sifting mechanism or similar should be introduced to ensure that such cases either remain in the High Court or are heard by a High Court judge in the Upper Tribunal.[396]

Lord Lloyd sought to provide such a filter. He said that the senior judiciary agreed that one particular class of immigration and asylum judicial review applications could currently be transferred as a class to the Upper Tribunal without injustice. This class was 'fresh claim applications', where the applicant puts forward further grounds to challenge a decision of the Secretary of State and the question then arises of whether or not those fresh grounds constitute a fresh claim. Lord Lloyd said that about 1,000 of the 3,000 applications for judicial review in 2008 were fresh claim applications, and of those only 12 were found to merit a substantive hearing.[397] Because his amendment did not seek to remove the Government's clause, the remaining 2,000 applications could be transferred at the discretion of judges on a case-by-case basis. It also left scope for further classes of claims to be transferred if appropriate, with the Lord Chief Justice's consent and the approval of both Houses of Parliament.[398]

However, Lord Lloyd's 'middle way' amendment was rejected (by 84 votes to 19) in favour of a more radical one in the names of Lord Kingsland and Lord Thomas of Gresford. They were "extremely unhappy" to permit any transfers of immigration or asylum judicial review cases until they had seen the effect of the transfer of the AIT to the unified tribunals service – which they hoped would substantially reduce the number of such judicial review cases. They were also unhappy about the transfer powers being introduced by delegated, rather than primary, legislation, because the opposition regard themselves as "bound by constitutional convention to vote against affirmative orders only

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394 See for example Joint Council for the Welfare of Immigrants, *Memorandum of evidence to the Home Affairs Committee on the Borders, Citizenship and Immigration Bill* [March 2009], p8

395 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC 375 2008-09, para. 1.28

396 *Ibid* para 1.29

397 HL Deb 1 April 2009 c1123

398 HL Deb 1 April 2009 c1124

in the most rare and exceptional circumstances".[399] They were therefore unable to support Lord Lloyd's amendment, though they agreed with his conclusions about fresh claim applications being transferable. Their amendment instead sought to remove the Government's clause altogether and replace it with one requiring fresh claim applications to be transferred to the Upper Tribunal, but allowing no other cases to be transferred.

Lord West set out various reasons why Lord Kingsland and Lord Thomas's amendment should be rejected, including that it would remove the proposed flexibility for judges to manage cases as they see fit, either by setting a class of case to be transferred or by transferring on a case-by-case basis (other than in relation to fresh claims). Nevertheless, the House of Lords voted for the amendment, defeating the Government by 137 votes to 80. It now appears as **clause 55**. On Third Reading in the House of Lords, Lord West indicated that "the retention of Clause 55 will be considered again in the other place".[400]

On a related issue, the Government had hoped that the Upper Tribunal would be immune to judicial review of its own decisions. However, this view is debatable. The Administrative Law Bar Association was amongst those respondents to the consultation paper that did not think there was any absolute rule preventing judicial review of superior courts of record, and it pointed out that, in any event, any such rule would have to be considered in the context of the *Human Rights Act 1988* and EC law.[401] The Government has now decided to leave this question to the courts.[402]

b. Limiting appeals to the Court of Appeal

The Government intended that the Court of Appeal would continue to hear appeals on points of law, even when immigration, asylum and nationality cases were transferred to the new tribunals system. However, Lord Lester of Herne Hill was concerned that the Lord Chancellor's power in section 13(6) of the 2007 Act to limit appeals from the Upper Tribunal to the Court of Appeal would apply to immigration and nationality judicial review cases.

Generally speaking, the current test for granting permission to appeal to the Court of Appeal is that the appeal must have a 'real prospect of success'. The 2007 Act, however, allows the Lord Chancellor raise the bar for appeals from the Upper Tribunal to the Court of Appeal, limiting them to (1) those raising "some important point of principle or practice" and (2) those with "some other compelling reason" for the Court of Appeal to hear them. He has made a general order doing exactly this, for England, Wales and Northern Ireland.[403] This provision was intended to limit 'second appeals' (that is, appeals against decisions which are themselves made on appeal from the original decision) rather than judicial review applications.

The restriction, if applied to immigration and asylum cases, could prevent litigants from appealing to the Court of Appeal against decisions of the Upper Tribunal even if they had

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399 HL Deb 1 April 2009 cc1125-7
400 HL Deb 22 April 2009 c1538
401 Administrative Law Bar Association, Response to *Fair decisions, faster justice*, 2008, para. 12
402 UKBA and Tribunals Service, *Immigration appeals: response to consultation*, 8 May 2009, p7
403 The *Appeals from the Upper Tribunal to the Court of Appeal Order 2008*, SI 2008/2834

an arguable point of law that an immigration or asylum decision involves a breach of the UK's international obligations, and the point had a real prospect of success. This issue had been raised in a legal opinion provided by Sir Richard Buxton (until recently a Lord Justice of Appeal in the Court of Appeal) to the Joint Council for the Welfare of Immigrants, and picked up by the JCHR (of which Lord Lester is a member).[404] The JCHR therefore recommended "a simple amendment to the Bill to ensure that the Lord Chancellor's power to impose the restrictive 'second appeal' test on appeals to the Court of Appeal is not available in immigration and nationality cases".[405] Lord Kingsland and Lord Thomas's successful amendment (now **clause 55(4)**) thus seeks to retain the existing test for appeals from the Upper Tribunal to the Court of Appeal in asylum and immigration cases.

The Government opposes this position, as it is seeking to relieve the burden of cases on the Court of Appeal:

> I therefore believe that we should retain the Lord Chancellor's power to restrict the test for appealing to the Court of Appeal in immigration cases. I accept that there may be some cases which raise the real prospect that the decision of the Upper Tribunal is in breach of the UK's human rights obligations, but these are precisely the sort of cases that would meet the test […][406]

It also considers that the restriction on appeals to the Court of Appeal would apply only to 'second appeals' in immigration, asylum and nationality cases (i.e. where an appeal has been decided by the first-tier tribunal, appealed to the Upper Tribunal and then a second appeal is being sought to the Court of Appeal), and not to appeals against judicial review decisions in the Upper Tribunal.[407]

c. Timing

Many Lords were concerned that the Government's proposals to lift the statutory bar were premature. They came only 18 months after Parliament had decided to exclude immigration, asylum and nationality judicial review cases from the Upper Tribunal and barely three months after the Upper Tribunal had started work, prompting Lord Kingsland, the Conservative Spokesman for Legal Affairs, to describe the clause as "a straightforward breach of faith with your Lordships' House".[408] Furthermore, the Bill was originally published before either the Government's response to the immigration appeals consultation exercise or the reports of reviews of Scottish civil and administrative justice were published.

Lord Thomas of Gresford, the Liberal Democrat Spokesperson for Justice, considered that this timing presented a threefold risk:

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404 Joint Committee on Human Rights, *Legislative Scrutiny: Borders, Citizenship and Immigration Bill*, 25 March 2009, HL 62/HC 375 2008-09, paras 1.30-1.32
405 *Ibid* para. 1.32
406 Lord West of Spithead, HL Deb 1 April 2009 c1130
407 Lord West of Spithead, HL Deb 1 April 2009 c1130
408 HL Deb 1 April 2009 c1125

- "an immediate risk of injustice to the individual litigant";
- "a risk that inadequate handling of these judicial reviews by an untested tribunal would result in an increase in the workload of the supervising court – the Court of Appeal"; and
- "the risk of reduced supervision of the Home Office resulting in it taking greater liberties, leading to more instances of injustice and increased litigation".[409]

At the very least, there was a concern that "it simply does not make sense to transfer judicial review of asylum and immigration cases to the new Upper Tribunal before the AIT itself has been transferred".[410] The Government confirmed that there was no intention to transfer such judicial reviews to the Upper Tribunal unless and until the AIT is transferred,[411] which is now planned for early 2010.[412] However, the House of Lords had to debate the proposals on judicial review before the details of that transfer were known.

Lord Lloyd and Lord Thomas of Gresford's amendment, which replaced the Government's clause following a division and now appears as clause 55 of the Bill (see above), therefore provides that the order transferring the limited class of judicial review case in question cannot be made until the AIT has been transferred to the unified tribunal system (**clause 55(3)**).

d. Underlying causes of the problems

Many commentators have suggested that the problems of delay and volume of cases would not be solved by the Government's proposals as they were caused by factors including:

- the poor quality of initial decisions;
- the faults of the current appeals structure;
- the fact that withdrawing appeal rights had led to greater numbers of judicial review applications;
- the emphasis on speed rather than quality throughout (see below);
- the Home Office's failure to comply with case-management directions; and
- the lack of adequate provision for legal representation.

The human rights group Justice cited the case of *Abdi*,[413] and the fact that the Home Secretary lost four out of five of the immigration cases that reached the House of Lords in 2008, as being indicative of serious and continuing flaws in immigration and asylum operations and policy.[414] The Home Affairs Committee argued that the "very real problem of overburdening in the higher courts" was "due in no small part to historically

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409 HL Deb 4 March 2009 c792
410 Lord Lloyd of Berwick, HL Deb 1 April 2009 c1122
411 Lord West of Spithead, HL Deb 1 April 2009 c1131
412 UKBA and Tribunals Service, *Immigration appeals: response to consultation*, 8 May 2009, p14
413 *Abdi and others v Secretary of State for the Home Department*, [2008] EWHC 3166 (Admin), which found that the Home Office had, in effect, operated for two years and undisclosed and unlawful policy of automatic detention of foreign prisoners pending deportation.
414 Justice, *Borders Citizenship and Immigration Bill: Briefing for House of Lords Second Reading*, February 2009, para 17

poor initial decision-making by the Home office, and the significant backlog of decisions in asylum cases".[415]

The Bowman Review in 2000 had found that the particularly high rate of settlement in immigration and asylum cases after permission to proceed was granted led to a significant waste of time and resources. It therefore recommended that the workload be reduced not by transferring immigration and asylum cases out of the usual judicial review process but by encouraging the Home Office and its representatives to examine the strength of their case at the earliest opportunity, with a view to early settlement where appropriate.[416]

The Administrative Law Bar Association asserted that as a result of the AIT appeals structure the Court of Appeal has found itself performing the function of a first-tier appellate tribunal, and has been so busy "precisely because so many of the appeals have merit". The Association suggested that the answer was not to impose a "draconian limit" on appeals to the Court of Appeal but to provide a sensible division of labour between the upper and lower tiers of the Tribunal.[417]

The Law Centre (Northern Ireland) calculated that there were over 100,000 negative decisions by the AIT in 2007, so the fact that there were only 3,500 reconsideration applications suggested that most people do accept the AIT's decisions as final.[418]

Lord Kingsland argued that until "the issues that underlie the explosion of judicial review applications",[419] including "the failure of the AIT to make fair and timely decisions",[420] had been addressed – perhaps in the forthcoming draft immigration simplification Bill – there was little point in proceeding to the proposed transfer.[421] Indeed, he said that "unless there is a fundamental reform in how the existing Asylum and Immigration Tribunal operates, the only consequences of passing these matters to the Upper Tribunal will be to create a similar problem there".[422]

e. Speed versus fairness?

For many years the Government has been trying to tackle the major delays and backlogs that have characterised the end-to-end asylum process, with some degree of success: 60% of new asylum cases are now being concluded within six months.[423] But some argue that this jeopardizes the fairness of the process; furthermore there is still a backlog of old asylum cases which the Government does not expect to clear until 2011,[424] and the Government has put less emphasis on speeding up immigration cases.

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415 Home Affairs Committee, *Borders, Citizenship and Immigration Bill [HL],* 29 April 2009, HC 425 2008-09, para 77
416 Sir Jeffery Bowman, *Review of the Crown Office list: a report to the Lord Chancellor*, March 2000, Dep 00/681, p33
417 Administrative Law Bar Association, Response to *Fair decisions, faster justice*, 2008, paras 35 to 38
418 Law Centre (Northern Ireland), Response to *Fair decisions, faster justice*, 2008
419 HL Deb 4 March 2009 c795
420 HL Deb 1 April 2009 c1125
421 HL Deb 4 March 2009 c795
422 HL Deb 1 April 2009 c1125
423 UKBA, *Key facts and figures*, April 2009
424 See Library Standard Note SN/HA/4439, *Asylum 'legacy' cases*, 26 February 2009

The Government's stated aim for the current reforms is to produce an immigration and asylum appeals system which is faster, which makes good decisions that are not litigated over in the higher courts, and which is recognised as fair, expert and efficient.[425] The need for speed and the desire to relieve the burden on the higher courts appear to be its main motivating factors; the need for high-quality decisions and fairness received only a brief mention in both the consultation paper and the Government response.

The Administrative Justice and Tribunals Council, which oversees the tribunal system and the administrative justice system as a whole, was one of many bodies which was "concerned about the degree of stress the Consultation Paper places on speed and finality, as against the marked lack of emphasis it gives to the principles of fairness, impartiality and human rights".[426] Asylum Aid's conclusion is illustrative of many respondents' views:

> Asylum Aid considers that many of the proposals contained within the consultation paper aim to limit the already diminished procedural rights that asylum applicants have because those rights are perceived to impede the achievement of the Border Agency's targets. This appears to be a symptom of the fact that the origin of the consultation is the Home Office rather than the Ministry of Justice. The result is that the policy considerations underlying the proposals place insufficient weight on ensuring just determination of the need for international protection. In Asylum Aid's view the positive aspects of the proposals, such as the incorporation of the AIT's work in the new Tribunal and the increased presence of High Court Judges in its upper tier, should be built upon. At the same time greater account should be taken of the rights of asylum applicants to fair status determination procedures and appeals.[427]

The AIT's Designated Judges suggested that the Home Office views appeals and judicial review primarily as a step in the process of exercising immigration control rather than as a judicial proceeding, and called on it to accept that judicial review is a reality of public administration which, however inconvenient, it cannot remove.[428]

Another respondent to the consultation exercise suggested that rather than making speed the *goal* of a good decision-making process, it should be the *consequence* of procedures that are fair and effective.[429]

The Government's response to the immigration appeals consultation exercise ends with some indications of the latest proposals to speed up the end-to-end asylum process,[430] but these proposals do not cover the immigration process, or include measures to improve the quality or fairness of either.

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[425] UKBA, *Immigration appeals: fair decisions; faster justice*, 21 August 2008, foreword
[426] Administrative Justice and Tribunals Council, Response to *Fair decisions, faster justice*, 2008
[427] Asylum Aid, Response to *Fair decisions, faster justice*, 2008, para. 20
[428] Designated Judges of the Asylum and Immigration Tribunal, Response to *Fair decisions, faster justice*, 2008, paras 1.2 and 8.1
[429] Glasgow Immigration Practitioners' Group, Response to *Fair decisions, faster justice*, 2008, para. 11
[430] UKBA and Tribunals Service, *Immigration appeals: response to consultation*, 8 May 2009, pp12-13

f. Scotland

Whilst the Scottish courts do not have a large immigration caseload, they do have their own issues and concerns.[431] The English focus of the appeals consultation paper and of the clause lifting the statutory bar caused some resentment. The Scottish peer Lord Kirkwood of Kirkhope condemned the lack of consideration for Scotland:

> For the Scottish legislative establishment, Clause [55] landed out of the blue. Worse than that, I do not know who was consulted in Scotland but certainly the Law Society of Scotland was not.[432]

The clause is being brought in before the results of Lord Gill's review of civil justice in Scotland, even though the Government had said in 2007 that that review "would be best placed to consider the detail of possible application for second appeals in Scotland".[433] The judges of the Court of Session indicated that they were not able to express firm views on the consultation proposal until Lord Gill had published his report. The Bill also pre-empts the final report of the Scottish Administrative Justice Steering Group chaired by Lord Philip. Lord Thomas of Gresford said that there is no obvious demand in Scotland for transfer of immigration cases from the Court of Session to the Upper Tribunal.[434]

The Scottish Parliament debated a legislative consent motion on the Bill on 19 March 2009.[435] Although the judicial review clause was not part of that order, the level of concern meant that it took up a large part of the debate. The Justice Minister, Kenny MacAskill, when rounding up the debate, made clear the Scottish Executive's unhappiness:

> […] The Government believes that the UK Government has acted inappropriately in ignoring our and the judiciary's request to delay the process because we have an on-going review of the structure of civil courts and law in Scotland. I am more than happy to join other members in raising the issue and making it clear that we would prefer Lord Gill to be given the necessary time and space to complete his review before the clauses to do with tribunals are addressed. I ask members of other political parties to ensure that their representatives in Westminster make those points. […] I am happy to go back to the UK Government to make it clear that many members in the Parliament have expressed the view that the UK Government's attitude is not as we would wish. We cannot do anything about that.[436]

Lord West of Spithead had emphasised the fact that the Government's proposed powers of transfer were permissive only: "The Lord President is not required to designate a class

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[431] See for example Sarah Craig, Maria Fletcher and Kay Goodall, *Challenging asylum and immigration tribunal decisions in Scotland - an evaluation of onward appeals and reconsiderations*, October 2008
[432] HL Deb 11 February 2009 c1188
[433] Vera Baird, Tribunals, Courts and Enforcement Bill Committee Deb, 15 March 2007 c36
[434] HL Deb 4 March 2009 c793
[435] SP OR 19 March 2009 col 16064-74
[436] SP OR 19 March 2009 col 16074

of cases which must be transferred, and the judges of the Court of Session do not have to transfer specific cases if they do not believe that it is right to do so".[437]

As noted above, the Government's clause has been replaced by one which allows the transfer of fresh claim applications but no others. This clause does not make any specific reference to Scotland.

g. Northern Ireland

The Law Centre (Northern Ireland) considered that transferring immigration, asylum and nationality judicial review cases to the Upper Tribunal would be unworkable in Northern Ireland.[438]

h. Procedure rules

The Tribunals' procedure rules are normally made by the Tribunal Procedure Committee (an advisory Non-Departmental Public Body, sponsored by the Ministry of Justice). In its consultation paper, the Government had "remained to be convinced" that the Committee was the appropriate body to set procedure rules for immigration matters, preferring to keep the power with a Government minister.[439] This would have allowed the Government to decide, for instance, the First-tier Tribunal's power to review its own decisions in immigration cases only.

Several members of the House of Lords agreed with respondents to the appeals consultation paper that it would be wrong for the rules under which immigration, asylum and nationality cases would be heard in the Upper Tribunal to be made by the Government (which is a party to the proceedings) rather than by the Tribunal Procedure Committee (which is an independent body). Lord Thomas of Gresford and Baroness Butler-Sloss were among those who protested strongly that this would be completely inappropriate and would result in a perception, at the very least, of a lack of impartiality.

Lord West of Spithead wrote to them to advise that the Government had changed its mind, deciding that procedure rules for immigration and asylum cases in the new Tribunal system would be make by the Tribunal Procedure Committee.[440] This is also stated in the Government's response to the immigration appeals consultation exercise.[441]

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[437] HL Deb 4 March 2009 c800
[438] Law Centre (Northern Ireland), Response to *Fair decisions, faster justice*, 2008
[439] UKBA, *Immigration appeals: fair decisions; faster justice*, 21 August 2008, p9
[440] HL Deb 4 March 2009 c802
[441] UKBA and Tribunals Service, *Immigration appeals: response to consultation*, 8 May 2009, p10

VI Welfare of children[442]

A. Background

Over many years, there has been clamour for the Government to abolish the immigration exemption in section 11 of the *Children Act 2004* (duty on public authorities to safeguard and promote the welfare of children) and the UK's immigration and nationality reservation to the United Nations Convention on the Rights of the Child.[443]

During the House of Lords debates in 2008 on the *Children and Young Persons Bill,*[444] the Home Office and the Department for Children, Schools and Families responded to this criticism. They signalled their intention not to amend section 11 but to impose a new equivalent duty on the UKBA to promote and safeguard the welfare of children.[445] The rationale for this approach was largely that section 11 applies only to England and Wales whereas the UKBA works throughout the UK. But the practical result of the proposed division was not entirely clear: for instance, would the UKBA be bound by guidance issued under section 11, which is central to the functioning of that duty?

When the UK ratified the **UN Convention on the Rights of the Child** in December 1991, it entered the following reservation on immigration and nationality matters:

> The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do no have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.

After years of saying that it had no intention of withdrawing this reservation, the Home Secretary announced a review on 14 January 2008. This consultation comprised one question at the end of the Border and Immigration Agency's January 2008 consultation on the draft *Code of practice for keeping children safe from harm*:

> **UN Convention on the Rights of the Child**
>
> Q16. Should the UK withdraw its immigration reservation to the UN Convention on the Rights of the Child? This reservation allows the UK to apply its immigration laws without having them interpreted in light of the UN Convention on the Rights of the Child.
>
> *Yes No Don't know*
>
> Please give reasons for your response.[446]

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[442] by Gabrielle Garton Grimwood

[443] See for example Home Affairs Committee, *Immigration Control*, 23 July 2006, HC 775 2005-06, paras 285-290

[444] Now the *Children and Young Persons Act 2008*

[445] See Department for Children, Schools and Families press notice, *Safeguarding children - Home Office and DCSF signal duty on UK Border Agency to protect children*, 24 June 2008

[446] UK Border Agency, *Keeping children safe from harm – code of practice consultation*, 31 January 2008 (see q16 in the proforma for responses)

Following this consultation exercise, and just before the Government's appearance before the UN Committee on the Rights of the Child on 23-24 September 2008, the Home Secretary announced that the Government would lift the reservation.[447] It was withdrawn in November 2008.[448] Although the Convention is not directly applicable in the UK courts, lifting the reservation may affect perceptions of how children in the immigration system should be treated and how law and guidance are interpreted.

B. The code of practice and children's champion

Before the Government had decided to introduce a child welfare duty for immigration, it pledged to create a Code of Practice. Following consultation on a draft, the UKBA *Code of Practice on keeping children in the immigration system safe from harm* came into force on 6 January 2009. Launching it, immigration minister Phil Woolas said:

> Treating children with care and compassion is a number one priority for the UK Border Agency. These new guidelines will reiterate that.
>
> It is right that the UK Border Agency is judged by the same standards as every other authority that deals with children. These rules bring together for the first time a common set of values all staff must abide by.
>
> No one wants to detain children and it only happens as a last resort, often because their parents seek to frustrate removal. In these difficult circumstances, we will treat children with the utmost sensitivity.[449]

The UKBA has a children's champion. Some indication of the role of the children's champion was given in response to a parliamentary question in December 2007 about children in immigration removal centres:

> [The] Border and Immigration Agency's Office of the Children's Champion (OCC) has established strong links with the Children's Commissioner for England, Sir Al Aynsley-Green. In agreement with the Children's Commissioners for Northern Ireland, Scotland and Wales, Sir Al Aynsley Green also represents them in immigration matters.
>
> The OCC has also attended events regarding the detention of children at which child welfare agencies from the voluntary and statutory sector were represented. It has also hosted a conference for health professionals to discuss services for children at Yarl's Wood Removal Centre, the main centre for holding families with children. Attendees included medical researchers and national campaigners for immigrant children.[450]

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447 Department for Children, Schools and Families press notice, *UK lifts reservations on the UN Convention on the Rights of the Child (UNCRC)*, 22 September 2008

448 United Nations C.N.980.2008.Treaties-7 *Convention on the Rights of the Child, New York, 20 November 1989, United Kingdom of Great Britain and Northern Ireland: Partial Withdrawal of Reservations*, 4 December 2008 (available on ILPA website)

449 UK Border Agency *UK Border Agency Commits To Keeping Children Safe From Harm* 6 January 2009

450 HC Deb 17 December 2007 c964W

According to the code of practice, UKBA staff may raise with the children's champion any concerns that they are not able to raise with their line managers.[451] The Code of Practice would be replaced by the proposed statutory duty and guidance.

C. The Bill

Clause 57 of the Bill (as brought from the Lords) would impose a duty on the Secretary of State to ensure that, in matters of immigration, asylum, nationality, any functions conferred by an Immigration Act on an immigration officer, on general customs functions or the customs functions of a customs official, functions are discharged with "regard to the need to safeguard and promote the welfare of children who are in the UK". The Director of Border Revenue must make similar arrangements.

It also provides for the Home Office to draw up guidance on the implementation of this duty. The Government has said it would "draw heavily" on the section 11 guidance when drafting the immigration guidance.[452]

D. Issues and concerns

a. Overview

Although the inclusion of a clause promoting the welfare of children received a broad welcome, Members of the House of Lords and other commentators outside Parliament have pointed out that there are limitations to the Bill's provisions and that other aspects of immigration and asylum law and policy seem to sit uneasily with them. During the Bill's consideration there, Members of the House of Lords identified a variety of issues – such as detention and the support available to asylum-seeking families – where, they believed, the question of children's welfare would be particularly pertinent.

The Equality and Human Rights Commission welcomed the Bill's provisions on the welfare of children, describing them as one of the Bill's "positive steps in clearing up problems inherited from the past", but it too noted that there were limitations.[453] Similarly, the Child Poverty Action Group welcomed the Bill's provisions but expressed concern that denying access to benefits was at odds with the stated commitment to children's welfare. The CPAG suggested that elements of the UN Convention on the Rights of the Child should be incorporated.[454]

In its initial briefing on the Bill, ILPA (the Immigration Law Practitioners' Association) said that in the provisions did not address:

- the continued detention of children and families;
- the longstanding failure to exercise the power to repeal section 9 of the Asylum and Immigration Act 2004 whereby families may be made destitute and children taken into care;

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451 Para 7.10

452 HL Deb 1 April 2009 c1143

453 Equality and Human Rights Commission *Parliamentary Briefing: Borders, Citizenship and Immigration Bill February 2009* [viewed 21 April 2009]

454 CPAG *Briefing on Borders, Citizenship and Immigration Bill 2009: For second reading in House of Lords: Protecting migrant children from poverty* February 2009

- the substantial number of children whose age is disputed resulting in their being detained, unsafely accommodated and their cases being inadequately considered in the asylum process;
- the need for children's guardians in this area of law; and
- the inadequate drafting of the trafficking which means that it has not proved possible to prosecute all those who traffic babies (a matter that could be addressed in this Bill or in the Policing and Crime Bill). [455]

In its report on the Bill,[456] the Joint Committee on Human Rights observed that it had in the past highlighted

> serious human rights concerns about the treatment of children in the UK subject to immigration control, including, for example, the inappropriate use of detention, the effect on them of heavy handed enforcement methods such as dawn raids and forced removals, and the use of inappropriate methods for testing their age.[457]

The Committee therefore welcomed the new duty, describing it as a "human rights enhancing measure which is a long overdue reversal of the Government's previous policy, which excluded children subject to immigration control from the protection of the UN Convention on the Rights of the Child".[458] It went on to suggest that the Bill's provisions were an opportunity to address "deep-rooted human rights problems experienced by children who are subject to immigration control".[459]

> We have consistently identified as one of the root problems the fact that children subject to immigration control are treated less favourably than UK national children because they have been excluded from the protection of the UN Convention on the Rights of the Child by the UK's immigration reservation. The provisions concerning child welfare in this Bill provide the opportunity to begin to address some of those deep-rooted human rights problems experienced by children who are subject to immigration control.

The Committee also urged that there should be full consultation with stakeholders before the statutory guidance was published and that it should be published in draft form while the Bill was still before Parliament, to enable scrutiny by parliamentarians.[460]

Some recurrent themes emerged in discussion of the Bill; some of these are discussed below.

b. Children applying to come to the UK

The chief executive of the Joint Council for the Welfare of Immigrants, Habib Rahman, has (like ILPA)[461] suggested that the Bill's provisions relating to children's welfare, welcome as they are, are insufficient in relation to children outside the UK:

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455 ILPA *Briefing: Borders, Citizenship and Immigration Bill,* 20 January 2009
456 Joint Committee on Human Rights *Legislative Scrutiny: Borders, Citizenship and Immigration*, 25 March 2009, HL 62/HC 375, 2008-09
457 *Ibid* para 1.14
458 *Ibid* p3
459 *Ibid* para 1.14
460 *Ibid* para 1.16

> Its limited coverage means that those children being removed from the country, those in entry clearance posts and in airports will all continue to remain outside the provisions' protective scope.[462]

An amendment tabled by Lord Avebury sought to remove the provision limiting the duty regarding the welfare of children to those in the UK. He argued that the duty should apply "to all UKBA staff whenever or wherever they come into contact with any child".[463] Lord West of Spithead resisted creating a statutory duty towards children outside the UK, including those applying for visas, and identified some practical difficulties:

> We are certainly mindful of the need for our staff operating overseas to understand the need to safeguard and promote the welfare of children, but applying a statutory duty to require them to do this is another matter entirely. Duties and obligations of this sort, for example under the 1951 refugee convention and the UN Convention on the Rights of the Child, are limited to people in the UK. It would not be appropriate for the border force to have specific statutory duties in relation to children who do not come under UK control and where our ability to give effect to the duty would be so dependent on local circumstances. This contrasts with the specific guidance we are developing for staff in this country.[464]

Lord West of Spithead had already written to Lords in similar vein. In a letter to Baroness Hanham, he offered a commitment that, as a matter of policy but not as a statutory duty, UKBA staff dealing with entry clearance applications overseas would seek to apply the duty. However, he went on:

> UK officials overseas are not in a position where they can require a certain response from the agencies of another country. Nor can they seek to impose the standards needed to fulfil a duty in the UK on another country's agencies. Moreover, in some countries international "minimum standards" agreements already exist and it would be wrong for UK officials to seek to over-ride or disagree with these in individual cases imply because of the way this duty was perceived in the UK.[465]

At Report stage, Lord West of Spithead expressed further concern about the impact of any such statutory duty on the number of visa applications:

> [T]here is a danger that people overseas bringing up their children in conditions which fall well below the standards that we are accustomed to here—many children in the world arguably fall into this category—will see this new duty as offering a new route of entry into the UK for their families. That risks significantly increasing both the numbers seeking entry and, subsequently, the number of challenges based on the new duty. We are confident that we would be able to successfully resist those challenges, but we would need to devote considerable financial and human resources to the task.[466]

He suggested that training for staff and risk assessment (to check for abuse) would contribute to safeguarding children. Other changes to the immigration rules – such as a

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461 ILPA *General Briefing: Second Reading (Lords): Borders, Citizenship And Immigration Bill* February 2009

462 Habib Rahman, "Borders, Citizenship and Immigration Bill", *JCWI Bulletin* Winter 2008/9

463 HL Deb 1 April 2009 c1144

464 HL Deb 1 April 2009 c1146

465 Lord West of Spithead, Letter to Baroness Hanham and others, *Borders, Citizenship and Immigration Bill – Committee day 3 and 4*, DEP 2009-1047

466 HL Deb 1 April 2009 c1147

requirement that there should be suitable care and reception arrangements for child visitors – had already been made. [467] Observing that this was not the last that the Minister would hear of the matter, Lord Avebury withdrew the amendment.

c. Detention of children

At second reading, Lord Avebury, welcomed the Bill's provisions but argued that the Government should move towards ending the detention of children.[468] The Earl of Listowel too suggested that detention and destitution could have a particularly harmful effect on children:

> In her previous report on the immigration removal centre at Yarl's Wood, the Chief Inspector of Prisons highlighted that the length of stay of children had increased and that stays were sometimes incorrectly reported. (…) The chief inspector wrote:
>
> > "We were concerned about ineffective and inaccurate monitoring of length of detention in this extremely important area. Any period of detention can be detrimental to children and their families, but the impact of lengthy detention is particularly extreme". [469]

In response, Lord West of Spithead conceded that there was more to be done and offered to arrange a meeting with the UKBA children's champion.[470] At Committee stage — discussing an amendment moved by Lord Avebury on the duty to collect and publish statistics and a further amendment from Baroness Hanham and Viscount Bridgeman on ministerial authorisation of the detention of children (which was not moved) — Lord West of Spithead suggested that, however reluctantly or sparingly it was used, the detention of children for immigration reasons would still be necessary:

> None of us wants to see children detained, and my noble friend Lord Judd spoke about that very eloquently. Each case is a personal tragedy, as we all know. The Government would much prefer families to leave this country voluntarily when they no longer have a right to remain here. Unfortunately, they do not always choose to do so. Often, they try to disappear within the country to get away from the fact that they might have to leave, and that often puts their children at risk. When they try to disappear and are not willing to return voluntarily, detention becomes a necessity in order to ensure compliance with the immigration laws.

He went on to describe the existing policy on children's detention, and to suggest that there was no need to put the ministerial authorisation of their detention on a statutory footing.[471]

d. Statistics on children in detention

Another issue which arose at Committee stage was that of statistics on children in immigration detention. It had been argued by the Refugee Children's Consortium and by

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[467] HL Deb 1 April 2009 cc1147-8
[468] HL Deb 11 February 2009 c1139
[469] HL Deb 11 February 2009 cc1198 - 99
[470] HL Deb 11 February 2009 c1212
[471] HL Deb 10 March 2009 cc1147-50

Members of the Lords that information on the number of children held in detention was lacking.

Lord Ramsbotham prepared an amendment — moved by Lord Avebury on the fourth day of the Committee stage and attracting broad support — to require the Secretary of State to collect and publish statistics on a regular basis.[472] Lord West of Spithead outlined the data already collected and agreed that more was needed:

> We already publish statistics on children in detention as part of the quarterly statistical summary of the control of immigration. In that respect, a statutory duty is not necessary and would add nothing to what already happens every three months. (…)
>
> We recognise that it would be helpful to have fuller information of this kind. We accept that this is an area where we must achieve more to develop confidence in how children are being treated.[473]

The amendment was withdrawn but the Lords returned to this issue at third reading when, in moving the motion that the Bill should pass, Lord West of Spithead once more committed the UKBA to doing better in its gathering of statistics and guidance:

> I commit to the House that the UK Border Agency will continue to review and update how it collates and updates its statistics and guidance. We can do better and we are putting in a lot of effort to do better to underpin the new duty to safeguard and promote the welfare of all the children with whom UKBA comes into contact. I have asked the agency to set up a round-table discussion involving representatives of the major children's charities to examine what information is currently available on children who are detained, what periods are involved and the reasons for their leaving detention.[474]

e. Support for asylum-seeking families

Lord Kirkwood of Kirkhope argued that it was contradictory to talk about safeguarding children when some were required to live on vouchers.[475] He pointed to the effects of poverty on children in asylum-seeking families and suggested how financial support might better be provided.[476]

He moved an amendment at Report stage in the Lords which would have added a reference to financial welfare to the Bill's provisions in respect of children. He conceded that the Immigration Simplification Bill might be a more appropriate place to address concerns about the destitution of children in asylum-seeking families, but that Bill might be delayed by an election (he said) and proper regulation was urgently needed.[477]

In response, Lord West of Spithead laid out what "the welfare of children" means in this context:

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472 HL Deb 10 March 2009 cc1139-41
473 HL Deb 10 March 2009 cc1147-8
474 HL Deb 22 April 2009 c1539
475 HL Deb 11 February 2009 c1189
476 HL Deb 1 April 2009 c1141
477 HL Deb 1 April 2009 c1140

> As noble Lords know, the intention of Clause 53 is to mirror as closely as possible the effect of Section 11 of the Children Act 2004. We want the border force to be on the same footing as other public bodies which have significant dealings with children so that we can improve interagency working and be more effective in the way in which we jointly safeguard and promote the welfare of children, which I think all of us in this House will agree is extremely important.
>
> For that to happen, all agencies involved need to share the same understanding of what we mean by welfare. In fact, DCSF's statutory guidance on Section 11, the guidance on which we intend to draw heavily for Clause 53, already defines the word "welfare". It may help if I quote from paragraph 2.7 of that guidance which states:
>
> > "In this guidance, welfare is defined ... in terms of children's health and development, where health means "physical or mental health" and development means "physical, intellectual, emotional, social or behavioural development'".
>
> The following paragraph states:
>
> > "Safeguarding and promoting the welfare of children",
>
> is defined as,
>
> > "protecting children from maltreatment; preventing impairment of children's health or development; ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully".
>
> The existing definition of welfare focuses on those elements which are most crucial to children's well-being. It is a tried and tested definition and well understood by those in the field. I see no merit in creating a new definition specific to the border force, which I am sure is not what the noble Lord intended.[478]

The amendment was withdrawn.

VII Trafficking of babies and children for exploitation[479]

A. Overview

A particular problem identified during earlier discussion of the Bill (and especially of children's welfare) had been that of trafficking of babies and children.

In recent years, human trafficking has been a subject of growing concern, both internationally and domestically. There are some difficulties of definition, as various different terms are used inconsistently, and it is also very difficult to get a clear idea of the numbers of people involved in human trafficking. Despite this, there have been various international agreements, studies and campaigns to address the problem. The

[478] HL Deb 1 April 2009 c1143
[479] by Gabrielle Garton Grimwood

UK government has put new legislative and other policies in place, including new trafficking offences and the creation of a UK Human Trafficking Centre.

Library Standard Note SN/HA/4324 on the UK response to human trafficking examines the UK Government's responses to human trafficking.

Under section 4(4) the *Asylum and Immigration (Treatment of Claimants, etc) Act 2004,* it is an offence to arrange or facilitate the arrival of a person in the UK for exploitation. The Act defines exploitation:

> (4) For the purposes of this section a person is exploited if (and only if)—
>
> (…)
>
> (d) he is requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that—
>
> (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and
>
> (ii) a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.[480]

Commentators have suggested that the definition in (d) is problematic, as it does not capture (for example) babies who are trafficked, as they cannot be said to have been requested or induced to undertake any activity. The Refugee Children's Consortium, for example, has called for the definition of trafficking to be broadened so that it encompasses the trafficking of babies and young children.[481]

The Home Affairs Committee published its report on trafficking on 15 May 2009.

B. The Bill

The Bill's provisions on trafficking people for exploitation were added at the Report stage when, on the second day, Lord West of Spithead moved an amendment to insert a new clause, which would widen the definition of the offence of human trafficking. This now forms **clause 56** of the Bill. The Explanatory Notes to the Bill as brought from the Lords (Bill 86) describe the impact of this clause:

> 203. (…) The effect of this amendment is to ensure the offence of trafficking captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind.

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[480] Section 4(4)

[481] Refugee Children's Consortium *Borders, Citizenship and Immigration Bill: House of Lords' Second Reading 11 February 2009*

C. Issues and concerns

In a briefing in January, ILPA asserted that experience had shown that the existing provisions of the *Asylum and Immigration (Treatment of Claimants, etc.) Act* were inadequate to deal with the problem of baby trafficking. Urgent change was needed, as a recent case had demonstrated:

> On 16 May Peace Sandberg was jailed for 26 months at Isleworth Crown Court after being found guilty of facilitating illegal entry into the UK. The illegal entry in question was that of a little baby believed to have been purchased in Nigeria. It appeared that the reason for the purchase of the baby was so that the purchaser qualified for priority housing in the UK.
>
> Ms Sandberg was not prosecuted for trafficking because…it was concluded that the section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act was inadequate to capture the trafficking of babies and very small children, e.g. for benefit fraud. The police and Crown Prosecution Service achieved a conviction, but they had to do so with one hand tied behind their backs.[482]

Baroness Hanham,[483] Baroness Howe of Idlicote[484] and Lord Sheikh[485] all argued that the Bill needed to close the gap in the law surrounding the trafficking of children. Baroness Butler-Sloss - vice-chairman of the All-Party Parliamentary Group on the Trafficking of Women and Children – agreed that the clause needed to go further, as current law and codes of practice did not adequately address the problem:

> Section 4(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 requires that a person is said to be exploited, if, and only if, requested or induced to undertake an activity such as begging. For goodness' sake, how are babies or young children able to comply with that requirement in the legislation? The victims are immigrant children and so part of Clause 51. I should like the Minister to look at this very real problem with a view to dealing more effectively with some of the trafficking gangs. It might interest the House to know that, in this deplorable and immensely lucrative trade in our country, more than 1,000 Roma children from Romania are being managed by a gang from Romania, mostly in London, and that each of those children is worth £100,000 to the traffickers.[486]

Introducing the Government amendment on the second day of the Bill's Report stage, Lord West of Spithead explained how the expanded definition of trafficking would address the problem of trafficking of children for benefit fraud. He too referred to the Peace Sandberg case:

> That issue [of the requirement within the terms of the 2004 Act that a victim of trafficking should have been "requested" or "induced'] was highlighted in the case of Mrs Peace Sandberg, who purchased a baby from Nigeria to seek priority housing in the UK. In this case, the baby's role was passive. Mrs Sandberg was convicted of facilitation, not trafficking, and jailed for 26 months in 2008.

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[482] ILPA *Briefing: Borders, Citizenship And Immigration Bill Policing And Crime Bill: Trafficking Of Babies – An Urgent Need To Amend The Legislation* 21 January 2009
[483] HL Deb 11 February 2009 c1136
[484] HL Deb 11 February 2009 cc1191-92
[485] HL Deb 11 February 2009 cc1172-73
[486] HL Deb 11 February 2009 c1175

> We believe that such conduct should rightly fall under the remit of trafficking. Our proposals will amend the definition of exploitation to enable that by removing the requirement for the child to be requested or induced to undertake any activity. Accordingly, if someone uses or attempts to use another person, including a small child, to obtain a benefit or gain of any kind, he or she would be capable of committing the offence.[487]

Lords welcomed this amendment. Baroness Hanham, Lord Avebury and Baroness Howe of Idlicote remarked that a lacuna in the law was being filled.[488] The amendment was therefore agreed.

In May 2009, Alan Campbell (Parliamentary Under Secretary of State at the Home Office) described the latest Government plans to tackle the trafficking of babies:

> A number of steps are being taken to identify and prosecute offenders trafficking babies into the UK. This includes the Government amendment to the Borders Citizenship and Immigration Bill which will enable the prosecution under trafficking legislation of those who bring babies and young children into the country for illegal purposes and where because of their age the role of the child is entirely passive.
>
> The Government's Action Plan on Tackling Human Trafficking includes a measure to prevent the trafficking of babies and children into the UK for fraudulently acquiring welfare benefits.
>
> Ongoing police-led operations at Heathrow and Gatwick continue to succeed in identifying trafficked children and ensuring their safety by working effectively with border staff and social workers.[489]

VIII Students: restrictions on studies[490]

A. Current law and policy

The immigration process for students underwent major change in March 2009; students applying on or after 31 March 2009 have been required to apply under Tier 4 of the new points-based system (PBS) as either an adult or child student. The relevant immigration rules (HC 395 as amended) are available on the UKBA website, together with quick guides for adult students and child students applying under Tier 4.[491] The guide for adult students summarises what students will need to meet the points threshold:

> **What do I need to apply?**
>
> You need 40 points to be able to apply for a student visa and must provide the proof needed with your application form.

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487 HL Deb 1 April 2009 c1138
488 HL Deb 1 April 2009 c1139
489 HC Deb 11 May 2009 cc525-6W
490 by Gabrielle Garton Grimwood
491 [viewed 16 April 2009]

Points	What you get points for	Proof and documents needed
30	Doing a course (at an acceptable level) with an approved education provider (also known as sponsorship)	Visa letter from your approved education provider, and the documents used to get the visa letter
10	Having enough money to cover your course fees and monthly living costs (also known as maintenance)	Bank statement or letter confirming that you have enough money available to cover your course fees and monthly living costs for up to one year, at the time you submit your application

> You must be able to prove that the money you need to apply has been in your account for 28 days before you submit your application.[492]

Although students must fulfil all the stipulated requirements – the course must be at an "acceptable level', provided by an "approved education provider', and the student must satisfy UKBA that they can meet the costs of their study and living expenses – there is no prohibition on students moving from one college or approved education provider to another, and nothing to confine a student to a particular course or institution.

B. The Bill

The *Immigration Act 1971* provides that, where a person who is not a British citizen is given leave to enter the UK, that leave may be subject to conditions restricting their employment or occupation in the United Kingdom, or requiring them to register with the police, or both.[493] The Bill would add to this list of potential conditions, by providing for conditions to be imposed on migrants' freedom to study in the UK, restricting them to one named institution. This restriction therefore could seemingly be imposed on any non-British citizen studying in the UK, not only those granted leave to enter as students.

The Explanatory Notes for the Bill as introduced to the Lords describe the impact of the clause. Summarising the Bill's provisions, Lord West of Spithead said:

> Clause 47, which was mentioned, introduces a change to the conditions for foreign students who come to the UK to study to allow their permission to be linked to the particular institution which sponsors them under the points-based system. At the moment students come here, go to an institution, move after a few months and then disappear. In future, we want to ensure that there is a responsibility on both the educational institution and the student to inform us that they will move to another course at another educational institution, which must be properly

[492] UK Border Agency *Applying for an adult student visa* [viewed 16 April 2009]
[493] at section 3(1) as amended

> sponsored and registered. That is to ensure that we do not have a loophole, which has caused considerable problems in the past.[494]

C. Issues and concerns

The Bill does not address issues of implementation of tier 4 of the points-based system, to which some Members of the House of Lords referred during the passage there of the Bill. Nor does it address other concerns expressed recently, when it was alleged that lax scrutiny of visa applications from people purporting to be students was allowing people who were not genuine students into the UK.[495]

In its briefings on the Bill, ILPA suggested that the Bill's provisions were not justified, especially as they could (on the face of it) extend to any migrant and not just those seeking entry under Tier 4 of the points-based system.[496] Moreover, ILPA argued, they might infringe human rights, particularly the right to private life (Article 8).[497] The campaign group Justice too has argued that there is no valid reason for the UKBA to restrict where a person studies.[498] The chief executive of the Joint Council for the Welfare of Immigrants has argued that the Bill's measures do not sit well with Government's commitment to boosting the number of international students coming to the UK and are likely to prove unpopular in a competitive global market for education.[499]

At second reading, Lord Avebury intimated that it was a drastic step to forbid moves between institutions.[500] The chief executive of Universities UK, Baroness Warwick of Undercliffe, whilst noting that not all organisations took the same view, said that Universities UK supported the move to tie student visas to a particular institution.[501] However, she also noted some potential problems. Even genuine students, she suggested, might wish or need to move between institutions to follow (for example) their PhD supervisor. If students were required to submit a fresh application and pay the usual fee of up to £500 to change institutions, that might deter international students from studying in the UK.[502] Baroness Warwick pointed to some other implications for universities, who were (for example) struggling to meet the timescales set by the Home Office.[503] From the Liberal Democrat benches, Lord Wallace of Saltaire questioned why the Government felt the need to impose these restrictions on students, declaring himself "puzzled" by the problems with which the Bill purported to deal.[504]

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494 HL Deb 11 February 2009 c1132
495 See, for example, Nick Meo and Emal Khan "£100 fakes helping terrorists into UK" *Sunday Telegraph* 12 April 2009
496 ILPA *General Briefing: Second Reading (Lords): Borders, Citizenship And Immigration Bill* February 2009
497 ILPA *Briefing: Borders, Citizenship and Immigration Bill,* 20 January 2009
498 Justice *Borders Citizenship and Immigration Bill: Briefing for House of Lords Second Reading* February 2009
499 Habib Rahman "Borders, Citizenship and Immigration Bill" *JCWI Bulletin* Winter 2008/9
500 HL Deb 11 February 2009 c1132
501 HL Deb 11 February 2009 c1154
502 HL Deb 11 February 2009 c1155
503 HL Deb 11 February 2009 c1155
504 HL Deb 11 February 2009 c1161

Lord Sheikh, however, gave a broad welcome to the Bill's provisions, pointing to the problem of students who abandon their studies and take employment.[505] Lord Tomlinson too pointed to the ease with which people arriving in the UK as students could disappear from view. The Home Office was right to clamp down on such abuses, although some of the changes already made as part of the points-based system - such as the requirement to have £600 a month available for living expenses (£800 in London) - were (he said) arbitrary and potential disincentives to international students.[506]

In responding to the debate, Lord West of Spithead defended the restriction on studies, describing it as "a relatively limited measure" and one that it was reasonable to expect educational establishments to comply with.[507] The Committee stage might, he suggested, be the appropriate time to consider the position of courses such as architecture or medicine which last longer than the four-year limit on the grant of leave to remain as a student.[508]

At the Report stage, Baroness Hanham tabled an amendment (108E) which would have tied the restriction on studies to those granted leave as a student and a probing amendment (109). The Bill as it stood (she argued) did not provide enough safeguards and an appropriate balance had to be struck between checking the credentials of students and enabling them to change courses once in the UK.[509]

Other Members of the House of Lords pointed to other potential pitfalls, both for universities and colleges and for students themselves. Baroness Finlay of Llandaff (an honorary professor at Cardiff University) observed that the clause would pose particular difficulties for medical students at Oxford, Cambridge and St Andrews, who often do not know where they will do their clinical studies, and for all medical students following a six-year course.[510]

Lord West of Spithead confirmed that the policy on the length of leave as a student had been changed.[511] He confirmed too that the Government's intention was that the restriction on studies would be placed on those granted leave as students and would restrict where they could study rather than what they could study: it would not prevent switching between courses at the same institution.[512] The detail of the provision would, he said, be contained in the immigration rules rather than in primary legislation, which gave only the "architecture" of the system.[513] Lord West of Spithead said that the condition would be applied to those already in the UK on implementation:

> As soon as we have secured Royal Assent, it is our intention to amend the Immigration Rules (…) As is usual practice, the Immigration Rules will be laid before Parliament for 21 days before coming into force, and we will look to publish

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505 HL Deb 11 February 2009 cc1172-73
506 HL Deb 11 February 2009 cc1185-86
507 HL Deb 11 February 2009 c1211
508 HL Deb 11 February 2009 c1211
509 HL Deb 4 March 2009 cc772-3
510 HL Deb 4 March 2009 c774
511 HL Deb 4 March 2009 c776
512 HL Deb 4 March 2009 c777
513 HL Deb 4 March 2009 c777

> revised guidance for tier 4 students around what this change will mean for them when we lay the rules.
>
> Once the rules are in force, the UK Border Agency will write to all migrants who had been granted leave to enter or remain under tier 4, informing them that they will, from the date of the letter, be subject to this condition. Hence, the condition will apply only from when the student is notified.[514]

Amendment 108E was withdrawn and others (including one which would have required the Secretary of State to consider immediately any application to vary a condition regarding studies) not moved.

IX Fingerprinting of foreign criminals[515]

The police may currently retain fingerprint and DNA data from individuals arrested for a recordable offence, irrespective of whether such individuals are actually convicted. The data may only be used for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person. Standard note SN/HA/4049 on the retention of fingerprints and DNA samples discusses the law and recent challenges to it.

The Bill confers (at **clause 53**) powers to take the fingerprints of foreign criminals subject to automatic deportation.

Justice has questioned the need for these provisions, arguing that they are part of a makeshift response to the problem of deportation of foreign national prisoners:

> The provisions [of sections 32-39 of the UK Borders Act 2007], 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 [role] of Parliament should be to question the continuing need for the 2007 provisions, rather than to add to them.[516]

In one of its briefings on the Bill, the Immigration Law Practitioners' Association suggested that the Government should make use of this opportunity to clarify the law on retention of fingerprint data.[517]

The provisions did, though, attract some support in the Lords and, at second reading, were welcomed by (for example) Lord Sheikh.[518]

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514 HL Deb 4 March 2009 c779
515 by Gabrielle Garton Grimwood
516 Justice *Borders Citizenship and Immigration Bill: Briefing for House of Lords Second Reading* February 2009
517 ILPA *ILPA General Briefing: Second Reading (Lords): Borders, Citizenship And Immigration Bill* February 2009
518 HL Deb 11 February 2009 cc1172-73

At Committee stage, Lord Avebury moved an amendment (amendment 111) to insert a new clause, which would have amended the *Terrorism Act 2000* so as to make provision for fingerprints or samples taken from a person to be destroyed within a month unless the person had consented in writing to their retention. He pointed to the complexity of existing law and to the recent judgement in the European Court of Human Rights in *S and Marper*.[519] He cited one instance of the taking of a DNA sample:

> [T]he taking of fingerprints and biometric samples is regulated by a different statute, the Police and Criminal Evidence Act 1984. It appears that the power to demand these samples does not even require that the examining officer suspects that the person has committed a criminal offence. In the case of Mr A [a British imam, detained at Heathrow airport, from whom a DNA sample was taken], he was being examined not as a suspect but, as I explained, to determine whether he was a suspect. Nothing said in the course of the interview would have given the officer reason to suspect that he had committed any terrorist offence. Can the Minister confirm that the power to demand samples from a person being interviewed for this reason under the 2000 Act does not rely on any evidence that the person has committed such an offence?
>
> It appears, further, that under Section 64 of the 1984 Act as amended, fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken. In the case of Mr A, the Special Branch told me that the samples were to be retained indefinitely.

Lord Avebury had already written to the Home Secretary, asking her to confirm that samples taken from people who were acquitted or not charged would be destroyed.[520] He suggested that the principle of taking fingerprints and DNA samples had been admitted, but nevertheless there was concern about retaining such records: the bottom line (he argued) was that retaining them indefinitely would be a breach of Article 8.[521]

Lord West of Spithead confirmed that the Government was considering how to respond to the judgement in *S and Marper* "in a way which recognises the value of fingerprints and DNA data in protecting the public'; a forensics white paper to be published later in 2009 would (he said) contain the Government's proposals.[522] He went on:

> The ability for police Special Branch officers to take fingerprints and samples at ports of entry has become an increasingly important tool in countering the activities of known or suspected terrorists. We would not wish to undermine the thrust of policy in relation to the strengthening of border controls—through, for example, biometric visas—by weakening this specifically counterterrorism measure.[523]

The amendment was withdrawn.

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[519] Discussed in the standard note
[520] HL Deb 4 March 2009 c783
[521] HL Deb 4 March 2009 cc787-8
[522] The white paper was published on 7 May 2009 and is discussed in the standard note
[523] HL Deb 4 March 2009 c785

X Detention at ports in Scotland[524]

The Bill would grant (at **clause 54**) a power to a designated immigration officer at a port in Scotland to detain an individual if the immigration officer thinks that the individual is subject to a warrant for arrest. This follows a similar power in relation to England, Wales and Northern Ireland in the *UK Borders Act 2007*,[525] discussed in Library Research Paper 07/11.

The Explanatory Notes for the Bill as introduced in the Lords pointed out that this provision would require a Sewel motion in the Scottish Parliament:

> 27. At Introduction this Bill contains provisions that trigger the Sewel Convention. The provisions relate to clause 49 which extends the permissive detention power in section 2 of the UKBA 2007 to designated immigration officers in Scotland. The provision will enable an immigration officer designated under section 1 of the UKBA 2007 to detain, at a port in Scotland, an individual whom the immigration officer thinks is subject to a warrant for arrest. The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. If there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

The clause was the subject of a legislative consent motion debated by the Scottish Parliament on 19 March 2009 and passed by 118 votes to 2.[526]

At Committee stage, Lord Hylton opened a debate on whether the clause should stand part of the Bill. He was (he said) greatly concerned about detention in England and Scotland. He suggested that the Government ought to table its own amendment to enshrine the principle that detention should be for the shortest time possible and used only where there was no alternative means to ensure compliance or, better still, set statutory time limits for detention.[527] Lord West of Spithead argued, however, that these issues fell outside the scope of the Bill, and the clause was agreed.[528]

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524 by Gabrielle Garton Grimwood
525 Section 2
526 SP OR 19 March 2009 C 16064-74 and C 16086-8
527 HL Deb 4 March 2009 cc788-9
528 HL Deb 4 March 2009 c790