Refugee Council briefing

REFUGEE COUNCIL

Borders, Citizenship and Immigration Act 2009

August 2009

Summary of key changes introduced by the Act:

Key change	The Refugee Council's concern
Sections 39 and 41 establish a new "path to citizenship" for refugees. This imposes additional periods of temporary leave as probationary citizens before they get a permanent right to stay. Commences: July 2011	Refugees whose need for protection is recognised by the UKBA should immediately be given permanent rights of settlement so they can rebuild their lives. As forced migrants who have no option of returning to their countries of origin they should not be faced with further hurdles such as extra years of 'probationary citizenship' and should not be made to fulfil additional obligations such as doing voluntary work.
Section 55 requires all immigration staff to safeguard and promote the welfare of children who are in the UK. Commences: By Order of the Secretary of State after Consultation on Guidance. Likely to be by the end of 2009.	Whilst we welcome the duty to safeguard and promote the welfare of children, this duty should apply to UKBA staff wherever they are operating not just in the UK as the Act says.
Section 53 provides for some Judicial Review cases that would have been considered by a High Court judge to be transferred to the Upper Tier of the Tribunal Service. Commences: By Order – likely to be early in 2010	The Refugee Council regards Judicial Review in the High Court as an essential safeguard, which should be retained for all immigration cases.
Section 25 changes the definition of the places where detainees can be held short term and allows some to be held there for unspecified periods. Commences: 21st July 2009	The Refugee Council is concerned that this new definition allows for immigration detainees to be held in facilities where they are with people held on criminal matters.

British Refugee Council, (commonly called the Refugee Council) is a company limited by guarantee registered in England and Wales, [No 2727514] and a registered charity, [No 1014576].
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This briefing focuses on the elements of the Borders, Citizenship and Immigration Act (BCI Act)[1] that are of most significance for refugees and asylum seekers.

1. Citizenship (Part 2)

What does the Act say?

Section 39: Acquisition of British citizenship by naturalisation: Application requirements: general

This section specifies the conditions which need to be satisfied for a person to be eligible for naturalisation. It does so by amending the British Nationality Act 1981.

In particular Section 39 (2) says applicants must fulfill the following:

- that the applicant must be in the United Kingdom at the beginning of (a) qualifying period;
- that the number of days on which they were absent from the United Kingdom in each year of the qualifying period does not exceed 90;
- that they had a qualifying immigration status for the whole of the qualifying period;
- that on the date of the application they have probationary citizenship leave;
- that they were not at any time in the qualifying period in the United Kingdom in breach of the immigration laws.

Section 41 The qualifying period:

This section then defines "the qualifying period" as the period immediately before the date of the application for naturalisation. In the case of the main applicant this is eight years (five if you are applying to join a spouse) if you do not meet the "activity condition". This is reduced to six years (three if you are joining a spouse) if you do meet the activity condition.

The activity condition is defined as being that "the Secretary of State is satisfied that the applicant—
(a) has participated otherwise than for payment in prescribed activities; or
(b) is to be treated as having so participated".

The Government has indicated that it is likely that to qualify people will have to do a total of 50 hours of activities over their qualifying period. The type of activity to be approved will be either voluntary work or civic activity on behalf of others or of the environment. The Government indicated how it intends to approach the "Activity condition", working in conjunction with local authorities, in a document called "The Government's Emerging Thinking on Active Citizenship June 2009". This can be viewed on the

[1] The BCI Act received Royal Assent on 21st July 2009 http://www.opsi.gov.uk/acts/acts2009/ukpga_20090011_en_1

Refugee Council website. Further announcements are expected. Qualifying activities are to be specified by order.

Points to note:

Refugees are given five years leave initially and this leave is then reviewed by the UKBA. Under the new law if their refugee status is then confirmed they will no longer be able to apply straight away for permanent settlement in the form of Indefinite Leave to Remain. They will instead be required to apply for Probationary Citizenship Leave for at least a further year at which point they can then apply for naturalisation as a UK citizen as they will have completed the six years qualifying period. If they fail to meet the "activity condition" they will be required to wait for a further two years before they can then apply for Permanent Residence (the new term for ILR).

Thus if people do not wish to become British citizens then they will be required to wait an additional two years before being granted permanent settlement.

The Government does have discretion to allow time spent pending an application for leave to remain in connection with an asylum or human rights claim, to count towards the qualifying period for naturalisation but has said that this would be used in 'exceptional' cases, and went on to define this very broadly:

> *"In the case of refugees, we would usually expect to exercise it where undue delay has occurred in determining an asylum application or where the delay was not attributable to the applicant."*[2]

This means that for most refugees the time spent waiting for a decision on their asylum claim will be additional to the times they will have to wait for permanent settlement once they are granted status.

Refugees will still in addition have to meet the entry requirements for probationary citizenship (i.e. pass examinations in ESOL Entry level 3 and knowledge of life in the UK, or ESOL with citizenship context). If they do not meet these requirements they will not be eligible for citizenship although they would qualify for permanent residence after a total of eight years qualifying period.

When will this change come in?

This will be by order of the Secretary of State and the government have said that they intend to commence this part of the Act in July 2011[3]. Thus people that obtain leave in the meantime will be able to apply for citizenship under the old provisions and not have to wait for a further period of temporary leave.[4] See also the Minister's comments about transitional arrangements in the House of Commons:

> *"We have also made it clear that people who already have indefinite leave to remain when the earned citizenship provisions commence, and people who apply for ILR before the provisions commence and whose application is successful, will be eligible to apply for citizenship under the current system, provided that they apply within two years of commencement"*.[5]

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[2] House of Lords, Report Stage Debate for Borders, Citizenship and Immigration Bill, 25 March 2009, column 717: http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90325-0010.htm Accessed 31/7/09
[3] See Hansard 14th July 2009 Column 232 http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090714/debtext/90714-0016.htm
[4] See section 58(9) Commencement which refers to transitional arrangements.
[5] See Hansard 14th July 2009 Column 233 http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090714/debtext/90714-0016.htm

Our comments and concerns:

Permanent residence upon recognition as a refugee: the Refugee Council believes that a person recognised as a refugee by the UK should receive permanent residence from this date, and not be forced to endure the uncertainty of an initial period of temporary leave. Refugees arriving in the UK through the Gateway Protection Programme[6] receive permanent residence immediately, and we believe that the same should apply to all those who are granted refugee status in the UK. Permanent residence helps a refugee to begin to rebuild their life in the UK and is particularly important in enabling refugees to recover from traumatic experiences. Prior to 2005 this was the policy and we strongly believe we should return to this position.

We are disappointed that a key recommendation of Lord Goldsmith's broad review of citizenship in 2008[7], for the UK Government to review the policy of granting limited leave to remain for five years to refugees, was not considered in the development of the "*Path to Citizenship*" proposals. We believe this policy should be changed and refugees granted Indefinite Leave to remain immediately.

Penalising those who do not wish to become UK citizens: in the scheme outlined in "*The Path to Citizenship*", if refugees who qualify as "active citizens" (i.e. they have evidence of volunteering from referees accepted by UKBA) did not wish to apply for citizenship they would be forced to wait a further two years for permanent settlement (i.e. three years of probationary citizenship with volunteering for settlement; five years without volunteering).

We thus remain concerned that refugees who wish to settle, but not become UK citizens, will be penalised by having to wait a further two years before becoming eligible for permanent settlement in the UK. A refugee's choice to become a UK citizen should be one that is made freely. Although many refugees will want to become citizens, some may wish to maintain their current nationality only. For example, rights to family reunion[8] and access to certain funding streams are only open to people with refugee status not those who have successfully obtained citizenship.

The Refugee Council has expressed strong reservations about the implications for refugees of the routes to citizenship proposals.[9] Our primary concern is that we believe the language of 'earning the right to stay' in the UK and of 'probationary periods' runs counter to the spirit of the UK Government's commitment to protect refugees and fulfil its obligations under the Refugee Convention and the European Convention on Human Rights. Granting long-term, secure protection to refugees who have fled persecution cannot be something that refugees have to earn, and the Government's routes to permanent status should reflect this. The provisions of the BCI Act contradict Article 34 of the 1951 Refugee Convention which requires signatory states to encourage or facilitate naturalisation.[10] UNHCR have also voiced concerns about this.

Inappropriate requirements for 'compulsory' volunteering: we do not think the requirement for refugees to engage in voluntary work within the probationary citizenship period is either necessary or fair. We believe that everyone in the UK should be encouraged and supported to live as active citizens.

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[6] The Gateway Protection Programme is operated by the UK Border Agency in partnership with the United Nations High Commissioner for Refugees (UNHCR), the United Nations' refugee organisation. It offers a legal route for up to 750 refugees to settle in the United Kingdom each year.

[7] See Chapter 7, Sec 55-59 Accessed 31/7/09 http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/docs/citizenship-report-full.pdf

[8] This was confirmed in the Court of Appeal in December 2008 in DL (DRC)&ECO Pretoria and ZN (Afghanistan)&ECO Karachi [2008] EWCA Civ 1420 http://www.bailii.org/ew/cases/EWCA/Civ/2008/1420.html

[9] See "The Refugee Council response to Paths to Citizenship" May 2008 http://www.refugeecouncil.org.uk/policy/responses/2008/citizenship.htm

[10] Article 34 of the 1951 Refugee Convention reads: *"Naturalization: The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings".*

At present, many refugees and asylum seekers contribute actively to life in the UK in a variety of ways. However, we are opposed to the linking of naturalisation and permanent residence to a requirement to volunteer.

There are many different reasons for volunteering, but being required to take part in order not to prolong the passage to citizenship risks undermining the voluntary nature of the activity. Making volunteering such a core component of the process could also be discriminatory, as people with illnesses and disabilities, women with children and single parents may find it difficult to find suitable volunteering opportunities.

No fees for naturalisation of refugees: Generally there are fees payable in order to apply for citizenship. The Refugee Council strongly believes that refugees and others with international protection needs should be exempt from fee charges for naturalisation or permanent residence. This is because people in fear of persecution have no option but to apply for settlement where they are having fled persecution. They should be exempt whether these charges are imposed directly, through the application process, or indirectly as a result of requirements to take the English for Speakers of Other Languages with a Citizenship Context or the Life in the UK test. UKBA has said it plans to publish a Consultation document on the charging of fees in late 2009.

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

During the passage of the Bill through Parliament we recommended that the period of time spent by refugees waiting for their asylum claim to be determined should count towards their qualifying period before becoming citizens or being given permanent residence.

We believe that all periods of temporary leave should count towards any qualifying period.[11]

No penalties for use of false documentation: Clause 39(2)(f) prevents anyone who has been in breach of immigration laws during the qualifying period from applying for citizenship.

Many refugees resort to the use of false documentation to flee persecution. They often have no other option as legal routes may be barred to them. The 1951 Refugee Convention recognises this, Article 31 stating that refugees should not be penalised for the use of false documents.[12]

Despite this provision in the Convention it does happen that people are prosecuted and imprisoned before it has been ascertained whether they have protection needs and hence should come within the protection of Article 31. Some do eventually attain refugee status and their previous conviction, itself inappropriate in view of their later recognition, should not then additionally disqualify them from citizenship or delay their application for permanent residence.

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[11] See Joint Parliamentary Briefing from the British Refugee Council, the Scottish Refugee Council and the Welsh Refugee Council: Borders, Citizenship and Immigration Bill June 2009 http://www.refugeecouncil.org.uk/policy/briefings/2009/revised_bci_briefing.htm

[12] See Refugee Convention 1951 Article 31 which reads: *"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."* http://www.unhcr.org/3b66c2aa10.html

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

What does the Act say?

Section 55: Duty regarding the welfare of children

UKBA staff now have a clear duty to "safeguard and promote the welfare of children who are in the United Kingdom".

They must also have regard to any guidance issued by the Secretary of State.

Points to note:

This measure is welcome and brings UKBA staff into line with other public bodies such as the police and prison services in England and Wales by replicating exactly the wording of Section 11 of the Children Act 2004 where that duty is specified.[13]

The UKBA has consulted informally on the guidance that will be issued connected to the new duty. We have sent our comments in writing and have already attended a consultation event to ensure our views have contributed to the guidance that will be issued to UKBA staff.

When does it come in?

By Order of the Secretary of State, following the finalising of the accompanying Guidance. During the passage of the Bill an assurance was given that this would be within three months of the Act being given Royal Assent, so it is expected in late October or November.

When section 55 comes into force the previous duty outlined in the Code of Practice for keeping children safe from harm will be repealed. This is the duty that was brought in under section 21(1) of the Borders Act 2007.

Comments and concerns

Section 55(1)(a) still refers to "the need to safeguard and promote the welfare of children **who are in the United Kingdom**". With the steady expansion of UK border controls beyond the UK some UKBA staff work outside of the UK and there is no good reason why staff working outside of the UK on UK business should not comply with UK law. The duty should be extended to all children that have contact with UKBA officials and not be confined to those in the UK.

It is also important that UKBA policies and processes are reviewed to ensure that they comply with the new duty.

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[13] Section 11 requires specified bodies to have regard to the need to safeguard and promote the welfare of children when they are carrying out their particular functions.

3. Judicial review and Fresh Claim applications (Part 4)

What does the Act say?

Section 53: Transfer of certain immigration Judicial Review applications

Judicial reviews: In a Consultation in 2008 the Government proposed transferring all immigration Judicial Review (JR) applications from the High Court to the Upper Tier of the Tribunal Service once the Asylum and Immigration Tribunal is transferred into that service early in 2010. The Refugee Council expressed strong concerns at the time, fearing that JRs in future would not receive the same level of independent scrutiny as they would from a High Court Judge. Following opposition in the House of Lords the Government accepted a compromise (in Section 53) that, for the moment, only in JR cases where a fresh claim based on further submissions is being made (and refused by UKBA) will such cases be transferred to the Upper Tier of the Tribunal service. Other immigration cases of JR, relating for example to detention or removal, will remain with the High Court.

When will in come in?

By Order of the Secretary of State once the Tribunal has assumed responsibility for immigration appeals as a whole – likely to be early in 2010.

Our comments and concerns:

The Government had originally proposed to provide for the transfer of all judicial reviews to the Upper Tier of the Tribunal. These provisions represent an improvement on that original proposal. However the Refugee Council remains opposed to the transfer of Judicial Reviews to the Tribunal without the guarantee of the presence of a High Court judge to ensure an adequate level of scrutiny.

The proposal to allow the transfer of all immigration Judicial Review cases to the new Tribunal, previously prohibited, was part of a UKBA consultation on immigration appeals in August 2008. [14] A joint response by the Refugee Council and the Refugee Legal Centre, which outlines the concerns that we have about this, is available on our website.[15] In summary, we are concerned that although the UK government has given assurances that the Upper Tier would be accorded the status of the High Court, it is far from clear what this would mean in practice. It does not appear to mean that a High Court judge will be present at every such case, which we would regard as a minimum requirement.

When announcing this more limited transfer the Minister did make clear that, although other transfers may be contemplated in the future, there must be some opportunity to assess the effectiveness of the new tribunal arrangements first to see if that is appropriate.

An additional point: An earlier amendment proposed in the House of Lords had also ensured that the Lord Chancellor could not exercise his power under section 13(6) of the Tribunals, Courts and Enforcement Act 2007 to restrict asylum and immigration appeals from the Upper Tribunal to the Court of Appeal. This was removed by the government in the House of Commons and so it remains the case the Court of Appeal could be prevented from rectifying an error of law in the decision of the Upper Tribunal unless it "a)...would raise some important point of principle or practice, or (b) that there is

[14] See http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/ Accessed 22/5/09

[15] See http://www.refugeecouncil.org.uk/policy/responses/2008/immigration_appeals.htm

some other compelling reason…”.[16] In our view all errors of law should be corrected – not just those that raise a point of principle.

4. Short term holding facilities (Part 1)

What does the Act say?

Section 25: Short-term holding facilities

“Short-term holding facility” is defined in Section 147 of the Immigration and Asylum Act 1999 as “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.

Section 25 adds the words “or (b) for the detention of—
(i) detained persons for a period of not more than seven days or for such other period as may be prescribed, and
(ii) persons other than detained persons for any period.”

“Detained persons” refers to people detained under Immigration Act powers. The effect of this addition is that people who are detained may be held in any custodial facility alongside people held on criminal matters such as customs and excise offences. Furthermore it also means that those held on criminal matters may be held indefinitely in what are, by definition, short term facilities.

Our comments and concerns:

These facilities are currently used to detain people immediately on arrival at a port, pending consideration of their application for leave to enter the UK, or immediately prior to removal from the UK. They include 'holding rooms' at ports, where people may be detained for no more than 24 hours.

The Refugee Council’s concerns are:

These facilities are not designed to hold people for in excess of seven days (or 24 hours, in holding rooms) and they are not designed to hold a mix of people for varying periods and under varying powers.

The new definition would potentially include a range of places (e.g. prisons, police cells and immigration removal centres) within it because these may hold someone under immigration powers for less than seven days. It would be unclear what would be the relevant rules or guidance in respect of the treatment and welfare of people held in such places.

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[16] See Tribunals, Courts and Enforcement Act 2007 Section 13(6)
http://www.opsi.gov.uk/acts/acts2007/ukpga_20070015_en_2#pt1-ch2-pb3-l1g13 Accessed 31/7/09