



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

Borders, Citizenship and Immigration Bill 2009

House of Commons Second Reading, 2<sup>nd</sup> June 2009

## Summary of key concerns

Our key concerns are:

- Refugees whose need for protection is recognised by the UKBA should immediately be given permanent rights of settlement so they can rebuild their lives. 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.
- Whilst the Refugee Councils 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 Bill currently says.
- Judicial Review in the High Court is an essential safeguard, which should be retained for immigration cases.

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## Introduction

This briefing focuses on the elements of the Borders, Citizenship and Immigration Bill (BCI Bill)<sup>1</sup> that are of most significance for refugees and asylum seekers. The British, Scottish and Welsh Refugee Councils' primary concern is the protection of refugees: those who are in the UK, as well as those who have been prevented from entering.

We believe that refugees should have access to a fair asylum determination procedure and should never be forced to return to situations where they face persecution. We believe that those who are recognised as refugees should enjoy the full benefits of the Refugee Convention, and be granted permanent settlement immediately.

**History of the BCI Bill:** In June 2007, the UK government announced its intention to review all existing immigration legislation which, since 1971, has become increasingly complex. Following consultation on how it should do this, the government published a draft (partial) Immigration and Citizenship Bill in July 2008.<sup>2</sup>

This was accompanied by a broader policy document "The Path to Citizenship" which addressed additional proposed measures that were not included in the Bill as published.<sup>3</sup>

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

One of our major concerns about the UK government's proposed approach to simplifying immigration legislation was that it attempted to do too much in too tight a timescale. We strongly recommended that the government should first consolidate existing legislation, before attempting to change or simplify it. The government, however, has continued with the larger Simplification Project, but its original timetable has slipped. A new large immigration Bill to enact the key proposals in the government's simplification agenda is not now expected until later in 2009.

As a result of the delay, the government claim that there are some measures that they need to introduce as a matter of urgency before a larger bill is introduced. These measures are contained in the BCI Bill, which is thus limited in scope and does not address the main concerns we had about the previous Bill.

We are concerned that by taking a piecemeal approach to implementing the Simplification proposals, the current Bill adds to the existing complexity of asylum and immigration law rather than reduces it, and lessens opportunities for proper parliamentary scrutiny of the whole simplification programme.

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

### 1. Citizenship (Part 2)

These clauses begin to enact some of the proposals outlined in "*The Path to Citizenship*". Clauses 39 – 50 amend the requirements for people applying for naturalisation. These provisions add a second stage

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<sup>1</sup> See: <http://www.ukba.homeoffice.gov.uk/managingborders/borderscitizenshipbill/> Accessed 22/5/09

<sup>2</sup> See <http://www.ukba.homeoffice.gov.uk/managingborders/simplifying> Accessed 22/5/09

<sup>3</sup> See <http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/> Accessed 22/5/09

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

to the path to citizenship: an extra period of one to three years of 'probationary citizenship' which for refugees will be after their five-year review. If refugees satisfy the government's (as yet undefined) 'activity condition' this extra period of time before an application will be considered will be one year. If refugees cannot meet the "activity condition" requirements, this extra period will be three years. Refugees will still have to meet the entry requirements for probationary citizenship (i.e. ESOL Entry level 3 and knowledge of life in the UK, or ESOL with citizenship context) and so actually their time spent in waiting for citizenship could be much longer.

### **Our comments and concerns:**

**Permanent residence upon recognition as a refugee:** the Refugee Councils believe that a person recognised as a refugee by the UK should receive permanent residence from this date, and not be forced to endure the uncertainty of an initial period of temporary leave. Refugees arriving in the UK through the Gateway Protection Programme<sup>5</sup> 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.

We are disappointed that a key recommendation of Lord Goldsmith's broad review of citizenship<sup>6</sup>, 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 also note that the UK government is still to issue clear guidance on how the review process will occur. In particular, it is unclear what further leave to remain will be granted to refugees who have a positive review but do not currently meet the criteria for entry to the probationary citizenship stage.

**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. 3 years of probationary citizenship with volunteering for settlement; 5 years without volunteering). There is no reference to this in this Bill, but we assume this remains the intention. We thus remain concerned that refugees who wish to settle, but not become UK citizens, would be further penalised by having to wait a further two years before becoming eligible for permanent settlement in the UK. 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 and access to certain funding streams are only open to people with refugee status.

The Refugee Councils have expressed strong reservations about the implications for refugees of the routes to citizenship proposals.<sup>7</sup> 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 new provisions of the BCI Bill contradict Article 34 of the UN Convention which requires signatory states to encourage or facilitate naturalisation.<sup>8</sup>

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<sup>5</sup> 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.

<sup>6</sup> See Chapter 7, Sec 59 Accessed 22/5/09

<sup>7</sup> See <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/docs/citizenship-report-full.pdf>

<sup>8</sup> See <http://www.refugeecouncil.org.uk/policy/responses/2008/citizenship.htm>

<sup>8</sup> 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*".

**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. At present, many refugees and asylum seekers contribute actively to life in the UK in a variety of ways. However, we are opposed to the linking of naturalisation and permanent residence to active citizenship. There are many different reasons for volunteering, but being required to take part in order not to prolong the passage to citizenship risks undermining the voluntary nature of the activity. Making volunteering such a core component of the process could also be discriminatory, as people with illnesses and disabilities, women with children and single parents may find it difficult to find suitable volunteering opportunities.

**No fees for naturalisation of refugees:** the Refugee Councils believe that refugees and others with international protection needs should be exempt from fee charges for naturalisation or permanent residence. They should be exempt whether these charges are imposed directly, through the application process, or indirectly as a result of requirements to take the English for Speakers of Other Languages with a Citizenship Context or the Life in the UK test.

**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 and therefore periods of temporary admission do not apply. Given the time it takes for some asylum applications to eventually be resolved, in many cases several years, many refugees will, in practice, wait considerably longer than the minimum of six years before being able to settle permanently.

The government has promised amendments that would give them 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. However they 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."*<sup>9</sup>

We believe that this should be strengthened so that all periods of temporary leave count towards any qualifying period.

**No penalties for use of false documentation:** in this context we also note that Clause 40 (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 and Article 31 of the 1951 Refugee Convention states that refugees should not be penalised as a result. Thus they should not be prevented from applying for citizenship.

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

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<sup>9</sup> 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 26/5/09

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

**We recommend:**

- All refugees and those granted protection under the ECHR should be granted permanent residence at the time that status is granted in order to enable them to rebuild their lives. They should not be required to overcome further hurdles in order to be able to settle permanently.
- Any qualifying period for citizenship or settlement should include periods of temporary admission.
- Refugees should not be penalised for committing immigration offences in terms of eligibility for citizenship.
- Refugees and those granted Humanitarian Protection, Discretionary Leave to Remain or Exceptional Leave to Remain should not be charged for applying for ILR.
- Refugees should not be required to perform voluntary activities in order to speed up their passage to citizenship or permanent permission to stay in the UK.
- Refugees and others with international protection needs should be exempt from fee charges for naturalisation or permanent residence
- Refugees, once granted ILR, should be supported to apply for citizenship outside of the probationary citizenship period.
- Those granted DLR and ELR should be eligible for ILR after a set period of years outside of the probationary citizenship period and should remain eligible for public funds and home student status for fee purposes.
- Those refused asylum but granted DLR, ELR or ILR who wish to apply for citizenship should continue to be eligible for public funds during the probationary citizenship period.
- Refugees should be automatically eligible for Learning and Skills Council funded ESOL to Entry level 3, including ESOL with citizenship context.

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

Clause 32 deals with the technical issue of ensuring that the duty to take steps to ensure children are kept safe from harm afforded to the Border and Immigration Agency (BIA) under section 21 of the UK Borders Act will now apply to staff that are part of the UKBA but were not part of the BIA.<sup>10</sup>

Clause 57 imposes a duty on the Secretary of State to ensure that there are adequate arrangements in place in relation to immigration and nationality functions to safeguard and promote the welfare of children.

**Our comments and concerns:**

This measure is welcome and brings immigration officers into line with other public bodies in England and Wales by replicating exactly the wording of Section 11 of the Children Act 2004.<sup>11</sup>

However, there is the need to ensure that the clause will result in the protection of children as intended. Clarification is needed on the purpose and meaning of the addition of 'children who are in the United Kingdom' in 57 (1) (a), as some UKBA staff work outside of the UK. There is no good reason why staff working outside of the UK on UK business should not comply with UK law.

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<sup>10</sup> The Border and Immigration Agency ceased to exist in April 2008. All of its functions were incorporated into the UK Border Agency.

<sup>11</sup> 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.

Guidance also needs to be cognisant of devolved child protection frameworks in Scotland and Northern Ireland.

### **We recommend**

- That the words 'who are in the United Kingdom' be removed from clause 57 (1) (a).

We welcome assurances given in the House of Lords that:

- The guidance issued under clause 57 will be produced jointly by the UKBA and DCSF and be modelled on the guidance issued under section 11, Children Act 2004 (section 11 guidance). We are pleased to note that the government intends to adopt part one of the section 11 guidance in the guidance issued under clause 57 and that this new guidance will be updated in tandem with the Children Act section 11 guidance.
- Allowing for time to consult on the guidance, the new duty under clause 57 will commence three months after the Bill gets Royal Assent.

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

Clause 55 provides the power to allow the transfer of judicial review applications for fresh claims from the Administrative Court to the Upper Tier of the Tribunal Service, which was established by the Tribunals, Courts and Enforcement Act 2007. The Administrative Court will decide what constitutes a fresh claim.

#### **Our comments and concerns:**

Since 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. However the Refugee Councils remain 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. Judicial review by a High Court judge (in Scotland a Court of Session judge) has frequently proved a crucial safeguard for refugees facing the threat of unlawful detention or removal.

The current clause would also ensure 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<sup>12</sup>. The Refugee Councils support this aspect of the clause without which the Court of Appeal could be prevented from rectifying an error of law in the decision of the Upper Tribunal.

The proposal to allow the transfer of cases to the new Tribunal, currently prohibited for immigration cases, was part of a UKBA consultation on immigration appeals in August 2008.<sup>13</sup> 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.<sup>14</sup> 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.

We are concerned, from a Scottish perspective, that various related on-going debates in Scotland on the future of the tribunals system have not been properly considered prior to this legislation being drafted.

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<sup>12</sup> Clause 55(4)

<sup>13</sup> See

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

Accessed 22/5/09

<sup>14</sup> See [http://www.refugeecouncil.org.uk/policy/responses/2008/immigration\\_appeals.htm](http://www.refugeecouncil.org.uk/policy/responses/2008/immigration_appeals.htm)

In particular, it is important to stress the need to fully respect the recommendations of the Administrative Justice Steering Group under Lord Philip. This included an option to create a new Scottish Tribunals Service to support both GB/UK tribunals within Scotland (including the Asylum and Immigration Tribunal) and Scottish tribunals.

In the chamber of the Scottish Parliament on 19 March 2009, the Scottish Justice Minister, Kenny MacAskill stated:

"The [Scottish] 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."<sup>15</sup>

**We recommend:**

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

## 4. Missed opportunities

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

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

Some refused asylum seekers at the end of their process who cannot be returned home but are complying with reporting requirements are able to obtain very limited help from the UKBA. This support is known as 'Section 4' or 'hard case' support and is in the form of accommodation and weekly vouchers worth £35, which can only be used in certain stores and, on particular essential goods. In many cases, vouchers cannot be used to buy clothes, shoes, nappies, sanitary items, pens, aspirin, paracetamol or to get a haircut. As of September 2008, just over 10,000 asylum seekers were receiving section 4 support. There are many thousands more who receive no support at all.<sup>16</sup>

Despite UKBA policy on the matter, if refused asylum seekers have concerns about their safety, they will not be coerced into leaving the UK by the withdrawal of support, forcing them to subsist on vouchers or denying them access to healthcare. Further, the Home Office's own research has concluded that there is very little evidence that those seeking asylum are deterred by the prospect of harsh treatment in a country of asylum because they have little knowledge of UK asylum procedures before they arrive, nor of entitlements to benefits, nor of how UK policies compare to those of other EU countries.

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

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<sup>15</sup> Debate on the legislative consent memorandum on the Borders, Citizenship and Immigration Bill (LCM(S3) 15.1) <http://www.scottish.parliament.uk/s3/committees/justice/reports-09/jur09-05.htm>

<sup>16</sup> The British Red Cross estimate that at least 26,000 destitute asylum seekers are receiving support from the Red Cross in the UK.

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

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

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

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

**Ensuring the UK's borders are protection sensitive:** The Refugee Councils are concerned that the UK's extra-territorial border controls do not contain adequate protection safeguards for refugees. As a result, refugees who encounter them are blocked from reaching safety and may even be sent back to the country in which they fear persecution. We believe the UK government should address as a priority its legal obligation to ensure the protection of refugees, wherever its officials operate interception measures.<sup>17</sup>

**Guardianship of unaccompanied children:** In order to ensure that children subject to immigration control receive equality of protection with UK citizen children, we ask the government to note that in its report on looked after children in April this year, the Children, Schools and Family Committee supported the idea of appointing guardians for unaccompanied children seeking asylum.<sup>18</sup> This Bill gives the government the opportunity to ensure that its new duty under clause 57 has real meaning for these children, who currently have no one person responsible for ensuring that their best interests are ascertained and therefore considered in decisions affecting them.

## **We recommend**

- That the government uses this Bill to introduce legislation allowing for guardians to be appointed to unaccompanied children subject to immigration control

## **Conclusion**

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

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<sup>17</sup> See Refugee Council's recent report '*Remote Controls: how the UK's border controls are endangering the lives of refugees*' (December 2008)

[http://www.refugeecouncil.org.uk/policy/position/2008/remotecontrols/remote\\_controls.htm](http://www.refugeecouncil.org.uk/policy/position/2008/remotecontrols/remote_controls.htm)

<sup>18</sup> House of Commons Children's, Schools and Families Committee Looked after Children Third report of the session 2008-9 HC 111-I Incorporating HC 442-i to -x, Session 2007-08 Published on 20 April 2009

<http://www.publications.parliament.uk/pa/cm200809/cmselect/cmchilsch/111/11102.htm>

Our key concerns are:

- Refugees whose need for protection is recognised by the UKBA should immediately be given permanent rights of settlement so they can rebuild their lives. They should not be faced with further hurdles such as extra years of 'probationary citizenship' and should not be made to fulfil additional obligations such as doing voluntary work.
- Whilst the Refugee Councils welcome the duty to safeguard and promote the welfare of children, this duty should apply to UKBA staff wherever they are operating.
- Judicial Review in the High Court should be retained for immigration cases.

The Refugee Councils regret that important and urgent issues, such as the destitution facing many asylum seekers at the end of the process and the loss of talent and dignity resulting from restrictions on entitlement to work, have not been addressed in this Bill.

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

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