Draft Immigration and Citizenship Bill

House of Commons Home Affairs Committee

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For further information contact

Eric Metcalfe, Director of Human Rights Policy

email: emetcalfe@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.

2. JUSTICE welcomes the Committee's inquiry into the draft Bill. As a human rights organisation, we have long been concerned with the issues of fundamental rights raised by immigration and asylum. And, as a law reform organisation, we have long been concerned with the increasing complexity of the law governing these areas,[1] the generally poor quality of decision-making by immigration officials, and the progressive trend of government to seek to restrict the appeal rights of immigrants and asylum seekers. Most recently, we have become concerned by statements such as that in the *Governance of Britain* Green Paper last year,[2] which seek to link rights explicitly to British citizenship rather than as something guaranteed to all people governed by British law.

3. As a law reform organisation, we therefore welcome the long overdue simplification and streamlining of immigration and asylum law that the draft Bill aims to achieve. Whether in fact it has achieved this is, however, open to question: Part 3 of the Bill dealing with citizenship seems to us one area where it has actually increased the complexity of the relevant law. More generally, however, we are concerned that the draft Bill has only continued the trend of recent immigration legislation: eroding rights of appeal and diminishing safeguards against arbitrary decision-making, rather than enhancing them. Given the size of the draft Bill, we can do no more than outline our key concerns in this submission.

Part 1: Entry into and stay in the UK

4. Clause 1(1) provides that a British citizen is free to 'enter and leave, and to stay in, the United Kingdom'. Clause 1(2) provides that this is 'subject to any requirements or restrictions imposed by *or by virtue of* this Act or any other enactment'.[3] The words 'by virtue of' indicate that a citizen's right to enter, leave or remain in the UK may be qualified not only by primary legislation but also by secondary legislation. However, given the draft Bill's own extensive reliance on regulation-making powers (see e.g. the immigration rules in clause 21 and the

[1] In this context, we note the draft Bill is the seventh piece of immigration legislation since 1999.

[2] See e.g. para 185: 'The Government believes that a clearer definition of citizenship would give people a better sense of their British identity in a globalised world. British citizenship – *and the rights and responsibilities that accompany it* – needs to be valued and meaningful, not only for recent arrivals looking to become British but also for young British people themselves [emphasis added]'.

[3] Emphasis added.

power to designate officials in clause 24), we question whether any proposed limitations on a citizen's right to enter, leave or remain should be open to qualification in this way.

5. We note that the right to enter and return to one's country is a fundamental right recognised in international and European law.[4] Any restrictions on this right must, among other things, be necessary and proportionate and – above all – 'must not nullify the principle of liberty of movement'.[5] Although we accept that the right to enter and remain may be legitimately regulated, any proposed restrictions should be clearly spelt out in primary legislation by Parliament itself, not left to the generous rule-making powers afforded to various subordinate officials.

6. We also note that the right to enter and return to 'one's own country' extends beyond people who are citizens. The UN Human Rights Committee makes clear that the right:[6]

> is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.

7. Unlike Part 1 of the draft Bill, the 1971 Immigration Act currently in force explicitly does *not* restrict the right to enter and remain to British citizens only – section 1(1) provides simply that any person with the right of abode under the Act 'shall be free to live in and come and go into and from' the UK. By contrast, the provisions for immigration permission for non-nationals under clauses 2 and 4 draw no distinction between individuals who, on the one hand, may have substantial ties to the UK (including those with right of abode under the 1971 Act) and those whom, on the other hand, may be only temporary visitors.

8. In addition, the wide range of restrictions that may be imposed on those with temporary permission under clause 10 (including police reporting requirements and limits on residence and employment) are in many cases likely to engage the Convention rights of individuals (including the right to liberty under Article 5 and the right to respect for private and family life under Article 8). Moreover, the extremely broad discretion to impose conditions under clause 10 does not require any need or justification to be shown, e.g. the reasonable belief of an

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[4] See e.g. Article 12(2) of the International Covenant on Civil and Political Rights and Article 2(2) of Protocol 4 of the European Convention on Human Rights: 'Everyone shall be free to leave any country, including his own'. See also Article 45(1) of the EU Charter of Fundamental Rights: 'Every citizen of the Union has the right to move and reside freely within the territory of the Member States'.

[5] UN Human Rights Committee, General Comment 27, Freedom of movement (Art.12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999), para 2.

[6] Ibid, para 20.

immigration officer that a residence requirement is necessary in any particular case. Of additional concern are the severe penalties for breach of conditions (that may include something as minor as failure to notify a change of address).[7]

9. A separate ground of potential concern is the provision relating to 'designated controlled areas' under clauses 22 and 23. In particular, clause 23 provides that, where a designated control area exists at a port, a person 'is not to be treated as entering the UK … until [they] leave the designated control area'. We think it important to reiterate that *arrival* in the UK, as distinct from entry into the UK, is the relevant trigger to the UK's obligations against *refoulement* under the Refugee Convention, the Torture Convention and the ECHR in this context. Notwithstanding the provisions on entry, the use of designated control areas must not be allowed to interfere with an individual's ability to claim asylum in the UK, nor their ability to prevent removal that would breach their rights under the European Convention.

Part 2: Powers of examination

10. Clause 25 provides immigration officials with a strikingly broad power: a power to examine any person who has arrived in[8] *or has already entered*[9] the UK. This power may be exercised to determine the person's identity and immigration status, including whether they are a citizen or not.[10] There are no geographical or time limits on the exercise of the examination power,[11] and it entails not only a power to require that person to submit to a medical examination,[12] but also a power to detain that person pending the completion of the examination, until 'all relevant matters have been determined'.[13] In other words, clause 25 empowers immigration officials to stop any person in the UK at any time and lawfully detain them for as long as they deem necessary to determine any of the matters set out in clause 25(2). In addition, refusal to comply with an examination or to submit to a medical examination constitutes a criminal offence.[14]

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[7] See e.g. clause 37(4)(d) which makes an individual in breach of conditions of their temporary permission liable to expulsion without right of appeal, or clause 99(1) which makes 'knowing' breach of such a condition a criminal offence. The requirement to notify a change of address could be imposed under clause 10(1).

[8] Clause 25(1)(a).

[9] Clause 25(1)(b).

[10] Clause 25(2)(a).

[11] By contrast, the power to examine persons *leaving* the UK under clause 26 is only exercisable at a port, international railway station or 'other place' which the Secretary of State believes is being used as an embarkation point from the UK (clause 26(1)(b)).

[12] Clauses 25(3) and 27(1)(b).

[13] Clause 53(1)(b).

[14] Clauses 101 and 102 respectively.

11. It is unnecessary to spell out the numerous ways that placing such a broad and unfettered power in the hands of immigration officials without safeguards would breach fundamental rights. It is plain that this power cannot sensibly be justified, and we look forward to major modifications to this Part in due course.

Part 3: Citizenship

12. Part 3 is intended to implement the government's proposals first set out in its *Path to Citizenship* consultation,[15] as well as those in Lord Goldsmith's review of citizenship.[16] We have elsewhere questioned the government's proposal to link citizenship with the enjoyment of rights.[17] Here we draw attention to the manner in which Part 3, far from simplifying the current law relating to British nationality, unnecessarily and unduly complicates it. No law which contains mathematical formulas such as those in clause 34 can rightly be described as simplifying anything.

13. We are similarly concerned at the proposed measure in clause 34(6) that seeks to extend qualifying periods for probationary citizenship, not simply for those convicted of criminal offences but for persons 'connected' with them – in essence, punishing persons not for their own actions, but for those they are related to.

14. We also draw attention to the language requirements for probationary citizenship, specifically 'sufficient knowledge of the English Welsh, or Scottish Gaelic language' in clauses 32 and 33. We understand that the purpose of this is to ensure that UK citizens are able to communicate in at least one national language. However, we question the rationale for requiring knowledge of a national language as a prerequisite for citizenship. We note for example that there are approximately 58,652 Scots Gaelic speakers in the UK,[18] as compared to approximately one million people in the UK who speak Urdu.[19] If the purpose of a language requirement is to ensure that new citizens are able to communicate with at least some of their fellow citizens, then it is unclear why preference should be given to a language spoken by 0.01% of its population over one spoken by 0.5%. If, on the other hand, the government is willing to recognise the value of linguistic diversity in the UK and, indeed, tie this to its citizenship agenda, then – again – the question becomes why the government should be keen to welcome Scots Gaelic speakers as citizens and not those who speak other languages. If,

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[15] Border and Immigration Agency, *Path to Citizenship: Next Steps in reforming the immigration system* (February 2008).

[16] *Citizenship: Our Common Bond* (October 2007).

[17] See e.g. Metcalfe, 'Human rights v the rights of British citizens', 5 *JUSTICE Journal* (2008).

[18] *UK Census 2001*, National Statistics Office.

[19] *A Guide to Urdu* (BBC Languages).

however, the government's goal is for everyone to speak English, then it is unclear why exceptions should be made for some minority languages but not others.

Part 4: Expulsion orders and removal from the UK

15. Expulsion orders under Part 4 combine two distinct and long-standing legal regimes – deportation and immigration removal – into a single legal scheme. The traditional 'non-conducive' grounds for deportation under section 3 of the 1971 Act, for instance, are now one of several of grounds in clause 37(4) upon which the Secretary of State has the discretion to make an expulsion order against a non-national.[20] Other grounds include being in the UK without permission (clause 37(4)(c)), breaching a condition of temporary permission (clause 37(4)(d)), and lack of transit permission (clause 37(4)(b)).

16. One of the key distinctions between deportation and immigration removal is that persons who are deported are unable to return to the UK while their deportation order remains in effect, whereas persons removed on immigration grounds are free to seek re-entry into the UK (at which point their previous removal can be taken into account in the decision to allow entry). By contrast, clause 37(1)(b) provides that an expulsion order remains in effect following removal, prohibiting re-entry until the order is cancelled or expires.[21] Moreover, clause 37(6) allows expulsion orders to be made for an unlimited period. In other words, Part 4 imposes mandatory and potentially indefinite bans on re-entry for *all* persons removed from the UK, not simply those deported for reasons of criminality, for example. We question why it should be necessary to impose automatic bans of this kind, without any evidence to show that the existing regime governing immigration removal and re-entry has been unsatisfactory.

17. A second consequence of the new scheme for expulsion orders is to collapse the long-established distinction between a decision to remove on the one hand, and the setting of removal directions on the other. Currently, it is the decision to remove which is typically the main subject of legal challenge, while the removal directions may be set much later and given at much shorter notice (currently 72 hours prior to removal)[22] and subject only to the more limited grounds of judicial review.[23] By contrast, the making of an expulsion order will be effective immediately upon notice to the individual concerned,[24] and removal directions are not

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[20] C.f. clause 37(4)(h) 'the Secretary of State thinks that the person's expulsion from the UK would be conducive to the public good'.

[21] Clause 37(7).

[22] See Border and Immigration Agency, Operational Enforcement Manual, chapter 44.

[23] C.f. Part 54 of the Civil Procedure Rules, para 18, dealing with judicial review of removal directions.

[24] Clauses 37(8) and 44.

required to be served on them.[25] The only bar on removal is clause 48, preventing removal where the individual has an in-country right of appeal. However, clause 171(3) excludes any appeal for persons alleged to have breached a condition of their immigration permission, and family members of such persons.[26] Given that this is likely to be a common ground for expulsion, it is striking that appeal rights have been stripped away in such a fashion.

18. Clause 37(2)(b) removes the discretion of the Secretary of State to make an expulsion order where the individual is a 'foreign criminal' (as defined by clause 51). This essentially restates the automatic deportation provisions of the UK Borders Act 2007 and accordingly shares its flaws. In our view, the mandatory expulsion of persons for criminality without any kind of assessment of individual circumstances (including whether there is any risk of future offending) smacks of arbitrariness, undermines the importance of rehabilitation in general, and are wholly unnecessary. The arbitrary nature of the mandatory scheme for foreign criminals is compounded by the lack of an in-country right of appeal,[27] and the provisions for the deportation of family members.[28] We also take the view that such provisions are incompatible with the provisions of Article 1(F) of the Refugee Convention, which disapplies the Convention only in cases of 'serious' crimes – a mere 12 months imprisonment in clause 51(2) is in our view well below this threshold.

19. The limitations on making expulsion orders in clause 38 by and large restate UK's obligations under the Refugee Convention, the ECHR and EU law. However, we see no reason for the formulation 'the Secretary of State thinks that' in clause 38(1) – in our view, this introduces a wholly unnecessary degree of subjectivity into what are well-established public law principles governing ministerial decisions. We also note that there is no provision to prevent expulsion in contravention of the UK's obligations under the Council of Europe Convention on Trafficking in Human Beings (all the more striking because such an exception *is* provided in relation to mandatory expulsion orders against foreign criminals in clause 39(5)).

Part 5: Powers to detain and immigration bail

20. As noted above, the power to detain under clause 53 extends to any person subject to the power of examination under clause 25, which is to say: everyone in the UK. As before, we consider that this provision needs substantial amendment in order to be compatible with fundamental rights.

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[25] Clause 44.

[26] There is also no in-country right of appeal for exclusion orders against those designated as 'foreign criminals' – see para 18 below.

[27] Clause 171(3)(b).

[28] See e.g. clause 51.

21. Clause 55 governs detention of persons pending their expulsion. Clause 55(1) grants the Secretary of State the power to detain where she 'thinks' the person is someone liable to be subject to an expulsion order. As with clause 38(1) discussed above, we consider that the formulation 'thinks' is an inappropriate formulation – at the very least, the power to detain an individual should only be exercised where the Secretary of State not only has reasonable grounds to believe they are liable to expulsion, but also where the Secretary of State reasonably believes that detention is *necessary* in order to effect that expulsion. We are also concerned at the provision for open-ended detention, without time limits. We are particularly surprised at the provision in clause 55(4), which creates a presumption in favour of detention of foreign criminals subject to expulsion 'unless, in the circumstances, the Secretary of State thinks it inappropriate'. Such a provision seems to us fundamentally at odds with the common law presumption of liberty and the right to liberty under Article 5 ECHR.

22. We are also surprised at the proposals in clause 62(2)(b) and (c) limiting the availability of immigration bail at the behest of the Secretary of State. Clause 62(2)(b) prevents the Asylum and Immigration Tribunal ('AIT') from granting bail to any person detained on arrival (including a UK citizen) until they have spent at least a week in the UK. Clause 62(2)(c) prevents the AIT from granting bail to any person whose removal is imminent and who has no pending appeal, without the consent of the Secretary of State. It is well-established that the right to liberty under Article 5 includes under Article 5(4) the right to review of one's detention by an independent and impartial tribunal 'by which the lawfulness of his detention shall be decided speedily … and his release ordered if the detention is not lawful'. It is plain to us that a tribunal whose power to grant immigration bail is variously time-limited and subject to the consent of a government minister is not capable of meeting the requirements of Article 5(4) in such a case.

23. We are similarly concerned at the power in clause 68(1), where the AIT has granted a person immigration bail under certain conditions, for the Secretary of State to impose additional conditions or vary those the AIT has already imposed. This seems to us an unwarranted and improper intrusion by the executive into the independence of the AIT in carrying out its judicial functions.

Part 9: Illegal workers

24. Part 9 of the draft Bill restates with little amendment the existing provisions relating to illegal workers in sections 15 to 26 of the 2006 Immigration Asylum and Nationality Act. As with the 2006 Act, we note that there is already no lack of criminal offences in this area.[29] Secondly,

[29] See e.g. section 8(1) of the Asylum and Immigration Act 1996 which makes it illegal for an employer to hire a person subject to immigration control where that person lacks permission to work in the UK. Similarly, section 9 of the National Insurance

the focus on illegal workers seems to us a disproportionate measure, given that those subject to immigration control are already subject to strict conditions governing their freedom to work (indeed, asylum seekers in the UK are prohibited from working altogether save with the special permission of the Secretary of State).[30] We note the right to work is a basic human right and one that the UK government has agreed to uphold and protect as part of its international obligations.[31] Rather than reiterate the provisions of the 2006 Act, Parliament should focus on enhancing the right of all to participate in paid employment, including lifting the bar on asylum seekers from working and providing further protection for those workers subject to immigration control.[32]

Part 10: Appeals

25. We note that the UK Border Agency has recently commenced a consultation on the immigration appeals system,[33] one that includes the long-standing proposal to roll the AIT into the common tribunal framework. We do not propose to comment on that proposal here, other than to note that it is liable to highlight many of the incongruities of the immigration and asylum appeals process and the general erosion of appeal rights as compared with other areas of administrative law. In any event, if that proposal is implemented, Part 10 is likely to undergo substantial revision.

26. As before, we note our concern about the effects of expulsion orders on the current appeal arrangements, including the loss of notice concerning the setting of removal directions and the lack of an in-country right of appeal for those whom are alleged to have breached a condition of their temporary permission or classified as 'foreign criminals'.[34] As we have noted on many previous occasions, the quality of decision-making by immigration officials at first instance is in general staggeringly poor and this accordingly strengthens the case for effective independent judicial oversight, rather than – as the draft Bill envisages – weakening it further. We are particularly concerned at the provision in clause 170(2) that would deny a person granted refugee status in the UK an in-country right of appeal if their permission was cancelled while

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Contributions and Statutory Payments Act 2004 creates a scheme of civil penalties for employers who do not make national insurance contributions in respect of their employees.

[30] Section 8 of the Asylum and Immigration Act 1996 and the Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225).

[31] See e.g. Article 23(1) of the Universal Declaration of Human Rights 1948: 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. See also Article 6 of the International Covenant on Economic Social and Cultural Rights 1966, ratified by the UK on 20 May 1976; Article 15 of the EU Charter on Fundamental Rights.

[32] See e.g. the Gangmasters (Licensing) Act 2004.

[33] *Consultation: Immigration Appeals – Fair Decisions; Faster Justice* (UKBA, 21 August 2008).

[34] See the discussion at para 17 above.

abroad (e.g. on holiday). In our view, such a measure may amount to constructive *refoulement* of a refugee contrary to Article 33(1) of the Refugee Convention. We also reiterate our concern expressed earlier about the denial of an in-country right of appeal to family members of those designated as 'foreign criminals' – whatever the merits or otherwise of the arrangements for those who have committed criminal offences while in the UK, we can see no justification for denying access to justice to individuals simply by virtue of their family ties.

Part 12: Definitions

27. The definition of 'refugee' in clause 205(3) as someone who is 'recognised' as a refugee is at odds with the provisions of the Refugee Convention. Specifically, the definition of refugee under Article 1(2) of the Convention makes no reference to recognition by a receiving state and neither are the UK's obligations under the Convention limited to those who are 'recognised' as such.

28. We also take issue with the definition of 'human rights protection' in clause 205(5), specifically its reference to further 'conditions … as are specified in the Rules'. It is not sufficient that any proposed conditions be 'framed by reference' to the UK's obligations under the European Convention on Human Rights – they must in fact be fully compatible with those obligations and we can see no basis for attaching conditions of any kind to a person's entitlement to protection under this head.

29. Lastly, the proposed limitation of the extraterritorial application of the draft Bill in clause 205(6) is incompatible with both the Refugee Convention and Article 1 of the ECHR. In respect of the Refugee Convention, it has never been held that the scope of a country's obligations are limited to its territory and, in respect of the ECHR, it is clear from decisions such as *R (B and others) v Secretary of State for Foreign and Commonwealth Affairs*[35] and *Al Skeini and others v Secretary of State for Defence*[36] that the UK's obligations under the Convention are not restricted to the territory of the UK. The ability of a person to make a protection application under the draft Bill should there match the UK's own jurisdiction and control, rather than its territory.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
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[35] [2004] EWCA Civ 1344 at para 79: ' the Human Rights Act 1998 requires public authorities of the United Kingdom to secure those Convention rights defined in section 1 of the Act within the jurisdiction of the United Kingdom as that jurisdiction has been identified by the Strasbourg Court'.

[36] [2007] UKHL 26 per Lord Brown: 'Parliament intended the [Human Rights] Act to have the same extra-territorial effect as the Convention'.