Briefing Paper 8.28



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DRAFT (PARTIAL) IMMIGRATION AND CITIZENSHIP BILL

As with other briefing papers on the Migration Watch website, this paper is not meant to be legally authoritative, but simply to be informative.

i The Bill is a draft published on 14 July 2008 to facilitate consultation. Some parts of it are still missing. The government's intention is that a Bill be tabled in Parliament in the autumn of 2008. The draft Bill is the next stage in a process initiated by the Border and Immigration Agency (now the UK Border Agency) in June 2007 when it issued a consultative paper "Simplifying Immigration Law". The emphasis in that paper was on simplification rather than consolidation (as explained later) and on the introduction of the points based system for the issue of work permits.

ii Consolidation of statute law is a well tried process of tidying up areas of the law which have become increasingly complicated by the passage of successive Acts of Parliament. The object is to bring together into a single Act the content of a number of existing Acts on the same subject. As far as practicable the words of the existing Acts are not changed but the various sections are reenacted in a logical sequence so that the law is made more readily accessible. All the sections on a particular subject are brought together into the same part of the consolidation Act instead of having to be traced through a succession of Acts, each amending previous Acts. A special parliamentary procedure applies to the passage of consolidation Acts. The parliamentary committees which normally debate a Bill clause by clause in detail are restricted to satisfying themselves that each clause is simply repeating in the same words as far as possible the provisions of an existing Act. No debate is allowed on the substance of the clause and no amendments are permitted. The existing statutory provisions are to be reenacted "warts and all" as the saying goes. Tax law ia the best illustration of how this works. Every year the Chancellor's budget is given statutory form in the Finance Act for that year, which invariably substantially amends existing tax law, with the result that the law becomes more complex and less readily accessible. Every few years a new Income and Corporation Taxes Act is passed so as to tidy up the law so that all pertinent sections of previous Acs are brought together and the previous sections are repealed.

iii Consolidation would be an appropriate treatment for asylum and immigration statute law, which has had a great deal of parliamentary attention in recent years and is now contained in the following Acts of Parliament:

Immigration Act 1971
Immigration Act 1988
Asylum and Immigration Appeals Act 1993
Asylum and Immigration Act 1996
Special Immigration Appeals Commission Act 1997
Immigration and Asylum Act 1999
Nationality, Immigration and Asylum Act 2002
Asylum and Immigration (Treatment of Claimants etc.) Act 2004
Immigration, Asylum and Nationality Act 2006
UK Borders Act 2007

However, the government's proclaimed intention is not to resort to consolidation but to start afresh and rewrite completely all the law on the subject in what is claimed to be a simplified and more readily understandable form. This is an ambitious project which will mean that if the Bill is tabled in Parliament in the next session, it will take up a great deal of parliamentary time and every clause will be open to being contested and amended.

Iv The draft is ostensibly complete in itself, but there are some parts not yet drafted, dealing with powers of arrest, entry and search, data sharing, biometrics, asylum support and access to public funds. Another part still to be drafted relates to the powers of appeal against or review of decisions of the Asylum and Immigration Tribunal. Another consultation paper on the subject of immigration appeals and possible ways of reforming the system has recently been published by the UK Border Agency. We are in process of studying this and expect to be submitting comments on it. I am not attempting in this paper to summarise all the provisions of the Bill, still less to compare those provisions with the corresponding provisions in the existing law, but aim to draw attention to the more significant changes and to comment where appropriate on parts which could be improved. Migration Watch has parliamentary contacts and we will where we think it appropriate seek to make our views known to MPs. The Home Affairs Committee of the House of Commons has already announced that it intends to take oral evidence on the draft Bill in the autumn. Following is a copy of written submissions we have made to the Home Affairs Committee and to the UK Border Agency.

Submissions to the Home Affairs Committee of the House of Commons by Migration Watch

Summary of Recommendations

(i) Need for schedule of derivations and destinations – paragraph 3.
(ii) Balanced migration – Bill should include power of Secretary of State to limit numbers in particular categories of permitted immigrants– paragraph 4.
(iii) No justification for powers to make orders conferred by Clause 8, which should be deleted. – paragraph 5,
(iv) Power of criminal courts in Clause 193 to overturn Secretary of State's refusal of asylum should be deleted. – paragraph 6.
(v) In Clause 205 "asylum" should be retained and difference between "asylum seeker" and "refugee" should be made clear. – paragraph 8.
(vi) Section 8 of the 2004 Act should be re-enacted – paragraph10..
(vii) The provisions on marriage in sections 24 and 24A of the 1999 Act and sections 19 – 25 of the 2004 Act should be re-enacted – paragraph 11.
(viii) The Bill should provide specifically that asylum and immigration appeals are to be conducted on an inquisitorial rather than adversarial basis – paragraphs 12 and 13.

Detail

2 We welcome a draft Bill which tidies up and brings together in one Act the complex body of law which has been developed in recent years. We do however have some concerns as to the way it will work in practice. It means among other things a complete change in well established terminology. Instead of leave to enter, limited and indefinite leave to remain and entry clearance we will have *immigration permission* which may be *permanent* or *temporary.* Instead of deportation or removal we shall have *expulsion orders.* Although the rights, remedies and obligations will be substantially unchanged they will be cast in unfamiliar form and language. This means that civil servants, legal practitioners, immigration judges and others concerned in the administration of the law will have to absorb and become accustomed to a whole new vocabulary. It is common when complex new Acts are brought into force that this is done in stages, but in the interests of avoiding the complications which this process entails, the government may well feel that in the interests of the tidiness and updating which is the core objective of the draft Bill, the Act should be brought into force as a whole on the same day. This will be a major challenge to all those responsible for administering the Act.

3 We compliment the draftsman on producing a user-friendly document. However, as the Bill is intended to be a complete restatement of the law on immigration we would be grateful if the Committee could use its influence with the Home Office to ensure the provision of a further schedule which would be normal in a consolidation bill and a great help to users. This is a schedule of derivations and destinations i.e. showing (1) where provisions from repealed Acts are repeated in the draft Bill and (2) against each clause in the draft Bill, the provisions in the Acts to be repealed to which its contents correspond.

4 Migration Watch has been critical of the failure of the Points Based System to place any limit on the number of immigrants granted visas for the purpose of employment. Our proposal, therefore, is that the necessary powers to impose limits on the numbers of those granted particular types of visa should be conferred on the Secretary of State after consultation with concerned parties and should be exercisable by statutory instrument, subject to parliamentary approval, in accordance with Clause 203(1) of the draft Bill.

5 We have some concerns about Clause 8 of the draft Bill, which provides that the Secretary of State "may by order grant immigration permission to such categories of persons as are specified in the order". Clause 8(2) gives examples of such categories, e.g. crews of ships, trains or aircraft, members of diplomatic missions etc., but the list is not exhaustive. Existing legislation does not contain any corresponding power. Hitherto provision for new categories of persons given entry clearance has been made by amendments to the Immigration Rules, which in addition to the major categories of student, spouse etc. also cover less obvious groups such as ministers of religion or airline ground staff. Clause 202 states that orders must be made by statutory instrument and provision is made in Clause 203 for parliamentary scrutiny. However, we do not see any justification for this new power and consider that all cases should continue to be dealt with under the Immigration Rules.

Asylum etc.

6 We have concerns also about Clause 193 of the draft Bill. It deals with cases where a person has been charged with one of the offences listed in Clause 193(1) and relies on the refugee defence afforded by the Clause. Subclause (6) states that if the Secretary of State has refused to grant *refugee permission* (asylum) that person is not to be taken as a refugee and therefore will not be able to use that defence "unless sufficient evidence is adduced to raise the issue as to whether [that person] is a refugee and the contrary is not proved beyond a reasonable doubt. The effect of this is to empower Circuit and District Judges hearing such cases to allow appeals against the refusal. Judges hearing criminal cases and lay members of juries in the Crown Court do not have the expertise or training required to second guess the conclusions of trained case workers in the UK Border Agency as to eligibility of applicants for asylum. If there is any question about the correctness of the Secretary of State's refusal, that should go to the Asylum and Immigration Tribunal as an appeal in the usual way. We note that the subclause does not extend to an unsuccessful appeal against refusal, nor should it. We suggest that subclause (6) should be deleted. If it is felt that anything else is needed in its place, the subclause should state unequivocally that:

(i) if there has been no appeal against the Secretary of State's refusal, that refusal should be treated as conclusive, and
(ii) if there has been an appeal and the appeal has been dismissed, the decision of the Tribunal should be treated as conclusive.

7 Clause 193 gives rise to problems with nomenclature as it defines "refugee" as having the same meaning as in the 1951 Convention. The problem with the Convention is that it uses the word "refugee" as meaning in modern parlance either an asylum seeker or a person who is now recognised as a refugee within the meaning of the Convention after his application for asylum or appeal against refusal of asylum has been successful. From a practical point of view it is important to differentiate between the two. In much of the literature on the subject of asylum the two expressions are frequently confused with the result that asylum seekers are assumed to be persons genuinely fleeing persecution in their countries of origin, whereas the truth is that less than 20% of asylum seekers are granted asylum while a further 10% are found not to be fleeing persecution but nevertheless to be in need of humanitarian protection. As an illustration of the confusion we quote a 72 page publication in 2005 by the Church of England entitled "A place of refuge". This publication was supposed to be a source of guidance on the subject of asylum seekers and refugees and began by carefully distinguishing between them. Unfortunately in the body of the work the distinction was forgotten and statements were made such as "the asylum seeker stands to lose his or her life". More recently the self-styled Independent Asylum Commission in its published material seems to equate all asylum seekers with refugees fleeing persecution.

8 Further scope for confusion between "refugee" and "asylum seeker" arises in draft Clause 205. This introduces for the first time the expression *protection application* which includes applications for asylum, or in the parlance introduced by the draft Bill *refugee permission.* According to subclause (2)(a) any such application is to be made on the basis that the applicant is a refugee, defined by subclause (3) a person "recognised as a refugee for the purposes of the Refugee Convention". But a person applying for asylum cannot be a refugee as so defined before his application has been considered. The definition is wholly illogical. If the clause is to be retained in its present form, subclause (2)(a) should read "P is an asylum seeker" and subclause (3) should be revised as follows:

> P is an asylum seeker if P claims protection under the Refugee Convention on the grounds that removing P from, or requiring P to leave, the United Kingdom would contravene the United Kingdom's obligations under that Convention

9 We also have concerns about the inclusion of references to humanitarian protection in Clause 205. We are currently seeking to have discussions with the Home Office on this subject and may well wish to make further submissions to the Committee on this subject before the deadline of 17 September 2008.

10 Credibility is a major problem in dealing with asylum and human rights applications and appeals. In recognition of the problem and the need for comprehensive guidance to decision takers, section 8 of the Asylum and Immigration (Treatment of claims, etc.) Act 2004 sets out a code of whose provisions decision takers must take account in assessing the credibility of claimants' evidence. In general, any behaviour by the applicant/appellant which is designed to conceal information, to mislead or to obstruct or delay the handling or disposal of a claim or appeal is to be treated as damaging the applicant's/appellant's credibility. We note with concern that none of the Clauses in the draft Bill re-enacts section 8. We regard it as most important that it should be re-enacted.

11 Another set of provisions which are in existing legislation but not in the draft Bill are the provisions on marriage in sections 24 and 24A of the 1999 Act and sections 19 – 25 of the 2004 Act. These provisions impose a special regime over prospective marriages in the UK in which one of the parties is subject to immigration control. Any such marriage requires the special permission of the Secretary of State. These provisions were introduced to counter the growing problem of sham marriages contracted for the purpose of obtaining leave to enter the United Kingdom. The problem remains and similar provisions should be incorporated in the draft Bill. The sections referred to have recently been considered by the House of Lords in the case of *Baiai* on the issue of their possible incompatibility with Article 12 of the European Convention on Human Rights. In that case their Lordships ruled as a disproportionate interference with the right to marry an instruction from IND (now the UK Border Agency) to immigration officers, stating that permission to marry should be denied to (i) all illegal immigrants, (ii) anyone whose grant of leave was no more than 6 months or (iii) who did not have at least 3 months leave remaining at the time of making the application for permission. The instruction had been issued without parliamentary sanction. However, their Lordships otherwise expressly confirmed that the sections referred to, subject to one exception, were valid and compatible with Article 12. The exception arose from an earlier case in which it had been held that the exclusion of marriages solemnised by priests of the Church of England as opposed by registrars was unlawful discrimination. The Home Secretary has already given an undertaking that the discriminating provisions will be amended so as to remove the incompatibility thus arising.

Appeals

12 We believe strongly that the procedure in hearing asylum and immigration appeals should in future be inquisitorial rather than adversarial and that this should be clarified by an explicit provision in the draft Bill. Up to now the view taken by the higher courts has always been that immigration judges should act in similar fashion to judges in civil litigation and simply hold the ring between the parties. They should refrain from asking questions themselves other than to the extent necessary for clarifying the evidence. They should not on any account "descend into the arena" and start cross examining appellants or other witnesses. There have often been times when the Home Office has been short of Presenting Officers and has not been represented at appeal hearings. The result is that on such occasions there is no one to cross examine the witnesses and in view of the readiness of so many appellants to resort to untruthful evidence, this is a serious deficiency.

13 The object of asylum and immigration appeals is very different from that of civil litigation. In the latter the judge should properly remain aloof and simply pass judgment on the basis of evidence and legal submissions. But these appeals are concerned with the rights and duties of individuals as against the state and the obligations of the United Kingdom towards foreign nationals who wish to visit, settle, claim asylum or whatever and in large measure to enjoy the same state benefits as its citizens. The immigration judge should be concerned to elicit the truth in proceedings before him, having regard to the public interest in every appeal. Migration Watch made a similar statement in proceedings before the House of Commons Constitutional Affairs Committee in 2003 and 2004. (See Second Report of the Session 2003-04, Volume II, page 60.) In our view this Bill is an opportunity to make this significant improvement to the system.

Harry Mitchell QC
Honorary Legal Adviser
Migration Watch UK
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