



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

BRIEFING PAPER ON THE BORDERS, CITIZENSHIP, AND IMMIGRATION BILL FOR THE HOUSE OF LORDS REPORT STAGE, 25 MARCH 2009

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,¹ and advising on whether a Bill is compatible with human rights.² In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies. In accordance with its mandate the Commission has also recently delivered advice to government on the content of a Bill of Rights for Northern Ireland.³
2. The Commission's two main concerns regarding the present Bill are:
 - implications of ending the Common Travel Area as a passport free zone, specifically the risk of racial discrimination emanating from mobile patrols and actual or *de facto* document requirements on the land border; and
 - the rationale and implications of reforms to naturalising as a British Citizen in relation to 'earning' rights and longer periods without social protection.

This submission will also touch on the evolving role of the UK Borders Agency (UKBA) and its relationship to human rights compliance and policing in Northern Ireland.

¹ Northern Ireland Act 1998, s.69(1).

² *Ibid*, s.69(4).

³ *Ibid*, s.69(7).

The Common Travel Area (clause 48)

3. The Common Travel Area (CTA) between the UK, the Republic of Ireland, the Channel Islands and Isle of Man has existed essentially as a free movement zone since the 1920s.⁴ The CTA is described by government as permitting British and Irish citizens “to move freely between the jurisdictions without the requirement to carry a passport”.⁵ Section 1(3) of the Immigration Act 1971 provides for arrival in the UK from elsewhere in the CTA not to be subject to control and for persons to not usually require leave to enter the UK from elsewhere in the CTA, subject to certain exceptions.
4. Government’s plans, which in legislative terms begin with this partial Bill, involve major reforms to the CTA costed at between £67-76 million over 10 years. The reforms could end the CTA as a passport-free zone introducing routine passport control at CTA ports on air and sea routes. Government will introduce targeted mobile checks along the land border between the Republic of Ireland and Northern Ireland.⁶

Migration control and human rights

5. The Commission recognises the right of the state to regulate migration, in ways that ensure respect for human rights. Clearly, if the mechanism and manner the state chooses to regulate migration engages and interferes with certain human rights the onus is on government to indicate that this interference is necessary in a democratic society, proportionate, in pursuance of a legitimate aim and adequately proscribed by law. This includes rights in the European Convention on Human Rights (ECHR) such as family life (Art 8) and freedom of association (Art 11) which can be read with the prohibition on discrimination (Art 14). There is also an onus, in accordance with Article 5, to ensure detention ensuing from such regulation is not exercised in an arbitrary fashion. Also relevant, are rights in other instruments to which the UK is a party including rights to movement, employment and contact across frontiers.

⁴ The CTA was given full statutory recognition in the UK under the Immigration Act 1971 and Immigration (Control of Entry through the Republic of Ireland) Order 1972 (as amended). The CTA is not a bilateral treaty based commitment but is referenced in the Amsterdam treaty.

⁵ Final Impact Assessment of Common Travel Area Reform (hereafter the CTA Impact Assessment) published with the Bill [Paragraph 1.3 Evidence Base]

⁶ In addition to the CTA Impact Assessment, Governments plans are set out in : *Strengthening the Common Travel: Government Response to the Public Consultation*, Home Office, UKBA, 15 January 2009.

Implications of the present Bill

6. Clause 48(1) of the present Bill would remove the exemption of all CTA journeys from passport control.⁷ Clause 48(2) removes the exemption of CTA ports from control zones, where effectively persons can be deemed to have arrived in, but not entered, the UK.⁸ The present Bill does not amend the situation as regards leave to enter.⁹
7. The Home Office has stated that further legislative changes to the CTA will be considered as part of the immigration simplification programme.¹⁰ The Commission's greatest concerns regarding the CTA reforms relate to the land border operations, where there are numerous crossings and a high volume of journeys, many of which are effectively short and local. The powers the UKBA intends to use on the land border operations remain unspecified and unclear. The UKBA has not ruled out that new powers will be introduced subsequent to this Bill through secondary legislation.¹¹ This would prevent the level of parliamentary scrutiny primary legislation is subjected to.

The land border: Northern Ireland and the Republic of Ireland

8. Government is not re-introducing permanent, fixed checkpoints on the land border but is introducing mobile checks on a 'risk led' basis. The CTA consultation proposals proposed the introduction of "ad hoc immigration checks on vehicles to target non-CTA nationals".¹² The Home Office subsequently stated such checks would be 'intelligence led' on persons both arriving in and leaving Northern Ireland referencing the:

⁷ The following text of Section 1(3) of the Immigration Act 1971 would be removed by the Bill: *Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act...*

⁸ Through amendment of section 11(2) of the Immigration Act 1971.

⁹ The present Bill (in inserting the text in bold) means Section 1(3) would read: **A person who arrives in the United Kingdom on a local journey from any of the Islands or the Republic of Ireland shall not** require leave to enter the United Kingdom on so arriving, except in so far as any of those places is for any purpose excluded from this subsection under the powers conferred by this Act; and in this Act the United Kingdom and those places, or such of them as are not so excluded, are collectively referred to as "the common travel area".

¹⁰ CTA Impact Assessment, para 3.10.

¹¹ Correspondence from UKBA to Commission 4 March 2009

¹² Strengthening the Common Travel Area Consultation paper, UKBA, 24 July 2008, para 2.6.

“...introduction of intelligence-led vehicle checks on an ad hoc basis on the Northern Ireland side of the land border mirroring the activity conducted in the Republic of Ireland.”¹³

9. The Home Office has given indications that there will be no passport control on the land border for CTA nationals:

“There will be no fixed document requirement for the land border for CTA nationals [British and Irish citizens]...
...individuals who are unable to satisfy the UKBA that they are CTA nationals will be subject to investigation in the same manner as in land detections.”¹⁴

10. Despite government stating its intention for CTA passport control to only be introduced on air and sea routes, this is not explicit in the Bill. At present Section 1(3) the Immigration Act 1971 prevents all CTA journeys being subjected to control under the same Act. Clause 46 removes all reference to not subjecting CTA-UK journeys to control. The Bill therefore actually has the effect of removing in its entirety the law which prevents CTA routes being subject to control. Whilst the control arrangements detailed in Schedule 2 of the Immigration Act 1971 refer to and are understood as usually applying to air and sea routes, Government, through Order in Council, can determine otherwise.¹⁵
11. At Committee stage government rejected an amendment which would have clarified that only CTA air and sea journeys could be subjected to passport control and that the journeys over the land border would not be subject to control under the 1971 Act.¹⁶ Government’s stated rationale for rejecting the amendment was that it “...would restrict the power to control persons travelling across the land border.” This government argued would “undermine the purpose of the CTA reforms” prevent “flexibility” and UKBA imposing “effective controls”.¹⁷
12. Despite this, Government, at Committee stage, continued to give an undertaking that they will “not require persons to carry a passport or national identity card”¹⁸ when crossing the land border. Notably the Home Office references that there

¹³ CTA Impact Assessment, Annex B.

¹⁴ Correspondence to the Commission from Lyn Homer, Chief Executive, UKBA, 9 October 2008.

¹⁵ Section 10 Immigration Act 1971 (as amended).

¹⁶ Amendment 108ZA moved by Lord Shutt of Greetland

¹⁷ Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office, Hansard HL 4 Mar 2009: Column 758

¹⁸ Ibid.

will be no 'fixed' document requirement or duty to carry a 'specified' document on the land border do not preclude a duty to carry 'a' document to cross the land border.

Human rights impact: the land border proposals

13. The likely format of enforcement operations will be mobile checks flagging down cars and buses within routes deemed to be of highest 'risk'. Specific intelligence may also be used to target particular vehicles. In this instance, the Commission is concerned that the level of 'intelligence' information used may be as low as a member of the public telephoning the UKBA because he or she 'thinks' he or she has spotted persons who might be immigration offenders.
14. At Committee stage in the House of Lords, the Minister gave the clearest details to date on how such mobile checkpoints will operate. Arguing that passengers will be selected on the basis of "intelligence and risk" he outlined that on the busy main Belfast-Dublin route the UKBA would:

...target the odd bus, minibus or taxi, because our experience has shown that those are much more likely to be a threat.¹⁹

He further detailed that a broader range of vehicles are targeted on quieter roads.
15. Regardless of whether government decides to bring in an actual duty to carry 'a' document when crossing the land border, clearly *all* those stopped under enforcement operations will be expected to 'satisfy' UKBA officers that they are British or Irish citizens through producing passports, other ID documents or otherwise. Non-CTA nationals will also be expected to satisfy UKBA officers through similar means. Even if there is no actual document requirement there would be a *de facto* document requirement.
16. The Home Office argues that its *ad hoc* checks will target non-CTA citizens. The clear question, in the context of ethnic diversity, is how are those policing the land border going to be able to tell who is a British or Irish citizen and who is not? Who, on indicating that they are not carrying any documents (and may have no obligation to do so), will be allowed to proceed and who will be subject to further examination and even arrest and detention until identity is verified? If a

¹⁹ Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office Hansard HL 4 Mar 2009: Column 758

document requirement is introduced which documents will be accepted and from whom? If non-CTA nationals are expected to carry passports/national ID cards and British/Irish citizens 'a' document how will UKBA patrols know who is compelled to carry a passport/national id card? For example, a Northern Ireland driving licence (rightly) does not state nationality; who will it be accepted as proof of CTA nationality from?

17. Any practice of singling out persons visibly from a minority ethnic background is not acceptable. The Commission would be deeply concerned by measures that lead to any form of racial profiling and, therefore, impact on minority ethnic persons, crossing or even just living or working near the land border. The potential outcomes of these circumstances would mean that minority ethnic persons would have to constantly carry identity papers or face frequent questioning regarding their status and, potentially, detention.
18. Racial profiling is not a human rights compliant exercise and the Commission has consistently raised concerns at measures that may directly or indirectly constitute racial profiling. Racial profiling engages Articles 8, 10, 11 and 14 of the ECHR and other international standards, to which the UK is a party, such as Article 12 of the ICCPR.
19. Further, discretionary powers whereby individuals in very similar circumstances meet very different fates could lead to the situation where detention powers are exercised in an arbitrary fashion in contravention of Article 5 of the ECHR.
20. The human rights impact assessment conducted on the CTA proposals indicates that no human rights implications derive from the reforms. This Commission is concerned that the measures are likely to have far reaching human rights implications in Northern Ireland. The equality impact assessment of the proposals deals with issues around racial profiling dismissing concerns by stating as fact:

"Passengers will not be (and are never) targeted on the basis of racial profiling."²⁰
21. The Commission has a body of work in this area including a formal investigation into the present practices of detention in Northern Ireland by the UKBA. The Commission is concerned that there have indeed been circumstances where persons have been singled out on the basis of being visibly from a

²⁰ CTA Impact Assessment, Annex A.

minority ethnic background.

22. Concerns about racial profiling were also raised in a recent media report pertaining to existing UKBA operations in Northern Ireland air and sea ports. A *Belfast Telegraph* report details the recent case of Jamiu Omikunle, a Nigerian student resident in England who had been visiting Belfast to attend a Christening. He was awarded £20,000 for having been unlawfully detained at Belfast International Airport after being stopped by an immigration officer and taken and held in a detention centre in Scotland for nine days. Mr Omikunle is quoted as saying "I was conscious it was only black people who were being stopped. I was very uncomfortable about this." The report referenced a number of other cases.²¹

Experience of land border checks in the Republic of Ireland

23. There have been *ad hoc* immigration checks on the Republic of Ireland's side of the border for some time now, with Immigration Gardaí boarding buses and trains as well as stopping private vehicles. Most persons travelling regularly by rail or bus on routes such as the main Belfast-Dublin route will have witnessed such operations, or been subject to them. There is often a perception that, in these operations, persons have been singled out on the basis of appearance – namely skin colour. In assessing whether such concerns are merely perceptions or have substantive foundation, the Commission is conscious of the concerns of sister organisations in the Republic of Ireland, namely, the Irish Human Rights Commission and the National Consultative Committee on Racism and Interculturalism (NCCRI). In responding in 2008 to the Republic's Immigration, Residence and Protection Bill, both organisations raised general concerns that provisions may lead to increased racial profiling.²² In reference to immigration checks on the land border by immigration Gardaí, the NCCRI is concerned with regard to racial profiling and is encouraging such incidents to be reported as racist incidents. The Commission is, therefore, particularly alarmed at the proposal that land border activity in Northern Ireland will 'mirror' that on the southern side of the land border.²³

²¹ Why some deportations are a black and white issue *Belfast Telegraph* 12/02/2009

²² Irish Human Rights Commission *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008, part III, para 8; National Consultative Committee on Racism and Interculturalism *Submission to the Joint Committee on Justice, Equality, Defence and Women's Rights: Immigration, Residence and Protection Bill 2008*, March 2008, para 4.

²³ CTA Impact Assessment, Annex B.

UKBA Powers: The land border proposals

24. As alluded to earlier in this paper there has been no clear indication as to which powers the UKBA intend to employ in relation to the land border operations. The UKBA are still considering whether to legislate as part of the immigration simplification process to enable checks on vehicles and have not ruled out legislation being brought in through secondary regulation. The UKBA has now given an undertaking that no *new* activity will be conducted on the land border until such powers are in place.²⁴
25. The UKBA had also previously indicated that investigations of persons through land border checks could be conducted with powers presently used in inland operations such as those used on domestic flights into Belfast.²⁵ The UKBA has, however, not been able to specify to the Commission which particular of these existing powers it intends to use in land border operations.
26. Clause 48 would enable CTA routes to be subject to control under the Immigration Act 1971. The Powers of Examination detailed in Schedule 2 of this Act refer to and are understood as usually applying to aircraft and ships and air/sea ports respectively. However as alluded to earlier government, through regulation, can determine otherwise.²⁶ In relation to the land border such a move would contradict the stated objective of not introducing fixed control requirements, albeit that such controls could be selectively implemented.
27. This contradiction would also emerge if government perused the extension of examination powers to trains, and even in-country, without exempting CTA routes. Such powers are among those the Government is considering in general for introduction in the Simplification Bill namely: adding international railway stations to the control arrangements currently set out for air/sea ports; the extension of powers of examination in-country to all persons who have "entered the UK" including the "power to require production a passport etc" (with refusal to submit to such an examination being a criminal offence punishable by a fine or up to six months in

²⁴ E-mail to Commission from UKBA Border and Visa Policy 16 Feb 09/4 Mar 09.

²⁵ Correspondence to the Commission from Lyn Homer, Chief Executive, UKBA, 9 October 2008.

²⁶ Section 10 Immigration Act 1971 (as amended).

prison).²⁷

28. Presently in Northern Ireland, 'international railway stations' would include Newry, Portadown, Lurgan, Lisburn and Belfast Central all of which are routinely served by the Belfast-Dublin Enterprise train service which crosses the land border, as well as being used for journeys within Northern Ireland. If the Government's intention to effectively extend the definition of a port to international rail did not exempt journeys across the land border this could introduce passport control, control areas and E-borders to these stations. None of this is referenced as planned in the present CTA reforms and whilst cross border rail is a land border route, government's plans remain unspecified. However, at the Committee stage debate on the CTA the Minister did indicate intention to gather e-borders data on 100% of passenger and crew movements by air, sea and rail by 2014 for all international journeys into the UK. However they did not make reference to a specific document requirement for the Enterprise service.²⁸
29. Even in the absence of routine control there are, however, a range of other wide discretionary powers vested in immigration officers. This includes provisions relating to removal in section 10 of the Immigration and Asylum Act 1999. Given that detention and examination precede removal these provisions could be stretched to stop and examine persons around the land border. This provision has been previously used in Northern Ireland to detain individuals, many of whom have valid visas. Provisions like these and their use in such a manner represents an extraordinary power, which is entirely inappropriate for use on the land border in these circumstances.
30. The ability to flag down and stop vehicles on the land border and the potential to detain their occupants (outside of standard criminal justice procedures and their safeguards and oversight) are reminiscent of emergency-type powers which could act contrary to the normalisation of security arrangements committed to in the Belfast (Good Friday) Agreement.
31. Genuinely intelligence led operations should apply evidence thresholds and practices concurrent with the norms of a democratic society outside an emergency situation. There

²⁷ See: Draft Partial Citizenship, Immigration and Borders Bill published in June 2008 clauses 22, 23, 25(1)(b)), 26, 28 and 101.

²⁸ Lord West of Spithead, Hansard, HL 4 Mar 2009 : Column 768

are, for example, existing provisions in the Immigration Act 1971 for search and arrest by immigration offences through a warrant granted by a magistrate to an immigration officer when the magistrate is satisfied there are reasonable grounds for suspicion. There is no indication to date that UKBA intends to restrict intelligence led operations to these circumstances.

Air and sea routes

32. Full routine passport controls will be introduced on all air and sea routes between the Republic of Ireland and the UK including Northern Ireland. This will be phased in by 2014 with controls being 'risk based' in the interim. In the absence of indication otherwise, the powers for passport control and potential for checks (and, therefore, the need to carry passports/EEA ID cards on all CTA routes) will commence on enactment.
33. By requiring passports or EEA ID cards from all passengers, the Government has mitigated against the potential for checks to have been operated in a racially discriminatory manner.²⁹ Although there is still a real risk of selective implementation during the transitional phase. There will clearly be a considerable socio-economic impact on CTA nationals who travel between the UK and Ireland and who do not have passports / UK ID cards but will now have to purchase them.³⁰
34. The vast majority of CTA air and sea routes, being between the Republic of Ireland and Great Britain, are hence outside the area of focus of the Northern Ireland Human Rights Commission. The present small number of flights from Northern Ireland airports to the Republic of Ireland will be included, as will a scheduled local ten-minute shuttle ferry journey across Lough Foyle from Magilligan, County Derry/Londonderry to Greencastle, County Donegal.
35. The powers will also enable government to introduce the E-borders scheme on CTA routes.³¹

²⁹ Rather than a broader range of ID documents being potentially accepted from CTA nationals which had been considered during consultation.

³⁰ First adult British passports currently costs £72 and standard 10-year Irish passports cost €80.

³¹ This scheme involves swiping passports/EEA ID cards and collecting other passenger information at air/sea ports (and international trains) which can be kept for up to ten years. The Home Office response to the CTA consultation cited feedback that E-borders requirements meant passport requirements would be

36. According to a media report, the Government had also proposed to introduce passport checks on flights from Belfast to Great Britain but has now dropped this plan.³² Notably however it now appears 'a' document requirement may be brought in through an alternative vehicle – namely extension of Section 14 of the Police and Justice Act 2006 to cover journeys between Northern Ireland and Great Britain. During the debate the Minister stated government rationale for doing this as:

Those routes offer the most suitable screening and intervention opportunities to address vulnerabilities from those crossing the land border between the Republic of Ireland and Northern Ireland...³³

Government has indicated this will be through delegating the document checks to carriers, and would intend to consult separately on this matter in the spring, with the consequent secondary legislation being taken forward in autumn 2009.³⁴

CTA Amendments:

37. A number of Peers oppose Clause 48 standing as part of the Bill. This would prevent CTA routes, including the land border being subject to routine control.
38. However, if parliament decides to peruse controls on CTA air and sea routes, an amendment such as that proposed at Committee stage³⁵ could clarify the situation of the land border. Government has consistently stated there will be no routine control on the land border. Parliament could make this explicit in the present Bill to prevent an interpretation to the contrary or changes by subsequent regulation or modification to other provisions without the scrutiny of primary legislation.

introduced on CTA routes anyhow. In reality and paradoxically E-Borders could not be introduced as intended without first taking the power in the Bill.

³² UK-Irish Travellers to Face Passport Checks *Guardian Online* 19/01/08

³³ Lord West of Spithead, Hansard, 4 Mar 2009 : Column 769

³⁴ Ibid.

³⁵ 108ZA: Clause 46, page 39, line 20, at end insert—

"() In section 1 of the Immigration Act 1971 (c. 77) (general principles: the common travel area) after subsection (2) insert—

"(2A) Arrivals by land from the Republic of Ireland to the United Kingdom shall not be subject to immigration control under this Act.""

39. Further, representations should be made to government to ensure that vehicle and other stops on CTA routes using existing or future powers will be genuinely intelligence led where there is sufficient evidence for the issuing of a warrant.³⁶ Government should also be pressed as to the necessity of routine immigration control on the Foyle estuary.

Necessity, proportionality and the Government's case

40. Government's stated objective is to strengthen and increase the security of the UK CTA borders. No empirical evidence relating to the CTA border is provided as to the necessity of the CTA reforms, the case for which appears to rely on general statements or assumptions. These are set out in the CTA Impact Assessment and can be summarised as pertaining to the general increase in UK passenger numbers leading to increased irregularity along with broader reform elsewhere to the immigration system and the CTA constituting a gap in this.

UKBA role in general policing

41. The two published documents in relation to the Common Travel Area consultation focussed entirely on immigration control matters and did not mention either terrorism or crime.³⁷ The CTA partial impact assessment did make some passing references to the reforms also being aimed at reducing organised crime, which were repeated in the full CTA impact assessment which also contained a reference to terrorism. The Minister speaking at Committee stage in the debate, in addition to referencing immigration control, also emphasised the two latter areas on a number of occasions including the statement:

The point of doing it [the CTA reforms] is to get at the criminals and the terrorists³⁸

It is unclear why, if agendas unconnected with immigration control are part of the CTA reforms, government overlooked mentioning this in the CTA consultation documents. It is also

³⁶ There will be opportunities under the forthcoming Immigration Simplification Bill to more broadly scrutinise the appropriateness of the range of powers granted to immigration (UKBA) officers.

³⁷ Strengthening the Common Travel Area Consultation Document (Home Office 24 July 2008) and Government Response to Consultation (Home Office 15 January 2009)

³⁸ Lord West of Spithead: Hansard HL 4 Mar 2009 : Column 770

unclear how targeting non-CTA nationals in mobile checks could in anyway address issues which involve British and Irish citizens. The Commission has consistently expressed alarm at any discourse that appears to conflate migration and criminality, or migrants and terrorism and would urge government to put greater thought into the way it is attempting to justify the CTA reforms.

42. It is unclear as to the relationship between the present measures, if any, to those recently brought into law under the recent Counter Terrorism Act 2008. The Commission has expressed concerns regarding a number of existing counter terrorism powers. Powers appear to be further extended by giving the UKBA a role in counter terrorism as well as the prevention of cross border crime. In relation to this the Commission has consistently raised concerns at powers that that are properly the role of police officers being delegated to UKBA officers. The Commission has concerns about the increasing use, and introduction into Northern Ireland, of a civilian force engaging in police work currently without the same standards, training and accountability as PSNI officers.
43. Parliamentarians will be aware there is a particular policing context within Northern Ireland including contexts for human rights compliance, and different structures for oversight and accountability.
44. The Commission has in the past raised concerns that powers and actions more appropriately vested in police officers have been taken up by UKBA officers. A case in point is the introduction of PACE arrest powers at ports under sections 1 to 4 of the UK Borders Act 2007, which the present Bill seeks to extend to Scotland.
45. The Commission urges parliamentarians that in scrutinising the evolving powers of UKBA officers, including those listed under Part 1 of the present Bill, that their impact into the particular policing circumstances of Northern Ireland is given due consideration.

'Earned Citizenship' proposals (clauses 37-45)

46. The Commission commented in detail on the Path to Citizenship proposals now being implemented by the present Bill. In essence, the Bill, rather than clarifying or simplifying makes the journey to British Citizenship more complex introducing additional criteria and lengthening time periods.

Much of the detail is neither explicit nor clear on the face of the Bill.

47. The Commission's primary concern with the measures is that generally migrants seeking to settle will be more vulnerable through being obliged to spend a much lengthier period of time than at present without social protection. The absence of social protection, in the form of social security, housing assistance, etc, for longer periods of time is set out as a cash benefit by Government;³⁹ however, the Commission is concerned it will come at a considerable human cost. A range of further restrictions could also be implemented without recourse to primary legislation furthering the potential for marginalisation.
48. At present, settlement (indefinite leave to remain) can be applied for following lawful temporary residence for a stipulated period of time, usually between two to five years. This leads to full access to social protection. The measures being implemented by the Bill introduce the additional phase of 'probationary citizenship', this would extend this time period without social protection by a minimum of one to three years for those seeking to become a British Citizen and three to five years for those seeking to settle long-term as permanent residents rather than British citizens.
49. The Commission does not raise issue with government encouraging migrants to seek British citizenship. However, the Commission would be concerned at any measures that reflect degrees of compulsion to do so. Government did consider a proposal of absolute compulsion which would have required migrants who settled to become British. This was not pursued largely on the ground that migrants from some countries which do not permit dual citizenship would have had to relinquish their other citizenship and this would have interfered with established human rights such as rights to return.⁴⁰
50. While persons will wish to seek to become British citizens, it is important to further recognise there will be other long-term residents who do not. It is a human right to hold an identity and a principle of human rights that no detriment should incur through holding that identity. In the case of Northern Ireland,

³⁹ Impact Assessment of Earned Citizenship Proposals, p 2.

⁴⁰ Set out in the Path to Citizenship Government Response to Consultation, p 9-10. Rights to return are set out for example in the Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) Art 13(2).

rights in relation to identification and acceptance as British or Irish (or both) along with provisions relating to Irish and British citizenship were contained in the Belfast (Good Friday) Agreement.⁴¹ Over 400,000 Irish passports have been issued to Northern Ireland residents over the last ten years, some of whom will also hold British passports or otherwise be regarded under British law as being British citizens.⁴²

51. The Commission is concerned that the present proposals effectively sanction persons who settle but do not seek to become British Citizens. This is done by having to spend, in relation to minimum time periods, three times as long without rights to social protection – an additional minimum of two years. The maximum time period for those seeking settlement but not citizenship is up to five years.⁴³ Further to sanctioning on the basis of chosen route, this measure is *de facto* discriminatory against nationals of countries who do not permit dual citizenship, who will be all but obliged to take the permanent residence, a matter which government has recognised.
52. The Commission is therefore concerned at the additional periods of time migrants seeking settlement will have to spend under restrictions. Our concerns are further compounded by the inequality of the time period between those seeking permanent residence and British Citizenship.
53. The Commission is also conscious of the impact of the measures on persons who may have been settled in the UK for some time as well as, in a transitional period, migrants who arrived to work in the UK in recent years, after potentially leaving jobs or making other significant investments, on the understanding that settlement could be attained under the current time periods.
54. The Bill could be amended to remove both the inequality and the additional time periods without social protection. This submission will now go on to examine the Government's reasoning behind the measures, its rationale and human rights compliance to this regard.

⁴¹ The Agreement recognised "the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments", para 1(vi).

⁴² Irish Government figures indicate that 402,625 passports were issued to Northern Ireland residents between 1998 and 2008, with the annual figure doubling between 2002 and 2007 (source: *Irish News*, 2 July 2008).

⁴³ Impact Assessment, 'Earned Citizenship' proposals, paras 32-39.

“Earning” rights

55. The Commission is deeply concerned at the suggestion that migrants should ‘earn’ rights which are human rights; this insinuates a move away from recognised human rights towards ‘citizen’s rights’. Under the ECHR and a range of international human rights treaties, to which the UK is a party, migrants in fact have the same rights as UK citizens. The only rights that can be the preserve of citizens are matters such as voting (for example, Article 25 of the ICCPR).⁴⁴
56. The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁵ applies to everyone in the state and contains a number of positive duties that relate to ensuring social protection. Article 2 (3) ICESCR contains a concession in relation to non-citizens to developing nations only which clearly does not apply to the UK. Steps to advance the positive duties should be undertaken without discrimination and subject to limitations only when compatible with the nature of these rights and solely for the purpose of promoting general welfare.
57. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁴⁶ contains a range of standards in relation to racial discrimination, some of which apply universally and some others to individual citizens. Article 1 defines racial discrimination as:

“[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

The UN has issued a General Recommendation that clarifies the responsibilities of state parties to ICERD in regard to non-citizens.⁴⁷ This means that differential treatment based

⁴⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999UNTS 171 (ICCPR).

⁴⁵ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA resolution 2200A (XXI) (ICESCR).

⁴⁶ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965 entered into force 4 January 1969 UNGA resolution 2106 (XX)) (ICERD).

⁴⁷ General Recommendation No 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

on citizenship or immigration status will constitute discrimination if it is not proportional and pursuant to a legitimate Convention aim.

58. At present, the Concluding Observations of a number of treaty monitoring bodies have expressed particular concern at the situation of non-nationals in the UK at present. The Government has not set out any case that the considerable additional restrictions on obtaining social protection are either necessary or proportionate to legitimate aims. Rather, the Government has attempted to justify these measures through the flawed concept that human rights must be 'earned'.

The rationale for the reforms

59. The Commission notes that a considerable amount of official discourse and proposals appear to be based on notions of threats constituted by migration and the need to control migrants, with little credible evidence being put forward to support this case. There is also little evidence of an exploration of the complexity of migration or willingness to consider alternatives. This increases the risk of undue interference in human rights but also the risk that measures designed to combat phenomena, that are either exaggerated or more complex than presented, are likely to be largely ineffective and counterproductive.
60. Government will be aware that public opinion as regards the migration system is often heavily influenced by misinformation and racial prejudice, resulting in demands for the system to be more restrictive. The Commission would, therefore, suggest that an effective way of increasing public confidence in the system is to challenge misperceptions and combat racial prejudice. A recent example of this concerns discourse that conflates migrants with criminality. Following a range of reports carried in the media, largely in relation to EU migrants, the Association of Chief Police Officers (ACPO) issued a paper providing empirical evidence that the percentage of persons who offend within migrant communities was, in fact, roughly in line with the broader population.⁴⁸ By contrast, the first subheading in the section on EEA migrants

⁴⁸ See: ACPO press release, 16 April 2008, [Online] Available: http://www.acpo.police.uk/pressrelease.asp?PR_GUID=%7b017B1944-5CB2-43F6-BE22-E9AD91364597%7d [accessed 21 October 2008]; and 'Migrant crime wave a myth: police study – ACPO report concludes offending rate no worse than the rest of the population', *The Guardian*, 16 April 2008 [Online] Available: <http://www.guardian.co.uk/politics/2008/apr/16/immigrationpolicy.immigration> [accessed 21 October 2008].

in the Path to Citizenship consultation document is "Obeying the Law", with measures outlined to ensure that "EEA nationals will not abuse our welcome by committing criminal acts".⁴⁹ In reference to international commitments to challenge racism, the Government has a duty to challenge assumptions rather than encourage them by treating them as if they were true. General Comment 30 of ICERD urges states to:

"Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large."⁵⁰

61. The central claim from Government is that the citizenship reforms will aid integration, yet this is not evidenced or substantiated. Further, a concern raised by the Commission, when commenting on the Path to Citizenship proposals, was that the tone of the reforms could be interpreted as British citizens holding a particular set of values that are not shared by non-Europeans and therefore need to be nurtured or taught. There is therefore potential for discourse on the citizenship reforms to actually reinforce prejudice against migrants to be counter productive in enhancing integration.

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⁴⁹ See: Home Office consultation document, *Path to Citizenship*, February 2008, paras 211-221. Two other issues are referenced – restriction to accessing benefits and and learning English. Other prominent issues, including employment and housing rights abuses, are not referenced.

⁵⁰ General Recommendation No 30 (General Comments): Discrimination against non-citizens, Office of the High Commissioner for Human Rights, 1 October 2004, para 12.