



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## RESPONSE TO HOME OFFICE CONSULTATION ON 'EARNING THE RIGHT TO STAY: A NEW POINTS TEST FOR CITIZENSHIP'

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,<sup>1</sup> and advising on whether a Bill is compatible with human rights.<sup>2</sup> 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.<sup>3</sup>
2. The Commission has engaged extensively with government and the legislature in relation to the present reforms to naturalisation as a British citizen and settlement. The Commission responded to the Home Office's *Path to Citizenship* consultation of February 2008 and more recently issued a number of briefing papers to parliamentarians on the Borders, Citizenship and Immigration Bill. Among the Commission's main human rights compliance concerns in relation to the Bill were the rationale and implications of the citizenship reforms it introduced in relation to 'earning' rights and migrants being required to endure longer periods without social protection.

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid*, s.69(4).

<sup>3</sup> *Ibid*, s.69(7).

3. The 'Earning the Right to Stay' consultation introduces a 'new stage' to the process for accessing both British citizenship and settlement (permanent residence) in the UK. The present submission highlights human rights compliance issues with what is presently envisaged set in the context of the broader earned citizenship reforms. This is structured into the following sections:
  - Commentary on the process, the consultation timing and associated discourse (paragraphs 4-5)
  - Earned Citizenship provisions in the Borders, Citizenship and Immigration Act 2009 (6-10)
  - Human rights compliance and earned citizenship (11-17)
  - International standards and rights to citizenship (18-20)
  - The proposed points test for citizenship and settlement: outline of proposals (21-26)
  - Points test: Time limits and human rights compliance (27-34)
  - Points test: Legal clarity – earning and potentially losing points (35-42)
  - Freedom of expression, association and assembly (43-46)
  - Criminal offences (47-50)
  - Points Test: Overall rationale (51-54)
  - Points test: Promoting integration? (55-59)
  - Integration and Northern Ireland (60-62)
  - Pre-application English language requirements for spouses (63-65)

**Commentary on the consultation timing, the implementation process, and associated discourse**

4. The Commission, and others, have been consistently concerned that measures engaging human rights compliance are best contained explicitly in primary legislation in order to afford them sufficient parliamentary scrutiny, rather than being subsequently introduced through regulation or other mechanisms. During its passage the Commission highlighted that little detail was provided on the face of the Borders, Citizenship and Immigration Bill on the citizenship reforms and that it granted wide discretionary powers to increase restrictions in relation to citizenship and settlement without

outlining what government planned the restrictions to be. The Bill, including the earned citizenship powers, became the Borders, Citizenship and Immigration Act 2009 when it received Royal Assent on 20 July 2009. The '*Earning the Right to Stay*' policy consultation document describes the proposals it articulates as 'a major change in approach' which 'takes the principles behind earned citizenship one stage further'.<sup>4</sup> The consultation and related impact assessment were issued in late July. The proposals within it are facilitated by the powers obtained in the Act. Given that these proposals have obviously been planned for some time it is unclear why government chose not to be open about them during the passage of the Bill. The Bill could therefore have been appropriately scrutinised in this context.

5. In recent Home Office consultations the Commission has found itself having to comment not only on the content of proposals but also the tone and language within consultation documents, given the presence of discourse with the potential to contribute to and incite racial prejudice and discrimination. The Commission is pleased that the language in the present consultation document has improved in this regard. The Commission is however still concerned at the impact of the message behind the actual 'earned citizenship' measures.<sup>5</sup>

### **Earned Citizenship provisions in the Borders, Citizenship and Immigration Act 2009**

6. The Borders, Citizenship and Immigration Act 2009 (hereafter the 2009 Act) empowered the introduction of the 'earned citizenship' policy. This policy, commencement of which is scheduled for July 2011, involves the introduction of additional criteria for obtaining citizenship or settlement and lengthens the qualifying time periods.
7. Under the previous system (which continues in place during the transitional period), settlement (indefinite leave to remain) can be applied for following lawful temporary

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<sup>4</sup> Home Office UK Borders Agency (July 2009) *Earning the Right to Stay: A points based test for citizenship*, paragraph 6.

<sup>5</sup> The Commission observed that the *Path to Citizenship* proposals could be interpreted as advocating that British citizens (and more broadly other EEA nationals who are outside the reforms) hold a particular set of values that are not shared by non-Europeans and which hence need to be nurtured or taught. The reforms have also placed emphasis on migrant deviance and the privilege of UK status. Any message insinuating inferiority or supremacy of nationalities runs contrary to the UK's international commitments.

residence for a stipulated period of time, usually between two to five years. This leads to full access to social protection (income based benefits, social housing, homelessness assistance etc.). Settled persons can then go on to apply for British citizenship if they so wish.

8. The Act introduced the additional phase of 'probationary citizenship' following the existing period of temporary residence. Rather than settlement, 'probationary citizenship' is a further period of restricted temporary residence set out to endure up to five years before application for British citizenship or settlement ('permanent residence') can be made. The time periods had been set out as 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.<sup>6</sup> The definition of qualifying temporary residence enabling progression on the route to citizenship/settlement has also been tightened. This means time under some circumstances of temporary residence will no longer count towards qualifying time.
9. Extending restricted temporary residence through 'probationary citizenship' extends the time period without social protection. The Commission's primary concern with this is that generally migrants seeking to settle will be more vulnerable through being obliged to spend a much longer period of time than at present without social protection. The absence of social protection for longer periods of time was set out by Government as advantageous in fiscal terms.<sup>7</sup> However, the Commission is concerned it will come at a considerable human cost. Parliament's Joint Committee on Human Rights shared the Commission's concerns, recommending that Government reconsider its position on restricting access to benefits and services to those within the 'probationary citizenship' category.<sup>8</sup> The Commission also voiced concern that there was no obvious justification for the inequality of the time period between those seeking permanent residence and British citizenship. In particular, this measure is *de facto* discriminatory against nationals of countries that do not permit dual citizenship, who if they wish or need to retain their original nationality will be obliged to take the 'permanent residence' route.

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<sup>6</sup> Home Office (February 2008) *Impact Assessment, 'Earned Citizenship' proposals*, paragraphs 32-39.

<sup>7</sup> As above p2.

<sup>8</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Borders Citizenship and Immigration Bill*, Ninth Report of Session 2008-09, paragraph 1.43.

10. Government describes British citizenship as a 'privilege'.<sup>9</sup> It is the case that there is generally no human right to British citizenship for citizens of other countries who willingly migrate to the UK. However, by linking eligibility of access to recognised human rights to social protection to the 'journey to citizenship' in this way, the 'earned citizenship' reforms do engage human rights compliance.

### **Human rights compliance and 'Earned Citizenship'**

11. The Commission has been consistently concerned at the suggestion that migrants should 'earn' rights which are human rights. This implies a move away from internationally recognised human rights towards 'citizen's rights'. The fundamental human rights recognised under the European Convention on Human Rights (ECHR) and a range of international human rights treaties, to which the UK is a party, are equally accessible to all persons within the jurisdiction of the state, meaning migrants as well as citizens. The only rights that can be the preserve of citizens are matters such as voting (for example, Article 25 of the ICCPR).<sup>10</sup>
12. In relation to compliance with the ECHR, the Commission concurs with the view of the Joint Committee on Human Rights that the denial of certain emergency benefits on grounds of nationality engages Article 14 ECHR (non-discrimination) in conjunction with Article 1, Protocol 1 (the right to property). The European Court of Human Rights (ECtHR) has held that the property rights protected by Article 1, Protocol 1 cover social welfare payments, including those not based on contributions.<sup>11</sup> This principle has also been followed by the House of Lords<sup>12</sup> and, therefore, will be applied by the domestic courts. Limitations to rights protected by Article 1 Protocol 1 can only be made in accordance with general interest and must abide by the principle of non-discrimination. This taken with ECtHR

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<sup>9</sup> Home Office UK Borders Agency (July 2009) *Earning the Right to Stay: A points based test for citizenship*, p4.

<sup>10</sup> International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976.

<sup>11</sup> For example, see *Koua Poirrez v France* Application number 40892/98, 30 September 2003; admissibility decision on *Stec v United Kingdom* [(2005) 41 EHRR SE18, at [47-55], *Luczak v Poland* Application no. 77782/01, 27 November 2007; *Andrejeva v Latvia* application no. 55707/00 (GC), 18 February 2009; *Weller v Hungary* application no. 44399/05, 31 March 2009.

<sup>12</sup> *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [2008] 3 WLR 1023 [29-32].

jurisprudence indicates that any restrictions on social protection to non-nationals engage Article 14 with Article 1, Protocol 1 and require compelling justification.

13. In the separate matter of European law the House of Lords has also ruled that restrictions on EU migrant's social protection can only be made in accordance with the principle of proportionality. This judgement was in relation to a Northern Ireland case dealing with restrictions on free movement rights, including social protection, for migrant workers from 2004 EU accession countries in which it was determined that derogations from the Treaty of Accession must be compatible with the general principles of community law, hence must be proportionate.<sup>13</sup>
14. The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>14</sup> applies to everyone in the state and contains a number of positive duties that relate to ensuring social protection.<sup>15</sup> 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.
15. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>16</sup> 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.

While the Convention permits distinctions to be made between citizens and non-citizens, the UN has issued a General Recommendation that clarifies the responsibilities of state parties to ICERD in regard to non-citizens.<sup>17</sup> This advises that

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<sup>13</sup> *Zalewska v Department for Social Development* [2008] UKHL 67.

<sup>14</sup> Adopted 16 December 1966, entered into force 3 January 1976.

<sup>15</sup> Article 2(3) ICESCR contains a concession to developing nations in relation to non-citizens which clearly does not apply to the UK.

<sup>16</sup> Adopted 21 December 1965, entered into force 4 January 1969.

<sup>17</sup> General Recommendation No. 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

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

16. The Concluding Observations of a number of treaty monitoring bodies have expressed particular concern at the situation of migrants in the UK. The Government has not made the case that the considerable additional restrictions on obtaining social protection under the 'earned citizenship' reforms 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'.
17. The Commission recently conducted a formal investigation into homelessness for people with no or limited access to public funds in response to growing concerns about destitution among migrants which raised a range of concerns regarding existing restrictions.<sup>18</sup> Given that the UK has already been criticised by human rights treaty bodies for the scope of existing restrictions on recourse to public funds, and that the provisions of the earned citizenship reforms facilitated by the 2009 Act dramatically extend these restrictions, they are likely to face legal challenge. It remains to be seen whether domestic courts, or ultimately the European Court of Human Rights will find the new restrictions incompatible with the convention. The logic of the present 'points for citizenship' proposals, which are likely to extend time periods even further, increases the likelihood of incompatibility.

### **International standards and rights to citizenship**

18. There is generally no right to British citizenship for citizens of other countries migrating to the UK. From a human rights compliance perspective, government is free to set conditions and criteria it wishes, provided that it does not interfere with human rights. Equally government is within its rights to regulate migration, provided it is done in a manner that respects human rights. However, the Commission is of the view that such interference is present primarily due to the link to entitlements to social protection throughout the 'earned citizenship' policy.
19. There are some circumstances where human rights obligations

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<sup>18</sup> Devlin, R. and McKenna, S. (2009) *No Home from Home: homelessness for people with no or limited access to public funds* (Belfast: NIHRC).

relating to citizenship do exist. The points test is to be applied to refugees and those granted humanitarian protection. The UK is party to the 1951 Refugee Convention, Article 34 of which deals with naturalisation.<sup>19</sup> This places a duty on states to facilitate the naturalisation of refugees and 'make every effort' to 'expedite naturalisation proceedings'. Given the obligation to 'expedite' (accelerate) proceedings the 'earned citizenship' measures having the opposite effect are a regressive step in relation to this provision.

20. Principles and rules relating to naturalisation as a citizen are also set out in the Council of Europe's 1997 European Convention on Nationality. The UK is not yet party to this Convention and hence is not bound by its provisions; it does however represent a leading regional standard. The Convention provides for a maximum time limit for residence prior to a naturalisation application of ten years:

Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.<sup>20</sup>

### **The proposed points test for citizenship and settlement: Outline of proposals**

21. The present proposals set out a points test within the earned citizenship system to "better manage the numbers allowed to settle permanently in the UK". The new principle envisaged is to break the link between "what has been perceived as an automatic entitlement to move from temporary residence to permanent settlement" empowering the state to change the threshold based on national interest. Specifically the test will:

...provide greater control over the number of people moving from temporary status to permanent settlement [...] giving government the ability to take a clear, enforceable decision about who should be allowed to stay permanently, with flexibility to raise or lower the threshold for settlement depending on the current interests of the country and economy.<sup>21</sup>

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<sup>19</sup> Convention relating to the Status of Refugees, adopted on 28 July 1951, entry into force 22 April 1954.

<sup>20</sup> European Convention on Nationality, CETS No. 166 (open for signature 6 November 1997, in force 1/3/2000), Article 6(3).

<sup>21</sup> Home Office UK Borders Agency (July 2009) *Earning the Right to Stay: A points based test for citizenship*, p4-6.

22. The slogan 'Points Test for Citizenship' (hereafter the Points Test) and more broadly the 'earned citizenship' label do have the potential to confuse, as the tests are intended to apply not only to those seeking British citizenship but also settlement.<sup>22</sup>
23. Further the Points Test will not actually decide who is allowed to stay permanently in the sense of granting permanent residence. Rather the proposals are to introduce the Points Test *between* two periods of temporary residence - 'temporary residence' per se and the further period of temporary residence entitled 'probationary citizenship'. Then after a number of years on probationary citizenship comes an entitlement to *apply for* settlement or British citizenship, with applications judged on another set of criteria, including a proposed revised advanced language and British history/culture tests. The Points Test is set out to apply on all three 'path to citizenship' routes: the family route, protection route and work route.
24. For persons on 'family' and 'protection' routes the Points Test in practice will actually consist of verification of continuing family relationship or protection needs. The intention is for the test to be passed automatically in relation to proof of ongoing family relationship or protection needs, which would earn the threshold of 20 points.<sup>23</sup> Whilst ten additional points are available in these categories for passing the Life in the UK and language tests they are in essence academic as whilst the tests need to be taken, they do not need to be passed. There are no plans to vary this threshold and indeed terminating residence at this stage for persons with ongoing protection needs or pursuing family reunification would engage, and could violate, the UK's human rights commitments.
25. In this context the Home Office has outlined that the effectively automatically-met Points Test on the protection and family routes is being applied for administrative convenience, to allow officials the consistency of applying the same Points Test mechanism across all routes.<sup>24</sup> The Commission is concerned that by introducing the Points Test

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<sup>22</sup> The Home Office could provide greater clarity on this; the distinction is of particular relevance to, for example, persons seeking settlement to join spouses in Northern Ireland but who may subsequently apply for Irish rather than British citizenship.

<sup>23</sup> *Earning the Right to Stay*, Paragraph 2.9.

<sup>24</sup> The extent to which this will provide clarity to officials and applicants is questionable. Officials in assessing ongoing protection needs or family relationships (both matters already planned or in practice) will in any case have to engage in 'tests' separate to the broader Points Test mechanism.

across routes where it is not actually relevant to decision making, a mechanism has been created for future variance whereby variable thresholds could be set for those exercising family reunification.

26. For migrant workers (the 'work route') a different and variable test with a changing threshold and additional criteria will be applied. Therefore the variable Points Test in practice is actually limited to non-EEA migrant workers on tiers 1 (highly skilled migrants) and 2 (formerly work permits) of the Points Based System for migration (PBS). The Home Office has outlined that migrant workers under the PBS will be granted periods of temporary leave which will extend to five years, and not beyond. At this stage, if seeking to remain, (non-EEA, Tiers 1 & 2) migrant workers will have to take the Points Test. Those with sufficient points to reach the variable threshold will move into probationary citizenship; those without sufficient points will be expected to leave the country.<sup>25</sup>

#### **Points Test: Time limits and human rights compliance**

27. Migrant workers who do not pass the Points Test (or who do not take it being aware they have insufficient points) can of course resubmit applications for further temporary residence under the PBS migration system, to be dealt with on their own merits. The logic of the system is however that the clock returns to zero and another five-year period of work will have to be undertaken before a fresh application to the Points Test can be submitted.<sup>26</sup>
28. Further to the 2009 Act the minimum time periods for application for settlement were planned to be between 8 and 10 years of qualifying time. The likely practical outcome of the break with a path to settlement after five years is that many migrant workers who wish to reside long term will in effect do so by having to spend short breaks outside of the UK to return for further 'initial' periods of temporary residence before, if ever, they obtain probationary citizenship.
29. The practical impact is likely to be that many migrant workers who reside long term (with short enforced breaks to countries

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<sup>25</sup> As above, Paragraph 2.8 & Annex A.

<sup>26</sup> Section 39(2)(c) of the Borders, Citizenship and Immigration Act 2009. substitutes sub-paragraph 2 of paragraph 1, schedule 1 of the British Nationality Act 1981, to provide *inter alia* that an application for naturalisation is not valid if any of the qualifying time period was spent without qualifying immigration status.

of origin) will have to spend many more years without social protection and being subject to other restrictions, including continued restricted access to the labour market. Such an outcome will increase the vulnerability of persons in such circumstances to exploitation and destitution, with, in addition to ethnicity, particular adverse impacts on women and persons with disabilities.<sup>27</sup> If the measures proceed the Commission would urge monitoring of outcomes across equality categories to ascertain overall impacts.<sup>28</sup>

30. The Commission welcomes the confirmation received from the Home Office that there are no plans to revoke Immigration Rule 276B which provides for the grant of Indefinite Leave to Remain due to "long residence" after ten years' continuous lawful residence, permitting an absence of up to six months, or 14 years where residence has involved irregularity.<sup>29</sup>
31. There are therefore likely to be persons who habitually reside in the UK for periods of up to ten years, on separate 'initial' temporary residence periods without any security of residency.<sup>30</sup> The children of migrants would not acquire British citizenship through birth in the UK whilst parents were on temporary leave. This could mean children born in the UK could have no longer have any right to live in the UK when aged nine, despite having effectively resided nowhere else.
32. Given the length of such time periods individuals will have established considerable ties and set down roots. An obligation to leave after such a lengthy period of residence could potentially fall within the ambit of Article 8 of the European Convention on Human Rights in relation to family life. There are also a number of other relevant international standards including International Labor Organization recommendation R86 which advocates the principle that generally a regularly admitted migrant worker should not be

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<sup>27</sup> *No Home from Home*, the Commission's investigation into restrictions on recourse to public funds, noted particular impacts on victims of exploitation, refugees/asylum seekers, victims of domestic violence, persons with ill health and disability and victims of racist intimidation.

<sup>28</sup> The Impact Assessment of the Consultation document itself singles out race, gender and disability as equality categories as having rendered results in the Evidence Base, although the conclusion is that the proposed reforms do not discriminate.

<sup>29</sup> Immigration Rules, available at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>.

<sup>30</sup> For persons who do not meet the criteria of Immigration Rule 276B, for example due to an absence of more than six months, this period of habitual residence could be longer.

removed after more than five years' residence.<sup>31</sup>

33. There are a number of other relevant international human rights standards to which the UK is not yet party, in particular the Migrant Worker Convention, one of the core UN treaties. The Convention provides that limitations on remunerated activities in pursuance of a policy of granting priority to permanent residents should cease after five years' temporary residence. It also advocates a maximum time limit for labour market access of two years. Although not legally binding on the UK the Convention represents internationally agreed standards. In relation to European Union instruments, the UK has not opted into the EC Long Residence Directive which provides for member states to grant long-term resident status after five years' residence.<sup>32</sup>
34. Given that EEA nationals are generally granted security of residence after five years' continued residence, there is an onus on government to put forward an objective and reasonable justification for the necessity of the differential.

#### **Points Test: Legal clarity – earning and losing points**

35. The consultation emphasises the importance of clarity for the applicant:

For migrants, the new system will increase the transparency of decision-making allowing them to plan activity to meet the threshold, as well as providing a clear decision point early in the process.<sup>33</sup>

36. The Commission concurs with the Home Office on the importance of transparency in decision making and clear paths to meet thresholds. It is a core concept of human rights that when an entitlement is created that there is legal certainty ('prescribed by law') in how to reach it. Improvements in the transparency of decision making are to be welcomed, but it is difficult to understand how the new test provides more clarity than the previous arrangement.
37. The proposals set out and provide some detail on the criteria which will gain migrant workers points in addition to passing

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<sup>31</sup> R86 Migration for Employment Recommendation (Revised), International Labor Organization (adopted 1 July 1949), Paragraph 18,

<sup>32</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (2003/109/EC), Article 4(1).

<sup>33</sup> Home Office UK Borders Agency (July 2009) *Earning the Right to Stay: A points based test for citizenship*, paragraph 7.

the existing language and Life in the UK tests. These are earnings/level of investment; qualifications obtained in the UK; employment in a shortage sector; employment in Scotland/other locations needing increased migration.

38. The consultation document also puts forward the potential that points could be deducted from applicants. Little detail is given on how this would operate in practice for what seems to be a proposal under consideration rather than a detailed option. The Commission would urge the dropping of this proposal which in addition to raising questions of proportionality and necessity also is likely to fail the test of legal certainty, given that most categories have no definition attached to them – most notably ‘failure to integrate into British life’, and ‘active disregard for UK values’. The Commission is particularly concerned about a suggestion by the Immigration Minister that this should be interpreted so as to penalise the exercise of freedom of expression, association and assembly. In relation to the category of criminality, for which a definition is provided, separate sanctions are already largely provided for without this measure, and its proportionality is questionable.<sup>34</sup>
39. There is no definition of ‘failure to integrate into British life’ and the consultation document seeks suggestions to what should be penalised. More general information on integration is provided elsewhere in the consultation which focuses on the language and UK culture tests (which are already subject to separate points awards) and additional suggestions around mentoring schemes and orientation days.<sup>35</sup>
40. No threshold is outlined in relation to ‘active disregard for UK values’. The consultation references UK or British values in a number of places but provides no definition, hence no legal certainty as to what this means. Application of British values to earned citizenship was earlier raised in the February 2008 *Path to Citizenship* consultation. The Commission in its response pointed out that there was no agreed notion of what a distinctly ‘British’ set of values might be. The formula chosen in *Path to Citizenship* was to ask people what they would most miss if they emigrated, producing a list contending that ‘British values’ were: ‘the NHS, tolerance, fairness and freedom of speech, a healthy disrespect for authority and yet a keen sense of order’. Other ‘values’ implied in the document were ‘paying your way’ and ‘obeying

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<sup>34</sup> *Earning the Right to Stay* paragraph 2.11.

<sup>35</sup> The impact of the proposals on integration is discussed later in this submission.

the law'.

41. As the Commission pointed out it was not apparent that there was anything distinctively British about any of the values in the list, which were largely universal.<sup>36</sup> Over 18 months later there is no evidence of further consideration being given to a definition of British values in relation to citizenship, the main development being the proposal for applicants to be sanctioned for disregarding such values.
42. Separately the Ministry of Justice, in the context of the March 2009 Rights and Responsibilities Green Paper, has initiated a UK-wide online discussion on 'Values in the UK today' which to date in over five months of operation has received ten responses.<sup>37</sup> The objective is the potential incorporation of values into a preamble to any future statement on rights and responsibilities. The Ministry of Justice has also undertaken a public attitudes survey in which respondents rated obeying the law, tolerance and freedom of expression as their top "values for living in Britain".<sup>38</sup> It is unclear what linkages, if any, there are between this initiative and the term used in the points for citizenship consultation, which contains no cross reference.

### **Freedom of expression, association and assembly**

43. Broader discourse on the reforms in relation to 'disregarding UK values' has suggested *restrictions* on freedom of expression, assembly and association for persons seeking to move into or in the probationary citizenship category. No such restrictions are referenced in the consultation document but they have been articulated by the Minister of State, Phil Woolas MP, in his widely reported proposal to impede citizenship or settlement to immigrants who participate in anti-war demonstrations. The Minister stated that in the context of having to swear an oath of allegiance to the Crown there was "a need to define in objective terms what this meant". When asked directly whether this meant that potential future citizens should refrain from participating in lawful demonstrations the Minister replied:

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<sup>36</sup> Northern Ireland Human Rights Commission (May 2008) *Response to The Path to Citizenship: Next Steps in Reforming the Immigration System*, p14.

<sup>37</sup> <http://governance.justice.gov.uk/join-the-debate/key-themes/values-in-the-uk-today/> [accessed 6 October 2009].

<sup>38</sup> <http://governance.justice.gov.uk/wp-content/uploads/2008/10/moj-opinion-poll-on-identity-belonging-and-values.doc> [accessed 6 October 2009].

In essence, yes. In essence we are saying that the test that applies to the citizen should be broader than the test that applies to the person who wants to be a citizen. I think that's a fair point of view, to say that if you want to come to our country and settle, you should show that adherence.<sup>39</sup>

44. There is clearly a diversity of views within the UK, not least in relation to the wars the UK is presently pursuing, and such plurality of opinion is a fundamental feature of the norms of a democratic society. This Commission itself advised government that attacking Iraq "without the support of the UN Security Council was a violation of international law and very serious breach of the human rights of people in Iraq".<sup>40</sup> The Commission regards it as inappropriate for government to seek to silence dissent from its policies by effectively threatening future access to social protection and other rights.<sup>41</sup>
45. Article 16 of the European Convention on Human Rights does permit restrictions on Articles 10 and 11 (freedom of expression and assembly) in relation to "the political activities of aliens". However, there is limited jurisprudence on this matter and it remains to be seen if the court would regard participation in a demonstration as falling within the ambit of 'political activities'. Furthermore there are other international standards to which the UK has subsequently become a party which do not contain this limitation. Articles 19 and 21 of the ICCPR relating to freedom of expression and assembly contain no caveat in relation to their exercise by non-citizens. The only explicit restriction in relation to expression and war in the ICCPR is a prohibition on propaganda *for* war.<sup>42</sup> A more recent Council of Europe instrument, the Framework Convention for National Minorities, to which the UK is a party, also protects the freedom of expression and assembly without making distinctions between citizens and non-citizens.<sup>43</sup> It is

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<sup>39</sup> Interview with Sarah Montague, Radio 4 *Today* programme, 3 August 2009; note that from the Minister's assertions the stage at which this 'test' would be applied would not be restricted to the probationary citizenship stage but continuously until citizenship was obtained.

<sup>40</sup> Northern Ireland Human Rights Commission (21 March 2003) "Human Rights Commission condemns attack on Iraq as an abuse of human rights", press statement.

<sup>41</sup> Furthermore this proposal would appear to contradict the provisions to encourage 'active citizenship' within the journey to citizenship which include trade union and political party activities, presumably without precluding anti-war demonstrations (see *Document made available to the House to illustrate the Government's emerging thinking on Active Citizenship*, 4 June 2009).

<sup>42</sup> Article 20(1).

<sup>43</sup> Adopted 10 November 1994, entry into force for UK 1 May 1998; Article 7.

difficult to envisage how government might make a persuasive case that such a distinction could be necessary. The intention to sanction this type of expression appears to be incompatible with international standards to which the UK is a party.

46. The Commission is concerned this particular proposal and its accompanying discourse will heighten racial prejudice. Whilst not explicitly stated there is a tacit innuendo that such comments are targeted at the Muslim community. It is thus not unreasonable to interpret the proposal as singling out and labelling this section of our population (citizen or otherwise) as prone to being 'disloyal'. In the particular circumstances of Northern Ireland this is an especially problematic message to articulate, heightening the risk of further prejudice, hostility and violence against those who are, or are perceived to be, Muslims.<sup>44</sup> The Commission would draw attention to the recent concluding observations on the UK of the UN Human Rights Committee:

The Committee remains concerned that negative public attitudes towards Muslim members of society continue to develop in the State party.<sup>45</sup>

The UN urged the UK to take energetic measures in order to combat and eliminate the phenomenon. The actions of the executive, both in policy and accompanying discourse should be compliant with this recommendation.

### **Criminal offences**

47. Proposals to deduct points are also set out for minor criminality. This is defined as minor crimes attracting non-custodial sentences (which fall below the threshold for deportation), for which applicants will not be able to obtain probationary citizenship until their conviction is spent. Immigration offences are already punishable to a greater degree by disallowance of qualifying time periods of any time spent in breach of immigration laws. In this context the

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<sup>44</sup> In Northern Ireland there is ample evidence of the scope for strong feelings to arise in relation to military engagements. A Homecoming parade in Belfast for British troops returning from Iraq and Afghanistan resulted in a police deployment costing £300,000, with the objective of preventing major unrest between supporters and counterdemonstrators (see *Evidence to Northern Ireland Affairs Committee*, Sir Hugh Orde, Chief Constable Police Service of Northern Ireland, HC 1174-I, 5 November 2008).

<sup>45</sup> Human Rights Committee (21 July 2008) *Concluding Observations on the UK*, UN Doc: CCPR/C/GBR/CO/6/CRP.1, paragraph 16.

Commission reiterates its concerns about the increasing broad range of immigration matters considered 'crimes' and the disproportionality of punishments.

48. One recent example is highlighted by the 2008 Judicial Review into the case of Jamiu Omikunle.<sup>46</sup> Mr Omikunle, a Nigerian student resident in England who had been visiting Belfast to attend a christening, was unlawfully detained by the UKBA at Belfast International Airport and served with a deportation order. He was detained for having switched university courses, and hence being accused by an immigration officer of 'deception'. Mr Omikunle was held first in a police station, then in a detention centre in Scotland. Following judicial review he was awarded £20,000 for his unlawful detention. This occurred in 2008 and Mr Omikunle can be legitimately regarded as a victim of a human rights abuse. If similar circumstances were to arise for another person, however, the label 'criminal' could be now applied to the victim, as the power to criminalise international students who switch university courses without the consent of the UKBA was taken under the Borders, Citizenship and Immigration Act 2009.<sup>47</sup> Such 'crimes' could therefore impede a person's path to citizenship or settlement.
49. Increased irregular migration is the likely result of immigration regulations that are perceived to be unfair, unworkable or disproportionate. The increased risk of irregular migration is conceded by the UKBA in relation to the present proposals.<sup>48</sup> Such phenomena would both increase the vulnerability of migrants to abuse and be contrary to government's stated aim of reducing irregular migration.
50. A final category for the potential deduction of points is anti-social behaviour, for which neither a definition nor a threshold are indicated. The Commission would urge government to rethink the proposal for points deduction in its entirety.

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<sup>46</sup> *An application by Jamiu Olanrewaju Omikunle for Judicial Review*, High Court of Justice Northern Ireland, Queen's Bench Division 28 July 2008 [2008] NIOB 79.

<sup>47</sup> Section 50 of the Borders, Citizenship and Immigration Act 2009 amends the Immigration Act 1971 to include a Restriction on Studies power. Under section 24 of the Immigration Act 1971 (as amended) failing to observe the restriction is an offence punishable on summary conviction by a fine of up to £5,000 and/or up to six months imprisonment.

<sup>48</sup> UKBA (July 2009) *Impact Assessment of consultation document: Earning the Right to Stay: A new points test for citizenship*, p2.

## The Points Test: Overall rationale

51. The Commission has consistently noted that a considerable amount of official discourse and proposals appears to be based on notions of threats constituted by migration and the need to control migrants, with little evidence being put forward to support this case. There is also little evidence of an exploration of the complexity of migration, or of willingness to consider alternative approaches. 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.
52. The central claim from Government during the passage of the 2009 Act, reiterated in the present consultation, is that the citizenship reforms will aid integration, yet this has not been evidenced or substantiated. A further core tenet of the argument is that the reforms will “encourage greater take-up” of British citizenship. The Commission notes the conclusions of the Home Affairs Committee in this regard:

We heard from migrants and migrants’ rights groups that the proposals on probationary citizenship in this Bill would be unlikely to encourage greater take-up of British citizenship, which is one of the Government’s stated aims. The Government should ensure that policy is based on consultation with the specific groups it seeks to incentivise – in this case migrants – rather than on its own assumptions.<sup>49</sup>

53. Paradoxically one of the aims of the present proposals is to *control and decrease take-up* of British citizenship and settlement. The rationale for doing so is to control population increase; quoting ONS statistics the consultation outlines:

The Office for National Statistics estimates that between 1996 and 2006 population in the UK grew by around 4%. Migration is now the main component to population change in the UK, accounting for around 61% of this increase. For Government to manage population growth, it must have mechanisms to control who is allowed to stay in the UK on a permanent basis, as well as who is permitted to work or study here temporarily.<sup>50</sup>

54. The consultation document highlights the benefits that

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<sup>49</sup> Home Affairs Committee: Borders, Citizenship and Immigration Bill [HL] Fifth Report of Session 2008-09, paragraph 16.

<sup>50</sup> Paragraph 2.2, quoting ONS (27 April 2009) *Key Population and Vital Statistics*.

migrants bring the UK and that population dynamics vary across the country, as is the case in Northern Ireland.<sup>51</sup> The impact of migration (which tends to involve people of working age) on demography is a complex and contested matter, with a range of different views on impacts and sustainability. The logic of the proposals is that a conclusion has been reached that increases due to migration are likely to be unsustainable and require control. It would be helpful if government set out the basis for this conclusion.

### **The Points Test: Promoting integration?**

55. The Home Office sets out the integration of migrants as one of the main objectives of the present intervention. The Commission has examined the outworking of the proposals in relation to internationally agreed measures of integration and observes that in fact the measures are likely to be largely counterproductive in relation to this aim.
56. There are three main integration measures outlined which could earn a migrant points. Two are revised processes for the existing English language and Life in the UK Tests whereby a two stage process is envisaged, the existing tests being applied at application for probationary citizenship stage and advanced English and British history/culture tests at citizenship or settlement stage. The third measure is a proposal for orientation and integration days, likely to be run by local Councils<sup>52</sup> at cost to the migrant applicant, which could also earn migrant workers points; consideration is also given to such days being compulsory, or being run by employers.<sup>53</sup>
57. The above measures all involve activity by migrants towards integration. Whilst this may be expected when discussing measures which can earn a migrant applicant points the consultation more broadly addresses the concept of

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<sup>51</sup> In the case of Northern Ireland the most recent annual population statistics indicate a population increase of 0.9% (15,900 people) mainly due to natural growth rather than migration: Northern Ireland Statistics and Research Agency (30 July 2009) *Population and Migration Estimates Northern Ireland 2008 Statistical Report*.

<sup>52</sup> The Home Office may wish to note that the powers and functions of local government in Northern Ireland differ considerably from those in Great Britain.

<sup>53</sup> If compulsory sessions are run by employers consideration would be required as to conflicts of interest and data protection (the latter should part of the role be data gathering).

integration.<sup>54</sup> The objective of the full integration of migrants who stay is set out in the policy impact assessment stating:

Speaking English, working hard, paying tax, and taking an active part in the community are all essential to integration.<sup>55</sup>

58. It should be noted that this list of attributes of integration is incomplete when measured against international standards. The need to tackle racism, discrimination and related inequality are often paramount in such instruments. At individual level measures involving the host as well as migrant population are advocated. For example the International Convention on the Elimination of Racial Discrimination urges states to adopt “immediate and effective” educational and information-based measures “with a view to combating prejudices which lead to racial discrimination”.<sup>56</sup> The declaration and actions adopted by the UN World Conference Against Racism in 2001 (the Durban Declaration and Programme of Action) contain *inter alia* references to integration in the context of family reunification and combating racism and inequality:

We recognise the necessity for special measures or positive actions for the victims of racism, racial discrimination, xenophobia and related intolerance in order to promote their full integration into society. [Durban Declaration, para 108]

...Calls upon States to facilitate family reunification in an expeditious and effective manner which has a positive effect on integration of migrants, with due regard for the desire of many family members to have an independent status. [Durban Programme of Action, para 28]

[Urges states to] implement specific measures involving the host community and migrants in order to encourage respect for cultural diversity, to promote the fair treatment of migrants and to develop programmes, where appropriate, that facilitate their integration into social, cultural, political and economic life. [Programme of Action, para 30(c)]<sup>57</sup>

59. A further set of indicators measuring integration are provided

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<sup>54</sup> A further positive action measure being considered is the extension of existing volunteer mentoring schemes for refugees to non-refugees.

<sup>55</sup> UKBA (July 2009) *Impact Assessment of consultation document: Earning the Right to Stay: A new points test for citizenship*, p4.

<sup>56</sup> Article 7.

<sup>57</sup> Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001, UN Doc A/CONF.189/12.

by the EU-sponsored Migrant Integration Policy Index (MIPEX) led by the British Council and Migration Policy Group. MIPEX provides a tool to measure good practice in legal frameworks in promoting integration. The tool is built on regional standards contained in EC directives, EU Common Basic Principles for integration policy and Council of Europe Conventions. MIPEX groups six policy areas shaping a migrant's journey to citizenship, namely labour market access; family reunion; long-term residence; anti-discrimination; access to nationality; and political participation.<sup>58</sup> Whilst measures such as enhancing language and cultural learning may contribute to a number of these above policy areas, the overall impact of the present proposals will be largely regressive across most categories and hence run contrary to the stated objective of ensuring integration.

## **Integration and Northern Ireland**

60. UK-wide integration measures should reflect awareness of the particular circumstances of Northern Ireland as a post-conflict and divided society. Measures aimed at 'integration into British society' are not just related to applications for British citizenship but for persons settling as residents in Northern Ireland, where there is a plurality of birthrights to national identity and citizenship. This is set out in the Belfast (Good Friday) Agreement as:

[the British and Irish Governments] ...recognise the birthright of all the people of Northern Ireland<sup>59</sup> 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 and would not be affected by any future change in the status of Northern Ireland.<sup>60</sup>

61. In the context of a post-conflict and divided society efforts are often made to ensure that the teaching of history and culture

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<sup>58</sup> MIPEX can be accessed at: <http://www.integrationindex.eu/>. It may be noted that the UK scores above average on all categories except the last, where its overall score is depressed by the absence of formal consultative structures, but its maximum score on the "political liberties" sub-category would presumably need to be reduced if new restrictions were imposed on political activities.

<sup>59</sup> In Annex 2 to the Agreement the British and Irish governments declare their joint understanding that the term "the people of Northern Ireland" refers to "all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British Citizen, an Irish citizen or who is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence".

<sup>60</sup> Belfast (Good Friday) Agreement, Constitutional Issues, paragraph 1(vi).

is non-partisan. In relation to the proposed British history and culture tests at citizenship and settlement application stage, the UK government should bear in mind the commitments it entered into under the Belfast (Good Friday) Agreement, including that:

...the power of the sovereign government with jurisdiction [in Northern Ireland] shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities.<sup>61</sup>

62. The 'earned citizenship' reforms will also impact on entitlements to Irish citizenship for children born in Northern Ireland to non-British/Irish parents. Children born in Northern Ireland in this circumstance are entitled to Irish citizenship only if at least one parent is settled in Northern Ireland without restriction on their period of residence. The overall 'earned citizenship' reforms and the present test make this scenario less likely and hence reduce access to a status that provides for access to nationality and hence promotes integration. Insofar as migrants awaiting permanent status are disincentivised from having children, this may also engage Article 8 ECHR (right to respect for private and family life) and Article 12 (right to found a family).

### **Pre-application English language requirements for spouses**

63. The consultation also contains information and an impact assessment into pre-application English language requirements for spouses. This matter was subject to previous consultation and appears to have been included for information in the present exercise although its implementation by changes to the Immigration Rules has been brought forward.
64. The Commission draws attention to criticism of the existing requirements for spouses by a UN Committee examining the UK's compliance with its international commitments. The UN Committee on Economic, Social and Cultural Rights recently declared that:

The Committee is concerned that the increase of age from 18

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<sup>61</sup> As above, paragraph 1(v).

to 21 for foreign partners to join their British partners has a discriminatory effect on some groups, in particular ethnic minorities and women.

**The Committee recommends that the State party allow foreign partners from the age of 18 to join their British partners and consider easing restrictions on family reunification in its Immigration Rules in order to comply with the principle of non-discrimination and ensure the widest possible protection of, and assistance to, the family.<sup>62</sup>**

65. The UK should therefore revisit its proposed changes and the present rules in light of the UN Committee's assessment.

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<sup>62</sup> Committee on Economic, Social and Cultural Rights (22 May 2009) Concluding Observations, E/C.12/GBR/CO/5, paragraph 26.