



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **BRIEFING PAPER ON THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL FOR THE HOUSE OF COMMONS, 2 JUNE 2009**

### **Introduction**

1. The present briefing is an extended and updated version of that provided to the House of Lords in March 2009 on the introduction of the Bill.
2. 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>
3. The Commission's two main concerns regarding the present Bill are:
  - the rationale and implications of reforms to naturalising as a British Citizen in relation to 'earning' rights and enduring longer periods without social protection; and

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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).

- Government's intention to reintroduce reforms to the Common Travel Area removed from the Bill in the Lords, thus ending the Common Travel Area as a passport-free zone, and the risks that this presents of racial discrimination in relation to mobile patrols and actual or *de facto* document requirements on the land border.

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.

## **'Earned citizenship' proposals (Part II)**

4. 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 not clear on the face of the Bill.<sup>4</sup>
5. 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 longer 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 by Government as advantageous in fiscal terms;<sup>5</sup> however, the Commission is concerned it will come at a considerable human cost.
6. 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. Settled persons can then choose to go on to apply for British citizenship.
7. The measures in the Bill would introduce the additional phase of 'probationary citizenship' following the existing period of temporary residence. Rather than settlement, 'probationary citizenship' will be a further period of restricted temporary residence intended to endure between one and five years before application for British citizenship *or* settlement ('permanent residence').
8. Extending restricted temporary residence extends the time period without social protection. The intention is for this

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<sup>4</sup> The Commission commented in detail on the Path to Citizenship proposals now being implemented in part by the present Bill.

<sup>5</sup> Impact Assessment of Earned Citizenship Proposals, p 2.

extension to be for 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.<sup>6</sup>

9. In addition to the general extension to the time period, the Commission is concerned that the present proposals disadvantage persons who settle but do not seek to become British citizens. This is because they would have to spend, in relation to minimum time periods, three times as long without rights to social protection – an additional minimum of two years. 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. The Commission does not take issue with Government *encouraging* migrants to seek British citizenship; however, restriction of rights in this manner constitutes a sanction rather than an incentive.
10. The Commission is therefore concerned at the additional periods of time that migrants seeking settlement will have to spend under restrictions. There is no obvious justification for the inequality of the time period between those seeking permanent residence and British citizenship.
11. The Commission notes that the Joint Committee on Human Rights has recommended that Government reconsider its position on restricting access to benefits and services to those within the 'Probationary Citizenship' category.<sup>7</sup>

**The Bill could be amended to prevent additional time periods (and therefore any inequality within them) being spent with restrictions to social protection.**

### **Transitional and future provisions**

12. 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, possibly after leaving jobs or making other significant sacrifices and investments, on the understanding that settlement could be attained under the current time periods.

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<sup>6</sup> Impact Assessment, 'Earned Citizenship' proposals, paragraphs 32-39.

<sup>7</sup> Joint Committee on Human Rights, Legislative Scrutiny: Borders Citizenship and Immigration Bill, Ninth Report of Session 2008-9, paragraph 1.43.

13. The Bill was amended in the House of Lords to clarify that new measures in Part II of the Bill should not affect an application for citizenship or settlement submitted prior to their commencement, nor any application for settlement (indefinite leave to remain) made in the period twelve months after commencement (Clause 39). Government could also clarify that the reforms will not impact on a person who already settled (with indefinite leave to remain) but is not a British citizen.
14. The Commission is also conscious of the view and evidence received by the Home Affairs Committee in relation to concerns that future measures may seek to restrict access to NHS primary health services for persons subject to immigration control. The Committee's conclusions note that convincing evidence from medical professionals cautioned against any future restrictions and noted 'persuasive arguments' on the damaging effects of any such restrictions.<sup>8</sup> As noted by the Home Affairs Committee, no such restrictions are part of the present Bill. However, the discussion on introducing further restrictions to rights, be they in the field of health, social protection, employment or otherwise, raises serious human rights compliance issues.

### **Human rights compliance and 'earned' citizenship**

15. The Commission is 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>9</sup>
16. 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-

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<sup>8</sup> Home Affairs Committee: Borders, Citizenship and Immigration Bill [HL] Fifth Report of Session 2008-09, paragraphs 20-27.

<sup>9</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999UNTS 171 (ICCPR).

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>10</sup> This principle has also been followed by the House of Lords<sup>11</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 jurisprudence indicates that any restrictions on social protection to non-nationals engage Article 14 with Article 1, Protocol 1 and require compelling justification.

17. The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>12</sup> 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 to developing nations only in relation to non-citizens 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.
18. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>13</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

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<sup>10</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>11</sup> *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [2008] 3 WLR 1023 [29-32].

<sup>12</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA resolution 2200A (XXI) (ICESCR).

<sup>13</sup> 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).

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>14</sup> This means that differential treatment based on citizenship or immigration status will constitute discrimination if it is not proportional and pursuant to a legitimate Convention aim.

19. The Concluding Observations of a number of treaty monitoring bodies have expressed particular concern at the situation of non-nationals in the UK. The Government has not made the 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'.

### **Citizenship: encouragement versus compulsion**

20. The Commission does not take 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 earlier considered 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.<sup>15</sup>
21. While many will wish to seek to become British citizens, it is important also to recognise that 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, 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)

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<sup>14</sup> General Recommendation No 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

<sup>15</sup> Set out in the Path to Citizenship Government Response to Consultation, pp 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).

Agreement.<sup>16</sup> Over 400,000 Irish passports have been issued to Northern Ireland residents over the last ten years, some to people who will also hold British passports or otherwise be regarded under British law as British citizens.<sup>17</sup>

### **The policy objectives of 'earned' citizenship**

22. The central claim from Government is that the citizenship reforms will aid integration, yet this is not evidenced or substantiated. A further core tenet of Government's 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>18</sup>

23. 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 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 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.
24. 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

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<sup>16</sup> 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", paragraph 1(vi).

<sup>17</sup> 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).

<sup>18</sup> Home Affairs Committee: Borders, Citizenship and Immigration Bill [HL] Fifth Report of Session 2008-09, paragraph 16.

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.<sup>19</sup> By contrast, the first subheading in the section on EEA migrants 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".<sup>20</sup> 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.<sup>21</sup>

25. 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 suggesting that British citizens hold a particular set of values that are not generally shared by non-Europeans, and that therefore need to be nurtured or taught. There is therefore potential for discourse on the citizenship reforms to actually reinforce prejudice against migrants, and to be counterproductive in terms of integration.

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<sup>19</sup> See: ACPO press release, 16 April 2008, [Online] Available: [http://www.acpo.police.uk/pressrelease.asp?PR\\_GUID=%7b017B1944-5CB2-43F6-BE22-E9AD91364597%7d](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].

<sup>20</sup> 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.

<sup>21</sup> General Recommendation No 30 (General Comments): Discrimination against non-citizens, Office of the High Commissioner for Human Rights, 1 October 2004, paragraph 12.

## The Common Travel Area

26. Far-reaching reforms to the Common Travel Area (CTA) that extends (principally) throughout the UK and Ireland were included in the Bill when introduced to the Lords.<sup>22</sup> The Commission voiced serious concerns that the type of enforcement activity proposed in Northern Ireland, on the land border with the Republic of Ireland, would lead to considerable racial discrimination. This concern was also shared and articulated by a number of peers.
27. At Report Stage, peers voted by almost a two-to-one majority to remove the Common Travel Area reforms from the Bill entirely. The Minister did, however, indicate that Government might seek to reintroduce the CTA measures in the Commons, albeit with the intention of doing it "slightly differently".<sup>23</sup>
28. Peers also amended the Bill to insert additional protection to prevent the proposed measures on the land border being otherwise introduced through regulation, therefore, without the level of parliamentary scrutiny that led to the original proposals being voted down. Clause 51 in the Bill as introduced to the Commons would amend section 10 of the Immigration Act 1971 (entry otherwise than by sea and air), to prevent an Order in Council including a provision to introduce immigration control measures on the land border.
29. In anticipation that Government may seek to reintroduce the Common Travel Area reforms in the Commons, this section of the briefing will cover the following issues:
  - Nature of the Common Travel Area and the engagement of migration control with human rights compliance
  - An examination of the government's original CTA reform proposals in relation to the land border between Northern Ireland and the Republic of Ireland
  - Outlining concerns regarding the human rights impact of the proposed measures on the land border, and experience to date of similar operations in Northern Ireland and the Republic of Ireland
  - Concerns regarding the legal basis and scope of powers for proposed UKBA activities on the land border
  - Information on the broader proposals on CTA air and sea routes and proposals in relation to journeys between

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<sup>22</sup> Clause 46 when introduced (subsequently Clause 48 at second reading). The CTA also covers the Channel Islands and the Isle of Man.

<sup>23</sup> Lord West of Spithead, HL Hansard 22 Apr 2009 : Column 1543.

- Northern Ireland and Great Britain, and
  - Concern at the implications of discourse immediately before the vote in the Lords portraying the routine immigration control proposals on the land border as counter terrorism and organised crime measures.
30. The Commission will endeavour to provide a briefing on the detail of any amendments proposed to the Bill in relation to the Common Travel Area. Conscious that if amendments are tabled close to the debate there may be insufficient time for such briefings to reach parliamentarians, we wish to set out our general concerns now.

### **The CTA, migration control and human rights**

31. 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.<sup>24</sup> 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”.<sup>25</sup> 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 not usually to require leave to enter the UK from elsewhere in the CTA, subject to certain exceptions.
32. Government’s plans, which in legislative terms begin with this 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 also plans to introduce targeted mobile checks along the land border between the Republic of Ireland and Northern Ireland.<sup>26</sup>
33. 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

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<sup>24</sup> 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.

<sup>25</sup> Final Impact Assessment of Common Travel Area Reform (hereafter the CTA Impact Assessment) published with the Bill [paragraph 1.3 Evidence Base].

<sup>26</sup> In addition to the CTA Impact Assessment, Government’s plans are set out in : *Strengthening the Common Travel: Government Response to the Public Consultation*, Home Office, UKBA, 15 January 2009.

interference is necessary in a democratic society, proportionate, in pursuance of a legitimate aim and adequately prescribed by law. This includes consideration of rights in the 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 that 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.

### **Government's original CTA reform proposals on the land border: Northern Ireland and the Republic of Ireland**

34. Government sought, under Clause 46(1) of the Bill introduced to the Lords, to remove the exemption of all CTA journeys from passport control.<sup>27</sup> Clause 46(2) would have removed the exemption of CTA ports from control zones, where effectively persons can be deemed to have arrived in, but not to have entered, the UK.<sup>28</sup> The clauses in the Bill introduced in the Lords did not amend the situation as regards leave to enter.<sup>29</sup>
35. The Home Office has stated that further legislative changes to the CTA will be considered as part of the immigration simplification programme.<sup>30</sup> 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 short and local. The powers that the UKBA intends to use on 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.<sup>31</sup> This would prevent

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<sup>27</sup> The following text of Section 1(3) of the Immigration Act 1971 would have been removed by the then 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..."*

<sup>28</sup> Through amendment of section 11(2) of the Immigration Act 1971.

<sup>29</sup> The Bill (in inserting the text in bold) means Section 1(3) would have 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".***

<sup>30</sup> CTA Impact Assessment, paragraph 3.10.

<sup>31</sup> Correspondence from UKBA to Human Rights Commission 4 March 2009.

the level of parliamentary scrutiny to which primary legislation is subjected.

36. Government is not proposing to reintroduce permanent, fixed checkpoints on the land border but to introduce 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".<sup>32</sup> The Home Office subsequently stated such checks would be 'intelligence led' on persons both arriving in and leaving Northern Ireland, referencing the:

...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.<sup>33</sup>

37. 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.<sup>34</sup>

38. Despite Government stating its intention for CTA passport control to only be introduced on air and sea routes, this was not explicit in the Bill when introduced in the Lords. At present, Section 1(3) of the Immigration Act 1971 prevents all CTA journeys being subjected to control under the same Act. Clause 46 of the original Bill would have entirely removed all reference to the freedom of CTA journeys from control. While 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.<sup>35</sup>

39. At House of Lords 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 journeys over the land border would not be subject to control under the 1971 Act.<sup>36</sup> Government's stated rationale for

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<sup>32</sup> Strengthening the Common Travel Area Consultation paper, UKBA, 24 July 2008, paragraph 2.6.

<sup>33</sup> CTA Impact Assessment, Annex B.

<sup>34</sup> Correspondence to the Commission from Lyn Homer, Chief Executive, UKBA, 9 October 2008.

<sup>35</sup> Section 10 Immigration Act 1971 (as amended).

<sup>36</sup> Amendment 108ZA moved by Lord Shutt of Greetland.

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 prevent UKBA imposing "effective controls".<sup>37</sup>

40. Despite this, Government, at House of Lords Committee Stage, continued to give an undertaking that it would "not require persons to carry a passport or national identity card"<sup>38</sup> when crossing the land border. Notably the Home Office references that there would 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 of the land border proposals**

41. 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' that he or she has spotted persons who might be immigration offenders.
42. 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.<sup>39</sup>

He further detailed that a broader range of vehicles are targeted on quieter roads.

43. 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

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<sup>37</sup> Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office, Hansard, HL 4 Mar 2009: Column 758.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

ID documents or otherwise. Non-CTA nationals will also be expected to satisfy UKBA officers through similar means. Even if there is no formal document requirement, there would be a *de facto* document requirement.

44. 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 they 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 document requirement is introduced, which documents will be accepted and from whom? If non-CTA nationals are expected to carry passports or national ID cards, and British or Irish citizens carry 'a' document, how will UKBA patrols know who is compelled to carry a passport or national ID card? For example, a Northern Ireland driving licence (rightly) does not state nationality; from whom will it be accepted as proof of CTA nationality?
45. 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 outcome is that minority ethnic persons would have to constantly carry identity papers or face frequent questioning regarding their status and, potentially, detention.
46. 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 ECHR and other international standards, to which the UK is a party, such as Article 12 ICCPR.
47. 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 ECHR.
48. 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.<sup>40</sup>

49. 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 visibly being from a minority ethnic background.
50. Concerns about racial profiling were also raised in a recent media report on 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.<sup>41</sup>

### ***Experience of land border checks in the Republic of Ireland***

51. 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 rights-based statutory organisations in the Republic of Ireland, such as the Irish Human Rights Commission and the National Consultative Committee on Racism and Interculturalism (NCCRI). In

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<sup>40</sup> CTA Impact Assessment, Annex A.

<sup>41</sup> Why some deportations are a black and white issue *Belfast Telegraph* 12 February 2009.

responding, in 2008, to the Republic's Immigration, Residence and Protection Bill, both organisations raised concerns that its provisions could lead to increased racial profiling.<sup>42</sup> With reference to immigration checks on the land border by immigration Gardaí, the NCCRI was sufficiently concerned about racial profiling as to encourage 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 other side of the land border.<sup>43</sup>

### **UKBA powers: The land border proposals**

52. As alluded to earlier in this paper, there has been no clear indication as to which powers the UKBA intends to employ in relation to the land border operations. The UKBA is still considering whether to legislate as part of the immigration simplification process to enable checks on vehicles, and has 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.<sup>44</sup>
53. 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.<sup>45</sup> The UKBA has, however, been unable to specify to the Commission which of these existing powers it intends to use in land border operations.
54. The CTA Clause removed from the Bill would have enabled 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, ships and air/sea ports respectively. However as alluded to earlier, Government, through regulation, can

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<sup>42</sup> Irish Human Rights Commission *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008, part III, paragraph 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, paragraph 4.

<sup>43</sup> CTA Impact Assessment, Annex B.

<sup>44</sup> E-mail to Human Rights Commission from UKBA Border and Visa Policy 16 February 2009/4 March 2009.

<sup>45</sup> Correspondence to the Commission from Lyn Homer, Chief Executive, UKBA, 9 October 2008.

determine otherwise.<sup>46</sup> In relation to the land border, such a move would contradict the stated objective of not introducing fixed control requirements, albeit that such control could be selectively implemented.

55. This contradiction would also emerge if Government pursued the extension of examination powers to trains, and even in-country, without exempting CTA routes. Such powers are among those that 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; extending 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 prison).<sup>47</sup>
56. At present 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 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 railway stations. None of this is referenced as planned in the present CTA reforms and while cross border rail is a land border route, Government’s plans remain unspecified.
57. Even in the absence of routine control, there is a range of other 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.

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<sup>46</sup> Section 10 Immigration Act 1971 (as amended).

<sup>47</sup> See: Draft Partial Citizenship, Immigration and Borders Bill published in June 2008, clauses 22, 23, 25(1)(b)), 26, 28 and 101.

58. The ability to flag down and stop vehicles on the land border and the potential to detain vehicle 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.
59. Genuinely intelligence-led operations should apply evidence thresholds and practices consistent with the norms of a democratic society outside an emergency situation. There are, for example, existing provisions in the Immigration Act 1971 for search and arrest for immigration offences through a warrant granted by a magistrate to an immigration officer, when the magistrate is satisfied that there are reasonable grounds for suspicion. There is no indication to date that the UKBA intends to restrict intelligence-led operations to these circumstances.

## **Broader reforms related to the Common Travel Area**

### ***CTA air and sea routes***

60. Government plans to introduce full routine passport controls 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) would have commenced on enactment had the proposals not been voted out.
61. By proposing to require passports or EEA ID cards from all passengers, the Government had mitigated the potential for checks to have been operated in a racially discriminatory manner.<sup>48</sup> However, there would have still been a real risk of selective implementation during the transitional phase. There would have been a considerable socio-economic impact on CTA nationals who travel between the UK and Ireland and who do not have passports or UK ID cards, but would have had to purchase them.<sup>49</sup>

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<sup>48</sup> Rather than a broader range of ID documents being potentially accepted from CTA nationals, as had been considered during consultation.

<sup>49</sup> A first adult British passport currently costs £72; a standard 10-year Irish passports costs €80.

62. The vast majority of CTA air and sea routes, being between the Republic of Ireland and Great Britain, are 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 would have been included, as would a scheduled, local, ten-minute shuttle ferry journey across Lough Foyle from Magilligan, County Derry/Londonderry to Greencastle, County Donegal.
63. The powers will also enable Government to introduce the e-borders scheme on CTA routes.<sup>50</sup>

### ***Journeys between Northern Ireland and Great Britain***

64. According to a media report, the Government had also proposed to introduce internal immigration control through passport checks on flights from Belfast to Great Britain, but subsequently dropped this plan which is not part of the present bill.<sup>51</sup> However, Government is now proposing document checks through powers under alternative immigration legislation, namely, the Immigration, Asylum and Nationality Act 2006 (as amended by Section 14 of the Police and Justice Act 2006). Secondary legislation under this Act can introduce passenger and service information requirements on domestic routes. Government's intention is to introduce this requirement, via secondary legislation, on domestic journeys between Northern Ireland and Great Britain only.<sup>52</sup> Within such a measure, document checks would not be conducted by UKBA officers but the responsibility would be delegated to carriers.
65. During the debate, the Minister stated that the Government rationale for this proposal was:

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...<sup>53</sup>

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<sup>50</sup> 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 introduced on CTA routes anyhow. In reality and paradoxically, e-borders could not be introduced as intended without first taking the power originally proposed in the Bill.

<sup>51</sup> UK-Irish Travellers to Face Passport Checks, *Guardian Online*, 19 January 2008

<sup>52</sup> Written Answer: Lord West of Spithead, Hansard, 11 May 2009 : Column WA154.

<sup>53</sup> Lord West of Spithead, Hansard, 4 March 2009 : Column 769.

Government has indicated that it intends to consult separately on this matter, including on which identity documents will be accepted. The Commission will seek to respond to the proposals.

### **Changing discourse on the motive for the CTA reforms**

66. Empirical evidence relating to the CTA is not provided to justify 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 irregular migration, along with the CTA constituting a gap in broader reform elsewhere to the immigration system.
67. The two published documents in relation to the Common Travel Area consultation focused entirely on routine immigration control matters and did not mention either terrorism or crime.<sup>54</sup> In addition, another published document, the final impact assessment, stated that the CTA “is purely an immigration arrangement; other agencies such as HMRC still operate controls on passengers and traffic entering the UK from another part of the CTA”.<sup>55</sup>
68. 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 terrorists.<sup>56</sup>
69. Also in the run up to the vote, the Serious and Organised Crime Agency (SOCA) provided extensive reports to a Belfast newspaper, highlighting alleged terrorism and organised crime threats facilitated by the land border.

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<sup>54</sup> Strengthening the Common Travel Area Consultation Document (Home Office 24 July 2008) and Government Response to Consultation (Home Office 15 January 2009). While emphasising immigration control, 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.

<sup>55</sup> Final Impact Assessment of Common Travel Area (CTA) Reform, p 1.

<sup>56</sup> Lord West of Spithead: Hansard HL 4 March 2009 : Column 770.

70. 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 unclear how the proposed routine immigration control activity on the land border 'targeting non-CTA nationals', could in any way address crime or security issues that are, on past experience, much more likely to involve British and Irish citizens.
71. The Commission has two areas of concern in relation to this shift in discourse. First, the risk that it could feed racially-constructed stereotypes and, second, the implications were UKBA officers given any further role in police work.
72. In relation to the first area, the Commission has consistently opposed any discourse that appears to conflate migration with criminality, or migrants with terrorism. At the Commission's recent conference on immigration detention, a senior UKBA spokesperson rightly described the number of migrants involved in serious crime as 'miniscule'. Discourse, which gives the impression that land border checks 'targeting non-CTA nationals' are counter-terrorism and organised crime measures, gives the opposite impression. The Commission would urge Government to put considerable thought and care into the way it is attempting to justify the CTA reforms and, in particular, the likely impact of such discourse.
73. Second, if there is to be any role for the UKBA on the land border in relation to counter-terrorism and organised crime, the Commission has consistently raised concerns at powers 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, oversight and accountability as PSNI officers.<sup>57</sup>
74. Parliamentarians will be aware that there is a particular policing context within Northern Ireland including an emphasis on human rights compliance, and different structures for oversight and accountability.

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<sup>57</sup> It would also be unclear as to the relationship, if any, between the present measures and those recently brought into law under the Counter-Terrorism Act 2008.

75. 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.
76. Outside the CTA reforms, the Commission also urges parliamentarians that in scrutinising the evolving powers of UKBA officers, including those listed under Part 1 of the present Bill, their impact on the particular policing circumstances of Northern Ireland be given due consideration.

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**Northern Ireland Human Rights Commission  
Temple Court, 39 North Street,  
Belfast BT1 1NA  
Telephone: (028) 9024 3987  
Textphone: (028) 9024 9066  
Fax: (028) 9024 7844  
Email: [information@nihrc.org](mailto:information@nihrc.org)  
Website: [www.nihrc.org](http://www.nihrc.org)**

**For further information contact:  
Daniel Holder, Policy Worker  
[daniel.holder@nihrc.org](mailto:daniel.holder@nihrc.org)**