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BORDERS, CITIZENSHIP & IMMIGRATION ACT 2009:

A NEW FRONTIER IN IMMIGRATION?

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ABSTRACT

The UK has always been a popular destination for migrants. As a result, it is argued that immigration into the UK is unsustainable at its current rate. To combat this, the UK government has introduced various pieces of legislation to control the influx of immigrants into the UK. More recently it has introduced the Border Citizenship and Immigration Act 2009 (BCIA 2009).

The BCIA 2009 aims to introduce a radical new approach to British citizenship requiring all migrants to speak English and obey the rule of law if they wish to gain citizenship and stay permanently in Britain. Furthermore, the BCIA 2009 designates powers previously the preserve of Her Majesty's Revenue and Customs to immigration officers.

This Paper aims to critically analyse the BCIA 2009 and in particular, if possible, offer suggestions of where the Act is open to legal challenge. Under the European Convention of Human Rights (ECHR), Article 8, every person has the right to respect for private and family life. Furthermore, every person has the right to prohibition against discrimination under the same Convention.

It is argued that the BCIA 2009 is fundamentally flawed and that the provisions contained within it are an inadequate test for migrants seeking to become citizens of the UK. Thus the Act is open to legal challenge by virtue of the provisions contained within the ECHR and other international statutes.

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PART I

INTRODUCTION

1. INTRODUCTION

I. BACKGROUND TO THE STUDY

There are various reasons why a person or persons would wish to leave their native countries, for instance; Asylum, natural disasters, war, poverty, employment, marriage or a host of other reasons. For some of these persons, the aim is to eventually become a Citizen of the host country and possibly remain there permanently. The goal of achieving citizenship for the particular individual provides a sense of belonging as well as rights and responsibilities already imposed upon and enjoyed by the citizens of that particular nation state.

The first form of citizenship was based on the way people lived in the ancient Greek times, in small-scale organic communities of the polis.[1] In ancient Greece, the main political entity was the city-state, and citizens were members of particular city-states. In the Roman Empire, polis citizenship changed form. Citizenship was expanded from small scale communities to the entire empire. Romans realised that granting citizenship to people from all over the empire legitimised Roman rule over conquered areas. Citizenship in the Roman era was no longer a status of political agency; it had been reduced to a judicial safeguard and the expression of rule and law.

In the last five hundred years, due to the rise of the Nation-State, citizenship is more closely identified with being a member of a particular nation. Generally citizenship is seen as the relationship between an individual and a particular nation and is the state of being a national of a particular country. Citizenship status carries with it both rights and responsibilities and is the ultimate goal for migrants wishing to settle in the host nation.

Most countries offer immigrants the opportunity to become Citizens of the host country once they

[1] A **polis** is a city, a city-state and also citizenship and body of citizens. When used to describe Classical Athens and its contemporaries, *polis* is often translated as "city-state." The word originates from the ancient Greek city-states.

have fulfilled certain requirements. The UK is no different. British citizenship is one of the six[2] different forms of British nationality. Some of these were defined in the British Nationality Act 1981, which came into force on 1 January 1983 and has been the basis of British nationality law since.

The *British Nationality Act 1981* (BNA 1981) received Royal Assent on 30 October 1981 and came into force on 1 January 1983. The Act reclassified *Citizenship of the United Kingdom and Colonies* (CUKC) into three categories:

- British citizenship
- British Dependent Territories citizenship (BDTC); and
- British Overseas citizenship.

The Act also modified the application of *Jus soli*[3] in British nationality. Prior to the Act coming into force, any person born in Britain (with limited exceptions such as children of diplomats and *enemy aliens*) was entitled to British Citizenship. After the Act came into force, it was necessary for at least one parent of a United Kingdom-born child to be a British citizen or "settled" in the United Kingdom (a permanent resident).

The BNA 1981 made a variety of other changes to the law:

- Mothers as well as fathers were allowed to pass on British citizenship to their children.
- The term Commonwealth citizen replaced the term British subject. Under the BNA 1981 the term British subject was restricted to certain persons holding British nationality through ties with British India or the Republic of Ireland before 1949.

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[2] The six forms of nationality are: British citizenship; British overseas citizenship; British overseas territories citizenship; British national (overseas); British protected person; and British subject. Other forms of British nationality have existed, but they are not current - for example, citizenship of the United Kingdom and Colonies (CUKC) or British Dependent Territories citizenship.

[3] In naturalization, ***jus soli*** (Latin: *law of ground*), also known as **birthright citizenship**, is a right by which nationality or citizenship can be recognised to any individual born in the territory of the related state.

- Right of Abode[4] could no longer be acquired by non-British citizens. A limited number of Commonwealth citizens holding Right of Abode were allowed to retain it.

- The rights of Commonwealth and Irish citizens to become British citizens by *registration* were removed and instead they were to be expected to apply for *naturalisation*[5] if they wanted to acquire British citizenship.

- Special provisions were made for persons from Gibraltar to acquire British citizenship.

- Women married to British men could no longer acquire British citizenship based purely on marriage.

- British Crown Colonies were renamed *British Dependent Territories* (subsequently amended to *British Overseas Territories*)

- The Channel Islands and the Isle of Man, which had been classified as colonies under the British Nationality Act 1948 became part of the United Kingdom for nationality purposes.[6]

Despite the changes brought by the BNA 1981 in relation to immigration and nationality law, the UK has remained a popular destination for all types of migrants; and as a result various governments have sought to limit and control immigration into the UK. This has meant that UK Immigration Law has undergone major changes since the implementation of the BNA 1981.

The introduction of various pieces of legislation and most recently the Borders, Citizenship & Immigration Act 2009 ("BCIA 2009") has meant that obtaining entry clearance[7], permanent

[4] The right of abode means that a person is entirely free from United Kingdom Immigration Control. In other words, they do not need to get permission from an Immigration Officer to enter the UK and can live and work in the UK without restriction.

[5] **Naturalisation** is the acquisition of citizenship and nationality by somebody who was not a citizen or national of that country when he or she was born.

[6] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nisec2gensec/Britishoverseasterritories?view=Binary

[7] Entry clearance, under UK immigration legislation, is the granting of visas and entry certificates to persons seeking to

residence[8] and subsequently Citizenship[9] in the UK has become more difficult, contrary to the Government's claims that it is simplifying immigration and nationality Law.

The BCIA received Royal Assent on 21st July 2009. Its aim is to introduce a radical new approach to British citizenship that will require all migrants to speak English and obey the law if they wish to gain citizenship and stay permanently in Britain - while speeding up the path to citizenship for those who contribute to the community by being 'Active Citizens'.[10]

With the BCIA 2009 having been passed, measures will gradually be introduced to work alongside the recently introduced points-based system[11] to ensure that only those people the UK needs can come and stay in the UK.

The area of proposed research is to critically analyse the BCIA 2009 and establish whether the introduction of the Act has indeed simplified or rather complicated the area of UK Immigration Law to the disadvantage of migrants seeking to obtain permanent residence and ultimately Citizenship against the back drop of the Government's objective of limiting UK Immigration. In particular, the paper aims to focus on *Part 1: Border Functions* and *Part 2: Citizenship*.

The paper will give a brief overview of the legislation contained within the BCIA 2009 and then analyse in various depths the provisions contained in Parts 1 and 2 of the BCIA 2009. The paper aims to concentrate in particular on the provisions contained within Part 2: Citizenship and offer

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enter the UK.

[8] Permanent Residence is also to as 'Indefinite Leave to Remain'. After a person has lived legally in the UK for a certain length of time (usually between two (spouse) and five years (worker)), they may be able to apply for permission to settle in the UK permanently. This is known as 'indefinite leave to remain'. There are further obligations of time imposed upon students and those who do not fall within the immigration rules of ten years.

[9] British citizenship is one of the six different forms of British nationality. Some of these were defined in the British Nationality Act 1981, which came into force on 1 January 1983.

[10] Active citizenship is the philosophy that citizens should work towards the betterment of their community through economic participation, public, volunteer work, and other such efforts to improve life for all citizens.

[11] The points-based immigration system is the means of regulating immigration to the United Kingdom from outside the European Economic Area (EEA). The scheme was phased in between 2008 and 2010. It is composed of five "tiers" which replaced all the previous work permits and entry schemes. The system is administered by the UK Border Agency. The five tiers are: *Tier 1: Highly Skilled Workers, Tier 2: Sponsored Workers, Tier 3: Temporary Workers, Tier 4: Students and tier 5: Youth Mobility Scheme.*

suggestions where the legislation may require clarification and may be open to legal challenge within the context of EU law or Human Rights legislation.

The paper will not discuss in detail any legislation other than the BCIA 2009 and British Nationality Act 1981 (as amended) and any questions raised on issues addressed within the paper on EU or Human Rights legislation are outside the parameters of this study and will not be discussed. The paper is limited to critically analysing Parts 1 and 2 of the BCIA 2009.

The paper aims to suggest that the provisions contained within the BCIA 2009 Parts 1 and in particular Part 2 are ambiguous at best and do little to speed up the path to citizenship for migrants in the UK. The provisions contained within the Act, in the opinion of the author, are detrimental to the prospects of the UK as it risks alienating economic migrants from settling in the UK due to the complex and poorly drafted legislation.

The primary concern of the author is the impact of Part 2 of the BCIA 2009 which outlines a reform of the naturalisation process. The changes proposed would introduce new barriers to migrants who wish to become British citizens.

The time taken to become a British citizen will be lengthened in a new 'probationary citizenship' period. Migrants would be expected to remain in continuous employment throughout the period of 'probationary citizenship'; despite continuing to have no access to non-contributory public funds. The BCIA 2009 will also introduce new restrictions on the types of leave which would qualify in migrants' journey towards citizenship.

Furthermore, the BCIA 2009 would restrict the amount of time migrants can spend outside the UK if they want to move towards naturalisation. The author has serious concerns about the rationale and impact of the measures proposed in the BCIA 2009 and proposes to address the following issues:

- What is Immigration and why the UK Government wishes to control it? – I will firstly define the term 'Immigration' and then briefly provide a history of Immigration in the UK.
- What is the BCIA 2009 and what does it propose? – I will explain the origins of the new Act and appraise the proposals behind its introduction.
- Is there any aspect of BCIA 2009 subject to legal challenge? – I will attempt to highlight areas of the act which are subject to legal challenge and propose changes which may avoid ambiguity.
- Finally, is the Citizenship philosophy reinforced by the legislation contained within Part 2 of the Act and does the BCIA 2009 represent an effective way of implementing such a philosophy?

It is the aim of the author to show that the provisions contained within the BCIA 2009 and in particular in Part 1 and 2 are detrimental to migrants and do nothing to expedite the immigration process. Furthermore, the author aims to suggest that the proposed Citizenship provisions contained within Part 2 of the BCIA 2009 are unfavourable to migrants whom will be required to fulfil various activities to the satisfaction of the Secretary of State in order to expedite their route to citizenship.

II. RELEVANCE OF THE STUDY

The aim of my research into UK Immigration Law is to appraise the new BCIA 2009 and offer comments on where the legislation can be modified or clarified to avoid ambiguity. By doing so, the paper aims to suggest that contrary to the Governments claims that it is simplifying UK Immigration Law it has instead complicated the legislation and disadvantaged all types of migrants who wish to come and stay in the UK.

The paper will aim to make suggestions as to how the legislation should be construed in light of case law and it will briefly explore the implications for migrants.

PART 2

OVERVIEW OF UK IMMIGRATION

2. OVERVIEW OF UK IMMIGRATION

A. WHAT IS IMMIGRATION?

Immigration is the migration by a person or persons into a place, of which they are not a native, in order to settle there permanently. There is a distinction between Asylum and Immigration and this should be clarified at the outset.

It is important to make this clarification as the philosophy of limiting migration into the UK only applies to economic migrants, not migrants seeking Asylum. Migrants seeking Asylum are commonly confused with economic and other migrants. This is incorrect and as a result of this misunderstanding, the wider public assumes all immigrants are the same, which subsequently fuels negative feeling against immigrants in the UK.

Asylum is protection given by a country to someone who is fleeing persecution in their own country. It is given under the 1951 United Nations Convention Relating to the Status of Refugees.[12] To be recognised as a refugee, a person must have left their home country and be unable to return due to a well-founded fear of persecution or death.

Asylum Seekers are not economic migrants. They are people who are entitled to seek a place of safety to escape persecution, torture or war. Most people seeking asylum in the UK come from countries with a poor human rights record. Most want to return to their own country when it is safe to do so.

In contrast, **Immigration** refers to migrants coming into the UK for other reasons such as work, study, marriage, settlement or a host of other reasons not related to humanitarian protection. It is these people to whom the BCIA 2009 applies and what the subject of this paper, primarily, relates

[12] A **Refugee** is defined in Article 1 of the Convention as amended by The **Protocol Relating to the Status of Refugees** entered into force on October 4, 1967.

to.

There is a misconception by many that all migrants into the UK are economic migrants, however, this is not the case. People entering the UK for the purpose of seeking Asylum do so not through choice, but through necessity. People seeking Asylum do so as the situation in their native country is such that leads to a genuine fear of persecution or death if they were to remain. As a result, these people have to flee and seek safety elsewhere.

The aim of the Government is to limit and control migration into the UK so that only those people the UK needs can come and settle her permanently, this limit on immigration would be difficult to enforce against migrants entering the UK for the purposes of Asylum. Thus, by introducing new legislation, the Government is making it more difficult for people whom it does not deem worthy to qualify as UK citizens and deterring others from coming to UK in the first place.

The author is of the opinion that any person who enters the UK legally and fulfils the requirements of the Immigration Rules[13] should be entitled to become citizens of the UK once they have fulfilled the requirements of the said rules, without facing further complications and having to fulfil obligations which would not be expected from those who are already citizens of the UK; and which place migrants into the UK at a disadvantage.

There are various requirements currently in operation which the author agrees with such as the requirement to prove that a person wishing to settle permanently in the UK and ultimately obtain Citizenship can converse in English which meets a certain standard and has knowledge of life in the UK[14]. However, all of the obligations contained within the new BCIA 2009 are not to the benefit of the migrant and, in the opinion of the author, can be construed as detrimental and open to possible legal challenge.

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[13] HC 395

[14] See: http://www.ukba.homeoffice.gov.uk/settlement/knowledge-language-life/

The Author also agrees that immigration law in the UK is complex and requires consolidation and detailed clarification in order to make the process less cumbersome and more attractive to the more prosperous economic migrants who may wish to settle in the UK; and thus contribute to the UK economy. However, the provisions contained within the BCIA 2009, in the opinion of the author, are ambiguous and in some respects flawed and ultimately disadvantageous to migrants who decide to settle in the UK permanently.

Furthermore, the author is of the opinion that the draft Immigration Bill which was due to replace all existing immigration legislation was deeply flawed and required considerable amendments in order for it to be acceptable and passed as law. The author believes that the concept of simplifying immigration and nationality law is one which is desirable, however, whether it is achievable is another matter entirely. Thus, the author aims to suggest that the introduction of the new BCIA 2009 has complicated immigration law rather than simplified it as was the claim of the Government.

B. MIGRATION TO THE UK

Immigration to the United Kingdom of Great Britain and Northern Ireland since 1922[15] has been substantial, in particular from Ireland and the former colonies of the British Empire - such as India, Bangladesh, Pakistan, the Caribbean, South Africa, Kenya and Hong Kong - under British nationality law. As discussed above, others have come as asylum seekers[16], seeking protection as refugees under the United Nations 1951 Refugee Convention, or from European Union (EU) member states, exercising one of the EU's Four Freedoms.[17]

From the mid-eighteenth century until at least 1947, and longer in many areas, the British Empire covered a large proportion of the globe and at its peak over a third of the world's people lived under British rule. Both during this time, and following the granting of independence to most colonies after the Second World War, the vast majority of immigrants to the UK were from either current or former colonies, most notably those in the Indian subcontinent and the Caribbean.

Following the end of the Second World War, the British Nationality Act 1948 was passed to allow the 800 million[18] subjects in the British Empire to live and work in the United Kingdom without needing a visa. These people filled a gap in the UK labour market for unskilled jobs and many people were specifically brought to the UK on ships such as the *Empire Windrush*.[19]

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[15] The name of the country was formally changed in 1927 from the *United Kingdom of Great Britain and Ireland* to *United Kingdom of Great Britain and Northern Ireland* by the Royal and Parliamentary Titles Act.

[16] Under the United Nations Convention Relating to the Status of Refugees from 1951, a **refugee** is a person who (according to the formal definition in article 1A of this Convention), "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country".

[17] The core of European Union economic and social policy is summed up under the idea of the four freedoms – free movement of goods, capital, services and persons.

[18] HC Deb 19 March 2003 vol 401 cc270-94WH.

[19] The **MV *Empire Windrush*** was a ship that is an important part of multiracialism in the United Kingdom. The *Empire Windrush* arrived at Tilbury on 22 June 1948 with its 492 passengers from Jamaica wishing to start a new life in the United Kingdom. The passengers were the first large group of West Indian immigrants to the UK following the Second World War.

Commonwealth immigration, made up largely of economic migrants, rose from 3,000 per year in 1953 to 46,800 in 1956 and 136,400 in 1961.[20] The heavy numbers of migrants resulted in the establishment of a Cabinet committee in June 1950 to find "*ways which might be adopted to check the immigration into this country of coloured people from British colonial territories*".[21]

Although the Committee suggested not introducing restrictions, the Commonwealth Immigrants Act was passed in 1962 as a response to public sentiment that the new arrivals "should return to their own countries" and that "no more of them come to this country"[22]. Introducing the legislation to the House of Commons, the Conservative Home Secretary Rab Butler stated that:

"The justification for the control which is included in this Bill.....is that a sizeable part of the entire population of the earth is at present legally entitled to come and stay in this already densely populated country. It amounts altogether to one-quarter of the population of the globe and at present there are no factors visible which might lead us to expect a reversal or even a modification of the immigration trend."[23]

As a result of the increased migration into the UK, various governments have attempted to stem the flow of migrants by introducing new laws as is evidenced by the statement of Conservative Home Secretary Rab Butler.

The UK has attempted to limit the influx of migrants with numerous pieces of legislation based on some vision of which types of people, in which types of situations should be permitted to stay in the UK and ultimately become UK Citizens. This means that there is now a myriad of complex legislation which makes up UK Immigration law.[24]

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[20] HC Deb 19 March 2003 vol 401 cc270-94WH.
[21] HC Deb 19 March 2003 vol 401 cc270-94WH
[22] HC Deb 09 February 1965 vol 706 cc178-82.
[23] HC Deb 16 November 1961 vol 649 cc687-819.
[24] For further details of the legislation related to UK Immigration Law, see: Immigration Law and Practice, Ian

As a result of the complexity of legislation, the former Labour government had undertaken to simplify the law for migrants and practitioners alike with the introduction of new legislation which will substitute all of the existing laws outlined above.

It was initially expected that one act would consolidate existing immigration legislation however the Home Office delayed introducing the Draft Immigration Bill which is due to consolidate all of the existing complex legislation into one single act. The Draft Immigration Bill was eventually announced in November 2009[25], and instead in the interim, the Government identified key measures to be quickly pushed forward using the BCIA 2009 as a vehicle.

These key measures included the recommendation made in a 2008 Home Office green paper "The Path to Citizenship"[26], which took as its starting point the premise that migrants "earn" citizenship and that only those who demonstrated their commitment to the UK should be allowed to obtain UK citizenship. Other clauses come from a partial (draft) immigration and citizenship bill also published in the summer of 2008.

Commentators such as Liberty, The Refugee Council, UNHCR[27], Justice and various other organisations have expressed concern at the provisions contained within the BCIA 2009 and some have even argued that the idea of the proposed draft Immigration Bill is deeply flawed.

The main thrust of their objection is that the BCIA 2009 erodes the rights of migrants by making it more difficult to obtain permanent residence or British citizenship by increasing the qualifying periods and by introducing more rigid qualifying criteria. This is in line with the government's proposal of earned citizenship.

Macdonald QC and Francis Webber (Butterworths Law) 7th Edition. 1 April 2008.

[25] Draft Immigration Simplification Bill November 2009: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/simplification-project-draft-bil/draft-immigration-bill?view=Binary

[26] The Path to Citizenship: Next Steps in Reforming the Immigration System February 2008: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/pathtocitizenship/pathtocitizenship?view=Binary

[27] The United Nations High Commissioner for Refugees

The author agrees with this view and suggests that the reason for such flaws is the inability to consolidate the existing legislation into one single Act without having a proper understanding of the complexities of the existing legislation. Furthermore, the author suggests that without producing detailed explanatory notes explaining the terminology and the purpose behind the legislation, any draft Immigration Bill is likely to face legal challenges, or be voted down in Parliament.

The basis of any possible legal challenge is likely to come in the form of a breach of one of the international statutes. In particular, the author is of the opinion that the provisions contained within the BCIA 2009, Part 2, will lead to a breach of some of the provisions of European Convention of Human Rights (ECHR). In particular, the author is of the opinion there is a potential for breach of Articles 2[28], 8[29] and 14[30] of the ECHR, although to what extent remains yet to be seen.

Furthermore, it is the opinion of the author that this commitment required of migrants to "earn" citizenship is unfair and disproportionate to the wider public interest and may be possible to legal challenge by virtue of EU or Human Rights legislation. In particular, the author suggests that the imposition of such a commitment on migrants may be deemed as an infringement of their Article 8 and 14 rights, and as a result may be open to possible legal challenge in the future.[31]

The author believes that immigration legislation should not imply such a commitment and instead the UKBA should find alternative means to ensure migrants are suitably integrated into society; for instance the requirement to prove a certain level of spoken English or the requirement to attend a citizenship ceremony.[32]

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[28] Article 2 of the European Convention on Human Rights (ECHR) protects the right of every person to their life.
[29] Article 8 of the ECHR provides the right to respect for private and family life.
[30] Article 14 of the ECHR provides for Prohibition against Discrimination.
[31] For example see: *Petrovic v Austria* (2001) 33 E.H.R.R in which the Court held that a difference in treatment concerning entitlement to parental leave allowances fell within the ambit of Article 8 ECHR and subsequently Article 14.
[32] A Citizenship Ceremony is the final stage in granting British Citizenship to foreign nationals. The ceremony welcomes new citizens into the community and celebrates the significance of becoming a British Citizen.

C. WHAT IS THE BCIA 2009

On 6th June 2007 the former Labour Government announced that it intended to consolidate and 'simplify' all immigration legislation since the Immigration Act 1971 into a single Act.[33] On 20th February 2008, the Prime Minister made a speech[34] launching the Green paper Consultation *The Path to Citizenship: Next Steps in Reforming the Immigration System*[35] which also gave details of the 'simplification' project.

Subsequently, a draft (Partial) Immigration and Citizenship Bill (the draft (Partial) Bill) was published in July 2008 along with Explanatory Notes, proposals for a full 'simplification' of immigration law,[36] and other draft documents.[37] The initial intention was that a full Bill would be introduced in the parliamentary session 2008-09[38]; however, this did not happen. The project timetable had lapsed and a full Bill was simply not ready.[39]

This was not surprising and was predicted by many in their response to the first consultation on 'simplification'.[40] Instead, the Government prioritized certain matters and proceeded with them first[41] in what is now known as the BCIA 2009. Only certain provisions of the BCIA 2009, Part 2 (Citizenship) and S.25 (short-term holding facilities), build on clauses first suggested in the draft (Partial) Bill. The remainder is all new.

The previous Government's intention was to produce a full draft 'simplification' Bill in October

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[33] Simplifying Immigration law: An Initial Consultation UK Border Agency (6 June 2007). Simplifying Immigration Law: Responses to the Initial Consultation paper (6 December 2007).
[34] Available at: http://www.number10.gov.uk/Page14624
[35] UK Border Agency (20 February 2008)
[36] Making Change Stick: An Introduction to the Immigration and Citizenship Bill. Home Office (14 July 2008).
[37] Draft Illustrative Impact Assessment. UK Border Agency (25 June 2008); Draft Illustrative Rules on Protection UK Border Agency (August 2008).
[38] UK Border Agency, National Asylum Stakeholder Forum, 22 May 2008, Minutes at 6.2
[39] See The Government's Draft Legislative Programme: Summary of Consultation, CM 7561 (December 2008).
[40] See for example Immigration Law Practitioner's Association's (ILPA) Response to Consultation on Simplifying Immigration Law, August 2007, Para 14, available at: http://www.ilpa.org.uk/Responses/SimplificationConsultation.Pdf
[41] HL Deb 11 February 2009 Vol. 707 c1128, per Lord West of Spithead, Parliamentary Under Secretary of State, Home Office; see also c1202, per Viscount Bridgeman (Conservative).

2009, but without drafts of all proposed secondary legislation and rules.[42] All the main political parties have expressed concern with the current legislative framework of immigration legislation;[43] however the future of a 'simplification' Bill is uncertain.

An interesting comment was made by then Shadow Immigration Minister Damian Green MP who summed up the state of the Immigration legislation when he stated: '*A clear and consistent policy that says that we need a limit on the number of people who come here, that those who come are welcome and that we will not mess them around by changing the rules every five minutes makes a country more welcoming than the system of the past 10 years.*'[44] Whether the goal of consolidating all existing immigration legislation into one single Act is achieved, is yet to be seen. The author opines that this would be extremely difficult given the propensity to rely on secondary legislation.

Furthermore, if immigration legislation is eventually consolidated and simplified into one single Bill, it is assumed all of the nationality provisions contained within the BCIA 2009 will be rolled up, modified and then incorporated into the new Bill.

The BCIA comprises of four parts. Part 1 concerns border functions, including customs functions, the designation of a Director of Border Revenue, provisions on the use and disclosure of information, and powers of investigation, detention, inspection, and oversight. Part 1 came into force the day the BCIA was passed.[45]

The aim of the author is to review Part 1 and offer comments on the legislation and suggest how the provisions contained within Part 1 have designated greater powers to immigration officers thus bringing the jurisdiction of UK Border Agency (UKBA) within the homes of UK Citizens.

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[42] Communication to the ILPA from Peter Wrench, UK Border Agency, head of the 'simplification' project (26 June 2009).
[43] HL Deb 11 February 2009 Vol. 707 c1128, c1133 per Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office; HC Deb 14 July 2009 Vol. 496 c256, per Chris Huhne MP, Liberal Democrat Home Affairs Spokesman
[44] *Hansard*, HC Committee, Third Sitting 11 Jun 2009 : Column 86
[45] S.58(1) BCIA 2009

Part 2 of the BCIA 2009 relates to Citizenship, including the acquisition of British Citizenship by naturalisation, the acquisition of British citizenship by the children of members of the armed forces, and the acquisition of British citizenship by registration by minors, British Nationals (Overseas), and descendants in the female line.

The provisions of Part 2 BCIA come into force on such a day as the Secretary of State may by order appoint.[46] The Government intends to commence the provisions that apply to naturalisation no earlier than July 2011 and the other remaining provisions in January 2010. This is important to note as it means that there is still a possibility that the implementation of the provisions contained within Part 2 of the BCIA 2009 can be affected or further still prevented.

The paper aims to analyse the provisions contained within Part 2 of the BCIA 2009 and comment on their implications to migrants. In particular, the author aims to suggest that the provisions relating to Citizenship are unfair and disadvantage migrants by requiring them to fulfil obligations which would otherwise not be expected of existing UK Citizens.

Part 3 of the BCIA 2009 relates to immigration including restrictions on studies, fingerprinting and detention at ports in Scotland. The provisions on the restriction on studies came into force on the day the BCIA 2009 was passed.[47] The other provisions come into force on such day as the Secretary of State may by order appoint.[48]

Part 4 of the BCIA relates to miscellaneous matters including the transfer of some applications for judicial review from the High Court to the recently created Upper Tribunal, the trafficking of people for exploitation and the duty regarding the welfare of children. The provisions in relation to judicial review come into force on such day as the Lord Chancellor may by order appoint[49], the same is the

[46] S.58 (2) BCIA 2009
[47] S.58(3)(a) BCIA 2009
[48] S.58(3)(b) BCIA 2009
[49] S.58(4)(a) BCIA 2009

case for provisions on trafficking people for exploitation and the duty regarding the welfare of children.[50]

The author has no objections to the implementation of Parts 3 and 4 of the BCIA 2009 as the view of the author is that these parts protect citizens and as a result do not require any modification or cause any great concern. Thus, paper does not aim to refer to Parts 3 or 4 of the BCIA 2009 any further unless it is necessary to do so for the purposes of the discussion.

[50] S.58(4)(b) BCIA 2009

PART 3

ANALYSIS OF BCIA 2009

3. ANALYSIS OF THE BCIA 2009

I. INTRODUCTION

There is a lack of academic literature on the new BCIA 2009 due to its recent introduction, therefore, this analysis is limited to the Act itself including consultation papers and responses received to the consultation process along with reviews carried out by various NGO's and charities. In addition, the author will be looking at Ministerial Statements[51].

The BCIA 2009 emanates from a wider Home Office project aiming radically to simplify immigration law. The government has acknowledged that the legal framework governing immigration has become overly complex[52] and as a solution, the legislation on immigration requires clarifying. Subsequently the previous Labour government proposed a Draft Immigration Bill[53].

It is argued by many[54] that as it was, the draft Bill itself was deeply flawed, containing much that would further erode appeal rights and increase arbitrary decision-making by immigration officials. Liberty correctly noted that "*the Government's zeal for reform of the criminal justice system is perhaps only matched by its unchecked enthusiasm for piecemeal reform of immigration and asylum law*." [55]

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[51] The use of Ministerial Statements was established in the case of *Pepper (Inspector of Taxes) v Hart [1992] UKHL* The case is a landmark decision of the House of Lords on the use of legislative history in statutory interpretation. The court established the principle that when primary legislation is ambiguous then, under certain circumstances, the court may refer to statements made in the House of Commons or House of Lords in an attempt to interpret the meaning of the legislation. Before this ruling, such an action would have been seen as a breach of parliamentary privilege

[52] Simplifying Legislation, Processes and Technology. UKBA: http://www.ukba.homeoffice.gov.uk/managingborders/simplifying

[53] Draft Immigration Simplification Bill November 2009: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/simplification-project-draft-bil/draft-immigration-bill?view=Binary

[54] Critics of the Draft Immigration Bill include the Refugee Council, Liberty, The Immigration Advisory Service, The Migration Advisory Committee and various other charities and NGO's.

[55] Liberty's Briefing on the Borders, Citizenship & Immigration Bill for Second Reading in the House of Lords (February 2009).

This view suggested by Liberty supports the notion that the government is partial to making numerous amendments to existing legislation, thus further complicating immigration legislation, rather than overhauling the existing system and replacing it with something more appropriate.

In place of the Draft Simplification Bill, the previous Labour Government opted for a two-stage approach: the introduction of the Borders Citizenship and Immigration Act 2009 containing a relatively narrow range of measures; and an Immigration Simplification Bill that would consolidate all existing immigration legislation into a single Act. The Immigration Simplification Bill has not yet materialised, however, the BCIA 2009 has and has been implemented as law.

Even though the BCIA was passed on 21st July 2009, one may think, therefore, that opportunities to influence the new route to citizenship, which is to be introduced by the Act's naturalisation provisions, have now gone. However, that is not the case.

Although the Act has now been passed, the naturalisation provisions in it have not yet commenced – that is, they have not yet become law. The Act gives the government power to implement the naturalisation provisions. Until they do so, there may still be opportunities to influence whether and how these are to be implemented.

It is important to note that the previous Labour Government had stated that it did not intend to implement the naturalisation provisions until July 2011. This means that with a new 'Coalition' government, there will be an opportunity to influence or decide whether or how these provisions are to be implemented.

At present, the view of the new Coalition Government is to limit migration into the UK. Presently, the new 'Coalition' government has decided to place a temporary cap on the number of migrant workers allowed into the UK from outside the EU, ahead of a permanent limit. Furthermore, they

have now stated that the number of foreign students allowed into the UK is unsustainable[56]. One can only assume that this means that the 'Coalition' government intends to place a cap on persons applying under the Tier 4: Students scheme.

Interestingly, a spokesperson for Mayor of London Boris Johnson told Channel 4 News: "*We share the concerns of the business community that a crude cap could be very detrimental to the free movement of the talented, creative and enterprising people who have enabled London to be such a dominant global force.*" [57] This is a view supported by the author, although in the opinion of the author, the cap is detrimental not only to London, but to the whole of the UK.

To place such a cap on immigration[58], in the opinion of the author, is detrimental to the economy of the UK as migrants provide, for instance in the case of Students, a source of temporary and part-time labour as well as contributing in monetary terms by, generally, paying higher fees reserved for international students outside of the EU.[59]

The Act itself, on the face of it, could be construed as ambiguous and draconian in the sense that Part 1 designates powers upon immigration officials which up until the present was unprecedented. These powers grant allow immigration officers to act as customs officers whom have wider reaching powers than previously enjoyed by immigration officers.

The author is of the opinion that designating such powers to inadequately trained and inexperienced staff is irrational. The reason for this is that the powers designated to Customs officers, such as entry of premises or search and seizure, should be carried out following adequate training and

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[56] Student Immigration levels Unsustainable says Minister. BBC News. 06 September 2010. Available at: http://www.bbc.co.uk/news/uk-politics-11191341

[57] Coalition Government Crackdown on Migration. Channel 4 News. 26 June 2010. Available at: http://www.channel4.com/news/articles/politics/coalition+government+crackdown+on+migration/3692477

[58] At present, the Coalition Government has imposed a Cap of 24,100 until July 2011 on Non-EU migrants entering the UK for work. BBC News. 26 July 2010. See: http://www.bbc.co.uk/news/10422895

[59] New figures for 2010-11 suggest that institutions will charge undergraduates from outside the European Union an average of £10,463 a year in classroom-based subjects, up 5.6 per cent on 2009-10. That rises to £11,435 for overseas undergraduates in laboratory-based subjects, an increase of 6.1 per cent. See: http://www.timeshighereducation.co.uk/story.asp?storycode=412760

supervision. Thus, in the view of the author, there appears to be a potential to abuse the powers designated.

In relation to the BCIA 2009, the explanatory notes provided[60]clearly state that "[t]hey [i.e. the notes] do not form part of the Act and have not been endorsed by Parliament." Further, the explanatory notes state that they are "...not meant to be, a comprehensive description of the Act."

Section 2 of the notes state: "*[t]he notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of section does not seem to require any explanation or comment, none is given.*" This provides reason to believe there remains significant ambiguity in the interpretation of the Act. This leads the author to believe that the Government has complicated rather than simplified immigration legislation, contrary to its claims.

The Act is the most recent to seek to amend the law on immigration, asylum and nationality. It includes the citizenship and child protection aspects of the Draft (Partial) Immigration and Citizenship Bill which was published for consultation in July 2008[61]. It incorporates aspects of other consultation exercises on the Common Travel Area (the UK, the Channel Islands, the Isle of Man and the Republic of Ireland)[62], and on immigration appeals.[63]

The BCIA is arranged into four parts:

1. Border Functions
2. Citizenship

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[60] Explanatory Notes. Borders, Citizenship and Immigration Act 2009 (2009): http://www.opsi.gov.uk/acts/acts2009/en/ukpgaen_20090011_en_1

[61] Draft (Partial) Immigration and Citizenship Bill July 2008: http://www.official-documents.gov.uk/document/cm73/7373/7373.pdf

[62] Simplifying Immigration Law: Responses to the Initial Consultation paper December 2007: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/simplification1stconsultation/consultationresponses.pdf?view=Binary

[63] Immigration Appeals: Fair Decisions, Faster Justice 21st August 2008: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/immigrationappeals/immigrationappealsconsultation?view=Binary

3. Immigration
4. Miscellaneous and General

Its key areas are that it:

- Allows for certain functions to be transferred from HM Revenue & Customs to officials of the recently created UK Border Agency. The customs role of the UK Border Agency will focus on border-related matters, while HM Revenue & Customs will retain responsibility for revenue and customs functions inland.
- Implements the Government's proposals for a new 'path to citizenship' by amending provisions of the British Nationality Act 1981 relating to naturalisation as a British citizen. Other amendments relate to the children of foreign and Commonwealth members of the armed forces and to the registration as British citizens of children born abroad to British mothers before 7 February 1961.
- Introduces powers to control all those arriving in the UK from another part of the Common Travel Area. Other changes relate to restrictions on studying in the UK, powers to take fingerprints, and detention at ports in Scotland
- Allows judicial review applications in immigration and nationality cases to be heard by the new Upper Tribunal instead of the High Court.
- Introduces a new duty on the UK Border Agency to safeguard the welfare of children.[64]

It is the opinion of the author that as it stands the BCIA 2009 is deeply flawed and does little to simplify immigration legislation. Moreover, the author suggests that the BCIA has instead complicated immigration legislation by designating wide-ranging powers to an inadequately trained UK Border Agency as well as complicating the path to obtaining citizenship for migrants in the UK. Furthermore, the author intimates that Part 2 of the BCIA 2009 discriminates against certain

[64] Latest News on the Bill: http://services.parliament.uk/bills/2008-09/borderscitizenshipandimmigration.html

migrants whom are desirous of becoming UK citizens.

In the forthcoming two chapters, the author will aim to appraise the provisions contained within Parts 1 and 2 of the BCIA 2009 and offer comments on their implications to migrants. In particular, the author will aim to show that the BCIA 2009 is flawed and subject to legal challenge in light of the provisions contained within the ECHR and various other international statutes..

II. ANALYSIS OF PART 1: BORDER FUNCTIONS

Part 1: Border Functions of the BCIA 2009 stems from the Prime Minister's announcement in July 2007 of the creation of 'a unified border force' and the Cabinet Secretary's Report: *Security in a Global Hub*.[65] It provides the legislative framework for immigration officers and officials of the Secretary of State to exercise revenue and customs functions which have to date been exercised by Her Majesty's Revenue and Customs ('HMRC').[66] The provisions contained within Part 1 BCIA 2009 enable the same individual to perform functions as both immigration officer and customs official.

Much of Part 1 of the BCIA 2009 is the latest stage in a process that began with the Nationality, Immigration and Asylum Act 2002, when border security became ever so important following the destruction of the Twin Towers in New York on 9/11, and was developed in later Acts following the increasing terrorist threat to the UK over the last decade, in particular the UK Borders Act 2007[67].

The most recent of changes which are contained within the BCIA 2009 were indicated by former Prime Minister Brown's announcement on 25th July 2007 of the Government's decision to merge the work of Customs at borders, the UK Immigration Agency and UK Visas, thus establishing a 'unified border force'.[68]

Part 1 of the BCIA 2009 originated in two parliamentary statements on national security made by the Prime Minister and a Report of the Cabinet Secretary, commissioned by the Prime Minister. In the first of the statements, made in light of the terrorist bombings in London and Glasgow on 29 and 30 June respectively, the Prime Minister referred to the borders as '*the second line of defence*'

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[65] HL Deb 11 February 2009 Vol. 707 C1129, per Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office, introducing the Bill at the second reading in the House of Lords.
[66] BCIA 2009, Explanatory Notes, Para 4.
[67] The **UK Borders Act 2007** introduced compulsory biometric residence permits for non-EU immigrants and introduced greater powers for immigration control. It received Royal Assent on 30 October 2007 with sections 17, 59, 60 and 61 coming into force on that day.
[68] HC Deb 25 July 2007 Vol. 463 c842.

against terrorism, as well as against crime and illegal immigration.

The Prime Minister announced that '*to strengthen the powers and surveillance capability of our border guards and security officers [the UK] will now integrate the vital work of the Border and Immigration Agency, Customs and UK Visas overseas and at the main ports of entry...and...will establish a unified border force*'.[69]

The Cabinet Secretary reported[70] on 14 November 2007 '*the benefits that could be achieved through increased integration of work at the border. These include;*

- *Exploiting commonality of process;*
- *[The] better management of the flow of people and goods at the frontier;*
- *Improved relationships with partners;*
- *More flexible distribution of resources at a national level and the effective and efficient deployment of resources on site.*'[71]

It was this philosophy of strengthening the borders that gave rise to much of the provisions contained within Part 1 of the BCIA 2009. Whether the act of strengthening and unifying the borders has actually worked is questioned by the author. In particular, the author suggests that whilst the provisions contained within the new BCIA may have strengthened the borders, it has done so to the detriment of migrants into the UK.

For example, Section 21 of the BCIA 2009 allows data to be shared between various government agencies. With the propensity of cyber theft and the poor organisation within the UKBA, one would wonder how often data was lost without the fact being made public knowledge.

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[69] HC Deb 27 July 2007 Vol. 463 cc842-3.
[70] Security in a Global Hub: Establishing the UK's New Border Arrangements, Cabinet Office (14 November 2007).
[71] Security in a Global Hub: Establishing the UK's New Border Arrangements, Cabinet Office (14 November 2007). Pg. 5, Para 3.

Another example is Section 25 of the BCIA 2009 which refers to *Short Term Holding Facilities.* The term "Short-term Holding Facility" is defined in Section 147 of the Immigration and Asylum Act 1999.[72] Section 25 of the BCIA 2009 adds the words: "*or (b) for the detention of:-*

(i) Detained persons for a period of not more than seven days or for such period as may be prescribed' and

(ii) Persons other than detained persons for any period."

At present, such holding facilities are used to detain people immediately upon arrival at a port, pending consideration of their application for leave to enter the UK, or immediately prior to removal from the UK. The facilities include 'holding rooms' at ports where people may be detained for no more than twenty four hours.

It is the view of the author that, facilities such as these are not appropriate to hold people for more than seven days and the provisions contained within Section 25 allow such practices to take place. This is a view that is echoed by the British Refugee council, whom in their paper of August 2009[73] suggest that the new definition would potentially include a range of places (e.g. prisons, police cells and immigration removal centres) within it as these places may be able to hold a person under the powers of UKBA control for less than seven days.

The British Refugee Council further suggested that it would be unclear what would be the relevant guidelines or rules in respect of the treatment and welfare of people held in such places.[74] The author shares the view of the British Refugee Council and would suggest that the provisions contained within Part 1 BCIA 2009 require further clarification and guidance.

Furthermore, the explanatory notes to the BCIA 2009 require amendment and further explanation

[72] S.147 of the Immigration and Asylum Act 1999 defines a Short-Term Holding Facility as "a place used solely for the detention of detained persons for a period of not more than seven days or for such other period as may be described".
[73] Refugee Council Briefing: Borders Citizenship and Immigration Act 2009 (August 2009). British Refugee Council.
[74] Refugee Council Briefing: Borders Citizenship and Immigration Act 2009 (August 2009). British Refugee Council.

needs to be provided in relation to the policing of these newly designated powers. In particular, the term 'holding rooms' needs to be defined clearly along with detailed explanatory notes explaining the situation in which such facilities may be used and for what purpose.

The implications of BCIA 2009, Part 1, for migrants and UK nationals passing through UK ports are likely to result from the increased range of powers that a single official at the border will enjoy[75] and from new information sharing powers[76].

Part 1 allows immigration officers to exercise revenue and customs functions which have up to now been exercised by Her Majesty's Revenue and Customs (HMRC) and thus is concerned with the redistribution of existing functions rather than the creation of new powers.

The BCIA 2009's most innovative feature is the bestowment of already existing powers on single individuals or bodies that were previously held separately. Part 1 BCIA 2009 carries out this distribution of powers and functions, firstly, by identifying the persons who are responsible for carrying out customs functions and secondly by detailing the functions to be performed by them. Section 1 relates to customs functions to be performed by the Secretary of State.

It is this re-distribution of powers that causes some concern to the author. The author's opinion is that the provisions contained within Part 1 of the BCIA 2009 are to the detriment of migrants entering ports in the UK and for the first time bring UK Nationals within the jurisdiction of the immigration officers. Previously, these powers were only enjoyed by HMRC officials.

The author opines that the granting of new powers to UKBA staff, which are not adequately trained is detrimental to migrants as it allows Immigration Officers to become more intrusive in their investigations to the detriment of migrants. The author suggests that in particular, this would be unfavourable to migrants entering the UK for the purpose of seeking Asylum.

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[75] BCIA 2009, Ss1-13.
[76] BCIA 2009, Ss14-21.

The author submits that granting such powers to inadequately trained staff who will exercise these powers on vulnerable refugees or persons in need of Humanitarian Protection (HP) is disadvantageous and may cause migrants in seek of humanitarian protection to fail to co-operate with the authorities due to a fear of institutionalism.

The author suggests that the granting of the new powers gives rise to the suggestion that the UK is becoming a police state and thus may detract migrants from wishing to come to the UK to the detriment of the UK economy due to the operational risks of such a venture. A view echoed by Lord West of Spithead whom stated:

"*This proposal has superficial attractions but, when we look at it in detail, as in government we must, it is not so attractive. There are some very real operational downsides...*"[77]

The explanatory notes for Part 1 to the Act state that "*The UKBA will carry out physical examinations at the frontier…and may support HMRC investigations inland into revenue smuggling"*. Clause 1[78] extends functions of 'general customs matters' that are currently exercisable by Commissioners for HMRC to the Home Secretary. [79]

It is this extension of powers that concerns the author. The author suggests that the extension of powers is detrimental to migrants as it designates wide-ranging powers to Immigration Officers whom do not have the appropriate training and expertise to enforce such powers. Furthermore, the author suggests that the particular powers granted could be deemed as draconian by migrants entering the ports of the UK.

The author is of the opinion that the powers could be exercised effectively with adequate training and supervision of UKBA staff, however, whether the provision of training and supervision with the

[77] *Hansard*, HL Report 25 March 2009: Column 669. Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office
[78] S.1 BCIA 2009
[79] Explanatory Notes. Borders, Citizenship and Immigration Act 2009 (2009): http://www.opsi.gov.uk/acts/acts2009/en/ukpgaen_20090011_en_1

assistance of other authorities and government agencies is possible, remains to be seen.

The author submits that due to the operational nature of the UKBA and its organisational structure, it is difficult to provide adequate training without the assistance of other government agencies and authorities.

Interestingly, supporting the opinion of the author, then Immigration Minister, Phil Woolas expressed some concern to the creation of a 'unified border force' when he stated: '*The Public Bill Committee found that opinion is divided among police authorities and forces, including not just those with a vested territorial interest. My fear is that if we created such a force as a designated force either within [the] UKBA or amalgamated it with existing forces, our ability to get the nationwide police forces to work with us as partners would be diminished, not increased.*'[80]

Another example of the draconian powers contained within Part 1 of the BCIA 2009 is Clause 2. [81] Clause 2 reserves the right for the Secretary of State to add or modify the matters that come within their control by order. Clause 3(1) [82] provides that the Secretary of State may designate an immigration officer or any other of his officials as a general customs official for the purposes of Part 1 of this Bill. Under clause 3(2) once designated, the official has the same functions as an HMRC officer in relation to 'general customs matters'. This includes functions listed in any other enactment, which is worrying as customs officials have wide-ranging powers.

Generally, customs officials have extremely broad powers to undertake a range of intrusive activities. The *Customs and Excise Management Act 1979* confers many of the functions and powers available to customs officers. Under that act a customs officer may ask to search a person or anything they have with them if, they reasonably suspect the person is carrying any item which is

[80] Hansard, HC Report 14 Jul 2009: Column 205. Phil Woolas MP, Minister of State for Borders and Immigration.
[81] Explanatory Notes. Borders, Citizenship and Immigration Act 2009 (2009): http://www.opsi.gov.uk/acts/acts2009/en/ukpgaen_20090011_en_1
[82] S.3 BCIA 2009

prohibited or restricted or which is liable to excise duty or tax. It is these powers that have now been bestowed upon immigration officials and which cause concern, not only to the author but also organisations such as Liberty who have suggested that:

'*...governments should be wary of sending continuous signals that immigration is criminally suspicious per se.*'[83]

Customs officials have the most intrusive types of search powers. Searches include pocket searches; a 'rub-down'; a strip search and an intimate search.[84] Powers available to customs officials also include among other things forfeiture powers; entry of premises powers; search and seizure powers. Part 1 will extend these powers to UKBA staff that will be able to carry out physical examinations at the frontier of their own volition and at the request of HMRC. It is this designation of powers that causes concern to the various NGO's and charities who champion civil rights. However, the author intimates that before criticising the newly designated powers, one must consider the philosophy behind such designation.

Therein lies the dilemma, how much and what powers should be designated to UKBA Staff and why is this necessary. One of these two questions can be answered simply by appreciating that the grant of powers is deemed necessary in light of the threat of global terrorism and thus necessary to protect the borders of the UK. A view supported by the author, however, the specific powers which have been granted are not deemed appropriate by the author.

The second of the two questions is not as simply answered and one which is unfortunately outside the scope of this paper. Although, the author opines, that only those powers which are deemed necessary in the day to day employment of UKBA staff should be designated, namely stop and

[83] Liberty: Report Stage Briefing on the Borders Citizenship Immigration Bill, June 2009: http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-report-stage-briefing-on-the-borders-citizenship-immigration-bill-.pdf

[84] An 'intimate search' means any search which involves a physical examination (that is, an examination which is more than simply a visual examination) of a person's body orifices.

search and the power to conduct a 'rub-down', intimate search or strip search. The power to enter and seize and entry of premises, in the opinion of the author, should be reserved for members of the police force and not designated to inadequately trained UKBA staff.

Ultimately, this may not always be possible and the author accepts that the designation of powers cannot be as straight forward as the allowing stop and investigatory powers. The author suggests that part of the problem lies with the complexity of the existing legislation which makes up UK Immigration Law. The fact that the BCIA 2009 refers to other legislation for the provision of powers shows its inadequacy. The author suggests in the event an Immigration Simplification Bill is eventually agreed, the powers designated to staff of the UKBA should be outlined clearly and concisely without reference to secondary legislation to avoid any ambiguity.

One could argue vehemently about the potential abuse of power or the inadequate training of UKBA staff, however, the philosophy behind the designation of such powers must also be considered. It is the view of the author that the illiberal measures contained within Part 1 of the BCIA 2009, however draconian they may seem, are necessary in light of the new terrorist threat faced by the UK however the provision of the new powers needs further control and clarification.

The author is of the opinion that failure to control and limit the powers already designated and furthermore failure to ensure UKBA staff is adequately trained, will result in an eventual abuse of powers and ultimately lead to possible legal challenges.

Liberty in their Report Stage Briefing on the Act in the House of Commons[85] stated that Part 1 of the BCIA 2009 is not proposing complementary powers that might be necessary for immigration officials in discharging their functions. It is proposing an entirely new function for immigration officials, confusing the distinction between immigration control and criminality. Furthermore,

[85] Liberty: Report Stage Briefing on the Borders Citizenship Immigration Bill, June 2009: http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-report-stage-briefing-on-the-borders-citizenship-immigration-bill-.pdf

Liberty called for all of clauses 1-21 of the BCIA 2009 to be deleted from the Bill; or failing that, at the very least, limit the powers extended to immigration officials.

This is a view not entirely shared by the author, who agrees that the powers are not necessarily new, however, they do affect a wider cross-section of people and there appears to be the possibility of abuse of powers by inadequately trained staff. The author disagrees with Liberty's suggestion that clauses 1-21 of the BCIA 2009 be deleted as the author believes some powers are necessary to be granted to UKBA staff to maintain a secure UK border.

With regard to the issue of confusing the distinction between immigration control and criminality, the author suggests that there is a fine line between the two when looking at border security. In the light of the increasing terrorist threat over the last two decades, it is necessary, in the mind of the author, to designate wider policing powers to immigration officials, however, there is also a fine line between the types of powers designated and it is this problem which requires addressing.

The author suggests that the powers designated to immigration officials should be limited and adequate training and supervision of immigration officers, whom are now carrying out duties previously the preserve of the HMRC, be vigorously carried out.

The Liberty report continues to state that the roll out of customs functions to immigration officers dramatically extends those who are subject to the powers of immigration officials, a view supported by the various charities and NGO's that have undertaken consultation on the implementation of the Act.

The general consensus in literature opposing the BCIA 2009 is that extension of powers under the Act brings British nationals within the control of the immigration service for the first time. Thus, it is argued that the proposed extensions in the Act have solidified this shift.

The author agrees with this general consensus, albeit with reservations. The author suggests that

the provision of such powers may be deemed necessary in the current climate of global terrorism, thus, the provision of powers to the UKBA is necessary if they are to protect the UK's borders effectively.

However, the author agrees with Liberty's view that the powers granted should be limited and controlled. The author would further suggest that the powers granted be clearly outlined in legislation and not languidly referred to in secondary legislation. In particular, the training of immigration officials is mandatory if these powers are to be exercised correctly.

This issue raises the question of how does one reach an effective balance between the provision of powers, respect for civil liberties and national security. In order to maintain an effective and secure border policy, it is necessary for such powers to be designated to immigration officials, however, these immigration officials need to be adequately trained and supervised.

The author suggests that this can possibly be done in a two step procedure. Firstly; with further consultation, limit the number of powers designated to immigration officials to those which are necessary for an immigration officer in his/her daily duties. Secondly; with the assistance of the Police and HMRC, supervise the training of officers to an adequate standard. How practical this solution is still yet one which needs to be considered.

Generally, it would be expected that dramatic extensions to the functions and powers of immigration officials would be preceded by consultation and accompanied by extensive policy justification, however, this has not happened and as a result, the explanatory notes to the Act contain, in the opinion of the author, scant reference to the policy behind its reform.

The Immigration Law Practitioners Association (ILPA)[86], a critic of the BCIA 2009, has expended

[86] The Immigration Law Practitioners' Association was established in 1984 by a group of leading UK immigration practitioners to: promote and improve the advising and representation of immigrants, provide information to members on domestic and European immigration, refugee and nationality law and se cure a non-racist, non-sexist, just and equitable system of immigration, refugee and nationality law practice.

considerable time and effort in producing a compilation of various Ministerial Statements which oppose the parts of the BCIA thus providing practitioners with the tool to make successful challenges through the courts by relying on the said Ministerial Statement under the principle established in the case of *Pepper –v- Hart*.[87] However, the provision of Ministerial Statements only provides a practitioner with the tools to challenge the legislation it does not provide details of where potential challenges can be made.

In the opinion of the author, the powers designated to immigration officials as a result of the legislation contained within Part 1 of the BCIA 2009 causes some concern. In a statement made by Tom Brake MP, he echoed the concerns of most people when he stated:

'*We are still worried that officers are potentially becoming more generalist in their approach, with a wider range of responsibilities that potentially leads to more problems, or more failures to follow the appropriate guidelines or procedures.*'[88]

Similarly, Damien Green MP, at the time Shadow Immigration Minister stated:

'*The underlying and extremely important issue is that people should have clear rules and know what they are, and that those rules should be completely clear about what immigration officers can do in terms of detention and enforcement.*'[89]

The author suggests that the provisions contained within Part 1 of the BCIA 2009 are necessary to maintain an efficient and properly policed border. However, the implementation and exercise of those powers designated by the provisions contained within Part 1 of BCIA 2009 requires careful supervision and control.

The author suggests that failure to maintain adequate supervision and sufficient training of staff may lead to an abuse of the powers and subsequently legal challenges which may further

[87] *Pepper (Inspector of Taxes) - v - Hart* [1992] UKHL 3. See also footnote No. 51.
[88] *Hansard*, HC Committee, First Sitting 9 Jun 2009 : Columns 15-16
[89] *Hansard*, HC Committee, Second Sitting 9 Jun 2009 : Column 57

complicate and obstruct an already congested immigration system in the UK. In order to overcome this problem, the author is of the opinion that the government will need to carry out extensive consultation processes.

III. ANALYSIS OF PART 2: CITIZENSHIP

As discussed above,[90] Citizenship is the status of belonging to a particular nation state and thereby observing its rules and regulations. The UK Government is now trying to amend the legislation so that it takes longer for migrants to become UK Citizens. Furthermore, they intend to impose an 'activity' condition, whereby migrants must undertake voluntary or unpaid work to show their commitment to the UK.

It is this philosophy of altering the route to becoming a UK Citizen that causes the author some concern and gives rise to the belief that the provisions contained within part 2 of the BCIA 2009 are detrimental to migrants as it places them in a less favourable position due to them having to undertake voluntary or unpaid work to show their commitment to the UK, in addition to having to wait longer to become UK Citizens.

In this appraisal of *Part 2: Citizenship*, the author proposes to concentrate on four issues. Firstly, what is the difference between Citizenship and Nationality; [91] secondly how the new proposed changes to the way migrants obtain citizenship will work in practice; thirdly, whether the requirement of undertaking activities to expedite the path to citizenship is reasonable or even legal and lastly; whether the obligations of 'good character' within the BCIA 2009 are prejudicial to migrants who wish to obtain citizenship.

With regard to the first issue, the difference between citizenship and nationality, at present the BNA 1981 makes provisions for the acquisition and loss of British Nationality through the establishment

[90] See Pg. 7.

[91] There are various arguments surrounding whether there is a difference between Nationality and Citizenship and whether there is a difference at all? The difference between Nationality and Citizenship is that *Nationality* can be applied to the country where an individual was born. In contrast, *Citizenship* is a legal status, which means that an individual has been registered with the government in some country. There are some cases of **nationality without citizenship**. For instance, until recently, people naturalised French could not vote for the first 5 or 10 years after taking the French nationality. But there are also cases of **citizenship without nationality**, which is much more common. For instance, foreigners in the Benelux, the 5 Nordic countries, some Swiss cantons, Portugal and New Zealand have the right to vote at some or all elections, and in some cases to be elected too. Nationals of Commonwealth countries living in the UK can also vote and be elected in the UK.

and regulation of British Citizenship and British Overseas Citizenship. The terms 'British Nationality' and 'British National' are not defined in British nationality law and the extent to which the terms refer is uncertain.[92]

Largely, British Nationality is realised through classes of statutory citizenship such as; British *Citizenship,* British Overseas Territory *Citizenship* etc. However, the terms 'nationality' and 'citizenship' have been used in British Nationality law without any proper distinction.[93] Thus, it is submitted by the author, that to a lay person, the terms UK National and UK Citizen are synonymous and interchangeable. A view supported by Laurie Fransman QC who stated: '*[The Government] speak[s] less of 'nationality and more of 'citizenship'. This can be seen in the title of the new Act itself...*'[94] the author thus submits that this causes confusion for migrants and complicates the issue of obtaining citizenship.

Although this lay understanding of nationality and citizenship is arguably not supported in the relevant legislation, due to it only making reference to Citizenship and not Nationality, however, in reality there is a distinction, as outlined in the BNA 1981.[95] The result of the use of terms without definition is confusion and in particular for migrants, most of whom speak little or no English.

Furthermore, British nationality lacks a connection to citizenship in its other sense, i.e. the domestic, as opposed to international, status to which civic and other rights and obligations attach.[96] Such rights and obligations are not found in the BNA 1981 but are found elsewhere throughout statute law and common law and do not attach to a possession of a class of British nationality.[97]

Thus, the author submits that Part 2 of the BCIA 2009 imposes inappropriate tests for a migrant

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[92] Blackstone's Guide to the Borders, Citizenship and Immigration Act 2009 (Blackstone's Guides) by Ian Macdonald QC, Laurie Fransman QC, Adrian Berry, Alison Harvey, Hina Majid and Ronan Toal (2009). Pg. 6.
[93] Ibid.
[94] Ibid. Pg 7.
[95] Ibid No.2.
[96] Blackstone's Guide to the Borders, Citizenship and Immigration Act 2009 (Blackstone's Guides) by Ian Macdonald QC, Laurie Fransman QC, Adrian Berry, Alison Harvey, Hina Majid and Ronan Toal (2009) Pg 7.
[97] See: British Nationality Law. 2nd Ed. (Butterworths) by Laurie Fransman (1998), Pg. 3-5.

seeking to obtain citizenship of the UK and is subsequently fundamentally flawed and open to legal challenges. Moreover, the author suggests that the provisions contained within Part 2 are unworkable unless modifications are also made to the existing Immigration Rules[98].

The term 'nationality' has been used interchangeably with 'citizenship' to describe the myriad of laws which govern the acquisition and loss of citizenship. However, the term 'citizenship' is increasingly the focus of policy-making by the Government and was described by Lord Goldsmith in his review as: *".....the package of rights and responsibilities which demonstrate the tie between a person and country..."*[99] The author contends that the use of the term 'citizenship' is meant to encompass the term nationality and thus the two terms are interchangeable.

Although the terms 'citizenship' and 'nationality' have been used synonymously in UK Law, the author is of the opinion that without a proper definition applied to the two terms the existing legislation, and any attempts to introduce legislation to consolidate all existing legislation; will further complicate the issue of obtaining citizenship in the UK unless the terms are defined clearly in any acts, including the BCIA 2009, and any explanatory notes, therefore avoiding any possible ambiguity.

With regard to the second issue, how will the proposed changes work in practice, Part 2 of the BCIA 2009 enacts some of the proposals outlined in the Green Paper: *The Path to Citizenship: Next Steps in Reforming the Immigration System*[100] ('the Green Paper'). In the Green Paper the Government outlined its proposals in relation to the path to British Citizenship,[101] as part of the programme of alteration to the immigration system. Changes included ensuring that those who come to the UK do so in the interests of the UK. The purpose of the changes was said to be:

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[98] HC 395.
[99] Citizenship: Our Common Bond (11 March 2009) Lord Goldsmith QC. Ch 4, Para 5, Pg.72.
[100] February 2008.
[101] It is not clear whether 'citizenship' referred to in the title of the Green Paper is British citizenship (the statutorily defined status in British nationality law) or citizenship in the broader and vaguer sense of membership of the community.

2. '*....to strengthen our shared values and citizenship...*'

3. '*...[that] the current system does not provide enough of an incentive for a migrant to progress to British Citizenship. [As a result] [w]e want to encourage people with the right qualifications and commitment to take up citizenship so that they can become fully integrated into our society.*'[102]

The author is of the opinion that the provisions contained within Part 2 of the BCIA 2009 do not strengthen shared values as claimed by the government and to the contrary alienate migrants who have to 'earn' [103]citizenship by showing their commitment by means of voluntary or unpaid work. The author suggests doing so is demoralising and discordant in relation to international statutes and in particular the European Convention on Human Rights (ECHR).

Some of the changes to the path to citizenship will need to be implemented by changes to the rules for the grant of leave to remain or enter under the Immigration Rules[104] and the policies for the grant of leave to enter or remain are outside of the Immigration Rules. Thus making the necessary changes to the grant of leave to remain or enter difficult. Moreover, the path to citizenship considers two alternative end points: British citizenship or Permanent Residence.

Only the requirements for British citizenship are found in the BCIA 2009 and its modifications to the BNA 1981. The requirements for Permanent Residence, defined as *Indefinite Leave to Enter (ILE) or Remain (ILR)* [105] for the purposes of nationality law by the BCIA 2009, require further reform of the Immigration Rules. Indubitably, this means that policies may lead to permanent residence being redefined as a substantive category under immigration law.

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[102] Green Paper: *The Path to Citizenship: Next Steps in Reforming the Immigration System*. February 2008. Page 6.
[103] Any references to 'earning' citizenship are references to the 'activity' condition referred to within the BCIA 2009.
[104] HC 395 of 1993-94 as amended.
[105] **Indefinite Leave to Remain** (ILR) is an immigration status granted to a person who does not hold right of abode in the United Kingdom (UK), but who has been admitted to the UK without any time limit on his or her stay and who is free to take up employment or study, without restriction. When indefinite leave is granted to persons outside the United Kingdom it is known as **Indefinite Leave to Enter** (ILE).

This, in the view of the author, further complicates immigration and nationality law to the detriment of migrants as it creates two classes of migrants. Those who wish to become UK Citizens and those who wish to remain in the UK with Permanent Residence whilst retaining the citizenship of another country. The author submits that this may lead to social problems amongst communities in the future; whether this indeed does materialise remains to be seen.

The author would enjoy nothing more than to discuss the merits of Permanent Residence versus Citizenship and would argue that Citizenship be granted to all migrants in the UK once they have completed a minimum period of five years lawful residence in the UK[106], however, such a discussion is outside the parameters of this paper and thus will not be referred to any further.

It is the view of the author that past and successive governments have maintained the distinction between Citizenship and Permanent Residence due to the complexity of already existing legislation and as a result have been unable or unwilling to make significant amendments without having to overhaul the immigration system entirely; at the expense of precious public support. The author admits this may be a cynical view, however, the author contends that the UK Government has had ample opportunities to overhaul the existing system and has failed to do so.

At present, the current route to citizenship is that a migrant in the UK must pass through three stages in order to become a British citizen. Firstly, a migrant will be granted a period of Limited Leave to Remain or Enter (LTR/LTE). Secondly, a migrant will need to be in possession of Indefinite Leave to Remain (ILR) for at least one year. Lastly, the migrant becomes eligible for British citizenship. To pass from one stage to the next, the migrant would have had to have satisfied specified criteria. The BCIA 2009 proposes to change these existing rules and introduce a new route to citizenship.

[106] The current Immigration Rules allow for most applicants to make an application for ILR once they have been in the UK for a period of 5 years or more legally. The rules for some categories differ, i.e. Spouse or Students.

The changes proposed by Part 2 of BCIA 2009 include changes to:

- the way in which migrants will in future be allowed to become British citizens
- the age at which certain children born overseas may register as British citizens
- allow certain persons born overseas to British mothers before 1961 to register as British citizens
- allow children of parents serving in the British armed forces to acquire British citizenship
- allow British Nationals (Overseas) with no other nationality to register as British citizens[107]

The changes mirror those proposed in the Green Paper. Following the introduction of the BCIA 2009 and implementation of Part 2 the proposed three routes to naturalisation as a British citizen are to be:[108]

1. The work route;[109]
2. The family route[110]; and
3. The protection route.[111]

The above-mentioned routes to naturalisation are based on the categories of leave to enter or remain that already exist under the current Immigration Rules[112] in respect of such persons. In order for these categories to lead to probationary citizenship and naturalisation as a British citizen under BNA 1981 as amended by the BCIA 2009, modification to the Immigration Rules will need to be made.

Inevitably, this means that policies may lead to permanent residence being redefined as a

[107] Blackstone's Guide to the Borders, Citizenship and Immigration Act 2009 (Blackstone's Guides) by Ian Macdonald QC, Laurie Fransman QC, Adrian Berry, Alison Harvey, Hina Majid and Ronan Toal (2009). Pgs 1-4.
[108] Green Paper: *The Path to Citizenship: Next Steps in Reforming the Immigration System*. February 2008. Pg 6, Para. 7.
[109] Highly Skilled and Skilled Workers (Tiers 1 and 2) under the Points Based System (PBS), and their dependents.
[110] Family Members of British citizens and permanent residents.
[111] Persons in need of protection, i.e. refugees and those granted humanitarian protection.
[112] HC 395 of 1994-94 as amended.

substantive category under immigration law. This, in the opinion of the author, further complicates immigration and nationality law to the detriment of migrants whom are already perplexed with the multifarious legislation.

The author submits that any further modifications to the already complex legislation will make the system of immigration law more bureaucratic and cause further delays within a system that is at full capacity and struggling to meet the demands of the public. The author suggests that the re-classification of the routes to citizenship will cause migrants further anguish and uncertainty without improving the existing system and thus the author questions its relevance.

The modifications required to the existing Immigration Rules will need to clearly specify or identify the categories of leave that are to count for the purposes of qualifying temporary residence leave[113] and probationary citizenship leave[114]. The modifications have not yet been made. Exactly how these modifications intend to be made is also questionable.

Under the BCIA 2009 each route to naturalisation as a British citizen, will contain within it three stages within the journey to citizenship:

1. Temporary residence;
2. Probationary citizenship; and
3. British citizenship or Permanent Residence. [115]

The Green paper suggested that: "....*the journey to citizenship will enable migrants to demonstrate a more visible and a more substantial contribution to Britain as they pass through the successive stages. At each stage, the journey will incorporate appropriate requirements that determine*

[113] BNA 1981, Sch 1, para 11(2), as inserted by BCIA 1009, s. 49(3).
[114] BNA 1981, Sch 1, para 11(3), as inserted by BCIA 1009, s. 49(3).
[115] Green Paper: *The Path to Citizenship: Next Steps in Reforming the Immigration System*. February 2008. Pg 6, Para. 7.

whether a migrant can progress."[116]

The author is of the opinion that some of the changes made to the BNA 1981, as outlined above, as well as the provisions contained within Part 1 of the BCIA 2009 are detrimental to migrants in the UK whom are seeking to gain permanent residence or become naturalised as UK Citizens as they have made it more difficult to obtain Naturalisation and thus prejudicing certain migrants. In particular, the author submits that the way migrants will in future be allowed to become British citizens is detrimental to the very migrants that the proposed changes affects.

The author contends that migrants who must fulfil certain requirements in order to show their commitment to the UK is unfavourable as well as not proportionate in the wider public interest as it gives the illusion of a second class of citizen and ultimately leads to fragmented communities.

With reference to the third issue regarding 'active citizenship', it is the view of the author that the route to citizenship provisions contained within the BCIA 2009 and in particular the references to an 'activity' condition are detrimental to migrants wishing to become British citizens and in addition are particularly disadvantageous to refugees as they will be required to undertake additional obligations which may portray them as second class citizens; and subsequently destroying the philosophy of community that the government is trying to create.

The author is of the opinion that contrary to the government's claims that it is simplifying citizenship by introducing a staged process, what it is in fact doing is controlling and limiting the acquisition of citizenship to the detriment of migrants in the UK. By controlling the requirements of Citizenship, the government will ultimately decide who and when it allows migrants in the UK to become Citizens.

A prime example of the detrimental provisions contained within the BCIA 2009 is Section 39[117] as

[116] Green Paper: *The Path to Citizenship: Next Steps in Reforming the Immigration System*. February 2008. Pg 6, Para. 10.

it outlines a 'qualifying period' prior to the submission of the application during which an 'activity' condition must be fulfilled. This section of the BCIA 2009 specifies the conditions which need to be satisfied for a person to be eligible for naturalisation as a UK citizen. It does so by amending the BNA 1981. In particular, S. 39(2)[118]states applicants must fulfil the following requirements:

- That the applicant must be in the UK at the beginning of the qualifying period;
- That the number of days which they were absent from the UK in each of the year of the qualifying period does not exceed 90;
- That they had a qualifying immigration status for the whole of the qualifying period;
- That on the date of the application they have probationary citizenship leave;
- That they were not at any time in the qualifying period in the UK in breach of the immigration laws.[119]

The term "qualifying period" is defined in Section 41[120] as the period immediately before the date of the application for naturalisation. At the time of application, those applying must have some form of leave[121] and satisfy a qualifying period of either eight, five if applying to join a Spouse, depending on the basis on which they are applying[122]. These periods can be reduced to six (three if joining a spouse) years if the individual satisfies the "activity condition"[123] (that is, if s/he engages in some form of approved voluntary activity). It is this requirement to fulfil a period of 'activity' that the author considers detrimental to migrants as in the view of the author, it helps create a second class of citizen.

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[117] S.39 BCIA 2009. Acquisition of British Citizenship by Naturalisation: Application Requirements: General.
[118] BCIA 2009
[119] Blackstone's Guide to the Borders, Citizenship and Immigration Act 2009 (Blackstone's Guides) by Ian Macdonald QC, Laurie Fransman QC, Adrian Berry, Alison Harvey, Hina Majid and Ronan Toal (2009). Pg. 57
[120] S.41 BCIA 2009
[121] S.37(2) BCIA 2009.
[122] S.39 BCIA 2009.
[123] Ibid 119.

Part 2 of the BCIA 2009 continually refers to 'citizenship' and the requirements undertaken by migrants in order to obtain UK Citizenship. In particular, there is a requirement that migrants in the UK 'earn' their citizenship by carrying out voluntary work or community service. A philosophy referred to as 'active citizenship'. It is this notion of having to 'earn' citizenship that is of most concern to the author.

The concern of the Government in this regard became apparent in an earlier Green Paper, *The Governance of Britain*[124] (July 2007), as part of a discussion relating to citizenship, national identity, common British values, a possible British Bill of rights and duties and the constitution.[125] The Green Paper, The Governance of Britain, considered briefly the social, cultural and functional aspects of being a British citizen and stated:

" ...more could be done to create a simpler, fairer and more meaningful system, ensuring that the benefits and rights of citizenship are valued and offered to those prepared to make a contribution to the UK's future."[126]

This concern was dealt with in the legislation by means of incorporating the 'activity condition'. The "activity condition" is defined as being that "the Secretary of State is satisfied that the applicant:-

(a) Has participated otherwise than for payment in prescribed activities; or

(b)*Is to be treated as having so participated*."[127]

The author submits that the notion that migrants in the UK should 'earn' citizenship is demoralising and detrimental to those migrants. It is suggested that having to undertake voluntary or unpaid work or carry out a period of community service in order to prove that a person is committed to the

[124] Cm 7170, Para. 180-93.
[125] Blackstone's Guide to the Borders, Citizenship and Immigration Act 2009 (Blackstone's Guides) by Ian Macdonald QC, Laurie Fransman QC, Adrian Berry, Alison Harvey, Hina Majid and Ronan Toal (2009). Page 55.
[126] Cm 7170, Para 187.
[127] S.41(1)(5) BCIA 2009.

UK is demeaning and demoralising. Moreover, it puts migrants in a position where they may be treated as second class citizens. Thus, it is argued that this is disproportionate and not in the wider public interest.

The author is of the opinion that the requirement to fulfil activities and 'earn' citizenship is unfavourable to migrants, in particular to refugees. A view echoed by the British Refugee Council in their Briefing of August 2009[128] in which they noted that under the current rules refugees are initially given five years leave to remain, which is then reviewed by the UKBA. Under the BCIA 2009, if a person's refugee status is then confirmed, they will no longer be able to apply for permanent settlement in the form of ILR.

Instead, they must apply for Probationary Citizenship Leave for at least a further year, following which they will be eligible to be able to apply for naturalisation as a UK Citizen as they will have completed the six years qualifying period. If they fail to meet the "activity condition" they will be required to wait a further two years before they become eligible to apply for Permanent Residence.[129]

The author is of the opinion that this position is unfavourable and detrimental to applicants as in the example provided by the British refugee Council. The author agrees with the British Refugee Council's view that a person recognised as a refugee by the UK should receive Permanent Residence from this date and not be required to endure a further two year period of temporary leave. In this regard, the author suggests that the legislation be amended to delete the requirement of an 'activity condition' entirely.

The British Refugee Council further argues that refugees in the UK should receive Permanent Residence immediately once granted refugee status and provide the example of the Gateway

[128] Refugee Council Briefing: Borders Citizenship and Immigration Act 2009 (August 2009). British Refugee Council.
[129] Ibid.

Protection Programme.[130]The author agrees with this view and would suggest that this be adopted in place of the provisions contained within Part 2 of the BCIA 2009; whether the new 'Coalition' Government heeds to the concerns of the various charities and NGO's remains to be seen.

In further support of the British Refugee Council's opinions the United Nations High Commissioner for Refugees (UNHCR) stated that in their view '*secure legal residence is of utmost importance to the successful integration of refugees and other persons with international protection. Secure residential status has a psychological impact which is conducive to integration.*'[131]

The report further suggested that refugees may be considered vulnerable persons lacking an effective nationality and that consideration should be given to facilitating naturalisation, especially in certain conditions in relation to naturalisation which may prove too difficult or impossible for refugees to meet.[132] The author agrees with this view and reiterates that the references to an 'activity condition be deleted from the BCIA 2009.

With reference to the progression of refugees or persons with Humanitarian Protection (HP) from temporary residence to probationary citizenship the UNHCR suggests that as a matter of best practice the required period of residency in order to become eligible for naturalisation should not exceed five years for refugees.[133] The author agrees with this view and submits that the legislation be amended to exempt refugees and persons with HP. The author suggests the UNHCR Report is lacking as it does not consider all migrants. In this regard, the author suggests that the required period of residency in order to become eligible for naturalisation as a UK Citizen should not exceed five years for all types of applicants, not only refugees.

The author suggests that refugees and persons with HP already spend a considerable amount of time

[130] The Gateway Protection Programme is operated by the UKBA in partnership with the UNHCR and offers a legal route for up to 750 refugees to settle in the UK every year.
[131] Response to Home Office Border Agency Consultation 'The Path to Citizenship: Next Steps in Reforming the Immigration System. UNHCR London. May 2009.
[132] Ibid.
[133] Ibid.

in immigration limbo whilst waiting for their applications to be processed. Furthermore, most of these applicant have lost their livelihoods and in some cases family members in their native countries and fled to the UK. As a result, they should not be penalised further when making an application for Citizenship. Instead, as a matter of course, they should be granted Citizenship upon the expiration of a five year period of residence in the UK as is the requirement under the Immigration Rules for most of the categories other than for a spouse.

In addition to the above arguments put forward by the British refugee Council and the UNHCR; the author presumes that migrants who wish to settle in the UK and not become UK citizens will be penalised by having to wait a further two years before becoming eligible for settlement in the UK (Permanent Residence).

The Government does have discretion to allow time spent pending an application for leave to remain in relation to a asylum or human rights claim, to count towards the qualifying period for naturalisation but has said that this would be used in 'exceptional' cases and went on to define this broadly:

'*In the case of refugees, we would usually expect to exercise it where undue delay has occurred in determining an asylum application or where the delay was not attributable to the applicant*'.[134]

The author suggests that for most refugees the time spent waiting for a decision on their asylum claim will be in addition to the times they will have to wait for permanent settlement once they are granted status. This situation is detrimental to refugees and those persons subject to HP as it does not allow them to settle in the UK to start a new life and instead puts them in a state of further immigration limbo until they obtain citizenship.

Whether a person wishes to become a UK citizen should be the choice of the individual. Although

[134] House of Lords, Report Stage Debate for Borders, Citizenship and Immigration Bill, 25 March 2009, column 717: http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90325-0010.htm

many migrants into the UK will wish to become UK citizens, some will wish to retain the citizenship of their native countries. These people should not be penalised by having to wait a further two years in order to obtain Permanent Residence. It is suggested that penalising such migrants is to their detriment and may give rise to possible legal challenges of the legislation under Article 8 and 14 ECHR.

In order to tackle this issue, the author suggests that the provisions related to the 'activity condition' be deleted from the BCIA 2009. The author submits that the obligation to undertake activities in order to 'earn' citizenship is discriminatory to all migrants and may give rise to possible legal challenge under Article 8[135] and 14 ECHR[136].

Liberty, in their report stage briefing of the BCIA 2009 stated *'[t]he activity condition will also operate in a discriminatory way in practice. It is easy to see how some, and not others, will find it easier to formally 'contribute'. The Government will most likely use the inclusion of Clause 41(1)[137] to argue that those who, for a variety of reasons, may be unable to volunteer formally will not be discriminated against.[138] Over and above the administrative nightmare created by such discretion, it will not prevent discrimination taking place. The Bill sets out no criteria for determining when a person shall be deemed to have fulfilled their activity requirement.*"[139]

The author agrees with this view and further suggests that the activity requirement is detrimental to migrants whom are not familiar with the complex immigration legislation and as a result of the complexity, fall foul of the rules.

With regard to legal challenges under the ECHR, the author appreciates that Article 14 ECHR

[135] Article 8 ECHR: The Right to Respect for Private and Family Life
[136] Article 14 ECHR: Prohibition of Discrimination.
[137] Proposed new clause 4B(5)(b) creates a discretion whereby the Minister can treat a person as having participated in prescribed activities where this is not the case.
[138] For example, those with certain disabilities, the elderly, those who have little or no time due to various social, family responsibilities.
[139] Liberty: Report Stage Briefing on the Borders Citizenship Immigration Bill, June 2009: http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-report-stage-briefing-on-the-borders-citizenship-immigration-bill-.pdf

provides a right not to be discriminated against only in respect for the other rights laid down in the Convention and its Protocols and therefore does not provide a free-standing prohibition on discrimination and does not apply unless the facts at issue fall within the ambit of another Convention right.[140] However, the author suggests that migrants invoking a breach of Article 14 ECHR would generally also be claiming a breach of one of the other fundamental rights contained within the ECHR and in particular Article 8 which has a wide interpretation.[141]

Immigration law has often found to engage Article 8 ECHR[142] and it follows that withholding citizenship status from migrants would also fall within the protection afforded by Article 8. Strasbourg has held that the denial of citizenship can breach Article 8 ECHR.[143] Thus, the proposed 'flexible' approach to citizenship contained within the BCIA 2009 may therefore engage Article 8 and thus, in the opinion of the author, most definitely face possible legal challenges.

As noted above, the introduction of 'Probationary Citizenship' coupled with the new points test for citizenship will increase qualifying periods for migrants wishing to seek settlement. This is contrary to various international statutes which emphasise the need to allow settlement for migrants. These include:

- Article 18, Recommendation R86, International labour Organisation. This outlines the principle that a lawfully admitted migrant worker should not be moved after 5 years residency.[144]
- Article 19, European Social Charter, which calls for the equal treatment of migrant workers

[140] See: *Rasmussen v Denmark* (1985) 7 E.H.R.R. 371. See also: *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 E.H.R.R. 471.
[141] Article 8 imposes a positive obligation on the state to actively respect family life, private life, the home and correspondence. In *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 10. Para 47 the court stated that Article 8 protects a right to identity and personal development, and the right to establish relationships. This shows the wide ranging rights which fall under the remit of Article 8.
[142] See Judgement in: S and Others v SSHD [2006] EWCA Civ 1157.
[143] Karrasev and family v Finland App. No. 31414/98. See JCWI Second reading briefing on BCIA 2009. Available at: http://www.jcwi.org.uk/Resources/JCWI/JCWI%20Second%20Round%20Briefing%20House%20of%20Commons.pdf
[144] R086, Recommendation concerning Migration for Employment, 1949.

to remuneration/working conditions and continuous employment.[145]

- Article 34, 1951 Refugee Convention, which requires states to facilitate naturalisation of refugees and to expedite naturalisation proceedings.[146]

In light of the possible potential breach of the various international statutes, the author submits that the new 'Coalition' Government reconsider the implementation of the outstanding provisions of the BCIA 2009.

The author suggests that the new 'Coalition' Government may not implement all of the provisions contained within Part 2 of the BCIA 2009 as is evident by opposition from the then Conservative Shadow Minister for Home Affairs, Baronness Hanham who stated: '*Volunteering is by definition an undertaking that individuals want to do: they want to do it to help others. It is not usual....for it to be a statutory requirement, or one that affects people's future, but that is what it would be under [section 41]. It is there to expedite the rout to citizenship. It is blackmail, to some extent, in that by undertaking a voluntary activity you get citizenship somewhat quicker.*'[147]

The author anticipates there to be considerable dispute over the provisions contained within Part 2 of the BCIA and their implementation over the coming months and due to the changing of government in the UK, the author is optimistic that the new 'Coalition' government will amend the 'activity condition' requirements or at best delete Part 2 of the BCIA 2009 entirely. Failure to do so would be extremely embarrassing for the individual ministers concerned.

Finally, with regard to the fourth and final issue of 'Good Character', this is covered by S.47 of the BCIA 2009 which generally states that any application for Citizenship must not be granted unless the Secretary of State is satisfied that the applicant is of good character. The explanatory notes to the act offer little in the way of explanation as to what the term 'Good Character' exactly means and

[145] Article 19, European Social Charter, (1996 Revised).
[146] Article 34, Convention relating to the Status of Refugees, 1951.
[147] Hansard, HL Committee 2 March 2009: Column 550.

thus the author suggests that this is left open to interpretation and as a result subject to legal challenge. Furthermore, by the UKBA's own admission, there is no statutory guidance as to how this requirement should be interpreted or applied.[148]

Section 47[149] moves the requirement for nationality applicants applying for registration to be "of good character" from section 58 of the Immigration, Asylum and Nationality Act 2006 ("IANA 2006") into each of the Acts which contain the relevant registration routes. It also adds a "good character" requirement in the case of an application for registration under section 1(3A), 3(2) or 4D of the British Nationality Act 1981. [150]

The author suggests that this addition of a "good character" requirement is detrimental to migrants in the UK in particular it is detrimental to refugees and persons whom are seeking HP. The author contends that persons entering the UK as refugees or in need of HP may have criminal records in their home countries and as a result may be denied citizenship based on previous transgressions.

This is a situation which is unacceptable and would be in contravention of the provisions contained within the 1951 Convention.[151] Thus, the author submits that requirement of "good character" may also give rise to possible legal challenge by virtue of the ECHR as discussed above.

Applications for British citizenship will normally be refused if the applicant has been convicted of a criminal offence and the conviction has not yet become 'spent' in accordance with the provisions of the Rehabilitation of Offenders Act 1974.

The UKBA may decide to ignore a single conviction for a minor offence if it resulted in a bind over, conditional discharge or small fine, if the applicant is suitable for citizenship in every other

[148] See: Annex D of Chapter 18 of HC 395. Available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nichapter18/ch18annexd?view=Binary
[149] S. 47 BCIA 2009
[150] British Nationality Act 1981. http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1981/cukpga_19810061_en_1
[151] The United Nations Convention Relating to the Status of Refugees 1951.

way, however, whether it chooses to do so is at its own discretion. The UKBA will only ignore "regulatory" offences such as speeding. They will not ignore offences involving dishonesty such as theft, violence or sexual offences. They will also not ignore drink-driving offences or convictions for driving while uninsured or disqualified.

The author submits that this position is unfavourable. The author suggests there are numerous persons within the prison system of the UK whom have been convicted of far more serious offences and despite being UK Citizens, have retained their citizenship status. The author contends that it is unreasonable to expect a migrant to comply with conditions that existing citizens of a nation state are not subject to and thus could be deemed as an infringement of Article 14 ECHR.

Returning to the issues outlined at the outset of this chapter, with regard to the first issue, the difference between Nationality and Citizenship. The author contends that to a lay person, the two terms are synonymous. The author suggests that to simplify UK Immigration and Nationality Law, the two terms require a proper definition attached to them. Failing to do so would further complicate the existing system.

With regard to the second issue, how will the proposed changes work in practice, the author submits that the provisions contained within Part 2 BCIA 2009 will not function effectively without modification of the definitions contained within the existing Immigration Rules and as a result, the BCIA 2009 is flawed.

The author suggests that in order for the provisions to be effective, the existing ‘Coalition’ Government should amend the existing legislation or better still repeal the provisions contained within Part 2 entirely.

With reference to the third issue, whether the requirement of undertaking activities to expedite the path to citizenship is reasonable or legal, the author contends that the provisions contained within

the BCIA 2009 may be open to possible legal challenge by virtue of the provisions contained within Articles 8 and 14 ECHR and in addition Article 34 of the Convention Relating to the Status of Refugees.

The author suggests that the references to 'activity condition' contained within the BCIA 2009 be removed entirely at best or failing that, further consultation be undertaken to clarify the provisions and in particular ensure that the provisions are modified to allow migrants to be paid at least the minimum wage for undertaking work within the community. The author contends that failure to do so would alienate migrants and give the illusion that they are second class citizens, although they have been contributing to the UK.

With reference to the fourth and final issue, whether the obligations of 'good character' are prejudicial to migrants who wish to obtain citizenship, the author suggests that these provisions should be deleted entirely as they are prejudicial to migrants.

The author submits that it is extremely difficult to ensure that a level playing field is applied to all cases that are submitted to the UKBA, especially if the term "good character" has not been afforded a proper definition and its meaning and application of the rules is left to the Secretary of State and its officers, namely the UKBA.

In addition to the four issues outlined above, there are additional underlying problems with the BCIA 2009. Under the BCIA 2009's provisions, migrants will no longer be able to average out absences over the qualifying period. This will mean that a migrant must not be absent from the UK for more than 90 days during any year of the qualifying period. This may be a problem for people who may be required to return to their home countries for family reasons and for those who may be working overseas for long periods of time.

The way the previous Labour government proposed to deal with this problem was to leave open the

possibility that in an individual case, discretion to waive the requirement may be exercised. This raises the problem of leaving the migrant with the uncertainty of knowing whether the discretion will be exercised until such time as he/she has all along the route to citizenship, thus meaning that the migrant would have endured the payment of fees for the submission of applications. This, in the opinion of the author, is unreasonable and detrimental to migrants.

Having reviewed some of the provisions contained within Part 2 of the BCIA 2009, it is the opinion of the author that the most sensible solution to the issues raised within this chapter would be to delete the provisions contained within Part 2 entirely. Whether the new 'Coalition' Government chooses to do so yet remains to be seen.

The author contends that there is a possibility that the provisions contained within Part 2 BCIA 2009 may be deleted taking into consideration some of the comments made by Damian Green MP who was then Shadow Immigration Minister. Mr. Green stated '*[t]wo areas give rise to particular concern. One...is the offer of a quicker route to citizenship if voluntary activity is undertaken. That comes close to compulsory volunteering which is perhaps the ultimate absurdity....We are in the throes of setting up yet more unnecessary new bureaucracy that will make life difficult, particularly for the small organisations...*'[152]

Whether this indeed does happen yet remains to be seen as the provisions pertaining to citizenship are not due to come into force until July 2011 or such day as the Secretary of State may by order appoint.[153] Thus one would hope, with the propensity of politicians to generally renege on promises previously made, that in this particular instance, sense would overcome any philosophy of managed migration.

[152] Hansard, HC Second Reading. 2 June 2009: Column 232.
[153] S.58(3)(a) BCIA 2009.

PART 4

RECOMMENDATIONS

4. RECOMMENDATIONS

The discussions outlined above show some of the flaws with the BCIA 2009. The author suggests that in order for the BCIA 2009 to work effectively, various modifications need to be made. The author submits that the following amendments be made:

1. Amend Clauses 1-21[154] (which are all dependent upon each other) to limit and clearly outline in Explanatory Notes or Guidance Notes the powers which have been designated to UKBA staff.
2. Clear definitions for the terms 'Nationality' and 'Citizenship' with detailed rights and responsibilities outlined for each. Whether this is possible is, in the opinion of the author, doubtful.
3. Amend Clause 39[155] so that the number of days spent outside the UK within the qualifying period does not exceed 540 days[156] and that in the period of twelve months before the date of the application the number of days does not exceed 90 days.
4. Remove Clause 41[157] entirely. Furthermore, remove all references to 'earning' citizenship and the 'activity condition'. If this is not possible, the author suggests that the 'activities' be clearly defined and outlined in explanatory notes and the migrants to whom the rules apply, be paid at least a minimum wage for the activities undertaken.
5. Amend Clause 47[158] so as to exempt refugees and persons subject to Humanitarian protection.

The above recommendations are based on the discussions outlined in this paper and do not form an

[154] BCIA 2009
[155] Ibid
[156] As is the case at present (September 2010).
[157] Ibid 153
[158] Ibid

exhaustive list. The author suggests that for a comprehensive list of amendments, a detailed clause by clause analysis be carried out to decipher the true implications of the provisions contained within the BCIA.

The author submits that this can be undertaken with the assistance of the various charities and NGO's who have provided responses to consultation papers in order to ascertain the true impact of the provisions upon migrants.

PART 5

CONCLUSION

5. CONCLUSION

It is evident from the provisions contained within the Act, outlined above, that the government has incorporated draft clauses published earlier in its Green Paper "The Path to Citizenship"[159], along with incorporating some of the responses received from the consultation process.[160] However, the consultation process does not seem to cover the area of potential challenges to the draft legislation and as a result is fundamentally flawed.

In addition to the Act itself, various Ministerial Statements[161] support or oppose the introduction of the new measures without fully understanding the implications on the vast number of persons in the UK whom are subject to immigration control and thus seem to miss the impact of the provisions upon the migrants whom it affects.

The existing literature supporting the BCIA mainly originates from government sources. Thus, it could be argued that the government is not likely to disclose details of possible legal challenges to the legislation as it would mean that it is admitting failure of its own law. Therefore, there appears to be an obvious lack of impartiality in literature supporting the Act.

The general consensus is that the BCIA is deeply flawed, whilst containing much that would erode appeal rights and increase arbitrary decision-making by immigration officials contrary to the belief in fair justice.

The most outspoken of the opposition including; Liberty, the British Refugee Council, the Human Rights Commission, the Northern Ireland Human Rights Commission and The United Nations High

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[159] The Path to Citizenship: Next Steps in Reforming the Immigration System February 2008: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/pathtocitizenship/pathtocitizenship?view=Binary

[160] Simplifying Immigration Law: Responses to the Initial Consultation paper December 2007: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/simplification1stconsultation/consultationresponses.pdf?view=Binary

[161] Borders Citizenship and Immigration Act. Ministerial Statements. Prepared for by ILPA by Elinor Harper and Steve Symonds (2009): http://www.ilpa.org.uk/publications/Ministerial%20Statements%20BCI%20Act%202009.pdf

Commissioner for Refugees, have all expressed concern over the Act and conducted appraisals. However, none of the literature reviewed provide suggestions of possible areas of challenges under the BCIA or further clarification on the meaning of parts of the legislation.[162]

The points-based system for economic and student immigration was introduced in 2008. Recent statistics suggest that the changing economic conditions are, to a limited extent, acting as a natural curb on levels of immigration. Thus, one would question why the government is adamant it must place further restrictions upon immigration.

Nevertheless, in spite of the UK's ageing population and skilled labour shortages, the recession has amplified concerns about the scale of economic immigration. The current system has been led by employer demand – that is to say, if an approved employer demonstrates that they have been unable to recruit from within the resident labour market, or the job is on the official shortage occupation list, permission to sponsor a suitably qualified foreign worker is likely to be given. There have been no overall controls over how many foreign workers are admitted to the UK or where they settle.[163]

Perhaps the most obvious lesson to learn from the past labour government is that legislative activity is an unsatisfactory response to underlying administrative and management problems. Nine pieces of primary legislation on immigration and asylum have been passed since 1997. Yet concerns have consistently been raised by the Home Affairs Committee and others about the UK Border Agency's failure to make timely, good-quality decisions.[164]

There is now widespread recognition that immigration law is overly complex. The new Government may wish to revive the *draft Immigration Bill*, which was published in November 2009

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[162] Liberty in particular have provided some of the most scathing criticism of the Act and in their Stage Briefing on the Act in the House of Commons outline where the Act should be amended and provide possible implications of the Act in its current form on the Immigrant community. http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-report-stage-briefing-on-the-borders-citizenship-immigration-bill-.pdf

[163] Managed Migration. www.parliament.co.uk. Available at: http://www.parliament.uk/business/publications/research/key-issues-for-the-new-parliament/security-and-liberty/managed-migration/

[164] Ibid.

and aimed to replace all existing pieces of legislation with a single statute. If they decide to do so, the author suggests that a comprehensive consultation be carried out with lawmakers, charities, NGO's, the UKBA, and a cross-section of the public.

The author is of the view that failure to conduct a detailed consultation would render any new proposed legislation encompassing all immigration law in the UK open to possible legal challenges and ultimately mean that the act would be fundamentally flawed.

PART 6

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