Memorandum to the Home Affairs Committee

Post-legislative Scrutiny of the Borders, Citizenship and Immigration Act 2009

Presented to Parliament
by the Secretary of State for the Home Department
by Command of Her Majesty

December 2014

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MEMORANDUM TO THE HOME AFFAIRS COMMITTEE

POST-LEGISLATIVE SCRUTINY OF THE BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009

INTRODUCTION

1. The memorandum provides a preliminary assessment of the Borders, Citizenship and Immigration Act 2009 (2009 c. 26) and has been prepared by the Home Office for submission to the Home Affairs Committee. It is published as part of the process set out in the document *Post Legislative Scrutiny – The Government's Approach (Cm 7320)*.

OBJECTIVES OF THE BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009

2. The Borders, Citizenship and Immigration Act 2009 (BCIA 2009) introduced a range of measures to provide a legislative framework for customs functions to be exercisable by the Secretary of State, the Director of Border Revenue and officials designated by them to support the assumption of customs functions by the UK Border Agency (now Border Force). The Act also introduced measures to change provisions for gaining citizenship including provisions to introduce "earned citizenship" (which has not been implemented). Further provisions were aimed at minimising the risk of abuse in the Tier 4 student[1] route by enabling a condition to be imposed on limited leave restricting studies; extending immigration officers' powers of detention at Scottish ports; transferring certain immigration judicial review applications from the High Court to the Upper Tribunal; introducing a duty regarding the need to safeguard children; and clarifying the meaning of "exploitation" in the trafficking offence in section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

3. The assessment section of this memorandum sets out in greater detail the policy objectives behind the specific provisions of the Act.

4. The Parliamentary Research Papers 09/47[2] and 09/65[3] provide a summary of the policy background to the Act.

[1] The Tier 4 student route is the main route of entry for non-EEA nationals to study in the UK.
[2] http://www.parliament.uk/briefing-papers/RP09-47.pdf
[3] http://www.parliament.uk/briefing-papers/RP09-65.pdf

IMPLEMENTATION

5. All of the provisions of the Act have now been commenced in full (see Annex B), except sections 39 to 41 and section 49. Sections 41 and 49 have been commenced in part only. Sections 39 to 41 would have amended requirements for naturalisation and included references to the type of leave which qualified individuals for naturalisation, residential requirements and the qualifying period for those who participated in prescribed activities.

6. These provisions were designed to implement "earned citizenship" but the Government announced in November 2010 that it would not implement "earned citizenship" because it would have been bureaucratic to administer and would have complicated the journey to citizenship without any significant benefits to individuals or the British public. Section 49, if commenced in full, would insert various interpretative provisions into Schedule 1 to the British Nationality Act 1981, such provisions being relevant to those "earned citizenship" measures in sections 39 to 41 of the Act which have not been commenced.

SECONDARY LEGISLATION AND SUPPORTING DOCUMENTS

7. Annex A lists relevant publications.

8. Annex B lists the Commencement Orders for the Act.

9. Annex C lists all the secondary legislation made under the Act, other relevant legislation and codes of practice issued under the Act.

10. There have been no known post-legislative reviews or assessments of the Act conducted in Government, by Parliament or elsewhere.

PRELIMINARY ASSESSMENT OF THE PROVISIONS/LEGAL ISSUES

PART 1 BORDER FUNCTIONS

Sections 1 - 38

11. The purpose of the customs-related sections in Part 1 is to allow customs functions to be exercised by the Secretary of State, the Director of Border Revenue and officials designated by them. The provisions:

    - define general customs functions exercisable by the Secretary of State and provide related powers to designate general customs officials (sections 1-5)

- require the Secretary of State to designate an official as the Director of Border Revenue and define the customs revenue functions of the Director (sections 6-10)

- provide the Director of Border Revenue with powers to designate customs revenue officials and define the scope of these powers (sections 11-13)

- set out legal requirements on the use and disclosure of customs information (sections 14-21)

- apply relevant sections of the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence Act (Northern Ireland) Order 1989 to investigations by designated customs officials and immigration officers (sections 22-23)

- inserted a new section 26C on investigations by designated customs officials into the Criminal Law (Consolidation) (Scotland) Act 1995, which provided enforcement powers to designated customs officials in Scotland (section 24)

- amended the statutory definition of short-term holding facilities so as to allow their use for persons other than those detained under Immigration Act powers. This was in order to ensure the most efficient use of these facilities by increasing the flexibility by which they might be used (section 25)

- allow the Commissioners for Her Majesty's Revenue and Customs ('HMRC') to make schemes for the transfer of specified property, rights, liabilities between the Commissioners or officers of Revenue and Customs and the Secretary of State, the Director of Border Revenue or designated customs officials (sections 26, 27)

- specify inspection and oversight arrangements for designated customs officials and immigration officers (sections 28-30)

- set out arrangements for the prosecution of offences (section 31)

- specify requirements for the payment of revenue collected by the Director of Border Revenue and Secretary of State to the Commissioners for HMRC and provides that the Treasury may by order require the payment of certain sums received by the Director and Secretary of State directly into the Consolidated Fund (sections 32, 33)

- make bridging provision for a duty regarding the welfare of children (section 34, see section 55 below)

- give powers to modify enactments or make supplementary provisions (sections 35-37)

- define certain terms in Part 1 of the Act (section 38)

Transfer of customs provisions to the Home Office

12. The general customs functions and the customs revenue functions set out in Part 1 of the BCIA 2009 were implemented on 5 August 2009. This coincided with the date that around 4500 customs officers were transferred from HMRC to the Home Office. Implementation of Part 1 enabled a seamless transfer of customs functions so these could be exercised at the UK's border from the date of the machinery of government change which transferred staff from HMRC to the Home Office. Implementation of the customs sections in Part 1 also provided for all existing enactments relating to the functions of an officer of Revenue and Customs (with the exception of the Commissioners of Revenue and Customs Act 2005, which was applied in part only) to be read so as to include a reference to customs officials designated either by the Secretary of State or the Director of Border Revenue, so far as is appropriate.

13. Since August 2009 the customs provisions in the BCIA 2009 have enabled Border Force to operate all customs controls carried out at the border on people, goods (including postal packages) and means of transport entering or leaving the UK and to enforce all relevant customs, excise and VAT laws where they relate to border movements. In practice this covers the delivery of all customs functions at ports, airports, approved wharves, control zones, transit sheds, international postal depots and within UK territorial waters or on the high seas.

Director of Border Revenue

14. The statutory role of Director of Border Revenue created by section 6 of the BCIA 2009 is currently held by the Director General of Border Force (and previously by the Chief Executive of the UK Border Agency). The role of the Director General therefore has dual accountability to the Home Secretary for general customs functions and to the Chancellor of the Exchequer for customs revenue functions. This arrangement preserves the Chancellor's arm's length oversight of revenue matters in a similar manner to the Chancellor's oversight of the Commissioners for HMRC; respecting constitutional convention.

Use and disclosure of information

15. Sections 14-21 set out the broad circumstances in which customs information may be used or disclosed and by whom, and define customs information. Section 15 establishes a statutory duty of confidentiality, prohibiting the disclosure of personal customs information by customs officials and any person to whom personal customs information has been disclosed. Section 16 sets out the limited range of circumstances in which personal customs information can be disclosed, which includes for the purposes of preventing and detecting crime, international agreements, for civil or criminal proceedings, where the person to whom the information relates gives consent, and for a variety of other purposes such as national security and allows Border Force to share information in order to protect

public safety. Section 17 sets out the circumstances where the further onward disclosure of personal customs information may be allowed and applies to persons who will have received information from persons specified in section 15, in accordance with section 16, or from other persons (who have received customs information from those persons) under section 17 itself. Section 18 establishes an offence of wrongful disclosure of personal customs information with a maximum penalty of two years imprisonment or an unlimited fine. This aligns the sanction with that under section 19 of the Commissioners for Revenue and Customs Act 2005 which governs the sharing of customs information by HMRC. Section 19 clarifies that the use and disclosure of information must be subject to the Data Protection Act 1998 and Part 1 of the Regulation of Investigatory Powers Act 2000, and also deals with which information is exempt under the Freedom of Information Act 2000. Sections 20 and 21 provide for disclosure of information by HMRC and by the Revenue and Customs Prosecution Office, by amendment to the UK Borders Act 2007, and extend the duty to share information under section 36 of the Immigration, Asylum and Nationality Act 2006 to customs officials, immigration officers, the Secretary of State, the Director of Border Revenue, officials acting for the Director, the police and HRMC.

16. The sharing provisions are used on a daily basis and are essential in helping to secure the border, prevent crime and protect public safety through close cooperation with other law enforcement agencies. Examples include sharing information with Police to prevent or detect crime or with other government departments to detect goods arriving in or departing the UK that may present a risk to public health or safety. The powers are effective and have not been challenged.

Secondary Legislation

17. One statutory instrument has been made under section 23 of the Act: The Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013 (SI 2013/1542)[4].

18. This order relating to England and Wales came into force on 25 June 2013. The purpose of this instrument was to apply certain provisions of PACE to criminal investigations conducted by immigration officers, and designated customs officials and to persons detained by designated customs officials. This included powers of arrest, search of premises and seizure of evidence as well as obligations in respect of persons detained on suspicion of having committed customs offences.

[4] http://www.legislation.gov.uk/uksi/2013/1542/contents/made

19. The 2013 Order has delivered significant operational benefits for Immigration Enforcement – Criminal and Financial Investigation (IE-CFI). Most IE-CFI teams comprise a mix of police and immigration officers and previously immigration officers in these teams would have relied upon different powers when investigating offences. The Order has meant that IE-CFI investigators, regardless of whether they are police or immigration officers, now can use the same powers. On a practical level this has removed the need for officers to receive separate briefings, has improved inter-operability and has delivered greater flexibility of response since all officers in an IE-CFI team can now be assigned to deal with a case.

20. In order to harmonise the operational powers in use in Northern Ireland with those in the rest of the UK, a further order will be made under section 23 of the BCIA 2009 in relation to immigration officers and customs officials in Northern Ireland. Its provisions will closely reflect the 2013 England and Wales Order. (Since the Police and Criminal Evidence Act 1984 does not extend to Scotland, criminal investigation powers for Border Force in Scotland are contained in other legislation).

Transfer schemes

21. Two transfer schemes[5] have been made under the provisions of section 26 of the BCIA 2009. The first one was made on 3 August 2009. This scheme came into effect on 5 August 2009 and was necessary to enable the transfer of property, rights and liabilities (including responsibility for legal proceedings) from HMRC to the Home Office, in respect of functions to which the scheme applies.

22. The second scheme was made and came into effect in December 2009 and covered the transfer of HMRC criminal investigation functions in relation to prohibited and restricted goods (with the exception of strategic exports and Intellectual Property Rights offences) to the Criminal and Financial Investigation team in the UK Border Agency. This customs criminal investigation function was subsequently assumed by the Border Policing Command of the National Crime Agency in October 2013.

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181263/BF-HMRC_Partnership_Agreement_2012-13.pdf

PART 2 CITIZENSHIP

Sections 39 - 49

23. The citizenship provisions in Part 2 of the BCIA 2009 amend the legislation on naturalisation and registration as a British citizen in the British Nationality Act 1981. The provisions:

    - amend the references to the type of leave which qualified individuals for naturalisation and the residential requirements (sections 39, 40 and 49)
    - provide for shorter qualifying periods for those who participated in prescribed activities (section 41)
    - amend the residential requirements for those in HM Forces or in Crown Service (section 39)
    - make additional provision for children born to serving members of HM Forces (sections 42 and 46)
    - extended eligibility for registration for minors, children of British mothers and British Nationals (Overseas) (sections 43, 44 and 45)
    - moved the good character requirement for registration introduced in the Immigration, Asylum and Nationality Act 2006, with additions for the new provisions at sections 42 and 43, into section 41A of the British Nationality Act 1981 (section 47)
    - moved the definition of "in the UK in breach of immigration law" for the purposes of naturalisation and registration inserted by the Nationality Immigration and Asylum Act 2002, with a slight amendment, into section 50A of the British Nationality Act 1981 (section 48)
    - the provisions relating to registration in section 42 to 48 were implemented on 13 January 2010.

24. With one exception (section 41(5), see below), the provisions for shorter qualifying periods for those who participated in prescribed activities have not been implemented (sections 39 to 41). They were intended to give effect to the previous Government's policy of "earned citizenship" but the current Government announced in November 2010 that it would not introduce these provisions on the basis that they would have been bureaucratic to administer and would have complicated the journey to citizenship without any significant benefits to individuals or the British public.

25. However, part of section 41(5) has been commenced to enable regulations to be made for the taking of biometrics in connection with naturalisation and residential applications.

26. The amendments to the residential requirements for individuals in HM Forces and Crown Service in the BCIA 2009 have not been implemented. The amendments

were intended to remove the requirement to be in the UK on the first day of the qualifying period for citizenship for those categories of individual. A provision to remove this requirement for members of HM Forces has now been introduced by the Citizenship (Armed Forces) Act 2014.

27. We are not aware of any challenges to the decision not to commence a number of these provisions.

28. There are currently a number of legal challenges from children born abroad to British mothers claiming that the provision enabling them to register as British does not go far enough and is discriminatory - that provision was introduced in 2003, but was amended by section 45 of the BCIA 2009.

29. Since January 2010, the registration provisions introduced by the BCIA 2009 have given the right to register as British citizens to a number of groups who were previously excluded or who had only a discretionary route to registration. The provisions relating to children of serving members of HM Forces have provided clarification of their position.

PART 3 IMMIGRATION

STUDIES

Section 50: Restrictions on studies

30. Section 50 was commenced on 21 July 2009. The provision was brought in to support the Tier 4 student immigration route by minimising the risk of abuse. It enables a condition to be attached to a student's leave to enter or remain so that they may only study at a specific education institution. The condition restricting study is set out in the Immigration Rules, and specifies that there is to be no study except at the institution that the student's Confirmation of Acceptance for Studies (CAS) records as the student's sponsor or at a partner of such institution.

31. The guidance[6] on the GOV.UK website explains the Tier 4 sponsorship system to those who wish to sponsor international students to study in the UK. It specifies that education institutions must hold a Tier 4 sponsor licence and must assign a CAS for a student to undertake a course of study at their institution.

32. GOV.UK guidance[7] also explains to migrants the requirements for leave to enter or remain in the UK under Tier 4. It says that migrants must be sponsored by a Tier 4 sponsor, who assigns them a CAS for a course to be studied at their institution. There is also guidance for Tier 4 sponsors.

[6] https://www.gov.uk/government/publications/sponsor-a-tier-4-student-guidance-for-educators
[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364762/T4_Guidance_10-14.pdf

33. The Immigration Rules set out the requirements that must be met by migrants applying for leave to enter or remain as Tier 4 students. This includes the requirement that migrants must be sponsored by a Tier 4 sponsor.

34. There have been two challenges against Section 50. In both cases, the provision and its application were successfully defended. Further, in *Qoao Aamir Afzaal* (CO/1461/2013) the court considered the Home Office's ability to impose conditions without further administrative action. The Court found that as section 3 of the Immigration Act 1971 sets out that the study condition can be imposed on leave to enter or remain (which may be granted in the form of entry clearance) for Tier 4 students, so no further administrative action is needed to impose the condition. The Immigration (Leave to Enter and Remain) Order 2000 (SI 2000/1161) requires that conditions are endorsed on the entry clearance. The courts found that the endorsement of the student's sponsor's reference number on the entry clearance was a clear indication of the study condition that the migrant can only study at the identified sponsoring institution. Students who study at any other institution are not complying with their conditions of leave, unless the institution is a partner of the sponsoring institution.

35. The Home Affairs Select Committee, the House of Lords Science and Technology Committee and the Independent Chief Inspector of Borders and Immigration have all reviewed implementation of the government's reforms to the student immigration route[8].

36. The Home Office has made a number of changes to tackle abuse of the Tier 4 route. This includes strengthening the sponsorship system to ensure that only Tier 4 sponsors who have been assessed for education quality and demonstrated strong immigration compliance are able to recruit international students. Nearly 800 colleges have been removed from the Tier 4 sponsor register since 2011. Requiring international students to study at a specified Tier 4 sponsor has protected them from poor quality institutions offering substandard education. This has encouraged more genuine, high quality students to come to study here, while deterring non-genuine ones. Applications for visas from university students increased by 5% in the year to June 2014 and by 8% for Russell Group universities. Visa applications to study at further education colleges, where much of the abuse has been concentrated in the past, fell by 25% in the same period.

[8] http://www.publications.parliament.uk/pa/ld201314/ldselect/ldsctech/162/16202.htm

http://icinspector.independent.gov.uk/wp-content/uploads/2012/11/An-inspection-of-Tier-4-of-the-Points-Based-System-29.11.2012.pdf

FINGERPRINTING

Section 51: Fingerprinting

37. Section 51 was commenced on 10 November 2009. The purpose of section 51 was to close a legislative gap that may have prevented the Home Office from taking fingerprints of foreign nationals subject to automatic deportation.

DETENTION AT PORTS IN SCOTLAND

Section 52: Extension of sections 1 to 4 of the UK Borders Act 2007 to Scotland

38. Section 52 of the BCIA 2009 extended to Scotland, with some modification, sections 1 – 4 of the UK Borders Act 2007. As with the provisions which it extended, the purpose of section 52 was to strengthen border security by introducing powers for immigration officers to support the police to tackle criminality. As these powers were not for the reserved purpose of immigration, but rather in support of the devolved purpose of policing, the powers were extended to Scotland with the agreement of the Scottish Government on 27 October 2014 (via the Borders, Citizenship and Immigration Act 2009 (Commencement No. 3) Order 2014[9].

39. The effect of section 52 is to give designated immigration officers at ports of entry in Scotland the power to detain individuals who are subject to a warrant for arrest. The detention is for a maximum period of three hours, pending the arrival of a constable.

40. With the recent commencement of section 52, bespoke training packages have been delivered to nominated trainers across Scotland, and the training of immigration officers is now underway. Border Force has also worked closely with Police Scotland to agree and manage the process when an individual is detained.

41. The purpose of section 52 is to put Scotland on a similar footing to other ports of entry across the UK, bolstering Border Force's capability to intercept wanted individuals at Scottish ports.

42. Training in Scotland and across the rest of the UK is still underway and the powers are not widely in use as yet.

[9] http://www.legislation.gov.uk/uksi/2014/2634/contents/made

PART 4 MISCELLANEOUS AND GENERAL

JUDICIAL REVIEW

Section 53: Transfer of certain immigration judicial review applications

43. Section 53 allowed judges to transfer certain immigration and nationality judicial review applications from the High Court, Court of Session and High Court of Northern Ireland, to the Upper Tribunal, which was set up by the Tribunals, Courts and Enforcement Act 2007 (the TCA 2007). The Upper Tribunal has exactly the same jurisdiction in judicial review matters as the higher courts, and may grant the same kinds of relief.

44. The TCA 2007 provided for the higher courts to transfer specified judicial review applications to the Upper Tribunal, but at the time of its enactment there was an exception for judicial reviews relating to immigration matters. This was partly as the Asylum and Immigration Tribunal did not form part of the TCA 2007 unified tribunal system, and partly to meet concerns about how quickly the Upper Tribunal might develop the necessary expertise.

45. Section 53 removed the exception contained in the TCA 2007 to enable the transfer of certain immigration judicial reviews, specifically challenges to "fresh claim" decisions in the High Court of England and Wales, to the Upper Tribunal. This was in response to increasing pressures of immigration judicial reviews on the workload of the higher courts[10], plans to transfer the Asylum and Immigration Tribunal into the TCA 2007 unified tribunal system, and an acceptance that non-immigration judicial reviews were being dealt with fairly and expeditiously in the Upper Tribunal.

46. The functions of the Asylum and Immigration Tribunal were transferred into the First Tier of the unified tribunals system on 15 February 2010, creating a new Immigration and Asylum Chamber. On 3 March 2011 a Written Ministerial Statement announced the Government's intention to bring into force section 53 of the BCIA 2009 with effect from 1 October 2011, stating (inter alia) that "The transfer of these judicial reviews will enable fresh claim asylum and immigration human rights applications to be dealt with by judicial members of the Upper Tribunal who have specialist skills and experience in asylum and immigration cases, and will also relieve workload pressure on the High Court, freeing up judicial time to address the high volumes of other types of cases heard in the High Court."[11]

[10] Ministry of Justice statistics indicate that in 2011 there were 11,200 applications for permission to apply for Judicial Review received in the Administrative Court, of which 8,649 concerned asylum and immigration matters – some 77 per cent.

[11] Hansard 3 Mar 2011 : Column WS121
http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/110303-wms0001.htm

47. Between March and June 2011 the Tribunal Procedure Committee conducted a consultation[12] to seek views on associated changes to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("UT Rules") in England and Wales to take effect once section 53 was in force.

48. The Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2011 (SI 2011/2343) were laid before Parliament on 22 September 2011 and enabled the transfer of immigration judicial reviews challenging "fresh claims" decisions to take effect from Monday 17 October 2011[13].

49. Monitoring was conducted internally by the Home Office and HM Courts Service after 1, 3 and 6 month intervals and shared with a working group led by led by the Ministry of Justice, as the transfer of judicial review falls within TCA 2007 implementation. The findings led to the issuing of a Practice Statement[14] by the Chamber President to address the matters identified.

50. Transfer of immigration judicial reviews challenging fresh claim decisions was successful in reducing the workload of the High Court in England and Wales, without giving rise to any concerns regarding the quality of scrutiny by the Upper Tribunal. It was accordingly decided to broaden the transfer power to other immigration judicial reviews.

51. The Crime and Courts Act 2013 repealed the limited power to transfer immigration judicial review challenges to fresh claim decisions contained in section 53 of the BCIA 2009 and provided a wider power to transfer immigration judicial reviews.

52. Most immigration judicial reviews in England and Wales are now dealt with by the Upper Tribunal, subject to a few exceptions that are still retained by the High Court (e.g. legally complex or more significant matters such as validity of legislation, unlawful detention, registration of sponsors, nationality).

53. The courts in Northern Ireland and in Scotland have not yet chosen to exercise the power to transfer judicial reviews.

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[12] https://www.justice.gov.uk/downloads/about/moj/advisory-groups/fcjr-consultation-paper.pdf
http://www.justice.gov.uk/downloads/about/moj/advisory-groups/fresh-claim-upper-tribunal-judicial-review-onsultation-reply.pdf
[13] http://www.legislation.gov.uk/uksi/2011/2343/made
[14] http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/PS+Fresh+claim+judicial+reviews+in+UTIAC+April+2013.pdf

TRAFFICKING PEOPLE FOR EXPLOITATION

Section 54: Trafficking people for exploitation

54. This section came into force on 10 November 2009 (SI 2009/2731). The purpose of section 54 was to clarify the meaning of "exploitation" in section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (AITCA 2004), which related to victims of trafficking.

55. Section 4 of AITCA 2004 put in place criminal offences in relation to the trafficking of people for the purpose of exploiting them, and provided a definition of "exploited person". This latter point was important, as the UK did not operate a National Referral mechanism at that time. This section ensured the UK would be compliant with elements of the Council of Europe Convention on Action against Trafficking in Human Beings[15], which was opened on 16 May 2005.

56. The UK did not opt into this Convention until 1 February 2008. At this point, it became clear that the definition of "exploitation" in section 4(4)(d) of AITCA 2004 was insufficient for the purposes of compliance with the Convention. Accordingly, section 54 of the BCIA 2009 was enacted. The previous definition of "exploitation" provided that a person who was "requested or induced" to undertake any activity was exploited. Section 54 of the BCIA 2009 clarified that the term "any activity" under section 4(4)(d) should be taken to mean those activities listed in section 4(4)(c) of the AITCA 2004. This was intended to cover use or attempted use of a person for the provision of services or the provision or acquisition of benefits of any kind, where the person is chosen on the grounds of ill-health, disability, youth or family relationship – to ensure the offence of trafficking captures those cases where the role of the person being exploited is entirely passive, and where the person is being used as a tool by which others can gain a benefit of any kind. This ensured the UK Government's compliance with the Convention. It also provided greater clarity to law enforcement agencies as to when prosecution may be appropriate.

57. However, current modern slavery and human trafficking offences are contained in a number of different Acts, which is why the Modern Slavery Bill intends to consolidate and simplify existing offences into a single Act. The provisions of the Modern Slavery Bill, when they become law, will supersede those contained in section 4 AITCA 2004 (as amended by section 54 BCIA 2009).

[15] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CL=ENG)

58. This section of the BCIA 2009 was intended to ensure compliance with the Council of Europe Convention on Action Against Trafficking in Human Beings. In this respect, section 54 BCIA 2009 has been effective. It provided a statutory basis upon which law enforcement can consider the prosecution of those who engage in trafficking related offences.

59. In 2013, the last year in which data is available, there were 210 cases recorded by the CPS as being linked to trafficking or modern slavery offences. In that year, there were 68 convictions for slavery or human trafficking offences.

CHILDREN

Sections 34 and 55: Duty regarding the welfare of children

60. Section 55 came into force on 2 November 2009 (SI 2009/2731) and placed a duty on the Home Secretary and the Director of Border Revenue to make arrangements for ensuring that immigration, nationality and asylum functions and customs functions are discharged with regard to the need to safeguard and promote the welfare of children in the UK. The purpose of section 55 was to provide the UK Border Agency with a means of discharging a responsibility proposed for all public bodies by Lord Laming's report into the death of Victoria Climbie. This is a responsibility to be vigilant on behalf of children for signs that they are at risk of harm translated into legislation as a duty for public bodies to have regard to safeguarding children and promoting their welfare in carrying out their functions. Section 55 seeks to apply this general responsibility to the immigration, asylum, nationality and general customs functions of the Home Office.

61. Section 34 was a 'bridging' provision that ceased to have effect when section 55 came into force. It was introduced following an undertaking to Parliament during the passage of the BCIA 2009 that the Code of Practice for Keeping Children Safe from Harm would not fall away until the duty in section 55 (Duty regarding the welfare of children) came into force (which happened on 2 November 2009). The effect of section 34 was to maintain the applicability of the Code of Practice required by section 21 of the UK Borders Act 2007 until the time that section 55 of the BCIA 2009 came into force. In order to ensure this it amended section 21 of the 2007 Act so that the Code of Practice applied to the immigration, nationality and asylum functions and customs functions of the Secretary of State and the Director of Border Revenue that are set out in the BCIA 2009. It also provided for the automation repeal of section 21 of the 2007 Act and the Code of Practice at the point when section 55 came into force.

62. The number of legal challenges arising from this provision has been extremely high. These take the form of legal challenge to an immigration decision on the grounds that the best interests of the child require a different decision.

63. The leading judgment on section 55 is that of the Supreme Court in *ZH Tanzania*[16] *(ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4).* As section 55 does not specify how immigration control responsibilities are to be balanced with children's best interests such considerations have had to be devised later.

64. In order to reduce litigation, it might have been preferable for section 55 to have specifically clarified in legislation how the duty to have regard to the need to safeguard and promote the welfare of children should be balanced against other factors. However, due to the genesis of the measure stemming from opposition amendments to the Children and Young Person's Bill in 2008, it is unlikely that this would have been possible.

65. The duty has been under constant review since its inception due to it being invoked as grounds for challenging decisions made by the Secretary of State in individual cases. These have involved a wider range of scenarios than that of unaccompanied children originally envisaged. Handling the number of judicial reviews involved has led to new work on claims based on children's interests, as has the need to develop policies around the application of the duty to a range of situations, e.g. removal of foreign national criminals with children in the UK; children close to the age of 18, whether newly arrived or here for some time, have begun to make applications or appeals challenging the leave they have been granted on the grounds that section 55 requires it to be replaced with permanent leave so that they can access benefit from higher education funding.

66. In practice this has expanded the grounds of challenge to the Secretary of State's decisions but may not necessarily have increased the number of challenges as many of these would have been brought anyway on other human rights related grounds. Among many non-governmental organisation partners it is regarded as being to the credit of the UK that it has incorporated a provision relating to children's best interests (and therefore children's rights).

[16] http://www.bailii.org/uk/cases/UKSC/2011/4.html

CONCLUSION

67. The Borders, Citizenship and Immigration Act 2009 was enacted to enable immigration officers and officials of the Secretary of State to exercise customs and revenue functions as part of the creation of the UK Border Agency. These functions are now exercised by the Home Office Border Force, with the Director General of Border Force taking on the statutory role of Director of Border Revenue. The Act had a number of other important objectives including minimising the risk of abuse in the Tier 4 student route and introducing a duty to safeguard children, and made other provisions around fingerprinting, trafficking, detention, transfer of judicial reviews and use of detention facilities.

68. This Act also provided a legislative framework for the policy of "earned citizenship" but these provisions have not been commenced due to a change of policy. With this exception, the Act has met its intended objectives.

Annex A

RELEVANT PUBLICATIONS

Borders, Citizenship and Immigration Act 2009

http://www.legislation.gov.uk/ukpga/2009/11/pdfs/ukpga_20090011_en.pdf

Borders, Citizenship and Immigration Act 2009 – Explanatory Notes

http://www.legislation.gov.uk/ukpga/2009/11/pdfs/ukpgaen_20090011_en.pdf

Commons Library Research Paper 09/47

http://www.parliament.uk/briefing-papers/RP09-47.pdf

Commons Library research Paper 09/65

http://www.parliament.uk/briefing-papers/RP09-65.pdf

Annex B

Commencement Orders for the Act by section

Provision	*Date of Commencement*	*Statutory Instrument number*
Sections 1 and 2 (General customs functions of the Secretary of State)	21.07.2009	*n/a – On Royal Assent)*
Sections 3 to 5 (General customs officials)	21.07.2009	*n/a – On Royal Assent)*
Sections 6 to 10 (The Director of Border Revenue)	21.07.2009	*n/a – On Royal Assent)*
Sections 11 to 13 (Custom revenues officials)	21.07.2009	*n/a – On Royal Assent)*
Sections 14 to 21 (Use and disclosure of information)	21.07.2009	*n/a – On Royal Assent)*
Sections 22 to 25 (Investigation and detention)	21.07.2009	*n/a – On Royal Assent)*
Sections 26 and 27 (Transfer of property etc.)	21.07.2009	*n/a – On Royal Assent)*
Sections 28 to 30 (Inspection and oversight)	21.07.2009	*n/a – On Royal Assent)*
Sections 31 to 34 (Other provisions)	21.07.2009	*n/a – On Royal Assent)*
Sections 35 to 38 (Supplementary)	21.07.2009	*n/a – On Royal Assent)*
Section 41(5) (Acquisition of British citizenship by naturalisation –The qualifying period)	27.10.2014	2014/2634
Section 42 (Acquisition of British citizenship by birth)	13.01.2010	2009/2731
Sections 43 to 47 (Acquisition of British citizenship etc. by registration)	13.01.2010	2009/2731
Section 48 and 49 (1) (Interpretation etc.)	13.01.2010	2009/2731
Section 50 (Studies)	21.07.2009	*n/a – On Royal Assent*
Section 51 (Fingerprinting)	10.11.2009	2009/2731

Section 52 (Detention at ports in Scotland)	27.10.2014	2014/2634
Section 53 (Judicial Review)	08.08.2011	2011/1741
Section 54 (Trafficking people for exploitation)	10.11.2009	2009/2731
Section 55 (Children)	02.11.2009	2009/2731

Annex C

Secondary legislation, other relevant legislation and codes of practice issued under the Borders, Citizenship and Immigration Act 2009

Police and Criminal Evidence Act 1984 (Application to immigration officers and designated customs officials in England and Wales) Order 2013, SI 2013/1542 (made under sub-ss (1), (3), (5)).

Customs (Inspections by Her Majesty's Inspectors of Constabulary and the Scottish Inspectors) Regulations 2012, SI 2012/2840.

Customs (Inspections by Her Majesty's Inspectors of Constabulary and the Scottish Inspectors) (Amendment) Regulations 2014, SI 2014/907.

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