

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's response to the Home Office  
Consultation:**

**"The Path to Citizenship: Next Steps in  
Reforming the Immigration System"**

**May 2008**

## Introduction

1. In February 2008, the Border and Immigration Agency within the Home Office published a consultation on proposals for further reform of the immigration system: “The Path to Citizenship: Next Steps in Reforming the Immigration System”.<sup>1</sup> Liberty does not usually comment on issues related to immigration and citizenship as, unlike asylum, international human rights law does not confer immigration rights. Our decision to respond to this particular consultation, however, is principally driven by the political context in which we see these proposals being initiated.

2. During the Parliamentary Debate on the Green Paper the Home Secretary, Jacqui Smith, stated that: “*the [citizenship process] should be fair and should reflect the sorts of expectations that we would place on ourselves*”. Despite this, the Green Paper contains several proposals which would require migrants to contribute (financially and otherwise) much more than those born in the UK. While there is no right to immigration status Liberty believes that once a person is accepted into the immigration system, they should not have to face unfair and discriminatory hurdles on their path to citizenship.

3. The conceptual framework for this current consultation seems to have been heavily informed by recent and ongoing discussions around a “British Bill of Rights”. Liberty remains concerned about the context and impetus for calls for a British Bill of Rights and in particular the tone that such calls have taken. Unfortunately this tone is reflected in several of the proposals contained in this Green Paper.

## Background

4. The defining feature of the post-war human rights framework is that fundamental human rights are universal and cannot be compromised or limited on the basis of, among other things, nationality or race. This framework further establishes that fundamental human rights are inalienable, thereby attaching to each and every human being by virtue of their common humanity.

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<sup>1</sup><http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/pathtocitizenship/>

5. Sadly, political discourse over the past few years has seen persistent attempts to undermine these concepts of universality and inalienability. In particular two worrying themes have emerged in wider debates around citizenship, “Britishness” and a British Bill of Rights. The first is the concept of “rights for British citizens”. The second is the idea that rights are conditional upon corresponding duties or responsibilities.

#### *Rights for British Citizens*

6. The idea that certain fundamental rights should be reserved for British citizens has been implied by both Government<sup>2</sup> and the Official Opposition<sup>3</sup> in recent years. Media depictions of the Human Rights Act 1998 (HRA) have portrayed it a charter for foreign criminals and terrorists. Occasionally prominent politicians have questioned judicial decisions to protect even the most fundamental human right, the absolute prohibition against torture<sup>4</sup>. There is a worrying trend in political discourse to imply that fundamental rights do not belong to all, and that foreign nationals resident in the UK should have a diluted standard of protection.

#### *Corresponding Duties/Earning Rights*

7. Linked to the suggestion that better rights protection should be reserved for British citizens is the idea that rights protection can be earned by non-citizens. This approach makes rights protection conditional upon a person’s behaviour. Proposals for a British Bill of Rights have, in particular, focussed on this idea. The “Governance of Britain” Green Paper stated that a “*Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a*

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<sup>2</sup> The “Governance of Britain” Green Paper published by the Ministry of Justice in July 2007 describes a Bill of Rights as “the articulation of the rights of each *citizen*” [Emphasis added].

<sup>3</sup> During his speech “Balancing Freedom and Security – A Modern British Bill of Rights” given at the Centre for Policy Studies (26/06/06) David Cameron called for “*a clear articulation of citizen's rights that British people can use in British courts*”.

<sup>4</sup> Ibid, David Cameron referred to the impact of the Chahal case (1996) stating: “The court in Strasbourg ruled that the British Home Secretary cannot balance the human rights risk to an individual if they are deported against the security risk to the UK if they stay. This applies once it is established that the person to be deported is at substantial risk of suffering torture or inhuman or degrading treatment...This European Court judgment, made in 1996 before the Human Rights Act has been used as case law in British courts since the Human Rights Act. This has made it harder than it otherwise would have been for the Government to deport dangerous terrorists”

way that respects the human rights of others<sup>5</sup>". The Official Opposition have also called for a Bill of Rights which sets out corresponding duties<sup>6</sup>.

8. Liberty does not believe that fundamental human rights are conditional or negotiable. Of course, this is not to say that all human rights are absolute. Individuals owe moral and legal obligations to the society they live in and the state is entitled to take steps to protect legitimate interests. This is reflected in the human rights framework. Similarly, criminal and civil laws restrictions exist to ensure that people act in accordance with their responsibilities. Rhetoric around earned rights and contingent on accepting responsibility may produce convenient sound bites. However the idea that fundamental human rights should be earned is deeply flawed in principle and would be unworkable in practice<sup>7</sup>.

### **Tone of the Green Paper**

9. In the Foreword to the Green Paper, the Home Secretary, Jacqui Smith, talks of a "*deal for citizenship*" and states that "*British people...think it's fair that the rights and benefits of citizenship are matched by responsibilities and contributions to Britain*". We fully understand the need for Government to be able to determine, through clearly defined criteria, who should be eligible for UK citizenship. However, we are concerned by the use of language which implies that rights can be lost or jeopardized if an individual fails to comply with a certain responsibility or does not "contribute" in the way that the Government requires.

10. In fact, much of the language in the Green Paper implies that the onus should be on a migrant seeking to reside in the UK to prove his or her worth, the implication being that migrants are, by default, a less deserving or less trustworthy group. For example, the title given to a section of the Green Paper "Paying Your Way" seems to imply some sort of propensity of migrants to somehow cheat the system or burden the state unnecessarily. Another example is the creation of the new "probationary citizenship" category, terminology that seems laden with suspicion and mistrust.

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<sup>5</sup> July 2007, CM 7170, para 210

<sup>6</sup> Ibid at Footnote 3: "A British Bill of Rights needs to define the core values which give us our identity as a free nation. It should spell out the fundamental duties and responsibilities of people living in this country both as citizens and foreign nationals."

<sup>7</sup> A person suspected of committing a crime could not, for example, be denied a right to a fair trial because they have not "earned" the right.

## **Integration & Vulnerability**

11. The Green Paper proposes a three stage “journey” to citizenship involving temporary citizenship, followed by probationary citizenship followed either by British citizenship or permanent residency. It proposes that economic migrants, refugees and those granted humanitarian protection will remain as temporary residents for 5 years before being entitled to apply for probationary citizenship. Those joining a partner or parent already resident in the UK will be entitled to apply for probationary citizenship after 2 years.

12. Despite its name, “probationary citizenship” will not bestow any of the recognised entitlements of citizenship. Rather it is a type of leave to remain that will further extend the period before migrants are able to apply for British citizenship or permanent residency. Under the Green Paper proposals probationary citizenship can last from between 1 - 5 years. Asylum seekers and economic migrants will be able to achieve full citizenship after a minimum of 6 years and permanent residency after a minimum of 8 years. However these minimum periods will only apply if additional voluntary requirements of “active citizenship” are fulfilled. If not the journey to citizenship could take up to ten years.

13. Currently secure immigration or citizenship status can be achieved in the UK within 5 years for migrant workers. While there is no right to citizenship status under human rights law, Liberty is concerned that the extended periods proposed in this Green Paper will mean that migrants will remain vulnerable for longer periods. Under the proposals, migrant workers, refugees and asylum seekers may be unable to access mainstream benefits or local authority housing for up to 10 years. Migrants will also be vulnerable to employers for longer periods, possibly working longer hours or accepting lower pay for fear of losing the right to remain.

14. While this proposal does not directly engage human rights law, Liberty is concerned that it may hinder community cohesion. Although the Green Paper states that one of its aims is to improve integration, it is arguable that extending the length of the formal integration process will actually prove counterproductive in practice. Those processing through the system will now spend longer being scrutinised and evaluated by the Border & Immigration Agency, the police, employers, voluntary organisations and others. This prolonged process of scrutiny, combined with the

additional tests proposed (considered below) may well perpetuate feelings of exclusion within migrant communities.

### **New Tests**

15. The Green Paper makes a number of proposals concerning tests that temporary residents and probationary citizens will have to meet to allow them to progress through the system. Failure to meet these tests will lead either to deportation or an extended period as a “probationary citizen”.

### ***English Language***

16. The Green Paper proposes that those seeking to progress from temporary residence to probationary citizenship will be required demonstrate English language ability. Currently migrants are expected to demonstrate English language ability before being granted settlement<sup>8</sup>. While Liberty agrees that speaking English is vital for effective integration we are concerned that the proposed reform may potentially interfere with the right to family life protected by Article 8 of the HRA. Under the current system, if the partner of a British citizen fails to pass the English language requirement they would be allowed to stay in the UK to continue to learn English so that they can pass the test. Under the proposed reform, partners of British citizens who fail the test at the end of their period of temporary residence would be required to leave the UK.

17. In February 2008 Liberty responded to a related Home Office consultation<sup>9</sup> which sought views on a pre-entry English requirement for spouses wishing to join their partners in the UK<sup>10</sup>. We stated that these blanket proposals could potentially act as a bar to entry to the UK and disadvantage those unable to learn English, for example, due to financial/time constraints, illness, disability, age or work commitments. As with the pre-entry English requirement, we believe that deportation for partners who fail to pass the English language requirement would interfere

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<sup>8</sup> Either by completing an English for Speakers of Other Languages (ESOL) Course, progressing from one ESOL level to the next or passing the Life in the UK Test

<sup>9</sup> The Home Office Consultation “Marriage Visas: Pre-entry English Requirement for Spouses”

<sup>10</sup> Our response to “Marriage Visas: Pre-entry English Requirement for Spouses” Consultation can be found at <http://www.liberty-human-rights.org.uk/publications/pdfs/immigration-and-marriage-consultations.pdf>

disproportionately with the right to family life and discriminate against those for whom English is not a first language.

### ***Transitional Fund***

18. The Green Paper proposes that for a migrant to progress through the system, they will need to demonstrate that they have “paid their way” in the UK over a period of time. Liberty agrees that it is important migrants make an economic contribution to society in the same way as expected by British citizens. However the Green Paper proposes that migrants will be required to contribute to a “transitional fund” with those likely to put the most pressure on public services – such as children and the elderly – required to contribute more. The Green Paper further raises the possibility of differential tax rates for recently arrived migrants.

### **Discriminatory**

19. The transitional fund proposed in the Green Paper will directly discriminate against all migrants and disproportionately impact the most vulnerable (such as children and the elderly) who may have less ability to pay. Article 1, Protocol 1 of the HRA protects the right to property, covering issues of taxation. The proposals to require migrants to pay into a transitional fund could well fall foul of this Article taken together with the right to enjoy rights without discrimination, including on the basis of a person’s national origin, under Article 14. As discussed below, it is very difficult to see any justification for a taxation policy which discriminates against migrants to the UK who, the Government has stated, already pay more UK tax and use fewer public services than UK citizens.

20. Liberty is also concerned that a levy on migrants may, in some circumstances, interfere with the right to family reunification protected by Article 8 of the ECHR.

### **Unjustified**

21. The Home Office has failed to justify the fund in practical terms. The Green Paper itself acknowledges that “*on average migrants pay more tax than non-migrants*”

*and consume fewer public services*<sup>11</sup>. This net gain sits uneasily with a proposal that migrants should make additional financial contributions to the state. The Government has sought to argue that a transitional fund is required because migration is unpredictable and affects different localities at different times. It has also argued that the fund is required so that money can be released quickly, when it is needed. Neither of these arguments justifies the need for migrants to contribute more in tax or one-off contributions than British citizens. Migration may well place temporary pressures on different localities making a dedicated fund a logical proposal. However there is no reason why this fund cannot be established from general tax revenue to which migrants already make an equal if not bigger contribution<sup>12</sup>.

### **Active Citizenship**

22. The Green Paper proposes that those who have demonstrated their commitment to the UK “should be allowed to complete their journey to citizenship more quickly than those who have chosen not to”. The Home Office intends to consult on whether there should be a minimum level of “active citizenship” before a person can progress to British citizenship or permanent residency.

23. Liberty does not believe that migrants should be expected or required to do more than those born into British citizenship. Forcing migrants to formally volunteer in order to speed up their progress through the immigration/citizenship system or gain citizenship/permanent residency is wrong in principle. Blanket application will also discriminate against migrants who may, for a variety of reasons, be unable to undertake formal volunteering work<sup>13</sup>. The consultation claims to recognise that there may be “issues of capacity regarding work and family commitments” but offers no concession for those who may be unable to undertake voluntary work. Instead the Green Paper goes on to claim that “active citizenship” will make becoming a British citizen more “significant and meaningful”<sup>14</sup>.

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<sup>11</sup> At Page 33 of the Green Paper

<sup>12</sup> Page 10 of the Green Paper states that “Evidence suggests migrants have a positive impact on GDP per head directly through their own output and indirectly through raising the productivity of others. On average the foreign born are more likely to earn more than the UK born and are more likely to be in employment as a proportion of the total population”.

<sup>13</sup> For example those with heavy work or family commitments, or indeed the disabled, young and elderly.

<sup>14</sup> It is unclear on what grounds the Home Office base their assessment that the “active citizenship” requirement will make becoming a British citizen more significant or meaningful. The Green Paper states that “public listening sessions” were convened across the UK in

24. Enforced volunteering may also damage the capacity of migrant communities. Many migrants already volunteer informally, for example, with childcare responsibilities or teaching English to other migrants. Formal volunteering<sup>15</sup> as proposed in the Green Paper ignores the way in which large numbers of migrants already contribute their services to the community. It offers a narrow and highly prescriptive view of “making a contribution” which does not necessarily accord with the efforts to contribute already made by many migrants.

### **Effect of Criminal Activity**

25. In January this year, immigration rules were tightened so that foreign nationals with certain criminal convictions would be subject to deportation. In keeping with this measure the Green Paper proposes a tightening of the rules for less serious offences. Under the proposals temporary residents who receive a custodial sentence or those that commit a crime involving violence, drugs or a sexual offence will have their application for probationary citizenship refused. Similarly if a probationary citizen commits a crime that falls within the deportation criteria or receives a custodial sentence for a lesser offence, they will be subject to removal. The Green Paper also seeks views on whether migrant parents whose children are convicted of a crime should have their progress to citizenship or permanent residence stopped.

26. Liberty is concerned that blanket rules concerning automatic removal can, in practice, lead to disproportionate and unjust penalties. While we agree that those settling in the UK should respect the criminal law, we believe that decisions concerning deportation following conviction should take into account the relevant circumstances of each case.

27. The consultation proposes that a probationary citizen convicted of an offence but not receiving a custodial sentence should have their period as a probationary citizen extended. It is, of course, more proportionate to require a person to spend longer progressing through the system, than to require deportation. However, Liberty believes that even a longer passage through the stages of citizenship could prove

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order to shape the reform proposals but there is no indication that any migrants or migrant organisations were either consulted or in attendance at these sessions.

<sup>15</sup> Examples provided in the Green Paper include: volunteering with a recognised organisation; volunteering overseas to support the UK’s international development objectives; serving on community bodies; fundraising activities for charities or schools

harsh and disproportionate in certain circumstances. Again, as with deportation, blanket rules for migrants convicted of criminal offences run the risk of producing unfair results in practice. It is far better to allow for flexibility within these rules so that individual circumstances can be considered.

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