



The Crown Employment (Nationality) Bill 08-09

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This Private Member's Bill is due for a second reading on Friday 12 June 2009. This Note gives background to its provisions which are designed to liberalise the nationality requirements for civil servants. The provisions of the Bill also appeared in the Public Administration Select Committee draft civil service bill and the *Civil Service Bill* introduced by the then Shadow Leader of the House, Oliver Heald, in the parliamentary session 03-04. The sponsor, Andrew Dismore, has introduced identical versions of this Bill in consecutive sessions, but none have succeeded in becoming law. The Government's draft *Constitutional Renewal Bill 2007-08* contained proposals to put the civil service on a statutory footing, but did not include the provisions of the *Crown Employment Nationality Bill*. Further information on civil service legislation is contained in Library Standard Note 2863 *Civil Service Legislation*.

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1 Introduction and background

Andrew Dismore has introduced the *Crown Employment (Nationality) Bill* in successive parliamentary sessions since 2002-3.¹ It is intended to liberalise the rules on the employment of non-nationals in the civil service. On 12 June 2009 the Bill is due for its second reading.²

The provisions of the Bill were included in the draft *Civil Service Bill* produced by the Public Administration Select Committee (PASC) in its report *A Draft Civil Service Bill: Completing the Reform* in 2004.³ The PASC report summarises the issues as follows:

BACKGROUND

19. The Act of Settlement of 1700 provides, in section 3, that no person born out of the kingdoms of England, Scotland or Ireland or the dominions thereto belonging should be capable of enjoying any office or place of trust, either civil or military, under the Crown. This prohibition does not apply to Commonwealth citizens or citizens of the Irish Republic (see section 52(6) of, and Schedule 7 to, the British Nationality Act 1981) or to British protected persons employed in a civil capacity (see section 1(1) of the Aliens' Employment Act 1955).

20. Section 6 of the Aliens Restriction (Amendment) Act 1919 provides that no alien shall be appointed to any office or place in the civil service of the State. An alien is now defined in section 51(4) of the British Nationality Act 1981 as a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland.

21. Under the Aliens' Employment Act 1955 the prohibitions were relaxed so that aliens could be employed if they were either:

- a) appointed in a country outside the UK, the Channel Islands and the Isle of Man in a capacity appearing to the Minister to be appropriate for aliens; or
- b) employed in accordance with a certificate issued by a Minister with the consent of the Minister for the Civil Service (this was originally with the consent of the Treasury but the function was transferred to the Minister for the Civil Service by the Transfer of Functions (Treasury and Minister for the Civil Service) Order 1995 (SI 1995/269)). In this connection either there must be no suitably qualified UK nationals available to do the work or the alien must possess exceptional qualifications or experience to do the job. Certificates last for 5 years and must then be renewed.

22. A list of the certificates issued under the 1955 Act and a statement of the number of persons employed under the certificates must be laid before Parliament by the Treasury. For the year 2001-2002 the number of certificates and persons employed under those certificates was 45.

23. The European Communities (Employment in the Civil Service) Order 1991 (SI 1991/1221) amended the 1955 Act so as to allow nationals of member states of the European Communities (and their spouses and certain children) to take up civil employment under the Crown apart from "public service" posts within the meaning of the EC Treaty (see Article 48(4) of the EEC Treaty, now Article 39(4) of the EC Treaty,

¹ Bill 48 of 2002-3; Bill 39 of 2003-4; Bill 40 of 2004-5; Bill 34 of 2005-6

² HC Deb 29 June 2007 c572-93

³ HC 128 Session 2003-4

which excludes from the freedom of movement of workers posts in the "public service").

24. The rights of nationals of member states of the European Communities were extended to nationals of member states of the European Economic Area by section 2(1) of the European Economic Area Act 1993.

25. In 1996 an amendment to the Civil Service Management Code was made to restrict Commonwealth and Irish nationals (who are not subject to the prohibitions in the Act of Settlement or the 1919 Act) from being employed in posts which were reserved for UK nationals. This put Commonwealth citizens and Irish nationals in the same position as nationals of other member states of the European Economic Area.

26. The effect of the existing rules, therefore, is that foreign nationals may be employed **abroad** in any civil post under the Crown (which includes the Diplomatic Service) if the Minister considers it appropriate. As regards civil employment, or the holding of office, under the Crown **within the UK**, Commonwealth Citizens, British protected persons and nationals of member states of the European Economic Area may be employed in posts other than reserved ones. Nationals of other countries may be employed in UK non-reserved posts only if a certificate is in force.

27. The exceptions made by the 1991 Order were made under secondary legislation (s.2(2) European Communities Act 1972). The limited scope of that power meant that the basic prohibition in the 1919 Act could not be entirely removed, but only amended to the extent necessary to comply with EC obligations. The EC Treaty (Article 39 EC) abolishes discrimination in employment on grounds of nationality, except in relation to 'employment in the public service' (Article 39(4)EC). There is therefore no obligation on Member States to admit other EU nationals to 'employment in the public service'. As far as the EC Treaty is concerned, Member States can employ EU nationals in such posts, but are not obliged to admit them. The 1991 Order could only reflect the UK's obligations under the EC Treaty, and could not amend the 1919 Act to any greater extent that was strictly required for that purpose.

28. This has given rise to a number of difficulties. As a matter of UK law, EU nationals can be admitted to civil service posts, but they cannot be admitted to ones which the European Court regards as 'employment in the public service'. Although the European Court interprets 'employment in the public service' narrowly, it nevertheless has taken the view that officials concerned e.g. in the collection of taxes are employed 'in the public service'. This has the result that, as a matter of the law of the UK, a national of an EU Member State could not generally be employed in the Inland Revenue, because this is a post which constitutes 'employment in the public service' within the meaning of Article 39(4)EC and therefore the exception from the 1919 Act does not apply, and a criminal offence is committed if he is so employed.

1.1 The Civil Service Bill 2003-4

The PASC Bill was introduced formally into Parliament by Oliver Heald, then Shadow Leader of the House, but made no further progress.⁴ In an Opposition day debate on the case for a civil service bill, Douglas Alexander, the Minister for the Cabinet Office, said that the Government would introduce its own draft legislation in that session.⁵ The only Member in the debate to cover the nationality requirement aspects of the bill was Andrew Dismore, who

⁴ Bill 37 of 2003-4 See Library Standard Note no 2863 [The Civil Service Bill 2003-4](#) for further background

⁵ HC Deb 21 January 2004 c1343

commented on some Opposition resistance to the terms of his Bill.⁶ Mr Dismore argued for widening the basis of recruitment to the civil service:

Mr. Dismore: The hon. Gentleman is correct. Under existing arrangements, there are limited procedures to enable foreign nationals to be recruited to the civil service. If I recall correctly, just over 40 certificates have been issued. However, that does not answer the hon. Gentleman's question. The civil service has to show either that no British national has the relevant skills or that the foreign national has exceptional skills to justify the issue of such a certificate. In fact, three quarters of those certificates are issued by the Ministry of Defence, not the civil service.

That brings me to the question of recruitment to the civil service. Under existing rules, 9 per cent. of Londoners—350,000 people—are excluded entirely from the civil service. In the United Kingdom as whole, 850,000 people are excluded. Nevertheless, the state still has to provide services to those people. The civil service should reflect the society that it serves. The very fact that it cannot recruit those people results in greater costs to the civil service. What about language skills? In my constituency, nearly 200 different languages are spoken. If civil servants were recruited from those backgrounds they would be able to communicate with people in my constituency in their own language, thus making savings on expensive language services. Such people are also aware of those communities' cultural ties and needs, and can respond more effectively when dealing with individuals from such backgrounds.⁷

Mr Dismore reiterated that existing arrangements were not satisfactory:

There is discrimination against Commonwealth and Irish citizens under existing arrangements, as they are excluded from applying for 25 per cent. of civil service posts. In fact, only 10 per cent. of posts need to be restricted on grounds of nationality for security reasons, but the definition of public service effectively excludes such people from 25 per cent. of those posts. There are severe illogicalities and anomalies in the system. For example, the wife of a British citizen who is a Chinese, Russian or Japanese national is forbidden from joining the civil service, but the Chinese, Russian or Japanese wife of a French citizen living in the United Kingdom is permitted to join the civil service.⁸

The Government plans to introduce civil service legislation have not yet achieved fruition,⁹ but some secondary legislation has separately reduced the number of posts which are reserved to UK nationals, without liberalising the general rules on civil service employment.

1.2 *European Communities (Employment in the Civil Service) Order 2007*

This Order reduced the number of posts reserved to UK nationals in the civil service. 97,000 posts (or 18 per cent) were unreserved until the Order was passed; the effect has been to reduce this number to 27,000 or 5 per cent of the civil service. One of the factors driving this change was dissatisfaction in the Northern Ireland Civil Service which was disproportionately affected by the prohibition on Irish nationals applying for reserved positions. The *St Andrews Agreement* signed between the British and Irish Governments in October 2006 contained the following commitment in Annex B:

⁶ HC Deb 21 January 2004 c1363

⁷ *ibid* c1365

⁸ *ibid* c1366

⁹ See Library Standard Note 2863 [Civil Service Legislation](#) for more details

- We will bring forward separate legislation before the end of 2006 to reform entry requirements to ensure access for EU nationals to posts in the Civil Service.¹⁰

The 2007 Order was the result of that commitment. The main change has been to open up recruitment in customs and excise posts to EEA nationals (including Irish citizens). Further information is given in the *Explanatory Memoranda*.¹¹

1.3 The Crown Employment (Nationality) Bill 2006-07

The Cabinet Office drafted *Explanatory Notes* to the Bill, with the consent of Mr Dismore.¹² Mr Dismore introduced his Bill on its second reading on 29 June 2007. He noted:

In our country, some 780,000 residents of working age are not UK, Commonwealth, or EEA citizens, and are thus excluded from civil service employment entirely. I have the honour to represent a constituency in London, which is a diverse world city, but 330,000 people in London, or 7 per cent. of its working-age population, are entirely excluded, not just from the higher echelons of the civil service, but from even applying for the most junior social security clerk's job. It is no wonder that we have difficulty filling civil service jobs in the capital when so many of my fellow Londoners are entirely out of the equation. In cities such as London, it is important to have a wide diversity of people working in the jobs through which the civil service comes face to face with members of the public, because those members of the public will be from different ethnic backgrounds. Language skills and knowledge of those backgrounds will be very helpful in dealing with the needs and requests of customers, or whatever they are called in the latest civil service jargon.

My Bill tackles the bizarre and discriminatory anomalies by sweeping away the existing complex, interlocking legislation, and replacing it with a simple amendment to the Act of Settlement, so as not to prohibit the employment of any person in any civil capacity under the Crown. It also empowers Ministers to make rules in respect of nationality requirements for certain categories of posts—that is, posts for which it is clearly necessary, and in the national interest, for the job to be reserved to a UK national. As we discussed earlier, when I started this marathon, it was thought that that was about 10 per cent. of posts. Now it is estimated that only about 5 per cent., or 27,000, civil service posts need be reserved. It is expected that the Bill would open up the remaining 95 per cent. of posts to selection on merit, regardless of the nationality of the applicant, enabling us to build a civil service that reflects the diversity of the society that it serves.

Over the years, support for my proposals has grown. The civil service trade unions have supported it, and the Public Administration Committee said in its report that it was a “much-needed reform”. The Bill has the support of the Commission for Racial Equality and, I think, the official Opposition, who we will hear from soon. I hope that it also has the support of the Liberal Democrats.¹³

Mr Dismore received the support of Oliver Heald, for the Opposition, and David Heath, for the Liberal Democrats. The then junior minister for the Cabinet Office, Gillian Merron, confirmed Government support for the Bill and said:

¹⁰ *Agreement at St Andrews* 13 October 2006 British and Irish Governments at http://www.nio.gov.uk/st_andrews_agreement.pdf

¹¹ http://www.opsi.gov.uk/SI/em2007/ukciem_20070617_en.pdf

¹² See <http://www.publications.parliament.uk/pa/cm200607/cmbills/038/en/2007038en.pdf>

¹³ HC Deb 29 June 2007 c580-588

In a nutshell, the Bill would give individuals the opportunity, irrespective of their nationality, to be considered for the vast majority of posts in the civil service, and in other posts of employment under the Crown. Appointment would continue to be subject to the existing rules of selection on merit, and the pre-appointment character and security checks undertaken in respect of all new appointees regardless of nationality would continue to apply.

The House should also be re-assured that there is nothing in this Bill that will change the requirements regarding eligibility to work in the United Kingdom generally. Requisite work permits will still have to be in place and there will be no question of individuals bypassing the immigration process.

The Bill will still allow certain posts to be reserved for UK nationals by giving to a Minister of the Crown, or to any person or body to whom that power has been delegated by a Minister of the Crown, the power to make rules imposing nationality requirements in respect of certain posts or categories of posts. It is intended that this power will be used only in respect of posts where considerations such as national security, intelligence, border control or diplomatic representation would apply, thereby requiring those posts to be reserved for UK nationals. This is assessed at no more than 5 per cent. of all posts within the civil service.

As this is a private Member's Bill, section 19 of the Human Rights Act 1998, which requires a statement of compatibility with convention rights where a Minister of the Crown is in charge of a Bill, does not apply. However, as a matter of good practice, it falls to me to express the Government's views on compatibility. The Bill will relax the current restrictions on eligibility for employment on nationality grounds in the civil service and in other posts of employment under the Crown. In doing so, it will not breach the provisions of the Human Rights Act 1998.

Under clause 2, the reservation of certain posts to employees who are UK nationals will be authorised by rules made by a Minister of the Crown or by any person or body to whom that power has been delegated by a Minister of the Crown. The intention is that any such rules will preserve the rights of existing employees, and provision is made for that in clause 2(4). Indeed, any rules would have to comply with the convention under the provisions of the Human Rights Act. On those grounds, the Bill will be compatible with the convention.

On Queen's consent, I also need to signal that the Bill has been subject to consultation with Her Majesty the Queen, as it has two identifiable impacts on the Crown. The first is the more technical of the two, but it will be of particular interest to this House. It is that the Bill will result in the existing royal prerogative in relation to the fixing of nationality rules under Orders in Council being replaced by a power for a Minister of the Crown to make rules and to delegate that power, as appropriate, to any person or body. In that way, the royal prerogative will be replaced by a power conferred by Parliament.

The second impact is that, as the Bill will extend to employment in any civil capacity under the Crown, it will also apply to the royal household. Employment in the royal household would therefore be open to people of all nationalities, unless rules similar to those planned for the civil service were put in place. Under the terms of the Bill, it would be possible for any such rules in respect of the royal household to be made by a person or body acting under a delegation from a Minister of the Crown. Accordingly, I can confirm that I have it in command from Her Majesty the Queen to acquaint the House that Her Majesty, having been informed of the purport of the Crown Employment (Nationality) Bill, has kindly consented to place her prerogative and

interests, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of debating the Bill.¹⁴

However, the Bill's report stage was adjourned on 19 October 2007 and so the bill was not successful in session 2006-07. This was what happened to the Bill in the 2004-5 session when it reached Commons Report stage on 15 October 2004, but debate was adjourned and the Bill made no further progress.

2 The Crown Employment (Nationality) Bill 2008-09

The *Crown Employment (Nationality) Bill 2008-09* was introduced into the Commons on 26 January 2009. *Explanatory Notes* were produced by the Cabinet Office, to help inform debate on the Bill. Both are available on the Commons website. The *Notes* explain that, as in previous versions of the Bill, it would repeal and revoke the *Aliens' Employment Act 1955* and the *European Communities (Employment in the Civil Service) Order 1991*. It would also extend to England, Wales, Scotland and Northern Ireland since civil servants in devolved areas hold office under the Crown.

¹⁴ HC Deb 29 June 2007 c587