



HOUSE OF LORDS

Select Committee on the Constitution

9th Report of Session 2008–09

Welfare Reform Bill

Report

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Welfare Reform Bill

Introduction

1. The Committee's terms of reference are "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution." In discharging the first part of our remit, our approach is to apply the test of whether a bill raises issues of principle affecting a principal part of the constitution.
2. Part 3 of the Welfare Reform Bill raises points of constitutional significance, which we draw to the attention of the House. Clause 42 proposes to amend the Child Support Act 1991 to give new sanction powers to the Child Maintenance and Enforcement Commission (CMEC) to disqualify a person from holding a passport, a driving licence, or both, if he or she has wilfully and culpably failed to pay maintenance for a child.

Background

3. The issues raised by clause 42 were debated by the House during the 2007–08 Session (see table below). Clause 42 seeks in effect to overturn the arrangements for a court-based passport disqualification procedure—agreed by Parliament in the Child Maintenance and Other Payments Act 2008—by conferring on CMEC administrative powers to impose such sanctions. The bill also seeks to replace the court-based system for driving licence disqualification with administrative powers for CMEC to make such decisions.

Date	Event
December 2007	Child Maintenance and Other Payments Bill introduced to the House of Lords, including powers for CMEC to impose sanctions by way of removing passports
December 2007	Constitution Committee make report critical of CMEC having passport disqualification powers, recommending that this should be a function of the courts (3rd Report of Session 2007–08, HL Paper 27)
February 2008	Committee stage debate on passport disqualification powers (HL Debates, 8 February 2008, GC 665)
May 2008	Report stage debate at which Government moved an amendment to confer passport disqualification powers on magistrates' courts (the sheriff in Scotland) rather than CMEC (HL Debates, 13 May 2008, col 962)
June 2008	Child Maintenance and Other Payments Act 2008 receives Royal Assent
July 2008	White Paper "Raising Expectations and Increasing Support: reforming welfare for the future" (Cm 7363) pledges Government to introducing administrative disqualification system for passports and driving licences
March 2009	Welfare Reform Bill introduced to the House of Lords, containing proposed powers for administrative disqualification of passports and driving licences

4. In 2007, we took the view that it was constitutionally inappropriate for officials in CMEC to have power to withdraw entitlement to hold a passport without reference to the courts.
5. Our view was reinforced when we realised that CMEC would have broad powers to contract-out any of its functions to third parties (a provision now contained in section 8(1) of the Child Maintenance and Other Payments Act 2008). If it was objectionable for a civil servant to impose a sanction by withdrawing the right to hold a passport, it was even more objectionable that this State power would be exercised by an employee of a private sector business. It was also far from clear to us that a process of an administrative decision followed by an appeal process in the courts would meet the Government's stated aim of avoiding protracted decision-making.
6. We were pleased that the Government listened to our "legitimate questions" (to use the words of Lord McKenzie of Luton) and brought forward amendments to the bill in May 2008 which required CMEC to apply to the courts for a passport disqualification order in a similar fashion to a driving licence disqualification order.¹
7. The provision in the Child Maintenance and Other Payments Act 2008 on passport disqualification² appears not to have been brought into force. Notwithstanding the fact that the court-based disqualification procedure for passports has not been tried and tested, the Government now seek in the Welfare Reform Bill to give CMEC and its contractors administrative powers to impose this sanction—along with similar administrative power to remove entitlement to hold a driving licence.

Welfare Reform Bill

8. We remain of the view, expressed in our December 2007 report, that it is constitutionally unsatisfactory for CMEC and its contractors—rather than the courts—to have a sanction power to withdraw a person's right to hold a passport. The freedom to travel to and from one's country is a constitutional right of such significance that restricting this right as a punishment demands rigorous examination by an independent and impartial judge.
9. In recent years, there has been a notable transfer of sanction powers from the courts to the executive. In recent reports and correspondence with ministers, we have sought to ensure that where the executive is conferred with coercive sanction powers there are safeguards for ensuring fair procedures are followed and that there is an effective appeal to the courts to ensure judicial oversight.³ **In relation to the present bill, we acknowledge that a person who is disqualified by CMEC from holding a passport would have a right of appeal to a court and that if such a right of appeal is exercised, the disqualification will be suspended until the appeal is determined. The possibility of an appeal does not, however, answer the prior question: is the sanction power one which the executive, rather than the courts, should be allowed to exercise.**

¹ HL Debates, 13 May 2008, col 962 (at Report stage); for debate on the issue at Committee stage, see HL Debates, 7 February 2008, col GC665.

² Section 28 of the 2008 Act inserted section 39B into the Child Support Act 1991.

³ See e.g. Regulatory and Sanctions Bill, 1st Report of 2007–08, HL Paper 16.

10. In the present bill, the Government seek to transfer sanction powers from the courts to civil servants in relation to passports and driving licences. It should be noted that the Child Maintenance and Other Payments Act 2008 created other sanction powers, including the imposition of curfew orders and an associated power to search premises and confiscate any money found.⁴ Curfew orders and search powers are, under current arrangements, made and authorised by the courts following an application by CMEC. **While the Government have not proposed that the executive should have power to impose curfew orders or search premises without reference to the courts, we are concerned that an unintended change in the constitution is occurring in which the executive is acquiring ever more powers to impose sanctions and punish people that a generation ago would have been regarded as falling within the remit of the courts. A line needs to be drawn around the type of power that civil servants can appropriately exercise and those for which judges should be responsible. In our view, suspending a person's right to hold a passport, because of its impact on a constitutional right, should fall into the latter category (along with powers to impose curfew orders and order searches of premises).**
11. If, contrary to our view, CMEC is to be given administrative sanction powers to remove passports, **we are concerned that there are insufficient safeguards on the face of the bill to ensure that such powers are exercised by officials of appropriate seniority within CMEC.** During the bill's passage in the House of Commons, the Parliamentary Under-Secretary of State for Work and Pensions told the Public Bill Committee that "this provision will not be used willy-nilly by junior clerks in the organisation".⁵ In our view, something more than ministerial assurances are required to make sure that decision-making within CMEC is organised in such a way as to ensure that sufficiently senior and experienced officers hold this power.
12. Moreover, sanction powers withdrawing a person's right to hold a passport should not be one that is made by a private sector business. **If, contrary to our view, an administrative power is created for CMEC to remove passports, it should be accompanied by an amendment to section 8(1) of the Child Maintenance and Other Payments Act 2008 to exclude imposition of sanction powers from those functions of CMEC that may be contracted-out. It would not be constitutionally appropriate for a third-party to have decision-making power over who may leave the United Kingdom.**
13. We welcome the provision in clause 43 of the bill of a 'sunset clause' and express requirement for a review after two years of the transfer of driving licence sanction powers from the courts to CMEC. **Given the concerns we have expressed, we call upon the Government to include passport sanction powers within this sunset clause and review.**

⁴ Section 28, amending the Child Support Act 1991.

⁵ Public Bill Committee, 3 March 2009, col 246 (Kitty Ussher MP).