



House of Commons Committee Stage
Nationality and Borders Bill
Briefing on Clause 10 and Selected Amendments
October 2021

Introduction:

We oppose Clause 10. It introduces discrimination on unlawful and arbitrary grounds; and will do considerable harm to refugees and to the asylum system. It is likely to cause considerable further delays and backlogs because it will certainly increase the workload of the Home Office. It will also create the conditions for more people to feel forced to make dangerous journeys to the UK to reunite with refugee family members because it permits the Home Office to delay or exclude existing refugee family reunion visas. Finally, it will undermine refugee integration, prolonging refugees' anxiety about their safety and future even after their entitlement to asylum in the UK has been established.

The justifications Ministers advance for all of this are based on profound misunderstandings of the UK's asylum obligations and equally profound inadequacies in analysis of the impact of what is proposed. If Clause 10 is commenced and implemented, the UK will be in violation of its international asylum responsibilities. As has been repeatedly made clear to Ministers via their consultation and since the introduction of this Bill, and by UNHCR and others, nothing in the Refugee Convention, nor in international asylum law more generally, permits the UK to discriminate between refugees in the quality of protection it provides.

The discrimination permitted by Clause 10:

Clause 10 differentiates between people, all of whom are refugees entitled to asylum in the UK. Subparagraphs (1) and (2) do this by categorising refugees into one of two groups. The basis for that discrimination, as elaborated in subparagraph (2), concerns the type of journey by which the refugee has come to the UK.

It is, in this context, vital to recall that the UK immigration rules provide no visa for anyone to come to the UK for the purpose of seeking asylum; and expressly provide for refusal or cancellation of any visa that is sought or obtained for a purpose other than that for which it is provided.¹ Since nobody is permitted to seek asylum in the UK unless getting here first,² the

¹ See e.g. paragraphs 30C, 9.13.1 and 9.20.2 of the Immigration Rules

² <https://www.gov.uk/government/publications/applications-from-abroad-policy>

rules – as they have long done – require people wishing to seek asylum in the UK (where they may have family, other connections or other reason to think this country will be safe for them) to make journeys that are not pre-authorised by the Home Office. There are relatively rare exceptions to this such as where, for example, a person studying in the UK becomes at risk of persecution during their studies by reason of a coup in their home country.

The adverse treatment permitted by Clause 10:

Clause 10 does not limit the discrimination that it allows. Instead, it provides only example of types of adverse treatment it would allow – this is made express in subparagraphs (5) and (6) by the words “for example”. Those examples provide four types of adverse treatment:

- (a) a person may be granted a more limited period of leave to remain than would apply but for the discrimination;
- (b) a person may be required to meet additional or more prohibitive requirements for applying to settle in the UK than would apply but for the discrimination;
- (c) a person may be barred from access to public funds which would not be permitted but for the discrimination; and
- (d) a person may be obstructed, delayed or denied altogether reunion with their family member which obstruction, delay or denial would not be permitted but for the discrimination.

The people to whom Clause 10 applies:

It is vital to understand to whom Clause 10 applies. There are only two groups of people affected by Clause 10. The group primarily affected are both:

- (a) refugees (that is people who are entitled to asylum by reason of their being at risk of persecution); and
- (b) entitled to asylum in the UK.

The second group affected are the partners and children of the first group of people. In many instances, this second group of people will be refugees too in that they will be at risk of persecution for similar reasons to those of their refugee family member (or may be at risk by reason of their relationship to that refugee family member). In all cases, they will be people who cannot be together with their refugee family member in their home country (because that place is not safe for their refugee family member).

No other person is affected by Clause 10. The clause is designed to penalise people fully entitled to be in the UK or, in the case of family members, people who have especially strong reasons for wishing and needing to reach the UK.

Ministers’ justifications

The Human Rights Memorandum published with the Bill sets out three aims that Ministers say are legitimate and provide justification for Clause 10. These are:

- (a) to prevent people choosing where they wish to seek asylum;
- (b) to encourage people to make their asylum claims in the UK as soon as they can; and
- (c) to encourage people to enter the UK by pre-authorised means.

The first of these aims is simply illegitimate. Neither the Refugee Convention nor international asylum law more generally requires someone to seek asylum in any particular country. While very few people do seek asylum in the UK, and the number who do has not increased in recent years, there are various reasons why someone may wish to do so here including that they have family or other connections here, have some historical or other link

to the UK – such as having worked for the British Army or some other UK entity – or having some particular faith in the UK as a place of justice and human rights respect. Some people also do not find safety elsewhere, including people subjected to squalor, exclusion and violence in northern France.³

The second and third aims are, insofar as they go, legitimate. But it is illegitimate to pursue them to the obstruction or denial of the UK’s asylum responsibilities. Moreover, while they may be legitimate aims, they are not in fact being pursued whether by this Bill or any other aspect of Government policy on asylum. Rather, these aims are being undermined and the Bill risks achieving their very opposite. The Bill includes various oppressive measures that may deter people to claim asylum for fear of, for example, being detained or summarily refused consideration in the UK’s asylum system and being expelled somewhere else (where the person is separated, again, from family or connections; or has not been, does not feel or will not be safe). That is not to encourage claims to be made as soon as possible but to encourage delay and hesitation, even to discourage claiming at all. And the Bill maintains the current position of making no visa available to come for the purpose of seeking asylum while expressly confirming that no asylum claim can be made save for at a designated place “*in the United Kingdom*” – see Clause 12(2). Not only is there no encouragement for people to enter by pre-authorised means. There are simply no pre-authorised means provided.

Stuart C McDonald
Anne McLaughlin

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Clause 10, page 13, line 13, leave out paragraph (a)

Member’s explanatory statement

This amendment would remove a provision allowing the Government to treat refugees differently depending on whether they are Group 1 refugees or Group 2 refugees.

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Clause 10, page 13, line 26, leave out paragraph (b)

Member’s explanatory statement

This amendment would remove a provision allowing the Government to treat refugees’ family members differently depending on whether the refugee is a Group 1 refugee or a Group 2 refugee.

Briefing:

Amendments 88 and 93 each relate to adverse treatment in respect of the length of time someone is to be permitted to remain in the UK. Amendment 88 applies to a refugee whom it has been established is entitled to remain in the UK. Amendment 93 relates to the dependent partner and children of that refugee. Were the UK’s asylum system and immigration rules to expand the recognition of family members beyond partners and children, Amendment 93 would extend to any other family members so included.

³ See e.g. <https://www.hrw.org/news/2021/10/07/france-degrading-treatment-migrants-around-calais>

The Bill does not state what may be the shorter period of leave given to the refugee and refugee's family member, who is to be adversely treated. However, indications given suggest the person may receive only 30 months limited leave to remain. This will have several harmful effects. It will gravely undermine the sense of security that the refugee has. The anxiety about their future is likely to be exaggerated by the knowledge that some refugees are to be treated better. It will impede any opportunity for a refugee to recover from the trauma of any past torture, exploitation or other abuse suffered in the person's home country or on the journey to the UK. It will do the same with traumas arising from other experiences of danger and harm in fleeing from persecution or experienced in the UK asylum system. The limited period of leave will not only suggest insecurity to the refugee, or family member, but also to other people, including any actual or potential employer who may therefore be deterred from investing in the person by offering any employment or training opportunity.

In addition to profoundly undermining a refugee's capacity to integrate in the UK – the place she, he or they will be staying and entitled to stay – the limited period of leave granted will accelerate the period within which the Home Office will be required to receive and consider an application for further leave to remain; and within which the refugee may require legal assistance for that. Of course, if the impact upon the refugee's mental health and/or social isolation is severe, it is possible the renewal deadline may be missed (meaning the refugee becomes an overstayer). If so, that will do nothing more than add complexity and cost to the process for re-establishing the asylum protection to which the refugee is entitled.

Stuart C McDonald
Anne McLaughlin

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Clause 10, page 13, line 15, leave out paragraph (b)

Member's explanatory statement

This amendment would remove a provision allowing the Government to treat refugees differently depending on whether they are Group 1 refugees or Group 2 refugees.

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Clause 10, page 13, line 28, leave out paragraph (c)

Member's explanatory statement

This amendment would remove a provision allowing the Government to treat refugees' family members differently depending on whether the refugee is a Group 1 refugee or a Group 2 refugee.

Briefing:

Amendments 89 and 94 each relate to adverse treatment in respect of the requirements that must be met to become settled in the UK. Amendment 89 applies to a refugee whom it has been established is entitled to remain in the UK. Amendment 94 relates to the dependent partner and children of that refugee. Were the UK's asylum system and immigration rules to expand the recognition of family members beyond partners and children, Amendment 94 would extend to any other family members so included.

The Bill does not state what additional or more prohibitive requirements may be introduced. However, indications given suggest that people will be required to renew periods of 30 months leave to remain several times before any application to settle will be considered. This will have several harmful effects similar to those to which the previous amendments relate. Indeed, generally, what is intended here can be summarised as prolonging and thereby exacerbating those harmful impacts for an indefinite (on the face of the Bill) and lengthy (having regard to indications given) period. The longer this goes on the greater the harm will be done to the possibility of refugee integration and recovery from past trauma.

This will also add considerable additional workload for the Home Office since the department will be required to receive and consider several and regular applications for further leave to remain; and for which the refugee may require legal assistance. Of course, if the impact upon the refugee's mental health and/or social isolation is severe, it is possible that a renewal deadline may be missed. If so, that will do nothing more than add complexity and cost to the process for re-establishing the asylum protection to which the refugee is entitled. It is especially odd that it is proposed to do this when Ministers have so long expressed concerns that the Home Office cannot cope with existing workload and backlogs – indeed these are said to be a reason for this Bill.⁴ This is one measure in the Bill that will add to that workload rather than reduce it.

Stuart C McDonald
Anne McLaughlin

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Clause 10, page 13, line 17, leave out paragraph (c)

Member's explanatory statement

This amendment would remove a provision allowing the Government to treat refugees differently depending on whether they are Group 1 refugees or Group 2 refugees.

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Clause 10, page 13, line 30, leave out paragraph (d)

Member's explanatory statement

This amendment would remove a provision allowing the Government to treat refugees' family members differently depending on whether the refugee is a Group 1 refugee or a Group 2 refugee.

Briefing:

Amendments 90 and 95 each relate to adverse treatment in respect of access to public funds. Amendment 90 applies to a refugee whom it has been established is entitled to remain in the UK. Amendment 95 relates to the dependent partner and children of that refugee. Were the UK's asylum system and immigration rules to expand the recognition of family members

⁴ At Second Reading, the Home Secretary complained the asylum system was "overwhelmed" (*Hansard HC*, 19 July 2021 : Col 709). That assessment is more than questionable – contrary to what she also said, asylum claims have not increased – but what is not questionable is that measures in this Bill will add to rather than reduce any pressure of workload.

beyond partners and children, Amendment 95 would extend to any other family members so included.

Paragraphs (5)(c) and (6)(d) of Clause 10 appear incapable of achieving anything but destitution among refugees recognised as entitled to remain in the UK and increased costs of legal assistance, claims made to the Home Office and judicial review work for the High Court that will be necessary to alleviate that destitution. The harm done to the wellbeing and social isolation of refugees or family members, who cannot access the necessary legal assistance and remain destitute, will be especially likely to aggravate risks that renewal deadlines for leave to remain will be missed. It will also make people vulnerable to exploitation in the UK. If so, the Bill will have achieved an increased opportunity for traffickers, enslavers and other abusers in the UK to thrive. The Bill will have done this at the expense of people, whom the Home Office knows and has recognised to be refugees and entitled to asylum here – that is people whom the department has had every opportunity and responsibility to ensure against that exploitation.

Stuart C McDonald
Anne McLaughlin

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Clause 10, page 13, line 19, leave out paragraph (d)

Member's explanatory statement

This amendment would remove a provision allowing the Government to treat refugees differently depending on whether they are Group 1 refugees or Group 2 refugees.

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Clause 10, page 13, line 25, leave out paragraph (a)

Member's explanatory statement

This amendment would remove a provision allowing the Government to treat refugees' family members differently depending on whether the refugee is a Group 1 refugee or a Group 2 refugee.

Briefing:

Amendments 91 and 92 each relate to adverse treatment in respect of the right to family life. Amendment 91 applies to a refugee whom it has been established is entitled to remain in the UK. Amendment 92 relates to the dependent partner and children of that refugee. Were the UK's asylum system and immigration rules to expand the recognition of family members beyond partners and children, Amendment 92 would extend to any other family members so included.

The Bill does not state what delay, obstruction or outright denial of refugee family reunion will be imposed. However, since there will be no option to preserve family unity in any other place, the inevitable result of impeding or denying a refugee family reunion visa will be to create the need for family members to undertake a similarly dangerous journey to that which may have been taken by the refugee. In achieving that result, the Bill will have provided the people smugglers and other abusers, for whom Ministers assert a strong abhorrence and determination to close down, with yet greater opportunity for exploitation and profits.

Ministers have said that an aim of this Bill is to strengthen safe and legal routes for refugees.⁵ The reality – most strongly though not solely emphasised by paragraphs (5)(d) and (6)(a) of Clause 10 – is that this Bill is shutting down a key such route for family members of refugees (one which has assisted significantly more people than has ever been the case with e.g. UK resettlement programmes) while maintaining the position of providing no such routes whatsoever for anyone to seek asylum in the UK. These paragraphs will – by denying or delaying family reunion for the refugee in the UK – exacerbate all the barriers to refugee integration and recovery from trauma that other provisions in Clause 10 similarly affect.

Stuart C McDonald
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Clause 10, page 13, line 34, at end insert—

“(7A) An Afghan national who is a refugee because they face a risk of persecution by the Taliban is not to be treated as a Group 2 refugee and in particular—

- (a) must not face a restriction on their leave to enter compared to group 1 refugees;*
- (b) must have access to indefinite leave to remain on the same basis as group 1 refugees;*
- (c) must not have no recourse to public funds conditions attached to any leave to enter or remain given to them; and*
- (d) must have access to family reunion on the same basis as group 1 refugees.”*

Member’s explanatory statement

This amendment would prevent the Secretary of State from treating Afghan refugees at risk of persecution by the Taliban as Group 2 refugees.

Briefing:

The amendment offers an opportunity to probe Ministers on their intentions to implement Clause 10. In short, do they intend to apply this to an Afghan refugee – including perhaps an interpreter for the British Army, a women’s human rights defender or someone with close family members already settled in this country – who was unable to gain access to the Afghan Relocation and Assistance Policy (ARAP) scheme⁶ or the emergency evacuation and compelled to commence and see through a journey to the UK to seek asylum for want of any alternative made available to them? There is no answer to this question that would, however, justify any differentiation among refugees whether Afghan or of other nationality, all of whom entitled to asylum in the UK and none of whom with any opportunity to seek asylum by any pre-authorised route.

⁵ Hansard HC, 19 July 2021 : Col 712, Second Reading *per* Home Secretary

⁶ <https://www.gov.uk/government/publications/afghan-relocations-and-assistance-policy/afghan-relocations-and-assistance-policy-information-and-guidance>

Ministers may make reference to their promised Afghan Citizens' Resettlement Scheme (ACRS).⁷ Of course, that offers nothing for anyone who is not Afghan. But even for Afghans, it is remarkable how much has been said and not delivered even now in terms of instituting this scheme; and there is no reason why any Afghan should have any confidence that this will provide for them – even assuming they may be identified as a potential beneficiary and in a position of sufficient safety and stability to engage with whatever process is introduced. In any event, many Afghans – including Afghans with family and other connections here – will simply not be eligible under that scheme even if they would be able to access a scheme if one were open to them.

Stuart C McDonald
Anne McLaughlin

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Clause 10, page 13, line 36, at end insert—

“(8A) Immigration rules made under the power in subsection (8) may not apply to any individual who has submitted a claim for protection prior to those rules coming into force.”

Member's explanatory statement

This amendment would prevent the differential treatment described in subsections (5) and (6) from applying to anyone who submitted a protection claim prior to the relevant immigration rules coming into force.

Briefing:

It would be an especial and additional injustice if people with outstanding asylum claims at the time of any implementation of Clause 10 were to then be put in the position that their claims were to be treated less well than they had every reason to expect at the time they made their claims and less well than other refugees whose claims happened to be dealt with more quickly.

Stuart C McDonald
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Clause 10, page 13, line 36, at end insert—

“(8A) Notwithstanding section 3(2) of the Immigration Act 1971, any regulations made under the power in subsection (8) shall be subject to the draft affirmative procedure.”

Member's explanatory statement

This amendment would mean that any regulations made under the power in subsection (8) could not enter into force until they had been approved by Parliament.

Briefing:

⁷ <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme>

An opportunity to probe Ministers about the propriety of the rule-making powers under section 3(2) of the Immigration Act 1971 in light of Clause 10 and what it highlights about how those powers may be and are used in ways that can cause significant harms to people – sometimes with little if any effective forewarning or opportunity to adjust to new and sometimes prohibitive conditions – and add considerable cost and complexity to the immigration and asylum systems.

Stuart C McDonald
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Clause 10, page 13, line 40, at end insert—

“(10) Before this section comes into force, the Secretary of State must lay before Parliament a report on the implications of this section for local authorities, the Scottish Government, the Welsh Government and the Northern Ireland Executive, and the report must be approved by a substantive vote in both Houses.

(11) A report under subsection (10) must include the following information—

(a) an assessment of the financial implications for the bodies listed in subsection (10);

(b) an assessment of the functions and powers of those bodies that will be affected by this section;

(c) details of any consultation and engagement with those bodies, and the outcome of such engagement and consultation;

(d) the Secretary of State’s findings, conclusions and proposed actions.”

Member’s explanatory statement

This amendment would require the Government to report on the implications of clause 10 for local authorities and the devolved administrations, and to obtain Parliamentary approval for such a report, before the clause enters into force.

Briefing:

It is clear that the implications of obstructing and delaying a refugee’s integration and recovery from trauma will have significant impacts far beyond them personally and the asylum system. Other public authorities and systems will be among those affected by the regime to be introduced by Clause 10. The briefings above have highlighted impacts for legal aid systems and courts; and also employers. Health, housing and welfare services can also expect to be among those affected. It is, accordingly, a reality that the impact of this provision will have impacts upon devolved responsibilities; and there seems every reason, therefore, to require assessment – ideally in consultation with local authorities and devolved administrations – as to that impact.

Stuart C McDonald
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Page 12, line 35, leave out Clause 10

Briefing:

For all the reasons advanced in this briefing – both in the first paragraphs and in briefing to various amendments – we strongly support that Clause 10 be left out of this Bill.