House of Commons Committee Stage
Nationality and Borders Bill

Briefing on Clauses 24 to 26 and Selected Amendments
(*appeals and removal to safe third country*)
October 2021

Introduction:
Since the Bill Committee's evidence sessions, the Government has tabled amendments to replace Clause 24 with New Clause 7. The aspects of Clause 24, to which Amendments 45 and 46 (below) relate, remain features of New Clause 7. It will, therefore, remain important for Parliament to consider these amendments as they relate to the proposed new clause.

Generally, Clauses 24 to 26 concern the most fundamental of safeguards against administrative error or abuse – the right of appeal to an independent judicial body against an administrative decision. Clause 26 concerns this and much more.

Clause 24 provides for that appeal to be accelerated and for the appellant to be detained throughout its process. Each of these features undermine the safety of the appeal process. We are, in principle, opposed to accelerated appeals procedures – not only those where the person is detained, though detention aggravates the lack of safety of such processes.

Clause 25 excludes the right of appeal altogether. We oppose this. Asylum or human rights claims are all concerned with fundamental matters, in respect of which independent judicial oversight of the initial administrative decision is vital.

Clause 26 provides for the prospect that a person seeking asylum may be removed to another country from which the entire asylum process – that in respect of the administrative decision and any subsequent appeal rights – is to be conducted while the person is to be detained or otherwise accommodated in another country. This is sometimes referred to by the term offshoring. There are several objections to this.[1] These begin with that shifting onto others the responsibilities of the UK is to undermine the international asylum regime – particularly given the UK's position as a relatively wealthy and stable country receiving few asylum claims and providing asylum to few people. Other objections include the dangers inherent in

[1] Many of these were addressed at length by Amnesty International at a time a previous UK Government made similar proposals. See: https://www.amnesty.org/en/documents/ior61/004/2003/en/

transferring responsibility for people to third countries where it is inevitably not possible to guarantee standards of treatment, accommodation and other conditions or accessibility and fairness of asylum procedures. There are also the costs involved in operating any offshoring regime and in securing the cooperation of third countries that is necessary for it. Ministers have stressed concern at the cost of the asylum system.[2] Clause 26 is one provision which casts profound doubt upon the sincerity of that concern.

Stuart C McDonald
Anne McLaughlin

45

Clause 24, page 28, leave out lines 9 to 11

Member's explanatory statement
This amendment would remove the requirement for detainees to give their notice of appeal within 5 working days.

46

Clause 24, page 28, line 22, leave out "may" and insert "must"

Member's explanatory statement
This amendment would require (rather than merely empower) the Tribunal or the Upper Tribunal to cease to treat cases as accelerated detained appeals where it is in the interests of justice to do so.

Briefing:
Amendments 45 and 46 concern Clause 24. Government Amendment 70 is to leave out Clause 24. Ministers seek to replace it with Government New Clause 7 (below). Nonetheless, Amendments 45 and 46 remain relevant in that they seek to change two features of Clause 24 which also appear in what is proposed to replace it.

Amendment 45 would remove the stipulation that notice of appeal from someone in detention must be provided within 5 working days when the normal time period is 10 working days. New Clause 7 includes the same stipulation at subparagraph (3)(a). Being in detention does not aid a person to secure and engage with legal representation or engage with the appeal process. It does the opposite. It does this in two ways. Firstly, detention is an isolating experience. It is, therefore, more difficult for someone to communicate with legal representatives. Even with detention advice surgeries – which people may have difficulty accessing and are for time-limited and often short periods – it is far more difficult for someone to spend sufficient time with a legal representative to ensure the person's claim is fully understood and can be properly presented (including in a notice of appeal). Secondly, detention is distressing – particularly for anyone for whom it is re-traumatising, but not only for such people. A serious challenge for any legal representative seeking to take instructions from a person in detention is both that the capacity of the person detained may be affected by their detention, and the emotional and psychological distress of this, and that the person is liable to be concerned, possibly to the point of agitation, with wanting to focus on their desire and need to be at liberty rather than the imminency of procedural steps in their claim or appeal (including an appeal deadline).

[2] *Hansard* HC, 19 July 2021 : Cols 705, 707 & 711 *per* Home Secretary at Second Reading

Amendment 46 would require the Upper Tribunal to stop treating a case as an accelerated detained case where it was in the interests of justice to do so. Clause 24 currently permits the Upper Tribunal to do so rather than requires this. New Clause 7 suffers from the same vice. If it is in the interests of justice that the appeal should not proceed in the constrained manner it has started (by the person being detained and by the appeal being accelerated), then the statutory provision should make clear that it must not proceed in that manner.

If Clause 24, New Clause 7 or any similar provision is to remain on the face of the Bill – and we would strongly urge that it not should – we would support the objectives of these two amendments.

Tom Pursglove

NC7

To move the following Clause—

*"**Accelerated detained appeals***

(1) In this section "accelerated detained appeal" means a relevant appeal (see subsection (6)) brought—

(a) by a person who—

(i) was detained under a relevant detention provision (see subsection (7)) at the time at which they were given notice of the decision which is the subject of the appeal, and

(ii) remains in detention under a relevant detention provision, and

(b) against a decision that—

(i) is of a description prescribed by regulations made by the Secretary of State, and

(ii) when made, was certified by the Secretary of State under this section.

(2) The Secretary of State may only certify a decision under this section if the Secretary of State considers that any relevant appeal brought in relation to the decision would likely be disposed of expeditiously.

(3) Tribunal Procedure Rules must secure that the following time limits apply in relation to an accelerated detained appeal—

(a) any notice of appeal must be given to the First-tier Tribunal not later than 5 working days after the date on which the appellant was given notice of the decision against which the appeal is brought;

(b) the First-tier Tribunal must make a decision on the appeal, and give notice of that decision to the parties, not later than 25 working days after the date on which the appellant gave notice of appeal to the tribunal;

(c) any application (whether to the First-tier Tribunal or the Upper Tribunal) for permission to appeal to the Upper Tribunal must be determined by the tribunal concerned not later than 20 working days

after the date on which the applicant was given notice of the First-tier Tribunal's decision.

(4) A relevant appeal ceases to be an accelerated detained appeal on the appellant being released from detention under any relevant detention provision.

(5) Tribunal Procedure Rules must secure that the First-tier Tribunal or (as the case may be) the Upper Tribunal may, if it is satisfied that it is in the interests of justice in a particular case to do so, order that a relevant appeal is to cease to be an accelerated detained appeal.

(6) For the purposes of this section, a "relevant appeal" is an appeal to the First-tier Tribunal under any of the following—

(a) section 82(1) of the Nationality, Immigration and Asylum Act 2002 (appeals in respect of protection and human rights claims);
(b) section 40A of the British Nationality Act 1981 (appeal against deprivation of citizenship);
(c) the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (S.I. 2020/61) (appeal rights in respect of EU citizens' rights immigration decisions etc); (d) regulation 36 of the Immigration (European Economic Area) Regulations 2016 (S.I. 2016/1052) (appeals against EEA decisions) as it continues to have effect following its revocation.

(7) For the purposes of this section, a "relevant detention provision" is any of the following—

(a) paragraph 16(1), (1A) or (2) of Schedule 2 to the Immigration Act 1971 (detention of persons liable to examination or removal);
(b) paragraph 2(1), (2) or (3) of Schedule 3 to that Act (detention pending deportation);
(c) section 62 of the Nationality, Immigration and Asylum Act 2002 (detention of persons liable to examination or removal);
(d) section 36(1) of the UK Borders Act 2007 (detention pending deportation).

(8) In this section "working day" means any day except—

(a) a Saturday or Sunday, Christmas Day, Good Friday or 26 to 31 December, and
(b) any day that is a bank holiday under section 1 of the Banking and Financial Dealings Act 1971 in the part of the United Kingdom where the appellant concerned is detained.

(9) Regulations under this section are subject to negative resolution procedure."

Member's explanatory statement
This new clause expands the categories of immigration appeals that can be subject to the accelerated detained appeals process that was introduced by clause 24.

Briefing:
We oppose New Clause 7 just as we are opposed to Clause 24, which it is to replace. For reasons given in the introductory paragraphs, appeal rights should be neither accelerated (nor truncated) – especially, but not only, where a person is detained. It is in the interests of justice and efficiency that procedures are full and fair. This not only protects against error – which in this jurisdiction may lead to a person's disappearance, execution, torture or other human rights violation – but reduces complexity, removes the need for much collateral litigation concerning the rights or wrongs of subjecting any particular person to lesser procedural standards – either to escape such procedures or to rectify any injustice after the event – and generally helps ensure consistency and confidence in the process.

New Clause 7(1)(b)(i) leaves to regulations what description of decisions may permit the Secretary of State to confine any appeal to the accelerated procedure it introduces. Subparagraph (2) merely requires the Secretary of State to consider whether any appeal may be dealt with "*expeditiously*" before she may certify a decision such that the process to be introduced by Clause 7 would apply. Subparagraph (3) provides for faster procedures (the acceleration) including the time provided for a detained person to lodge any appeal (subparagraph (3)(a)). Subparagraph (5) merely empowers rather than requires the Upper Tribunal to remove the appeal from the accelerated process where it is satisfied that is in the interests of justice. Subparagraph (6) extends the appeals to which this process may apply from that provided by Clause 24. This includes to accelerate appeals concerned with a decision to deprive a British citizen of their British citizenship (subparagraph (6)(b)). None of this is necessary or safe.

Stuart C McDonald
Anne McLaughlin

105

Page 29, line 19, leave out Clause 26

106

Page 61, line 33, leave out Schedule 3

Briefing:
Amendments 105 and 106 would leave out the provisions that would permit 'offshore processing' from the Bill. We strongly support their omission.

Clause 26 would permit the UK to banish people seeking asylum in the UK to third countries from where their asylum claims, and any appeals, would be conducted. This is not the first UK Government to propose such measures, which we regard as odious. People are entitled to seek asylum in the UK and it is a profound derogation of this country's responsibilities to seek to foster its obligations, in whole or in part, onto others. Doing so would undermine international commitment to refugees and providing asylum. It would do significant. psychological harm to people subjected to the proposed regime – and, if either the UK were unwilling or unable to guarantee the conditions people would face in the places to which it is proposed they be banished – that harm may also be life-threatening, physical and long-lasting or permanent. The cruelty that has, for instance, been done by the Australian Government by similar processes is long and well documented.

While our objections to Clause 26 and any intention to introduce similar offshoring procedures in the UK is firmly founded upon the injustice and harm of what is proposed, there are other objections. The enormous cost of the Australian regime – even to impose this upon a relatively small number of people – provides further reason for Parliament to reject Clause 26.[3] As with Clause 14, Clause 26 cannot be implemented unless the cooperation of third countries is secured. Also as with Clause 14, the objectives of Clause 26 are all one-way. They are for the UK to shift its responsibilities onto one or more other countries. Again, as with Clause 14, this has thus far proven to be wholly impracticable. As the Australian experience shows, securing the necessary cooperation costs money, large amounts of money, even to secure cooperation to impose such a regime on a relatively small number of people. If Parliament is concerned at the cost of the UK's asylum system, that in itself would provide more than sufficient reason not to endorse what is being proposed.

The Committee heard from the High Commissioner for Australia to the United Kingdom. The Committee should take note of his refusal to answer directly the succinct point that was put to him that the policy pursued by his country "*…costs billions of dollars and subjects people to… cruel and inhuman treatment.*"[4] Among other failures by the High Commissioner to directly answer questions and matters put to him, he said he was unaware of the widely reported fact that a report had been made to the International Criminal Court[5] and did not have figures to be able to answer questions about the cost of this policy.[6] It would appear from the written evidence that the Committee has since published that neither the High Commissioner, nor anyone else on behalf of the Australian Government, has seen fit to respond in writing to these questions and observations put to him when he gave oral evidence. By contrast, the Committee has received a wealth of evidence from a variety of sources all attesting to the profound cruelty and huge expense of this policy. The High Commissioner's failure to address the matters put to him speaks not of confidence in the policy but of a profound defensiveness about it. The Committee should heed the warning of UNHCR in oral evidence to the Committee:[7]

> "*Let me just take a step back on Australia. The Australian approach was essentially based on offshoring and externalisation, and on turning around the boats. The offshoring and externalisation did not have any impact on the boats, but it did have a terrible, terrible impact on the people who got caught in it. If you read reports of what happened on Nauru and Manus island and so on, there were very high levels of violence, sexual violence against women and children and suicides. Children were found to be the most traumatised that most practitioners had ever seen. Children were essentially withdrawing into themselves and becoming entirely irresponsive to external stimuli. There were also suicides and self-harm. You really need to ask yourselves whether that situation is something you would like to associate your country with, to be entirely frank.*"

Parliament should not endorse any attempt by the Government to follow the same disastrous path.

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[3] Even in 2016, the financial costs per person cruelly subjected to this policy were astronomical: see Amnesty International's 2016 report drawing on information from the Australian National Audit Office: https://www.amnesty.org.uk/files/2017-05/island-of-despair.pdf?ixQRwFFZA.DsEUHOwgrxwxTXQ029jASw

[4] *Hansard* HC, Public Bill Committee Oral Evidence, 23 September 2021 : Col 78

[5] *Hansard* HC, Public Bill Committee Oral Evidence, 23 September 2021 : Col 77

[6] *Hansard* HC, Public Bill Committee Oral Evidence, 23 September 2021 : Cols 77, 78 & 80

[7] *Hansard* HC, Public Bill Committee Oral Evidence, 23 September 2021 : Col 92

Stuart C McDonald
Anne McLaughlin

58

Clause 26, page 29, line 22, leave out paragraph (b)

Member's explanatory statement
This amendment is consequential on Amendment 57.

57

Schedule 3, page 62, leave out from line 2 to end of page 64 and insert—

"(2A) This section does not prevent a person being removed to, or being required to leave to go to, a third State if all of the following conditions are met—

(a) the removal is pursuant to a formal, legally binding and public readmission agreement between the United Kingdom and the third State;
(b) the State meets the definition of a safe third State set out at section 14 of the Nationality and Borders Act 2021, as shown by reliable, objective and up-to-date information;
(c) the person has been found inadmissible under section 80B of the Nationality, Immigration and Asylum Act 2002;
(d) the third State in question is the State with which the person was found to have a connection under section 80B of the Nationality, Immigration and Asylum Act 2002;
(e) taking into account the person's individual circumstances, it is reasonable for them to go to that State; and
(f) the person is not a national of that State."

Member's explanatory statement
This amendment modifies the circumstances in which a person can be removed to, or required to leave to go to, a safe third State.

159

Schedule 3, page 62, line 39, at end insert—

"(2D) Notwithstanding subsection (2A), a person who is particularly vulnerable to harm must not be removed to, or required to leave to go to, a State falling within subsection (2B) or any state to which Part 2, 3 or 4 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 for the time being applies.

(2E) For the purposes of subsection (2D), a person is particularly vulnerable to harm if they—

(a) are suffering from a mental health condition or impairment;
(b) have been a victim of torture;
(c) have been a victim of sexual or gender-based violence;
(d) have been a victim of human trafficking or modern slavery;

(e) are pregnant;
(f) are suffering from a serious physical disability;
(g) are suffering from other serious physical health conditions or illnesses;
(h) are aged under 18 or 70 or over;
(i) are gay, lesbian or bisexual;
(j) are a trans or intersex person."

Member's explanatory statement
This amendment would prevent persons who are particularly vulnerable to harm from being removed to, or required to leave to go to, a state falling within subsection (2B).

Briefing:
In its written evidence to the Committee, UNHCR has succinctly stated:[8]

> "*It is UNHCR's view that the very limited safeguards set out in the Bill would mean that any extraterritorial processing established on these terms would be in breach of the UK's international obligations, not in line with them.*"

Amendments 57, 58 and 159 seek to address, in part, these concerns by establishing some restrictions on the places to which a person could be sent under Clause 26 and Schedule 3 and excluding certain people from the measures altogether on the basis of characteristics or experiences that could be expected to make them especially vulnerable to being harmed by such measures.

Whereas we consider these useful probing amendments they nonetheless would not address all the fundamental problems with Clause 26. They would not address the first objection to these measures, which is that by seeking to shift responsibilities onto others they fundamentally undermine international commitment to what is a shared responsibility. They would also not address further objections concerning the need to guarantee conditions of accommodation and quality of access to asylum procedures. Moreover, whereas it is undoubtedly the case that persons with the characteristics and experiences listed by Amendment 159 could be expected to be among those most vulnerable to harm by offshore processing, these are likely to be insufficient in practice – either in addressing all reasons why a person may be especially vulnerable or because identifying persons with the relevant experience or characteristic before she, he or they may be banished under the offshoring regime would, in many instances, be likely to prove extremely difficult. Not least because these experiences and characteristics are also ones that inhibit their immediate or early disclosure. As regards other people likely to be especially harmed, we would note that people with family or indeed other close connections in the UK are likely to be especially vulnerable by reason of the isolation from these connections that, in many instances, they will already have endured considerable risks, hardships and harms to reach or reunite with.

Any attempt at offshore processing is wrong in principle and we profoundly object to it. As a party to the 1951 UN Convention relating to the Status of Refugees – and a founding party at that – the UK shares with other States the responsibility to provide access to asylum for refugees. Clause 26 and its purposes are entirely undermining and antithetical to that shared

[8] https://bills.parliament.uk/publications/43060/documents/788

responsibility. That what is proposed risks further and very substantial harms provides further reason to reject this clause but mitigating these risks cannot give it legitimacy.