House of Commons Committee Stage
Nationality and Borders Bill

Briefing on Clauses 27 to 36 and Selected Amendments
(*Interpretation of Refugee Convention etc.*)
October 2021

Introduction:
Clauses 27 to 35 concern the meaning of various provisions of the 1951 UN Convention relating to the Status of Refugees. We object to these provisions as a matter of principle for they attempt to introduce an unilateral interpretation of an international agreement in ways that seek to undermine settled understanding of that agreement both internationally and in UK domestic law. This constitutes a repudiation of the Convention, of which the UK was one of the founding States, and of the UK's commitment to the obligations shared by this country with all States under that Convention. Accordingly, Clauses 27 to 35 – as with other aspects of Part 2 – not only dismantle the UK's commitment to international law on refugees and asylum, they are profoundly damaging to an international regime on which the lives and safety of people fleeing persecution and conflict depends.

If the UK is to unilaterally redefine and confine its international obligations, that is an encouragement to others to do likewise. If so, international law on refugees and asylum will be fatally undermined with the prospect that people forced to flee persecution and conflict are made even more insecure and at risk throughout the world. Among the devastating consequences of this would be to make more people compelled to move more often and further in search of safety; and to make those people more dependent on and vulnerable to those who would exploit them – smugglers, traffickers, enslavers and others. Ultimately, this will be defeating of any of the aims Ministers have professed in support of this Bill.

There may be other disastrous consequences including consequences that enlarge the number of people forced to flee from tyranny and oppression because if the UK is to so openly refuse to abide by and respect its international agreements, it can be expected that others will feel further encouraged not to do so – not only as these relate to refugee and asylum law. If respect for international human rights and other international standards, including relating to conflict, is further reduced, that will put more people at risk of persecution and in need of seeking asylum.

A further objection to Clauses 27 to 35 is that they will enlarge the arbitrary and unlawful discrimination that is intended to be done by this Bill in differentiating between refugees. Clause 10 proposes a discrimination, based on the way by which the person fleeing persecution has come to the UK, between refugees in and recognised as entitled to asylum in the UK. The adverse treatment caused by that discrimination is to significantly reduce and undermine the quality of the protection provided in the UK to the refugee once recognised. Clauses 27 to 35, however, discriminate in the recognition of the refugee's status. Refugees who must rely upon the UK's asylum system are to be wrongly held to unduly narrow standards – concerning both the standard of proof that they are required to satisfy and the conditions they are to satisfy to establish their international law status. By contrast, refugees who are resettled having been identified by UNHCR as refugees will have been, rightly, held to the Convention standards.

This discrimination will have wider consequences too. The disparity – already large – between the UK and its nearest neighbours, who receive and provide protection to significantly, in some instances far, more refugees than the UK will be enlarged. This will be so because, at least insofar as its asylum system is concerned (which remains by far the greater source of UK provision of protection to refugees), the UK will be excluding refugees on the basis of its unilateral and illegitimate reduced interpretation of the Convention.

None of this can provide or improve confidence in the UK's asylum system. It will promote inconsistency and treatment of people, which is not safe – including the prospect of returning someone to a place where she, he or they face disappearance, execution, torture of other persecution. This can only undermine wider confidence in the UK system.

Stuart C McDonald
Anne McLaughlin

47

Clause 27, page 30, line 8, at end insert—

"(7) This section and section 28 to 35 may not be commenced before—
(a) the Secretary of State has consulted with such parties as the Secretary of State considers appropriate on—
(i) the compatibility of each section with the Refugee Convention; and
(ii) the domestic and international implications of the UK adopting each section;
(b) the Secretary of State has laid before Parliament a report on the outcome of that consultation stating which parties were consulted, and stating in respect of each section—
(i) the views of the parties consulted on its compatibility and implications;
(ii) the differences between the interpretation of the Convention provided by the section and any interpretations provided by the higher courts before the passing of this Act;
(iii) the reasons why the Secretary of State concludes that the section should be commenced;

(c) both Houses of Parliament have considered that report and approved the commencement of each of the sections that is to be commenced.

(8) For the purposes of subsection (7)—
"interpretation provided by the higher courts" means an interpretation provided by any judgement of the High Court or Court of Appeal in England and Wales, of the Court of Session in Scotland, of the High Court or Court of Appeal in Northern Ireland or of the United Kingdom Supreme Court that has not been superseded."

Member's explanatory statement
This amendment would require the Secretary of State to hold consultations on the compatibility of Clauses 27 to 35 with the Refugee Convention, and to report to Parliament on such consultations, before the relevant Clauses enter into force.

Briefing:
UNHCR has made clear, including in evidence to the Committee, that if passed in its current form the Bill will be a:

> "*…breach of international law, as the Bill contravenes in the UK's obligations under the 1951 refugee convention.*"[1]

Migrant Voice and Amnesty International concur with that assessment. We are very far from alone in that. The Joint Committee on Human Rights has recently received oral evidence from, among others, Raza Husain QC, a leading silk with particular expertise in international and domestic law on refugees and asylum, who describes the Bill as representing:

> "*…the biggest legal assault that there has ever been on the refugee convention in this country.*"[2]

We concur with that assessment too.

Amendment 47 provides opportunity for Parliament to put a check on at least some of this. It would require the Secretary of State to consult on the interpretations of the 1951 UN Convention relating to the Status of Refugees that are advanced in Clauses 27 to 35 – on their compatibility with the Convention and their domestic and international implications if passed into UK law. It would then require the Secretary of State to lay before Parliament a report that sets out, for Parliament's benefit:

(a) the views of those consulted;
(b) the differences between what is presented in these clauses and what is already settled in UK domestic law as to the meaning of the Convention; and
(c) why, given these views and differences, the Secretary of State nonetheless considers it appropriate for these interpretations of the Convention to be passed into law.

[1] *Hansard* HC, Public Bill Committee Oral Evidence, 23 September 2021 : Col 87
[2] Oral Evidence to the Joint Committee on Human Rights, HC 588, 9 September 2021, Q7

Amendment 47 would leave Parliament's decision whether to adopt measures, which are not compatible with international law and which conflict with the interpretations settled in UK law by rulings of the UK's higher courts, until after that report was made available and could be fully considered.

Ministers may say that the wider policy pursued by this Bill is dependent on the interpretations set out in these clauses. Certainly, Clause 10 – to which we have set out strong objections by reason of its own incompatibility with justice or international law[3] – is linked to Clause 34; and there are other, generally less direct, links between some other clauses and these clauses. But that does not provide good reason for Parliament to be invited by Ministers to legislate into UK law interpretations of an international agreement that are widely recognised as incompatible with that agreement and which are also contrary to the settled rulings of our courts on the meaning of that agreement.

Stuart C McDonald
Anne McLaughlin

152

Clause 29, page 30, leave out subsection (2) and insert—

"(2) The decision-maker must first determine whether there is a reasonable likelihood that—

(a) the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and

(b) if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—

(i) they would be persecuted for reason of the characteristic mentioned in subsection (a), and

(ii) they would not be protected as mentioned in section 31."

Member's explanatory statement
This amendment would remove the "balance of probabilities" phrase from the Bill and would maintain the status quo.

48

Clause 29, page 30, line 45, leave out subsections (2) and (3)

Member's explanatory statement
This amendment would remove the requirement for the decision-maker to assess, on the balance of probabilities, whether a claimant's fear of persecution is well-founded.

[3] See briefing to Clause 10 here: https://www.amnesty.org.uk/files/2021-10/Clause%2010%20Committee%20Stage.pdf?VersionId=g6sr8R6hR2tN_j3YLnygftEReuvN1vnj

Bambos Charalambous
Holly Lynch

132

Clause 29, page 30, line 45, leave out ", on the balance of probabilities" and insert "whether there is a reasonable likelihood that"

133

Clause 29, page 31, line 1, leave out "whether"

134

Clause 29, page 31, line 5, leave out paragraph (b) and insert—

> *"(b) if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—*
>
> *(i) they would be persecuted for reason of the characteristic mentioned in subsection (a), and*
>
> *(ii) they would not be protected as mentioned in section 31."*

Member's explanatory statement
The amendment would maintain the status quo and bring the bill back in line with UNHCR standards and UK jurisprudence.

Briefing:
Clause 29 introduces a multi-layered and complex test concerning the standard of proof required to establish refugee status. In doing so, it seeks to overturn long-settled jurisprudence, including in the UK, as to the relevant standard of proof. These various amendments, in separate ways, seek to revert to the current position and provide opportunity to probe Ministers about the impropriety and dangers of what they propose by Clause 29.

The proper answer – as with all that is set out in Clauses 27 to 35 – is simply to remove these provisions from the Bill for reasons elaborated in the introductory paragraphs. In the absence of that, the most satisfactory of these amendments is Amendment 48. Not only does it make clear that *the* standard of proof is a 'reasonable degree of likelihood' but it removes the additional complexity of requiring the decision-maker to adopt a multi-layered consideration process rather than the required holistic assessment of whether the person seeking asylum is or is not at risk of persecution in her, his or their country of nationality (or nationalities) or, if that person is stateless, former habitual residence.[4]

The dangers of what is proposed by Clause 29 are emphasised by the juxtaposition of paragraphs (2) and (4). It is possible that a decision-maker would conclude, under paragraph (4), that a person would be persecuted in the relevant country and so would be a refugee but is excluded from doing so by consideration of one of the questions in paragraph (2) *solely* because of a higher standard of proof. This is plainly unsafe for if the person has presented sufficient evidence to show that she, he or they would be persecuted if returned to that country, the person must be recognised as a refugee in order that the UK fulfils its obligations and the person is not returned to that harm.

[4] *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449; *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] AC 958

There are further problems with the complex test proposed by Clause 29. Paragraph (2)(a) requires the person to 'have' a characteristic. It is long settled that a person need not 'have' the characteristic in question. The Convention does not require this. It requires that the person is at risk of persecution by reason of the characteristic. The characteristic may, therefore, be a factor in why the person would be persecuted whether or not the person possesses it.

This clause is not compatible with the UK's international law duties under the 1951 UN Convention relating to the Status of Refugees. It should be omitted from the Bill.

Stuart C McDonald
Anne McLaughlin

49

Clause 30, page 31, line 47, leave out "both" and insert "either"

Member's explanatory statement
This amendment would mean that – in order to be defined as a particular social group for the purposes of the Refugee Convention – a group would only have to meet one (not both) of the conditions set out in subsections 3 and 4.

Briefing:
Amendment 49 provides a particularly clear example of one of the key vices of Clauses 27 to 35. The amendment concerns Clause 30, which in turn concerns the interpretation of "*membership of a particular social group*" for the purposes of the 'refugee' definition to be found in Article 1(A)(2) of the 1951 UN Convention relating to the Status of Refugees. Clause 30 proposes a cumulative test by which a refugee must establish – if her, his or their fear of persecution is by reason of membership of such a group – that the group consists of persons sharing a feature set out in paragraph (3) of Clause 30 and that the group satisfies the condition set out in paragraph (4) of Clause 30. In short, this is to require the group to both share an innate, immutable or fundamental characteristic that cannot be changed or should not be forcibly renounced and to have a distinct identity in the relevant country for being perceived to be different by "*the surrounding society*".

The UK's highest court – at the time, the UK House of Lords – has expressly considered the argument that the meaning of "*membership of a particular social group*" requires both the conditions specified in paragraphs (3) and (4) or requires one or other of them. The leading speech given by Lord Bingham in *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 gives the conclusive answer:

> "*16. ...If* [the provision is understood] *as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies* [both criteria]*, then in my opinion it propounds a test more stringent than is warranted by international authority.*"

Clause 30 is plainly contrary to this settled interpretation – in domestic and international law – of the Convention. Amendment 49 seeks to correct this error by confirming the alternative position and rejecting the cumulative requirement that Clause 30 currently advances by paragraph (2). Committee members may wish to take note that the importance of "*member of a particular social group*" includes that this aspect of the refugee definition provides the

basis of the Convention's protection for many refugees whose fear of persecution is for reasons concerning gender-based violence and persecution of people on grounds of their sexual orientation or identity.

We would further urge Committee members to reflect further, for the following reasons, on this as an example of the wider vice underpinning Clauses 27 to 35.

Parliament cannot change international law. Ministers are, however, inviting Parliament to legislate – make law – as to the meaning of international law. They are doing so in circumstances where the meaning of that international law has been clearly settled both internationally and domestically. Moreover, Ministers are doing this in circumstances where that meaning has been clearly settled in UK law by the UK courts at the highest level in performance of their constitutional function of interpreting and enforcing law in the UK. The interpretation for which Ministers seek parliamentary approval is expressly, in this instance, contrary to that international law as has been made clear by the UK courts. Accordingly, Parliament is being invited to make law in contradiction and repudiation of that international law. Clause 30 is an especially stark example of this. Nonetheless, it is but one example.

Stuart C McDonald
Anne McLaughlin

157

Clause 34, page 33, line 20, at end insert—

"(1A) Subsection (1) shall not apply to any refugee—
(a) whose claim for asylum is on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
(b) whose claim for asylum is on the basis of gender-based violence;
(c) who has experienced sexual violence;
(d) who is a victim of modern slavery or trafficking;
(e) who is suffering from a mental health condition or impairment;
(f) who has been a victim of torture;
(g) who is suffering from a serious physical disability;
(h) who is suffering from other serious physical health conditions or illnesses."

Member's explanatory statement
This amendment would exempt certain groups from subsection (1).

158

Clause 34, page 33, line 34, at end insert—

"(2A) Subsection (2) shall not apply to any refugee—
(a) whose claim for asylum is on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
(b) whose claim for asylum is on the basis of gender-based violence;
(c) who has experienced sexual violence;
(d) who is a victim of modern slavery or trafficking;
(e) who is suffering from a mental health condition or impairment;
(f) who has been a victim of torture;

(g) who is suffering from a serious physical disability;
(h) who is suffering from other serious physical health conditions or illnesses."

Member's explanatory statement
This amendment would exempt certain groups from subsection (2).

50

Clause 34, page 34, line 1, leave out paragraph (b) and insert—

"(b) in subsection (3), after (b), insert—
"(ba) entry in breach of a deportation order, entry without leave, remaining in the United Kingdom without leave, or arriving in the United Kingdom without entry clearance under section 24 of the 1971 Act";
(c) in subsection (4), after (c), insert—
"(ca) entry in breach of a deportation order, entry without leave, remaining in the United Kingdom without leave, or arriving in the United Kingdom without entry clearance under section 24 of the 1971 Act""

Member's explanatory statement
This amendment would mean that individuals who committed these offences (and the other offences set out in section 31 of the Immigration and Asylum Act 1999) would be able to use the defence set out in section 31 of that Act, even if the offence was committed in the course of an attempt to leave the UK.

Briefing:
Clause 34 is among those provisions of this Bill that is both contrary to the 1951 UN Convention relating to the Status of Refugees and contrary to the settled interpretation of that Convention by the UK's higher courts. Its purpose is to exclude a refugee from the protection provided by Article 31 of the Convention against penalty for entering the UK without prior permission – something for which the great majority of refugees entitled and provided with asylum in the UK have no alternative in order to seek and secure their right to asylum here.

Amendments 157 and 158 provide opportunity to probe Ministers as to the consequence of this by reference to some of the people who are to be laid open to penalty and, indeed, criminal prosecution. Amendment 50 seeks to do two things. Firstly to remove paragraph (5)(b) of Clause 34, which seeks to reverse the decision of the UK's highest court – at that time, the House of Lords – in *R v Asfaw* [2008] UKHL 31 – as to the extent of the Convention protection in Article 31. Amendment 50 also seeks to explicitly protect a refugee against prosecution for the offences listed in connection with seeking to leave the UK.

As with Clauses 27 to 35 more generally, our position is that Clause 34 should be removed from the Bill. We note its relation to Clause 10, which is also incompatible with the UK's Convention obligations and should be removed. We have addressed more on this in our earlier briefing on Clause 10.[5]

[5] https://www.amnesty.org.uk/files/2021-10/Clause%2010%20Committee%20Stage.pdf?VersionId=g6sr8R6hR2tN_j3YLnygftEReuvN1vnj

Stuart C McDonald
Anne McLaughlin

51

Clause 35, page 34, line 1, leave out sub-paragraph (i)

Member's explanatory statement
Under this amendment, persons receiving certain prison sentences in the UK shall be presumed (as at present) but not automatically deemed (as proposed in the Bill) to have committed a particularly serious crime.

53

Clause 35, page 34, line 21, leave out "12 months" and insert "four years"

Member's explanatory statement
Under this amendment, persons shall be deemed to have committed a "particularly serious crime" if they receive a prison sentence of more than four years in the UK (as opposed to two years at present, or 12 months as proposed in the Bill).

52

Clause 35, page 34, line 24, leave out sub-paragraph (i)

Member's explanatory statement
Under this amendment, persons receiving certain prison sentence outside the UK, or persons who could have received such a sentence had they been convicted in the UK, shall be presumed (as at present) but not automatically deemed (as proposed in the Bill) to have committed a particularly serious crime.

54

Clause 35, page 34, line 27, leave out paragraphs (b) and (c) and insert—

"(b) in paragraph (b), for "two years" substitute "four years";
(c) in paragraph (c), for "two years" substitute "four years""

Member's explanatory statement
Under this amendment, persons shall be deemed to have committed a "particularly serious crime" if they receive a prison sentence of more than four years outside the UK (as opposed to two years at present, or 12 months as proposed in the Bill), or if they could have received such a sentence had they been convicted in the UK.

Briefing:
Clause 35 amends section 72 of the Nationality, Immigration and Asylum Act 2002 – a provision to which we also object. Section 72 constitutes a more limited attempt to define and confine the UK's obligations under the Convention. It does so by attempting to legislate the application of Article 33(2) of the Convention, which in specified circumstances permits a State to refuse the protection of *non-refoulement* to a refugee – i.e. it would permit a State to return a refugee to a place where that person was at risk of persecution. Those limited circumstances are where there are "*reasonable grounds for regarding*" the refugee to be "*a*

danger to the security of the country" or, if the refugee has "*been convicted by a final judgment of a particularly serious crime*", to be "*a danger to the community of that country.*"

Section 72 of the 2002 Act seeks to introduce presumptions as to what constitutes a particularly serious crime and who constitutes a danger to the community. These presumptions are profoundly flawed. For instance, it is manifestly clear, for at least two reasons, that the circumstances addressed by Article 33 are only to apply in relatively restricted and very serious circumstances. Firstly, it is implicit to Article 33, and its subject matter, that it is not intended that anything less than the most serious of offences and dangers could displace the obligation not to return a person to a place where she, he or they may be disappeared, executed, tortured or suffer other persecution. Secondly, Article 33(2) is express that not only crime but also serious crime is not sufficient to permit this.

It is clear that section 72, as it stands, does not properly reflect the Convention in this regard. Clause 35 seeks to amend section 72 in ways that will enlarge upon the disparity between the statutory provision and the provision of the Convention that it purports to interpret and apply.

Clause 35 and section 72 somewhat expose the whole of the project advanced by Clauses 27 to 35 in seeking, by legislation, to unilaterally define and confine the meaning of the 1951 UN Convention relating to the Status of Refugees and the UK's obligations under that international agreement. The UK has already, wrongly, adopted provisions by section 72 in contravention of its international obligations that suggest offences that are plainly not at the 'particularly serious' level required by Article 33(2). The UK Government now seeks parliamentary approval to impose an even more encompassing interpretation of the Article by Clause 35.

The vice in this can be made obvious in two ways. Firstly, it is possible to reflect on the wide range of offences that are within the range of offences to which a 12 months prison sentence may be applied. That range stretches from offences for which there is a mandatory life sentence to offences where 12 months is the maximum permitted sentence. Secondly, it is possible to reflect on the provisions in this Bill. Clause 37 would introduce a 4 years maximum sentence for knowingly entering the UK without permission to do so. Clause 38 would introduce a maximum sentence of life for helping a person seeking asylum, for no gain, to reach UK shores. Ministers may or may not regard these offences as equivalent to murder or trafficking in children for sexual exploitation. No reasonable person, however, could suggest any such equivalence.

Amendments 51 to 54 offer an opportunity for the Committee to probe Ministers on these matters. We support all four of these amendments – not because we consider them adequate to return the UK to compliance with its international obligations but because what is proposed by the Bill is so dramatically opposed to that.

Amendments 51 and 52 do no more than seek to maintain the status quo in domestic law which provides the minimal, and we regard as insufficient, safeguard that sentences which trigger consideration of section 72 are not treated as conclusive of an offence being 'particularly serious'.

Amendments 53 and 54 seek to minimally – we emphasise minimally – align what is intended by Clause 35 with what the Bill separately seeks to do by Clause 37 (read with Clause 34). Clause 34 (see above) seeks to significantly and wrongly narrow the applicability

of Article 31 of the Convention so as to permit prosecution of many people seeking asylum in the UK who must do so by entering the UK without permission. Clause 37 seeks to increase the sentence, to which these people would thereby be made liable, to four years. It is manifestly unjust and destructive of the Convention's aims and objectives that a refugee seeking asylum in these circumstances could not only be prosecuted and imprisoned for seeking asylum in the UK but could also thereby be excluded from the most fundamental of the refugee's rights being the right not to be returned to a place where she, he or they would be persecuted.

Stuart C McDonald
Anne McLaughlin

55

Clause 36, page 35, line 14, at end insert—

""protection in accordance with the Refugee Convention" means a legal status that is inclusive of the rights and obligations set out at Articles 2-34 of the 1951 Convention".

Member's explanatory statement
This amendment would define – for the purposes of Part 2 of the Bill – what constitutes protection in accordance with the Refugee Convention.

Bambos Charalambous
Holly Lynch

135

Clause 36, page 35, line 27, at end insert—

""protection in accordance with the Refugee Convention" means a legal status that is inclusive of the rights and obligations set out at Articles 2-34 of the 1951 Convention."

Member's explanatory statement
This amendment would clarify the meaning of "protection in accordance with the Refugee Convention" and ensure that it includes the positive rights and obligations necessary to ensure durable and humane solutions, and not merely protection against refoulement.

Briefing:
Amendments 55 and 135 seek to define for the purpose of the proposed inadmissibility regime that what is designated or treated as a safe third country must be one that provides asylum to refugees in compliance with all of the rights enumerated in the 1951 UN Convention relating to the Status of Refugees. Amendment 136 (below) seeks to expand on that.

Bambos Charalambous
Holly Lynch

136

Clause 36, page 35, line 27, at end insert—

""safe third country" is one where there are, in law and practice—

(a) appropriate reception arrangements for asylum-seekers;

(b) sufficiency of protection against serious harm and violations of fundamental rights;

(c) protection against refoulement;

(d) access to fair and efficient State asylum procedures, or to a previously afforded refugee status or other protective status that is inclusive of the rights and obligations set out at Articles 2-34 of the 1951 Convention;

(e) the legal right to remain during the State asylum procedure; and

(f) if found to be in need of international protection, a grant of refugee status that is inclusive of the rights and obligations set out at Articles 2-34 of the 1951 Convention."

Member's explanatory statement

The Bill offers several different definitions of what a "safe" third country is. This amendment would provide a single, consistent standard throughout the Bill that is consistent with international law.

Briefing:

Amendment 136 seeks to define what is a 'safe third country'. It seeks to provide that standard across the Bill's provisions. However, the Bill – unhelpfully – uses the term "*safe third State*" in relation to its inadmissibility provisions whereas the term "*safe third country*" is used elsewhere. Amendment 136, then, provides an opportunity to not only address profound questions as to the standards of protection that ought to be guaranteed in any country treated as a safe third State or country but to probe Ministers as to the reasons for, and usefulness or effect of, use of these distinct terms.