House of Commons Committee Stage
Nationality and Borders Bill

Briefing on Clauses 16 to 23 and Selected Amendments
(*supporting evidence, priority removal notices & late evidence*)
October 2021

Introduction:
Clauses 16 to 23 are misconceived and dangerous. The impact of these clauses is to introduce penalties for non-compliance with procedural requirements concerning the timing of disclosure of evidence and grounds in support of the claim, made by a person in the UK, to permission or entitlement to remain here. The penalties are mostly by way of directing a decision-maker – whether an official or an independent judge – as to the consideration or conclusion the decision-maker is to make about the evidence and the claimant's credibility. Clause 21 is different. Here the penalty is an accelerated and reduced appeal process.

These provisions risk doing grave harm to refugees, victims of modern slavery and other people while undermining efficiency, effectiveness and trust and confidence in the immigration, asylum and appeals system. They risk these things because they pre-empt the role of the competent decision-maker, which is to assess all the evidence to determine the facts and ultimately the claim that is presented.

The role of the decision-maker includes consideration of whether, and if so to what degree, any conduct of the claimant casts doubt on that person's credibility or the evidence submitted; or indeed whether that conduct is consistent with the claim and supportive of the claimant's credibility. That is to be done on the basis of everything before the decision-maker – including the evidence and any submissions that may be made by or for the claimant or the Secretary of State. Ultimately, the decision-maker, who has the evidence and submissions before them, is the competent body or person to evaluate all that is relevant and reach conclusions about and upon credibility and evidence.

If it is the Secretary of State's position that decision-makers are not competent to perform this role, that is not a matter that can properly or effectively be remedied by seeking to direct the decision-maker in advance as to weight that must or must not be given to evidence and credibility findings to be reached about claimants. What the Government is presenting to Parliament by Clauses 16 to 23 amounts to an invitation to usurp the role of the decision-maker, in advance and without any of the advantage of the decision-maker in having before

them the specific evidence, submissions and facts. That is to fundamentally undermine the decision-maker, including independent judicial decision-makers, and any trust and confidence it is possible to have in them and the processes and decisions for which they are responsible.

It is doubtful that Ministers will wish to assert that decision-makers are incompetent. If, however, Ministers do not wish to make that assertion, this begs the question why there should be any thought – still less actual proposal – to interfere with the decision-makers' role and authority. It also emphasises the dangers in doing so. If decision-makers are competent, they must be capable of being relied upon to perform their basic function in assessing the evidence and submissions before them. Since the interference intended by Clauses 16 to 23 is always to prejudice decision-makers' assessment of claimants' evidence and credibility, these provisions can only ever cause some claimants with good claims to be wrongly treated as having bad claims – including by wrongly treating people as lacking credibility and by wrongly giving evidence less weight than it deserves. There is a distinct problem as to what a decision-maker is to understand to be "*minimum weight*" under Clause 23(2). How much weight will constitute 'minimum' is unclear but what is clear is that it is a direction for the decision-maker to give the evidence a certain level of weight that is less, perhaps significantly less, than the evidence may merit. That is plainly improper.

This is because either the assumption being made in advance in the proposed statutory provision will accord with the assessment the competent decision-maker would have made without that provision or it will be the wrong assessment. That means refugees wrongly refused asylum, victims of modern slavery wrongly treated as never having been trafficked or enslaved and other people with good human rights claims establishing their right to remain in the UK (e.g. because they face torture or other serious harm for non-Refugee Convention reasons) wrongly treated as without any good claim.

Ministers may say that even competent decision-makers make errors. This is true and it works both ways (which these provisions do not – and Clause 21 adds the extreme of insulating an appellate decision-maker from any error of law oversight). It is why there are appeal procedures, generally restricted to errors of law – though the fairness, availability and accessibility of these procedures is further undermined by provisions elsewhere in this Bill and other legislation currently before Parliament. What Clauses 16 to 23 are about is weighting the decision-making, including in what is meant to be an independent judicial appeal process, against claimants and in favour of the Home Office. If anything like this were done in another national jurisdiction – weighting the independent judicial process in favour of the State – it would be identified as corruption and tyranny. It is not a proper role for the legislature and Parliament ought to reject these and any new provisions where these seek to determine what a decision-maker must make of the evidence and claimants who come before them.

The concerns expressed above are exacerbated because the capacity of claimants to meet what is being required and avoid sanction is, in several respects, dependent on third parties. It is, for example, directly dependent on legal representatives, interpreters and experts (country experts and medical experts), amongst others. It is, for example, indirectly dependent on, amongst others, the Home Office and its subcontractors since the conditions in which the person is accommodated or, indeed, their being detained, is likely to impact on the capacity of the person to engage effectively with the process, including legal representatives and the Home Office. Claimants are, almost without exception, particularly vulnerable to this

dependency. They are not well-placed to demand that those on whom they depend either act with sufficient efficiency, clarity or professionalism or take responsibility where they do not.

Bambos Charalambous
Holly Lynch

36

Clause 16, page 20, line 8, at end insert ", subject to subsection (1A)"

Member's explanatory statement
This amendment is consequential to the amendment which would remove the ability to serve an evidence notice on certain categories of person.

37

Clause 16, page 20, line 8, at end insert—

"(1A) The Secretary of State may not serve an evidence notice on a person—
(a) who has made a protection claim or a human rights claim on the basis of their sexual orientation or gender identity;
(b) who was under 18 years of age at the time of their arrival in the United Kingdom;
(c) who has made a protection or human rights claim involving sexual or gender-based violence; or
(d) is a victim of modern slavery or trafficking."

Member's explanatory statement
This amendment would remove the ability to serve an evidence notice on certain categories of person.

Stuart C McDonald
Anne McLaughlin

153

Clause 16, page 20, line 8, at end insert—

"(1A) The Secretary of State must not serve an evidence notice on a person—
(a) who has made a protection claim or a human rights claim on the basis of sexual orientation, gender identity, gender expression or sex characteristics;
(b) who was under 18 years of age at the time of their arrival in the United Kingdom;
(c) who has made a protection or human rights claim on the basis of gender-based violence;
(d) who has experienced sexual violence;
(e) who is a victim of modern slavery or trafficking;
(f) who is suffering from a mental health condition or impairment;
(g) who has been a victim of torture;
(h) who is suffering from a serious physical disability;
(i) who is suffering from other serious physical health conditions or illnesses."

Member's explanatory statement
This amendment would prevent the Secretary of State from serving an evidence notice on certain categories of people.

Briefing:
Amendments 36, 37 and 153 are useful probing amendments. They draw attention to circumstances, in which people can be expected to have difficulty or be unable to comply with the procedure to be established by Clause 16. That procedure is for the Secretary of State or an immigration officer to serve on a person, who has made an asylum or human rights claim, what is referred to as an "*evidence notice*". This notice is to require the person to provide by a specified date the evidence the person wishes or needs to rely upon to substantiate their claim; and to provide a statement giving reasons for not providing that evidence, or some of it, before the specified date.

Clause 16 must be read with Clause 17(3), which is to amend section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 such that a person who provides evidence after the specified date without "*good reasons*" is to be taken to have done something that damages the person's credibility. This is an instruction to the decision-maker (which includes an immigration officer, the Secretary of State and an independent judge on an appeal). This advance instruction may accord with what a competent decision would decide on the same facts without this legislative instruction or it may not. If not, all the vices addressed in the introductory paragraphs to this Briefing will flow.

These three amendments highlight people with experiences and characteristics that are likely to make them especially at risk from Clause 16 and the sanction in Clause 17(3). This may be because the experience or characteristic of the person causes that person to be reluctant and sceptical to disclose information about them that they may fear will prejudice how they are treated or causes that person to have difficulty engaging with an official, a legal representative or other person sufficiently well to be able to identify what it is necessary to disclose or how to obtain the evidence that is needed. However, the particular experience or characteristic will not always be known at the time that the evidence notice may usually be served; and disclosure of the particular experience or characteristic may in effect be the relevant evidence in support of the claim that Clause 16 and Clause 17(3) seek to regulate – e.g. evidence that the person has experienced torture, has been trafficked or suffers from a mental health impairment.

One especially dangerous outcome will be that a person who has made an asylum or human rights claim finds themselves in the invidious position of being deterred from making a formal disclosure because of the wider risk that their credibility is damaged. If so, vital information that the decision-maker needs to ensure the efficiency and effectiveness of the process is not provided. This is a recipe for unsafe procedures and decisions; and fresh claims seeking to correct that. Rather than try to pre-empt what the decision-maker should do, Parliament should support decision-makers to perform their function; and everyone, most especially claimants, should be able to have confidence that the process, including appeal process, will treat them fairly – i.e. free from any weighting against the claimant and in favour of the State.

Stuart C McDonald

Anne McLaughlin

27

Clause 16, page 20, line 9, leave out "requiring" and insert "requesting"

Member's explanatory statement
Under this amendment, evidence notices would "request" (rather than "requiring") the provision of supporting information for a protection or human rights claim.

28

Clause 16, page 20, line 14, leave out "must" and insert "may"

Member's explanatory statement
This amendment would remove the obligation for applicants to provide supporting information for a protection or human rights claim.

39

Clause 17, page 20, line 22, at end insert—

> *"(1A) For subsection (1) substitute—*
> *In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or human rights claim, a deciding authority shall take into account any behaviour to which this section applies."*

Member's explanatory statement
This amendment would mean that – whilst attempts to conceal information, mislead, or delay the processing of a claim would still be taken into account – it will be for the deciding authority to assess what impact this has on the claimant's credibility.

43

Clause 23, page 26, line 38, leave out subsection (2) and insert—

> *"(2) Where subsection (1) applies, the deciding authority must have regard to the fact of the evidence being provided late and any reasons why it was provided late in considering it and determining the claim or appeal."*

Member's explanatory statement
This amendment would remove the provision which states that "minimal weight" should be given to any evidence provided late.

Amendments 27, 28, 39 and 43 seek to restore the position to that which respects the role of the decision-maker. They relate to the evidence notice process to be introduced by Clause 16ff. Amendment 43 also relates to the priority removal notice process to be introduced by Clause 18ff.

Amendment 27 would continue to permit the Secretary of State – if she believes she needs statutory authority – to request evidence within a time she or an immigration officer may specify. Amendment 28 would continue to permit a claimant – should that person believe it

necessary and possible – to explain why any evidence was not supplied before any time that is specified. Most importantly, Amendments 39 and 43 would preserve the decision-makers' competence to assess all the evidence and facts and determine what is the proper conclusion to be drawn from these, having regard to any assertion that may be made – including by the Secretary of State to an independent judge – that evidence was supplied late and without good reason.

While we do not consider Clauses 16, 17 or 23 to be necessary or appropriate, if they are to stay, we would support these amendments.

Stuart C McDonald
Anne McLaughlin

86

Page 20, line 19, leave out Clause 17

Briefing:
For reasons given above, we support that Clause 17 be left out of the Bill. What is expressed above in relation to the vice of pre-empting the decision-maker applies to what are referred to as "*relevant behaviour*" identified in subparagraph (2) of Clause 17 just as much as that identified in subparagraph (3).

Stuart C McDonald
Anne McLaughlin

40

Clause 18, page 22, line 4, leave out "requiring" and insert "requesting"

Member's explanatory statement
Under this amendment, priority removal notices would "request" rather than "require" the recipient to provide information.

41

Clause 20, page 23, line 38, leave out ", as damaging the PRN recipient's credibility,"

Member's explanatory statement
This amendment would mean that – whilst late provision of information would still be taken into account – it would not necessarily be deemed as damaging the claimant's credibility.

Briefing:
Amendments 40 and 41 operate in the same way as Amendments 27, 28 and 39 but here in relation to Clauses 18, 20 and 23 concerning what is referred to as a "*priority removal notice*". These are to restore the position to that which respects the role of the decision-maker. Amendment 43, which is addressed in relation to an "*evidence notice*" and is considered alongside Amendments 27, 28 and 39 (above), applies equally to the priority removal notice regime to which Amendments 40 and 41 relate.

A priority removal notice, as introduced by Clause 18ff, may be served on a person who is liable to removal or deportation; and is to require that person to disclose information and evidence in relation to any claim the person may have to remain in the UK before a date that may be specified by the Secretary of State or an immigration officer. The notice may be required under Clause 18. Clauses 20 and 23 provide specific sanctions concerning how the person's credibility and/or the evidence the person may rely upon is to be treated by a decision-maker.

Clause 20(3) is to require that a person's credibility is treated as damaged if the person has not provided the information and evidence demanded by a notice under Clause 18 within the time specified and there are not good reasons for that. Clause 23(2) is to require a decision maker to give "*minimum weight*" to evidence.

While we do not consider Clauses 18 to 23 to be necessary or appropriate, if they are to stay, we would support these amendments.

Paul Blomfield

138

Page 23, line 25, leave out Clause 20

Paul Blomfield

140

Page 26, line 29, leave out Clause 23

Briefing:
For reasons given above, we support that Clauses 20 and 23 be left out of the Bill.

Paul Blomfield

139

Clause 20, page 23, line 40, at end insert—

"(3A) For the purposes of subsection (3) "good reasons" include, but are not limited to—

(a) evidence of post-traumatic stress,

(b) potential endangerment to the PRN recipient caused by collecting evidence for anything mentioned in subsection (1)(a) before the PRN cut-off date.

(3B) The Secretary of State must publish guidance including a non-exhaustive list of "good reasons" within the meaning of subsection (3) within 30 days of this Act receiving Royal Assent."

Member's explanatory statement
This amendment would illustrate potential interpretations of "good reasons" for late compliance and require the Home Secretary to publish a non-exhaustive list of potential "good reasons" to aid asylum decisions.

Stuart C McDonald

Anne McLaughlin

154

Clause 20, page 23, line 40, at end insert—

"(3A) The Secretary of State or competent authority must accept that there are good reasons for the late provision of anything mentioned in subsection (1)(a) where—

(a) the PRN recipient's protection or human rights claim is based on sexual orientation, gender identity, gender expression or sex characteristics;

(b) the PRN recipient is suffering from a mental health condition or impairment;

(c) the PRN recipient has been a victim of torture;

(d) the PRN recipient has been a victim of sexual or gender based violence;

(e) the PRN recipient has been a victim of human trafficking or modern slavery;

(f) the PRN recipient is suffering from a serious physical disability;

(g) the PRN recipient is suffering from other serious physical health conditions or illnesses."

Member's explanatory statement
This amendment defines "good reasons" for the purposes of subsection (3).

Briefing:
Amendments 139 and 154 are useful probing amendments. They draw attention to circumstances, in which people can be expected to have difficulty or be unable to comply with the procedure to be established by Clause 18ff; and in which it may be inappropriate and unjust to treat the person's credibility as damaged for not doing so.

Our concerns set out in relation to Amendments 36, 37 and 153 (above), which relate to the separate evidence notice procedure, apply equally to these amendments, which concern the priority removal notice procedure.

Bambos Charalambous
Holly Lynch

38

Clause 23, page 26, line 40, at end insert—

"(2A) Subsection (2) does not apply where—

(a) the claimant's claim is based on their sexual orientation or gender identity; or

(b) the claimant was under 18 years of age at the time of their arrival in the United Kingdom."

Member's explanatory statement
This amendment would remove the direction to the deciding authority to give minimal weight to evidence provided late in cases where an asylum claim or human

rights claim is based on issues of sexual orientation or gender identity; or where the claimant was under 18 when they arrived in the UK.

Bambos Charalambous
Holly Lynch
Paul Blomfield
Stuart C McDonald
Anne McLaughlin

131

Clause 23, page 26, after line 40, insert—

"(2A) The deciding authority must accept that there are good reasons why the evidence was provided late where—

(a) the claimant's claim is based on sexual orientation, gender identity, gender expression or sex characteristics;
(b) the claimant was under 18 years of age at the time of their arrival in the United Kingdom;
(c) the claimant's claim is based on gender-based violence;
(d) the claimant has experienced sexual violence;
(e) the claimant is a victim of modern slavery or trafficking;
(f) the claimant is suffering from a mental health condition or impairment;
(g) the claimant has been a victim of torture;
(h) the claimant is suffering from a serious physical disability;
(i) the claimant is suffering from other serious physical health conditions or illnesses."

Member's explanatory statement
This amendment sets out the circumstances where the deciding authority must accept that there were good reasons for providing evidence late.

Briefing:
Amendments 38 and 131 are useful probing amendments. They draw attention to circumstances, in which people can be expected to have difficulty or be unable to comply with the procedures to be established by Clauses 16 and 18; and in which it may be inappropriate and unjust to require minimum weight to be given to evidence that is provided outside of the time periods specified in those procedures.

Our concerns set out in relation to Amendments 36, 37 and 153 (above), which relate to treating a claimant's credibility as damaged apply equally to these amendments, which concern treating that person's evidence as of less weight than any proper assessment of the evidence would show it to deserve.

Stuart C McDonald
Anne McLaughlin

44

Clause 23, page 27, line 13, at end insert—

"(6B) This section does not apply where the evidence provided proves that a claimant is at risk of persecution by the Taliban."

Member's explanatory statement
This amendment would disapply Clause 23 (under which minimal weight is given to any evidence provided late) in respect of claimants who are at risk of persecution by the Taliban.

Briefing:
Amendment 44 is a useful probing amendment. It highlights the vice of Clause 23 in seeking to pre-empt the weight a decision-maker is to give to evidence on the basis that the person relying on the evidence has not complied with a requirement of the Secretary of State or an immigration officer to provide that evidence within a time specified by the Secretary of State or the immigration officer.

Clause 23(2) requires evidence to be given minimum weight – whatever that may mean – to evidence on the basis that the person has not complied with a procedural requirement. It does not matter, for the purposes of Clause 23, what the evidence shows, where it comes from, how incontestable may be its source or any other factor that is specific to the evidence and establishes, objectively and properly, what its true and effective weight is. As the amendment demonstrates, the evidence may establish a person is at risk of persecution. Clause 23(2) attempts to preclude the decision-maker from acknowledging that or acting on it in making her, his or their decision.

This may be emphasised by a hypothetical example of what the evidence may be. Here are just three such examples that relate to this specific probing amendment:

(1) The claimant has presented a letter issued by an officer of the British Army, duly confirmed by the Ministry of Defence, to establish that the claimant was working for the British Army in Afghanistan and that work involved identifying sources of Taliban intelligence and activity that led to military operations to counter this, all of which is known to the Taliban and places the person at especially high risk of disappearance, torture and execution if returned. The source and content of the letter may be entirely uncontentious. However, it was submitted late and, perhaps, there is no good reason for this.

(2) The claimant may have been presented documentation from Afghanistan specifically identifying the claimant as a person wanted by the Taliban by reason of the person's sexual orientation or identity. There may be clear and uncontested evidence establishing the source and veracity of the documentation. Again, it may be submitted late and there may be no good reason for this.

(3) The claimant's body may bear scarring that is peculiar and highly consistent with a particular form of torture known to have been carried out by the Taliban in some part of the country. The claimant may have only lately revealed her, his or their scarring and/or obtained expert evidence concerning this. Again, it may be that the evidence and what it shows is entirely uncontentious. It may be that, nonetheless, it is submitted late and for no good reason.

While these may be extreme examples, they highlight clearly the vice of Clause 23 by requiring a decision-maker – including an independent judge – to give less weight to evidence than it objectively merits. In practice, there will be many and various examples – most of which are likely to be more complicated. But the result will always be the same – requiring less weight than the evidence merits, risking a decision that is wrong, unsafe and not justified by any objective standard.

The results of this are obviously unsafe for claimants. They are also harmful to the asylum, immigration and appeals system. They will undermine any trust and confidence that can properly be had in these systems and decisions made in them. They will risk leading to people being returned to places where they be executed, tortured or otherwise suffer human rights abuses. They will – since the people wrongly treated as a result will for obvious reasons remain as afraid of their return as before – not encourage any cooperation with Home Office processes but will be likely to lead to fresh claims, applications for judicial review and significantly increased workload and costs (all of which could and should have been avoided).

Stuart C McDonald
Anne McLaughlin

155

Clause 21, page 24, line 21, at end insert—

"(2A) The Secretary of State must accept that there are good reasons for P making the claim on or after the cut-off date where—

(a) the PRN recipient's protection or human rights claim is based on sexual orientation, gender identity, gender expression or sex characteristics;
(b) the PRN recipient is suffering from a mental health condition or impairment;
(c) the PRN recipient has been a victim of torture;
(d) the PRN recipient has been a victim of sexual or gender based violence;
(e) the PRN recipient has been a victim of human trafficking or modern slavery;
(f) the PRN recipient is suffering from a serious physical disability;
(g) the PRN recipient is suffering from other serious physical health conditions or illnesses."

Member's explanatory statement
This amendment defines "good reasons" for the purposes of section 82A(2) of the Nationality, Immigration and Asylum Act 2002 (as inserted by this Bill).

42

Clause 21, page 24, line 37, leave out subsection (2)

Member's explanatory statement
This amendment would protect the right to an onward appeal from an expedited appeal decision by the Upper Tribunal in certain cases.

Briefing:
Amendments 155 and 42 concern the priority removal notice regime to be introduced by Clause 18ff. These relate to the specific sanction, introduced by Clause 21, of restricting a claimant to an expedited appeal process if the claimant provides any information or evidence after the date specified for these to be provided.

Amendment 155 seeks – like e.g. Amendments 139 and others – to establish what are good reasons for information or evidence having been provided after the specified date such that, if a claim is refused, the usual appeal process is to apply.

Amendment 42 seeks to remove from Clause 21 the provision – subparagraph (2) – to exclude a person subjected to an expedited appeal from seeking permission to appeal to the Court of Appeal against any error of law that is made by the Upper Tribunal on that expedited appeal. Clause 21(2) is especially concerning for it seeks to oust any supervisory jurisdiction of the Court of Appeal for the sole appeal hearing that the person will have been permitted, which itself will have been pushed through significantly more quickly than would normally be the case. The risk of error leading to someone being returned to a place where she, he or they may be executed, tortured or suffer some other human rights abuse will, inevitably, be increased. This will be done by both the acceleration of the proceedings and the exclusion of one stage of the normal appeal process – which would usually be to appeal to the First-tier Tribunal with a right to seek permission to appeal to the Upper Tribunal on any error of law made by that lower tribunal. To remove any oversight of the Court of Appeal is such circumstances is neither safe nor justified.

Generally, we are opposed to expedited appeals procedures. Appeal procedures should be conducted according to consistent standards of process and fairness. Anything less is to invite error and injustice, including where this may lead to a person being returned to a place where they face execution, torture or other human rights violation in manifest contradiction to the domestic and international law obligations upon our Government.