Nationality and Borders Bill

House of Lords, Second Reading
5 January 2022

Introduction:

1. Given the short period before Second Reading, we do not attempt a comprehensive assessment of the Bill in this joint briefing. We do not, for example, set out the many ways by which this Bill represents a fundamental repudiation of the UK's international asylum obligations; and the dangerous implications for people seeking asylum in this country and elsewhere of the UK doing this.[1] We and others have done so elsewhere.[2]

2. Instead, we focus upon some of the key objectives that either underpin or are said to underpin the Bill. We do so under the following distinct subheadings:

    - A charter for criminal gangs and exploitation
    - Wrecking the UK asylum system
    - Avoiding judicial oversight over the exercise of power

A charter for criminal gangs and exploitation:

3. There is almost nothing in this Bill that targets criminal gangs and exploitation. Its targets are not these people. Rather, it targets their victims and members of the public who act to assist these victims. Nor is this Bill neutral in its impact upon exploitation. Ultimately, it will positively enable and further enrich people smugglers, human traffickers, and other abusers.

4. The sole provision in the Bill that Ministers can make some claim to being targeted at criminal smugglers is clause 40(2). It will extend the maximum sentence for assisting someone to enter the UK without permission from 14

[1] See e.g., UNHCR's observations on the Bill, September 2021: https://www.unhcr.org/6149d3484/unhcr-summary-observations-on-the-nationality-and-borders-bill-bill-141

[2] We provided detailed evidence by way of submission to the Commons' Public Bill Committee: https://bills.parliament.uk/publications/42865/documents/708

years to life imprisonment.[3] It is, to say the least, doubtful that criminal gangs undeterred by possible 14-year sentences will be deterred by this. However, they are not the main targets of even this increase in sentencing powers.

5. Clause 40(3) extends the existing offence of assisting someone seeking asylum to enter the UK in a very precise way.[4] The offence currently applies only where the person providing assistance does so 'for gain'. That limitation is to be removed. People smugglers and human traffickers are self-evidently acting for gain. The targets of removing the words 'for gain' are people who are acting for purely humanitarian reasons. The increased maximum sentence in section 40(2) applies equally to the expansion of the offence to which clause 40(3) relates. Accordingly, Good Samaritans are not only targeted for prosecution. They are targeted with the most severe of sentencing powers.

6. At Common's Report, the Government belatedly introduced a provision to exempt the RNLI and others acting under the formal instruction of the UK or another country's coastguard from liability to prosecution.[5] For other members of the public, the offence remains. A complex defence, solely related to assistance at sea, was also then introduced under which a member of the public would need to prove she, he or they acted only from the point of the person assisted being in distress at sea.[6] If the person providing the assistance is one of the people on the boat or dinghy – perhaps because they are compelled to take charge by smugglers, they take it upon themselves to try to ensure everyone reaches safety or are simply picked out to be treated as if 'in charge' – the defence is expressly not available to them.[7] This confirms the wider ambition of the Bill – not to target criminal gangs but to target and punish the victims of crime and exploitation and people who seek to help these victims.

7. People are driven to rely upon ruthless and dangerous criminal gangs because their circumstances are so deprived, dangerous, and desperate that, in the absence of any safer alternative, they must risk their lives and wellbeing in the hope of reaching somewhere safe.

8. Some people, including Ministers, claim that people are safe in France and elsewhere and do not need to make dangerous journeys, whether by boat, lorry, or rail to reach the UK. Whatever the motivations for making these claims, their persistence serves only to demonstrate a refusal to accept reality. People are aware these journeys are dangerous and traumatising. Even well-publicised tragedies in which many people have lost their lives are not a deterrence.[8] People attempt these journeys because they have no real alternative; and this Bill does nothing to alter that. Indeed, the Bill compounds it.

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[3] The relevant offence is contained in section 25 of the Immigration Act 1971.

[4] The relevant offence is contained in section 25A of the Immigration Act 1971.

[5] See section 25BA(1) to be inserted by clause 40(4).

[6] See section 25BA(2) to be inserted by clause 40(4).

[7] See section 25BA(3) to be inserted by clause 40(4).

[8] The recently reported tragedy by which 27 people, including children and a pregnant woman, are known to have lost their lives in the Channel on 24 November 2021 has not deterred boat crossings, just as the widely reported death of 39 people, suffocated in a lorry at Purfleet in October 2019, has not deterred similar dangerous journeys.

9. The reasons people take these risks are straightforward. Their circumstances of squalor, violence, misery, inability to access asylum elsewhere and/or separation from loved ones and other connections in the UK compel them to do so.[9] They seek safety from persecution, conflict, and other harms.[10] Many already carry the physical and psychological scars of extreme traumas – whether caused by torture, enslavement, abuse, and fear – in the countries they have fled and passed through. And they seek nothing more than to exercise their right to seek asylum in the UK by the only means that is accessible or even made available to them.

10. UK rules require asylum claims to be made in the UK[11] and provide no visa for anyone to come to the UK to seek asylum.[12] Every amendment tabled at Commons' Committee and Report to create a safe route for even a few people to reach the UK for this purpose, including amendments tabled and supported by Government backbenchers, was rejected by the Government. The Bill includes no such routes. It, therefore, leaves entirely unchallenged the current control of people smugglers and others over how the relatively low number of people who seek asylum in the UK must do so.[13]

11. While the Bill does little if anything to target criminal gangs, it contains a raft of measures to prosecute, penalise and mistreat their victims. Its primary target in all of this is people seeking asylum. It seeks to prevent their arrival and criminalise them if they do come.[14] It seeks to prevent them from making their claims here.[15] If they are nonetheless able to do so, it seeks to prevent them establishing their claims.[16] And if, despite all of this, they are able to establish their claim to asylum in this country, it seeks to penalise them even then. Clause 11 will do so by meagre grants of temporary permission to stay, prolonged

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[9] Amnesty documented much of this in northern France in December 2019. The situation has not improved. See: https://www.amnesty.org/en/documents/eur21/1585/2019/en/

[10] Home Office immigration statistics are published quarterly. They not only show that most people who seek asylum in the UK are entitled to asylum; they indicate that the people who have made the crossing by sea have a disproportionately high success in the asylum and appeals system if and when they are able to make their claims.

[11] This is longstanding Home Office policy and is confirmed in clause 13 of the Bill, which designates where an asylum claim must be made.

[12] The rules not only include no provision for a visa to be granted for this purpose but comprehensively provide for any application to be refused and any visa to be withdrawn if the purpose for which it is sought or obtained is to make an asylum claim.

[13] Asylum claims in the UK have remained relatively low for several years; and significantly lower in absolute terms to any comparable EU neighbour and significantly lower in relative terms to most EU countries (the outliers are Eastern European States).

[14] There are various provisions to do this including the maritime powers in Schedule 5 and the expanded offences and sentences in clauses 39 and 40.

[15] Of particular significance is clause 15 to empower the Home Secretary to treat a claim as inadmissible and so refuse to consider it.

[16] This is done by procedures that are fast tracked; procedures out of country (so-called offshoring); pre-emptive directions to decision-makers to treat a person's credibility as damaged or their evidence as of little weight; and by provisions to unilaterally define and confine the settled meaning of the Refugee Convention (including the definition of a refugee).

uncertainty as to people's future in the UK, no recourse to public funds conditions on their stay here and a denial of family reunion.

12. This criminalising, punishing, and vilifying of people is a gross repudiation of asylum rights and respect for humanity. It will be a windfall for criminal gangs and other abusers. If people are pushed back to squalor, violence, and exclusion, they will be compelled to attempt another dangerous journey. If obstructions to one route become too great, in the absence of any safer alternative, people will depend upon smugglers who will find other, often more dangerous, routes by which to exploit people. If the conditions that people meet in the UK – even people recognised as refugees – are made more severe and hostile, people will become more reliant on new abusers, who can exploit their need to sustain themselves and find shelter. If refugees are precluded from sponsoring even their closest family members to obtain visas to join them, those family members will turn to the same gangs to reunite with their family member.

13. None of this is anything other than a charter for criminal gangs and exploitation of people on journeys to the UK and in the UK. It makes a mockery of this Government's claim to be a champion in the struggles to end modern slavery and violence against women, including domestic slavery and domestic abuse.

14. Home Secretaries habitually appear to believe that management of the UK's immigration and asylum systems can be advanced by seeking to criminalise failure to comply with their rules and policies. It is a false belief. One made more harmful by the equally habitual practice of maintaining rules and policies that are constantly in flux, made hugely complex and pay little if any attention to the realities, needs and rights of the people affected by them. This criminalisation, if ever to be acted upon, is costly. Because it can never be fully acted upon it is arbitrary – occasionally singling out one or two unfortunate people among many for prosecution and imprisonment at great expense to the taxpayer. It does make the system more foreboding and so adds to the fears and deprivations that cause people to become vulnerable to a host of abusers. It is also used to give a false impression of tackling serious crime and exploitation – such as where unfortunate individuals are singled out from among a group of people seeking asylum by boat and treated as ringleaders and smugglers.[17] The time, money and other resources expended to maintain such false impressions are resources that might be directed to actually tackling exploitation or supporting its victims. We deplore the approach in this Bill as in previous legislation.

Wrecking the UK asylum system:

15. The recklessness of this Bill is not limited to providing opportunity and encouragement to smuggling gangs, human traffickers, and a host of other abusers. The wider social harms and costs of this Bill are similarly not so limited. The Bill threatens to wreck the UK's asylum system – which will undoubtedly have many wider social costs – even as Ministers make claim to be fixing that system. We highlight three aspects to this.

[17] See e.g., https://www.theguardian.com/politics/2021/dec/12/legal-challenge-seeks-to-end-uks-jailing-of-asylum-seekers-who-steer-boats

16. First, Ministers are already responsible for generating dreadful backlogs in the asylum system. They have greatly exacerbated these by their foolhardy decision to introduce rules under which people who make claims in the UK are refused admission to that system on the basis the Home Office will seek to persuade other countries to instead receive the person into their systems.[18] Other countries already receive far more claimants than does the UK.[19] These rules have predictably proven entirely ineffective at achieving anything other than enormous uncertainty and distress to people seeking asylum while increasing the asylum backlog by many thousands of claims.[20] Yet, clause 15 of this Bill seeks to entrench this in primary legislation.

17. Second, quite apart from exacerbating backlogs, this Bill sets out to significantly increase the workload of the Home Office. Clause 11 will do so in at least two potentially dramatic ways:

    a. Granting refugees only very short periods of permission to stay:[21] This will mean they must soon and repeatedly thereafter make several further applications to extend their stay.[22] Every such application is additional work for Home Office decision-makers necessitated solely by a refusal to provide the long-term security that a refugee needs to recover from trauma, rebuild their life and integrate successfully in the community. Worse, people whose trauma, isolation and misunderstanding of the process is too great may simply miss the deadline for any one of these applications. They will become overstayers – itself a criminal offence[23] – with all the additional complexity that arises from the need to urgently regularise their stay in the UK.

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[18] Amnesty wrote to the Minister on 17 December 2020 concerning these rules with warnings that have been borne out since their implementation on 31 December 2020 at 11pm. Our letter and the Minister's reply are available here: https://www.amnesty.org.uk/resources/amnesty-uk-letter-immigration-minister-ministers-reply-regarding-immigration-rules

[19] A matter emphasised with sources of data in the joint submission of Migrant Voice and Amnesty International UK to the Public Bill Committee, at e.g. paragraphs 6, 33(c) and 45, which submission is available here: https://bills.parliament.uk/publications/42865/documents/708

[20] Data taken from the Home Office immigration statistics quarterly release, 25 November 2021, covering the period to end September 2021, shows that since 31 December 2020 at 11pm the Home Office identified 7,006 people for whom it considered applying those rules. It formally issued notices to 6,598 of these people that it was actively considering trying to transfer them to another country. It has served 48 people with decisions that it will not admit them into the UK asylum system for this reason. It has transferred 10 people. It says some of these people departed voluntarily. It has, however, admitted 2,126 people into the asylum system after commencing this procedure in their case. Meanwhile, the asylum backlog has risen over this time to 67,547 outstanding claims. That will now include the 2,126 people belatedly admitted into the system but will not include the several thousand more people who can be expected to be admitted in due course.

[21] Clause 11(5)(a) & (6)(b). It has been indicated that 30 months permission to stay is to be granted to the refugee.

[22] Clause 11(5)(b) & (6)(c). It has been indicated that repeated applications will be made up to at least 10 years permitted residence before the refugee may apply for indefinite leave to remain.

[23] An offence which this Bill is, by clause 39, to increase the potential sentence of imprisonment to 5 years.

b. Making 'no recourse to public funds' a condition of the permission to stay that is granted to a refugee:[24] Ministers acknowledge that leaving a refugee homeless and destitute would be unlawful and unacceptable. They say, therefore, that facility will be provided for a condition of no recourse to public funds to be lifted. This will require an application. Instead of the relevant Jobscentre Plus office, social services or other department simply assessing a person's eligibility for support in the usual way, the refugee will first need to apply to the Home Office to persuade that department to lift the condition. Every such application will again be additional work for Home Office decision-makers necessitated solely by a refusal to provide the security that a refugee needs. Worse, it can be expected that some, perhaps many, refugees will become destitute and homeless because of this. That will not only add considerable complexity to addressing their welfare needs. It will exacerbate the risk of people becoming overstayers with all the distress, further complexity and workload that is likely to cause.

18. Third, the Bill includes a host of provisions that intentionally set out to diminish the prospect that a refugee will be able to substantiate her, his or their entitlement to asylum. Failing or refusing to recognise the status of refugees undermines confidence in the asylum system. For the people wrongly refused asylum from persecution, there is no real alternative but to explore every avenue of seeking to prove their status because not doing so is either to remain in limbo or to return to a place where the person faces torture, disappearance, execution, or some other extreme harm. Fresh claims, onward appeals and judicial review claims must be anticipated – what else is a refugee to do? The refugee will also need to seek financial and housing support from the Home Office. If this is all inaccessible or ineffective, a refugee may have to go to ground simply to save their life. Of course, that not only puts them at further risk of criminal exploitation. It generates its own increase of work for the Home Office, which is responsible for the complex and costly task of identifying and managing people in the country without permission – including an increased population of people present and entitled to asylum here but wrongly deprived of that. The various ways in which the Bill will profoundly exacerbate these problems include:

    a. Provisions to pre-emptively direct decision-makers, at the Home Office and in the tribunal appeals system, to treat the credibility of a person seeking asylum as damaged and treat the evidence they submit as of little weight:[25] Such directions are entirely inappropriate. Either decision-makers are competent to assess evidence and decide matters of law and fact, in which case these directions do nothing more than risk that a decision-maker wrongly rejects the claim or appeal of a refugee because of the direction rather than proper assessment of the law and evidence.

[24] Clause 11(5)(c) & (6)(d)

[25] Clauses 18, 21 and 25 include directions to decision-makers to treat specified conduct by a claimant or appellant, including failure to provide evidence or grounds for their claim within a time imposed by the Home Office in any individual case, as damaging to that person's credibility or as requiring that person's evidence to be treated as of little weight.

If, on the other hand, decision-makers are not competent, they should not be in post.

b. Provisions to fast track asylum claims and/or appeals, including in detention:[26] Detained fast track processes have caused a great deal of harm to many people, whose claims were rushed through an appeal system in a process that could not do justice because of both its speed and the impact of detention.[27] It is deeply troubling to see the Government seeking legislative authority to reintroduce this injustice. As before, people are likely to have their claims rushed through only to be left languishing for long periods in detention because of the refusal of asylum.[28] That may result for no better reason than no effective opportunity has been given for someone to tell their lawyer let alone the Home Office or an immigration judge what has happened to them or secure the evidence they may need to establish their claim.

c. Provisions to unilaterally define and confine the meaning of the Refugee Convention (including the Convention definition of who is a refugee) including in ways that are contrary to settled international and domestic law: The various clauses following clause 29 seek to do this. Several of these either add complexity or are intended to renege upon settled understanding of asylum law or both. The outcome again can only be a greatly increased prospect that people who are refugees are refused asylum – not because they do not face persecution if returned to their home country but because the legislation will have unjustly stacked the decision-making process against them.

19. Ministers make various complaints about the pressure they claim the asylum system has been put under. They have done this themselves. Asylum claims remain relatively low in the UK, but Ministers policies have undermined the capacity of the system to manage its responsibilities. This Bill will greatly worsen all of this.

Avoiding judicial oversight over the exercise of power:

20. The recklessness inherent in so much of this Bill is exacerbated by an intention to avoid or exclude judicial oversight from the exercise of various powers to which it relates. This is consistent with the Government's intentions by the

[26] Clauses 23 and 26 provided for accelerated appeals, including in detention.

[27] In *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber), Upper Tribunal (Immigration and Asylum Chamber) & Secretary of State for the Home Department* [2015] EWHC 1689 (Admin), the High Court concluded that appeals in the previous detained fast tracks were unlawful by reason of their "*…allowing one party to the appeal to the put the other at serious procedural disadvantage without sufficient judicial supervision, the Rules are not securing that justice be done or that the tribunal system is fair.*" The Court of Appeal rejected the Lord Chancellor's appeal: [2015] EWCA Civ 840 finding the process to be "*systemically unfair and unjust.*"

[28] Among the many profound harms and injustices of the former detained fast-track process highlighted by Bail for Immigration Detainees (BID), in their report *Out of sight, out of mind* (2009), were examples of people detained for many months after an accelerated detained process that lasted barely weeks: https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/174/Out_of_Sight__Out_of_Mind.pdf

Judicial Review and Courts Bill to oust the constitutional jurisdiction of the High Court to oversee the tribunal appeals system (including as this applies to asylum and human rights immigration appeals).[29] The impact of that other Bill is liable to be made all the more severe by several provisions of this Bill – including those that pre-emptively direct tribunal judges as to their role in assessing credibility and weight to give to evidence, those that will require appeal procedures to be fast-tracked and those that seek to redefine the meaning of the Refugee Convention.[30]

21. There are several other aspects of this Bill, and belated Government amendments to it, that appear to enlarge upon the desire to exclude judicial oversight of the exercise of ministerial power. We draw attention to the following by way of example:

    a. Introducing a power to deprive a British citizen of their citizenship in secret:[31] During Commons' Committee, the Government introduced Clause 9.[32] It concerns how the Home Secretary may exercise her existing powers to deprive a British citizen of their citizenship.[33] They are constructed in ways that greatly disproportionately affect black, Asian, and other minority ethnic citizens. Clause 9 is to permit the Home Secretary to exercise these powers in secret. Ministers have emphasised that the right of appeal will remain. What good is any such right to a person if she, he, or they are kept unaware of it and of the need for it to be exercised? The power to strip some people of their British citizenship is already a draconian measure with a disproportionate impact that is an affront to justice and to any sense of citizenship as a unifying status of all who possess it. Permitting such a power to be exercised in secret ought to be unthinkable. Clause 9 has provoked fear and anger among many people and communities; and we share their outrage.[34]

    b. Removing the express power for the Home Secretary to admit a person into the UK asylum system having become satisfied that there is no reasonable prospect of acting on her decision to treat the person's claim as inadmissible:[35] The Government removed this power at Commons' Report. That was an extraordinary thing to have done. In principle, it appears to permit the Home Secretary to leave a person seeking asylum

[29] See Amnesty's supplementary submission to the Judicial Review and Courts Bill Public Bill Committee on clause 2 of that Bill: https://publications.parliament.uk/pa/cm5802/cmpublic/JudicialReviewCourts/memo/JRCB07.htm

[30] Several of these are briefly summarised in the preceding section of this briefing (at paragraph 18)

[31] This was introduced as New Clause 19 during Commons' Committee.

[32] More on this is available from the joint submission of PRCBC and Amnesty to the Joint Committee on Human Rights: https://committees.parliament.uk/writtenevidence/40868/pdf/

[33] The deprivation power is provided by section 40 of the British Nationality Act 1981

[34] See the Parliament petition that has attracted over 250,000 signatures in barely a fortnight: https://petition.parliament.uk/petitions/601583

[35] As originally published, and as published after Commons' Committee, this power had been included in subsection (7)(a) of section 80B, which is to be inserted into the Nationality, Immigration and Asylum Act 2002 by what is now clause 15.

in indefinite and permanent limbo by refusing to consider the person's claim even though she acknowledges she is incapable of transferring the person to another country. In practice, the Home Secretary seeks to shield herself from effective judicial scrutiny for failure to exercise a statutory power that is now removed from the face of the Bill.

c. Removing the prohibition upon the Home Secretary and her agents from action that contravenes UN Convention on the Law of the Sea: This was removed by the Government at Commons' Committee.[36] It was done in relation to new powers in this Bill to stop, board, detain and divert boats (including dinghies and inflatables) at sea for the purpose, among other things, of the Government's intention to pushback boats at sea. Removing this prohibition is entirely inconsistent with the Home Secretary's existing maritime powers;[37] and appears designed simply to avoid effective judicial scrutiny against the UK's international obligations concerning assistance at sea to persons in danger or distress.[38]

d. Including an exemption from criminal and civil liability for agents of the Home Secretary exercising powers at sea: This is to be found in paragraph J1 of Part A1, which the Bill is to insert into Schedule 4A of the Immigration Act 1971. The dangers of the Government's stated intentions to pushback and turnaround boats at sea are profound. If implemented, the risk of fatalities is clear. The compatibility of this policy with any notion of law is entirely dubious; and that those who may be instructed to carry it out are to be exempted from criminal and civil liability in doing so merely serves to emphasise the recklessness of what is proposed.

22. These are not the only ways by which this Bill seeks to avoid or exclude judicial oversight. Clause 28, which is to permit the use of what are referred to as 'offshore' asylum processes is a particularly stark example. Among the many appalling injustices done by the Australian offshore policy was the effective exclusion of legal, judicial, medical, humanitarian and media scrutiny – all of which at enormous human and financial cost and, despite what is said by the defenders of this policy, without ending the arrival of people seeking asylum including by boat.[39]

Conclusion:

23. Save for important provisions in clauses 1 to 8 to correct historical injustice, discrimination and unfairness in British nationality law, this Bill is dangerous. Save for those first eight clauses, we are vigorously opposed to it and gravely

[36] As originally published, Schedule 5 in introducing section 28LA to the Immigration Act 1971 included this prohibition as section 28LA(4).
[37] e.g., sections 28M(4) and 28N(4) of the Immigration Act 1971
[38] Article 98, UN Convention on the Law of the Sea
[39] The voluminous evidence provided to the Public Bill Committee rebutting the argument and testimony put forward in support of the Australian policy includes this detailed submission by the Kaldor Centre for International Refugee Law at the University of New South Wales, Sydney: https://bills.parliament.uk/publications/43063/documents/791

concerned as to the impact it, and the policy underlying it, will have on many thousands of people in the UK; and potentially, by setting such a reckless example, millions more people elsewhere.