Nationality and Borders Bill

House of Lords Report
28 February 2022

Compliance with the Refugee Convention

New Clause on Convention compliance, Clause 11 (differentiation), Clause 15 (inadmissibility), Clauses 18, 21 & 25 (damage to credibility & minimum weight to evidence), Clause 28 (offshore processing), Clause 39 (immigration offences), Clause 40 (humanitarian assistance to people seeking asylum), New Clauses on safe and legal routes

BARONESS CHAKRABARTI
LORD JUDGE
LORD PANNICK
BARONESS HAMWEE

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Before Clause 11, Insert the following new Clause—

"Compliance with the Refugee Convention Nothing in this Part authorises policies or decisions which do not comply with the United Kingdom's obligations under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees."

Member's explanatory statement
This new Clause reflects the Government's stated intention of compliance with the Refugee Convention and ensures Part 2 provisions are read subject to that international legal obligation.

PRESUMED PURPOSE:

To guarantee that policies implemented and decisions taken under powers provided by the Bill are compliant with the Refugee Convention.

BRIEFING:

We regard this amendment as of especial importance given the content of the Bill and the limited effect that several of the amendments tabled to some of its key clauses would have. That limited effect is addressed in this briefing in relation to specific amendments.

As indicated in the Member's explanatory statement, it is Ministers' stated position that it is for them – subject only to securing Parliament's approval, ultimately by securing the support of their majority in the other place – to decide upon the meaning of the Refugee Convention. As Baroness Williams of Trafford stated on day 2 of Committee:

"*…as a sovereign nation, it is up to us to interpret the 1951 Convention.*"[1]

Accordingly, Ministers resist criticism of the many ways by which the Bill sets out to undermine that Convention on the basis that it is simply for them to determine the meaning of this vital international agreement. In doing so, Ministers have refused to accept, still less address, authoritative assessments of the Bill's incompatibility, its plain incompatibility with the settled interpretations of the UK's higher courts or any wider criticism, including the overwhelming rejection via the Government's public consultation of what is now in the Bill concerning refugees and asylum.[2]

Those authoritative assessments include those of UNHCR,[3] the Joint Committee on Human Rights,[4] legal opinion of leading refugee and asylum lawyers,[5] several Law Lords who have participated in debates at Committee[6] and the assessment of Amnesty International among others.[7]

Clauses 29 to 37, in particular, have been widely exposed as in flagrant conflict with the settled jurisprudence of the UK's highest courts.[8] However, these 'interpretation' clauses are far from the sole way by which this Bill fundamentally challenges the notion of respect of internationally shared obligations agreed by Treaty. Among the most egregious of the other provisions, which are an affront to the spirit, purpose and letter of the Refugee Convention, we would highlight the following.

Clause 11 (differential treatment of refugees):

Amnesty and Migrant Voice strongly support the removal of this clause from the Bill (as tabled by Lord Kerr of Kinlochard, Lord Rosser, Lord Etherton and Lord Paddick, amendment **28**).

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[1] *Hansard* HL, 1 February 2022 : Col 852

[2] The Government publication of the consultation response appears designed to reveal as little as possible, but in the Overview of its publication it is clearly stated that "*around three quarters of those who responded said they opposed many of the policies set out*".

[3] The UN High Commissioner for Refugees (UNHCR) has published its various statements, analyses and legal opinion on this Bill.

[4] The Joint Committee in its Twelfth Report of Session 2021-2022 has been clear that it considers several provisions of Part 2 (Asylum) "*are inconsistent*" with the Refugee Convention.

[5] The legal opinion of Raza Husain QC and others commissioned by Freedom from Torture is publicly available and plain.

[6] Law Lords who have participated in debates at Committee and/or tabled or put their names to amendments and thereby passed damning verdicts on several provisions in this Bill include Lord Judge, the former Lord Chief Justice, Lord Etherton, the former Master of the Rolls and Lord Brown of Eaton-under-Heywood, a former member of the House of Lords' appellate committee and Justice of the Supreme Court.

[7] Amnesty and Migrant Voice have not lightly condemned this Bill, particularly in relation to its asylum provisions, as "*a charter for criminal gangs and exploitation*", "*wrecking the UK's asylum system*" and an attempt at "*avoiding judicial oversight over the exercise of power*", as we did in our Lords' Second Reading briefing. Responses by Ministers in Committee have not altered our assessment.

[8] See e.g. the legal opinion of Raza Husain QC, *op cit*

There is no saving Clause 11. It is fundamentally abhorrent to the Refugee Convention, and international human rights law more generally, to seek to withhold or severely curtail rights afforded to a refugee on arbitrary grounds. That the grounds on which Ministers seek to justify Clause 11 are arbitrary is manifest on the face of the Convention, which establishes the rights of refugees on a universal and equal basis. Where there is any permitted deviation from this, it is expressly stated – as in Article 32.2 where the protection against *refoulement* is withheld from certain refugees who are not lawfully present. Clause 11, however, seeks to permit the Secretary of State to deny a refugee effective protection, family reunion, the long-term security that may be necessary for effective access to the labour market and basic housing and welfare provision. None of that is Convention compliant.

Clause 15 (inadmissibility of asylum claims):

Inadmissibility of asylum claims (Clause 15): We strongly oppose the existing policy that Clause 15 seeks to place on the statute book. That policy is currently implemented via the immigration rules.[9] Accordingly, merely deleting Clause 15 (as tabled by Lord Rosser, Lord Paddick and Lord Etherton, amendment **31**) is inadequate; and Amnesty had proposed amendment to constrain the exercise of any policy for transferring responsibility for people and their asylum claims from one country to another. Amnesty's proposal would have imposed three cumulative conditions on the policy:

(1) Operation of the policy in any individual case would only be permitted where there is a pre-existing agreement with the country to which it is proposed to transfer the person and their claim for that purpose.
(2) That agreement must be mutual. In other words, to the degree that it establishes the basis for transferring any person from the UK, it must equally provide for transfers to the UK.
(3) Real connections – including family connections in the UK – must be recognised as a basis for transfer to the UK.

Each of these conditions is minimally needed to ensure the policy respects the fundamental purpose of the Refugee Convention, which is to promote shared responsibility among the international community for providing asylum. The conditions are also needed to ensure that policy does not continue to wreck the UK asylum system with devastating delays and escalating backlogs, none of which can provide any legitimate basis or context for refusing to permit someone entry into the asylum decision-making process.

Clauses 18, 21 & 25 (damage to credibility and minimal weight to evidence):

Amnesty and Migrant Voice are strongly opposed to all of these clauses and their equivalents in the provisions of Part 5 (Modern Slavery). They ought to be removed from the Bill. Whereas we recognise the value of probing amendments that were pursued at Committee, we do not consider that attempts to mitigate these clauses by seeking to exempt certain categories of claimant are adequate. They may even be harmful to the claimants they seek to protect.

[9] See paragraphs 345A to 345B of the Immigration Rules

The starting point is that statutory directions to decision-makers as to what should be made of the credibility or evidence of a claimant or appellant, who appears before them, are simply incompatible with any proper or reasonable decision-making process. Parliament cannot predict the proper assessment of credibility or weight of evidence in a case that is not before it. Moreover, in pursuing these clauses, Ministers are inviting Parliament to forcefully disrespect and undermine the integrity and function of decision-makers charged to make decisions on asylum claims and appeals.

The vice of these clauses may be briefly highlighted in relation to Clause 25 (minimal weight). Imagine someone seeking asylum, who possesses indisputable and conclusive evidence establishing the risk to them of torture, disappearance or other persecution that comes from an impeccable source. But for no good reason whatsoever, this evidence is submitted late. A decision-maker, unencumbered by Clause 25, will consider the lateness of the evidence's presentation but dismiss the relevance of that in the face of its obvious probative value. This is because the role entrusted to the decision-maker is not to police procedural compliance but to assess claims to asylum, having regard to any procedural failing insofar as this properly in any individual case may shed some light on the quality of the claim that is made. However, a decision-maker constrained by Clause 25 is to do something that is at once wholly fanciful and manifestly destructive of that decision-maker's very purpose. That is to imagine and give effect to the notion that the evidence before the decision-maker does not possess the weight it clearly does; and in doing so to condemn with eyes wide open in reality, but firmly shut in law, a refugee to the very risk of return to persecution from which the decision-maker ought to safeguard that person.

Exempting certain categories of people from these baleful provisions risks doing harm to those very people. This may be most easily explained by way of example. Imagine that survivors of torture are specified as exempt. This may be done because it is correctly understood that torture survivors are disproportionately likely to struggle to meet any procedures or deadlines imposed for disclosing information and evidence. However, if it is done, it can be anticipated that those responsible for the asylum system will become increasingly concerned that the procedures and deadlines, the importance of which are to be elevated by these clauses of the Bill, may be undermined by people making claims to be torture survivors. These concerns will themselves be likely to be further exaggerated by the additional demands on the bureaucracy of applying the exemption in favour of torture survivors. The result that can be anticipated is one of greater scepticism towards survivors of torture. If so, not only will the torture survivor be put at risk of facing the damage to credibility and effective exclusion of particular evidence, which these clauses will deliver. The survivor will be more comprehensively disadvantaged by a general rejection of her, his or their history of surviving torture – itself likely in many cases to be a vital element of their asylum claim – and by a conclusion that not only is this not made out but is an example of deception that undermines their credibility all the more thoroughly. The answer to these concerns is that the clauses in question ought to be deleted.

Clause 28 (offshore processing):

Amnesty and Migrant Voice are implacably opposed to the policy of offshore processing. The arguments against it have been well rehearsed – including its huge cost, its abandonment of Refugee Convention responsibilities, the cruelty that has

been done elsewhere under such a policy and its ineffectiveness even for the improper purposes to which it has been put.[10]

If Lords wish to effectively put an end to dangerous speculation about implementation of such a policy – which we would very much welcome – they need to go further than merely removing Clause 28 (as tabled by Lord Rosser, Lord Paddick and Lord Etherton, amendment **36**). That clause and Schedule 3 make amendments to the existing powers by which such a policy may be implemented, which sit in Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. If Lords are to make Clause 28 a priority, we would respectfully urge that doing so must extend to removing the relevant provisions in the 2004 Act. The need for this was emphasised by the response of the Minister to Lord Paddick at Committee in debate on this clause:

> "*…it has been possible, for almost 20 years, to remove individuals from the UK while their asylum claim is pending if a certificate is issued under Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.*"[11]

The sense in removing the 2004 Act provisions is emphasised by the fact that, despite these powers being available to the Home Office for almost 20 years, spanning Labour, coalition and Conservative governments, this policy has never been implemented. Finally removing these provisions would put to bed 20 years of useless distraction from what should be the focus. That is improving the effectiveness of the asylum system in efficiently and safely identifying people in need of protection, providing that protection to which they are entitled and responsibly managing the circumstances of people who are properly identified as not in need of protection.

Clause 39 (immigration offences):

Amnesty and Migrant Voice support each of the following amendments in the absence of any stronger purpose in defence of the right to seek asylum from persecution.

We regard it as unnecessary and improper for the Government to seek by this Bill to extend immigration offences to arrival rather than entry to the UK. Arriving without permission is a matter that is properly dealt with by administrative regulation rather than criminal prosecution. The damage of generally escalating the means by which the State seeks to deal with 'arrival' to matters of criminal prosecution is emphasised by the contradiction of such measures with the duty to receive and respect people seeking asylum and their right to do so. But given the many barriers that have been erected over the last couple of decades to people seeking asylum accessing ordinary means of travel – such as plane, train or ferry – by which a person may arrive at a point of immigration control to seek entry, it is near impossible for most refugees who seek safety in the UK to do so by any means other than arriving and entering before any claim for asylum can be made. In those circumstances, we consider that the amendments do not go nearly far enough and that the offences (identified as D1 and E1 in Clause 39) to which they relate should simply be removed from the Bill.

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[10] A relatively recent systematic analysis of the Australian experience of this policy is available from the detailed written evidence of the Kaldor Centre for International Refugee Law at the University of New South Wales, Sydney to the Commons' Public Bill Committee.

[11] *Hansard* HL, 8 February 2022 : Col 1418

BARONESS MCINTOSH OF PICKERING

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Clause 39, Page 40, line 7, leave out "arrives in" and insert "enters"

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Page 40, line 14, leave out "arrives in" and insert "enters"

***Clause 40 (prosecuting humanitarian action)*:**

Amnesty and Migrant Voice support each of the following amendments. These are minimally necessary to ensure that people acting for purely humanitarian reasons, including doing so to save life at sea in fulfilment of moral and legal obligations, are not put at risk of prosecution. It is a mark of just how damaged has become any sense of human value and respect for life and human rights that Ministers are pursuing by this Bill a policy of intimidating, deterring and punishing humanitarian action. These basic values ought to be ones that government promotes even accepting that at times those who pursue them may do so – sometimes wholly legitimately and necessarily – not always in ways that government may welcome.

It is not enough to leave to the discretion of officials whether, after the event, to prosecute. Nor is it enough to leave to the judge, jury and trial process whether a defence can be made out.[12] The damage Clause 40 will do starts long before any of this. Intimidating and deterring humanitarian action with the threat of prosecution and imprisonment will cost lives. It will also impose very heavy burdens on those of sufficiently strong integrity to nonetheless act on humanitarian values even if they may ultimately escape prosecution or conviction.

LORD ROSSER
LORD PADDICK
BARONESS MCINTOSH OF PICKERING

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Clause 40, Page 41, line 40, leave out subsection (3)

Member's explanatory statement
This would give effect to the recommendation of the Joint Committee on Human Rights to maintain the current position that the offence of helping an asylum seeker to enter the United Kingdom can only be committed if it is carried out "for gain".

BARONESS MCINTOSH OF PICKERING

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Clause 40, Page 42, line 7, at end insert—

> ", or if the person performing the act of facilitation reasonably believed that, if Her Majesty's Coastguard or the overseas authority had been aware that the assisted individual was in danger or distress at sea, they would have co-ordinated the act."

Member's explanatory statement
This amendment ensures that a person facilitating the rescue of a person in danger or distress who does not have express orders from HM Coastguard can do so with impunity.

[12] Clause 40 does this even with the highly restricted compromise introduced by the Government at Commons' Report in response to criticism that it had opened up the RNLI and their volunteers to criminal prosecution.

New Clauses on safe and legal routes:

Amnesty and Migrant Voice remain strong supporters of the need for the UK to establish safe and legal routes by which people may seek and receive asylum from persecution without continued reliance upon dangerous journeys and ruthless criminal exploitation. There are several New Clauses that have been tabled. We generally support each of these. We merely wish to emphasis three matters.

(1) In relation to safe and legal routes, Ministers remain either very badly briefed or very far short of transparency about the absence of these routes under existing and longstanding policy. Nobody is permitted to make a claim for asylum unless they are present in the UK. The immigration rules make no provision for anyone to be permitted to come to this country for that purpose. Nonetheless, the UK's relatively modest commitment to providing asylum is achieved overwhelming via its asylum system and therefore relies upon people, who can secure no pre-authorisation for their journey, reaching the UK by such means as are available to them. This Bill as drafted will change none of this.

(2) As regards the various options by which safe and legal routes may be provided, we are broadly supportive of any and all. Nonetheless, we consider it especially baleful that UK policy remains so resistant even to enabling people seeking asylum to do so in the UK where they have family, particularly where the relevant family member is ordinarily resident in the UK.

(3) Nonetheless, in relation to this Bill, we have not made safe and legal routes a particular priority. We regret that. However, we do not consider it is possible for us to do so in the face of a Bill that threatens to all but destroy the UK's asylum system. That is of overwhelming importance because of all the damage it will do internationally as well as in the UK to respect for the lives and rights of refugees. It is additionally and separately of overwhelming importance because the asylum system that is being dismantled is by far the most significant way by which the UK meets any of its shared responsibility to provide asylum – both because the number of people provided asylum by that system is far in excess of any other means by which protection is provided; and because that system is also the foundation for the family reunion visas – bizarrely championed by Ministers in debates on this Bill – which themselves significantly exceed in number of people provided protection by resettlement.

SUMMARY CONCLUSION:

The degree to which Part 2 (Asylum) and certain provisions of Part 3 (Immigration Control) are both incompatible with the Refugee Convention and generally offensive to international human rights law is extremely alarming.

The recklessness and lawlessness of what is to be done by this Bill will not only harm many refugees, it will also:

- wreck the UK's asylum system with potentially enormous costs to the taxpayer;
- enable smugglers, traffickers and other abusers to thrive far more prosperously; and

- send a dismal signal to the rest of the world that the UK has effectively abandoned the asylum responsibilities that it shares with others with the prospect of providing further license to others to shirk those responsibilities.

The complete absence in this Bill of any provision to better enable people forced to flee from persecution to reach a place of safety, establish their claims to asylum and confidently rebuild their lives in welcoming communities, is stark. At every turn, this Bill seeks to impede, deter and punish refugees. That can only do people – many of whom are not only at risk of persecution but have already experienced torture and other extremely traumatising abuses – real harm. It may deter people, who need asylum in the UK, from coming forward or maintaining contact with the Home Office or other authorities. It can only extend their vulnerability to criminal exploitation and abuse in this country and on a journey to it. It cannot provide any encouragement to other nations – many of whom already taking far more asylum responsibility than the UK – to continue, still less extend their efforts to fulfil the Refugee Convention's purpose.

This is set against the opening of a new and potentially devastating conflict in Ukraine, the presence once again of a Taleban government in Afghanistan, not to mention continuing conflict and repression across large parts of the world. Abandoning the UK's asylum commitments at this time is, if anything, even more disreputable and reckless than it would be in other circumstances.