HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Legislative Scrutiny: Nationality and Borders Bill, HC 588

Wednesday 17 November 2021

Watch the meeting

Members present: Harriet Harman MP (Chair); Lord Brabazon of Tara; Joanna Cherry MP; Lord Dubs; Florence Eshalomi MP; Lord Henley; Angela Richardson MP; Dean Russell MP; David Simmonds MP; Lord Singh of Wimbledon.

Questions 18 - 27

Witnesses

I: Zoe Gardner, Policy & Advocacy Manager, Joint Council for the Welfare of Immigrants; Lucy Moreton, Professional Officer, Immigration Services Union.

Examination of witnesses

Zoe Gardner and Lucy Moreton.

Q18 **Chair:** Welcome to this evidence session of the Joint Committee on Human Rights. Half our members are Members of the House of Lords and half are Members of the House of Commons. We are concerned about human rights and scrutinising legislation for the implications for human rights. This is the committee's third evidence session on the Government's Nationality and Borders Bill. Our concerns are the human rights of the right to life, the right not to be discriminated against, the right not to be subjected to inhuman or degrading treatment, the right not to be unjustly detained and the right to family life. There are a number of human rights issues at stake on the issues that this Bill covers.

We have published our first report, which looked at the nationality clauses of the Bill. The Bill has just completed its committee stage in the House of Commons and will then go on to report stage. It will then obviously make its way to the House of Lords.

Today, we are very grateful to have two panels of witnesses. On the first panel, we will hear from witnesses who have experience of conducting asylum casework, both inside the Home Office and on behalf of asylum seekers. The second panel of witnesses provide front-line services to children: an individual representing a refugee and migrant children's advocacy organisation and a medical professional who can speak about scientific accuracy of age assessment methods.

For our first panel, to discuss the asylum decision-making, we have in the room Zoe Gardner, who is policy and advocacy manager at the Joint Council for the Welfare of Immigrants. As people will know, it campaigns for justice in immigration. Zoe is a researcher and campaigner on migrants' rights in the UK and across Europe. Welcome, Zoe.

We also have Lucy Moreton, who is the professional officer at the Immigration Services Union; she is appearing with us by Zoom today. The ISU is the trade union representing Home Office staff involved in UK immigration, customs and border management for people in the Home Office. Lucy assists in employment tribunal proceedings and provides legal advice.

Can I start by asking the first question? The Government, as you will know, accepted Wendy Williams' recommendation made in the Windrush review that Home Office decision-making should be built on principles of fairness, rigour and humanity. That is what was proposed and what the Government accepted. Is asylum decision-making in the Home Office in line with those principles? Will the Nationality and Borders Bill have any impact, positive or negative, on whether those principles lie at the heart of decision-making?

Just to help set the scene, could Lucy describe what that decision-making process is? If somebody applies for asylum, how is the case decided? Zoe and Lucy, could each of you say whether that structure provides for those principles and how the Bill will affect that one way or the other?

Lucy Moreton: The starting point is to provide information. At an early stage, once a claim is made, an applicant will be able to provide information through an interview or written submissions. They could be photographs or video evidence. All of that is gathered together and considered by an asylum decision-maker who is usually at executive officer grade. They will make the initial decision as to whether the claim merits a grant of asylum or not, or a lesser grant of leave to remain because removal is impracticable. If that decision is adverse, it can be challenged through the courts. If it is positive, it is enacted by an administrative officer who does the associated paperwork for it.

The Home Office is working really quite hard to embed the findings of the Williams report. The factors that led to it were of immense concern, particularly to the members this union represents, because they are so deeply involved in the very front-line decisions that sparked the unfortunate events leading to that review. The Bill itself is not likely to change that work to embed those provisions. Home Office staff, who are the members we represent, do their absolute best to be completely fair and robust.

The issue comes because of the pressure of work, the expectations with timelines and the requirements to make decisions within a short timeframe. There is a lack of concern for their mental health or well-being. There is an element that just suffers burnout, and that erodes the humanity of decision-making. Once you have heard really horrific stories over and over again, you can become very hardened to it if you do not have the space to process that and take care of your own mental health and well-being. It is no criticism of the staff where that has happened; they need greater support in order to keep that essential element of humanity there.

Zoe Gardner: Thank you very much for having me here. For full transparency, I should probably say that I have never acted as a caseworker on asylum cases. I represent JCWI, which has a legal team that takes these cases. I bring that expertise to this.

Yes, there is more or less total convergence of opinion among expert groups of people working in the asylum rights area that Home Office decision-making is extremely unsatisfactory in asylum cases for many of the reasons that Lucy has already pointed out. It has been raised repeatedly, in expert reports from colleagues of mine within the sector of refugee protection, from the Independent Chief Inspector of Borders and Immigration, and from parliamentary committees like yours previously, that there is a lack of resourcing and understanding of the evidence on vicarious trauma and compassion fatigue that can take place within the Home Office.

It is a recognised medical and perfectly ordinary defence mechanism that, when you continuously hear these terrible stories, you begin to disbelieve them or tell yourself that they are exaggerated in some way. There is a real problem stemming from a lack of support and resourcing within the Home Office asylum decision-making sector that is resulting in poor-quality decisions. We see the impact of that on our clients every day. We also see it in the appeals figures. Over half of asylum appeals are allowed, which means that the decisions to refuse somebody protection were made wrongly in the first instance. Of course, these are issues of life and death. This goes again to the pressures that are placed on the asylum casework decision-makers, because they are forced to make decisions that really have people's lives hanging in the balance day in, day out.

Unfortunately, the Bill that we have before us takes no steps whatever to correct those long-standing issues of poor-quality asylum decision-making. The Bill will exacerbate those problems in three key ways, which I hope we will get to in more detail throughout the session.

First, it will introduce greater delays into the asylum system through the inadmissibility rules that introduce delays in and of themselves, but also through increasing the complexity of how decisions need to be made.

Secondly, it will increase the likelihood of further appeals and legal challenges. A longer time will be spent in the court challenging these decisions because of that complexification of the process of who qualifies for what type of protection.

Finally, and most importantly, it will result in more people who are genuinely fleeing persecution being denied the protection they need, because it introduces measures that fly against the scientific evidence to damage the credibility of people. That will obviously have a severe impact on the protection of those people's human rights, their protection from degrading treatment and their right to life.

Chair: In an earlier report after we looked at the Windrush error in decision-making, which was not asylum but was about Home Office decision-making, we suggested that independent decision-making should be considered. If you are making a very important decision, it should be set aside from the Executive. What do you think about that?

Zoe Gardner: That is a very interesting suggestion. Look at the national referral mechanism and the single competent authority, which is where decisions on trafficking and modern slavery cases are made. That body has a degree of autonomy and independence from the Home Office. It is a highly trained decision-making force, and we find that the decisions coming out of there are generally of a higher quality. It may be one route to pursue.

There is an absolute culture that it would appear comes from the top of the department in the Home Office, both at a ministerial level and in the

Civil Service, of this department seeing itself as a gatekeeper. It is trying to

catch people out, to prove that people are telling a lie and that they do not need the protection they say they do, rather than taking pride in the fact that it is the department that could offer protection to the people who need it.

Turning that around into a culture in which people take pride in their ability to protect people would go a long way to changing this problem with poor decision-making. Whether that can happen under the auspices of a Home Office that is clearly hostile towards asylum seekers—there really is no nicer way of putting it—I do not know. Autonomy from the Home Office might be one way of pursuing that.

Chair: Lucy, what do you think about that? Would your members be happier with being away from the political heat of the contested issue of immigration numbers and being able to make decisions in a more independent environment? Is that difficult for you to say?

Lucy Moreton: It is difficult to say. Wherever these individuals sit, they are civil servants. They cannot be insulated from the media coverage or the undercurrent that, as Zoe says, is hostile to migration. They will make the best decisions that they can make in the place they are in. Whether they are independent from the Home Office or not makes less difference than resourcing them properly and giving them the information, training, support and capacity to make sensible decisions that are well reasoned and well argued in a reasonable timeframe. Nobody comes to work to do a bad job; they come to work to do the best they can.

Zoe's and my point about compassion fatigue and becoming hardened and damaged by some of these horrific accounts will happen whether they are independent of the Home Office or not. With the greatest respect to the individuals who are making those initial decisions—I was one of them many years ago—those decisions are made at a relatively junior grade in the Home Office. The political pressures are not felt in quite the same way as they are at a more senior level within the Civil Service.

In the prevailing culture that Zoe observes—I will not comment on whether she is right or not on that—the pressure falls on the more senior leaders. They are arguably more capable of withstanding that and upholding the values of the Civil Service and the Home Office specifically. It rests less with the caseworkers who make the decisions. Whether you are independent or not will probably not have a significant impact.

Q19 **David Simmonds MP:** This is just a very brief pressing of a point. Can I ask both witnesses whether they think there is a better model anywhere in the public sector or the system that might be relevant to apply here? I am conscious, for example, that there have been immigration appeal tribunals. There are also various appeal tribunal mechanisms in

employment, and even in things like parking and commercial disputes. Is there anything we could learn from there that would make this better?

Zoe Gardner: I am afraid that I have one focused area of expertise, so I do not really know of any examples. The Home Office could benefit a great deal in general from more joined-up thinking across other departments, working with others where things are working well, and being open and not defensive about learning from those good examples.

Lucy Moreton: That is certainly true. Nothing that places initial decision-making or that first-instance decision in the hands of a court will necessarily help. It is really important to have a tribunal system, whether that is immigration appeals or employment tribunals, but that first decision is always made by somebody.

It is better to keep that decision-making within the Civil Service model. A lot of parking decisions, for example, are made by contractors. Immigration decisions are so multi-faceted and bound into humanity, and you need so much experience and depth of knowledge within your field and the country field in which you work, that they lend themselves better to a permanent employment model. Like Zoe, I am not aware of any particular best practice. Were there any, I am sure that we and the Home Office would welcome learning from them.

Chair: It is about getting the decision, which Zoe has emphasised is such an enormously important decision in people's lives, right at the outset. We will ask further questions about the appeal success rate of appellants and the incidence of appeal. Apparently, around 75% of asylum applicants whose application is refused at initial level lodge an appeal. Presumably, if the decision were more correct at first instance or had more credibility, there might be fewer appeals and we might have more rapid decision-making.

Q20 **Lord Dubs:** I want to turn to the backlog of asylum applications. Bearing in mind that the number of asylum applications has remained at a fairly consistent level over the past five years, why has the number of asylum applications awaiting a decision increased from approximately 21,000 at the end of 2016 to 57,000 at the end of June 2021? What are the human rights implications of such a delay, and how could the backlog be decreased while ensuring that decision-making processes are fair and the rights of applicants are fully respected?

Zoe Gardner: I am sure that Lucy and I will echo each other again to a degree here, because it is about resourcing the asylum caseworkers. There is a huge amount of churn in asylum decision-making staff. It is hard to retain staff. It is not clear to me that that justifies this extreme increase in delays that we are seeing.

Lord Dubs is absolutely right to highlight the impact that that has. We see that on our clients day in, day out. We are talking about people who are vulnerable and have experienced severe trauma in many cases. They

have no idea how long they will wait, but they are waiting, on average, for really unacceptably extended periods of time just to get a letter back saying when the date of their interview will be.

Chair: What sort of periods of time are we talking about—weeks, months or years?

Zoe Gardner: The average is now over a year, which is astounding. I have some figures here. It will only have gone up from this, but for the year ending December 2020 there were 2,284 people who had been waiting for over three years, and 55 of those were children. This system absolutely is not working. To be honest, it is hard to tell from the outside where the blockage is. It is not acceptable and causes huge detriment to the mental health of the people who are caught within that system.

That is just for the initial decision. As we have discussed and will go into, there are appeals. That is another lengthy process before people eventually get the protection they need and are able to start their lives again. During this time, people are, in almost all cases, not allowed to work or study. They are in accommodation that is completely substandard, especially for the kinds of periods we are talking about. Maybe for a short period, somewhere not that great would be tolerable, but it is not when it ends up being for years at a time.

We see people's mental health deteriorate. In the long term, that is detrimental not only for them as individuals but for the country. Their recovery, ability to integrate and ability to start their lives again are massively hampered by this. They will need long-term support. We see people come in who are bright, motivated, qualified and desperate for help, and we see them be completely broken down and become just a shell. Years later, they call us up and ask, "When am I going to hear?" We cannot give them an answer. It is absolutely unacceptable, and, as I say, this Bill will make that worse.

Lucy Moreton: Part of the answer to the backlog is coronavirus. It is certainly true that the rate of decision-making was impacted by that. It is not all of the story by any stretch of the imagination, but it is part of it.

Retention, as Zoe says, is absolutely horrific within the asylum decision-maker role at the moment. There was a nine-month training programme that has just been shortened to six months through the asylum academy that is just rolling out. The majority of individuals do not remain beyond 12 months, and almost none of them remain beyond 24.

Chair: Do you mean the caseworkers?

Lucy Moreton: Yes. They are the individuals who are making the decisions. That is because of the conditions they work in and the capacity. Remuneration within the Civil Service is not particularly high. They see this as a stepping stone to better-paid roles elsewhere, which is absolutely fair enough; everyone has a right to better their lives and circumstances.

On the impact on mental health and well-being, the sickness rates are very high. The staff surveys report fairly high levels of dissatisfaction and perceptions of bullying and harassment within the departments.

None of this is universal, but they are all pieces of the puzzle of why we need highly trained decision-makers. You can make a decision in a country case far faster if you really know that country. It takes years to build that knowledge. If they stay less than 12 months, we are constantly playing catch-up, trying to recruit new people, trying to train the people we have and trying to replace those who move on into other areas of the Civil Service or out of the Civil Service altogether. That has led to the increase in backlog.

Zoe is absolutely right about the impact on the individuals. If we could make the asylum decision system much faster and get from end to end in six months, in an ideal world that would serve so many purposes. It would lead to the protection not only of the public purse but of the individuals who deserve protection and of the reputation of the UK internationally. Nothing in the Bill as it stands will achieve that. Zoe has quite correctly highlighted that this will just bog us down in legal challenge after legal challenge, which will go on for decades.

Of course, resourcing of the courts is part of this. It is not just getting them from application to decision but getting them all the way through all the court processes, and the court delays are a significant part of that. With respect, if someone has an adverse decision, they are not going to put their hands up and go, "Okay, fine. I'm going to go home" just because it is well reasoned, cogent and correct. They have a right of appeal in the UK and they will use it. That is important. We are a just society, or we try to be. They have a right of appeal, and it is fair and right for them to use that.

Zoe Gardner: I obviously completely agree with the vital importance of that right to appeal, but there is some evidence from the Netherlands, where they have tried various different approaches. When people had gone through a process that they considered to be fair and had had the chance to be heard and to provide all their evidence clearly, and had understood the process they were in, there was evidence that there was greater compliance with the system, even when negative decisions were made at the end. That is a small example, because unfortunately that kind of process is rare around the world. Where it has been tried, it seems to have positive outcomes.

Q21 **Florence Eshalomi MP:** Good afternoon to everyone. One thing you have touched on is issues with caseworkers and productivity. I am a south London MP representing Vauxhall, and I will have been an MP for two years next month. There is a 50:50 split between Home Office and housing casework; that makes up the bulk of the thing. We have seen fewer substantive interviews and fewer decision-making processes with the caseworkers. Lucy, have the asylum caseworkers you represent raised any concerns to you about their workload and general well-being?

Lucy Moreton: Very much done so. The workload across the Civil Service is very pressured. We understand that it is important. The public purse is important. We must all do more with less, but pressure is being placed on

staff to make decisions, particularly in complicated cases. If you cannot take the time to have a proper think about it, do some proper research and write in a considered and measured way, you cannot do a job that you are proud of. Taking away the caseworker's pride in their ability to do a good job impacts their mental health and well-being.

We have touched repeatedly on the point about hearing these horrific stories over and over again. Some of them will be constructed; that is the nature of this. The majority of them will not be. If you do not have time to decompress and process the horror of what you are hearing, that too will take an inevitable toll on your mental health and well-being. You cannot take that time out or receive that care if you are fighting against an unrealistic expectation to make a decision.

In the service agreement, the intention is to make a decision in 26 weeks. With the number of cases the individuals have responsibility for—it is thousands of cases for each individual—that is simply an unrealistic expectation. If we could resource the whole process better and give staff the space to make a proper, considered, careful human decision and to have proper care for their own health and well-being, that would make a huge difference.

Florence Eshalomi MP: You may both be aware that the Permanent Secretary, Matthew Rycroft, outlined all the issues that you have touched on at the Home Affairs Committee on 22 September. He said that they need 1,000 more caseworkers by April 2022. Do the asylum caseworkers you represent have adequate training resources to complete their jobs? Will that increase in support staff help the situation?

Lucy Moreton: The training academy recently reduced the training, which had been a nine-month programme, to a six-month programme. That was in response to staff feedback. If you are recruited into a role, you are recruited to make decisions, but then you are not allowed to make those decisions for three-quarters of your first year, you get annoyed and you go away quite quickly.

They have changed the pattern of training, but that has yet to really bed in, so it is very difficult to tell right now whether this new system of training is adequate. It certainly takes at least two years to become fully conversant with the role that you are fulfilling and the complexities of the decisions that you must make.

The Home Office is proposing to recruit all these new staff. We have to train them, so even if we recruit them by April 2022 they will not be online until much later in 2022. It is also proposing paying an additional recruitment and retention allowance to staff who remain after 12 and 24 months, because we need to build that depth of expertise in people who

have made this decision-making a large part of their career choice and progressed though the grades within it.

Zoe made a very interesting point fairly early on about people being proud to make decisions that protect people, and the need to change the culture from a gatekeeper culture of "Keep out the bad guys"—that is largely what borders, border decisions and immigration decisions are predicated on, particularly in asylum case-working—into something that is a bit more customer-friendly. We did that with the EU settled status scheme, and we put in sufficient resources. Civil servants do not really like the phrase "customer service approach"—certainly, Home Office civil servants do not—but we need to turn it a little. Yes, it is about protecting the UK, national security and fairness for the public purse, but it is also about providing a service that they can be proud of. That culture change would be really important.

Florence Eshalomi MP: I will leave it there, but I just wanted to add my thanks to the caseworkers in the Home Office who have dealt with some really complex asylum cases in my constituency. I am sure that is the case across the country. They obviously need more resources to do their jobs.

Q22 **Chair:** Is there an algorithm monitoring the caseworkers to see what their rates of recommendation of acceptance and refusal are so that somebody's cases are looked at if they are bleeping up above a certain level, or is the integrity of each individual decision respected?

Lucy Moreton: The process is quality-assured, so decisions are double-checked. Yes, there is a time and motion monitor, for want of a better term, that makes certain that people are making the right numbers of decisions and roughly the right proportion of decisions. A senior manager can review any of those.

Chair: I can see the point about getting through a certain number of cases and making a certain number of decisions, but how can there be a right number for accepting and refusing asylum applications? Does that not cut right across the integrity of the process?

Lucy Moreton: When you have a large enough statistical sample, it is possible to draw a statistical conclusion, but that will fall down when your sample becomes smaller and smaller. When you are dealing with how many Afghan nationals over 10 years would be refused or granted, you can make a meaningful statistical decision from that. You cannot make a meaningful statistical distinction when you are dealing with a smaller number.

You are right that it removes the humanity from the process. When you are looking at your counters, for want of a better phrase, and going, "Hang on a minute. I'm a little bit high on the grants at the moment. I need to find some more refusals", you do not want to be the person

whose papers are in front of you, when that person is facing the pressure from their managers to change their grant and refusal rates. It is possible to set the limits based on decades of historical experience, but the practical application of those limits is more difficult.

Chair: Looking at the refusal and acceptance rate of the past will just tell you what was considered to be the percentage of accepted and refused cases in the past. Surely it cannot or should not tell you anything, or even be any part of the picture, if you are considering the human rights of an individual.

Lucy Moreton: Yes, absolutely. The Civil Service has to count. It has to prove what it does in order to get its budgets. Traditionally, the Civil Service as a whole tends to be a little process-driven. Certainly, it falls down when you are trying to apply those numbers and productivity targets to an individual. That can never improve the quality of your decision-making.

Chair: There is a difference between productivity in getting through the number of cases and productivity in the number of refusals.

Lucy Moreton: Yes.

Chair: Those are two very different sorts of productivity.

Q23 **Lord Henley:** You talked just then, Lucy, about the process being quality-assured, but we are assured that the proportion of successful asylum appeals has been steadily increasing over the last decade—that implies that they are the wrong decision—with success rates up from 29% in 2010 to 44% in September 2020. Zoe referred to a figure of about half now being overturned on appeal. Does the number of asylum decisions that are right first time, which is what we want to get, appear to be decreasing? What could be done to improve that quality assurance and enable the Home Office caseworkers to make the correct decisions the first time?

Lucy Moreton: We need better training, more experienced staff and more resources. I know that it is really boring for a trade union to keep coming back and saying, "More resources".

The issue with the rise in asylum appeal rates is twofold. One issue is the pressure on the presenting officer units, who are the Home Office staff members who present the Home Office's case at appeal. These are not legally qualified individuals; they are just civil servants. The pressure on them is such that they are not able to attend. I have been trying to get exact figures and I have not managed to, but, depending on who you speak to, for about 20% to 30% of appeals the Home Office does not present them. Those appeals will be lost immediately. The issue is being able to resource the presenting officers so that we have well-qualified, well-experienced staff who are able to attend every appeal. Can you imagine the situation in the criminal justice system if the prosecution

simply failed to turn up for a day? That is what is happening, and that is not right for the appellants either.

The other problem is the delay in the court system. By the time the courts have made a decision that has been fed back to change the decision-making process at the start of the process, it can be years later. This means that many thousands of cases have been decided in the meantime in the light of the decision of an appellant authority that decided wrongly, but from which the caseworkers have not been able to learn because of the delay in getting it through the court system.

Lord Henley: Could I just pick up on one small bit that I did not quite get? In 20% or 30% of appeals, you do not even turn up at the appeal.

Lucy Moreton: Yes, regretfully.

Lord Henley: That is largely a question of resources.

Lucy Moreton: Yes, absolutely. If there is no presenting officer to do that appeal, no one attends.

Chair: Is that random, or is it decided: "This one's so borderline that we're not going to"?

Lucy Moreton: It appears to be largely random. The response line taken is that it is random and just driven by how many other cases individuals have. If the Home Office were bringing cases to the courts that were so weak that it made a positive decision not to attend and defend them, that would be indefensible. If that were the position, why would we not just grant? It is very difficult to have the Home Office say that it is anything other than a random accident of caseloads.

Chair: It is quite odd when randomness is the reassuring, confidence-building option here.

Zoe Gardner: I just want to come back with some specifics that might help with your question, Lord Henley. I want to talk about the standard of proof. One issue that comes up again and again when asylum decisions are overturned by the courts is that they find that the wrong standard of proof has been applied by the decision-maker. This has come up repeatedly in expert reports. The UN Committee Against Torture criticised asylum decision-making in 2019 for applying the standard of proof that is appropriate in criminal trials, which is the balance of probabilities, when faced with evidence of people who are presenting with evidence of having been tortured.

This is really important at this point, because the standard of proof in asylum cases is deliberately set at a low level, which is not more likely than not but a real risk or a reasonable likelihood. That is because it is a very serious issue if you wrongfully deny somebody who has, in many cases, great difficulty in bringing documentary evidence to show that they have been persecuted because they are gay or were threatened with FGM. You do not get a certificate that shows that you have experienced

these things, so it is very difficult to prove that you are a victim of persecution at that serious level. That is why the standard of proof is set at that level, but there is significant evidence that that is not well understood. It is a training issue among asylum decision-makers.

It is so important to bring this up in this context, because the Nationality and Borders Bill complicates and splits the standard of proof by introducing a higher standard in certain parts of the asylum claim. It will simply make the process more complex. It will make it take more time and involve more legal challenges. It will again mean that people who have faced horrifying situations and face a real risk of being returned to persecution or danger will have to prove the same evidence at two different standards.

To give you an explanation of what I mean, this split standard of proof means that you will have to prove the real risk of what has happened to you on the basis of the lower standard. For example, a Tamil asylum seeker will have to prove that there is a reasonable likelihood that they were detained by the Sri Lankan state, but they will have to prove on the balance of probabilities that they were detained as a member of the LTTE. A gay asylum seeker fleeing homophobic violence will have to prove that there is a reasonable likelihood that they were beaten, but they will have to prove on the balance of probabilities that they were beaten because they were gay. That is absurd. It will complicate the system and make it far more difficult for people who are genuinely fleeing persecution to obtain the protection that they need. This Bill will make the quality of decision-making go down for sure.

Lord Henley: It will make even more important the point that Lucy Morton was making about the need to get training correct.

Zoe Gardner: Even more training.

Lord Henley: We all know the problems of understanding standards of proof, burdens of proof and all that, and even more so for non-lawyers.

Zoe Gardner: Yes. It will exacerbate those problems and make it more complicated for those decision-makers, who will therefore need more training.

Q24 **David Simmonds MP:** The question I was going to put has to some extent been answered already, but I can perhaps draw out some key points from it. First, do you have a view on what measures will be required for a more robust quality control mechanism covering the issues with decision-making that you both described?

Specifically, do you have a view about the transparency of decision-making and how that can be addressed so that the applicant has clarity about what process is being followed and why decisions have been made?

Finally, do you have a view about the benefits or otherwise of the process

being entirely independent? Lucy has already answered that by saying that it needs to be somebody within the Civil Service, for reasons that she has outlined. Would an independent agency staffed by the Civil Service be a more robust and acceptable mechanism than having it done entirely within a government department, for example?

Zoe Gardner: There is a great deal of dysfunction and negative culture within the Home Office. I see the arguments for why independence from the Home Office might be one way of addressing it, but there is a problem with this issue being politicised. This is a few tens of thousands of extremely vulnerable people per year seeking safety in our country. It really should not be front-page news eight months of the year. When the entire government policy seems to be led by the intention to discredit, disbelieve and get rid of asylum seekers, I cannot see a circumstance in which credible, quality processes are put in place for these people who really need our help and should be the major concern of government every day.

Lucy Moreton: You asked how we can approve the assurance. I am afraid it almost amounts to repeating the same things. The individuals who conduct the assurance must have had the training, time and capacity to do that properly and correctly.

Your third question was whether it should be independent. You are correct that I have touched on that. We cannot isolate these individuals from the political narrative. Of course, the Immigration Service was independent once upon a time. It was an independent body separate from the Home Office. It was originally brought back into the Home Office in 1999, with the political remarks that it was not fit for purpose. It has been absorbed into the Home Office as opposed to being an executive group apart from it. Whether it is right to return to that or not, the individuals who make the decisions will still live and breathe the culture and media coverage of the day.

Forgive me. I do not recall your middle point. You had three questions.

Chair: It was about transparency.

Lucy Moreton: Thank you. There is a fine line to be walked. The Home Office, like all government departments, has to publish the standards to which judgments are made. That is available. It is fairly well hidden, perhaps, but it is available. The more you make that decision-making transparent, the easier it is for someone who does not justify protection to know what it is and what bullet points you need to hit in order to get this.

I am very wary of falling into that trap of negative, anti-migrant rhetoric, but certainly not all those who seek our protection meet those requirements. Even at the highest standard at the appellant level, 50% of those cases fail, as well as 50% succeeding. The number is appalling

whichever way you read it, but there are still individuals who seek to exploit the protection of the UK.

Zoe is absolutely right that the burden needs to be low enough. Nobody flees persecution carrying their documentation with them. That does not happen in practical terms, but we also have to have enough regard to individuals who would seek to exploit particularly some of the more obvious

elements that would fall within or be excluded from protection. Is it transparent enough? Probably not, but there are reasons why transparency is more challenging in this instance. Ultimately, the decision on that rests at a political level.

David Simmonds MP: I will press both of you a little on the point about the transparency and independence of the decision-making process. It seems to me that the gold standard would be a process that we all accepted was completely fair, so the numbers of people gaining acceptance through that system would become a politically neutral issue because we would agree that the system was fair, so whether it produced 5,000 arrivals or 100,000 arrivals gaining asylum it must be the right number because the system is fair.

Do you have a view about what steps could be taken through the Bill to move towards a system that would command public confidence as being fair, detached from the numbers of people arriving and the political impact that that has?

Zoe Gardner: There is a real problem with the way this issue is spoken about generally across politics. I would assume very much that anybody who is an MP, and certainly a Minister, understands the definition of a refugee. That is not the case for anybody walking down the street, and it is understandable that people want to feel that they can have confidence in the system, but the way asylum seekers are spoken about does not reflect the legal reality.

A perfect recent example is the Home Secretary claiming that people crossing on small boats across the Channel are not legitimate asylum seekers. In fact, they are, because they come from countries where they are fleeing persecution, enter into our asylum system and lodge a claim for protection. That makes them genuine asylum seekers, and, in many cases, genuine refugees. That is the legal reality. That is the meaning and definition of those words, but if the Home Secretary goes out and says, "They're not. They're economic migrants. They're trying to take advantage", that is the perception that the public will have. There will be a diminishment of trust in that system.

That political reality feeds upon itself and produces the situation that we have now in which the system is entirely dysfunctional and the proposals before us—I hope we will have time to get to a little more detail about what the Bill will really do—will make the situation significantly worse.

Lucy Moreton: It is very difficult to separate the system from the politics completely. I am not sure that I could suggest with any credibility a system that could have so much public faith from the outset that we could reach the outcome that you suggest, which is of course the correct one. If the system works, we take as many people as we take; it does not matter what the numbers are.

We have got to this very low point in faith in the system and the speed of delivery in the system through many years of underresourcing and neglect. We are not going to fix that, certainly not with one Bill, and arguably not at all with this Bill. There is no magic bullet. It will take almost as many years to make the system work as it took to break it.

Improving the quality of decision-making to the extent that the courts uphold the decision of the Home Office in the majority of cases will be a very good start, but in order to get to that point we need to resource and contract the length of time it takes to get from one end of the system to the other. At the moment, it can take an easy 10 years from encounter, whether that is arrival across a border, being encountered in country or being here legitimately and your circumstances at home changing, to getting to the end of the system where you might be looking to a final grant or move.

That can be 10 years, and so much in the world changes overnight. A claim from an individual that might have been perfectly rightly refused in January could be perfectly rightly granted in June, July or August because the global political situation had changed. We do not have the resources to respond to that, and that leads to a lot of the perception of unfairness and the distress experienced by the staff and users of that system.

Q25 **Joanna Cherry MP:** Zoe, you said you would like to address some of the detail of the Bill. Maybe we could come on to that now. I will address my question primarily to you, but Lucy should feel free to come in. I want to talk about the late-evidence clauses in the Bill. You touched upon them earlier. There are a number of clauses in the Bill that would enable the Home Office to require an asylum seeker to provide grounds of the claim and evidence by a specified date. Where an individual fails to do that—to use the language of the Bill, "without good reason"—the Bill requires the decision-maker to take into account the late submission as damaging to credibility and to have regard to the principle that late evidence should be given minimal weight.

Do you think a failure to meet a deadline should damage somebody's credibility and affect the weight given to the evidence? What implications will this have for the human rights of asylum seekers?

Zoe Gardner: Thank you very much for that question. It is an extremely important point that this Bill introduces measures to undermine the credibility of people who submit late evidence.

There are two sides to this. On the one hand, this is part of what many of the clauses in this Bill do, which is basically to replicate existing principles and to couch it in certain language—again, this cultural framing that posits asylum seekers as trying to game the system, as liars and as all the things that, generally speaking, they very much are not. There is already a very clear requirement in the Immigration Rules and the Immigration, Asylum and Nationality Act 2006 that all evidence be submitted at the earliest possible opportunity. If you submit evidence late, you will have to explain why and give a good reason. That principle already exists within the system.

On the one hand, this does not do much, but it requires judges to give minimal weight to evidence submitted late. The reason why evidence may be submitted late is documented in extensive scientific evidence. One of the key reasons is that people who have experienced trauma, particularly trauma such as that resulting from sexual violence, experience post-traumatic stress disorder. One of the many symptoms of that is avoidance. Memories made at times of extreme trauma in your life are stored differently in your brain, and it is very difficult to recollect and reproduce them in a chronological and consistent way. In particular, this goes to women and sexual minorities who have experienced the type of violence that brings about feelings of shame.

Generally speaking, as I said, people on the street in the UK do not understand the details of the asylum system. The people who are coming here to seek asylum do not understand the process by which their claim is being assessed, and they do not know that they have to provide these pieces of evidence. Women who have been victims of FGM, domestic violence or sexual violence do not know that that can be part of their asylum claim. They may find it extremely difficult to explain and give an account of those experiences in detail, particularly when interviewers may be men, interpreters may be men. There are a huge number of very clearly scientifically documented reasons why people do not always provide all the evidence up front straightaway.

In fact, just last week, in the High Court case, David Lock QC confirmed that a person giving an inconsistent account and not being able to give a full account of the traumatic experiences that they have undergone should not be damaging to their credibility. That is reiterated by the UN. There are many reasons why that late evidence might come in at that stage.

As I said, there are already measures in place to say that you must justify giving that evidence late. If you say that this evidence must be given minimal weight and you put that on statutory footing, what if the evidence shows that a person will undergo torture and it is given late? Should that be given minimal weight? Of course not. This is interfering with the constitutional responsibility that judges have in our country to make an assessment based on the facts before them. It is absolutely dangerous to put this requirement in the Bill, because it will mean that

people who are presenting credible evidence at a later stage, potentially due to their trauma, may be denied protection. That is unacceptable.

Q26 **Lord Brabazon of Tara:** The Government have stated that some clauses in the Bill, such as the requirement to act in good faith in Clause 64, will stop challenges being made that will "frustrate the efficient functioning of the system of immigration control, in particular to delay a person's removal or deportation". Is individuals frustrating the asylum process a widespread problem? If so, does the good-faith requirement tackle the problem in a

way that ensures fair decision-making for the applicants?

Lucy Moreton: Whether the production of late evidence or late challenge frustrates the process is in itself a really weighted phrase, and it depends on which side of the coin you are looking at it from. For example, in a relatively recent issue that hit the media, a deportation flight took off with only a very small number of individuals on board because everybody else had lodged a late challenge to it. Was that frustrating their removal? Yes, in one respect it was. Equally, was it bringing entirely right and proper challenges that they had a right to have heard, which needed to be aired, and therefore their removal in that particular instance was delayed? In that case, it is just the proper exercise of justice and not frustration.

There is a right to bring material at that very late stage when you have been arrested or picked up and are usually in the custody of immigration enforcement. You wait 48 hours. We have to wait 48 hours, and then you are removed. In that 48 hours, there is an entirely understandable scrabble to get anything that will stop this, to buy everybody enough time to breathe and have some time to think.

From one perspective, yes, it is a problem. For almost every removal, for very understandable reasons there is a degree of somebody trying to frustrate it, because nobody wants to be forcibly returned to a country. Whether or not they face persecution or risk there, they do not want to go. If they wanted to go, they would have gone. Of course, they want to do something that will stop that. It is that widespread.

The application of a good-faith requirement is quite difficult to judge and is likely to lead simply to further litigation with what is good faith. Some of these are manifestly poor faith, but the justice system already has the provision to deal with things that are time-wasting, repetitious or manifestly without merit at the outset. Beyond that, without testing what is brought forward, how can you know that it is manifestly without merit?

The balance is quite risky, because where we get this wrong we risk someone's life or liberty. The outcome is far more serious than simply, "Goodness me. Sorry, we sent you back in error. Come back to the UK". They may not be able to come back to the UK, so there is a humanitarian and a human rights obligation to look at this very carefully. What is

unmeritorious frustration and what is a quite understandable and perfectly legitimate legal challenge? That is a really hard line to draw.

Zoe Gardner: Can I just say something very quickly about whether people are standardly trying to abuse the system? JCWI has represented people at all stages of the immigration and asylum process for almost 60 years. It is our experience that cases in which somebody who is not truly fleeing persecution and does not need protection gains protection are vanishingly rare, but cases in which people truly need protection and are denied that protection happen all the time.

Q27 **Angela Richardson MP:** Echoing the evidence that you have both given today, the UK representatives to UNHCR told us that provisions in the Bill may lengthen the time taken to make asylum decisions and increase the number of appeals. For example, under Clause 11, decision-makers would be required to make additional inquiries as to whether a person came to the UK directly and claimed asylum as soon as reasonably practicable, and whether there is a good reason for their unlawful presence. Adverse decisions will potentially result in appeals to the First-tier Tribunal and beyond, if so. Do you agree with this analysis? If so, are there more effective ways to clear the backlog?

Zoe Gardner: Yes, I absolutely agree with that analysis. The rules in question are just one of the areas where this Bill complicates decision-making. They also simply introduce a six-month delay on almost all asylum applications.

We have numerous clients now who belong to the 4,500 people who have been served with inadmissibility notices on arrival in the UK. That means that the Government give themselves six months to find somewhere else—anywhere else—to get rid of them to. All our clients who have so far been served with those notices have, after six months' delay, now entered into the standard asylum procedure. I understand that five people have been removed. The Government do not have the agreements in place to remove people.

I do not know the nationalities or identities of those five people, but I would speculate that they are probably not people who have been accepted as asylum seekers somewhere else. They are probably nationals of the country they have been returned to. This Government do not have any agreements to send people who are not nationals of that country to another country. Because of the way countries work, it seems highly unlikely that many will sign up to the idea of just taking in foreign nationals we do not want.

This is just an additional six months' delay with no other purpose that we can tell. It is having a really terrible impact on the mental health of our clients, including clients who have family members here and who could have been starting their new lives if they were simply recognised as the refugees they are. That is one way in which it will cause delays.

As I said, the split standard of proof will make decision-making more complicated and increase delays. Obviously, there will be appeals and a legislative process that will come about because of these other measures, such as the credibility ones that I talked about. Overall, this Bill could have been designed to increase the bureaucracy of the asylum system.

I should add that, after they have been recognised as refugees, this Home Office wants to reassess their situation every two and a half years. It wants to deny them public funds unless they are destitute, which they evidently will be, and therefore they will have to apply to have those conditions lifted. This Home Office seems to want more bureaucracy when its backlog is piling up and it is not coping with its current caseload. It is not clear to me how that will be achieved; it is certainly not in the Bill.

Lucy Moreton: I would absolutely echo that. There has been so much debate about the legality of many of these measures that it is inevitable that, were the Bill to pass in its current form and this become law, it would be challenged repeatedly and through to a fairly high level. Those challenges must be allowed, because the impact of all the appeals and everything that Zoe and I have talked about for the last hour is to slow the system even further. I know I already said that it was broken, and you cannot break something that is already broken, but we would pulverise it.

There are better ways to deal with this backlog, and we have both spoken about the need to resource the system end to end, from first admission to last removal. This does not apply just to the Home Office; the court system, social services and the local authorities that build the support systems around that can also shorten the length of time that this takes, from the appalling eight to 10 years that we see now down to a reasonable six to 12 months. We would still make good-quality, understandable, fair and just decisions, but in a much shorter timeframe.

In order to do that, we need resources. That means accommodation, people, IT and training. We need a lot more of it. We need the people that we get to stay, and they will stay only if we treat them right, value them as employees, value their mental health and well-being, value their personal circumstances, and do not treat them like machines. That will improve the backlog far more quickly than complicating the system will.

Chair: Thank you both very much indeed. You have given us a very compelling and concerning insight into the way the system is operating at present and the impact of the Nationality and Borders Bill. Zoe, could you take back to your colleagues in JCWI what an incredibly important role they play in this very difficult discourse? Long may they continue to do so. To echo what Florence said to you, Lucy, as Florence's parliamentary neighbour I am one of your customers. We see how complex and difficult the cases are. Sometimes, the longer they have gone on, the more distant people are from the information that caused them to come here in the first place, so it gets harder, not easier. We appreciate the work that

they are doing under a lot of pressure. Thank you very much to both of you for giving evidence to us.