Joint Committee on Human Rights
Committee Office · House of Commons · London · SW1A 0AA
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From Rt Hon Harriet Harman MP, Chair

Tom Pursglove MP
Parliamentary Under Secretary of State

17 November 2021

Clarification on Part 2 (Asylum) and Part 5 (Modern Slavery) of the Nationality and Borders Bill

Dear Tom,

As you will be aware, the Joint Committee on Human Rights is currently conducting its scrutiny of the Nationality and Borders Bill. Whilst we are looking forward to taking evidence from you on 1 December, we are disappointed that we were not able to hear from you earlier in the Bill's progress through the House of Commons. We were also disappointed that the decision was taken not to agree to our request to hear evidence from officials including representatives from Border Force, in October, which prevented us from asking detailed questions on operational matters to assist us in coming to our conclusions and recommendations. It is vital that on legislation with such significant human rights implications, the Home Office facilities parliamentary scrutiny by this committee.

We have already published a report on Part 1 of the Bill, which is concerned with the nationality provisions of the Bill. To assist us with scrutiny of the remaining parts of the Bill, we would be grateful for greater clarification on the matters set out below. We would appreciate a response by Friday 27 November, so as to inform our evidence session with you on 1 December.

PART 2 (ASYLUM)

Differential treatment of refugees

Clause 11[1] would for the first time see the UK treat some who are accepted as refugees less generously based on the manner of their journey to the UK. The Government's Explanatory Notes explain the purpose is to discourage asylum seekers from travelling to the UK other than via safe and legal routes. The ECHR memo provided by the Government further states that the UK has legitimate interests in encouraging asylum seekers to claim asylum in the first safe country they arrive, in encouraging them to make their claim at the first available opportunity, and in promoting lawful methods of entry.

[1] Clause references are to the Bill as Amended in the Committee, Bill 187 of Session 2021-22

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The UK's courts have confirmed that asylum seekers are not always required to claim asylum in the first safe country they reach, including in *(Adimi and others) v CPS and Secretary of State for the Home Department*.[2] Furthermore, the UK Representative at UNHCR, Rossella Pagliuchi-Lor, told us in oral evidence that:

> *"Such a principle [that asylum seekers should make their claim in the first safe country they reach] does not exist in international law and, indeed, it could not exist in international law because it would undermine the very principle of co-operation on which the system is premised."*

Clause 36 of the Bill sets out a new binding statutory interpretation of Article 31 of the United Nations Refugee Convention, which prohibits the penalisation of refugees that have come directly from a country where their life or freedom was threatened. It states that a refugee cannot be taken to have come to the UK directly if they stopped in another country "unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country".

1. Is it the Government's intention in clause 36 of the Bill to narrow the established legal interpretation of "coming directly" under Article 31 of the Refugee Convention with respect to where refugees are required to claim asylum to avoid penalty?

Asylum claims by persons with connection to a safe third State

Clause 15 would allow an asylum claim to be declared inadmissible if it is made by someone with a "connection" to a "safe third State". Although inadmissibility and transfer procedures can lawfully be made between countries, certain standards must be met. There must be assurances that asylum claims are not declared inadmissible when they should be dealt with in the UK and that asylum seekers would be safe from removal to a State where they could not access an effective asylum system or where their human rights might be at risk, particularly in connection with the right to life (Article 2 ECHR), freedom from torture and inhuman or degrading treatment (Article 3 ECHR), and freedom from slavery and forced labour (Article 4 ECHR). It is obviously also important that return agreements with other States are in place to ensure that inadmissibility decisions do not leave asylum seekers in limbo.

2. What safeguards will the Government put in place to ensure that claims that should be dealt with by the UK are not declared inadmissible, and that asylum seekers are not sent to locations that are unsafe or cannot offer an effective asylum system?

[2] See [1999] EWHC (Admin) 765, [2001] QB 667; and [2008] UKHL 31.

a. What steps will be taken to ensure that asylum claims are not declared inadmissible when there is no practical possibility of another State taking responsibility for them?

b. What is the timeframe expected for identifying safe third countries and ensuring return agreements are in place?

Changes to speed up asylum claims and appeals process

Clauses 17 and 19 aim to ensure that all claims for asylum and humanitarian protection are made promptly, in a manner that does not frustrate "an efficient processing and removal of the individual concerned". However, the system must ensure fairness for asylum applicants, particularly considering that failures in the asylum system may result in removals in breach of applicants' human rights.

Clause 18 may require a decision-maker to take into account late evidence as damaging to credibility and clause 25 creates an obligation "to have regard to the principle" that evidence raised late should be given minimal weight. It seems possible that procedural errors made by applicants could be converted into damage to the substantive claim, given that failure to meet deadlines for evidence or priority removal notices might impact on credibility and on the weight given to evidence.

Clause 26 introduces an accelerated appeals process for asylum applicants. Whilst we welcome reforms that would eliminate unnecessary delays in the asylum decisions and appeals processes, asylum seekers must be able to present their claims effectively, in accordance with the common law right to access justice and the right to an effective remedy under Article 13 EHCR. Moreover, the new process holds similarities with the Detained Fast Track (DFT) process, introduced in 2003, and suspended in 2015 after legal action determined that the tight timeframes of the process and the lack of safeguards to protect against unfairness rendered it unlawful.[3] It is important that past mistakes are not repeated.

3. What safeguards will the Government put in place to ensure that the imposition of new deadlines for those that claim asylum will not result in unfairness in individual cases, and will allow asylum seekers to effectively present their claims and appeals? Will this involve guidance to decision makers on how to ensure fairness when taking procedural matters into account in the assessment of credibility and evidential weight?

4. How does the Government intend to ensure that the new accelerated appeals process does not create the same unfairness that led to the suspension of the DFT?

[3] *R (Detention Action) v First Tier Tribunal* [2015] EWCA Civ 840

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Offshore processing of asylum seekers

Under clause 28 and Schedule 3, an asylum seeker could face removal to other safe countries before their asylum application has been processed. The Explanatory Notes to the Bill clarify that this provision supports the "future object of enabling asylum claims to be processed outside the UK and in another country". There are many risks involved in relying on other nations to carry out asylum processing on the UK's behalf, in particular concerning the quality of accommodation and the treatment of asylum seekers. The UNHCR has noted how:

> "*offshoring of asylum processing often results in the forced transfer of refugees to other countries with inadequate State asylum systems, treatment standards and resources. It can lead to indefinite 'ware-housing' of asylum-seekers in isolated places where they are 'out of sight and out of mind', exposing them to serious harm. It may also de-humanise asylum-seekers."*[4]

5. How does the Government intend to mitigate the risks involved in offshore asylum processing, and ensure compliance with human rights obligations, particularly with respect to the right to life (Article 2 ECHR), freedom from torture and inhuman or degrading treatment (Article 3 ECHR), and the right not to be arbitrarily detained (Article 5 ECHR)?

Refoulement

Article 33(2) of the Refugee Convention sets out that the principle of "*non-refoulement*" does not apply to refugees where there are reasonable grounds for considering them a risk to the security of the country, or where, as a result of them committing a particularly serious crime, they constitute a danger to the community. Clause 37 of the Bill would now define "particularly serious crime" as a crime which leads to a sentence of 12 months or more.

The courts have been clear that the term "particularly serious crime" restricts drastically the offences to which Article 33(2) applies.[5] They have previously found that, to comply with the Refugee Convention, even a sentence meeting the current threshold of 2 years creates only a rebuttable presumption that a "particularly serious crime" has been committed.[6] The JCHR has also previously considered the scope of Article 33(2), noting that this provision should be interpreted restrictively:

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[4] UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom, May 2021
[5] See EN (Serbia) v SSHD [2009] EWCA Civ 630.
[6] Ibid

"In view of the humanitarian purpose of that Convention, the exceptions to the principle of non-refoulement in Article 33(2) should be given a restrictive interpretation, not an interpretation which expands their scope and correspondingly weakens the principle itself".[7]

6. Is the Government satisfied that reducing the threshold for 'particularly serious crimes' is consistent with Article 33(2) of the Refugee Convention?

PART 5 (MODERN SLAVERY)

Definition of "victim of slavery" and "victim of human trafficking"

Clauses 59(7) and 68 introduce a new power for the Secretary of State to define the meanings of "victim of slavery" and "victim of human trafficking" through Regulations made subject to the affirmative procedure. The definitions of these terms will affect not only people being trafficked across borders for the purposes of slavery, but also people within the UK who may be victims of slavery. The definitions will need to comply with all relevant domestic and international human rights instruments, such as the Council of Europe Convention Against Trafficking in Human Beings (ECAT) and the UN Palermo Protocol. Given this, we would normally expect such important definitions to be included on the face of the Bill.

7. Why is the Government proposing that the definitions of the important terms "victim of slavery" and "victim of human trafficking" should be defined by the Secretary of State in Regulations rather than contained within the Bill itself?

Disapplication of rights and obligations under the EU Trafficking Directive

Clause 67 provides that section 4 of the European Union (Withdrawal) Act 2018 ("EUWA") ceases to apply to rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the EU Trafficking Directive (2011/36/EU) so far as their continued existence would otherwise be incompatible with provisions made by or under the Nationality and Borders Bill. Section 4 EUWA effectively provides that EU measures (such as the EU Trafficking Directive) continue to have legal effect after exit day where the Courts (domestic courts or CJEU) have recognised, in a case decided before exit day, that a right under an EU Directive has direct effect.

It is not clear what rights under the EU Trafficking Directive have been retained as part of UK law after exit day through the operation of s. 4 EUWA. Further, it is not clear

[7] Twenty-Second Report of Session 2003-04, on the human rights compatibility of the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes Order) 2004, at paras 26 and 28.

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from the face of clause 67 what rights retained under s. 4 EUWA will continue to apply or will cease to apply by virtue of this clause. Legal certainty will be heavily impacted, as these provisions fail the requirement for law to be accessible, and, given the subject matter, there is a risk that human rights and rights for victims of human trafficking or slavery could be at stake.

8. Can the Government provide a memorandum setting out which rights under the EU Trafficking Directive were retained by s. 4 EUWA and which of those rights will cease to have effect under clause 67 of the Nationality and Borders Bill?

I would be grateful if you could provide a response to this letter by 27 November 2021, in advance of our public evidence session on 1 December 2021.

Yours sincerely,

Harriet Harman

Rt Hon Harriet Harman MP
Chair of the Joint Committee on Human Rights