Written evidence from Joint Council for the Welfare of Immigrants (NBB0053)

About JCWI

JCWI was founded in 1967 to ensure that the rule of law and human rights were respected in the immigration system. We are the UK's leading immigration charity covering all aspects of immigration, asylum, and nationality law.

We provide specialist legal advice in immigration and asylum matters and carry out research, examine and analyse immigration policy and law. We use the knowledge gained from the experiences of our clients navigating the asylum and immigration systems to inform our advocacy, identify trends and areas of concern and to make evidence-based recommendations for the improvement of our systems.

Summary

The Nationality and Borders Bill passed its Second Reading in Parliament on 20 July 2021 and enters Committee Stage in September 2021. The Bill makes major changes to the asylum system in the UK, overturning 70 years of adherence to the 1952 UN Refugee Convention.

The Bill significantly curtails the rights of refugees. It represents a fundamental challenge to the principle of refugee protection in the UK, introducing a two-tier system where any refugee reaching the country who has not benefited from a place on a resettlement programme may have their claim deemed inadmissible and be expelled to another country, or eventually granted only a temporary status with restricted rights to family reunification and financial support. It introduces an institutional model for asylum accommodation and makes provision for the offshore processing of asylum applications. It will increase pressure on the judicial system through an accelerated appeals process that represents a deliberate attempt to reduce access to justice and makes procedural changes that put refugees at greater risk of being denied the protection they vitally need. It introduces more severe penalties which will further criminalise asylum seekers for exercising their legal right to seek asylum.

The Bill will increase delays in the Home Office, add to the backlog of asylum claims, and leave many in limbo, while doing nothing to address the culture of disbelief that results in poor-quality decision-making. Ultimately, it risks increasing the number of refugees who are unable to obtain protection and face *refoulement*. The impacts of these measures are likely to be so severe that the UN Refugee Agency (UNHCR) has taken the unusual step of strongly and publicly opposing the plans, stating in its response to the consultation on them *"UNHCR is concerned that the plan, if implemented as it stands, will undermine the 1951 Convention and international protection system, not just in the UK, but globally."* JCWI joins the UNHCR, along with the unanimous voices of expert civil society organisations in opposing the Bill in its totality.

Consultation questions responses

Changes to application and appeal process for asylum applicants including credibility and the weight given to evidence submitted late:

Do proposed changes to the application and appeals process for asylum applicants provide adequate human rights protection, including provisions providing for credibility and the weight given to evidence to be affected by the timeliness of applications and supportive evidence?

The Bill contains a provision to raise the standard of proof for asylum claims to the same as any other civil claim. This is a change to the very foundation of asylum law, doing away with a standard developed by specialist senior judges, which has been in operation for decades.

The standard of proof in asylum applications has historically been deliberately set at the threshold of demonstrating a "reasonable likelihood" of persecution. This is intended to reflect the life-threatening risks entailed in wrongly refusing a refugee, alongside the inherent difficulty of bringing evidence for individuals taking on the state in a complex and potentially traumatising procedure. There has long been a problem of Home Office decision-makers misapplying the standard of proof and perpetuating a culture of disbelief towards asylum seekers. The problem will be exacerbated by this Bill.

The Bill re-introduces a split standard of proof for different parts of an asylum claim, raising the standard to that of a balance of probabilities for the historical facts of a claim and maintaining the "reasonable likelihood" threshold regarding risk in the future. This split approach aims to make it more difficult for refugees to prove their need for protection and is likely to result at best in complex, expensive and time-consuming litigation, and at worst in the refoulement of refugees unable to meet higher standards of proof nonetheless at real risk.

It is our experience that refugees in genuine need of protection struggle and often fail to meet the existing threshold of proof for their claim and are wrongfully refused. A significant part of casework at JCWI is spent working with asylum seekers wrongly refused protection as they are unable to meet the already heavy demands of the system. Such refugees are eventually recognised, but only once JCWI has expended very serious time and financial resources which most legal aid firms cannot afford to outlay. In the meantime, asylum seekers face the most serious kinds of harm, including being removed to torture, making suicide attempts, and having traumatic, dangerous pregnancies. On the other hand, the number of asylum seekers recognised as refugees who do not genuinely need protection is vanishingly small. The introduction of this change will increase the number of cases where this occurs and thus increase *refoulement*.

The also Bill seeks to establish the principle that evidence submitted late without good reason should be given only "minimal weight" by asylum judges.

This approach is both an unnecessary and dangerous step. There are strong requirements already in place under s.120 and s.96 of the Immigration Act 2002, as well as under s.353 of the Immigration Rules, to ensure that all evidence is submitted at the earliest possible opportunity and any late submissions be justified. If timing of submission of evidence is suspect, judges are perfectly able to consider this for themselves. There is therefore no practical purpose to these new provisions.

The principle that the Bill is seeking to introduce appears to require judges to have minimal regard for evidence that is submitted late, regardless of how robust or important that evidence is. Such measures challenge the judiciary's constitutional responsibility to make fair and impartial decisions based on all the individual circumstances of a case.

There are numerous reasons why refugees and victims of trafficking may be unable to provide all the evidence and information regarding their case at one early stage in the procedure. This includes a simple lack of knowledge of the system and what constitutes evidence, as well as the significant obstacle to immediately disclosing information for survivors of trauma including and especially women and survivors of sexual violence. The UNHCR has clear guidance urging states not to deny claimants the benefit of the doubt based on delays in supplying evidence for these very reasons. Contrary to the assumptions of the Bill, it is not a minority of cases where there are good reasons for

submitting evidence late, it is usually the case. The impact of this provision, therefore, will be exacerbate the culture of disbelief at the Home Office, which is bad for asylum seekers and bad for the system.

The Bill seeks to introduce a new fast-track process of "accelerated detained appeals" for migrants in detention and introduce "priority removal notices" limiting access to justice by removing access to the First Tier Tribunal. These plans replicate elements of the "Detained Fast Track" process that was declared unlawful by the High Court in 2015 and found to be "structurally unfair." Any attempt to deport people seeking asylum faster with fewer opportunities to obtain competent legal representation and challenge poor decisions increases the risk of returning people to extremely serious danger and will inevitably penalise victims of trauma to the greatest extent.

Asylum seekers when they are in detention are in a state of heightened anxiety and fear due to the threat of removal and the triggering reminders of past detention or other situations of powerlessness such as trafficking, so it is particularly difficult for them to provide their full account. Detainees are frequently cut off from access to their telephones, the internet and the people they know, all key sources of evidence. Furthermore, this Bill extends the impact of accelerated detained appeals to people facing deportation from prisons as well. It is extremely difficult to get access to appropriate legal advice from prison settings, even more so than immigration detention facilities. Given this and the extremely accelerated timeframe permitted to submit appeals – five days – this policy is bound to result in serious miscarriages of justice.

The highest standards of fairness must apply to asylum determination, given the life-and-death stakes, as explained by Lord Bingham.

The two-tier system of refugee protection and inadmissibility rules:
Does introducing a two-tier system of rights for refugees meet the UK's obligations under refugee law and human rights law?

The two-tier system is based on the idea that refugees should not have any choice over where they seek to rebuild their lives and should be punished for seeking to exercise agency. This was not the intention of the drafters of the Refugee Convention.

The Refugee Convention requires host states to "make every effort to expedite naturalization" of refugees whereas the two-tier system will allow for much more restricted access to Indefinite Leave to Remain for some refugees, with the New Plan proposing that leave will be granted for just 30 months at a time and that there will be "no automatic right to settle" (settlement being a precondition for naturalisation). In JCWI's experience, people who are recognised as refugees need lasting protection from long-term situations of risk in their country of origin. It is highly unlikely that it will be safe to return people who have been found to be refugees just 30 months after that decision, so the additional insecurity and psychological distress caused by these measures – not to mention the additional bureaucratic strain on Home Office systems – serve no purpose.

The Bill redefines the terms of Article 31 of the Refugee Convention, ripping up years of interpretation by specialist judges who recognised that the terms "without delay", and "directly" should be interpreted flexibly to take into account the myriad experiences of refugees. The much-restricted definition of these terms will be applied deliberately with the result that the majority of refugees will only obtain a "second class" status.

Article 8 ECHR allows for each person to have respect for their right to develop a private and family life. Traumatised people require stability to recover and move on with their lives. For those who have family members at home they should be able to bring them to the UK and for

those who do not, they should be given the stability to allow them to meet people and form relationships in the UK. It is suggested that "group two" refugees – those who have not entered the UK through a resettlement programme – will have restricted rights to family reunification, which will be deeply detrimental to their recovery and stability, as well as denying a safe route to protection to their family members, who may decide instead to take irregular journeys themselves out of desperation to be reunited.

In response to a Freedom of Information (FOI) request submitted by the Refugee Council, the Home Office published the Equalities Impact Assessment (EIA) it has carried out on the inadmissibility rules, which have been introduced in secondary legislation since January 2021, but will be placed on a statutory footing by this Bill. The EIA found that there would be likely to be indirect discrimination on the basis of race and colour as, due to the possibility of obtaining a visa to travel to the UK or not, people of some nationalities will be more likely to have their asylum claim deemed inadmissible than others. The Government's assessment in the EIA is that this is a clearly proportionate means of achieving a legitimate aim, but JCWI does not share this view.

On 16 September, the Government published the EIA for the Bill as a whole. As with the inadmissibility rules, the EIA found that the new system will produce direct and indirect discrimination on the grounds of race and nationality, highlighting how the most significant countries of origin of asylum seekers so far entered in inadmissibility procedures are Iran, Iraq, Afghanistan and Sudan. It once again found this discrimination to be justified in the pursuit of the goals of discouraging irregular journeys, despite the fact that it also concedes that there is limited evidence that the approach will in fact have that effect, and noted that evidence rather suggests that people in these circumstances may instead take yet more dangerous routes to enter the UK. It is remarkable that the pursuit of a policy that is not supported by evidence can still be considered justifiable grounds to produce racist discrimination in our asylum system.

The Refugee Council has estimated that there may be discriminatory impacts of the other measures that form part of the two-tier system in the Bill, including a finding that 90% of the people who would potentially no longer be entitled to reach the UK through family reunification because this would be denied to their family member as a "group two" refugee, would be women and children.

There is, furthermore, a real risk that the proposals will result in significant delays, or the failure to provide at all, protection to refugees seeking asylum from persecution in the UK, which is unambiguously counter to the intent of the Refugee Convention. An FOI submitted by the Scottish Refugee Council has ascertained that, of the 4,561 people who have thus far been given notice that their claim is being considered under the inadmissibility process, 2,982 (66%) are from seven countries with a very high recognition rate as refugees in the UK, including Iran, Eritrea, Vietnam and Syria. There were also, at the beginning of September, 173 Afghans in the inadmissibility pool. These people, who are highly likely to have credible protection claims, are at the very least to have those claims frozen for 6 months or more, if indeed they are not to suffer deportation to potentially any other country that will take them. The mental health and refugee protection needs of this vulnerable population are protected under our international legal obligations and should be prioritised.

The standard by which a country will be considered "safe" for removal under the inadmissibility rules is not clearly defined in the Bill, but this standard should be, at the very least, brought into line with standards required under the Refugee Convention. Thus, the absence of persecution in the country of removal, and protection from *chain refoulement,* are necessary but by no means sufficient standards that should satisfy the UK to send an asylum

seeker there. While these minimum standards are not clearly defined, the Bill risks sanctioning the return or deportation of refugees to situations where their needs cannot be met and this risk is exacerbated in the case of particularly vulnerable groups including sexual minorities and survivors of trauma or torture. Aside from the violation to refugee rights that is entailed, this may also make the removals ineffective, as refugees will have to make further dangerous and clandestine journeys to return to the UK or another true safe haven in order to find the meaningful protection they need.

UK Border Force powers to direct vessels out of UK territorial waters and *non-refoulement*:

Do proposed new powers for UK Border Force to direct vessels out of UK territorial waters, and for the Home Office to return people to "safe countries" risk undermining refugees' human rights as well as the principle that refugees should not be expelled or returned to the frontiers of territories in any manner whatsoever where they risk persecution (the principle of non-refoulement)?

Do the changes proposed by the Bill adequately protect the right to life for those at sea?

Proposals that the UK Border Force will undertake "pushback" operations in British waters to effectuate the mass expulsion of asylum seekers pose a very serious risk to life and are likely to be incompatible with obligations under international human rights and maritime law.

It is a fundamental and longstanding obligation to render assistance to persons in distress at sea. The 1982 UN Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea and the International Convention on Maritime Search and Rescue all affirm this principle and mandate a duty to operate effective search and rescue services and to cooperate with neighbouring states. Human rights law also has a strong precedent against operations such as the ones proposed in this Bill. The 2012 Hirsi Jamaa v. Italy case in the European Court of Human Rights found that the Italian authorities had violated the human rights of migrants intercepted at sea and forcibly returned to Libya on the basis that the applicants were under the de jure and de facto control of the Italian authorities and thus were entitled to an individual assessment of their circumstances.

The Channel is the busiest shipping route in the world and the migrants seeking to make irregular crossings of it are invariably forced to do so on small crafts which place them automatically at severe risk and in need of assistance. There are no international waters in the Channel, so migrants being returned under the powers being proposed in this Bill would be "pushed back" directly into French territorial waters. The French Interior Minister has made clear that France will not accept any breaches of maritime law and that a policy of returning migrants in this way would negatively impact cooperation on migration issues. Without the active cooperation of a French search and rescue operation, the risks entailed by a policy of returns at sea would be magnified to a significant degree and risk creating a stand-off situation, with migrants' lives in the balance.

The risk to life under circumstances where a migrant vessel is left adrift while state actors refuse to provide the assistance required is enormous. In 2011, a small boat carrying 72 migrants from Libya was abandoned by rescue operations in this manner for 14 days, despite the knowledge of the authorities of numerous countries. Only nine of the passengers eventually survived the ordeal. There have been thousands of other deaths associated with "pushback" operations in the context of other European countries more recently too. An investigation carried out by the Guardian found that in just the last two years, European countries were responsible for "pushing back" up to 40,000 migrants from their territorial waters, linked to the deaths of 2,000 people. In the circumstances, the policy would risk

implicating border officials in civil liability under the right to life, Article 2 of the European Convention on Human Rights.

Extending the offence of facilitating irregular entry to those who seek no benefit:

What are the implications of extending the offence of helping an asylum seeker facilitate irregular entry to the UK so that it also covers those that may help asylum seekers for no benefit to themselves?

The implications of extending the offence of facilitating irregular entry so that it covers those who may help asylum seekers for no financial benefit are very serious. During the past 12 months, the government has been using legislation aimed at criminal gangs of smugglers in order to pursue refugees themselves in the courts. Laws against facilitating entry have been intentionally used to unjustly penalise people exercising their right to seek asylum, including people who may be the victims of forced labour or trafficking. These changes, along with dramatic increases in minimum sentencing guidelines aim to enable further prosecutions of people with no meaningful connection to criminality.

Drone footage has been used to single out refugees with their hand on the tiller of small boats at sea and prosecute them under legislation that had previously been used against members of organised crime networks bringing migrants into the UK for profit. There is no evidence that these people are members of smuggling gangs. The Independent Chief Inspector of Borders (ICIBI) found that "there were no organised crime group members onboard the boats." And the National Crime Agency has also confirmed that it has received intelligence that asylum seekers are being forced to carry out work without pay for smuggling gangs in Northern France.

One Yemeni man described the ordeal in an investigation carried out by The Independent, "They took our money, they used us to work for free, they threatened us… [The smuggler] told me, 'I can kill you here, no one will identify me and I will escape.' He took videos of me and of my friends while we were preparing boats for other journeys. He said, 'I could now accuse you of being a smuggler, you could be in jail.'" This testimony demonstrates how the zeal with which the Home Office has pursued the criminal prosecution of Channel crossers has led to a failure to identify potential victims of trafficking and forced labour, and the prosecution of victims for the crimes of their perpetrators.

The risk of such prosecutions was foreseen when the Refugee Convention was drafted, precisely because refugees are, by definition, forced into dangerous and risky situations during their flight. Article 31 of the 1952 Convention is intended to protect refugees from prosecution for irregular entry. In the light of this, the Crown Prosecution Service (CPS) issued clarified guidance in July 2021, confirming that "In cases involving the use of a boat where the sole intention is to be intercepted by Border Force at sea and brought into port for asylum claims to be made, no breach of immigration law will take place … the same applies where the intention is to sail the boat to a designated port of entry in order to claim asylum." This guidance is in clear conflict with provisions in the Bill that seek to further criminalise asylum seeker journeys that are not connected to crime or profit.

The government appears to be seeking with these proposed measures to remove the requirement that refugees making these journeys be in any way connected to smuggling gangs, and simply to free its hand to prosecute people who are demonstrably not criminals, but rather asylum seekers.

Offshore processing of asylum claims:

Do the proposed powers to remove asylum seekers to "safe countries" while their asylum claims are pending, with a view to supporting the processing of asylum claims outside the UK in future, comply with the UK's obligations under refugee law and human rights law?

Proposals to process the claims of asylum seekers in offshore centres are an extremely worrying development. Aside from the obvious logistical difficulties in finding a country willing to take on responsibility for housing refugees who wish to build new lives in the UK, it is not at all clear what the situation would be for any person whose claim were rejected and found themselves in that overseas location. If they would be subject to deportation by the authorities of the host country, there could be a real risk of refoulement or chain refoulement occurring. It would likewise be extremely difficult to monitor and ensure that minimum standards of dignity and rights were respected in an offshore location. This includes measures such as screening for particular vulnerabilities such as psychological conditions or being a survivor of torture or trafficking, particular provisions for children, families, women, sexual minorities, etc.

Under the proposals in the Bill, no details are available about what access to legal representation and an effective appeals process could feasibly be made available under such conditions. It is the case even in UK-based asylum facilities that hygiene conditions and screening to identify vulnerable residents is not always available to an adequate standard. Similarly, asylum seekers in the UK system frequently experience barriers to accessing legal advice and representation. In an offshore scenario, the risk of these serious deficiencies occurring and resulting in miscarriages of justice would be multiplied.

The only highly economically developed country which has achieved the offshoring of asylum procedures has been Australia. There is a very significant body of evidence that the Australian experiment has been disastrous in terms of the human rights and dignity of the people concerned. Most recently, in August 2021 researchers from the University of New South Wales published a report that noted that paediatricians working in offshore facilities said that the children in their care were among the "most traumatised they had ever seen" and that medical teams from MSF similarly described suffering that was among the worst they had ever encountered, including among victims of torture. In February 2020, the International Criminal Court (ICC) declared that Australia's offshore processing system for asylum seekers amounted to cruel, inhuman or degrading treatment, and thus constituted a breach of Australia's international human rights obligations. This legacy is not one that the British state should be emulating, especially in such vague and incomplete terms as presented in this Bill.

Instructions to decision-makers on how to interpret the Refugee Convention:

Will the proposed instructions to decision-makers on how to interpret the Refugee Convention secure or restrict the protections that Convention guarantees?

The Bill redefines the Refugee Convention, moving away from years of developed case law, to restrict the protection that is provided.

We have previously discussed the raising of the standard of proof and redefinition of the terms in Article 31, very significant changes that reduce protections offered to refugees.

There are other departures from established law with little justification including:

- The threshold for refugees losing protection against refoulement (a measure of "last resort" according to the UNHCR) is reduced so that a one-year prison sentence automatically results in revocation of refugee status. This would exclude for example a client of ours sentenced to one year imprisonment for handing over a false passport

in an employment agency when he needed to work because the Home Office had failed to provide him with asylum support.

- "Particular Social Group" is redefined to dictate use of the term used as a minimum standard by the European Union, instead of using the definition preferred by the House of Lords. For those whose "Convention Reason" is not one of the named reasons (political opinion, nationality, religion, race)

Changes to modern slavery law:

Do the changes that the Bill would make to the law regarding modern slavery ensure appropriate protections for victims? What will be the consequences of the presumptions that compliance with procedural requirements should affect a person's credibility as a victim?

The changes proposed in the Bill to the law regarding modern slavery will make it more difficult for victims to be recognised and will reduce access to support for those who are. The justification provided for these changes, that there has been an "alarming rise in people abusing our modern slavery systems" are not supported by any evidence. Indeed, the Home Office's own figures reveal that in the year of 2020 92% of reasonable grounds and 86% of conclusive grounds decisions made on cases of potential victims referred to them were positive. There are good reasons for this, including that the fact that only a designated First Responder can admit a person into the NRM, creating a significant protection against abuse of the system. The extremely high recognition rates point to a system working extremely well, not one that needs to reform to keep the largely successful applicants out.

See also research regarding the reasons why victims of trafficking may have good reason for late disclosure of evidence above.

Quality of Home Office decision-making in human rights cases:

Home Office decision making is neither rigorous nor independent. JCWI's legal department receives Home Office decisions every day that are not worth the paper they are written on. It is rare that Home Office decisions are found to be sustainable by judges, and JCWI frequently recovers our costs, due to the Home Office decision being found to be not only wrong, but unreasonable.

If the Home Office is genuine in wanting to create a fairer and more efficient system it must provide better training and a better culture for its staff, we saw the effect of poor decision making during the Windrush Scandal, but the culture of disbelief is at its worst when it comes to asylum decision making.

The measures put forward in this Bill will not begin to address the endemic problem of poor decision-making in the Home Office. 43% of Home Office asylum casework decisions are overturned on appeal, even as access to high quality legal representation for those bringing such appeals has been slashed through cuts to the Legal Aid system.1 Rather than this leading to a review of the quality of decisions, the Home Office considers this shows that court resources are being "wasted" by asylum seekers, This is not the approach of a serious department which is able to engage with the judiciary and see the value of the legal system in driving up standards of decision making.

17/09/2021

[1] Between 2005 and 2018 there was a loss of 56% of legal aid providers and 64% of not for profit advice providers in asylum and immigration Dr J. Wilding, Legal Aid Droughts and Deserts; A Report on the Legal Aid Market, 23 July 2019 https://righttoremain.org.uk/legal-aid-droughts-and-deserts-new-report-by-dr-jo-wilding/