

Written evidence from Jesuit Refugee Service UK (NBB0055)

Executive Summary

The overhaul of the asylum system within the Nationality and Borders Bill (The Bill) constitutes an attack on the rights of refugees, reducing protections for them and creating numerous barriers to asylum. Key provisions within the Bill risk contravening international law. Reasonable space constraints do not permit exhaustive analysis. Our key concerns are:

- Introducing a two-tier system of rights for refugees is cruel, ignores basic realities of forced migration, and is likely to contravene the UK's obligations under refugee law.
- Penalties for apparently delayed disclosure in asylum and human rights claims, and modern slavery cases, fail to address the many good reasons for such delay. They could deny asylum and/ or support to many who need and are entitled to it.
- Plans to raise the threshold of proof in asylum determination place an unrealistic and disproportionate burden of proof on asylum applicants.
- Proposed detained fast-track appeals would resurrect a process found to be profoundly unjust and unlawful.
- Offshore processing of asylum claims is likely to involve systemic cruelty and is incompatible with our duty to offer sanctuary.
- The Bill's interpretation of the Refugee Convention restricts protections afforded to refugees. Among other things, it seeks to exclude refugees who stopped in another country *en route* to the UK from immunity from prosecution for illegal entry. This interpretation operates alongside criminal offences of illegal entry and arrival within the Bill. People coming to the UK to claim asylum could risk criminal charges by default under these proposals.
- The Bill increases barriers to recognition as a victim of modern slavery, and therefore to support and protection.
- Home Office decision-making routinely fails to safeguard human rights, partly due to conflict of interest with the Home Office's immigration control functions.

About JRS UK and the context of this evidence

The Jesuit Refugee Service (JRS) is an international Catholic organisation, at work in 50 countries around the world with a mission to accompany, serve and advocate on behalf of refugees and other forcibly displaced persons. JRS in the UK has a special ministry to those who find themselves destitute as a consequence of government policies and those detained for the administration of immigration procedures. JRS UK runs a day centre, activities, hosting scheme (*At Home*), and legal advice project for destitute asylum seekers, most of whom are pursuing fresh claims, and destitute newly recognised refugees; and detention outreach services to Heathrow IRC. We have also been providing practical and pastoral support to people accommodated at Napier barracks, and working partly within the barracks, since Autumn 2020.

Our evidence draws on our direct organisational experience of working with people in the asylum system, including in Napier barracks, and in immigration detention; on research conducted with refugees and people seeking asylum; and on testimonies from refugees and people seeking asylum.

Key concerns

A TWO-TIER SYSTEM OF REFUGEE RIGHTS

Introducing a two-tier system of rights for refugees is cruel and likely to contravene the UK's obligations under refugee law.

- **The Refugee Convention does not state that refugees must claim asylum in the first safe country they come to, and it permits refugees to cross borders irregularly in order to claim asylum.** Global provision for refugees could not function if all refugees claimed asylum in the first safe country they came to. Most refugees are hosted in developing countries, and the UK receives fewer asylum applications than most other European countries.ⁱ Discriminating against refugees on the basis of how they travel is therefore incompatible with commitment to refugee protection.
- **Penalising refugees for how they travel ignores the realities of forced migration.** Most refugees have no choice of how they travel.
- **Discriminating against refugees obliged to arrive spontaneously will not prevent desperate people from making dangerous journeys or save lives at sea.** There is strong evidence that policy focused on closing borders forces people to take more dangerous journeys and leaves them more vulnerable to traffickers.ⁱⁱ
- **There are numerous good reasons that refugees may take a while to disclose their need for asylum,** laid out below. Discriminating against a refugee because they did not claim at what appears to have been the earliest opportunity is unjust.
- **Likely limitations on the rights of 'group 2' refugees** (as outlined in clause 10, section 5), would infringe on their basic human rights and dignity: **Barriers to settlement in the UK**ⁱⁱⁱ would force refugees to live with the threat of expulsion hanging over them, denying them a chance to rebuild their lives. **Subjecting refugees to No Recourse to Public Funds conditions**^{iv} could deny them access to vital services, such as NHS care included in the NHS charging regime. It would place them at risk of poverty, leaving them vulnerable to exploitation. **Reducing family reunion rights**^v interferes with right to family life and is cruel. It also constitutes a reduction of safe, managed routes for people seeking sanctuary. It is notable that all of these limitations would also militate against integration and be bad for wider society.

Testimony: Aaron is a refugee who travelled to the UK via other countries. *Aaron^{vi} was a young teenager when he had to leave Eritrea without his family. Aaron's father had been conscripted into the country's brutal military service. He came home to see his family. When he left again, he told his family that he was going back to his base but he never showed up there. The military came to Aaron's house looking for his father and told Aaron's mother that they would take Aaron if they couldn't find his father. Aaron had no choice but to leave. "People really suffer", he says. "They don't want to leave their country but their country forces them because military service in Eritrea is the worst thing. You have to serve the military forever. There is no life, there is*

nothing.” He left Eritrea and spent two years looking for safety before he arrived in the UK. He travelled via Sudan and Libya, both of which were very dangerous. He then went to Italy, where he felt unsafe sleeping outside under bridges, and to France, where he ended up in the Calais jungle. “They didn’t treat us like human beings” he explained. He came to the UK in the back of a lorry. “I wasn’t expecting anything,” he remembers. “I just escaped to keep my life, to be safe. That’s the most important thing.” Aaron was in the UK asylum system for 7 years before finally being recognised as a refugee, and as having been one all along. He was initially refused asylum and had to submit a fresh claim. Now, he plans to study IT.

PROPOSED CHANGES TO ASYLUM DETERMINATION

Penalties depending on timeliness of evidence

Penalties for apparently delayed disclosure in asylum and human rights claims and modern slavery cases could deny asylum and/ or support to many who need and are entitled to it.

Clauses 16-23 contain provisions that would make it harder to bring evidence, and have it given significant weight, after making an initial application in relation to asylum or human rights, or to bring fresh evidence after becoming appeals rights exhausted. Clauses 46 and 47 operate similarly for potential victims of modern slavery. However, there are many good reasons for delayed disclosure:

- Asylum interviews are daunting. Claimants are regularly asked to recount traumatic events. Many struggle to understand the asylum process, and do not know what is relevant or how to navigate the system. In JRS UK’s research with refugees and asylum seekers, people often described feeling subject to an opaque system that made no sense. One person explained: *“It’s like talking to a machine.”*^{vii}
- Good legal advice is very difficult to access. Since 2005, there has been a huge reduction in free asylum legal advice: across the UK, between 2005 and 2018, 56% of legal aid providers in asylum and immigration were lost and not- for-profit providers fell by 64%.^{viii} This has the potential to impact not only what evidence is brought, and what issues are raised, at the point of an initial claim, but also at the point of appeal. It can therefore necessitate a fresh claim.
- There are numerous psychological and cultural barriers to disclosure, especially of trauma, exploitation, and sexual violence^{ix} which are likely to be key to an asylum or modern slavery case. Social stigma can be a particularly big barrier in LGBTI cases.^x
- It is difficult to collect documentary evidence where relevant events occurred on another continent, sometime ago, and one had to flee in haste. Fresh or supplementary evidence therefore often becomes available after the claim has first been made.
- Modern slavery victims are especially likely to struggle to trust authorities: trafficking victims supported by JRS UK have routinely been told by their traffickers that if they seek help from authorities, they will be arrested, detained, and removed.^{xi} **It is correspondingly very problematic that compliance with procedural requirements should be taken to reflect on a victim’s credibility.**

In our work with people pursuing fresh claims, many people we support have encountered issues like these during their initial claims.

An unrealistic burden of proof in asylum determination

Clause 29 would raise the threshold of proof required in asylum determination. It would specifically mean demanding a higher level of proof when deciding whether someone has a “well-founded fear of persecution”. Currently, all relevant facts within an asylum claim must, in theory, be proved to a “reasonable degree of likelihood”. The current standard, though often not adhered to, attempts to reflect 1) the inherent difficulty of proving one’s need for asylum and 2) the horrendous consequences of erroneously refusing someone – human lives are at stake. Under the Bill, “well-founded fear of persecution” would need to be proved on the “balance of probabilities”. **This would entail demanding an unrealistic level of proof for something inherently difficult to evidence, and thus result in denial of protection to many who need it.**

This occurs in the context of a long-standing culture of disbelief and refusal in asylum determination.^{xii} There is much evidence that Home Office caseworkers often apply an excessive standard of proof to asylum claims, and either simply prejudge claimants’ credibility – starting from the position that people are lying – or conclude that they are lying without sufficient consideration.^{xiii} Approximately 40% of refusals are overturned on appeal to the courts, indicating a serious systemic flaw in initial decision-making. Rather than improving decision-making, this Bill would legislate poor decision-making grounded in suspicion.

Detained fast-track appeals

The Bill’s fast-track asylum appeals process has worrying human rights implications:

- It does not offer enough time for the process to work justly; for instance, there is not enough time to secure legal advice.
- Detention is an extremely poor context from which to navigate an asylum claim.^{xiv}
- Previous attempts to fast-track asylum determination in detention have been ruled illegal because the process they yielded was so unfair.^{xv} Rather than seeking to learn the lessons of the past, the Bill seeks to resurrect an unworkable and unjust system.

Testimony: *Joel^{xvi} fled a war-torn country in West Africa. He arrived on a visa and later went to claim asylum. He was immediately detained and placed on the detention-fast track scheme. Within two weeks, his case was refused. Because he was in detention, he wasn’t able to gather documents to corroborate his story, and he was disbelieved. He explains the process was rushed and he “the judge doesn’t even have enough time to make his judgements. But lives are at stake.” He was eventually released from detention, and ultimately put in a fresh claim for asylum. This time, he was able to collect the relevant documents. Nearly six years after he first claimed asylum, he was recognised as a refugee. He is now starting to rebuild his life. The detained fast-track system yielded an unfair process that took 6 years of this young man’s life.*

OFFSHORE PROCESSING

The Bill would allow asylum seekers to be removed from the UK while their claims are being processed, opening the door to offshore processing.^{xvii} Offshore processing has given rise to serious

human rights abuses and systemic cruelty in other contexts where it has occurred.^{xviii} Removing someone while their asylum claim is pending risks placing them in danger.

INTERPRETATION OF REFUGEE CONVENTION

The Bill's interpretation of the Refugee Convention would restrict protection for refugees on many levels. Space prohibits exhaustive analysis, so we highlight one key issue here.

Clause 34 interprets refugees' immunity from penalty for illegal presence or entry under Article 31(1) so as to reduce the contexts in which it applies:

- Clause 34(1) excludes by default refugees who stopped in a country outside the UK (this is contrary to standard interpretations of the Refugee Convention, including in English case law).^{xix} Clause 34(5) reinforces this exclusion by amending the Immigration and Asylum Act 1999 so that a refugee is not immune if they passed through another country and could "*be expected to have sought*" protection there, rather than if they could have expected to actually receive it. This leaves refugees for whom the UK is the first country in which they believed themselves to be safe open to prosecution for entering the country.
- Clause 34(2) excludes refugees who did not claim asylum at what appeared to be the earliest opportunity. This is problematic for the reasons set out above under "Penalties for Delayed Disclosure."

This occurs alongside the articulation of **criminal offences of entry and arrival without leave** elsewhere in the Bill.^{xx} Clause 37(2) potentially has significant implications for the right to claim asylum because it seeks to criminalise *arrival* without leave specifically, meaning that a refugee who arrived without leave could face criminal charges even if the first thing they did was claim asylum.

Most refugees do not have time to go to an embassy when fleeing for their lives and, anyway, the UK does not typically issue humanitarian visas: **people coming to the UK to claim asylum could be at risk of facing criminal charges by default** if the Bill becomes law.

MODERN SLAVERY

The Bill would make it much harder for victims of modern slavery to gain recognition and support:

- **Penalties for apparently delayed disclosure are a significant factor, addressed above.**
- **A higher evidential bar for recognition and support**

Clause 48 raises the evidential bar for a potential victim of trafficking to be given a positive reasonable grounds decision, so that there must be reasonable grounds that the person *is* rather than *may be* a victim.

Victims already face immense barriers to recognition. JRS UK frequently works with people with strong indicators of trafficking who have received negative decisions within the National Referral Mechanism. Correspondingly, last year, 81% of first stage, and 75% of second stage, trafficking rejections that were challenged were overturned.^{xxi} The current threshold for a positive reasonable

grounds decision at least seeks to reflect the inherent difficulty of proving one is a victim and allow access support while the issue is further assessed. This legislation is likely to make a bad situation worse.

- **Exclusion from protection and support for victims of modern slavery could impact victims criminalised as a direct result of exploitation**

Excluding victims of modern slavery from protection and support on grounds connected to criminality overlooks the reality that many victims of slavery have criminal convictions directly resulting from their exploitation.

JRS UK's detention outreach team frequently supports victims of trafficking who have been trafficked to the UK for exploitation on cannabis farms.^{xxii} Following police raids, they were charged with offences related to cannabis production, advised to plead guilty by duty solicitors, and ultimately imprisoned. Many had served sentences of 12 months or more, and would thus be excluded under Clause 51, subsection f. The Bill does not contain safeguards that would prevent this from happening, and it is questionable whether sufficiently rigorous safeguards could be created.

HOME OFFICE DECISION-MAKING

In JRS UK's observation, Home Office decision-making is often focused on immigration control to the exclusion or side-lining of human rights concerns. For instance, in our work with detained victims of trafficking, we found that victims often remained detained, in some cases after recognition, because immigration factors were seen to outweigh the victim's need to be released.^{xxiii} Relatedly, detained individuals recognised as Adults at Risk under the Home Office's own policy for identifying vulnerable people routinely remain in detention because immigration factors are allowed to outweigh their vulnerability. This includes torture victims, who frequently explain that being detained is like being tortured again.^{xxiv}

We observe many instances in which Home Office safeguarding practice is poor and lacks rigour. In our work supporting individuals placed at Napier barracks, we frequently encounter victims of torture and trafficking, despite the fact that this contravenes the Home Office's own policy. In many cases, victims of trafficking have had screening interviews in which they explain they have travelled through Libya. Libya is a hotspot for trafficking and ought to raise a red flag, but repeatedly we find it has not: no action has been taken and the individual has consequently been placed in accommodation that is especially likely to retraumatise them.

Recommendations

- **Refugees and people seeking asylum should never be penalised for how they travelled to, arrived at, or entered the UK.**
- **Plans to raise the threshold of proof in asylum determination should be abandoned.**

- **Asylum and modern slavery legislation should reflect the difficulty asylum claimants and modern slavery survivors have in disclosing and bringing evidence, and the delay this can cause. Delay should not be taken to reflect poorly on credibility.**
- **Asylum claims and appeals should be processed in the community, and not in detention.**
- **Plans for offshore processing should be abandoned.**
- **Plans to raise the threshold of proof for a positive reasonable grounds decision in modern slavery cases should be abandoned.**

Concluding Remarks

This legislation creates serious barriers to refugee protection, undermining the right to claim asylum, and restricts the rights of refugees. As such, it runs the risk of contravening international law. Plans to introduce a two-tier system for people recognised as refugees are especially egregious in this respect, abandoning the very principle of international protection. Furthermore, the Bill would in practice significantly reduce protection for victims of modern slavery, in a context where accessing such protection is already very difficult.

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ⁱ In 2019 there were approximately, 128,940 asylum applications in [France](#) compared with 35,566 in the UK.

ⁱⁱ See E.g. Foreign Affairs Select Committee, “[Responding to Irregular Migration](#): a diplomatic route” 2019; JRS Europe, “Forgotten at the gates of Europe: ongoing protection concerns at the EU’s external border” 2018, p.7.

ⁱⁱⁱ Clause 10, subsections 5a and 5b.

^{iv} Clause 10, subsection 5c.

^v Clause 10, subsection 5d.

^{vi} This is a pseudonym.

^{vii} JRS UK, *For Our Welfare and not for Our Harm*, authored by Dr Anna Rowlands.

^{viii} Refugee Action, “[Tipping the Scales](#): access to justice in the asylum system” (2018).

^{ix} See for example Paaras Abbas, Martha von Werthern, Cornelius Katona, Francesca Brady and Yeree Woo, “The Texture of Narrative Dilemmas: qualitative study in front-line professionals working with asylum seekers in the UK”, *BJPsych Bulletin*, Volume 45, Issue 1, February 2021, pp. 8 – 14.

^x See UKLIG (now Rainbow Migration), “[Still Falling Short](#): The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity”, 2018.

^{xi} See JRS UK’s Topical Briefing “Survivors of Trafficking in Immigration Detention” (June 2019), available for download [here](#).

^{xii} Freedom from Torture, *Lessons not Learned: the failures of asylum decision-making in the UK* (2019).

^{xiii} See for example, Freedom from Torture, *Beyond Belief: how the Home Office fails survivors of torture at the asylum interview* (2020).

^{xiv} JRS UK, “[Detained and Dehumanised](#): the impact of immigration detention”, p.24.

^{xv} *Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

^{xvi} This is a pseudonym.

^{xvii} Schedule 3.

^{xviii} For example, in 2018, the UNHCR was obliged to urge the Australian government to evacuate its offshore facility at Nauru due to spiralling health concerns: <https://www.unhcr.org/uk/news/briefing/2018/10/5bc059d24/unhcr-urges-australia-evacuate-off-shore-facilities-health-situation-deteriorates.html>.

^{xix} *R v Uxbridge Magistrates Court (ex parte Adimi)* [1999] Imm AR 560.

^{xx} Clause 37.

^{xxi} Home Office response to an [Freedom of Information](#) request submitted by the NGO After Exploitation.

^{xxii} JRS UK, “Survivors of Trafficking in Immigration Detention” available for download [here](#).

^{xxiii} JRS UK, “Survivors of Trafficking in Immigration Detention” available for download [here](#).

^{xxiv} JRS UK, “[Detained and Dehumanised](#): the impact of immigration detention”, p.19.