Written evidence from Law Society of England and Wales (NBB0068)

1. Introduction

1.1. The Law Society of England and Wales is the independent professional body that works globally to support and represent 200,000 solicitors, promoting the highest professional standards, the rule of law and access to justice.

1.2. The UK has a well-founded reputation as a home to legal excellence, with a healthy respect for and commitment to upholding the rule of law. However, the Law Society is concerned that the Nationality and Borders Bill undermines this reputation through provisions that are incompatible with the UK's obligations under international law, hinder access to justice or unacceptably and unnecessarily constrain the ability of solicitors to represent their clients diligently.

2. 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?

2.1. The Nationality and Borders Bill contains a number of measures which seek to speed up the asylum application and appeals process by either setting accelerated timelines for certain cases, reducing the levels of appeal available or penalising the late provision of evidence. While tackling delays is a valid aim, the Law Society does not believe that the provisions put forward would achieve this. Instead, they would have profoundly negative consequences for the ability of those claiming asylum to access justice and the overall effectiveness of the immigration system.

2.2. Firstly, clause 24 provides for an accelerated timeframe for certain appeals made from detention. The Law Society believes that this would amount to a new 'Detained Fast Track' procedure, which was found to be unlawful in 2015 due to being 'structurally unfair'. Under this previous procedure, before being found unlawful, many fast-track decisions were successfully challenged and removed from the fast track after an initial hearing. Such procedures therefore merely create another layer and more delay. The right to a meaningful appeal is a central requirement when determining refugee status, and cases should not be accelerated for reasons that are unrelated to their merits.

2.3. Accelerating the timeline of appeals could have serious consequences for access to justice, and the Law Society believes such a process should be properly explored before implementation. Legal processes require adequate time for acquiring and considering relevant evidence, identifying relevant experts (if necessary), and preparing a case. This is central to the proper functioning of the justice system as it ensures individuals receive the best representation possible and helps secure rulings that are fair, accessible and clear. This time, understandably, is even more necessary when a person is a refugee, and so the case is likely to be highly complex and

sensitive in nature, involving the fundamental safety and liberty of a vulnerable person who may not speak the English language. Avoiding delays is in everyone's interests, but in practice, these delays are often caused by a change in circumstances or further evidence coming to light, rather than deliberate last-minute claims or the withholding of information.

2.4. Ultimately, creating an accelerated process for those in detention also has an impact on the cases of those not detained. These cases would effectively be pushed back further in the queue, creating further delays in a system where the wait to have an asylum case heard is unduly long. We therefore consider that this would simply push the delays experienced in the immigration system elsewhere rather than create the intended efficiencies.

2.5. Furthermore, the Bill does not set out which cases may be designated as suitable for accelerated appeals by the Secretary of State, and we are concerned that any use of the new powers that reaches beyond those cases which are clearly and obviously unfounded, and without merit, would have a deleterious effect on access to justice.

2.6. Clause 21 also seeks to streamline appeals processes by removing the First-Tier Tribunal from the process of challenging priority removal notices (PRNs) and instead sending appeals directly to the Upper Tribunal (the 'one-stop process'*)*. This would essentially result in single-tier appeals.

2.7. Creating single-tier appeals increases the risk of unjust decisions being made without opportunity for correction. In particular, this step cannot be viewed in isolation but should be taken in conjunction with the proposed ouster clause in the Judicial Review and Courts Bill which is seeking to remove *Cart* judicial reviews and the ability of the High Court to exercise supervisory jurisdiction over the Upper Tribunal. The sum effect of these two measures would be to prevent any reconsideration of the Tribunal's decisions regarding PRNs in either appeal or judicial review, save for in the most extreme of circumstances. This therefore creates a very real risk of injustice that must be avoided.

2.8. As with accelerated detained appeals, we also do not believe that this would be successful in creating a more efficient asylum system. Removing the First-Tier tribunal from the process in relation to PRNs would simply result in increased pressure on the Upper Tribunal. The Upper Tribunal does not have the capacity to handle these increased pressures and so without providing extra resources attempts at creating efficiency will not succeed.

2.9. In addition to the streamlining of appeals, the Law Society has significant concerns regarding the proposed introduction of penalties for the late submission of evidence. Clauses to this effect are in place in relation to both asylum and human rights claims (clauses 17 and 23) and PRNs (clauses 20 and 23).

2.10. The first manner in which late submission of evidence would be penalised is by relating this to the claimant's credibility (clauses 17 and 20) so that it damages it.

This fails to acknowledge the reality of situations that people seeking asylum may encounter. There are many reasons that evidence may be provided late but in earnest. This could include the impacts of trauma on a claimant, especially in cases where a person has been the victim of human trafficking. Many will also have been unable to take evidence with them when fleeing, either due to having to leave quickly or it being unsafe to travel with such documentation. Equally, there are practical difficulties in contacting people in the country they have fled to obtain this evidence, which might alert the authorities to their location or put friends and family at risk.

2.11. Clause 23 then goes on to creates the additional principle that "minimal weight" should be given by a decision-maker to evidence submitted late following an evidence notice in asylum or human rights claims or appeals, or in response to a PRN, unless there is good reason. The concerning effect of this would be to effectively require the Secretary of State or the Tribunal to disregard what might be critical material when determining questions of fundamental rights. This runs the significant risk of poorly informed decisions being made resulting in injustice for individuals when their life, liberty and safety could be at stake.

3. Does introducing a two-tier system of rights for refugees meet the UK's obligations under refugee law and human rights law?

3.1. Clause 10 allows for the differential treatment of refugees on the basis of whether they arrive directly in the UK from the country they are fleeing and if they present themselves to authorities to make an asylum application without delay. Arriving directly is defined in Clause 34 as not having stopped in another country outside the United Kingdom unless the individual can show that they could not reasonably be expected to have sought protection in that country.

3.2. The creation of a two-tier system for cataloguing refugees based on their method of arrival does not recognise the sad reality: people fleeing persecution, due to that very persecution, may have to use irregular and unorthodox means to travel – as shown by refugees currently attempting to flee Afghanistan. The Law Society has asked the Home Office to reconsider elements of its travel and entry requirements to the UK for Afghan citizens that were in place before the Taliban takeover, primarily the requirement for biometrics provision, now only able to be done in India or Pakistan. Nonetheless, the existence of requirements like these underlines how difficult and impractical it is for some refugees to use 'proper' routes (of which there are very few) when fleeing persecution. The practical realities refugees fleeing face mean that they often have to use these irregular means as their only choice.

3.3. The UNHCR has in its observations on the Bill that it, and the introduction of a two-tier system of protection, is "fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention".[1] We agree with this assessment.

[1] UNHCR, *UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22* (September 2021), para.1. Available at: https://www.unhcr.org/6149d3484/unhcr-summary-observations-on-the-nationality-and-borders-bill-bill-141

3.4. In relation to clauses 10 and 34 they would impermissibly penalise those arriving through irregular means which may take them through the territories of other countries. There is no requirement in the Refugee Convention, or elsewhere in international law, that those fleeing persecution should claim asylum in the first safe country they reach, which is the underlying rationale for these measures. The UNHCR has emphasised that such an interpretation would undermine the "global, humanitarian and cooperative principles on which the refugee system is founded" and place an unworkable burden on neighbouring countries to that which refugees flee.

3.5. The ways in which categories of refugees may be treated differently under clause 10 are further incompatible with the Refugee Convention. Firstly, 5(c) and 6(d) allow a condition of no recourse to public funds to be applied to either the refugee or a family member, in contravention of article 24 of the Refugee Convention. In addition, 5(d) and 6(a) allow differential treatment in whether or not a family member is to be given leave to enter or remain, which conflicts with the overarching principle of the unity of the family included at the beginning of the Convention. This may further raise compatibility issues with article 8 of the Human Rights Act and European Convention of Human Rights.

3.6. In addition, clause 10 also allows for differential treatment in the periods of leave to remain which are granted, which will have an impact on the capacity of courts and immigration officials. We know that where limited periods are granted, and especially where these are short, this only increases the number of cases that return to officials and the courts for review when this period is up. This has been seen before in the asylum system and will lead to delays and backlogs.

4. 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)?

4.1. Clause 14 permits asylum claims made by those with a "connection to a safe third country" to be declared inadmissible and for that person to be removed to that country. These measures have been in place under the Immigration Rules since 1 January 2021. However, no one has been removed under them because no safe country has yet agreed to receive them. In this situation, where it is unlikely the individual will be able to be removed to a third country, under clause 14(7)(a) the claim will nevertheless have to be considered. Therefore, the only impact that these rules will have (as has been seen with the current rules) is to increase the number of people waiting for decisions to be made on their asylum applications, during which time they are unable to work and are reliant on the state. This both keeps the individual in a state of limbo which is detrimental to their wellbeing and increases costs to the state.

4.2. We also note that the UNHCR has raised concerns that clause 14 sets a low standard at which a country will be considered 'safe' and one at which an individual would be at risk of human rights violations if removed to that country.[2] One of the conditions for determining whether a country is "safe" would be that the individual's "life and liberty are not threatened in that State by reason of their race, religion, nationality, membership of a particular social group or political opinion". This therefore excludes a whole range of violations of other fundamental human rights to which they may be at risk within that state, outside of threats to life or liberty.

5. 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?

5.1. Clause 38 raises the sentence for assisting unlawful immigration, from a maximum of 14 years to life. It also makes the charge far more broadly applicable, as it omits the "for gain" element of the offence, established in 25A(1)(a) of the Immigration Act 1971. We are concerned that omitting this element would have the perverse effect of making those engaged in humanitarian assistance for no personal gain potentially open to a sentence usually reserved for the most serious crimes.

6. 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?

6.1. The explanatory notes to the Bill state that the measures under clause 26 and Schedule 3 to permit removing asylum seekers to a safe country while their asylum claims are pending are intended to "*support the future object of enabling asylum claims to be processed outside the UK and in another country.*" At present, we do not believe there is sufficient information on the Government's future plans to process asylum claims outside the UK to provide a full assessment of their compliance with international law.

6.2. However, we have significant concerns that the current plans detailed under Schedule 3 to remove an asylum seeker to a third country while their application is processed would potentially place them outside of the UK's jurisdiction, and therefore possibly outside the reach of protections provided by the Human Rights Act and European Convention of Human Rights. If the intention is to develop immigration processing centres in other territories, we would be further concerned that these would likely be outside other mechanisms such as inspection processes of the conditions in which they are held.

6.3. Removing individuals claiming asylum to a state outside the UK would further severely impede the ability of the individual to seek legal advice or obtain legal aid for representation to support their claim. This could prevent meritorious applications from being accepted and create a substantial barrier to access to justice.

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[2] *Ibid.,* para. 32.

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

7.1. The Law Society is concerned by the changes introduced in clause 29 which amends the standard for proof of refugee status. Currently, under UK case law a refugee must show there is a reasonable likelihood of being persecuted to be recognised as a refugee. This Bill will change the requirement to 'the balance of probabilities'.

7.2. This establishes a higher threshold which will be more difficult for those claiming asylum to meet. Requiring a higher standard of proof puts a greater burden on the asylum seeker to provide more evidence, which is often difficult or expensive for an individual who has fled their home country to obtain, or dangerous for them to travel with. This threshold change would likely therefore exclude many who are deserving of asylum, but unable to prove it.

7.3. In addition, changing an established evidentiary threshold will also affect the speed at which cases can be dealt with. Courts will have to interpret what this new standard means and there will likely be an increase in litigation due to this to establish the parameters of the requirement.

7.4. Clause 35 directs decision-makers on how to interpret Article 33(2) of the Refugee Convention, specifically what is to be considered a "particularly serious crime".

7.5. The principle of non-refoulement is a core principle of the Refugee Convention, whereby it is prohibited to remove a refugee to a country where they would be at risk of persecution. An exception is made to this in Article 33(2) of the Convention, where it is permitted to remove refugees if they have been convicted of a "particularly serious crime" and are considered to be a danger to the community.

7.6. Currently, under Section 72 of the Nationality, Immigration and Asylum Act 2002, a refugee who has been convicted of a crime which carries at least a 2-year sentence of imprisonment is considered to have committed a particularly serious crime for the purposes of Article 33(2) of the Refugee Convention. Both whether this does in fact constitute a particularly serious crime and whether the individual is a danger to the community is rebuttable.

7.7. Clause 35 would first lower the threshold of a particularly serious crime from 2 years to 12 months. It also makes this element non-rebuttable, so that the only element that can be challenged is whether the individual is a danger to the community.

7.8. Crimes carrying sentences of 12 months imprisonment vary and include a range of non-violent offences. This is therefore a very low threshold and would encapsulate offences that cannot reasonably be said to be particularly serious. The risk of removing an individual's refugee protection on this basis and returning them to a country where they face persecution would be disproportionate. This risk is increased through the proposal to also make this non-rebuttable, as there can be no discretion for determining whether in an individual case the refugee has in fact committed a particularly serious crime.

7.9. Even with this change in place, it would remain open to a refugee to challenge their removal on the basis that they do not pose a danger to the community. Lowering the threshold therefore only practically results in increasing the number of cases that would need to be determined against this factor. This will inevitably increase pressures on the already overloaded Immigration Tribunal, leading to delays and rising backlogs.

8. Other issues of concern

8.1. Although not directly the subject of questions in this call for evidence, the Law Society wishes to register with the Committee its concerns regarding clause 62 of the Bill. This requires the Tribunal Procedure Committee to give the Tribunal the power to fine individuals exercising a right of audience or right to conduct litigation or an employee of such a person, for "improper, unreasonable or negligent behaviour".

8.2. Solicitors are already subject to an extremely rigorous regulatory regime by the Solicitors Regulation Authority, which includes duties to the court and duties relating to integrity. Furthermore, those providing services to people seeking asylum in England and Wales are also likely to be doing so on a legal aid basis, with the Legal Aid Agency providing further means of scrutiny and oversight. In addition, the Tribunal Procedure Rules already have provision for wasted costs and the Tribunal has powers to refer cases of improper behaviour to the regulator, as in R (Hamid) v SSHD [2012] EWHC 3070. It is therefore not clear why these measures are thought to be necessary. To introduce further overlapping and potentially duplicative regulatory requirements may have the perverse impact of undermining effectiveness of all relevant regimes, in addition to increasing complexity and bureaucracy.

8.3. We fear that the broad formulation of the measure could have a chilling effect on the willingness of solicitors to take on difficult cases for fear of risking personal financial liability. Indeed, this chilling effect may extend to Home Office Presenting Officers who would similarly be liable under the measure. It could risk driving a wedge between solicitors and their clients, by creating a conflict of interest if solicitors are to be held personally liable for costs for reasons outside of their control. Solicitors are fundamentally obliged to act in their clients' best interests, which may involve adjourning a case due to a change in circumstances which they are not at liberty to disclose.

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