# **Nationality and Borders Bill 2021: submission to the Joint Committee on Human Rights legislative scrutiny**

# Freedom from Torture, July 2021

## **JCHR scrutiny questions**

### Question 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?

1. The proposals to ‘fast track’ claims and appeals under clauses 16-23 would, depending on the manner in which they are implemented, inhibit access to justice, risk inherent unfairness contrary to the common law and violate the procedural requirements of Articles 2, 3, 4, 8 and of Article 13 ECHR. Most importantly, they may give rise to a significant risk of *refoulement*.
2. There are ample mechanisms built in to the procedure to reduce the burden of handling repeat claims for asylum so any additional mechanisms must be balanced against the obligation not to *refoule* refugees. This obligation compels the government to consider any fresh claims up until the moment of return. The ECHR also obliges the Government to give ‘anxious scrutiny’ to any claims made under Article 3. The Government cannot propose to restrict access to the asylum process in the name of efficiency without breaching these obligations.

### Question 3: Does introducing a two-tier system of rights for refugees meet the UK’s obligations under refugee law and human rights law?

1. Importantly, clause 10 does not base the distinction between Group 1 and Group 2 refugees on the categories of ‘regular’ or ‘irregular’ arrival but instead makes a distinction between those who are protected by Article 31 of the Refugee Convention and those who are not. This clause must then be read alongside clause 34, which narrows the protection available under Article 31. In spite of the presentation in the Bill, the inadmissibility regime, which on the face of it appears to track the component parts of Article 31, is expressly designed to target unlawful entrants.[[1]](#footnote-1)
2. This means that many refugees who, under international law should benefit from Article 31 protection from penalty, will find themselves in Group 2 “on account of” their unlawful entry, and are likely to be **denied the rights and protections under the Convention**.
3. Under clause 10 a ‘Group 2 refugee’ is likely to be granted temporary protection status with limited leave to remain (up to 30 months), no automatic path to settlement limited family reunion rights and, possibly, no recourse to public funds. These measures will create a parallel and substantial community of refugees with nothing to distinguish them, in terms of fear of persecution, from those who have arrived through pre-authorised routes and been granted refugee status or indefinite leave to remain.[[2]](#footnote-2)
4. The proposed two-tier system is a regressive and unprincipled step that is inconsistent with the basic rationale of the Refugee Convention. One important reason is that Article 31 was intended as a protection against penalisation for unlawful entry or presence. It was never intended to be used as the basis for systematically affording some refugees less protection than others. An individual’s rights under the Convention – and the corresponding obligations of Contracting States – flow from the simple fact of meeting the Convention definition; they are not dependent on a formal recognition process, and certainly not one that favours those who have travelled with prior authorisation.
5. **Article 34 of the Refugee Convention** calls on States to facilitate the naturalisation of refugees in recognition of the importance of citizenship as the end-point in the pursuit of a durable solution. In spite of this obligation, the temporary protection regime would intentionally maintain a sizeable community of refugees in a precarious state, with no hope of integration or naturalisation. Such an approach would be inconsistent with the good faith effort required of the UK by Article 34.
6. The temporary protection regime is, additionally, very likely to be inconsistent with **Article 14 ECHR read with Article 8**. The constant threat of withdrawal of protection inherent in the temporary protection regime would profoundly impact on the enjoyment of a refugee’s private and family life in the UK. The proposed limitation or removal of family reunion rights would only add to this harm. This harm would impact disproportionately on refugees who arrived without prior authorisation. This is a group that is analogous, in terms of the need for safety, stability, community and family unity, to those who arrive through a pre-authorised route. It is also a group that would fall under the “other status” category for the purpose of Article 14 in terms of being a personal, identifiable or acquired characteristic. The disproportionate impact felt by this group cannot be objectively justified bearing in mind how the statutory definition of Article 31 narrows its scope such that unauthorised arrivals will be indirectly penalised in a manner that is proscribed under the Refugee Convention.
7. For a torture survivor, repeated grants of limited leave would have such a harmful impact, including by denying them full access to healthcare and the stability required to rehabilitate, that it would almost certainly constitute inhuman and degrading treatment and be **contrary to Article 14 UN Convention Against Torture** (right to rehabilitation).
8. Attaching a No Recourse to Public Funds condition to temporary protection status is **contrary to Article 23 of the Refugee Convention** which instructs Contracting States to *‘accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.*' This proposal could result in up to 3,100 more people per year living in poverty and driven into debt and exploitation.[[3]](#footnote-3)

*Clause 34 immunity from penalties.*

1. The “coming directly” requirement in Article 31 was never meant to preclude passage through a “safe”, intermediate country. The critical question is not whether a person could - or even should - have sought asylum elsewhere, as **there is no requirement in international refugee law to seek protection in the first “safe” country.** Instead, the question is whether an asylum seeker or refugee had **already found secure asylum** (whether temporarily or permanently), such that there is no protection-related reason for their irregular onward movement. Thus, clause 34’s replacement of the “coming directly” requirement in the Immigration and Asylum Act 1999 (granting immunity only if the applicant can show that they “could not reasonably have expected to be given protection…. in that country”) with a clause (cl 34(5)(a)) that removes immunity if the applicant could reasonably be expected to have “sought” protection there,constitutes a unilateral narrowing of theprotection offered by Article 31.
2. The inadmissibility regime and the two-tier system constitute the “penalty” to which those who have entered unlawfully will be subjected. The inadmissibility regime is designed to, and will in practice, overwhelmingly apply to unlawful entrants. It can therefore be described as being imposed “on account of” their unlawful entry for the purpose of Article 31.

*Clause 14: inadmissibility.*

1. There is no reference in either clause 14 of the Bill, the Inadmissibility Guidance,[[4]](#footnote-4) or the Immigration Rules to a requirement for the decision-maker to consider whether removing an asylum-seeker to a third country carries a real risk of indirect *refoulement*. While ‘safe third country’ arrangements are not unlawful *per se* as a matter of international law, the absence of adequate safeguards to prevent onward *refoulement* will result in **breaches of the UK’s obligations under Article 33 of the Refugee Convention** (non-*refoulement*). To be effective, the prohibition on *refoulement* must be extended **to all refugees, including those whose status has not yet been formally recognised (i.e. all asylum seekers)**. The **prohibition also extends to “indirect” *refoulement***: that is, removal to a territory from which there is a real risk that they will be expelled to their country of origin. The absence within this Bill of any obligation on the UK to ensure that the ‘safe third State’s asylum procedure affords effective protection from direct or indirect *refoulement* is likely to create a risk of a breach of **Article 2** (right to life), **Article 3** (prohibition of torture and inhuman and degrading treatment) **and Article 4** (prohibition of slavery and forced labour) **of the ECHR**.[[5]](#footnote-5) To avoid such a breach would require a positive duty to be placed on the UK to conduct an individualised assessment of each ‘safe third State’ rather than merely assuming compliance with Convention standards as this Bill appears to allow for. Additionally, this must be a preventative duty if it is to avoid a breach of **Article 7 ICCPR** (the international analogue of Article 3 ECHR) and **Articles 2 and 16 of the UN Convention Against Torture**. It is not enough to provide a remedy after the event.[[6]](#footnote-6)
2. Nowhere is it stipulated that there is a requirement to consider the adequacy of the refugee status determination procedures in a potential ‘safe third country’ and whether the claimant will “enjoy sufficient protection” more generally in the third State. The Bill makes it clear that the ‘safe third State’ need not even be a signatory to the Refugee Convention. If a refugee is not recognised as such because they are not afforded a proper opportunity to prepare and present their case, or appeal the refusal, then the fact that the country respects the principle of *non-refoulement* generally will be irrelevant.
3. Importantly, the Bill does not clarify for decision makers what standard they should apply in determining whether the criteria for a ‘safe third State’ are met. In the absence of clear guidance outlining the correct standard to be applied, there is a risk that they may determine the criteria on the balance of probabilities - therefore allowing removal even if there is a real risk of onward refoulement. Alternatively, they may consider only whether there is (for example) a formal legal prohibition on refoulement with no consideration of how it is observed in practice. Similarly, in defining a ‘connection’ to a safe third State, no standard is set for how to interpret a ‘reasonable’ expectation that someone could have made an asylum claim in that State, which could conceivably be a country in which the claimant has never set foot.
4. Treating the claims of asylum-seekers who have entered the UK unlawfully as *prima facie* inadmissible is a “penalty” for the purposes of **Article 31 of the Refugee Convention** and, therefore, a breach of that article (see paragraph 37). Some level of individualised assessment would be required as a safeguard in any safe third country arrangement. The provisions allow for the Secretary of State to consider a claim even where it has been declared inadmissible in two situations: when it is unlikely to be possible to remove the applicant within a “reasonable period” (replicating the existing provision) and where there are “exceptional circumstances”. The latter significantly raises the bar for applicants who have a good case for having their claim heard in the UK, including applicants with a family connection in this country that is not considered “exceptional”.

### Question 7: 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?

1. Depending on how the Government intends to implement this proposal, there may be a significant risk of a breach of international law. Asylum-seekers cannot lawfully be removed for offshore processing if doing so would result in a real risk of breach of their rights under Article 2, 3 or 4 ECHR, including through inhuman or degrading treatment during the status determination procedure and the risk of return to torture, persecution or death. To prevent a violation of Article 3 ECHR and Article 33 of the Refugee Convention, procedural safeguards would need to be in place to ensure there was no risk of *refoulement*.
2. Asylum-seekers who arrive in the UK are within its jurisdiction for the purposes of Article 1 ECHR. This means that asylum-seekers could not lawfully be removed for offshore processing if doing so would result in a real risk of breach of their rights under Article 2, 3 or 4 ECHR. Any exposure to torture, inhuman or degrading treatment, or the risk of trafficking, during the status determination process, or a risk that the process itself would result in return to the country of origin to face such treatment, might constitute a breach.
3. Additionally, asylum-seekers could not lawfully be removed for offshore processing if this would breach the UK’s obligations under Article 8 ECHR. This might occur if removal interferes with an asylum-seeker’s intention to join close family members whose claims were already being processed in the UK. A violation of the right to respect for private life might occur if, for example, a person had serious mental health issues which would be exacerbated by removal and would not be properly treated in the destination country, as may be the case for survivors of torture and trauma. Any interference with an asylum-seeker’s procedural rights under Article 8 (taken with Article 13 ECHR, which guarantees the right to an effective remedy) may also constitute a breach. Asylum-seekers could also not be removed to an unlawful risk of breaches of their right to liberty and security of the person under Article 5 ECHR.
4. Asylum-seekers processed offshore could also remain within the jurisdiction of the UK – and therefore engage Article 1 ECHR - if it continued to exercise authority and control over them[[7]](#footnote-7) including, potentially, through the involvement of UK State agents in the running of reception centres or the conduct of status determination procedures.
5. There is a risk that offshore processing would contravene obligations of non-discrimination and non-penalisation under Articles 3 and 31 of the Refugee Convention if, for example, the criteria for selection were based at all on common countries of origin or means of arrival in the UK.
6. It would, furthermore, breach Article 14 of the ECHR if the criteria for offshore processing indirectly discriminated against refugees from particular countries or with particular religious beliefs, or against refugees who had arrived in the UK without authorisation, unless the differential impact of these criteria were objectively justified. Similarly, when devising and applying the criteria for offshore processing it would be unlawful not to treat particular groups of asylum-seekers – for example, victims of torture or trafficking or those with serious mental health issues – as differently as their particular situation warranted. With this in mind, there is a very real risk that vulnerable asylum seekers, including women and children are subjected to offshore processing.
7. Removal for offshore processing may contravene the prohibition on *refoulement* under Article 33 of the Refugee Convention if the destination country did not in practice, as well as formally, respect the prohibition on *refoulement* (to persecution or to breaches of Article 2/3 or 4 ECHR) and if the status determination procedures in the destination country, and the procedures for considering human rights claims, were not “fair and efficient”. This can occur when refugees are subjected to extraterritorial processing in countries without the experience or resources to assess refugee status fairly, efficiently and with adequate safeguards, or to ensure practical and effective protection against *refoulement*.
8. If the UK were to send asylum-seekers to be processed in a location which did not respect the full range of 1951 Convention rights to which refugees (and hence, as a practical matter, asylum-seekers) are entitled, this would constitute a failure to implement its obligations under the Convention in good faith. This would include the right to enjoy the benefit of the Convention without discrimination (Article 3); the right of free access to the courts (Article 16); and the right to the same treatment as nationals with respect to “elementary education” (Article 22(1)). Other rights must be afforded to all refugees who are physically present in the State’s territory: these include rights relating to freedom of religion (including the religious education of children) (Article 4); non-penalisation (Article 31(1); and the right not to be subjected to restrictions on movement “other than those which are necessary” (Article 31(2)).

### Question 8: Will the proposed instructions to decision-makers on how to interpret the Refugee Convention secure or restrict the protections that Convention guarantees?

1. Raising the standard of proof to ‘*a balance of probabilities’* (Clause 29) will significantly increase the number of refugees wrongly sent back to face death or torture and, as such, risks **contravening Article 33 of the 1951 Convention**.
2. The current legal standard of ‘*reasonable degree of likelihood’* is a test grounded in an understanding of the nature of persecution for a Convention-based reason, the reality of an asylum seeker’s experience of flight and the serious implications of setting evidentiary expectations too high. Our Proving Torture[[8]](#footnote-8) research demonstrated how hard it already is, even to this relatively low standard of proof, for survivors of torture to prove their claim.
1. See the Secretary of State’s Foreword to the New Plan for Immigration policy statement, HM Government, March 2021 [↑](#footnote-ref-1)
2. In the year ending September 2019, 62% of asylum claims were made by those who entered the UK without authorisation, including those who entered by small boat, lorry, or without visas, accessed here: <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/> [↑](#footnote-ref-2)
3. The impact of the New Plan for Immigration Proposals on asylum, Refugee Council briefing, June 2021, accessed here: <https://refugeecouncil.org.uk/information/resources/new-plan-for-immigration-impact-analysis/> [↑](#footnote-ref-3)
4. Home Office, Inadmissibility: safe third country cases, Version 5.0, 31 December 2020, accessed here: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf> [↑](#footnote-ref-4)
5. Ilias and Ahmed v Hungary (App. No. 47287/16, 21 November 2019 [↑](#footnote-ref-5)
6. A and Ors (No 2) v Secretary of State for the Home Department [2006] 2 AC 221 (HL) [↑](#footnote-ref-6)
7. See e.g. *M v Denmark* (1992) 73 DR 193, [196]; *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643. [↑](#footnote-ref-7)
8. Freedom From Torture, Report: Proving Torture, Demanding the impossible Home Office mistreatment of expert medical evidence, November 2016, accessed here: <https://www.freedomfromtorture.org/sites/default/files/2019-04/proving_torture_a4_final.pdf> [↑](#footnote-ref-8)