

# Nationality and Borders Bill: House of Lords second reading briefing

20 December 2021



## About Freedom from Torture

Freedom from Torture is the only human rights organisation dedicated to the rehabilitation of torture survivors who seek refuge in the UK. We do this through direct and second-tier services from our specialist centres across the UK. Each year we support more than 1,000 torture survivors, primarily through psychological therapies, forensic documentation of torture, legal and welfare advice, and creative projects.

To accompany this briefing, Matrix Chambers has provided us with a legal opinion of the Bill<sup>1</sup> clarifying the implications of the proposals in relation to international refugee and human rights law.

## Executive summary

The proposals within the Nationality and Borders Bill constitute the greatest threat to the UK's asylum system in a generation. They will limit access to protection in the UK, criminalise people seeking safety, increase the risk of return to persecution, hold asylum seekers in a prolonged limbo, curtail the rights of refugees, isolate refugees in harmful 'camps', condemn refugees to poverty and cripple the asylum system with delays and inefficiencies.

**This Bill will not deliver on the stated objectives.** It will do nothing to increase the fairness of the asylum system, improve the quality of decisions or enhance the protection offered to refugees. This Bill will not break the business model of smuggling, but instead will increase the vulnerability and exploitation of those who will continue, in the absence of any other option, to move irregularly to seek protection. The Bill will not reduce the Home Office's current backlog of **83,733** outstanding asylum cases<sup>2</sup> and will make it no easier to remove those with no right to be in the UK. The Government's own Equality Impact Assessment<sup>3</sup> (EIA) recognises that "*evidence supporting the effectiveness of this approach [increased deterrence to encourage people to claim asylum elsewhere] is limited*".

**Freedom from Torture supports the call for a global resettlement target of 10,000 places per year.** A fit-for-purpose global resettlement scheme is a straightforward reform that does not require legislation and does enjoy significant public and cross-party support. Unlike the proposals in this Bill, it would contribute to the delivery of the Home Office's objective to provide a safe route for some of the most vulnerable people seeking protection in the UK. The issue of irregular arrivals taking dangerous routes to safety in the UK is a complex one and will not be addressed by resettlement alone. We all want to see an end to the deaths in the Channel, but investment in one safe route must not come at the expense of access to protection for those who arrive in the UK clandestinely.

**In seeking to penalise those who arrive in the UK by irregular means this Bill represents the biggest legal assault on international refugee law ever seen in the UK.** It is a betrayal of the letter and spirit of the 1951 Refugee Convention, which was drafted in the wake of the holocaust, to ensure that the impossibility of pre-authorised travel would be no barrier to accessing protection from persecution. If this Bill is passed, every year thousands of refugees will be denied the opportunity to secure protection, and to recover from persecution because the UK has reneged on its commitment to assess or recognise the protection needs of those who arrive on its shores.

The Government insists that this Bill is compliant with our international obligations under the Refugee Convention but has provided no evidence to support its contention. The Bill is, in fact, part of a concerted effort to push through an array of legislation that reduces our human rights and limits our ability to challenge any abuses that occur. This encompass parts of the Policing Bill, restrictions on judicial review, and proposals to reform the Human Rights Act. When taken as a whole, the impact of this regressive package of legislation will be to harm the most vulnerable, undermine the global system of refugee protection and do lasting damage to the UK's reputation.

<sup>1</sup> The Matrix Chambers joint legal opinion of the Nationality and Borders Bill available at: <https://action.freedomfromtorture.org/joint-opinion-nationality-and-borders-bill-october-2021>

<sup>2</sup> <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-september-2021/how-many-people-do-we-grant-asylum-or-protection-to>

<sup>3</sup> Nationality & Borders Bill Equality Impact Assessment: [//publications.parliament.uk/pa/bills/cbill/58-02/0141/Nationality\\_and\\_Borders\\_Bill\\_-\\_EIA.pdf](https://publications.parliament.uk/pa/bills/cbill/58-02/0141/Nationality_and_Borders_Bill_-_EIA.pdf)

**This briefing focuses on clauses 11 (differential treatment), 15 (inadmissibility), 36 (immunity from penalties) and 39 (illegal entry) which are all linked by the principle of penalty based on method of arrival.**

#### Clause 11: Differential treatment of refugees

Clause 11 authorises the Secretary of State to treat two groups of refugees differently according to compliance with the three criteria set out in subsections (2) and (3). Someone is a 'Group 1' refugee if they have (i) come to the UK directly from a country or territory where their life or freedom was threatened; (ii) they have presented themselves 'without delay' to the authorities, and (iii) where relevant, they are able to show 'good cause' for their unlawful entry or presence. If these conditions are not met then a person will be a 'Group 2' refugee. A 'Group 2' refugee may be granted temporary protection status with limited leave to remain (no less than 30 months<sup>4</sup>), no automatic path to settlement, limited family reunion rights and no recourse to public funds (NRPF).

The criteria that apply to differentiation appear to track the terms of Article 31 of the Refugee Convention but, at Clause 36 the Bill contains a statutory codification of the component parts of Article 31 (particularly "coming directly") which is narrower in scope than, and therefore inconsistent with, Article 31 as properly interpreted. **This means that many refugees who, under international law should benefit from Article 31 protection from penalty, will find themselves in 'Group 2', and will be denied the rights and protections under the Convention.**

**These measures are profoundly unfair** as they will create a parallel community of refugees with nothing to distinguish them, in terms of fear of persecution, from those who have been resettled to the UK.

The majority of people who make an asylum claim in the UK have entered irregularly.<sup>5</sup> The top five nationalities arriving by small boat are people from Iran, Iraq, Sudan, Syria and Afghanistan.<sup>6</sup> These nationalities top the referral list to Freedom from Torture's therapeutic rehabilitation services,<sup>7</sup> and we know that many of our clients have arrived irregularly in the UK. The majority of asylum claims in the UK are successful<sup>8</sup> and the grant rate is even higher for those who secure one of our expert medico-legal reports to evidence their experience of torture.<sup>9</sup>

Contrary to the Government's claims, **it is the most vulnerable who will be penalised by these measures.** Women, children, victims of sexual violence and survivors of torture are often compelled to travel irregularly to seek asylum. This is often because alternative routes to protection are not available or accessible to these groups. The difficulty of identifying someone as a survivor of torture and the administrative demands of the resettlement process can often stand in the way of selection for what is currently the only real alternative route to safety.

Penalising refugees who do not present their claim 'without delay' following arrival risks further punishing the most vulnerable. It is clinically recognised that an experience of torture or trauma will lead to avoidance behaviours and interfere with the person's ability to disclose. The Bill's EIA recognises that there is a risk of indirect discrimination against certain groups with protected characteristics. During Commons committee stage the Minister argued that the proposal to differentiate will be 'sensitive to certain types' and that decision makers will be able to take vulnerabilities into account. Again, this safeguard will be left to the immigration rules and policy guidance, as he refused to build any protections into the clause on the justification that such safeguards would be abused. This reveals much about the Minister's confidence in the Home Office's ability to identify and respond to vulnerability.

The Minister also explained that the shorter period of leave is appropriate for 'Group 2 refugees' because it provides the Secretary of State with more opportunities to see if the country situation has changed, but offered no justification that links the need for this measure to the method of arrival. For a torture survivor, repeated grants of

<sup>4</sup> This was clarified in the 'will write' letter from the Minister on 26<sup>th</sup> October 2021: [http://data.parliament.uk/DepositedPapers/Files/DEP2021-0840/Minister\\_Pursglove\\_26\\_October\\_Committee\\_Session\\_Letter.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2021-0840/Minister_Pursglove_26_October_Committee_Session_Letter.pdf)

<sup>5</sup> 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. <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/>

<sup>6</sup> Nationality & Borders Bill Equality Impact Assessment: [https://publications.parliament.uk/pa/bills/cbill/58-02/0141/Nationality\\_and\\_Borders\\_Bill\\_-\\_EIA.pdf](https://publications.parliament.uk/pa/bills/cbill/58-02/0141/Nationality_and_Borders_Bill_-_EIA.pdf)

<sup>7</sup> <https://www.freedomfromtorture.org/news/where-does-torture-happen-around-the-world>

<sup>8</sup> The overall grant rate for asylum claims made in 2019 was 65%: [How many people do we grant asylum or protection to? - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/how-many-people-do-we-grant-asylum-or-protection-to)

<sup>9</sup> Freedom from Torture's 'Proving Torture' research report in 2016 found that 76% of cases, for which the final outcome was known, were granted asylum following a successful appeal. Proving Torture is available at: [https://www.freedomfromtorture.org/sites/default/files/2019-04/proving\\_torture\\_a4\\_final.pdf](https://www.freedomfromtorture.org/sites/default/files/2019-04/proving_torture_a4_final.pdf)

temporary leave would have such a harmful impact, including by denying them full access to healthcare and the stability required to rehabilitate, that it would likely constitute inhuman and degrading treatment and be contrary to Article 14 UN Convention Against Torture (right to rehabilitation).

The Minister further clarified that the NRPF condition will not apply to anyone who was in receipt of section 95 support, which includes the vast majority of those awaiting an outcome on their asylum claim.<sup>10</sup> This clarification is welcome but begs the question why this condition is even necessary. This condition could result in up to 3,100 more people per year living in poverty and driven into debt and exploitation.<sup>11</sup> The denial of security and the threat of impoverishment is likely to drive more people into conditions of forced labour, trafficking and abuse. This will, inevitably, hit the most vulnerable the hardest, and particularly those struggling with the disabling trauma resulting from persecution and torture and enduring delayed or interrupted access to support and rehabilitation. Our Poverty Barrier<sup>12</sup> research with torture survivors in the UK revealed incidences of informal work, transactional relationships, sex-for-money, violence and rape resulting from an experience of destitution.

The powers in the Bill leave discretion for the Secretary of State to impose conditions ‘as appropriate’, and this will be set out in the immigration rules and policy guidance. This means that we may see further conditions being applied to ‘Group 2 refugees’, without parliamentary scrutiny to consider the implications. This could include anything from withdrawal of the right to work to the imposition of healthcare charges.

**These proposals will not contribute to the creation of a better, more efficient asylum system.** The Home Office is already struggling to process the volume of asylum claims currently in the system.<sup>13</sup> These proposals envisage repeating the decision-making process for people with Temporary Protection Status as regularly as every two and a half years. This would cripple the Home Office apparatus and leave many thousands in limbo<sup>14</sup>, at risk of destitution and exclusion from vital public services and support. By actively constraining the assimilation and naturalisation of refugees, this clause is also inconsistent with Article 34 of the Refugee Convention.

**There is no evidence that granting Temporary Protection Status will act as a deterrent and reduce irregular journeys to the UK.** Between 1999 and 2008, the Australian government operated a system of Temporary Protection Visas (TPVs) as a way of deterring irregular arrivals. In 2000, there were 2,939 arrivals. In 2001 arrivals rose to more than 5,000. TPVs did not ‘break the business model’ of smuggling to Australia and did not stop deaths at sea. Many of the women and children who drowned in October 2001 were the family members of TPV holders.<sup>15</sup> Ultimately, the policy was futile, as 90% of TPV holders were granted permanent protection.<sup>16</sup>

#### Recommendations:

1. **Support an amendment:** Clause 11 cannot be amended such to improve or soften its impact. We urge Peers on all sides to **press for its removal from the bill altogether** through your contributions to the debate and by **leading or supporting subsequent amendments**. Please get in touch if you would like to know more.
2. **Seek responses from the Minister:** Would you consider making the interventions below:
  - a. Can the Minister confirm that the approach mandated under Clause 11 is designed to and will in practice punish those arriving in the UK irregularly regardless of whether they have good cause for doing so, and explain how this is consistent with our obligations under Article 31 of the Refugee Convention?
  - b. Can the Minister set out the evidence that shows how reducing the rights and entitlements of refugees will have the effect of deterring dangerous journeys?
  - c. What estimate has the Home Office made of the cost of needing to reassess a refugee’s protection needs every two and a half years? And what impact will that have on existing delays in making asylum decisions?

<sup>10</sup> At end September 2021, 62,651 people were awaiting a decision on their asylum claim and were in receipt of support. Immigration Statistics, year ending September 2021.

<sup>11</sup> New Plan for Immigration – Impact Analysis – June 2021. [www.refugeecouncil.org.uk/information/resources/new-plan-for-immigration-impact-analysis/](http://www.refugeecouncil.org.uk/information/resources/new-plan-for-immigration-impact-analysis/)

<sup>12</sup> The Poverty Barrier: the right to rehabilitation for survivors of torture in the UK, Freedom from Torture, 2013. [www.freedomfromtorture.org/news/the-poverty-barrier-report](http://www.freedomfromtorture.org/news/the-poverty-barrier-report)

<sup>13</sup> At end September 2021, 56,520 people had been waiting for a decision for more than 6 months. Immigration Statistics, year ending September 2021.

<sup>14</sup> The Refugee Council predicts that up to 9,200 per year could receive temporary protection status, *ibid*.

<sup>15</sup> Asylum Seeker Resource Centre, What are Temporary Protection Visas? <https://asrc.org.au/resources/fact-sheet/temporary-protection-visas/>

<sup>16</sup> [www.unitingjustice.org.au/refugees-and-asylum-seekers/information-and-action-resources/item/931-temporary-protection-visas-tpvs-fact-sheet](http://www.unitingjustice.org.au/refugees-and-asylum-seekers/information-and-action-resources/item/931-temporary-protection-visas-tpvs-fact-sheet)

## Clause 15: Asylum claims by persons with connection to safe third State: Inadmissibility

Clause 15 allows for a claim to be declared inadmissible if the applicant has travelled through, or has a connection to, a safe third country where they could have claimed asylum. It also allows the Secretary of State to remove people seeking asylum to a safe country that agrees to receive them, even if they have no connection to it.

The objective behind Clause 15 is to deter irregular arrivals, to allow for protection to be offered to those who arrive through 'regular' routes, and to facilitate more removals under 'safe third country' arrangements. In the first three quarters of 2021, 6,598 'notices of intent' were issued to people seeking asylum to inform them that their claim was being considered for inadmissibility. Of these, 48 people were declared inadmissible and only ten were removed. Over 2,000 people were readmitted to the UK asylum procedure for consideration of their claim, presumably because no return agreement could be secured.<sup>17</sup> In the absence of readmission agreements this policy is unworkable at scale, is ineffective as a deterrent and is cruel in the way it holds refugees in limbo.

During Commons report stage, the Government amended clause 15 to remove the power of the Secretary of State to consider an asylum claim that she has previously declared inadmissible where she determines that it is unlikely to be possible to remove the claimant to a safe third State within a reasonable period. This means that anyone whose claim is declared inadmissible but for whom no general or specific readmission agreement can be secured, will languish in limbo indefinitely. In addition to the human cost of such insecurity, under this clause the Home Office will have to support the majority of these inadmissible but unremovable cases under section 4 of the Immigration and Asylum Act 1999 (including financial support and accommodation) for an indefinite period.

Subjecting asylum seekers to long periods of uncertainty and anxiety is detrimental to their physical and mental health and will damage their ability to successfully integrate into the UK once status is recognised. The evidence suggests that most of those routed through this procedure will be granted status in the UK. The implications of Clause 11 will mean that their status (as Group 2 refugees) will be precarious and offer little security and stability.

Clause 15 sets an unacceptably low standard for when a State will be considered 'safe' for a claimant and contains no safeguards to prevent onward refoulement, risking a breach of Article 33 of the Refugee Convention (non-refoulement). The prohibition on refoulement must apply to all refugees, including those whose status has not yet been recognised, which means that any inadmissibility arrangement must include a requirement for the decision-maker to consider whether removing an asylum-seeker to a third country carries a real risk of direct and indirect refoulement. There must be a requirement to consider the adequacy of the refugee status determination procedure in a potential 'safe third country'. In defining a 'connection' to a safe third country, the Government has set no standard 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.

As a penalty imposed on all who arrive irregularly, this clause breaches Article 31 of the Refugee Convention. Under Dublin<sup>18</sup>, family unity, the best interest of the child and time spent on the territory of the State all limited the extent to which irregular entry could be used to justify transfer, as part of an individualised assessment. In committee, the Minister stated that "*representations [...] about why inadmissibility processes should not be applied in their case, including any connections they may have to the UK, will be considered ahead of any removal to a safe third country*" but the clause only allows for 'exceptional circumstances' to be taken into account. This clause is not intended to facilitate responsibility sharing but rather to offload our responsibility to other States.

The idea that the inadmissibility process will act as a deterrent to those arriving irregularly is unproven and misguided. Refugees are unlikely to have much knowledge of the UK asylum procedure before deciding to embark on a journey to safety. The Home Office's own research has found that refugees have little knowledge of UK asylum procedures; entitlements to benefits in the UK; or the availability of work.<sup>19</sup>

**Recommendation: please press for the removal of clause 15 in its entirety.**

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<sup>17</sup> Immigration Statistics, year ending September 2021.

<sup>18</sup> The Dublin Regulation (also known as Dublin III) is EU law setting out which country is responsible for looking at an individual's asylum application.

<sup>19</sup> Understanding the decision making of asylum seekers, Home Office research study 243, July 2002

## Clause 36: Article 31(1) immunity from penalties, and Clause 39: illegal entry and similar offences

Clause 36 seeks to clarify the circumstances in which an individual is or is not immune from penalties, on the basis of their illegal entry or presence. The removal of the protection from penalisation from refugees on the basis that they “stopped” in another country and could reasonably be expected to have “sought” protection in that country or (in the case of those with a *sur place* claim) failed to make a claim before the expiry of their existing leave to remain, is a misconstruction and in breach of Article 31 of the Refugee Convention.

The criteria for application of Article 31 have been broadly interpreted in international and domestic case law. The UK’s Supreme Court affirmed that all provisions of the Convention should be given “*a generous and purposive interpretation, bearing in mind [the Convention’s] humanitarian objects*”.<sup>20</sup> **UK courts have established that some element of choice is open to refugees as to where they may claim asylum.**<sup>21</sup> 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, but whether they had **already found secure asylum**, such that there is no protection-related reason for irregular onward movement.

The inadmissibility regime (Clause 15) and second-class refugee status (Clause 11) will overwhelmingly apply to irregular entrants. The provisions under Clause 36 will seek to deny these entrants any protection from penalty and will inevitably expose refugees who should fall within the scope of Article 31 as a matter of international law, to differential treatment in breach of the Refugee Convention. Once excluded from the protection of Article 31, refugees intercepted at sea will be criminalised under the proposal in Clause 39 to extend the existing offence of illegal entry so that it encompasses arrival in the UK without valid entry clearance. As it is not possible to apply for entry clearance for the purpose of claiming asylum in the UK, and yet an asylum seeker must be physically in the UK in order to make a claim, **the effect of this clause is to criminalise the act of seeking asylum in the UK.**

Refugees prosecuted under this proposal will face a maximum penalty of four years<sup>22</sup> in prison. Clause 37 reduces the threshold at which a crime will be considered ‘particularly serious’ and, as a consequence, a refugee can lose protection against *refoulement*. This threshold aligns with the maximum summary conviction for the offence of unlawful arrival (12 months) thereby ensuring that **the majority of asylum-seekers are not only criminalised for pursuing safety, but that this pursuit constitutes an offence that will deny them protection from refoulement.**

The policy objective is to deter illegal arrival but there is no evidence to support this assertion, and the Government admits that when deterrence measures are applied to break a smuggling route, smugglers simply adapt their operation by creating new routes that are frequently more dangerous and expensive.<sup>23</sup>

The Minister claims the Government “*is not seeking to criminalise those who come to the UK genuinely to seek asylum*”. However, 90% of those who are granted asylum in the UK are from countries whose nationals need entry clearance to enter the UK<sup>24</sup> and 62% of asylum applicants to the UK had entered the country irregularly<sup>25</sup>. This clause means that almost no-one would be able to come to the UK to seek asylum without committing a criminal offence. While the Minister reassured that it would only be in the public interest to seek prosecution where ‘aggravating factors’ are present, he allowed no safeguards to be built in to the Bill. What remains is a framework for the arrest, prosecution and imprisonment of thousands of asylum seekers and refugees every year.

**Recommendation: please press for the removal of clauses 36 and 39**

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<sup>20</sup> R (ST (Eritrea)) v Secretary of State for the Home Department [2012] 2 AC 135, para 30.

<sup>21</sup> R v Uxbridge Magistrates Court, ex parte Adimi [1999] Imm AR 560. See also UNHCR Executive Committee Conclusion No.15 (1979);

<sup>22</sup> The offence will carry a maximum penalty of twelve months’ (on summary conviction) or four years’ imprisonment (on conviction on indictment)

<sup>23</sup> The EIA recognises that ‘*There is a risk that increased security and deterrence could encourage these cohorts to attempt riskier means of entering the UK.*’

<sup>24</sup> UNHCR Observations on the Nationality and Borders Bill, October 2021: [www.unhcr.org/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021](https://www.unhcr.org/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021)

<sup>25</sup> Nationality and Borders Bill Explanatory Notes