

The Nationality and Borders Bill
Advice to Women for Refugee Women

Executive summary

Background

1. The Nationality and Borders Bill ('the Bill') is wide ranging and extensive in its scope and content. It was first published on 06 July 2021 and is due to go to report stage in the Commons having undergone some amendments on 04 November 2021. This legal opinion has been prepared for Women for Refugee Women and identifies and assesses the implications of some of the most controversial and unprecedented aspects of the Bill on women seeking protection. Our view is that the Bill, as currently drafted, runs contrary to the UK's obligations under international refugee and human rights law generally and for women and girls in particular; risks undermining the UK's reputation in terms of meeting its international obligations to refugees, and ultimately, is counter-productive to the Government's aim, because it will result in more not less litigation as the Courts try to grapple with the implications of these wide ranging changes to established protections.
2. The process by which the Bill has come before Parliament is itself a matter of concern. The Bill provides for the implementation of the Government's policy proposals as set on in the "New Plan for Immigration", which proposed substantial and controversial changes to immigration and asylum law. The New Plan for Immigration consultation was itself not without controversy. The consultation period was only for 6 weeks, despite the fact that the proposals are far-reaching, covering areas such as rights of appeal, asylum, nationality, and trafficking. The Government did not publish a consultation response until the day the Bill was introduced into Parliament. There is little in the Government's response that indicates that concerns voiced in the limited consultation made any tangible impact on the Government's direction of policy. Further, it was not until September 2021 that an Equality Impact Assessment was finally published. This is despite the fact that this Bill has significant equalities impacts, and potentially will perpetuate the injustices in the current system, whilst further denying protection to genuine refugees, many amongst them highly vulnerable women and girls.
3. Our advice focuses on four main areas in the Bill that impact on women and girls in particular:
 - i. Significant changes to asylum and international protection - including the creation of a two-tier system for asylum, heightened standard of proof and a change to the definition of 'particular social group'.
 - ii. Re-introduction of accelerated detained (fast track) appeals.
 - iii. Accommodation Centres.
 - iv. Identification of victims of modern slavery and disqualification from protection.

i) *Asylum and international protection*

4. Part 2 of the Bill constitutes a fundamental abrogation of the purpose and obligations of the Refugee Convention. In particular, Clauses 11-13 and 17-21 introduce an unprecedented 'two-tier' system that will discriminate between treatment of refugees, depending on their method of travel and entry to the UK. There is no legal or evidential justification for this change, either as a matter of legal principle under the Refugee Convention, nor as a matter of policy practice, in light of the Government's own evidence. The Government accept in their Equality Impact Assessment that the top five nationalities for small boat arrivals (for men *and* women) are Afghanistan, Iran, Iraq, Sudan and Syria. All five states are countries which produce a many genuine refugees every year, with Afghanistan and Syria being in the top five **global** nationalities that fall under UNHCR's mandate. All five nationalities are recognised *by the Government* as producing genuine international protection profiles for women and girls affected by issues such as sexual and gender-based violence and trafficking. These proposals will only make it more difficult for genuine asylum claimants to obtain protection, which they are entitled to as a matter of right. Under these proposals, Afghan women and girls fleeing gender-based persecution under the newly installed Taliban regime would be disadvantaged in the examination and treatment of their claim if they arrived 'illegally', i.e. via small boat.
5. Clauses 29 to 37 of the Bill, which deals with the '*Interpretation of the Refugee Convention*', also seek to redraw and confine the meaning of the Convention in an attempt to turn back the clock on well-established principles. This will have a consequential impact on *who* the Convention applies to and *how* that person should be treated. Women who would be recognised *now* by the Home Office and the UK courts as refugees may well not be recognised under the newly defined provisions.
6. Clause 31 aims to change the standard of proof and the evidence required in asylum claims, while Clause 32 seeks in subsections (2)-(4) to change the test for the definition of a 'particular social group' (PSG). These changes reverse longstanding principles and are a clear attempt to reinstate approaches which have been repeatedly and roundly rejected by the courts. These changes can and will have a disproportionate adverse impact on asylum seekers who are women and girls, as many women face persecution as a result of their sex or gender e.g. gender-based and sexual violence, discriminatory denial of education, access to political and civic equality.

ii) Re-introduction of accelerated detained appeals.

7. Clause 26 reintroduces an accelerated detained appeals process by amending s 106 of the Nationality, Immigration and Asylum Act 2002. The re-introduction of a detained 'fast track' appeals system is a deeply retrograde step. The Court of Appeal held in 2015 that the former Detained Fast Track appeals system, which had operated for a decade, was "structurally unfair and unjust".¹ The problems identified by the Court of Appeal are in our view inherent to any 'fast track' system of determining asylum appeals and are not cured by additional days.
8. In our view and in light of the history and litigation against similar accelerated procedures - any new system will be operated in breach of Articles 3, 5 and 14 ECHR as far as women and girls subject to it are concerned. They are particularly vulnerable groups unsuitable for their claims to be decided under fast track procedures in detention and who were and will be fundamentally failed by such a system again.

iii) Accommodation centres

9. Clause 12 proposes to introduce asylum accommodation centres, which are also particularly concerning given the impact on vulnerable women. As the UNHCR Guidelines on the Protection of Refugee Women recognise, in addition to sharing the protection problems experienced by all asylum seekers, asylum-seeking women and girls have "*special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation, and protection against sexual discrimination in the delivery of goods and services*".²
10. Recognising the special protection needs of asylum-seeking women extends to ensuring gender-appropriate accommodation. Notably, it appears that the Government intends for reception centres to serve as accommodation until the resolution of a person's claim. In the light of extensive delays in the asylum decision-making process, an asylum-seeking woman could be expected to remain in a reception centre for several months or even years and in conditions that may well breach their fundamental human rights.

¹ *R (Detention Action) v First-tier Tribunal* [2015] EWCA Civ 840

² United Nations High Commissioner for Refugees, Guidelines on the Protection of Refugee Women, published on July 1991, accessible at <<https://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>>

iv) Identification of victims of Modern Slavery

11. Part 5 of the Bill makes provision for modern slavery and trafficking cases. These are currently contained in Clauses 57-68 of the Bill. We have serious concerns that the changes to Clauses 57-59 and 62-63 will make it harder for women and girls, who are victims of trafficking and modern slavery, to be positively identified and protected, contrary to the UK's obligations under both Article 4 of the European Convention on Human Rights and the Council of Europe Convention on Action against Trafficking in Persons. The clauses on trafficking and modern slavery are deeply concerning, having no basis in law, and are far likely to led to a reduction of identified victims. We are also concerned that the changes are being ushered in to enable swifter immigration enforcement action – i.e. removal from the UK – *before* trafficking claims are properly and lawfully investigated and determined.

Conclusion

12. It is our view that the clauses highlighted above need to be removed wholesale from the Bill. The Government needs to abandon the plan to create a discriminatory regime for asylum seekers and refugees which will have a disproportionate impact on women. Its equality impact assessment is wholly inadequate and does not meet the requirements of the law. The proposals as they currently stand are contrary to the United Kingdom's obligations under international law and cannot be remedied by amendments. It will not achieve the purported aims of reducing litigation or saving public money; on the contrary, it is only likely to lead to substantial protracted litigation, delay and uncertainty for years to come.