

Nationality and Borders Bill 2021: House of Commons Committee Stage Women for Refugee Women briefing on Clauses 29 & 30

Background

Women for Refugee Women (WRW) works with women seeking asylum in the UK, to challenge the injustices of the UK's asylum system. Together with our partners across England and Wales, we support hundreds of women who have fled sexual and gender-based violence, including rape, female genital mutilation and forced prostitution. At WRW we are extremely concerned about the impact that the Nationality and Borders Bill will have on these vulnerable women.

This briefing focuses on Clauses 29 and 30 and their impact on decision-making in cases that involve gender-based violence. A legal opinion on the Bill from Garden Court Chambers confirms that these changes would make it even harder for women who have survived gender-based violence to have their claims properly investigated and recognised.

We therefore strongly encourage members of the Public Bill Committee to disagree to a motion that Clauses 29 and 30 stand part of the Bill.

Proving a well-founded fear of persecution - Clause 29 & Clause 30

1. Over the years, there has been substantial research on the failures of the Home Office in delivering a fair asylum process, and on the reasons why many women who flee gender-based persecution may be wrongly denied protection.¹ As acknowledged in Home Office policy, women who have fled sexual and gender-based violence can experience severe

¹ See, for example: Freedom From Torture (2019) *Lessons Not Learned: The Failures of Asylum Decision Making in the UK* <https://www.freedomfromtorture.org/news/lessons-not-learned-reportseptember-2019>, Women for Refugee Women (2012) *Refused*; Asylum Aid (2011) *Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims*, <https://consonant.org.uk/wp-content/uploads/2019/05/UnsustainableWEB.pdf>; European Parliament, Directorate-General for Internal Policies (2012) *Gender Related Asylum Claims in Europe*, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET%282012%29462481_EN.pdf

challenges in disclosure, for instance as a result of severe trauma, fear or a lack of knowledge of the asylum process.²

2. Women also often struggle to evidence their asylum cases in the current system; rape or other forms of sexual assault or sexual exploitation are often more difficult to prove because unlike other forms of torture they do not always leave physical scarring. Further, gender-based violence, especially abuse in the private sphere (such as the community) is not as well documented by human rights organisations and others, making the assessment of whether there is a future risk of persecution even more challenging for women.
3. Combined with the inadequate understanding that is shown by some decision-makers of the effects of sexual and gender-based violence, **women end up facing multiple barriers to getting a fair assessment of their asylum claims.** Yet instead of introducing changes that would support women who have survived gender-based violence to access a fair assessment, the changes to the well-founded fear test (Clause 29) and the definition of ‘particular social group’ (Clause 30) will make it even harder.
4. Clause 29 introduces a heightened and confusing test for determining whether an individual should be granted refugee protection. First, the individual must show, on a ‘balance of probabilities’, that she has a subjective fear of persecution - in other words, that she genuinely believes in her mind that she would be persecuted if returned to her country of origin. Only then can the decision-maker go on to assess whether there is an objective fear of persecution in light of the situation in her country. This second assessment is to be decided against a ‘reasonable likelihood’ standard of proof - the standard that is consistent with UNHCR guidance.
5. There are a number of issues with the way in which Clause 29 is drafted. It wrongly elevates subjective fear, by requiring the individual to demonstrate this first, and it provides for two different standards of proof. These changes have the effect of **heightening the overall test, as well as complicating the assessment of whether the person is a refugee and should be granted protection.**
6. By introducing a dual standard of proof, Clause 29 reverses 20 years of established UK jurisprudence. It also goes against UNHCR standards which remind us that refugee claims are unlike criminal cases or civil claims’, given what is at stake for the claimant if an incorrect

² Home Office (2018) *Gender Issues in the Asylum Claim*;
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699703/gender-issues-in-the-asylum-claim-v3.pdf

decision is made.³ According to the UNHCR, jurisprudence developed in common law countries 'supports the view that there is no requirement to prove...that persecution is more probable than not'.⁴ **In other words, case law from other countries shows that the standard applied in refugee status determination is lower than the civil standard of 'balance of probabilities'.**

7. **We are very concerned that Clause 29 is likely to have a disproportionate impact on asylum-seeking women who have fled sexual and gender-based violence, and particularly when combined with the changes to the 'particular social group' definition in Clause 30.**
8. Clause 30 introduces a restricted definition of 'particular social group', a ground in the Refugee Convention that women escaping gender-based violence frequently depend on to obtain refugee status. It provides that two criteria must now be met in order for a claimant to show that she is a member of a 'particular social group', not one as is currently the case.
9. Yet no explanation has been put forward by the government as to why this change is needed, which reverses UK case law and seeks to reinstate *incorrect* European law;⁵ **the change to the definition of 'particular social group' was not heralded in the consultation on the New Plan for Immigration** and is not sufficiently justified in the government's Explanatory Notes to the Bill.
10. **Since this ground is often used by survivors of gender-based violence - given the absence of gender as an explicit ground in the Refugee Convention - women will be significantly and disproportionately impacted** by this change, needing to overcome an additional hurdle in order to obtain safety in this country.

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³ UNHCR (1998) *Note on Burden and Standard of Proof in Refugee Claims*;
<https://www.refworld.org/docid/3ae6b3338.html>

⁴ *Ibid.*

⁵ EU Council Directive 2004/83/EC of 29 April 2004 sought to codify a consistent approach to the Refugee Convention. However, it contained an error in its definition of 'particular social group', contrary to UNHCR standards. This error was the subject of much litigation in the UK but was ultimately resolved in the landmark Upper Tribunal decision in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) which decided firmly that the two criteria in the 'particular social group' definition are alternative, not cumulative. The change proposed in the Bill would reinstate the error contained in the EU directive.