House of Commons Committee Stage
Nationality and Borders Bill

Briefing on Clause 14 and Selected Amendments
October 2021

Introduction:
Clause 14 introduces two new sections into the Nationality, Immigration and Asylum Act 2002. New section 80B would empower the Secretary of State to declare an asylum claim made in the UK "*inadmissible*" to the UK's asylum system on the basis that she considers the person seeking asylum to have "*a connection to a safe third State*". It provides a definition of such a State in subsection (4). Subsection (6) refers to new section 80C, which provides the meaning of "*connection*".

This is to introduce into primary legislation the inadmissibility regime introduced by the Secretary of State in Immigration Rules at 11pm on 31 December 2020[1] at the point of the UK's departure from EU arrangements including arrangements under the Dublin Regulations[2] by which responsibility is determined among Member States for asylum claims made on the territories of those Member States. In doing this, Clause 14 will expand that regime's theoretical reach.

Three fundamental failings:
Clause 14, just like the regime in the Immigration Rules that it expands upon, suffers from three fundamental failings:

(a) Unlike the Dublin Regulations, which it purports to replace, it is not a reciprocal regime. Its operation is entirely one-way – i.e. it purports to establish a basis for transferring responsibility for an asylum claim, and the person who has made it, from the UK to another country while recognising no circumstances in which it would be necessary or appropriate to transfer a claim from that country to the UK.
(b) Unlike the Dublin Regulations, it is built on foundations that are, at least thus far, entirely void of substance. It purports to establish a basis for transferring an asylum

[1] Paragraphs 345A to 345D of the Immigration Rules, as inserted by Statement of Changes in Immigration Rules, HC 1043
[2] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person

claim, and the person who has made it, to another country with no agreement in place with that country to receive the person. Since 31 December 2020, the Home Office has been exacerbating delays and backlogs, not to mention people's uncertainty and distress, in its asylum system by notifying thousands of people of an intention to transfer them to other countries while having no capacity to do that.[3]

(c) Underpinning each of these failings is a third, which is profoundly undermining of the obligations that fall upon the UK and all other countries under the 1951 UN Convention relating to the Status of Refugees and international asylum law more broadly. That international law is founded on a principle of shared responsibility. Clause 14 is a particularly stark example in this Bill of a refusal to share responsibility and rather a determination to shift responsibilities onto others. Given the UK has long taken relatively little responsibility for either receiving people seeking asylum or providing asylum,[4] this attempt to refuse and shift still more of what limited responsibility the UK is asked to take is especially harmful. It is a dangerous message to send to others, particularly those currently taking far more responsibility, that a relatively wealthy and stable country already taking so little responsibility considers it reasonable and appropriate to refuse to do even that much.

Amendment 26 (see below) provides particular opportunity to consider these profound failings in relation to Clause 14. Other amendments address discrete concerns regarding the safety or practicality of what is proposed.

Undermining Ministers' stated objectives:
In addition to its three fundamental failings, Clause 14 is also contrary to specific objectives that Ministers' claim lie behind this Bill. Those objectives include improving protection provided to refugees,[5] reducing backlogs and delays[6] and saving costs.[7] Each of these is undermined by Clause 14. Rather than improving protection, it delays the provision of that. In doing so, it adds – as the existing regime in the Immigration Rules shows – to delays and backlogs in the asylum system. Those delays and backlogs add to costs – both costs of supporting people during the prolonged period during which their claims are simply put on hold and costs that are likely to be caused by the impact of delay and the anxiety and distress it will cause. While Ministers' assert an aim that claims be made as soon as is possible – itself a reasonable objective and one often closely connected to the ability of a person seeking asylum and the asylum system to engage most efficiently and effectively – delaying a claim duly made merely undermines any utility in it having been made more quickly.

Contradiction at the heart of Ministers' analysis:
Ministers make two assertions that cannot be reconciled with each other. The first assertion is that the UK asylum system is "*overwhelmed*".[8] There is no justification for this assertion.

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[3] See e.g. Oral Evidence of UNHCR to Public Bill Committee, *Hansard* HC, Public Bill Committee, 23 September 2021 : Col 92

[4] Comparisons with UK's nearest neighbours in Western Europe show that it continues to receive very modest numbers of people into its asylum system. This must also be put in the context that Europe is not a region receiving disproportionately high numbers of refugees.

[5] *Hansard* HC, 19 July 2021 : Col 706 *per* Home Secretary

[6] The Home Secretary made much reference to delays and efficiency at Second Reading including at *Hansard* HC, 19 July 2021 : Cols 706 & 707

[7] Costs to the taxpayer were among the very first concerns raised by the Home Secretary at Second Reading: *Hansard* HC, 19 July 2021 : Col 705

[8] *Hansard* HC, 19 July 2021 : Col 709 *per* Home Secretary

However, the second assertion – which is necessary for the very viability of Clause 14 – is that Ministers can and will persuade other countries to accept transfer from the UK of people seeking asylum and their claims. At Second Reading, the Home Secretary specifically identified "*France, Germany, Belgium, the Netherlands, Italy and Greece*"[9] as countries to which she contended people seeking asylum in the UK could and should be pursing their claims. These are countries already receiving larger, and in some cases very much larger, numbers of people into their asylum systems. Ministers expectation is that these countries should not only continue to manage these larger numbers of claims but, on top of this, should agree to receive more claims by transfer from the UK.

Dublin Regulations:
Until end of 2020, the UK participated in this agreement between EU Member States. The agreement determined which of those States was responsible for an asylum claim made anywhere within their collective territory. Where that determination was that the responsible State was not the State where the asylum claim had been made, it set out the process by which a person and their claim were to be transferred from the State where the claim was made to the State responsible for it. There remain considerable problems with the Dublin Regulations, which have proved to be costly and ineffective in securing any reasonable sharing of responsibility among Member States. Responsibility under these arrangements tends to fall disproportionately on States such as Greece, Italy and Spain – being countries at the outer borders of the EU. This is not only unfair but has detrimental effects on both the efficiency of asylum procedures in those countries and confidence, more broadly, including among people seeking asylum, in such procedures. One impact has been to encourage people wishing to exercise their right in a particular country – where they may, for example, have family or other connections – to seek to avoid authorities for fear that this will prejudice any opportunity they may have to be able to make their claim in that country. As with so much asylum policy across Europe, including the UK, this continues to enable and empower smugglers, their exploitation and profits.

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Clause 14, page 17, line 31, at end insert—

"(d) there are in law and practice—
(i) appropriate reception arrangements for asylum seekers;
(ii) sufficient protection against serious harm and violations of fundamental rights;
(iii) protection against refoulement;
(iv) access to fair and efficient state asylum procedures, or to a previously afforded refugee status or other protective status that is inclusive of the rights and obligations set out at Articles 2-34 of the 1951 Convention;
(v) the legal right to remain during the state asylum procedure;
(vi) a grant of refugee status that is inclusive of the rights and obligations set out at Articles 2-34 of the 1951 Convention for those found to be in need of international protection;

[9] *Hansard* HC, 19 July 2021 : Col 710

(e) it is safe for the particular claimant, taking into account their individual circumstances."

Member's explanatory statement
This amendment modifies the definition of a "safe third State".

Briefing:
Amendment 56 seeks to do nothing more than ensure that the human rights of any person – including the right to seek and enjoy asylum from persecution – are fully respected in practice, rather than mere theory, before there is any attempt to transfer that person and that person's asylum claim to another country.

Given the focus on northern France and crossings of the Channel, it is important to recognise that many of the few people who attempt the crossing to the UK have not found safety there. They have met with violence and exclusion, including from the State authorities, and been unable to access asylum procedures or adequate shelter and other welfare provision.

Amnesty has on several occasions reported on human rights violations in northern France against people seeking asylum;[10] and, more recently, Human Rights Watch has reported on these same violations.[11] They include the State, and its agents, subjecting women, men and children to violence, homelessness, deprivation and squalor. None of this is to question that France provides safety to a very much larger number of people than does the UK. But it emphasises that because a country is safe for one or many people does not mean it is safe for another. It similarly emphasises that the likelihood that a country will not prove safe for someone is exacerbated when its neighbours refuse to take their share of responsibility for providing asylum – by reducing either will or capacity within that country to uphold its obligations to do so. The more that is so, the more people will need to move.

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Clause 14, page 17, leave out lines 35 to 38

Member's explanatory statement
This amendment removes subsection (6), which states that a claimant whose asylum claim has been denied by virtue of their connection to a particular safe third State may be removed to any other safe third State.

Briefing:
Amendment 19 provides opportunity to probe Ministers regarding their intentions in relation to new section 80B(6) of the Nationality, Immigration and Asylum Act 2002, which is to be introduced by Clause 14.

[10] See e.g. https://www.amnesty.org/en/documents/ior40/3669/2021/en/ and https://www.amnesty.org/en/documents/eur21/1585/2019/en/
[11] See https://www.hrw.org/news/2021/10/07/france-degrading-treatment-migrants-around-calais

Ministers have claimed that the UK asylum is "*overwhelmed*".[12] This is, on its face, an extraordinary assertion given that asylum claims over the previous two years have fallen slightly;[13] and that the UK continues to receive very few people seeking asylum compared to many countries including its nearest European neighbours, such as France,[14] who would appear to be the countries most in Ministers' minds in relation to Clause 14.[15]

Even so, Clause 14 is an especially odd response to any concern about delays, costs and pressure of workload in the asylum system. As was entirely predictable, and predicted,[16] and has now been shown by the operation of the regime introduced to the Immigration Rules on 31 December 2020, a unilateral regime by which claims are declared inadmissible on the basis that they should be considered elsewhere, with no capacity to give effect to that, is merely to create the conditions for creating and exacerbating delays, backlogs and costs along with all the uncertainty and distress that comes with that.

New section 80B(6), on its face, would appear to significantly extend these harms to both the individual and the administration. It does so by inviting the Secretary of State, or her officials, to keep casting about for possible places to transfer someone and that person's claim rather than addressing their inability to transfer the person and claim to the place or places initially proposed or intended. Subsection (6) tends to emphasise the general nature and purpose of Clause 14, which is to forever seek to avoid responsibilities rather than take them while demanding that others take the responsibilities that are to be shunned.

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Clause 14, page 17, line 40, leave out "may" and insert "must"

Member's explanatory statement
In cases where it is unlikely to be possible to remove the claimant to a safe third State, or in other exceptional circumstances, this amendment would require otherwise inadmissible claims to be considered under the immigration rules.

Briefing:
If Clause 14 is to stand part of the Bill, this amendment ought to be entirely uncontroversial. If the Secretary of State has determined that transferring the person and their claim to another country is unlikely to be possible, why should there be any hesitation about her being required to deal with the claim made to her? That should be similarly so if she has determined there are circumstances in which she should consider the claim – though why should such circumstances need to be "*exceptional*"?

[12] *Hansard* HC, 19 July 2021 : Col 709 *per* Home Secretary
[13] Government Immigration Statistics show 35,737 asylum claims received in 2019, 29,815 claims in 2020 and 14,670 claims in the first half of 2021 (substantially below the first half in 2019).
[14] EU official datasets show France to have received in September 2021 alone, 14,240 asylum claims. In recent years, France has been receiving into its asylum system between 3-4 times the number of people received by the UK into its asylum system.
[15] See e.g. *Hansard* HC, 19 July 2021 : Col 710 *per* Home Secretary
[16] See Amnesty International UK's letter to the Minister in December 2020 (and the Minister's response): https://www.amnesty.org.uk/resources/amnesty-uk-letter-immigration-minister-ministers-reply-regarding-immigration-rules

The use of the word "*may*" rather than "*must*" appears to have no purpose save to permit the Secretary of State room to hesitate or vacillate in the face of her own recognition – however unwelcome that may be to her – that the claim must be determined in the UK. That is a recipe for aggravating still further the delays, backlogs and costs, with all the attendant uncertainty and distress, to which Clause 14, if implemented, will undoubtedly lead.

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Clause 14, page 17, line 41, leave out line 41 to line 2 on page 18 and insert—

"(a) in the absence of a formal, legally binding and public readmission agreement between the United Kingdom and the State to which the person has a connection;
(b) as soon as the proposed State of readmission refuses to accept the person's return or if the person's readmission has not been agreed within three months of the registration of their asylum claim, whichever is sooner;
(c) if, taking into account the claimant's personal circumstances, including the best interests of any children affected by the decision, it is more appropriate that the claim be considered in the United Kingdom;
(d) in such other cases as may be provided for in the immigration rules".

Member's explanatory statement
This amendment broadens the circumstances in which the Secretary of State must consider an asylum application, despite a declaration of inadmissibility.

Briefing:
Amendment 21 seeks to replace the vague circumstances, currently set out in subsection (7), in which the Secretary of State is to take responsibility for an asylum claim that she has either designated or proposed to designate as inadmissible to the UK asylum system.

If Ministers are truly concerned to address and reduce delays, backlogs and costs, more explicit control over the circumstances in which a claim may be declared and maintained as "*inadmissible*", such as by this amendment, is clearly required. Nonetheless, it is our view that even this amendment does not go sufficiently far to address the failings with Clause 14 because it provides for no reciprocity in any arrangements that may be agreed with a third country. To that extent – though it may be questionable whether the Secretary of State will be able to agree non-reciprocal arrangements (or at what price she would have to pay to secure them) – the amendment maintains the fundamental failing of Clause 14 by its undermining of the principle of shared responsibility on which the international asylum regime is based.

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Clause 14, page 17, line 33, leave out "5" and insert "3"

Member's explanatory statement

This amendment is consequential on a later amendment about the definition of "connection".

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Clause 14, page 18, line 13, leave out line 13 and insert—

> *"(a) has been granted refugee status or another protective status in the safe third state that is inclusive of the rights and obligations set out at Articles 2 to 34 of the 1951 Convention".*

Member's explanatory statement
This amendment would strengthen the safeguards in place before a "connection" can be relied on for the purposes of inadmissibility.

23

Clause 14, page 18, leave out lines 16 to 24

Member's explanatory statement
This amendment changes the definition of a "connection" to a safe third State.

24

Clause 14, page 18, leave out lines 35 to 37

Member's explanatory statement
This amendment changes the definition of a "connection" to a safe third State.

Briefing:
Amendments 18, 22, 23 and 24 are concerned with the definition of "*connection*" that is provided by new section 80C of the Nationality, Immigration and Asylum Act 2002, which is to be introduced by Clause 14.

Amendment 18 is merely consequential on amendments 23 and 24, which remove from the Bill two circumstances in which it is currently said that a connection for the purpose of the inadmissibility regime is established. Amendment 24 would remove subsection (5), which introduces what is termed "*Condition 5*". That condition is especially vague. Whereas it requires some relation to the "*claimant's particular circumstances*", it says nothing of what is meant by that. Such vagueness can only aggravate the prospect of delays, backlogs and costs that will be caused by Clause 14.

Amendment 22 and 23 ought to be read together. The former revises subsection (1) in a way designed to ensure that it only applies where the protection status given to the refugee, in the country to which it is said that person has a connection, is in compliance with what is required by the 1951 UN Convention relating to the Status of Refugees. The latter removes any prospect that a protection status less than that which is required by the Convention will suffice.

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Clause 14, page 18, leave out lines 38 to 43 and insert—

"(6) For the purposes of this section, a "relevant claim" to a safe third State is a claim for refugee status or other protective status that is inclusive of the rights and obligations set out at Articles 2 to 34 of the 1951 Convention."

Member's explanatory statement
This amendment changes the definition of a "relevant claim" to a safe third State.

Briefing:
Amendment 25 is consistent with amendment 22. In short, if the making of an asylum claim in another country is to establish the connection necessary for declaring a person's claim in the UK to be inadmissible, it must be the case that the protection status offered in that other country to a refugee is fully compatible with the 1951 UN Convention relating to the Status of Refugees.

This ought to be uncontroversial. If Ministers do not accept this, they will be explicitly further undermining the Convention and the international asylum law system that they say is at risk of being disrespected.[17] They will be doing so by effectively endorsing a view that the Convention need not be respected and, rather than meeting the standards it requires of States, it is permissible to do and provide less. Sadly, this way of undermining the Convention is a feature elsewhere in this Bill including in later provisions concerning the meaning of the Convention. This is dangerous – for it specifically endorses and encourages others to fail to meet, or refuse altogether, their own obligations. It is especially concerning that the UK may do this given its relative wealth and stability and the fact that it continues to receive so few asylum claims and provide asylum to so few people. Ironically, the impact of this may be to encourage more people to seek asylum in the UK because they are unable to find a place of safety elsewhere.

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Clause 14, page 18, line 46, at end insert—

*"**80D Conditions for implementation of section 80B***

(1) The Secretary of State may not make a declaration under section 80B(1) in relation to any State unless there are in place reciprocal arrangements with that State by which—
(a) that State has agreed to receive from the United Kingdom a person with a connection to it; and
(b) the United Kingdom has agreed to receive from that State a person who has made an asylum claim in that State who has a connection to the United Kingdom.

[17] *Hansard* HC, 19 July 2021 : Col 711 *per* Home Secretary (albeit the Home Secretary's complaint is directed, and wrongly directed, at people seeking asylum)

(2) For the purposes of subsection (1), any reciprocal arrangements must provide for the period within which a State is to receive a person from the United Kingdom; and any declaration made under section 80B(1) shall cease to apply if that period has passed and the person remains in the United Kingdom.

(3) The period to which subsection (2) refers must not be longer than 6 months from the date the asylum claim to which it relates is first made.

(4) Notwithstanding subsection (3), the passing of the period shall not prevent the transfer of a person from the United Kingdom to another State in which the person has a family member and to which the person wishes to be transferred.

(5) The Secretary of State may not make a declaration under section 80B(1) in relation to any person who—

(a) has a family member in the United Kingdom;
(b) has been lawfully resident in the United Kingdom;
(c) has worked for or with any United Kingdom Government body or other body carrying out work for or sponsored by the United Kingdom Government; or
(d) has a family member who has been lawfully resident in the United Kingdom or worked with or for such a body.

(6) In this section—

"a family member" means a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece."

Member's explanatory statement
This amendment would prevent the Secretary of State from rejecting asylum claims on the grounds that the claimant has a connection to a safe third State unless the UK has reciprocal arrangements with that State.

Briefing:
Amendment 26 would introduce new section 80D to the Nationality, Immigration and Asylum Act 2002 to address the three fundamental failings with Clause 14 and the current inadmissibility regime that was introduced into the Immigration Rules at 11pm on 31 December 2020. Those failings are outlined in the introductory paragraphs to this Briefing. Amendment 26 addresses these failings as follows.

Firstly, subsection (1) addresses the absence of reciprocity. It would require the Secretary of State to establish reciprocal arrangements with any third country with whom she intends to operate her inadmissibility regime.

Secondly, subsections (1) to (3) address the absence of foundations for the Secretary of State's current regime in the Immigration Rules. By requiring reciprocal arrangements to be established with relevant third countries, it would ensure the existence of those foundations before more claims are declared inadmissible on the basis of an intention to transfer someone and their claim to another country, which intention the Secretary of State is incapable of implementing. Those arrangements need to establish, with clarity, the means by which any

implementation is to be achieved – including the period during which transfers will be implemented. Anything less is to build in additional uncertainty, delay and cost.

Thirdly, amendment 26 more generally addresses the failure that underpins Clause 14, which is the failure to take or share responsibility for providing asylum. Clause 14 – as does the existing regime in Immigration Rules – conceives of 'connection' as something always being to some other place. Any connection to the UK – however close or compelling it may be – is ignored. People's connections such as those of family, even their closest family members, language, previous residence in the UK or by working for UK entities, including the British Army, are all overlooked. Subsections (5) and (6) seek to remedy that – at least insofar as certain tangible connections specific to the UK are to be expressly recognised.

Subsection (4) recognises – as did the Dublin Regulations, in which the UK was previously a participant – that some people may have family connections elsewhere and would wish to be reunited with their family members in seeking asylum. It would permit some limited flexibility in the transfer process where this was to achieve the family reunion, which the person seeking asylum wishes to secure.