Nationality and Borders Bill

Commons Consideration of Lords Amendments
22 March 2022

Of the 54 Lords amendments returning to the Commons, 19 are as a result of Government defeats in the Lords. The remainder are either Government amendments or amendments acceded to at Third Reading that are consequential upon the 19 defeats.

This briefing addresses 12 of the 19 amendments that arose from Government defeats. These generally relate to nationality and asylum matters. While Amnesty generally supports each of the 19 Lords amendments and recognises the importance of amendments concerning age assessment and modern slavery, the 12 we address in this briefing concern matters in which we have taken a particular interest and/or have particular expertise. They are taken in the order they appear in the Bill and by reference to the numbering on the relevant order paper.

A short explanation of the effect of each amendment and Amnesty's position upon it is given under discrete subheadings below.[1]

BRIEFING

Amendment 1 – Provision for Chagos Islanders to acquire British nationality

1. The amendment would restore British nationality rights to people who are only without British overseas territories citizenship or British citizenship because they are the descendants of people forcibly evicted from their British homeland and exiled ever since by successive British Governments. Had that eviction and exile not taken place, all the people to whom this modest amendment applies would have been born in the British Indian Ocean Territory and have been born British overseas territories citizens; and have acquired subsequent rights to be registered as British citizens.

2. The first 8 clauses of the Bill have our support because these seek to restore British nationality rights to people wrongly deprived of these rights by discrimination and injustice over decades and generations. In that context, the Government's continued resistance to this amendment is hard to fathom. It is of enormous importance to the relatively few people to whom it applies.

[1] Amnesty's wider position on this Bill is available from the written evidence we provided to the Public Bill Committee and our Lords' Second Reading joint briefings with PRCBC and others on nationality provisions and with Migrant Voice on asylum matters.

Contrary to the briefings Ministers appear to have received from officials, it sets no precedent whatsoever because the eviction and exile of the Chagossians, and its impact on British nationality rights, does not arise in any other British nationality law context.

3. Amnesty therefore strongly supports this amendment.[2]

Amendment 4 – Leave our Clause 9

4. The amendment removes from the Bill the license given to the Secretary of State to exercise her power to deprive British people of their citizenship without informing them.

5. The opportunity to review and constrain the extreme and excessive powers that have developed over the past two decades to deprive British people of their citizenship on grounds said to be 'in the public good' has been sadly passed by. It is not generally in the public good that the citizenship rights of the public are made so precarious by powers that so widely permit stripping of citizenship; nor that liability to the exercise of these powers falls so disproportionately upon black, Asian and other minority ethnic British people. The prospect that these powers may in future be exercised in secret – effectively preventing a British citizen from taking steps to show the exercise of the power to be wrong, excessive or based on misinformation or mistake – exacerbates what is already a grave disrespect for citizenship rights that has significantly disproportionate racial impact.

6. Amnesty therefore strongly supports this amendment.[3] Nonetheless, there remains much to address concerning respect for British nationality law and citizenship rights.[4]

Amendment 5 – Compliance with the Refugee Convention

7. This amendment does nothing more than seek to secure the effect of the Bill against violation of the UK's shared international obligations under the Refugee Convention.

8. Ministers have repeatedly disavowed any intention to violate or undermine the Convention. If so, there is no good reason for resisting this amendment. Given the Bill includes – even with the revisions made in the House of Lords – significant provisions affecting how the Convention is to be interpreted and applied, it is especially vital that this amendment be retained. That is even more so given the provisions in the Bill which improperly and dangerously direct decision-makers, including independent judicial decision-makers, as to what their assessment of credibility should be and what weight to give to evidence in asylum proceedings. Those provisions fly in the face of any respect for the independence and function of decision-makers, whose role is to assess

[2] Further information is available from our joint briefing with PRCBC for Lords' Report.
[3] Further information is available from our joint briefing with PRCBC for Lords' Report.
[4] Further information is available from our joint briefing with PRCBC for Lords' Committee on an amendment concerning citizenship rights.

evidence on the basis of what is before them not some pre-determination arising from any procedural failing on the part of someone seeking asylum.

9. Amnesty therefore strongly supports this amendment.[5]

Amendment 6 – Leave out Clause 11

10. The amendment removes from the Bill the power given to the Secretary of State to treat people, whom it has been established are refugees and entitled to asylum in the UK, differently according to the manner of their arrival and claiming asylum.

11. There is no lawful basis whether in the Convention or international law more generally – and no rational basis – for discriminating between refugees in this way. Indeed, both the Convention and international law prohibit such discrimination; and it is generally abhorrent to seek to punish and penalise people for exercising their right to seek asylum in the UK by the only means available to them, which are journeys that are not pre-authorised and are often dangerous and traumatising. That the clause, which this amendment has removed, permits that discrimination to include depriving a refugee of the means to house and support herself, depriving a refugee of the opportunity to be reunited with their family members and causing a refugee to be without any certainty and security about his future in the UK exacerbates the underlying injustice of it. That is even more so given these severe penalties are merely specified examples where the clause purports to permit other discriminations that are not specified.

12. Amnesty therefore strongly supports this amendment. It has the added advantage of preventing the Secretary of State from acting in ways that would cause significantly increased costs and workload to the asylum system (by requiring many refugees to make frequent and repeated applications to extend their leave to remain) and would increase opportunity for criminal exploitation in the UK and on journeys to it (of people made destitute here and of family members no longer permitted a visa to join a refugee here).[6]

Amendment 7 – Changes to the Immigration Act 1971 (permission to work)

13. The amendment requires the Secretary of State to grant permission to work to people seeking asylum if they have been waiting for six months for a decision on their claim; and it would not permit the Secretary of State to restrict that to a narrow range of largely unattainable jobs.

14. Denying people seeking asylum the opportunity to work is costly in human, financial and efficiency terms. The human costs arise because excluding people from valuable social activity undermines and prevents their integration and recovery from trauma. The financial costs arise by excluding people from the means to support themselves in whole or in part. The efficiency costs arise

[5] Further information is available from our joint briefing with Migrant Voice for Lords' Report.
[6] Further information is available from our joint briefing with Migrant Voice for Lords' Report.

because people whose psychological integrity is degraded by this exclusion are made less capable of engaging effectively with administrative and legal processes such as are necessary to determine their claims to asylum.

15. Amnesty therefore supports this amendment.[7]

Clause 8 – Safe third State: commencement

16. The amendment would prohibit the exercise of powers in clause 16 to treat asylum claims as inadmissible unless and until one or more formal returns agreements are in place for the purpose of transferring people in the UK to another country for that country to address their asylum claims.

17. Clause 16 is to put into primary legislation the policy that is currently pursued under the immigration rules by which the Secretary of State has notified thousands of people that their asylum claims will not be dealt with as she intends to persuade some other country to receive them. This policy has had the inevitable effect of greatly enlarging asylum backlogs because there are no agreements in place with any country to give effect to it; and because there is no rational basis for any country wanting to enter such an agreement (unless the Home Office is to pay heavily for this) under which it would add to its current asylum responsibilities, those responsibilities of the UK, which the Government would prefer to avoid.

18. Amnesty supports this amendment. Nonetheless, we have serious reservations as to its adequacy. Firstly, it does nothing to address the existing policy and practice under immigration rules that is causing so much harm – distress to people left in limbo, increased backlogs in the asylum system and increased cost and chaos. Secondly, the amendment does not appear to link the requirement for an agreement to the exercise of the power in any individual case. It would appear, therefore, to permit the exercise of the power to treat a claim as inadmissible even though the country to which it is proposed to transfer the claimant is not one of the countries with whom any agreement has been reached. Thirdly, the agreements the amendment contemplates are not mutual. There is, therefore, no sharing of responsibility. If there are circumstances in which someone can legitimately said to be 'connected' to some other country for the purposes of their asylum claim, there must equally be circumstances in which someone in another country can legitimately be said to be connected to the UK for such purposes. These are three profound reasons why the amendment is inadequate even though we acknowledge it is a real, though relatively modest, improvement to the Bill.[8]

Amendment 9 – Leave out Clause 28(a)

19. The amendment removes from the Bill revisions to section 77 of the Nationality, Immigration and Asylum Act 2002 to curtail the general prohibition on removing a person who has sought asylum while her, his or their claim remains pending.

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[7] Further information is available from our joint briefing with Migrant Voice for Lords' Report.
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20. Clause 28 as originally drafted (it is now clause 30) is intended to empower the Secretary of State to implement a policy of offshoring. That policy is essentially one long used by Australia by which people seeking asylum are transferred to other countries or territories for their claims to be dealt with there and pending any further consideration of whether and where they may be provided asylum if so entitled. Much has been said about the Australian policy. As detailed evidence presented to the Public Bill Committee confirms, the policy has not merely been hugely expensive, done terrible harm to women, men and children and profoundly damaged Australia's international reputation. It has not been a success. That evidence to the Committee included detailed and sourced evidence to show that the High Commissioner of Australia to the UK, in giving evidence to that same Committee, had provided incorrect information on several, vital matters, including matters on which it is hard to understand how he could have been so mistaken.[9]

21. Amnesty supports this amendment. We would have preferred that Parliament went further in removing all provisions in this Bill and in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 that relate to or would enable offshore processing. We note that Home Office and political desire to institute such a policy has continued for at least around two decades. Parliamentarians would do well to reflect on the fact that this has never been done. We would respectfully suggest that the reasons for this is the huge cost, considerable cruelty and ineffectiveness of the proposed policy. It is deeply concerning that rather than take responsibility for making the asylum system work effectively, the Government continues to flirt with wholly inappropriate and impractical proposals including this.[10]

Amendment 10 – Immigration Rules: entry to seek asylum and join family

22. This amendment would require the Secretary of State to amend her immigration rules to make provision for people seeking asylum to be admitted to the UK for that purpose. It would require, at a minimum, that the rules make provision for such people in Europe, who have family who are ordinarily and lawfully resident in the UK, to be admitted.

23. It is revealing that the Secretary of State's response to the crisis now facing Ukrainian refugees has been to focus on the particular need for people fleeing conflict and persecution to reunite in safety with family. While that response has been inadequate, confused and piecemeal, it does emphasise the importance of enabling family reunion in the UK as a means towards securing effective participation by the UK in the shared international obligation to provide asylum. The response also emphasises the fixation of the Home Office upon requiring people to obtain visas even while its rules generally make no provision for a visa to be obtained or retained if the purpose for its use is to seek asylum from persecution. This amendment is, therefore, especially timely and poignant. It does not seek to determine the rules the Secretary of State must make. Rather,

[9] See e.g. the written evidence of the Kaldor Centre for International Refugee Law at UNSW Sydney.
[10] Further information is available from our joint briefing with Migrant Voice for Lords' Report.

it follows the existing legislation (in the Immigration Act 1971) that expressly requires the rules to include provision for certain types of movement to and admission to the UK – e.g. for work, study etc.

24. Amnesty therefore strongly supports this amendment. The Government's position, including in this Bill, is starkly inconsistent. It seeks to punish and penalise people seeking asylum for making journeys that are not pre-authorised. However, like its predecessors, it makes no provision by which a person wishing to exercise their right to seek and receive asylum in the UK may obtain authorisation for a journey to the UK for that purpose. The amendment would enable the Government to remove the inconsistency. Nonetheless, the amendment would not in itself correct the moral, legal and practical impropriety of setting out to penalise and punish refugees who may remain unable to access any such authorisation from reaching the UK by other means.[11]

Amendment 11 – Refugee resettlement schemes

25. This amendment would require the Secretary of State to establish resettlement schemes under which at least 10,000 refugees are resettled to the UK each year.

26. This would constitute a substantial increase – even beyond that at the height of the Syrian resettlement programmes – in the number of resettlement places provided by the UK to refugees. However, it would still constitute a smaller number than, for instance, the number of refugees provided asylum (i.e. the people who had to reach the UK to make a claim and were then able to establish themselves to be refugees) via the UK's asylum system last year. It must also be recalled that the people who received asylum in this way are also the people on whom refugee family reunion visas depend. Putting together the people who were granted asylum last year and the people granted refugee family reunion, this constituted around 19,000 people. This emphasises the central role of the asylum system for the UK to deliver its continued modest contribution to providing asylum to refugees. The modesty of that contribution is once again being emphasised by the latest crisis for refugees – on this occasion from Ukraine – and the number of people received by neighbouring countries. UNHCR, for example, indicates that Moldova has received more than 350,000 refugees in less than three weeks; Poland nearly 2 million.[12]

27. Amnesty therefore supports this amendment. Nonetheless, we caution that it is not and cannot be a substitute for maintaining an open and effective asylum system, something which so much else in this Bill seeks to shut down.

Amendment 13 – offences: arriving in the UK without permission

28. The amendment removes from the Bill the offence of knowingly arriving in the UK without a valid entry clearance despite requiring entry clearance under the immigration rules.

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[11] Further information is available from our joint briefing with Migrant Voice for Lords' Report.
[12] As at 12 noon CET, according to UNHCR's data portal.

29. What is now clause 44, as drafted prior to this amendment, contained a new offence. That offence would have a particular impact upon refugees by criminalising travel to the UK without entry clearance (a form of pre-authorisation). That is plainly incompatible with the Refugee Convention. Its incompatibility is not saved by the defence permitted under section 31 of the Immigration and Asylum Act 1999, particularly as that is to be amended and restricted by what is now clause 38 of the Bill. Moreover – quite apart from these fundamental concerns – there are practical problems with criminalising arrival in that refugees are seldom in a position to establish their status (and hence immunity from penalty) at the time of arrival. There is a dreadful history of refugees being wrongly prosecuted at or shortly after entry, at a time when they cannot prove their status (they are yet to have their claims considered, still less any appeal completed) and during which there is undue pressure to take a plea while the refugee is held in prison on remand.[13] That pressure is all the greater where a criminal lawyer does not have expertise in relevant asylum law; and because advice may be given to offer a plea to avoid a higher sentence. This is made even worse because clause 39 of the Bill (itself incompatible with the Convention) opens the possibility that a minimum sentence of 12 months' imprisonment may be sufficient to altogether exclude the refugee from being recognised as a refugee in the UK. The impact of the foregoing is exacerbated by the fact that the UK's immigration rules do not make provision for entry clearance to be provided to anyone for the purpose of seeking asylum.

30. Amnesty therefore supports this amendment. It is minimally necessary to restore some degree of protection for the rights of refugees to seek asylum in the UK. It falls short of securing full and adequate protection for a host of reasons – some connected to other provisions of this Bill; and some arising from existing law, policy and practice in the UK. Nonetheless, the error and harm in all of this would be significantly enlarged but for this amendment.[14]

Amendment 20 – Leave out Clause 40(3)

31. The amendment removes from the Bill the provision to extend the offence of assisting a person seeking asylum to enter the UK to where such assistance is provided for no gain.

32. What is now clause 45 had included provision to delete the current wording of the offence of providing assistance that limits the offence to those who do so "for gain". Amending the existing offence would criminalise people who assist someone seeking asylum to enter the UK in a range of purely humanitarian circumstances, including circumstances that involve saving life at sea or acting in other ways that do nothing more than respond to desperate and dangerous circumstances in a morally responsible way. It is extraordinary that the Government should seek to criminalise such actions in such a sweeping way. There is nothing in this that is directed to tackling criminal exploitation by people smugglers since that activity is plainly not undertaken for anything less than

[13] A 2017 paper from the University of Reading includes some further data and analysis.
[14] Further information is available from our joint briefing with Migrant Voice for Lords' Committee.

substantial gain. While the Government did – before the Bill left the Commons – introduce some protection for saving life at sea, the amendments it brought forward are plainly insufficient even in respect of that. Anyone responding to what they believe to be a dangerous situation at sea, at a time prior to the engagement of a coastguard authority, would be putting themselves at risk of prosecution – with a potential maximum sentence under this Bill of life imprisonment. The possibility they may be able to establish the defence the Government belatedly introduced is not good enough. Humanitarian action, such as this, should not be deterred by potential prosecution; and humanitarian actors should not face the harm and distress of criminal prosecution (even with the possibility they may ultimately prove a relatively complex defence).

33. Amnesty therefore strongly supports this amendment. Once again, it is a minimally necessary measure but cannot and does not mitigate the dangers inherent in this Bill and underlying policy that will put people at risk of prosecution for doing nothing less than what they not only should do but should be encouraged to do by any morally upright government and society.[15]

Amendment 54 – not endangering life at sea

34. The amendment prohibits the use of new maritime powers contained in Schedule 6 in ways that could endanger life at sea.

35. The need for this amendment was established by the Government's decision to remove from the Bill the stipulation that authority for the use of these powers could only be given where the Secretary of State was satisfied that such use would be permitted by the Convention on the Law of the Sea. That stipulation had been included in the same way that it is included in existing provisions that extend the Secretary of State's immigration functions and powers to enforcement at sea. The decision to remove the stipulation from the Bill during Public Bill Committee has required this amendment. The need for it is made all the greater by the repeated public suggestions by the Secretary of State that she may exercise maritime powers in ways that many others, including her officials, have consistently warned would endanger life.

36. Amnesty therefore strongly supports this amendment.[16]

[15] Further information is available from our joint briefing with Migrant Voice for Lords' Committee.
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