

ILPA's Briefing for the House of Commons Committee Stage for the Nationality and Borders Bill – Part 3: Immigration Offences and Enforcement, Clauses 37 and 38

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

Proposal

ILPA considers that the proposed changes to the provisions for immigration criminal offences in Clauses 37 and 38 **should not stand part of the Bill**.

There are four significant changes proposed in the Bill. Each is addressed separately below.

Briefing

The Nationality and Borders Bill further criminalises people coming to the UK to seek asylum. It does so by switching the emphasis from 'entering' the UK to 'arriving' in the UK. The difference is significant. Together with a combination of other powers, it means that people can be stopped from crossing the English Channel in small boats and turned away for criminal behaviour. If by luck they land on the English coastline, they can be prosecuted. But many such people will be persons seeking asylum, with a right to come to the UK and seek asylum. The proposal ignores the provision of the Refugee Convention (Article 31) that prohibits penalties being imposed on refugees who enter or are present in a country without authorisation. The result is incompatible with UK international commitments.

(1) Clause 37 - The Crime of Arrival

Clause 37 should not stand part of the Bill. It introduces a new provision (in Clause 37(2)) so that a person who requires entry clearance (such as a visa) under the Immigration Rules¹ and who knowingly *arrives* in the United Kingdom without a valid entry clearance will commit an offence (Clause 37 of the Bill amending section 24 of the Immigration Act 1971).

This change would expand the power to prosecute a person. Currently, immigration offences focus on 'entry' to the UK. But 'entry' has a special meaning and presenting yourself on arrival or subsequent temporary admission to the UK does not count as 'entry'.

Further, in reshaping this offence, the Bill makes no provision for a defence under Article 31 of the Refugee Convention.

In point of fact, there is no UK entry clearance or visa for someone to come to the UK to claim asylum. A person seeking asylum (who is in fact a refugee) will commit an offence in arriving in the UK to claim asylum under the proposed offence. They will do so whether they arrive by crossing the Channel or by arriving using a visa issued for another purpose.

(2) Clause 37 – Crime of Assisting Unlawful Immigration Extended to Helping Those 'Arriving'

Clause 37(4) introduces a new provision that amends existing law to add a new dimension to assisting unlawful immigration (Clause 37 of the Bill amending section 25 of the Immigration Act 1971), so that it would be an offence to do an act:

- to facilitate the commission of a breach or attempted breach of 'immigration law', the latter being defined hereafter to include *regulation of entitlement to arrive in the United Kingdom*, by an individual who is not a national of the United Kingdom,

¹ Please note that the Government's amendment 110 creates an equivalent provision for a person who is required under immigration rules not to travel to the United Kingdom without an ETA that is valid for the person's journey to the United Kingdom and knowingly arrives in the United Kingdom without such an ETA.

- knowing or having reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of such immigration law by the individual, and
- knowing or having reasonable cause for believing that the individual is not a national of the United Kingdom.

For the reasons given in relation to (1) above, arrival and assisting arrival should not be penalised in this way.

(3) Clause 38 – Unnecessary Severity in Criminal Penalty

Clause 38 should not stand part of the Bill. It alters the maximum penalty for assisting unlawful immigration: it is raised from 14 years' imprisonment to life imprisonment (Clause 38(1) of the Bill amending section 25 of the Immigration Act 1971).

There is no need for this. A maximum penalty of fourteen years' custody is already draconian. Life sentences are reserved for offences of the order of murder, rape, and armed robbery. Assisting unlawful immigration is not in that category; indeed, it devalues the public opprobrium attached to those offences to say that it is so associated. The criminal law needs to have its most severe sanction reserved for the most severe offences.

(4) Clause 38 – Criminalising Those Who Help Persons Seeking Asylum But *Not for Gain*

Clause 38 should not stand part of the Bill. It alters the offence of helping an asylum-seeker to enter the United Kingdom so that it captures not just those who do so *for gain* but also everyone else (Clause 38(2) of the Bill amending section 25A of the Immigration Act 1971).

Under the amended provision, a person commits an offence if:

- ‘(a) he knowingly facilitates the arrival or attempted arrival in, or the entry or attempted entry into, the United Kingdom of an individual, and
- (b) he knows or has reasonable cause to believe that the individual is an asylum-seeker.’

While this provision does not apply to anything done by a person acting on behalf of an organisation which ‘aims to assist asylum-seekers’ and ‘does not charge for its services’ (see section 25A(3) of the Immigration Act 1971), that does not help persons steering vessels. By these alterations, a person seeking asylum who steers an insecure vessel crossing the Channel may be prosecuted for helping other persons seeking asylum in the same boat (literally and metaphorically).

The Result

By criminalising arrival in the UK, criminalising helping those who arrive in the UK, introducing life imprisonment for those who help them, and criminalising those who help persons seeking asylum other than for gain, the ability of people to seek asylum in the UK is frustrated.

The new criminal offences dovetail with the new maritime enforcement powers proposed (Clause 41 and Schedule 5); the latter may only be used for the purpose of preventing, detecting, investigating or prosecuting a relevant offence (which includes offences found in sections 24, 25 and 25A of the Immigration Act 1971, see above). Thus, the new offences work twice over: first, to criminalise behaviour; second, to enable enforcement powers.

In addition, the new offences have to be seen alongside the provision that prevents people seeking to claim asylum from being able to do so when stopped in UK territorial waters (Clause 12).

Taken together, the criminalisation of arrival, the new maritime enforcement powers, and the prohibition on claiming asylum in UK waters frustrate UK obligations in international law.

Article 31 of the Refugee Convention

Article 31(1) of the Refugee Convention binds the UK on the plane of international law. It provides that:

‘1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without

authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’

In the UK, Article 31 has proved its usefulness in resisting the conviction of persons seeking asylum in criminal proceedings, see *R v Uxbridge Magistrates’ Court, ex parte Adimi* [2001] QB 667². Thereafter, by reference to Article 31 of the Refugee Convention, a defence of limited utility was introduced into UK law by section 31 of the Immigration and Asylum Act 1999. However, direct reliance on Article 31 continues to be useful in resisting prosecution in relation to matters not obviously covered by section 31 of that Act, see *R v Asfaw (UNHCR intervening)* [2008] 1 AC 1061³.

Unsurprisingly, the Nationality and Borders Bill does not provide defences in UK law based on Article 31 of the Refugee Convention to the crimes of arrival introduced by the Bill. Indeed, the Bill goes further and seeks to restrict the applicability of Article 31, see Clause 34. It is wrong that no provision is made for a defence based on Article 31. There is a risk of a breach of international law in the result. And most importantly, people claiming asylum are criminalised. The proposals should not stand part of the Bill.

² <https://www.bailii.org/ew/cases/EWHC/Admin/1999/765.html>

³ <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080521/asfaw-1.htm>