

ILPA's Briefing for the House of Commons Report Stage for the Nationality and Borders Bill – Part 2: Asylum, Clause 32 Amendment

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.

[Clause 32: Article 1\(A\)\(2\): reasons for persecution](#)

Proposed Amendment

Clause 32, page 34, line 25, replace “only if it meets both of the following conditions.” with “where:”.

Page 34, line 26, replace “(3) The first condition is that” with “(a)”.

Page 34, line 27, replace “(a)” with “(i)”.

Page 34, line 28, replace “(b)” with “(ii)”.

Page 34, line 29, replace “(c)” with “(iii)”.

Page 34, line 30, replace “.” with “, and/or”.

Page 34, line 31, replace “(4) The second condition is that” with “(b)”.

Page 34, line 33, replace “(5)” with “(3)”.

Result of Amendment

32. Article 1(A)(2): reasons for persecution

[...]

(2) A group forms a particular social group for the purposes of Article 1(A)(2) of the Refugee Convention where:

- (a) members of the group share—
 - (i) an innate characteristic,

- (ii) a common background that cannot be changed, or
- (iii) a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and/or

(b) the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

(3) [...]

Briefing

There have historically been two different approaches to the definition of “particular social group”. These are set out in subclauses (3) and (4) to clause 32. In 2002 UNHCR sought to reconcile these two approaches, by proposing the following:

"B. UNHCR's Definition

10. Given the varying approaches, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled.

11. The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.”¹

EU Council Directive 2004/83/EC of 29 April 2004 was implemented in domestic legislation via the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. This came into force on 9 October 2006, and set out the following in relation to “particular social group”:

- "(d) a group shall be considered to form a particular social group where, for example:
 - (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is

¹ <https://www.unhcr.org/uk/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> page 3

*so fundamental to identity or conscience that a person should not be forced to renounce it, **and***

- (ii) *that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;" [emphasis supplied]*

This meant that both of the two different approaches to the concept of “particular social group” had to be met, *contrary* to UNHCR’s position.

The matter ended up in the House of Lords in 2006 in *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* [2006] UKHL 46.² Lord Bingham stated, at [16] of the judgment that: “*If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test **more stringent than is warranted by international authority. In its published Comments on this Directive (January 2005) the UNHCR adheres to its view that the criteria in sub-paragraphs (i) and (ii) should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met.***” Lord Brown agreed, stating at [118] that: “*I entirely accept the definition of a particular social group contained in paragraph 11 of the UNHCR 2002 Guidelines as set out in para 15 of Lord Bingham's speech. The EU Council Directive 2004/83/EC (the Asylum Qualification Directive) and any Regulations brought into force under it will, I conclude, have to be interpreted consistently with this definition.*” [bold and underlined emphasis supplied]

Since then, the correct position has continued to be the subject of litigation, however the position as set out in *Fornah*, namely that the two criteria are alternatives, and not cumulative, was confirmed most recently in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC).

The position is therefore that there was an error in the EU law which our domestic courts have attempted to rectify, yet the Government is now seeking to replicate the original error in this Bill. In the Public Bill Committee, the Government justified its stance by asserting it needed to bring certainty to any area bedevilled by conflicting authority.³ Not so. There is no conflicting authority: the UNHCR

² <https://www.bailii.org/uk/cases/UKHL/2006/46.html>

³ [https://hansard.parliament.uk/Commons/2021-10-26/debates/328ec7c7-97a8-4b51-b611-23fa943d325c/NationalityAndBordersBill\(TenthSitting\)](https://hansard.parliament.uk/Commons/2021-10-26/debates/328ec7c7-97a8-4b51-b611-23fa943d325c/NationalityAndBordersBill(TenthSitting))

and the Senior UK Courts have a clear and constant interpretation. It is the Government that seeks to depart from this shared interpretation of the Refugee Convention. It does so without warrant and without justification. It reduces Refugee Convention protection in so doing.⁴ The result would be a breach of an international law commitment that could not be rectified in the Courts. Such evasion of an international law commitment should not be sanctioned by Parliament by way of primary legislation. The amendment outlined in this briefing ensures the UK keeps its international law commitment.

⁴ See the UNHCR Observations on the Nationality and Borders Bill, page 54, para 150: ‘The Bill proposes narrowing the definition of a particular social group from that currently found in UK jurisprudence. In UNHCR’s view, this could exclude some refugees the protection to which they are entitled.’
<https://www.unhcr.org/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021>