

# ILPA's Briefing for the House of Commons Report Stage for the Nationality and Borders Bill: Schedule 6 – Maritime Enforcement, Duty of Rescue 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.

## Schedule 6 – Maritime enforcement

### *Proposed Amendment*

Schedule 6, page 95, line 25, at end insert–

“(4) Authority for the purposes of subsection (3) may be given only if the Secretary of State considers that the Convention permits the exercise of Part A1 powers in relation to the ship.”

### *Result of Amendment*

## SCHEDULE 6 MARITIME ENFORCEMENT

Section 44

1 Part 3A of the Immigration Act 1971 (maritime enforcement) is amended as follows.

2 Before section 28M insert—

### **“28LA Enforcement powers in relation to ships: United Kingdom**

(1) An immigration officer or an enforcement officer may exercise the powers set out in Part A1 of Schedule 4A (“Part A1 powers”) in relation to any of the following in United Kingdom waters, foreign waters or international waters—

- (a) a United Kingdom ship;
- (b) a ship without nationality;
- (c) a foreign ship;
- (d) a ship registered under the law of a relevant territory.

(2) But Part A1 powers may be exercised only—

- (a) for the purpose of preventing, detecting, investigating or prosecuting a relevant offence, and
- (b) in accordance with the rest of this section.
- (3) The authority of the Secretary of State is required before an immigration officer or an enforcement officer may exercise Part A1 powers in relation to—
  - (a) a United Kingdom ship in foreign waters,
  - (b) a ship without nationality,
  - (c) a foreign ship, or
  - (d) a ship registered under the law of a relevant territory.
- (4) Authority for the purposes of subsection (3) may be given only if the Secretary of State considers that the Convention permits the exercise of Part A1 powers in relation to the ship.”

[...]

### Briefing

By the Nationality and Borders Bill, through new maritime enforcement powers, the Home Office seeks to extend its activity, beyond the United Kingdom territory, beyond UK territorial waters, and into international waters and into foreign waters: see Clause 44 and Schedule 6 to the Bill (as amended in the Public Bill Committee). In so doing it seeks powers *to stop, board, divert, and detain foreign ships and ships without nationality, including small boats crossing the English Channel carrying people seeking asylum.*

As introduced to the House of Commons, these powers contained a *safeguard* to preserve the UK’s international law commitments as regards the law of the sea (which contains a duty of rescue). Then, when the Bill reached the Public Bill Committee, the Government’s own amendment removed this safeguard.<sup>1</sup> The safeguard is vital to *ensure compliance with the duty of rescue* where people are in danger of harm or loss of life in Home Office operations. The proposed amendment restores that protection.

### The Nationality and Borders Bill as introduced to Parliament

When the Bill was introduced into the House of Commons it contained the *safeguard* that the authority of the Secretary of State was required before an immigration officer or an enforcement officer could exercise powers in relation to:

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<sup>1</sup> See Government Amendment 82: [https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill\(EleventhSitting\)](https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill(EleventhSitting)) and [https://hansard.parliament.uk/Commons/2021-10-28/debates/66b1e524-3688-4227-86e0-64af2068fee9/NationalityAndBordersBill\(TwelfthSitting\)](https://hansard.parliament.uk/Commons/2021-10-28/debates/66b1e524-3688-4227-86e0-64af2068fee9/NationalityAndBordersBill(TwelfthSitting)).

- a United Kingdom ship in foreign waters
- a ship without nationality
- a foreign ship, or
- a ship registered under the law of the Channel Islands, Isle of Man, or a British overseas territory.

Authority could be given only if the Secretary of State considered that the *1982 United Nations Convention on the Law of the Sea (UNCLOS)* permits the exercise of powers in relation to the ship in question (see Schedule 5, paragraph 2 of the Bill as introduced to the House of Commons,<sup>2</sup> inserting section 28LA(4) into the Immigration Act 1971).

UNCLOS contains a large number of provisions, some of which are concerned with freedom of navigation and the limited circumstances in which it may be curtailed. It also contains provision for the duty of rescue. As originally introduced to the House of Commons, the need to ensure compliance with UNCLOS was a vital safeguard. As UNCLOS contains provision for the duty of rescue, it follows that the Secretary of State's consideration of whether UNCLOS permits an operation by Home Office vessels against a ship (including a small boat carrying people seeking asylum) included not only consideration of freedom of navigation but also consideration of the duty of rescue and how to safeguard it.

In any operation in which a Home Office vessel would be seeking to board and/or divert a ship, where the safeguard is in place, it follows that, were the duty of rescue not to be considered, the Home Office's tactics and operational plan might otherwise be inconsistent with UNCLOS. Where the safeguard applies, the duty of rescue would necessarily need to be part of the planning and preparation of any operation *before* it was authorised by the Secretary of State. Restoring the UNCLOS safeguard to the Bill would help ensure fulfilment of the duty of rescue by Home Office vessels engaged in the English Channel and elsewhere.

### **The Duty of Rescue and the Law of the Sea**

Article 98 of UNCLOS sets out duties in respect of rescue of persons at sea.

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<sup>2</sup> <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf>.

The first duty is that *every state* shall require the *master of a ship flying its flag*, in so far as the master can do so without serious danger to the ship, the crew or the passengers:

- to render assistance to *any person found at sea in danger of being lost*,
- to proceed with all possible speed to *the rescue of persons in distress if informed of their need of assistance*, in so far as such action may reasonably be expected of the master, and
- *after a collision*, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of the master's own ship, its port of registry and the nearest port at which it will call.

The second duty is that every coastal state (such as the UK) shall promote the establishment, operation and maintenance of *an adequate and effective search and rescue service* regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring states for this purpose.

The first duty reflects the well-established position in customary international law. It applies in international waters and there is an analogous provision to like effect applicable in UK territorial waters (Article 18(2), UNCLOS).

Critically, *there are no public policy limitations on the duty*. Therefore, it follows that the fact that a person seeking asylum in the UK may be committing an immigration-related criminal offence in crossing the English Channel makes no difference. There is still a duty to rescue them if they are in danger of being lost, if they are in distress and have sought assistance, or after a collision.

Further, the duty of rescue applies to Home Office vessels as much as any other vessel. Home Office vessels engaging in boarding and diverting a ship (including a small boat carrying people seeking asylum) will be subject to the duty of rescue, where one of the criteria set out above applies.

### **The Significance of the Attempt to Avoid the Duty of Rescue**

The removal of the safeguard of mandatory consideration of UNCLOS requirements before the Secretary of State authorises the use of maritime enforcement powers against a ship (including a small

boat carrying people claiming asylum) will have consequences for any and all the material obligations that UNLCOS imposes.

In particular, as UNCLOS contains provision for the duty of rescue, it will remove mandatory consideration as to what the duty of rescue requires and how to safeguard that duty as part of the planning and preparation of any operation by Home Office vessels.

The removal of this vital safeguard needs to be seen alongside two other measures.

First, it should be seen in the context of the attempt to immunise Home Office officials from criminal and civil liability arising out of its maritime enforcement operations. As a matter of principle, the Home Office ought to be accountable for any harm to life and limb caused by its actions. However, as matters stand, it seeks to exempt its officials from criminal and civil liability, see Paragraph 10 of Schedule 6 to the Nationality and Borders Bill. Under the Bill, a relevant officer is not liable in any criminal or civil proceedings for anything done in the purported performance of maritime enforcement functions if the court is satisfied that the act was done in good faith, and there were reasonable grounds for doing it.

Second, by a further Government amendment put down before the Public Bill Committee, the Home Office removed the requirement that the Secretary of State may give authority to an officer to require a ship (including a small boat carrying people seeking asylum) to be taken to another state or other British territory *only if* that state or territory is willing to receive the ship.<sup>3</sup> In other words, the Home Office may require a vessel carrying people seeking asylum to leave UK waters and return to France without being required to check whether France is willing to receive the vessel.

In such circumstances, the authorisation of operations against fragile and insecure vessels, without consideration of the duty of rescue or of whether France will receive them, will increase the risk of such vessels being left adrift in the Channel, with self-evident increase of risk to life and limb for the people concerned.

The proposed amendment restores vital protection. It deserves support.

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<sup>3</sup> See Government Amendment 83: [https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill\(EleventhSitting\)](https://hansard.parliament.uk/Commons/2021-10-28/debates/0a424bb1-a73c-4e0e-875b-6778019c444d/NationalityAndBordersBill(EleventhSitting)) and [https://hansard.parliament.uk/Commons/2021-10-28/debates/66b1e524-3688-4227-86e0-64af2068fee9/NationalityAndBordersBill\(TwelfthSitting\)](https://hansard.parliament.uk/Commons/2021-10-28/debates/66b1e524-3688-4227-86e0-64af2068fee9/NationalityAndBordersBill(TwelfthSitting)).