

ILPA's Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill: Criminal Offences and Maritime Enforcement

This Bill strikes a fundamental blow to the ability of persons seeking asylum to reach the UK, to claim asylum, and to do so without committing a criminal offence.

Crime of Seeking Asylum

Clause 39 of the Bill criminalises people coming to the UK to seek asylum.¹ 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 and jailed for up to four years if found guilty on indictment. Additionally, if they disembark from a plane and immediately present themselves to authorities and express their wish to claim asylum, knowingly arriving without the requisite valid visa or Electronic Travel Authorisation, they will also be caught by this provision.² They will have no defence, as Clause 39 ignores the prohibition on imposing penalties on refugees for unauthorised entry in Article 31(1) of the Refugee Convention.

Crime of Assisting Unlawful Immigration

Clause 39(4) would make it an offence to help people, who are not nationals of the UK, to arrive, or attempt to arrive, in the UK in breach of immigration law.³ If the person helping knows, or has reasonable cause to believe, that person is not a UK national, and their help facilitates that person's arrival in the UK in breach of immigration law, under Clause 40(2), they can be convicted on indictment to life imprisonment.⁴

¹ It amends section 24 of the Immigration Act 1971 to make it an offence to arrive in the UK without valid entry clearance or a valid Electronic Travel Authorisation if it is required under the Immigration Rules.

² This is a change from the previous position as section 11(1) of the Immigration Act 1971 defines entry to the UK: 'a person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer'.

³ Clause 39(4) amends section 25 of the Immigration Act 1971.

⁴ Clause 40(2) amends section 25(6)(a) of the Immigration Act 1971, and extends the maximum penalty from fourteen years of imprisonment.

Crime of Helping Persons Seeking Asylum

Additionally, helping a person seeking asylum to arrive, or attempt to arrive, in the UK will become a criminal offence through Clause 40, punishable by imprisonment for life, the most severe of criminal sanctions.⁵ This will apply not only to those who help persons seeking asylum *for gain*, but also those who do so for humanitarian reasons, including family and friends,⁶ provided they do so knowingly and they know or have reasonable cause to believe the person they are helping is seeking asylum.

Defences and Exclusions

The crime of helping a person seeking asylum to arrive in the UK will 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, as they are specifically excluded by section 25A(3)(a) of the Immigration Act 1971.

Similarly, under the Bill, persons are not considered to have committed a facilitation offence if the act was done by, on behalf of, or coordinated by, Her Majesty's Coastguard (or an overseas maritime search and rescue authority exercising similar functions).⁷ This would cover voluntary organisations such as the Royal National Lifeboat Institution ('RNLI'), or independent lifeboats if their assistance is tasked through Her Majesty's Coastguard.

However, for all other acts, persons must rely on a new defence by showing the assisted individual had been in danger or distress at sea, *and* the assistance was provided between the individual being first in danger or distress at sea and the time when the person was delivered safely on land.⁸ However, the UK must have been the nearest place of safety on land to which the individual could have been delivered, or the person must have good reason for delivering the person to the UK. Crucially, passengers who are on the 'ship', who may themselves be seeking asylum in the UK, will not be able to rely on this defence for steering the ship if they were on the ship when the assisted individual was first in danger or distress at sea. This further contravenes Article 31(1) of the Refugee Convention.⁹

⁵ *ibid.*

⁶ Clause 40(3) omits the words 'and for gain' in section 25A(1)(a) of the Immigration Act 1971.

⁷ Clause 40(4) inserting section 25BA(1). A 'facilitation offence' is defined as an offence under section 25, section 25A, or section 25B to the extent that it continues to apply by virtue of regulation 5(7) of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (S.I. 2020/1309).

⁸ Clause 40(4) inserting section 25BA(2). It is noteworthy that, per section 25BA(4), a person will be taken to show these facts for a defence if sufficient evidence of the fact is adduced to raise an issue with respect to it, and the contrary is not proved beyond reasonable doubt.

⁹ Clause 40(4) inserting section 25BA(3)(b).

Maritime Enforcement Operations

The Nationality and Borders Bill proposes to confer new maritime enforcement powers on immigration and enforcement officers. Under the current statutory framework, these powers can only be exercised in the waters of England and Wales, Scotland, and Northern Ireland.¹⁰ The new powers extend into foreign and international waters.¹¹

On reasonable grounds of *suspicion* that certain immigration-related criminal offences¹² - including the new crime of arrival in Clause 39 - are being committed, the Home Office will be able to operate boats in UK territorial waters and use powers to stop, board, *require the ship to be taken to any place* (on land or on water) in the UK or *elsewhere* and be detained there, and/or *divert* a ship requiring it to leave United Kingdom waters.¹³ The new power to require a ship to leave UK waters, is accompanied by a power of a relevant officer to ‘require any person on board the ship to take such action as is reasonably necessary to ensure that person leaves United Kingdom waters’.¹⁴

The ships upon which these enforcement ‘pushback’ operations can be carried out are not only the seaworthy vessels used in navigation that one might imagine. The definition in the Bill is so broad as to extend to fragile and insecure vessels that cross the Channel: any ‘structure (whether with or without means of propulsion) constructed or used to carry persons, goods, plant or machinery by water’¹⁵.

By a Government amendment during Committee stage in the other place, the Home Office removed the requirement in the Bill 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.¹⁶ 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.

¹⁰ Part 3A of the Immigration Act 1971.

¹¹ See Paragraph 2 of Schedule 6 to the Nationality and Borders Bill, inserting section 28LA(1) of the Immigration Act 1971.

¹² See Paragraph 8 of Schedule 6 to the Nationality and Borders Bill.

¹³ see Clause 44 and Schedule 6, particularly Paragraph 10 of Schedule 6 to the Nationality and Borders Bill, inserting B1 in Part A1 of the Immigration Act 1971.

¹⁴ *ibid* Section B1(5).

¹⁵ See Paragraph 8(b) of Schedule 6 to the Nationality and Borders Bill, amending section 28Q of Part 3A of the Immigration Act 1971.

¹⁶ See House of Commons, Nationality and Borders Bill (Amendment Paper for Committee Stage 27 October 2021) Government Amendment 83:

<https://publications.parliament.uk/pa/bills/cbill/58-02/0141/amend/natbord_rm_pbc_1027.pdf>, HC Deb 28 October 2021, vol 702, cols 443-446

<[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 HC Deb 28 October 2021, vol 702, cols 461-2

<[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))> accessed 20 January 2022.

As noted by the Joint Committee on Human Rights, in these circumstances the right to life is inherently engaged: ‘The positive obligations under Article 2 ECHR mean that in the context of safety of life at sea, States need to have an adequate legislative and administrative framework in place to protect lives at sea, including checks that ships are seaworthy, and adequate systems for search and rescue operations at sea’.¹⁷

However, the Bill does not require the Secretary of State to consider whether the [1982 United Nations Convention on the Law of the Sea \(UNCLOS\)](#), which includes the duty of rescue,¹⁸ *permits* the exercise of powers in relation to the ship in question. Although the Bill was introduced with this vital safeguard,¹⁹ when the Bill reached the Public Bill Committee in the other place, the Government amended the Bill to remove it.²⁰ It was declared ‘unnecessary’ to articulate in the Bill this fundamental duty embedded for centuries ‘in every mariner’s psyche’ (as described by the noble Lady, Baroness Jolly, in the Second Reading of the Bill), notwithstanding that the Government had initially elected to do so in this Bill and that this safeguard is contained in each other relevant section of the Immigration Act 1971.²¹

The ‘duty of rescue’ for Masters of all ships is incorporated in domestic law through the Merchant Shipping (Safety of Navigation) Regulations 2020,²² with failure punishable on indictment by imprisonment of 2 years and/or a fine.²³ Yet, in the same stroke as criminalising persons seeking asylum and those helping them, and removing the requirement from the Bill to consider the duty of rescue, Schedule 6 of the Bill immunises Home Office officials from criminal and civil liability arising out of its maritime enforcement

¹⁷ Joint Committee on Human Rights, *Legislative Scrutiny: Nationality and Borders Bill (Part 3) - Immigration offences and enforcement* (Ninth Report of Session 2021-22, 24 November 2021) [37] <https://committees.parliament.uk/publications/8021/documents/83303/default/> accessed 3 February 2022.

¹⁸ Article 98 of the 1982 United Nations Convention on the Law of the Sea. This is reflected in regulation 33 (Distress messages - obligations and procedures) of Chapter V (Safety of navigation) of SOLAS 1974 and Article 10 (duty to render assistance) of the Salvage Convention 1989.

¹⁹ See Schedule 5, paragraph 2 of the Bill as introduced to the House of Commons, inserting section 28LA(4) into the Immigration Act 1971: <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf> accessed 20 January 2022.

²⁰ See House of Commons, Nationality and Borders Bill (Amendment Paper for Committee Stage 27 October 2021) Government Amendment 82:

https://publications.parliament.uk/pa/bills/cbill/58-02/0141/amend/natbord_rm_pbc_1027.pdf and HC Deb 28 October 2021, vol 702, cols 444-446

[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 HC Deb 28 October 2021, vol 702, col 460

[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)) accessed 20 January 2022.

²¹ HL Deb, 5 January 2022, Vol 817, Col 594

<https://hansard.parliament.uk/lords/2022-01-05/debates/5565C246-FDC7-4A38-86E8-52825DE21125/NationalityAndBordersBill> accessed 2 February 2022; section 28M(4), 28N(4) and 29O(4) of the Immigration Act 1971.

²² Regulation 5(2)(n) incorporates regulation 33 (Distress messages - obligations and procedures) of Chapter V (Safety of navigation) of SOLAS 1974.

²³ Regulation 9(2)(d) and 9(5) of the Merchant Shipping (Safety of Navigation) Regulations 2020.

operations.²⁴ The Home Office wishes to act with impunity, without legal accountability for any harm to life and limb caused by its new diversion maritime tactics, so long as they were done in good faith, and there were reasonable grounds for doing them. If, negligently, but in good faith and with reasonable grounds for the act, the immigration or enforcement officer kills a person at sea, there may be no recourse or effective remedy for them or their family against the Home Office,²⁵ and no criminal responsibility of the officer for manslaughter.

In such circumstances, the authorisation of operations against fragile and insecure vessels, without consideration of the duty of rescue or whether France will receive them, may 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 use of maritime enforcement powers in UK territorial waters, coupled with a prohibition on making an asylum claim in those waters (in Clause 13(7)), means that it may become impossible to make an asylum claim in the UK when arriving by Channel crossing. The Bill fails to provide safe routes for their entry, and '[r]esettlement programmes cannot compensate for the UK's proposed abdication of responsibilities towards refugees within its jurisdiction'.²⁶

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.

Should you require further information regarding this briefing, please contact the Immigration Law Practitioners' Association at info@ilpa.org.uk.

²⁴ See J1 'Protection of relevant officers' in Paragraph 10 of Schedule 6 to the Nationality and Borders Bill, in the proposed Part A1 of Schedule 4A of the Immigration Act 1971: 'not liable in any criminal or civil proceedings for anything done in the purported performance of functions under this Part if the court is satisfied that the act was done in good faith and there were reasonable grounds for doing it'.

²⁵ (n 17) at 96, the Joint Committee on Human Rights stated, 'this clause could risk neither being liable for harm caused, even killing a person (where that was done as a consequence of immigration enforcement action). It would be better if this clause made it clear that this wasn't an attempt by the Home Office to absolve itself of civil liability, but rather specifically for the officers not to be liable personally. We therefore recommend amending that paragraph to read "The Home Office, rather than an individual officer, is liable in civil proceedings for anything done in the purported performance of functions under this Part of this Schedule."'

²⁶ UNHCR, 'UNHCR Updated Observations on the Nationality and Borders Bill, as amended' (January 2022), page 21 <<https://www.unhcr.org/61e7f9b44>> accessed 03 February 2022.