

ILPA's Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 2: Asylum, Clause 13 Proposed Amendment – Prohibition on Making Asylum Claims in UK Territorial Waters

Summary

The Nationality and Borders Bill proposes to elevate the prohibition on making an asylum claim in the territorial sea of the United Kingdom to an Act of Parliament, which may frustrate a person's ability to make an asylum claim in a place where the UK has full jurisdiction. This prohibition forms part of a package of measures in the Bill that actively impedes the operation of the Refugee Convention. The proposed amendment removes the offending subsection.

Background

The Immigration Law Practitioners' Association ('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.

Proposed Amendment

Page 17, Clause 13, line 1, leave out subsection (7)

Page 17, Clause 13, line 4, leave out "(8)" and insert "(7)"

Briefing

The offending subsection states:

'(7) The reference to the United Kingdom in subsection (2), so far as it has effect for the purposes of paragraph (d) of that subsection, does not include a reference to the territorial sea of the United Kingdom.'

Clause 13(1) of the Nationality and Borders Bill requires an asylum claim to be made at a designated place. Although some places may be designated later by regulations, all the places designated on the face of the Bill are on the territory or landmass of the United Kingdom. However, the UK territorial sea is excluded from being a place where a Home Office Immigration Officer is authorised to accept an asylum claim.

Why prohibit asylum claims being made in UK territorial waters?

The Home Office expects Immigration Officers to be in UK territorial waters (in practice, the English Channel) in boats, exercising maritime enforcement powers to board, intercept and drive away insecure vessels of persons seeking asylum crossing the Channel, before those people arrive on UK territory to claim asylum. Such exercises would be hampered, if not frustrated, were Immigration Officers to board a vessel, or maybe even rescue people in distress from a vessel and move them on to their own Home Office boat, only to have those people make claims for asylum in the UK.

However, does the exclusion of the UK territorial sea from being a place to make an asylum claim frustrate the operation of the 1951 Refugee Convention? Is it really performing Refugee Convention obligations in good faith to make policy in this way?

Clause 13(7) in the Context of Maritime Enforcement Powers

The exclusion of UK territorial waters from being a place where a person seeking asylum can make an asylum claim sits alongside a set of provisions that provide the Home Office with maritime enforcement powers: see Clause 44 and Schedule 6 of the Nationality and Borders Bill.

If the Nationality and Borders Bill is enacted, the Home Office will be able to operate boats in UK territorial waters and use powers to stop, board, detain and/or *divert* a ship. The definition of 'ship' is broadened in the Bill so that it extends to fragile and insecure vessels that cross the English Channel: Presently 'ship' is defined so that it includes 'every description of vessel (including a hovercraft) used in navigation'. The present definition is to be supplemented so that 'ship' *also includes* 'any other

structure (whether with or without means of propulsion) constructed or used to carry persons, goods, plant or machinery by water¹.

If a relevant officer (a UK official such as an Immigration Officer) has reasonable grounds to suspect that a relevant immigration-related offence is being, or has been, committed on the ship, or the ship is otherwise being used in connection with the commission of such an offence, they may:

- (i) stop the ship,
- (ii) *board the ship,*
- (iii) *require the ship to be taken to any place (on land or on water) in the UK or elsewhere and detained there; and/or*
- (iv) *require the ship to leave United Kingdom waters.*²

The power is broad enough to allow the relevant officer to require a ship carrying persons seeking asylum across the English Channel to be diverted away from the UK and back to France. Self-evidently, such action may frustrate a person who wishes to claim asylum in the UK.

These maritime enforcement powers arise on the suspicion that certain immigration-related criminal offences are being committed. If the Nationality and Borders Bill is enacted, those offences will include *crimes of arrival* in the UK, crimes that themselves may also frustrate a person who wishes to claim asylum in the UK (see Clause 39 of the Bill).

Further, while the requirement for an asylum claim to be made on UK territory in Clause 13 of the Bill puts into law analogous provision presently found in paragraph 327D of the Immigration Rules (the latter being merely statements of executive policy), *it elevates the measure to the status of primary legislation, a move that makes it much more difficult to argue in court that a refusal to accept an asylum claim made in UK territorial waters is unlawful as being contrary to the Refugee Convention.*

At present, section 2 of the Asylum and Immigration Appeals Act 1993 provides that nothing in the Immigration Rules may lay down any practice that would be contrary to the Refugee Convention. By elevating the prohibition on making an asylum claim in UK territorial waters from the Immigration Rules to an Act of Parliament, the Nationality and Borders Bill alters its strength and may immunise it from being disapplied by the courts as being contrary to the Refugee Convention. *The change is significant and anything but innocent or mere tidying up.*

¹ See Paragraph 8(b) of Schedule of Schedule 6 to the Nationality and Borders Bill, amending section 28Q of Part 3A of the Immigration Act 1971.

² See Paragraph 10 of Schedule 6 to the Nationality and Borders Bill, inserting B1 in Part A1 of the Immigration Act 1971.

The use of maritime enforcement powers in UK territorial waters to prevent persons seeking asylum from reaching the UK moves aspects of UK border control from the UK landmass into UK territorial waters. Coupled with the prohibition on making an asylum claim in those waters, the result is that it may become impossible to make an asylum claim in the UK when arriving by Channel crossing.

The prohibition on making an asylum claim in UK territorial waters operates alongside measures that criminalise arrival in the UK, and measures that empower Immigration Officers to drive people away from the UK with immunity³.

Such treatment of forcibly displaced people making a dangerous cross-Channel crossing may be ethically shameful, but is it unlawful? Does it contravene international law commitments?

International Law that Binds the UK

In frustrating the making of an asylum claim, such powers cut against the ability of a person to seek a Refugee status determination. Clause 13(6) of the Nationality and Border Bill defines an asylum claim as:

'[...] a claim made in accordance with the immigration rules by a person to the Secretary of State that to remove the person from, or require the person to leave, the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.'

If the UK Government actively frustrates the making of an asylum claim using the powers and measures set out above, *in a place where the UK has full jurisdiction*, that is in UK territorial waters, that frustrates a person who seeks to make an asylum claim and thereby secure a Refugee status determination.

Further, in addition to the Refugee Convention, it is important to remember that other international law treaties and instruments may also be engaged. Those international law treaties include the duty of rescue at sea, as found in the UN Convention on the Law of the Sea (UNCLOS), the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Maritime Search and Rescue (SAR), and the International Convention on Salvage. That duty of rescue applies to Home Office boats as much as any other vessel, and, where it is engaged, it will require Home Officials to rescue persons seeking asylum and land them at a place of safety.

³ 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.

Moreover, where UK Home Office boats are operating in UK territorial waters against insecure vessels carrying people coming to claim asylum, there ought to be sufficient jurisdiction for the protection of the Human Rights Act 1998 to be engaged, so that the provisions of the European Convention on Human Rights (ECHR), particularly, Article 2 (Right to Life) and Article 3 (Prohibition on Torture, Inhuman and Degrading Treatment or Punishment) may be relied upon.

As a matter of principle, the Home Office ought to be accountable for any harm to life and limb caused by its maritime enforcement actions. It may be that the Human Rights Act 1998 contains the main method to hold it to account. By the Nationality and Borders Bill, *the Home Office seeks to exempt its officials from criminal and civil liability for damage to life and limb caused by its maritime operations*: see Paragraph 10 of Schedule 6 to the Nationality and Borders Bill, page 108, line 27. That the Government seeks to include such a provision suggests it is conscious that use of these maritime enforcement powers could lead to conduct that might otherwise be judged as criminal beyond all reasonable doubt.

The Principle of *Non-refoulement* in the Refugee Convention

Returning to the Refugee Convention, how does the prohibition on claiming asylum in UK territorial waters square with the principle of *non-refoulement* as set out in Article 33(1) of the Refugee Convention?

Article 33(1) provides:

“1. No Contracting State shall expel or return (“refouler”) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

(italic emphasis added)

While Article 33(1) of the Refugee Convention may not expressly ensure access to UK territory or to a Refugee status determination procedure, it nonetheless has legal effects that require a person to be provided with temporary refuge. Clearly, when a person arrives on UK territory, it may have such applicability. However, what about when a person arrives in UK territorial waters? Where a person who seeks asylum is in UK territorial waters and is prevented from claiming asylum by use of the package of maritime enforcement powers and measures set out above, is the principle engaged and what are its effects?

In such circumstances there is no doubt that the UK is exercising jurisdiction (the push-back would be in UK territorial waters adjacent to the UK landmass and the boats pushing back would be UK Home Office vessels). Accordingly, the Home Office should not assume that cases that deal with push-back operations on the High Seas such as the US Supreme Court cases of *Sale v. Haitian Centres Council, Inc.*, 32 *ILM* (1993) 1039 (itself criticised in *Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997), or a case that deals with hold-back operations in foreign airports prior to departure, such as the UK (judicial) House of Lords case of *R (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport* [2005] 2 AC 1, provide answers that support its position.

The questions of the extent to which Article 33(1) of the Refugee Convention is engaged when a vessel is stopped and diverted in UK territorial waters, whether the Refugee Convention is being applied in good faith in such cases, and the extent to which and on what basis such matters will be justiciable in UK domestic courts if Clause 13 of the Nationality and Borders Bill becomes law, will require careful assessment.

Conclusion

The attempt to prohibit by legislation the making of an asylum claim in UK territorial waters is part of a package of measures to frustrate asylum claims from being made in the UK. Many of those asylum claims will have merit and would otherwise oblige the UK to offer people protection. In substance, the Home Office package of measures in the Nationality and Borders Bill actively impedes the operation of the 1951 Refugee Convention. It should be opposed on that basis.

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