Immigration Law Practitioners' Association and Women for Refugee Women Briefing for the House of Lords Committee Stage for the Nationality and Borders Bill – Part 2: Asylum, Clause 31 Amendment

Summary

Clause 31 attempts to implement a heightened two-limb test for determining whether an individual has a well-founded fear of persecution and should therefore be granted refugee protection in the UK. The Immigration Law Practitioners' Association (ILPA) and Women for Refugee Women are seriously concerned that it will result in protection wrongly being denied to those at genuine risk of persecution.

The test in Clause 31 requires the decision-maker to be satisfied, on the 'balance of probabilities' (i.e. that it is more likely than not), that the asylum claimant has a characteristic which could cause them to fear persecution for a reason covered by the Refugee Convention, and that they indeed fear that they will be persecuted if returned to their country of origin.

Only if these facts are established to that new heightened standard can the decision-maker consider whether on the lower standard of proof (of 'reasonable likelihood'), the person will be persecuted if returned.

In summary, the new test:

- Imposes a higher hurdle for all asylum claimants;
- Disproportionately adversely affects vulnerable groups, including survivors of gender-based violence, who already struggle to have their claims for refugee protection correctly determined by the UK;
- Contravenes UNHCR standards;
- Reverses over 20 years of settled UK case law; and
- Has not been adequately justified by the Government.

In our opinion, Clause 31 should not stand part of the Bill, and the status quo established by settled case law of the senior courts, supported by the UNHCR, should continue to apply.

We strongly urge members of the House of Lords to join Baroness Chakrabarti, as well as Baroness McIntosh of Pickering, Baroness Hamwee and the Bishop of Gloucester, in opposing the question that Clause 31 stand part of the Bill. The clause should be omitted to ensure the UK keeps its international law commitment, and does not wrongly deny certain refugees, including vulnerable women and girls, vital protection in this country.

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.

Women for Refugee Women is a charity that supports women seeking asylum in the UK and challenges the injustices that they experience. Together with our partners across England and Wales, we support hundreds of women who have fled gender-based abuse, including female genital mutilation, rape and honour-based violence. Our research has documented how many women seeking asylum in the UK have fled gender-based abuse in their countries of origin. In 2020, 78% of the women we spoke with had fled gender-based violence in their countries of origin.[1] Many of these women were abused again on their journeys to the UK.

Women for Refugee Women is deeply troubled by the impact that the Nationality and Borders Bill will have on these women, who already face significant challenges to the proper recognition of their asylum claims. Over 50 organisations working with women seeking asylum and survivors of gender-based abuse have written to the Home Secretary, expressing grave concerns that more women will be wrongly refused asylum, retraumatised, and placed at risk of violence and abuse.[2] The Government's Tackling Violence against Women and Girls strategy, published in July 2021, committed to 'bring[ing] about real and lasting change', recognising that violence against women is 'still far too prevalent and there are too many instances of victims and survivors being let down.'[3] These and other commitments in the strategy are gravely undermined by proposals in the Bill, including the change to the well-founded fear test in Clause 31.

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[1] Women for Refugee Women, *Will I Ever Be Safe? Asylum-seeking women made destitute in the UK* (2020) <https://www.refugeewomen.co.uk/not-safe/> accessed 13 January 2022, page 6.

[2] Women for Refugee Women, '52 Organisations Unite to Tell Priti Patel that the Nationality and Borders Bill Will Have a 'Cruel and Discriminatory' Impact on Women' (24 November 2021) <https://www.refugeewomen.co.uk/womens-charities-condemn-government-asylum-plan/> accessed 13 January 2022.

[3] HM Government, *Tackling Violence against Women and Girls* (July 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005630/Tackling_Violence_Against_Women_and_Girls_Strategy-July_2021-FINAL.pdf> accessed 13 January 2022, page 14.

Case Study

‘Alisha’

‘Alisha’[4] came to the UK on a visit visa, fleeing honour-based violence from her family. She grew up in a deeply controlling home, where her father dictated her life: he was abusive and violent with her mother, and her brothers learned from him to be controlling too. Her father had arranged marriages for all the girls. When one sibling objected, she was locked in their house until she acquiesced. Each daughter was married to a religiously conservative man, who made them wear full veils against their will.

‘Alisha’ was the youngest. She had a secret relationship with a man of her own will. When it ended badly, she feared he would tell her family that she had disobeyed them. Her father then arranged a marriage for her. She fled her home country because she feared she would be killed when the family learned she had a relationship outside of marriage, without their approval.

She arrived in the UK, and first went to a family member who lived here to seek support. She had pretended to her father and brothers that she was coming to the UK for the purposes of visiting this family member, and that she would be back after a short visit.

The family member here in the UK believed her but would not support her asylum claim. ‘Alisha’ claimed asylum but was initially disbelieved by the Home Office for a number of reasons, including because she had arrived on a visit visa. The Home Office also did not accept that her family member here in the UK would refuse to support her, without any real consideration of the complex familial and cultural dynamics at play.

In addition, the Home Office refused to accept that she would be able to have a secret relationship in her home country, given the strict nature of her father’s control. However, they failed to have regard to the fact that she explained she would meet him secretly during her lunch break and had saved his number under a female name in her phone, should her father ever find it.

In short, the Home Office did not accept any of ‘Alisha’s’ asylum claim. She had an appeal before the Tribunal, at which she was able to adduce an expert psychological report. The report showed that she was suffering from depression, anxiety and post-traumatic stress disorder, and that her presentation was entirely consistent with that of victims of long-term abuse. Her claim for asylum was ultimately allowed by the Upper Tribunal.

[4] ‘Alisha’ is a former client of barristers at Garden Court Chambers. We have used a pseudonym to protect her identity.

'Alisha's' claim shows that there are cases in which the system already fails to adequately consider the asylum claims of women and girls in practice, and Clause 31 of the Bill will only make this more so. The Home Office's approach to fact finding in her case was inappropriately restrictive: if 'Alisha' was from a controlling home, it is not plausible she would have been able to ever form a relationship in secret.

But that restrictive thinking ignored clear parts of 'Alisha's' evidence, about how she took precautions, how she hid from her family. It also ignores the lived experiences of countless women and girls in these circumstances. Her entry to the UK via a visit visa and the 'delay' in claiming asylum until after she sought out her relative in the UK all worked against her when the Home Office assessed her credibility. Her presentation during her asylum interviews was markedly similar to that recorded by the psychologist during their assessment, who identified that she was suffering from post-traumatic stress disorder and anxiety when reliving her traumatic experiences. This was not taken into account at the time of the initial decision.

She also did not have any documentation to support her claim because what she described happening was complex controlling family dynamics. She would now have to meet an even higher standard of proof, that of the balance of probabilities, in light of Clause 31. The new heightened test means that women like **'Alisha' are more likely to be incorrectly refused safety in the UK. According to the lawyers who represented her, it is likely that under the Bill 'Alisha' would be denied asylum, and could be returned to her country of origin and placed at risk of even more abuse, possibly death.**

Detailed Consideration of Clause

Clause 31 attempts to implement a heightened two-limb test for determining whether an individual has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and should therefore be recognised as a refugee in the UK. It requires the decision-maker to be satisfied, on the 'balance of probabilities' (i.e. that it is more likely than not) that a person has 1) a characteristic which could cause them to fear persecution because of one of the five reasons listed in the Convention, and 2) that they indeed fear such persecution in their country (a subjective fear).

Only if these facts are established to this heightened standard can the decision-maker consider on the lower standard of proof ('reasonable likelihood'), whether the person will be persecuted, and will not be protected, if returned to their country of nationality or former habitual residence.

ILPA and Women for Refugee Women wish to preserve the status quo in law, such that the 'reasonable likelihood' standard applies to all facts, with subjective and objective fear assessed holistically, rather than separately.

The Existing Standard

There is significant international authority regarding *how* a State should identify a refugee.

The UNHCR has reiterated the correct standard of proof for such claims:

> *'In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.'*[5]

Their reasoning for this standard of proof has been clear from the outset:

> *'In examining refugee claims, the particular situation of asylum seekers should be kept in mind and consideration given to the fact that the ultimate objective of refugee status determination is humanitarian. On this basis, the determination of refugee status does not purport to identify refugees as a matter of certainty, but as a matter of likelihood.'*[6]

To that end, UNHCR standards highlight the importance of giving the applicant the 'benefit of the doubt', in light of the difficulties people have in proving their asylum claims as well as **the potentially life-threatening harm** to the person should the wrong decision be made:

> *'Given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where an adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the "benefit of the doubt"'*
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> *In other words, the credibility assessment purposefully and positively accommodates and allows for doubt and uncertainty. A decision-maker may accept a fact as credible, even though he or she is not certain that it is true.'*[7]

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[5] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979) at [42] <https://www.unhcr.org/4d93528a9.pdf> accessed 31 January 2022 (emphasis added).

[6] UNHCR, *Note on Burden and Standard of Proof* (1998) at [2] < https://www.refworld.org/docid/3ae6b3338.html> accessed 31 January 2022 (emphasis added).

[7] UNHCR, *Beyond Proof* (2013), at [237], citing UNHCR's *Note on Burden and Standard of Proof* <https://www.refworld.org/docid/519b1fb54.html> accessed 31 January 2022 (emphasis added).

UNHCR has voiced its specific opposition to Clause 31 and concern that the approach proposed 'will lead to refugees being denied asylum in error.'[8]

For more than 20 years, UK courts have given effect to these international standards, applying the 'reasonable likelihood' standard of proof for all elements of the refugee definition. UK courts have explicitly rejected the 'balance of probabilities' threshold for any part of the assessment.

In the case of *Karanakaran,* in 2003, Lord Justice Brooke explained why the lower standard ought to apply:

> *'It is clear that the majority was influenced by the notorious difficulty many asylum-seekers face in "proving" the facts on which their asylum plea is founded. In many of these cases, they said, the evidence will be the applicant's own story, supported in some instances by reports from organisations like Amnesty International. The stress generated by the nature of an asylum claim and the possible consequences of refusal, complemented by the highly formalistic atmosphere of interview or court, made the task of evaluating the evidence more complex.'*[9]

This approach was endorsed by the House of Lords in *Sivakumar* in 2003: 'on an overall view of the evidence there was a reasonable likelihood of a well founded fear of persecution for a Convention reason'.[10]

Later, in *HJ (Iran)* the Supreme Court confirmed that the 'reasonable likelihood' standard of proof is less demanding because of the interests at stake: 'Where life or liberty may be threatened, the balance of probabilities is not an appropriate test'.[11]

The New Standard

The Benefit of the Doubt

Clause 31 proposes to import a split in the standard of proof for different parts of an asylum claim:

- The standard for proving whether a person has a characteristic which could cause them to fear persecution (and thereby also past facts), and whether they do fear such persecution, will be raised to the 'balance of probabilities';
- The standard for proving future risk of persecution will remain whether there is a 'reasonable likelihood'.

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[8] UNHCR, *UNHCR Updated Observations on the Nationality and Borders Bill, as amended* (January 2022) at [202] <https://www.unhcr.org/61e7f9b44> accessed 31 January 2022.

[9] *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at [53] (emphasis added).

[10] *Sivakumar v Secretary of State for the Home Department* [2003] UKHL 14 at [19] (emphasis added).

[11] *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 at [90] (emphasis added).

The test of 'balance of probabilities' is used in civil litigation. It means that it must be more probable or more likely than not that an event has occurred.

Meeting this higher standard can be difficult. If there is doubt as to whether an event has happened, then it will be considered not to have happened. Lord Hoffmann has explained this standard:

> *'If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.'*[12]

Clause 31 incorrectly fails to provide persons seeking asylum with the benefit of the doubt. Mere uncertainty in the mind of the Home Office or a judge should not result in refusal of a claim so vital as one for refugee protection.

<u>One Holistic Test</u>

Parliamentary Under Secretary of State, Tom Pursglove MP, has stated that this clause will 'lead to clearer and more consistent decisions.'[13] In our opinion, the present well-founded fear test is adequately clear. In contrast, the new test will create confusion and lead to greater numbers of inconsistent and incorrect decisions, resulting in increased litigation as well as further trauma for desperate people seeking safety.

It has long been settled that there is a single question for the courts to answer: 'does the claimant asylum-seeker have a "well-founded fear of being persecuted", if returned to his own country, for reasons falling within article 1A(2) of the Convention?'.[14]

The proposed test errs in separating and elevating the standard for assessment of subjective fear/past and present facts. The assessment of what has happened to the person in the past and the assessment of what could happen to them in the future cannot be straightforwardly separated from each other, and **must be reviewed together, as one holistic test.**

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[12] *Re B* [2008] UKHL 35.

[13] HC Deb 26 October 2021, vol 702, col 400 <https://hansard.parliament.uk/Commons/2021-10-26/debates/328ec7c7-97a8-4b51-b611-23fa943d325c/NationalityAndBordersBill(TenthSitting)> accessed 31 January 2022.

[14] *HJ (Iran)* at [87] citing Simon Brown LJ in *Secretary of State for the Home Department v Iftikar Ahmed* [2000] INLR 1, cited by McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (2003) 216 CLR 473 [42].

As set out in the UNHCR's Guidance on the Burden and Standard of Proof:

> *'While by nature, an evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, such an evaluation should be made based on factual considerations which take into account the personal circumstances of the applicant as well as the elements relating to the situation in the country of origin.*
>
> *The applicant's personal circumstances would include his/her background, experiences, personality and any other personal factors, which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account.'*[15]

Therefore, **the test in Clause 31(2) cannot be separated from the test in Clause 31(4)**. Subjective fear of persecution, whether a person has such a characteristic for which they fear persecution, and whether a person has suffered past persecution, is wholly relevant to the assessment of their future risk of persecution.

Nearly twenty years ago, the Court of Appeal in *Karanakaran* specifically considered a split test as is proposed in Clause 31 and rejected it: 'if there was a first stage (proof of present and past facts) followed by a second stage (assessment of risk) then any uncertainties in the evidence would be excluded at the second stage, and that this could not be right.'[16]

Barristers have highlighted the perverse outcomes that could result from the Government's proposed split test. In their legal opinion of the effects of the Bill on women, barristers of Garden Court Chambers have said:

> *'If Clause 31 is enacted, protection will be denied to women who are reasonably likely to have been abused but cannot prove it 'on a balance of probabilities'. In this context, the retention of the 'real risk' standard for the prediction of future risk becomes virtually meaningless. Past abuse is recognised to be the best indicator of future risk, but it will be discounted unless established on the high balance of probabilities standard.'*[17]

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[15] UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims* (16 December 1998) at [18]-[19] <https://www.refworld.org/pdfid/3ae6b3338.pdf> accessed 31 January 2022.

[16] *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at [52] referring to *Kaja* [1995] Imm AR 1.

[17] Stephanie Harrison QC, Ubah Dirie, Emma Fitzsimons, and Hannah Lynes, 'Nationality and Borders Bill: Advice to Women for Refugee Women' (23 November 2021) at [17] <https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf> accessed 31 January 2022.

Effect of the Change

Any lawyer will know that the standard of proof runs to the very core of any legal claim. It explains how difficult it is to prove something to the decision maker, in this case the Home Office, and on appeal or judicial review to a judge.

Thus, the proposed change is not small or insignificant; **it will fundamentally affect the ability of a person to be granted refugee status, and disproportionately affect those who are vulnerable and who already struggle to evidence their claims.** Barristers of Garden Court Chambers have made clear in their opinion that Clause 31 will 'significantly worsen asylum decision making, and will have a disproportionate impact on asylum-seeking women and girls'.[18]

Additionally, they have raised that the introduction of Clause 31 will produce a mismatch between domestic asylum law and the European Convention on Human Rights.[19] Article 3 of that Convention will contain a lower standard of proof than Clause 31, but for the entirety of the assessment: a person will not be able to be expelled where there are substantial grounds for believing they would be exposed to a real risk of torture or inhuman or degrading treatment or punishment as a result. Therefore, decision makers and tribunals will have to apply two different standards of proof to the same facts. A person may thus still qualify for humanitarian protection, where they previously would have qualified for refugee protection. This is yet a further reason for considering that the relevant Clause will undermine the coherence of the law and protection of women and girls.

Over the years, there has been substantial research on the failures of the Home Office in delivering a fair asylum process, and on the reasons why many women who flee gender-based persecution may be wrongly denied protection.[20]

As acknowledged in Home Office policy, women who have fled sexual and gender-based violence can experience severe challenges in disclosure, for instance as a result of severe trauma, fear or a lack of

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[18] ibid [12].
[19] ibid [18].
[20] See, for example:
Freedom From Torture, *Lessons Not Learned: The Failures of Asylum Decision Making in the UK* (2019) <https://www.freedomfromtorture.org/news/lessons-not-learned-report-september-2019> accessed 31 January 2022;
Women for Refugee Women, *Refused: The experiences of women denied asylum in the UK* (2012) <https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-reports-refused.pdf> accessed 31 January 2022;
Asylum Aid, *Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims* (January 2011) <https://www.refworld.org/docid/4d3435d12.html> accessed 31 January 2022;
European Parliament, *Directorate-General for Internal Policies, Gender Related Asylum Claims in Europe* (2012) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf> accessed 31 January 2022.

knowledge of the asylum process.[21] Women also often struggle to evidence their asylum cases in the current system; rape or other forms of sexual assault or sexual exploitation are often more difficult to prove because unlike other forms of torture they do not always leave physical scarring.

Further, gender-based violence, especially abuse in the private sphere (such as the community) is not as well documented by human rights organisations and others, making the assessment of whether there is a future risk of persecution even more challenging for women. Combined with the inadequate understanding that is shown by some decision makers of the effects of sexual and gender-based violence, women end up facing multiple barriers to obtaining a fair assessment of their asylum claims. **Yet, instead of introducing changes that would support women who have survived gender-based violence to access a fair assessment, the changes to the well-founded fear test will make it even harder for them.**

The Home Office's own policy acknowledges that the level of proof in asylum claims must be 'low because of what is potentially at stake – the individual's life or liberty – and because asylum seekers are unlikely to be able to compile and carry dossiers of evidence out of the country of persecution'.[22] In the same vein, UNHCR standards remind us that 'refugee claims are unlike criminal cases or civil claims.'[23] It is unclear, to say the least, why the Government is now going against this approach.

Parliamentary Under Secretary of State, Tom Pursglove MP, stated that the new test is 'appropriate to ensure that only those who qualify for protection under the Refugee Convention are afforded protection in the UK'.[24] But no evidence has been adduced to show that those who do not qualify for protection are making successful claims. In fact, what we have is ample evidence that points towards a long-standing culture of disbelief in Home Office decision-making.

The Government's Equality Impact Assessment on the Bill does not provide any explanation of how the effect of the new test on vulnerable groups, such as survivors, has been assessed and is justified in light of the purported policy aims.[25]

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[21] Home Office, *Gender Issues in the Asylum Claim* (version 3.0, 10 April 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699703/gender-issues-in-the-asylum-claim-v3.pdf> accessed 31 January 2022.

[22] Home Office, *Assessing Credibility and Refugee Status* (2015) <https://www.gov.uk/government/publications/considering-asylum-claims-and-assessing-credibility-instruction> accessed on 31 January 2022.

[23] Office of the United Nations High Commissioner for Refugees, 'Note on Burden and Standard of Proof in Refugee Claims (16 December 1998) <https://www.refworld.org/pdfid/3ae6b3338.pdf> accessed 31 January 2022.

[24] HC Deb 26 October 2021, vol 702, col 400 <https://hansard.parliament.uk/Commons/2021-10-26/debates/328ec7c7-97a8-4b51-b611-23fa943d325c/NationalityAndBordersBill(TenthSitting)> accessed 31 January 2022.

[25] Home Office, 'New Plan for Immigration Overarching Equality Impact Assessment of polices being delivered through the Nationality and Borders Bill' (16 September 2021)

In light of the serious consequences for desperate people, there can be no justification for this change. **This is why we urge peers to stand with Baroness Chakrabarti, Baroness McIntosh of Pickering, Baroness Hamwee, and the Bishop of Gloucester in calling for this Clause not to stand part of the Bill.**

Contact

Should you require further information regarding the amendment to the standard of proof in Clause 31, please contact Zoe Bantleman, Legal Director of the Immigration Law Practitioners' Association at info@ilpa.org.uk.

For further information on the impact of Clause 31 on survivors of gender-based abuse, or additional case studies, please contact Priscilla Dudhia, Policy & Advocacy Coordinator of Women for Refugee Women at priscilla@refugeewomen.co.uk or 07869 147 248.

<https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment> accessed 31 January 2022.