

## 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 32 Amendment

### Summary

Membership of a 'particular social group' forms one of the grounds of persecution under which a person may qualify as a refugee under the 1951 Refugee Convention.

The current UNHCR and domestic law definition of a 'particular social group' is:

1. A group of persons who share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it;  
and/or
2. A group that has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

However, Clause 32 of the Nationality and Borders Bill ('the Bill') requires both of these conditions to be fulfilled, rather than requiring them to be met in the alternative.

- It reverses case law of senior UK courts, contravenes UNHCR standards, and reinstates an erroneous EU law standard.
- It introduces a regressive definition of a 'particular social group' that will disproportionately affect vulnerable persons, including women and girls fleeing gender-based persecution, who will need to meet an additional hurdle in order to obtain refugee protection.
- There has been no pre-legislative consultation with experts or those with lived experience on the new definition, as it was not included in the New Plan for Immigration, and the Government has failed to heed the repeated warnings of experts about the negative ramifications of this change.
- The Government's Equality Impact Assessment on the Bill failed to adequately assess the impact of the change on vulnerable groups.
- The Government has failed to justify this significant change to the law and refugee protection.

The Immigration Law Practitioners' Association ('ILPA') and Women for Refugee Women recommend an amendment that ensures the UK keeps its international law commitment, and does not wrongly deny certain refugees, including vulnerable women and girls, vital protection in this country. We strongly urge members of the House of Lords to support our amendment to Clause 32, which has been tabled by Baroness Lister.



## 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.<sup>1</sup> 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.<sup>2</sup> 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.'<sup>3</sup> These and other commitments in the strategy are gravely undermined by proposals in the Bill, including the change to the definition of a 'particular social group' in Clause 32.

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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](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

### 'Rosa'

'Rosa',<sup>4</sup> a woman in her 50s, came to the UK on a six month visit visa arranged by a neighbour. She fled her home country due to serious physical and sexual violence at the hands of her husband. When she arrived in the UK, she did not claim asylum at the airport because she did not know what asylum was and she had never had any legal advice. She was from a relatively rural background and had a basic education. 'Rosa' had been married from a young age and was subject to serious violence throughout the course of her relationship.

Her husband was a member of the police force in her home country and had exercised a high degree of control over her for years. She never sought medical attention for the injuries she sustained because her husband would not allow her to go to a doctor or a hospital.

After 'Rosa' arrived in the UK, she locked herself away in a private address. She never accessed any support from charities because she was so afraid. She had left her home country only eight days after escaping her marriage, so the trauma was very recent.

After overstaying her visa, 'Rosa' was arrested and detained by immigration enforcement. She then claimed asylum. Her claim, which was initially allocated to the Detained Asylum Casework - a procedure for assessing asylum claims in detention - was refused by the Home Office at first instance. Whilst in detention, a Rule 35 report<sup>5</sup> by a medical practitioner identified that she had physical and psychological injuries consistent with her account.

During the case management stage, the Rule 35 medical report was highlighted as showing independent evidence, generated via the Home Office's own processes, that 'Rosa' was credible about her experiences. Following representations, the Home Office conceded that she was in fact credible. However, the case went to hearing because the Home Office disputed, among other points, that the persecution 'Rosa' suffered fell within the ambit of the 1951 Refugee Convention and that she was entitled to protection in the UK.

There are multiple factors in 'Rosa's' case which would make it even more difficult for her to obtain refugee protection under the changes proposed in the Bill. This briefing focuses on the change in Clause 32 to the definition of a ground in the 1951 Refugee Convention that women like 'Rosa' often rely on to access protection.

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<sup>4</sup> Rosa' is a former client of barristers at Garden Court Chambers. We have used a pseudonym to protect her identity.

<sup>5</sup> Rule 35 of the Statutory Detention Centre Rules 2001 (SI 238/2001) requires doctors in immigration removal centres to report to the Home Office concerning any detainee about whom they have health-related concerns.

At the time of her hearing, ‘Rosa’ only needed to establish that either she had an innate characteristic that could not be changed (here being a female victim of gender/domestic violence) *or* that female victims of domestic violence in her home country are perceived as being different by the surrounding society. But under the Bill, she would need to fulfil both criteria in order to show that the persecution she faced falls within the Refugee Convention.

According to the barristers who represented her in this case, it is likely that ‘Rosa’ would not have been able to show that she was a member of a ‘particular social group’ under the definition proposed by the Bill, and therefore that the abuse she suffered fell within the Refugee Convention, entitling her to protection in the UK.

A detailed consideration of the change to the definition of ‘particular social group’ can be found below. Given its serious implications for refugee protection, we strongly urge peers to support our amendment to Clause 32, which has been tabled by Baroness Lister.

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

##### *Proposed Amendment*

Clause 32, page 35, line 47, leave out ‘only’, and insert ‘one or’ before ‘both’.

##### *Result of Amendment (emphasis added)*

#### **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 if it meets **one or** both of the following conditions.

(3) The first condition is that members of the group share—

- (a) an innate characteristic,
- (b) a common background that cannot be changed, or
- (c) a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.

(4) The second condition is that the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

[...]

## Detailed Consideration of Clause

In order to successfully claim asylum, a person must first show that they have a well-founded fear of persecution for one of the five reasons set out in the 1951 Refugee Convention: race, religion, nationality, political opinion, and membership of a particular social group.

Clause 32 introduces a restricted definition of ‘particular social group’, reversing UK case law, contravening UNHCR standards, and reinstating incorrect EU law. This particularly and adversely affects certain vulnerable persons, including women. The Refugee Convention does not include ‘gender’ as one of the five reasons. Therefore, as quoted by Baroness Hale in the House of Lords case of *Fornah*, the San Remo Expert Roundtable in September 2001 concluded that ‘[t]he text, object, and purpose of the Refugee Convention require a gender-inclusive and gender-sensitive interpretation’.<sup>6</sup> Women who have survived gender-based persecution often rely on membership of a ‘particular social group’ to claim asylum.

We are, therefore, extremely concerned that the change to the definition of a ‘particular social group’ will prevent survivors of abuse from accessing protection in the UK, as barristers from Garden Court Chambers have also warned.<sup>7</sup> In their legal opinion on the Bill, barristers have described the change as an ‘unexplained regressive step which will disproportionately impact women and girls seeking asylum on the basis of specific forms of gender persecution’,<sup>8</sup> who will need to meet an additional hurdle in order to obtain refugee protection.

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:

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<sup>6</sup> *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, para 84.

<sup>7</sup> Stephanie Harrison QC, Ubah Dirie, Emma Fitzsimons, and Hannah Lynes, ‘Nationality and Borders Bill: Advice to Women for Refugee Women’ (23 November 2021) <<https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf>> accessed 13 January 2022. Concerns about the change to the definition have also been raised by organisations in the women’s sector, in written evidence to the Public Bill Committee <<https://bills.parliament.uk/bills/3023/publications>> accessed 13 January 2022.

<sup>8</sup> (n 7) page 11, para 26.

*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.*<sup>9</sup>

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 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 added).

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 House of Lords considered the matter 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:

- Lord Bingham stated, at [16] of the judgement that '[i]f, 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' (bold and underlined emphasis added); and
- Lord Brown agreed at [118]: '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)

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<sup>9</sup> UNHCR, *Guidelines on International Protection No. 2: "Membership of a Particular Social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02)* (7 May 2002)

<<https://www.unhcr.org/uk/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>> accessed 13 January 2022, page 3, para 11.

*and any Regulations brought into force under it will, I conclude, have to be interpreted consistently with this definition.'*

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 by the specialist Immigration and Asylum Chamber of the Upper Tribunal in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC).<sup>10</sup>

The position in law is, therefore, that there was an error in the EU law which our domestic courts have attempted to rectify. However, the Government is now seeking to replicate the original error in this Bill. In the Public Bill Committee in the House of Commons, the Government justified its stance by asserting it needed to bring certainty to an area bedevilled by conflicting authority.<sup>11</sup> That is not so. There is no conflicting authority: the UNHCR 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, and it does so without warrant or proper justification. 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.

In addition to contravening established international standards, UNHCR has warned that Clause 32 could exclude certain refugees from safety, as the ground has 'proved critical in the protection of those with claims based on gender, sexual orientation, gender identity, status as former victims of trafficking, disability or mental-ill health, family and age'.<sup>12</sup> Those affected include vulnerable survivors of sexual and gender-based persecution.

By way of example, barristers from Garden Court Chambers explained how under the Bill a trafficked woman would need to show not only that her status as a trafficked woman is an innate characteristic, but also that trafficked women as a group are perceived as having a distinct identity in her country of origin.<sup>13</sup> The latter is of course much more difficult to establish than the former because this is judged by the perceptions of the society in her country, and it can be very challenging to find objective evidence on women as a distinct group.

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<sup>10</sup> The headnote of the case states, '1. *The Geneva Convention relating to the Status of Refugees 1951 provides greater protection than the minimum standards imposed by a literal interpretation) of Article 10(1)(d) of the Qualification Directive (Particular Social Group). Article 10 (d) should be interpreted by replacing the word "and" between Article 10(1)(d)(i) and (ii) with the word "or", creating an alternative rather than cumulative test.*'

<sup>11</sup> Hansard Public Bill Committee debate of Nationality and Borders Bill (26 October 2021) <[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))> accessed 13 January 2022.

<sup>12</sup> UNHCR, 'UNHCR Legal Observations on the Nationality and Borders Bill' <<https://www.unhcr.org/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021>> accessed 13 January 2022, page 54, para 150-151.

<sup>13</sup> (n 7) page 11, para 25.

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.<sup>14</sup> This can be due to severe challenges in disclosure, as acknowledged in current Home Office policy,<sup>15</sup> as well as in evidencing their claims, especially when the abuse was inflicted in the ‘private’ sphere at the hands of community or family members as opposed to by the state. This research has also shown how decision-makers have failed to understand that gender-based abuse falls within the remit of the Refugee Convention and therefore can engage the UK’s protection obligations. Yet, instead of introducing changes that would support survivors to access safety, the change to the definition of a ‘particular social group’ will make it even harder for them.

Further, the Government has failed to justify this significant and harmful change. The new definition of ‘particular social group’ was not included in the New Plan for Immigration and was, therefore, not subject to public and expert feedback. There has been no meaningful consultation on this change. Despite recognition that cohorts of vulnerable women and girls will be disadvantaged by this change, its impact is not explained in the Government’s Equality Impact Assessment on the Bill,<sup>16</sup> which has been described as ‘superficial and inadequate’<sup>17</sup> by barristers of Garden Court Chambers.

The amendment outlined in this briefing ensures the UK keeps its international law commitment, and does not wrongly deny certain refugees, including vulnerable women, of vital protection in this country.

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<sup>14</sup> 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 13 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 13 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 13 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](https://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf)> accessed 13 January 2022.

<sup>15</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699703/gender-issues-in-the-asylum-claim-v3.pdf)> accessed 13 January 2022.

<sup>16</sup> Home Office, ‘New Plan for Immigration Overarching Equality Impact Assessment of policies being delivered through the Nationality and Borders Bill’ (16 September 2021) <<https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment>> accessed 13 January 2022.

<sup>17</sup> (n 7) page 34, para 80.



## Contact

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*For further information on the impact of Clause 32 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](mailto:priscilla@refugeewomen.co.uk) or 07869 147 248.*