**Joint Briefing on Clause 31 Well-founded Fear Test**
**Nationality and Borders Bill, House of Lords Report Stage**


*Summary*

This briefing addresses Clause 31 of Part 2 of the Nationality and Borders Bill ('the Bill'). That Clause seeks to reverse over 20 years of UK jurisprudence, by changing the 'well-founded fear' test for determining whether someone is a refugee.

Our 27 organisations have significant expertise in working with people seeking asylum in the UK or those representing them. We are seriously concerned that **the Government's proposed test will result in protection wrongly being denied to people at genuine risk of persecution**, warnings that have been repeatedly voiced but ignored throughout this Bill's passage.

People who are wrongly refused asylum are likely to be retraumatised and forced into destitution, and could be sent back to face serious harm, including torture or even death. In addition to the human cost, the Government's proposed change will result in increased litigation, wasted judicial resources and prolonged decisions in a system already rife with delays. The Government has failed to provide proper justification for this clause, despite those serious, potentially life-threatening, consequences.

**We strongly urge members of the House of Lords to vote for the amendment to Clause 31, tabled by the Lord Bishop of Gloucester, supported by Baroness Chakrabarti**.

Our amendment, as detailed below, would maintain the current approach to 'well-founded fear', in keeping with UK jurisprudence and the humanitarian spirit of the Refugee Convention.

*What does Clause 31 do?*

Clause 31 of the Bill introduces a **higher two-part** test for determining whether an asylum claimant has a 'well-founded fear' of being persecuted and should therefore be entitled to refugee protection in the UK.

The first part of that test requires the claimant to prove, on the 'balance of probabilities', that the reason for which they fear persecution is covered by the Refugee Convention, and that they indeed fear that they will be persecuted if returned.

Only if these facts are established to that new higher standard can the decision maker go on to the second part of the test, and consider whether there is a 'reasonable likelihood' that the person would be persecuted if returned.

*Why is Clause 31 a serious concern?*

**In summary, the proposed test:**

1) **Imposes an even higher hurdle for asylum claimants to overcome and will result in people wrongly being denied refugee protection in the UK;**
2) **Disproportionately affects particularly vulnerable groups, who already struggle to have their claims for refugee protection correctly determined by the UK's asylum system;**
3) **Contravenes international obligations under the 1951 Refugee Convention as recognised by UNHCR;**
4) **Reverses decades of settled jurisprudence of our courts without adequate justification; and**
5) **Will cause confusion in decision making, resulting in an increased number of appeals, and increased costs and delays in an already back-logged asylum system.**

Many people already struggle to have their claims properly investigated and recognised by the UK's asylum system. Over the years, findings from NGOs, the United Nations, parliamentary committees and even Government inquiries have revealed how decision makers at the Home Office apply an unrealistically high burden of proof towards people seeking asylum, leading to incorrect refusals of protection. This in turn leads to higher numbers of appeals, increasing costs and delays in the asylum system.

As the UNHCR, legal practitioners, and former judges have made clear, the proposed test in Clause 31 will only exacerbate these barriers. It will also **disproportionately affect particularly vulnerable groups**; this includes survivors of gender-based abuse,

those who have fled persecution based on their sexual orientation or gender identity, and persons with disabilities.

In contrast to the test in Clause 31, the UNHCR has consistently called for a 'reasonable likelihood' standard of proof when assessing whether someone is a refugee.[1] This, it has stated, is in recognition of the **severe difficulties people can have in proving their asylum claims** as well as **the potentially life-threatening harm to them** should the wrong decision be made.

For more than 20 years, UK courts have agreed with the UNHCR's approach to interpreting the Refugee Convention, consistently applying the 'reasonable likelihood' standard for all elements of the refugee definition. Our Supreme Court has explicitly rejected the higher 'balance of probabilities' threshold, which Clause 31 now seeks to introduce: '**[w]here life or liberty may be threatened, the balance of probabilities is not an appropriate test'.**[2]

Our courts have also called for one holistic test, rather than a two-part assessment like that presented in Clause 31. Nearly twenty years ago, the Court of Appeal specifically considered a split, two-part test, and rejected it.[3] During the Bill's journey, legal practitioners have highlighted the confusing nature of the proposed two-part test as well as the perverse outcomes that could result from it for people in genuine need of safety.

Vulnerable groups will need to prove on the balance of probabilities that they have a Convention characteristic. For example, they may need to prove their sexual orientation or gender identity to this higher standard. For certain other groups, such as "abused women" or "women who have been trafficked", they will need to prove it is more likely than not that they have been abused or trafficked. In their legal opinion of the effects of the Bill on women, Stephanie Harrison QC and other 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.'[4]

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[1] 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 11 February 2022.

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

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

[4] 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] (emphasis added) <https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf> accessed 11 February 2022.

The heightened test in Clause 31 also requires a person to prove their subjective fear to this higher standard. In their joint opinion, barristers, including Raza Hussain QC, have argued that this will adversely affect children, persons with certain cognitive disabilities, and other vulnerable groups who cannot conceive or articulate their subjective fear.[5] The new test could result in a situation where, even though there is a reasonable likelihood that the person will be persecuted if returned, they would be denied refugee protection because they were unable to prove subjective fear to the 'balance of probabilities' standard. But surely, if there is a reasonable likelihood that a person will be persecuted, it would be perverse to find they are not a refugee simply because they have not proven it is more likely than not that they have a subjective fear.

As well as resulting in perverse and incorrect outcomes, the attempt to separate the two parts of the test and apply different standards of proof to each will result in an increased number of appeals, and increased costs and delays in an already back-logged system. Research has revealed that at the end of March 2021 there were 66,185 awaiting an initial decision from the Home Office, **the highest number for over a decade**.[6] Seven out of 10 people had been waiting for more than a year. Such delays can be incredibly detrimental to the mental health and physical safety of already vulnerable people, particularly women and survivors of gender-based abuse, who are placed at increased risk of suffering further abuse in the UK as a result of prolonged decision making.

***What is the Government's justification for Clause 31?***

Amendments have been tabled and debated throughout the Bill's passage to understand the Government's justification for deviating so drastically from established practice and jurisprudence. Ministers have responded that their proposed test will lead to greater clarity and consistency in decision making.[7]

Yet, the present well-founded fear test is adequately clear. In contrast, the proposed test will create confusion and lead to a *greater* number of incorrect decisions - not only by creating a two-part assessment but also in introducing a new 'balance of probabilities' standard. As one experienced immigration barrister put it: 'Assessments against the 'balance of probabilities' standard are inherently vaguer, because it posits an absolute standard of probability which does not, in fact, exist.'[8]

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[5] Joint Opinion of Raza Hussain QC, Jason Pobjoy, Eleanor Mitchell, and Sarah Dobbie 'Nationality and Borders Bill' for Freedom from Torture (7 October 2021) [191] <https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf> accessed 21 February 2022.

[6] Refugee Council, 'Living in Limbo: A Decade of Delays in the Asylum System' (July 2021) <https://www.refugeecouncil.org.uk/information/resources/living-in-limbo-a-decade-of-delays-in-the-uk-asylum-system-july-2021/> accessed 17 February 2022.

[7] HC Deb 26 October 2021, vol 702, col 400; HL Deb 8 February 2022, vol 818, col 1436 to col 1453.

[8] Rudolph Spurling, 'Analysis: the Borders Bill and the Refugee Convention' *Free Movement* <https://www.freemovement.org.uk/nationality-and-borders-bill-and-the-refugee-convention/> accessed 11 February 2022.

The Government has also claimed 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'.[9] However, no evidence has been adduced to show that those who do not qualify for protection are making successful claims. Instead, what we have is ample evidence that points towards a long-standing culture of disbelief in Home Office decision-making.[10] In the latest statistics, 48% of appeals against the Home Office's decisions to the First-tier Tribunal are successful.[11] 32% of judicial reviews are settled or decided in favour of claimants.[12] Moreover, the appeal success rate has been steadily increasing over the last decade (up from 29% in 2010).[13]

The Government has argued that the 'problem at the moment is that there is no clearly outlined test as such. There is case law, there is policy and there is guidance in this area, but the current approach leads to a number of different elements being considered as part of one overall decision'.[14] However, there is nothing unusual about applying settled case law. The guidance and policy are documents drafted by the Home Secretary for her caseworkers, and we are aware that she proposes to continue to use policy and guidance documents after this Bill has passed. If the current documents are unclear, they are open to her to amend. If there is confusion as to how to apply case law, this is a training need she must meet. The solution is not to legislate a new 'interpretation' in primary legislation, without justification for departing from the settled test of our courts who in their proper function have interpreted the Refugee Convention.

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[9] HC Deb 26 October 2021, vol 702, col 400.
[10] See, for example: British Red Cross, ''We want to be strong, but we don't have the chance': Women's experiences of seeking asylum in the UK' (January 2022) <https://www.redcross.org.uk/about-us/what-we-do/we-speak-up-for-change/womens-experiences-of-seeking-asylum-in-the-uk> accessed 11 February 2022; Wendy Williams, 'Windrush Lessons Learned Review' (March 2020) <https://www.gov.uk/government/publications/windrush-lessons-learned-review> accessed 11 February 2022; Freedom From Torture, 'Lessons Not Learned: The Failures of Asylum Decision Making in the UK' (September 2019) <https://www.freedomfromtorture.org/news/lessons-not-learned-report-september-2019> accessed 11 February 2022; Rainbow Migration, 'Still Falling Short' (2018) <https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf> accessed 11 February 2022.
[11] Ministry of Justice, 'Tribunal Statistics Quarterly: July to September 2021', Table FIA_3 First-tier Tribunal (Immigration and Asylum Chamber) Number of appeals determined at hearing or on paper (9 December 2021) <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021> accessed 11 February 2022.
[12] Summary of Government Submissions to the Independent Review of Administrative Law at [57] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/976219/summary-of-government-submissions-to-the-IRAL.pdf> accessed 11 February 2022.
[13] Refugee Council, 'Top facts from the latest statistics on refugees and people seeking asylum' <https://www.refugeecouncil.org.uk/information/refugee-asylum-facts/top-10-facts-about-refugees-and-people-seeking-asylum/> accessed 11 February 2022.
[14] HL Deb 8 February 2022, vol 818, col 1436 to col 1446.

Our courts have paved the common law tradition for a large part of this world, and have interpreted our international legal obligations in accordance with the interpretation of the Convention's supervising guardian, the UNHCR. Contrary to the suggestion by Lord Wolfson during Committee Stage,[15] the imposition of a different standard of proof in certain other jurisdictions does not provide a justification for its importation to the UK. Indeed, neither Canada nor Switzerland, cherry picked[16] by the Government as 'highly respected democratic countries' with a higher standard of proof, form an appropriate comparator.

In Canada, a first instance asylum decision is not made by an immigration enforcement agency, but by a judge in an oral hearing.[17] The 'balance of probabilities' test applies to assessing *objective* evidence, in light of the situation in that country; by contrast, there is a nuanced assessment of *subjective* fear that recognises a person may be incapable of experiencing or articulating it.[18] Therefore, Clause 31's balance of probabilities test for assessing *subjective* fear is not the Canadian approach.

On the Continent, including in Switzerland[19], legal traditions and asylum systems are markedly different and inquisitorial in nature. We understand that the Swiss standard of proof[20] has been applied in practice in a manner similar to the lower standard of 'real risk' in Article 3 of the European Convention of Human Rights, and is lowered in case law[21] for children, and for mental health, trauma and gender-specific reasons. Crucially, Switzerland has a single holistic test, whereas Clause 31 introduces a two-stage test.

In any case, the Government is not proposing to make corresponding systemic changes to the UK's decision making apparatus, for example, shifting it from adversarial to inquisitorial, or from Home Office led to judge-led. The appropriate standard of proof, within the UK's fact finding system, enforcement environment, and legal tradition, is the lower standard of 'reasonable likelihood' for the entirety of the holistic test.

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[15] HL Deb 8 February 2022, vol 818, col 1447.

[16] Australia, for example, applies a lower standard of proof applied to a single holistic test: a 'real chance' of being persecuted, as established by the High Court of Australia in 1989 in *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at [12] <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1989/62.html> accessed 15 February 2022.

[17] Immigration and Refugee Board of Canada, 'Claiming refugee protection - 4. Attending your hearing' <https://irb.gc.ca/en/applying-refugee-protection/Pages/index4.aspx> accessed 15 February 2022.

[18] Immigration and Refugee Board of Canada, 'Chapter 5 - Well-founded fear' <https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef05.aspx#n561> accessed 17 February 2022.

[19] L. Affolter, 'Asylum Decision-Making in Switzerland' in *Asylum Matters* (Palgrave Socio-Legal Studies. Palgrave Macmillan, Cham) <https://doi.org/10.1007/978-3-030-61512-3_3> accessed 15 February 2022.

[20] In Article 7(2) of the Asylum Act in German the test is 'beachtliche Wahrscheinlichkeit' and the Italian is 'probabilitá preponderante' ('preponderant likelihood'), which are preferred in the literature over the French ' haute probabilité'. Federal Department of Justice and Police FDJP, State Secretariat for Migration SEM, Asylum Directorate, *Handbook on Asylum and Return: Article D1 Refugee status* (1 March 2019) <https://www.sem.admin.ch/sem/de/home/asyl/asylverfahren/nationale-verfahren/handbuch-asyl-rueckkehr.html> accessed 17 February 2022; Swiss Asylum Appeals Commission, *EMARK 1993 No. 11* <https://ark-cra.rekurskommissionen.ch/de/emark.html> accessed 17 February 2022.

[21] See, for example, D-4037/2017; D-6822/2014, D-6738/2012; E-1917/2014.

In terms of the impact on particularly vulnerable groups, the Government's Equality Impact Assessment on the Bill does nothing to appease our concerns; it fails to provide any explanation of how the effect of the proposed test on vulnerable groups has been assessed and is justified in light of the purported policy aims of the Bill.[22] Organisations in the violence against women and girls sector, religion or belief groups, and those supporting LGBTQI+ persons, have consistently voiced concerns about the impact of Clause 31 on those groups.[23] Often, their only evidence is their own word, and they may have deep shame and trauma that make it difficult to relay their account, which will now be judged to a higher standard of proof.

Prior to the introduction of the New Plan for Immigration, the Government did not indicate that the 'well-founded fear' test, as currently applied, was problematic and in need of overhaul. Given the poor justification for this change, it is very difficult to avoid the conclusion that the Government is simply trying to reduce the number of refugees being recognised as such in the UK.

***What does the amendment do?***

Leave out Clause 31 and insert the following new Clause—

**31 Article 1(A)(2): well-founded fear**

(1) In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum seeker's fear of persecution is well-founded, the following approach is to be taken.

(2) The decision-maker must determine **whether there is a reasonable likelihood that**—

> (a) the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and

[22] Home Office, 'New Plan for Immigration Overarching Equality Impact Assessment of polices 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 11 February 2022.

[23] See, for example, this letter to the Home Secretary sent by 52 organisations in the violence against women and girls sector: 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/>; and this briefing by a coalition of LGBTQI+ organisations: <https://www.rainbowmigration.org.uk/sites/default/files/2022-01/Briefing%20for%20House%20of%20Lords_0.pdf> accessed 11 February 2022.

**(b) if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—**

**(i) they would be persecuted for reason of the characteristic mentioned in subsection (a), and**

**(ii) they would not be protected as mentioned in section 33.**

*Further information/briefings on Clause 31:*

**Joint Briefing of ILPA and Women for Refugee Women on Clause 31 for Committee Stage:** https://ilpa.org.uk/wp-content/uploads/2022/01/ILPA-and-WRW-Clause-31-amendment.pdf

**UNHCR Updated Observations on the Nationality and Borders Bill**, as amended (updated January 2022), from page 66, paragraph 202:
https://www.unhcr.org/61e7f9b44

**Joint Briefing of Rainbow Migration, LGBT Foundation, Mermaids, African Rainbow Family, Micro Rainbow, Stonewall**, from page 12:
https://www.rainbowmigration.org.uk/sites/default/files/2022-01/Briefing%20for%20House%20of%20Lords_0.pdf

**Andy Sirel, JustRight Scotland, and member of Immigration and Asylum Subcommittee of the Law Society of Scotland giving evidence to the Scottish Parliament Social Justice & Social Security Committee** (10 February 2022) from 09:52:
https://www.scottishparliament.tv/meeting/social-justice-and-social-security-committee-february-10-2022

**Law Society of Scotland, Nationality and Borders Bill Second Reading Briefing,** from page 10:
https://www.lawscot.org.uk/media/372066/second-reading-briefing-on-the-nationality-and-borders-bill-v2.pdf

**Joint Opinion of Raza Hussain QC, Jason Pobjoy, Eleanor Mitchell, and Sarah Dobbie 'Nationality and Borders Bill' for Freedom from Torture** (7 October 2021), from paragraph 181:
https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf

**Joint Opinion of Stephanie Harrison QC, Ubah Dirie, Emma Fitzsimons, and Hannah Lynes of Garden Court Chambers, 'Nationality and Borders Bill: Advice to Women for Refugee Women'** (23 November 2021), from paragraph 10:
https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf

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