Ministry of Justice

Lord (David) Wolfson of Tredegar, QC
Parliamentary Under-Secretary of State

All peers
House of Lords
London
SW1A 0PW

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My Lords,

NATIONALITY AND BORDERS BILL: LORDS COMMITTEE STAGE 10TH FEBRUARY 2022 - COMPLIANCE WITH THE REFUGEE CONVENTION

I am grateful to you all for the detailed debate on the Nationality and Borders Bill on 10th of February 2022. Our debate covered a variety of topics including adherence to international obligations and conventions. During the course of that debate, I committed to write to the House on the Bill's compliance with the Refugee Convention.

General

Where there is no specific provision within the Refugee Convention which defines a certain term or sets out a specific procedure, and where there is no supra-national body akin to the European Court of Human Rights for example, it is open to states to interpret the terms of the Refugee Convention. Limit is placed on that autonomy to interpret by way of the principles of treaty interpretation in the Vienna Convention on the Law of Treaties. The general rule of interpretation in Article 31(1) of the Vienna Convention, requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. Account can be given in certain circumstances to other factors such as subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation or to preparatory work.

As many terms are left to the interpretation of states, there is often no unanimity of interpretation to the Convention terms. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('the Qualification Directive'), sought to harmonise interpretation of certain Refugee Convention concepts for member states of the EU. Now the UK has left the EU, it is for Parliament to interpret the terms within the Convention subject to the principle of the Vienna Convention.

Clauses 29-38 of the Nationality and Borders Bill outlines this Government's proposed definitions of some of the key concepts of the Refugee Convention. This is a desirable law reform which will provide all interacting with the asylum system with greater clarity, in doing so driving accurate and efficient decision-making by the Home Office and the Courts.

T 020 3334 3555
F 0870 761 7753

E https://contact-moj.dsd.io/
www.gov.uk/moj

102 Petty France
London
SW1H 9AJ

Clauses 11 and 36 – Differentiation

Distinguishing between different refugees forms part of the Refugee Convention itself. For example, the entire 'structure of entitlement' under the Refugee Convention rests on different levels of attachment, with physical presence and lawful presence, distinguished for purposes of various entitlements. Article 31 does not contain a blanket prohibition on the imposition of penalties on refugees who enter or are present illegally. Article 31 prohibits penalties only in respect of refugees who (a) are coming directly from a territory where their life or freedom was threatened, (b) present themselves without delay to the authorities, and (c) show good cause for their illegal entry or presence. We consider that differentiation is not a penalty, taking into account the fact that the Convention does not explicitly define 'penalty' and the fact that there is no unanimity on the definition of penalty. In any event, the Convention does not prohibit differentiation and the clear implication of Article 31 is that states are entitled to impose penalties on refugees who enter their territory illegally when the three conditions are not satisfied.

Clause 11 of the Nationality and Borders Bill provides a power for the UK to treat refugees differently, according to whether they satisfy certain criteria based on those in Article 31(1) of the Refugee Convention. The Government has set out its interpretation of Article 31(1) in Clause 36 of this Bill.

Clause 11 provides a non-exhaustive list of examples of where this classification may result in differential treatment from that of a Group 1 refugee, including in relation to the length of leave issued, requirements to achieve settlement, recourse to public funds, and family reunion rights.

The power in this clause does not compel the Secretary of State to act in a certain way and leaves clear discretion to impose or not impose conditions as appropriate depending on the circumstances. We will set out our policy in Immigration Rules and guidance in due course. Everything we do will of course comply with the UK's international obligations – and there is nothing in the Refugee Convention that prevents signatories from differentiating between refugees in the manner proposed.

It is recognised that each of the criteria in Article 31(1) requires an investigation of the individual circumstances of a particular refugee, including any relevant vulnerabilities and protected characteristics. The provisions allow for flexibility to meet that requirement.

The Convention does not explicitly define what is meant by 'coming directly' or 'without delay'. We have taken into account the broad wording of the Refugee Convention, and the principles of treaty interpretation in the Vienna Convention. We have also considered the original intention of Parliament in in relation to s.31(2) of the Immigration and Asylum Act 1999 and that there is sufficient flexibility within policy to allow an individual to demonstrate that the provisions should not apply in their particular circumstances. We have also taken into account that Group 2 refugees will still be protected (*not refouled*) and receive relevant entitlements so that the object and purpose of the Convention is upheld. Accordingly, the provision is considered a good faith, compatible interpretation of the Refugee Convention.

Clause 15 – Inadmissibility

The primary protection afforded refugees under the Refugee Convention and its protocol is *non-refoulement*, including no onward *refoulement*. It is clear that *non-refoulement* is the primary requirement of 'safety'. The same is true for protection afforded under Article 3 of the ECHR. Furthermore, an individual may not meet the definition of refugee under the Convention but may still require protection. A state may still be safe for them where they will not be *refouled* even though they are not a 'refugee'. Our criteria for determining whether a country is safe, and for subsequently making a claim inadmissible, upholds the UK's obligations under international law.

The definition of safe third state is widely used; it is used in EU law under Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ('the Procedures Directive'). The Procedures Directive recognised at Recital 22 that "…Member States should not be obliged to assess the substance of an application for international protection where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to that country". And further at Recital 23: "Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country. Member States should only proceed on this basis where this particular applicant would be safe in the third country concerned".

It is recognised that, if there were no reasonable prospects of removing an inadmissible individual from the UK to a safe third country so that that individual was held in limbo indefinitely, neither able to access the asylum system in the country of removal nor the UK system, that would be contrary to the object and purpose of the Refugee Convention. Our reasonable period policy ensures that this does not happen and ensures operation of the inadmissibility policy compatibly with the Refugee Convention.

Individuals will have an opportunity to explain their actions and circumstances when claiming asylum in the UK, and that will be carefully considered in deciding whether an inadmissibility decision is appropriate. They will be also be able to make representations on why any third state is not safe in their particular circumstances. Any decision to declare a claim inadmissible and to remove an individual will be subject to standard principles of public law including rationality. The inadmissibility provisions are compatible with the Refugee Convention.

Clause 30 – meaning of persecution

The clause sets out actors of persecution and the nature of acts which will amount to persecution ('acts of persecution'). As to actors of persecution the clause reflects, without substantial change, the provisions of Article 6 of the Qualification Directive.

In relation to refugees, there is no change to current UK law relating to the definition of 'actors of persecution' which is currently defined in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ('the 2006 Regulations'), which transposed, along with Immigration Rules, the Qualification Directive.

However, Clause 30 does not refer to actors of serious harm. The reason for that is the Bill provisions relate only to the interpretation of the Refugee Convention and not to subsidiary protection. A subsidiary protection route was required by the Qualification Directive and was implemented by the Immigration Rules and the 2006 Regulations in the form of the Humanitarian Protection route. The UK will continue to maintain its Humanitarian Protection route in the Immigration Rules (although the eligibility criteria for the route will be amended to align with our current international obligations, namely under Articles 2 and 3 of the European Convention on Human Rights (ECHR)).

Similarly, Clause 30(2) and (3) reflect, without significant change, the definition of acts of persecution in paragraph 5 of the 2006 Regulations.

Therefore, the meaning of persecution reflected in the Bill has been the UK's definition for over 15 years. The definition of 'persecution' within the Qualification Directive has consistently been considered compatible with the UK's obligations under the Refugee Convention. We have taken the opportunity to simplify and clarify the form of drafting, which puts the definition in to one clause fitting with the style used in the rest of the Bill and used in UK primary legislation.

Clause 31 – well-founded fear

The aim of Clause 31 is to lay out a clear two-stage test to consider whether a claimant has a 'well-founded fear' of persecution for one of the reasons outlined in the Refugee Convention. The clear test will support improved decision-making and will contribute to greater consistency between Home Office decision-makers and the Courts.

We considered an extensive range of options and concluded that a split standard of proof across the test is most appropriate given the legal context (including caselaw) and the nature of what we're testing. For example, it is appropriate to test facts relating to the claimant's character and current fear to the balance of probabilities. However, determining a future risk is naturally less certain and it therefore warrants a lower standard of proof of a reasonable degree of likelihood.

Case law in England and Wales formerly adopted a structured approach with a split test in the way currently proposed in the Bill (see for example, *R v Immigration Appeal Tribunal, ex p Jonah* [1985] Imm AR 7 and the Court of Appeal's obiter comments in *Horvath v Secretary of State for the Home Department* [2000] INLR 15). The Supreme Court recognised in *MA (Somalia) v Secretary of State for the Home Department* [2011] 2 All ER 65 that "the approach in *ex p Jonah* and *Horvath*'s case to the ascertainment of past facts may also be seen as consistent with the requirement for 'substantial grounds' or 'serious reasons'" [20]. It also recognised that the issue was a difficult one.

Further, United Nations High Commission for Refugees (whose views are influential, though not binding) take the same view. Their 'Note on Burden and Standard of Proof in Refugee Claims', dated 16 December 1998, says at para 11 that '[c]redibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.' Some authoritative academics also support the approach, for example in Guy Goodwin-Gill's and Jane McAdams's, *The Refugee in International Law* (3rd ed, 2007), state at p 56 that 'the facts on which the claimant relies may be established on a balance of probability'. There is some express support for this view in the practice of at least two other states that apply the Convention, for example, Canada and Switzerland.

Whilst it is recognised that the position taken by the Court of Appeal in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 (where the court preferred the approach of single answer to the overall question of whether a person was indeed a refugee, with 'reasonable degree of likelihood' being the standard to be met), has been the position applied in the UK since that time, consideration of the historic case law, views of authoritative academics, the approach of a number of other jurisdictions and Article 31 of the Vienna Convention on the Law of Treaties, shows that it is not the only possible good faith interpretation of the Convention.

The need for clarity and consistency, and for only genuine refugees to be granted access to the benefits of refugee status in the UK, is driving the need for change. The test still ensures however that genuine refugees can be recognised in the UK and therefore the test in the Bill is a good faith, compatible interpretation of the Refugee Convention and supports the Convention's core purpose. Consequently, the well-founded fear test, as drafted in the Bill, is compliant with the Convention and appropriate for operation in the UK asylum system.

Clause 32 – particular social group

Clause 32 aims to clarify an area where there has been a degree of contradiction and confusion for many years. We are not changing our policy or position on the 'test' for establishing if someone is part of a 'Particular Social Group'. We are clarifying the original intention of the drafting contained in the Qualification Directive and the existing definition in the 2006 Regulations which transposed, at the time, the applicable EU law in to domestic law. In the Qualification Directive and the 2006 Regulations a 'Particular Social Group' is a group where:

- 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*
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;…(emphasis added).

The drafting of those definitions provides that both elements of the definition must be satisfied in order for a person to be considered to be a member of a Particular Social Group. Domestic courts have interpreted the 'and' as an 'or' for the purpose of the 2006 Regulations, resulting in the need for this clarification in primary legislation.

The intention of Clause 32 is to provide clarity and consistency for all those working in and engaging with the asylum system. Defining how key elements of the Convention should be interpreted and applied is vital in creating a robust system which can generate consistency and certainty, which ultimately will drive efficiency.

There is no authoritative or universally agreed definition of "particular social group" among State parties to the Convention, and in particular whether the test set out in Article 1(A)(2) of the Refugee Convention should be applied cumulatively or not. The UN High Commissioner for Refugees has issued guidance supporting the view that the cumulative approach is a misapplication of the Refugee Convention; however that guidance, whilst a relevant consideration, is neither legally binding nor determinative as a matter of international law. Article 1(A)(2) of the Refugee Convention does not elaborate on what is meant by 'membership of a particular social group'. As such the question is whether interpreting Article 1(A)(2) in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the object and purpose of the Convention, the UK can properly form the view that the definition in Clause 32 correctly captures what is meant in the Refugee Convention by 'a particular social group'.

Following consideration of the broad wording in the Refugee Convention, the approach of a number of other jurisdictions, including the EU bloc and the USA, inconsistency of caselaw and the Vienna Convention on the Law of Treaties, we remain of the view that the current definition in Clause 32 is a good faith, compatible interpretation of the Refugee Convention. Furthermore, this interpretation supports its core purpose; to provide protection to those who need it based on a fear of being persecuted for the reasons set out in the Refugee Convention.

Clause 33 – protection from persecution

The aim of clause 33 is to provide a clear definition for decision-makers to apply when considering whether a claimant can return to their country of origin or country of former habitual residence and receive protection from persecution from the relevant authorities.

The definition of 'protection from persecution' within Clause 33 is largely based upon the definition within the Qualification Directive (see Article 7). Consequently, it is to the same effect as the definition operated in the UK asylum system currently, as outlined in the 2006 Regulations (Regulation 4). This definition, both in the Regulations and in Clause 33, sets out that if the state (or as relevant, party or organisation) takes reasonable steps to prevent the persecution by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution, and the asylum seeker is able to access the protection, they are taken to be able to avail themselves of protection from persecution, and as such do not have a well founded fear of persecution. As with our current definition, this definition is fully compliant with the UK's international obligations, including those under the Refugee Convention.

Clause 34 – internal relocation

The aim of clause 34 is to provide a clear definition for decision-makers to apply when considering whether a claimant can internally relocate in their country of origin or country of former habitual residence in order to prevent persecution from occurring. This clause follows long-standing policy and caselaw and ensures compatibility with the UK's obligations under the Refugee Convention. It is to the same effect as Article 8 in the Qualification Directive.

Clause 35 - disapplication of Convention in case of serious crime etc

The aim of clause 35 is to provide decision-makers with clarity on how to apply Article 1(F) of the Refugee Convention. This definition is largely based upon the current definition within the 2006 Regulations.

In order to provide greater clarity to decision-makers, we have clarified the meaning of a 'biometric immigration document' and detailed that Article 1(F) can be applied to any acts committed before admission to the UK as a refugee.

This, like the current definition, is compatible with the UK's obligations under the Refugee Convention.

Clause 37 – particularly serious crime

The aim of clause 37 is to provide an appropriate definition of a 'particularly serious crime' which ensures that we keep the UK public safe whilst ensuring compatibility with the UK's obligations under the Refugee Convention.

Article 33(2) of the Refugee Convention permits the *refoulment* of refugees to the country from which they have sought refuge in limited circumstances; this includes where an individual, having been convicted of a particularly serious crime, constitutes a danger to the community in the UK. The ultimate question is whether the refugee 'constitutes a danger to the community'. The commission of, and conviction for, a particularly serious crime therefore constitutes a threshold requirement for the operation of the exception.

Clause 37 therefore reinstates the original policy intention of Section 72 of the Nationality, Immigration and Asylum Act 2002 in relation to the fact that it is only that someone constitutes a danger to the community that need be rebuttable.

"Particularly serious crime" is undefined in the Refugee Convention and is therefore open to interpretation in accordance with the Vienna Convention on the Law of Treaties.

Whether a crime is particularly serious is a matter of fact based on the sentence passed by the Criminal Court; following commencement of this Bill, if the sentences meets the threshold of 12 months' imprisonment, we consider it to be a 'particularly serious crime' for the purposes of considering whether a refugee falls for *refoulement* under Article 33(2) of the Refugee Convention.

Sentencing is a decision for the Criminal Courts who weigh up a number of aggravating and mitigating factors to come to their decision. In the UK custodial sentences are reserved for the most serious offences and are imposed when the offence committed is "so serious that neither a fine alone nor a community sentence can be justified for the offence" (section 230(2) of the Sentencing Code). A custodial sentence may be imposed where the court believes it is necessary to protect the public, with the length of the sentence depending on the seriousness of the offence (see Sentencing Council website Custodial sentences – Sentencing (sentencingcouncil.org.uk)). The threshold of 12 months' imprisonment only relates to sentences of immediate custody, meaning that an individual will not be deemed to have committed a particularly serious crime if a Criminal Court has concluded that a suspended sentence of 12 months' or more imprisonment is the appropriate punishment. In such

circumstances, it is deemed inappropriate to reopen the reasoning of the Court to debate again whether a crime is particularly serious.

The effective requirement for *refoulement* under Article 33(2) is that the individual constitutes a danger to the community. If they are not, they cannot be *refouled* in breach of Article 33(1) even if they have been convicted of a particularly serious crime. The assessment of whether an individual poses a danger to the community to the UK is complex and relies on a number of factors. This can include the nature of the offending and its wider implications for society but also the subsequent conduct of the individual concerned. The sentencing threshold therefore merely acts as a trigger to review all the circumstances surrounding an individual's conduct and whether they constitute a future danger to the community.

The primary object and purpose of Article 33 is not to *refoule* a refugee unless they constitute a danger to the community (and Article 33 is a primary protection under the Refugee Convention). This object and purpose can be achieved by having a rebuttable presumption in relation to the danger to the community element of the test. The rebuttable presumption element of clause 37 is therefore compatible with the Convention.

In relation to the definition of 'particularly serious crime', we have considered the range of offences that would fall under the new definition. We have also taken into account the fact that the law in this country regards any imprisonment as a last resort, reserved for offences that (alone or along with others associated with them) are so serious that neither a fine alone nor a community sentence can be justified for the offence. Considering also the fact that there is no uniformity in the interpretation adopted by other States Parties which could be instructive for the purpose of establishing any agreement of the parties as to its interpretation, the approach taken in some other jurisdictions (Canada and Germany for example), and the fact that someone who meets the threshold of a particularly serious crime can rebut the assumption that they are a danger to the community, we consider that Clause 37 is a good faith, compatible interpretation of the Refugee Convention.

A copy of this letter will be placed in the libraries of both Houses.

Yours sincerely,

LORD (DAVID) WOLFSON
OF TREDEGAR, QC