



# IWD 2022: Disproportionate and Discriminatory Impact of the Nationality & Borders Bill on Women

Stephanie Harrison QC, Garden Court Chambers (Chair)  
Emma Fitzsimons, Garden Court Chambers  
Ubah Dirie, Garden Court Chambers  
Priscilla Dudhia, Women for Refugee Women



GARDEN COURT CHAMBERS



8 March 2022



@gardencourtlaw

IWD 2022:  
Disproportionate and Discriminatory  
Impact of the Nationality & Borders Bill  
on Women

Emma Fitzsimons, Garden Court Chambers

8 March 2022



GARDEN COURT CHAMBERS



 @gardencourtlaw

# Overview

---

- Experiences of women and girls claiming asylum
- Context to the Nationality and Borders Bill
- Legal Implications of Clause 11 of the Bill – Differential Treatment of Refugees and the creation of a ‘Two-tier’ System



# In profile: women and girls claiming asylum

---

- Top five nationalities for asylum claims in the UK (according to 2021 statistics):
  - Iran
  - Eritrea
  - Albania
  - Iraq
  - Syria
- Protection needs/risk profiles for women include theatres of **conflict, political and religious grounds**, as well as **risks arising as a result of being a woman** e.g. early/forced marriage; 'honour'-based violence; trafficking and modern slavery; gender-based violence including domestic abuse, FGM, denial of education, persecutory discrimination.



*“In other words, the world has woken up to the fact that **women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of the inferior status accorded to their gender in their home society.** States parties to the Refugee Convention, at least if they are also parties to the International Covenant on Civil and Political Rights and to the Convention on the Elimination of All Forms of Discrimination against Women, **are obliged to interpret and apply the Refugee Convention compatibly with the commitment to gender equality in those two instruments.**”*

Baroness Hale, *K & Fornah v SSHD* [2006] UKHL 46



# Why the lived experience of women and girls matters in asylum decision making?

---

- The bodies of women and girls are battlefields.
- Highly traumatic to disclose, discuss and repeat over and over.
- SGBV/harm is not always visible, or identifiable: Implications for timing, disclosure and evidence gathering.
- SGBV/harm is not always easily recognisable and depends on the attitudes of State/Society/Internalisation.
- Self-identification: Not always possible.
- Intersectionality and impact of conflict on women and girls: Not always well understood.



# The Nationality and Borders Bill

- Follows the New Plan for Immigration.
- Late and inadequate Equality Impact Assessment.
- Report Stage in the House of Lords
- Track progress:  
<https://bills.parliament.uk/bills/3023>

## Nationality and Borders Bill

[AS AMENDED IN PUBLIC BILL COMMITTEE]

### CONTENTS

#### PART 1

##### NATIONALITY

###### *British overseas territories citizenship*

- 1 Historical inability of mothers to transmit citizenship
- 2 Historical inability of unmarried fathers to transmit citizenship
- 3 Sections 1 and 2: related British citizenship
- 4 Period for registration of person born outside the British overseas territories

###### *British citizenship*

- 5 Disapplication of historical registration requirements
- 6 Citizenship where mother married to someone other than natural father

###### *Powers of the Secretary of State relating to citizenship etc*

- 7 Citizenship: registration in special cases
- 8 Requirements for naturalisation etc
- 9 Notice of decision to deprive a person of citizenship

###### *Registration of stateless minors*

- 10 Citizenship: stateless minors

#### PART 2

##### ASYLUM

###### *Treatment of refugees; support for asylum-seekers*

- 11 Differential treatment of refugees
- 12 Accommodation for asylum-seekers etc

###### *Place of claim*

- 13 Requirement to make asylum claim at "designated place"





# Refugee clauses focus today's session

---

- Found in Part 2 of the Bill overhauling asylum law
  - Clause 11 – Differential Treatment for Refugees
  - Clause 31 – Well-founded fear
  - Clause 32 – Particular Social Group



## UNCHR's view

---

**“This Bill would undermine, not promote, the Government’s stated goal of improving protection for those at risk of persecution. It seems to be aimed at deterring refugees, but there’s no evidence that would be the result.”**

UNCHR’s Representative to the UK, Rossella Pagliuchi-Lor,  
September 2021

[https://hansard.parliament.uk/commons/2021-09-23/debates/122e6daf-470b-49c5-a05e-4daba0170c73/NationalityAndBordersBill\(FourthSitting\)](https://hansard.parliament.uk/commons/2021-09-23/debates/122e6daf-470b-49c5-a05e-4daba0170c73/NationalityAndBordersBill(FourthSitting))



# Clause 11: Differential Treatment for Refugees

---

## **11 Differential treatment of refugees**

*(1) For the purposes of this section—*

*(a) a refugee is a Group 1 refugee if they have complied with both of the requirements set out in subsection (2) and, where applicable, the additional requirement in subsection (3);*

*(b) otherwise, a refugee is a Group 2 refugee.*

*(2) The requirements in this subsection are that—*

*(a) they have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention), and*

*(b) they have presented themselves without delay to the authorities.*

*Subsections (1) to (3) of section 36 apply in relation to the interpretation of paragraphs (a) and (b) as they apply in relation to the interpretation of those requirements in Article 31(1) of the Refugee Convention.*



---

(3) Where a refugee has entered or is present in the United Kingdom unlawfully, the additional requirement is that they can show good cause for their unlawful entry or presence.

(4) For the purposes of subsection (3), a person's entry into or presence in the United Kingdom is unlawful if they require leave to enter or remain and do not have it.

(5) The Secretary of State or an immigration officer may treat Group 1 and Group 2 refugees differently, for example in respect of—

(a) the length of any period of limited leave to enter or remain which is given to the refugee;

(b) the requirements that the refugee must meet in order to be given indefinite leave to remain;

(c) whether a condition under section 3(1)(c)(ii) of the Immigration Act 1971 (no recourse to public funds) is attached to any period of limited leave to enter or remain that is given to the refugee;

(d) whether leave to enter or remain is given to members of the refugee's family.



---

*(6) The Secretary of State or an immigration officer may also treat the family members of Group 1 and Group 2 refugees differently, for example in respect of—*

*(a) whether to give the person leave to enter or remain;*

*(b) the length of any period of limited leave to enter or remain which is given to the person;*

*(c) the requirements that the person must meet in order to be given indefinite leave to remain;*

*(d) whether a condition under section 3(1)(c)(ii) of the Immigration Act 1971 (no recourse to public funds) is attached to any period of limited leave to enter or remain that is given to the person.*

*(7) But subsection (6) does not apply to family members who are refugees themselves.*

*(8) Immigration rules may include provision for the differential treatment allowed for by subsections (5) and (6).*

*(9) In this section—*

*• “limited leave” and “indefinite leave” have the same meaning as in the Immigration Act 1971 (see section 33 of that Act);*

*• “refugee” has the same meaning as in the Refugee Convention.*



## Clause 11: Government's justification?

---

*“In the 12 months ending September 2019, around 62% of asylum applicants to the UK had entered the UK irregularly. At present, all asylum seekers by and large have their claims processed in the same way and receive the same entitlements, if granted refugee status in the UK, irrespective of their route to or actions in the UK. This clause provides a power for the UK to treat refugees differently according to whether they satisfy certain criteria under Article 31(1) of the Refugee Convention, in respect of which our interpretation is set out in Clause 36. Article 31(1) sets out that States shall not impose penalties on refugees that come directly from a territory where their life or freedom is threatened, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence.*”

*The purpose of differentiation is to discourage asylum seekers from travelling to the UK other than via safe and legal routes. It aims to influence the choices that migrants may make when leaving their countries of origin - encouraging individuals to seek asylum in the first safe country they reach after fleeing persecution, avoiding dangerous journeys across Europe...”*



## Clause 11: Analysis

---

- Government justification? – Mode of arrival *versus* actual merits of the claims
- No legal justification in the Refugee Convention for penalising mode of arrival, or in conditions of stay thereafter
- Fails to acknowledge the push/pull factors for women and girls fleeing conflict and persecution
- No current legal safe routes to the UK – see recent experience of women fleeing Afghanistan and Ukraine
- Fails to understand reasons why a woman refugee may not be in a position to make a direct journey to the UK in order to claim asylum



# Reasons why women may pass through a third country before claiming asylum in the UK

---

- Do not enjoy the civic, political and legal freedom to arrange for their own exit;
- Under control of agent (including their persecutor) or smuggler - victims of trafficking and domestic violence
- The countries en route are not actually “safe” for the woman in question – risks of refoulement, street-homelessness, destitution, systemic discrimination and racism;
- Family or support networks in the UK wish to reunite with;
- Historic/cultural links due to diaspora, experience, family ties, language etc.





# Reasons why women may delay in claiming asylum

---

*“disclosure of gender-based violence at a later stage in the asylum process should not automatically count against their credibility. There may be a number of reasons why a claimant, or dependant, may be reluctant to disclose information, for example feelings of guilt, shame, and concerns about family ‘honour’, or fear of family members or traffickers, or having been conditioned or threatened by them. [...]*

*Those who have been **sexually assaulted** and or who have been victims of trafficking may suffer trauma that can impact on memory and the ability to recall information. The symptoms of this include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, shame, a pervasive loss of control and memory loss or distortion. [...] You may, where necessary, **allow claimants a reasonable time to submit psychological or medical evidence where trauma may affect their ability to recall events consistently or to otherwise support their claim, where a claimant’s account is doubted...**”*

Gender Issues in the Asylum Claim, Home Office, 10 April 2018



# Consequences for women fleeing persecution

---

- A woman refugee who makes a dangerous journey that includes passing through other countries, or who delays in making a claim for asylum, may be classed as a Group 2 Refugee, and denied access to public funds; denied the right to reunite with family; and be denied settled immigration status.
- Bear in mind, this applies to **recognised refugees**: **the UK Government will actively deny public funds, security of settlement and the right to family reunion for persons who have fled persecution or serious harm in their home state.**



# Discriminatory impacts

---

- **No recourse to public funds:** Difficulties accessing DV shelters, denial of free school meals where linked to parents' entitlement; and de facto exclusion from job markets of single parents (mainly women) who have limited access to government-subsided childcare; severe risks of poverty, debt, substandard accommodation and homelessness
- **No right to family reunion:** The lack of a safe route to be sponsored by a refugee family member mean that more women and children are likely to attempt dangerous journeys, either at the same time as a male applicant or thereafter if he is in Group 2. Borne out by the experiences in Australia – threefold increase in percentage of women and children refugees.
- **Implications for settlement:** Impeded recovery and integration; impact on children born of Group 2 Refugees.



## Further reading/events

---

- GC Chambers Opinion to Women for Refugee Women - <https://www.refugeewomen.co.uk/legal-opinion-borders-bill-discriminates-against-women/>
- Garden Court Chambers Conference on the Bill 29 March 2022 - <https://www.gardencourtchambers.co.uk/events/nationality-and-borders-bill-conference>



# IWD 2022: Disproportionate and Discriminatory Impact of the Nationality & Borders Bill on Women Clauses 31 and 32

Ubah Dirie, Garden Court Chambers

8 March 2022



GARDEN COURT CHAMBERS



@gardencourtlaw

## Quick Overview of Part 2

Part 2 Asylum	Clause
Treatment of refugees; support for asylum-seekers	Clauses 11-12
Place of claim	Clause 13
Inadmissibility	Clauses 14-16
Supporting evidence	Clauses 17-18
Priority Removal Notices	Clauses 19-24
Late evidence	Clause 25
Appeals	Clauses 26-27
Removal to safe third country	Clause 28
Interpretation of Refugee Convention	Clauses 29-37
Interpretation of Part 2	Clause 38



# Heightened Standard of Proof – *Clause 31*

---

## 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 first determine, on the balance of probabilities –**
  - (a) whether 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**
  - (b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic. (See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant's credibility).)
- (3) Subsection (4) applies if the decision-maker finds that –
  - (a) the asylum seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and
  - (b) the asylum seeker fears persecution as mentioned in subsection (2)(b).
- (4) The decision-maker must determine whether there is a **reasonable likelihood** that, 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) –
  - (a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and
  - (b) they would not be protected as mentioned in section 33.
- (5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 34 (internal relocation)



## Clause 31 – Main Issues

---

- Since *Karanakaran* it has been settled law that there is a single standard of proof in asylum claims. A person seeking asylum would only need to show a ‘*real risk*’ or ‘*reasonable likelihood*’ of persecution on return
- Clause 31 seeks to introduce a **dual** standard of proof - past facts must be proved on the higher balance of probabilities test, while the lower ‘*real risk*’ or ‘*reasonable likelihood*’ standard continues to apply to predictions of future risk.
- Reversal of over 20 years of jurisprudence - decision of the Court of Appeal in *Karanakaran v SSHD* [2000] 3 All ER 449, as endorsed by the House of Lords in *Sivakumar v SSHD* [2003] UKHL 14
- Dual approach is contradictory – the assessment of past facts and the assessment of risk cannot be straightforwardly separated from one another





## Clause 31 – Main Issues

---

- Clause 32 introduces a mismatch between domestic asylum law and requirements of ECHR
- Article 3 ECHR prevents expulsion where ‘*substantial grounds have been shown for believing*’ that expulsion would result in the person being exposed to a **‘real risk’** of torture or inhuman or degrading treatment or punishment (as reaffirmed by the European Court of Human Rights in *Babar Ahmad v United Kingdom* (2013) 56 EHRR 1).
- Clause 31 therefore means that tribunals will have to apply two different standards of proof to the same facts, one for the asylum claim and the other for the human rights claim.
- This will undermine the coherence of asylum law and the utility of seeking the status of refugee if an impossibly high standard will be applied compared to the ECHR.
- This is important for female asylum seekers because Refugee Status provides an internationally recognised status, should provide security and a path to settlement and integration into the host state.



## Clause 31 – Discriminatory impact

---

- Change will significantly worsen asylum decision making and will have an especially disproportionate impact on women and girls
- Even with the lower standard its been recognised by the courts that asylum seekers face a '*notorious difficulty*' in establishing the facts they rely on. Combine this with the culture of disbelief that is well recognised to operate within Home Office decision making
- Also add to the mix that facts that many asylum seeking women and girls have experienced traumatic events such as rape, sexual assault and domestic abuse – more difficult to prove because unlike other forms of torture they do not always leave physical scarring and are in the private sphere.



## Clause 31 – Discriminatory Impact

---

- Many women will have as a result of their experiences will have PTSD, depression etc.
- It is well-documented that PTSD and depression can have a significant impact on autobiographical memory and that inconsistencies are to be expected in the genuine accounts of victims of trauma.
- In particular, PTSD and depression are associated with ‘over general’ memory, which makes it more difficult to remember specific past events. Human memory for temporal information such as dates, durations and sequences is also poor in general, even in non-traumatised people. The fact that mental health conditions can explain inconsistencies in an account has been recognised in the case law (see AM (Afghanistan)).
- Personal casework experience - Home Office continues to disbelieve many accounts on the ground that they are internally inconsistent or where disclosure is piecemeal or fragmented. No consideration of the impact of trauma on memory and this manifests itself.



MARY  
BERRY

*Quick  
Cooking*



= perfect  
recipe for  
refusal

Inspiring, easy recipes from  
Mary's new BBC series



 @gardencourtlaw

# Particular Social Group – *Clause 32*

---

## 32 Article 1(A)(2): reasons for persecution

(1) For the purposes of Article 1(A)(2) of the Refugee Convention –

(a) the concept of race may include consideration of matters such as a person’s colour, descent or membership of a particular ethnic group;

(b) the concept of religion may include consideration of matters such as –

(i) the holding of theistic, non-theistic or atheistic beliefs,

(ii) the participation in formal worship in private or public, either alone or in community with others, or the abstention from such worship,

(iii) other religious acts or expressions of view, or

(iv) forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality is not confined to citizenship (or lack of citizenship) but may include consideration of matters such as membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) the concept of political opinion includes the holding of an opinion, thought or belief on a matter related to a potential actor of persecution and to its policies or methods, whether or not the person holding that opinion, thought or belief has acted upon it.

(2) A group forms a particular social group for the purposes of Article 1(A)(2) of the Refugee Convention **only if it meets 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.

(5) A particular social group may include a group based on a common characteristic of sexual orientation, but for these purposes sexual orientation does not include acts that are criminal in any part of the United Kingdom.



## Clause 32 – Main issues

---

- In order to establish a claim for refugee status, a person must show that they have a well-founded fear of persecution on account of one of the 5 convention reasons: *race, religion, nationality, political opinion and membership of a particular social group*.
- Gender is not one of the convention reasons.
- However as highlighted by Baroness Hale in ***Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department [2006] UKHL 46, 18 October 2006,***  
*18... despite the fact that sex or gender is not included as one of the Convention grounds and that the proposal to include sex in the list of factors of the non-discrimination clause in Article 3 of the Refugee Convention was opposed, it was nevertheless agreed at the 2001 San Remo Expert Roundtable that: “The refugee definition, properly interpreted, can encompass gender-related claims. The text, object, and purpose of the Refugee Convention require a gender-inclusive and gender-sensitive interpretation. As such, there would be no need to add an additional ground to the Convention definition.”*



## Clause 32 – Main issues

---

- Since 2004 much of UK asylum law has been based on the Qualification Directive which codified at an international level a consistent approach to the Refugee Convention.
- The Directive provided two touchstone criteria for what constitutes a PSG – for many years there was a debate about whether these requirements were cumulative so that they both had to be met or alternative so it would be sufficient if only one was met.



## Clause 32 – Main issues

---

- Enter ***DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC)***
- Position clearly settled by the Upper Tribunal – **limbs are alternative and not cumulative.**
- Recognition that if the cumulative approach is adopted it will result in protection gaps

***59. The difficulties created by the use of “and” are therefore not mere semantics but can give rise to protection gaps which is contrary to the obligations of signatories to the Convention***

- Clause 32(2) and (3), however, reverse DH. They provide explicitly that both of the criteria must be met, not just one.





## Clause 32 – discriminatory impact

---

- This significantly impacts women and girls in particular. Since gender is not one of the five Convention reasons, Clause 32 will give many victims of gender-based violence an additional hurdle to meet in order to obtain refugee status.
- If they are relying on membership in a particular social group, they must show not only that the group to which they belong shares an immutable characteristic, but also that that group has a ‘distinct identity’ in the relevant country.
- For example, a trafficked woman may need to show not only that her status as a trafficked woman is an immutable characteristic, but also that trafficked women as a group are perceived as having a distinct identity in her home country.
- The latter being very much more difficult to establish than the former.
- This clause – which was not heralded in the consultation – is an unexplained regressive step which will disproportionately impact women and girls seeking asylum on the basis of specific forms of gender persecution.





# Thank you

020 7993 7600

info@gclaw.co.uk

@gardencourtlaw



GARDEN COURT CHAMBERS

---