GARDEN COURT CHAMBERS

Nationality and Borders Bill Conference

Tuesday 29 March 2022

Welcome/Keynote

Sonali Naik QC, Joint Head of the Garden Court Chambers Public Law Team

GARDEN COURT CHAMBERS

British Nationality: Acquisition and Loss in the Nationality and Borders Bill

Laurie Fransman QC and Adrian Berry

#NABBConference

29 March 2022

@gardencourtlaw

British overseas territories citizenship

The British overseas territories:

Anguilla

Bermuda; British Antarctic Territory

British Indian Ocean Territory

Cayman Islands

Falkland Islands

Gibraltar

Montserrat

Pitcairn, Henderson, Ducie and Oeno Islands

St Helena, Ascension and Tristan da Cunha

South Georgia and the South Sandwich Islands

The Sovereign Base Areas of Akrotiri and Dhekelia (Cyprus)

Turks and Caicos Islands

British Virgin Islands

[NB: the Crown Dependencies (Channel Islands, Isle of Man) are not overseas territories]

British overseas territories citizenship

Clause 1: Historical inability of mothers to transmit citizenship

- This clause creates a registration route for the adult children of British overseas territories citizen (BOTC) mothers to acquire British overseas territories citizenship

- New s 17A of the British Nationality Act 1981 ('the 1981 Act') does for British overseas territories citizenship, what s 4C does for British citizenship: reduce the prejudice caused by sex discrimination in pre-1983 British nationality law

British overseas territories citizenship

Clause 2: Historical inability of unmarried fathers to transmit citizenship

- This clause creates a registration route for the adult children of unmarried BOTC fathers to acquire British overseas territories citizenship

- New ss 17B-G of the 1981 Act do for British overseas territories citizenship, what ss 4E-I do for British citizenship: help end the prejudice caused by discrimination against those born to unmarried fathers in pre-1 July 2006 British nationality law

British overseas territories citizenship

Clause 3: Sections 1 and 2: related British citizenship

- This clause creates a registration route as a British citizen under the 1981 Act for people who have registered as BOTCs under the new routes introduced by Clauses 1 and 2
- In 2002 all those with BOTC status additionally became British citizens by virtue of section 3 of the British Overseas Territories Act 2002 ('the 2002 Act')
- Those who were unable to become BOTCs, due to the fact that women could not pass on citizenship, or because their parents were not married, were also unable to become British citizens under the 2002 Act

British overseas territories citizenship

Clause 4: Period for registration of person born outside the British overseas territories

- This clause amends Section 17(2) of the 1981 Act to remove the requirement that an application for the registration of a child as a BOTC must be made *within 12 months* of the birth
- Section 17(2) provides a registration route for a child whose parent is a BOTC *by descent* and had been in a territory for a continuous period of 3 years at some point before the child's birth
- At present, an application under this route must be made *within 12 months* of the child's birth
- The parallel provision for British citizens (s 3(2)) was amended in 2009, replacing the requirement for the application to be made within 12 months of the child's birth with a requirement for the application to be made *while the child is a minor*
- This provision amends the BOTC registration route in the same way

British overseas territories citizenship

Clause 5: Provision for Chagos Islanders to acquire British nationality (House of Commons version, 22 March 2022)

This clause inserts section 17H into of the 1981 Act. A person is entitled to be registered as a BOTC on an application if:

- they are a direct descendant of a person ('P') who was a CUKC by virtue of Ps birth in the British Indian Ocean Territory or, prior to 8 November 1965, in those islands designated as the British Indian Ocean Territory on that date, and
- they have never been a BOTC or a British Dependent Territories citizen

British overseas territories citizenship

Clause 5: Provision for Chagos Islanders to acquire British nationality (House of Commons version, 22 March 2022)

An application under this section must be made:

- in the case of a person aged 18 years or over on the commencement date, before the end of the period of five years beginning with the commencement date;
- in the case of a person aged under 18 on the commencement date, or a person who is born before the end of the period of five years beginning with the commencement date, before they reach the age of 23 years.

British citizenship

Clause 6: Disapplication of historical requirements: Consular registration

- This clause amends ss 4C and 4I of the 1981 Act, so that the requirement for a person's *birth to have been registered within 12 months at a British consulate* is to be ignored when assessing whether they would have become a Citizen of the UK and Colonies ('CUKC') under the British Nationality Act 1948 ('the 1948 Act'), had *women and unmarried fathers* been able to pass on citizenship at the time of their birth
- Under the 1948 Act, citizenship could normally only be passed on for *one generation* to children born outside of the UK and Colonies. However, paragraph 5(1)(b) of the 1948 Act permitted it to be passed on to further generations if the child was born *in a foreign country* and *their birth* was registered within a year at a British consulate. The child of a British mother or unmarried British father could not be registered because they were unable to pass on citizenship at that time
- The clause amends the 1981 Act, so that applications under section 4C (British mothers) and section 4I (unmarried fathers) will not be refused solely because the requirement to register the birth within a year has not been met. This reflects the decision in the case of the *Advocate General for Scotland v Romein* [2018] UKSC 6

British citizenship

Clause 7: Citizenship where mother married to someone other than natural father

- This clause amends the the 1981 Act to provide an entitlement to British citizenship for individuals who were previously unable to acquire it because their *mother was married to someone other than their biological British citizen father at the time of their birth*
- This addresses the decision in the case of *K (a child) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin), which found that, in these circumstances, the definition of father in the 1981 Act was incompatible with Article 8 (read with Article 14) ECHR

British citizenship

Clause 7: Citizenship where mother married to someone other than natural father

- Section 50(9A) of the 1981 Act defines 'father' for the purposes of determining the nationality of the child
- 'Father' is either: the *husband (or male civil partner)* of the child's mother at the time of the child's birth, or the *person treated as the father in IVF cases*. *If neither* of those situations apply, the father is someone who *can provide proof of paternity*. Where the child's mother is married to someone other than the child's natural father, her husband is the child's father for nationality purposes, even if not biologically related to the child
- The above definition of 'father' came into force on 1 July 2006. Before then, 'father' was only defined as the *husband of the child's mother*. In that situation, where the child's biological parents were unmarried, the *child could not take on the father's British citizenship*

Clause 7: Citizenship where mother married to someone other than natural father

- Remedial registration routes were subsequently inserted into the 1981 Act to allow the children of unmarried fathers born prior to 1 July 2006 to register as British citizens. These provisions are set out at sections 4E–4J of the 1981 Act
- This clause is intended to create an entitlement to British citizenship for children born on or after 1 July 2006 who did not become British *because their mother was married to someone other than their natural father*. By removing *the 1 July 2006 cut-off date* for registration under sections 4F – 4I, they will be able to apply
- Section 4D of the 1981 Act provides a registration route for *children who were born outside of the UK and qualifying British overseas territories to members of the British armed forces*, serving outside the UK and qualifying territories. Currently, a child does not qualify under this provision where their mother was married to someone other than their biological father at the time of the child's birth. This will also be remedied by this clause

Clause 8: Citizenship: registration in special cases

This clause creates new registration provisions which allow the Secretary of

State to grant British citizenship and/or British overseas territories citizenship to adult applicants if, *in the Secretary of State's opinion*, the person would have been or would have become a British citizen and/or BOTC had it not been for:

- *historical unfairness* in the law;
- an act or omission of a public authority;
- or other *exceptional circumstances* relating to the person's case.

Clause 8: Citizenship: registration in special cases

'Historical legislative unfairness' includes circumstances where a person would have become, or would not have ceased to be, a British subject, a citizen of the United Kingdom and Colonies, or a British citizen, if an Act of Parliament or subordinate legislation had, for the purposes of determining a person's nationality status:

- treated males and females equally,
- treated children of unmarried couples in the same way as children of married couples, or
- treated children of couples where the mother was married to someone other than the natural father in the same way as children of couples where the mother was married to the natural father.

Clause 8: Citizenship: registration in special cases

- The Secretary of State already has a power to register minors as British citizens by discretion under subsection 3(1) of the 1981 Act
- Currently, no such power exists to grant citizenship by discretion to adults
- Clause 7 is not as wide as s 3(1) of the 1981 Act

British citizenship and British overseas territories citizenship

Clause 9: Requirements for naturalisation, etc..

- This clause enables the Secretary of State to waive a requirement for naturalisation as a British citizen under section 6 of the 1981 Act, naturalisation as a BOTC under section 18, and registration as a British citizen under section 4, namely *to have been present in the UK (or British overseas territory) at the start of the applicable residential qualifying period*
- Section 6 of the 1981 Act gives the Secretary of State the power to grant a certificate of naturalisation to an adult. The requirements for naturalisation are set out at Schedule 1 to the 1981 Act. There is a requirement to complete a period of either 3 or 5 years' residence in the UK (or a British overseas territory) before an application can be made (this is the residential qualifying period) *and* the individual *must have been present in the UK (or British overseas territory) at the beginning of the residential qualifying period*.

British citizenship and British overseas territories citizenship

Clause 9: Requirements for naturalisation, etc..

- Section 4 of the 1981 Act, a provision for registration of British nationals as British citizens, has residence requirements which mirror those for naturalisation. Similar provisions exist for naturalisation as a BOTC, at section 18 of the 1981 Act
- The rationale behind all these requirements is that an individual must be able to demonstrate a *sustained connection with the UK* (or British overseas territory), although absences up to a specified number of days are permitted by the legislation
- The Secretary of State has the power to waive the requirement relating to the maximum number of days absence and to treat this requirement as fulfilled in the special circumstances of a particular case (see paras 2 and 6 of Schedule 1 to the 1981 Act for British citizenship and BOTC, respectively, and in s 4(4) for registration)

British citizenship and British overseas territories citizenship

Clause 9: Requirements for naturalisation, etc..

- Presently, there is no power to waive the requirement to have been present in the UK *at the start of the qualifying period* (except in relation to applications for naturalisation as British citizens from current or former members of the armed forces)
- The clause amends the 1981 Act to allow the Secretary of State to waive the requirement that the individual must have been present in the UK or relevant overseas territory at the start of the qualifying period *in the special circumstances of a particular case*

British citizenship and British overseas territories citizenship

Clause 9: Requirements for naturalisation, etc..

- Clause 9 of and Schedule 1 to the British Nationality Act 1981 allow the Secretary of State to treat a person who has indefinite leave to enter or remain as meeting certain residence requirements in relation to an application for citizenship under those sections.
- The Secretary of State may treat the applicant as fulfilling the requirement *not to be in breach of immigration laws* without enquiring into whether or not the applicant was in the UK in breach of the immigration laws in the period mentioned.
- Among others, it will benefit those with EUSS Settled Status/ILR who were exercising pre-Brexit EU rights of free movement as students or self-sufficient persons but who lacked comprehensive sickness insurance (CSI) and thus were in breach of immigration laws as not lawfully resident.

Deprivation of citizenship

Deprivation of Citizenship clause (put back into Bill by House of Commons on 22 March 2022)

- The clause amends section 40 of the the 1981 Act to allow a decision to deprive a person of citizenship to be made in the absence of written notice being given to the person and to make sure that the associated deprivation order is valid
- The clause ensures that any deprivation order made before the clause comes into force remains valid where the person was not notified of the decision to deprive in accordance with section 40(5) of the 1981 Act
- The clause has been introduced following the High Court judgment in *D4 v Secretary of State for the Home Department* [2021] EWHC 2179 in relation to reg 10(4) of the British Nationality (General) Regulations 2003; see now [2022] EWCA Civ 33, upholding that judgment
- Reg 10(4) provides that notice of a deprivation decision is deemed to have been given in certain circumstances when it is placed on a person's Home Office file

Deprivation of Citizenship clause

- The judgment found regulation 10(4) to be *ultra vires* s 41(1) of the 1981 Act and therefore void and of no effect. As a consequence, the Court declared the deprivation order made in that case to be null and void
- The aim of this clause is to provide a means of depriving a person of their citizenship where it is considered not possible to give notice, or there are reasons for not giving, prior notice of the deprivation decision, as specified in the clause
- This is considered necessary to ensure that deprivation powers can be used where a person is no longer contactable by the Home Office

Deprivation of citizenship

The Secretary of State seeks to dispense with the requirement to give to the person concerned written notice of a decision to deprive them of British citizenship. The dispensation would apply in a large number of cases where the Secretary of State for the Home Department was satisfied it was not in the public interest

The requirement to give notice does not apply if:

- The Secretary of State does not have the information needed to be able to give notice, and
- the Secretary of State *reasonably considers it necessary*, in the interests of:
  (i) national security,
  (ii) the investigation or prosecution of organised or serious crime,
  (iii) preventing or reducing a risk to the safety of any person, or
  (iv) the relationship between the United Kingdom and another country,

that notice under that subsection should not be given

Deprivation of citizenship

Rights of Appeal are adjusted accordingly. A person

- who is given notice of a decision to make an order, or
- in respect of whom an order is made *without the person having been given notice* of the decision to make the order,

may appeal against the decision to the First-tier Tribunal

Deprivation of citizenship

- Where the Secretary of State has made an order and has not given the notice required, and
- the person in respect of whom the order was made makes contact with the Secretary of State for the Home Department
- The Secretary of State must, as soon as is reasonably practicable, give the person written notice specifying:

    (i) that she has made the order,

    (ii) the reasons for the order, and

    (iii) the person's right of appeal to the First–tier Tribunal or SIAC.

Deprivation of citizenship : Judicial Oversight

Provision is made for SIAC to consider a decision of the Secretary of State

- not to give notice to a person before depriving them of a citizenship status on conducive to the public good grounds, or

- not to give late notice to a person who has been deprived of a citizenship status on those grounds without having been given prior notice.

Deprivation of citizenship : Judicial Oversight

- If the Secretary of State *proposes* to make a conducive grounds deprivation order without notice, the Secretary of State *may* apply to SIAC .

- If the Secretary of State *makes* a conducive grounds deprivation order without notice, the Secretary of State *must* apply to SIAC within the period of seven days beginning with the day on which the order is made, unless an application has already been made.

Deprivation of citizenship : Judicial Oversight

- The function of SIAC on an application is to determine whether, in respect of each condition on which the Secretary of State relies that view is *obviously flawed* (NB the conditions are: does not have info to give notice; or she reasonably considers it necessary, in the interests of: (i) national security, (ii) the investigation or prosecution of organised or serious crime, (iii) preventing or reducing a risk to the safety of any person, or (iv) the relationship between the United Kingdom and another country)
- In determining that question, SIAC must apply the principles that would be applicable on an application for judicial review.

Deprivation of citizenship : Judicial Oversight

If SIAC determines that the Secretary of State's view is obviously flawed in respect of each condition on which the Secretary of State relies:

- if the order in question has not been made, notice must be given in relation to the order;
- if the order has been made, the Secretary of State must, within the period of 14 days beginning with the day on which SIAC

  (i) give late notice in respect of the order,

  (ii) revoke the order, or

  (iii) make an application to SIAC for fresh consideration due to a material change of circumstances or fresh evidence.

Deprivation of citizenship : Review of Want of Notice

- If the Secretary of State makes a conducive grounds deprivation order without notice, and SIAC has not made the determination about it (i.e. whether the Secretary of State's decision obviously flawed).
- The Secretary of State must, at least once in every review period, review the circumstances of the person in respect of whom the order was made (so far as known) and decide whether to give late notice in respect of the order.
- On such a review, the Secretary of State must decide to give late notice to the person unless it appears to the Secretary of State that any of the conditions disabling the notice requirement are met.

Deprivation of citizenship : Review of Want of Notice

If the Secretary of State decides at any point to give late notice in respect of the order:

- She must give the notice as soon as reasonably practicable, and
- once the notice is given, further reviews are not required.

If on the expiry of the final review period the Secretary of State has not given, or has not decided to give, late notice in respect of the order, She must make an application to SIAC within the period of seven days beginning with the day after the final day of that review period.

Deprivation of citizenship : Review of Want of Notice

The Review period is :

- the period of four months beginning with the day after the day on which SIAC first determined an application in relation to an order, and
- each of the next five successive periods of four months

Deprivation of citizenship

- Possession of British citizenship is in the nature of a constitutional right not to be subject to arbitrary deprivation, see *Ahmed and Others (deprivation of citizenship)* [2017] UKUT 00118 (IAC), at para 26
- Notice of a decision is a fundamental feature for it to have legal effect, per Lord Steyn in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, at para 26
- Article 12(4) of the International Covenant of Civil and Political Rights (ICCPR) provides that, 'No one shall be arbitrarily deprived of the right to enter his own country

Deprivation of citizenship

The United Nations' Human Rights Committee is the body of independent experts that monitors implementation of the ICCPR. In its General Comment (No 27): Article 12 (Freedom of Movement) it noted:

'21.... The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country'

Deprivation of citizenship

- The United Kingdom is also bound by the United Nations' 1961 Convention on the Reduction of Statelessness
- The United Nations High Commissioner for Refugees ('UNHCR') has a mandate to address statelessness. In its *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness* ,the UNHCR considers the position of those who stand to be deprived of citizenship and be left stateless *as well as considering the procedural requirements for any deprivation of nationality (even where not left stateless) to avoid the charge that it is arbitrary and thereby unlawful*

Deprivation of citizenship

UNHCR *Guidelines on Statelessness No 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness:*

'99. State decisions involving the acquisition, retention or renunciation of nationality should be issued in writing and open to effective administrative and judicial review. *The individual whose nationality is withdrawn should also be provided with written reasons for the withdrawal in a language they understand.'*

Deprivation of citizenship

- In addition to the affront that the Clause poses to the common law, and international legal standards, it may breach the United Kingdom's human rights commitments under the European Convention of Human Rights ('ECHR'), which have been incorporated into domestic law by the Human Rights Act 1998
- The use of the powers conferred by the clause may give rise to deprivation decisions that are incompatible with Article 6, 8, and 14 ECHR.

Statelessness

Clause 10: Citizenship: stateless minors

- This clause amends Schedule 2 to the 1981 Act to introduce a new requirement for the registration of a stateless child (aged 5 to 17) as a British citizen or a BOTC and maintains the existing requirements in relation to those aged 18 to 22
- Provisions for reducing statelessness within the nationality framework are set out at section 36 and Schedule 2 of the 1981 Act
- Paragraph 3 of Schedule 2 to the 1981 Act provide for a stateless child born in the UK or an overseas territory to be registered as a British citizen or BOTC. The conditions which apply to this provision include, amongst others, a residential requirement and a requirement that the individual has always been stateless.

Statelessness

Clause 10: Citizenship: stateless minors

- According to the Secretary of State, there have been cases where parents have chosen not to register their child's birth, which would have acquired their own nationality for their child, so that the child can register as a British citizen under the statelessness provisions.
- The clause aims to prevent this 'vice'. This is to be achieved by adding a requirement that the Secretary of State be satisfied that the child cannot reasonably acquire another nationality.

Clause 10: Citizenship: stateless minors

The change will leave certain children stateless and in doing so runs contrary to the UK's obligations under the 1961 UN Convention on the Reduction of Statelessness

- It adds a provision for those aged 5-17 that the Secretary of State is satisfied that the child applicant is unable to acquire another nationality. It provides that a person is able to acquire a nationality where (i) that nationality is the same as one of the parents; (ii) the person has been entitled to acquire that status since birth; and (iii) *in all the circumstances, it is reasonable to expect them (or someone acting on their behalf) to take steps to acquire that nationality*

Clause 10: Citizenship: stateless minors: Criticism

- The problem with the provision is that it allows the Secretary of State to keep a child born in the UK without a nationality stateless from the age of 5 onwards, when in fact, the 1961 Convention—which the 1981 Act purports to implement—simply requires that the applicant is stateless and not that they cannot reasonably acquire another nationality
- The only circumstances where conferral of British citizenship could be withheld under the 1961 Convention is where the nationality of a parent was available to the child *immediately, without any legal or administrative hurdles, and could not be refused by the state concerned*, see for example paragraphs 24 to 26 of the UNHCR '*Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*'.

GARDEN COURT
CHAMBERS

Maritime Enforcement

Adrian Berry, Garden Court Chambers

The Package

- Inability to claim Asylum in UK Territorial Waters
- Crimes of Arrival
- Connected Maritime Enforcement powers
- Lack of Duty of Rescue Protection
- Limited criminal and civil liability

Maritime Enforcement

Inability to claim Asylum in UK Territorial Waters

- Clause 14 of the Bill (as amended by the House of Lords) requires an asylum claim to be made at a *designated place*.
- Although some places may be designated later by regulations, all the places designated on the face of the Bill are on the territory or landmass of the United Kingdom.
- However, the UK territorial sea is excluded from being a place where an Immigration Officer may accept an asylum claim.
- This makes it easier for UK Immigration Officers to stop, board, and divert vessels heading for the UK.

Maritime Enforcement

Crimes of Arrival

- First, it introduces a new provision so that a person who requires entry clearance (such as a visa) under the Immigration Rules and who *knowingly arrives* in the United Kingdom without a valid entry clearance will commit an offence (clause 44 of the Bill amending section 24 of the Immigration Act 1971).

Maritime Enforcement

Crimes of Arrival

- Second, the Bill amends existing law to add a new dimension to *assisting unlawful immigration* (clause 44 of the Bill amending section 25 of the Immigration Act 1971), so that it would be an offence to do an act: (i) to facilitate the commission of a breach or attempted breach of 'immigration law', the latter being defined to include regulation of entitlement *to arrive in* a state, by an individual who is not a UK national, (ii) who knows or has reasonable cause for believing that the act facilitates the commission of a breach or attempted breach of such immigration law by the individual, and (iii) who knows or has reasonable cause for believing that the individual is not a UK national

Maritime Enforcement

Crimes of Arrival: Rescuers

- There is limited provision for a defence in relation *to facilitation offences and rescuers*. By new s 25BA, a person does not commit a facilitation offence if the act of facilitation was an act done by or on behalf of, or co-ordinated by (i) *Her Majesty's Coastguard, or (ii) an overseas maritime search and rescue authority exercising similar functions.*

- In *proceedings for a facilitation offence*, it is a defence for the person charged with the offence to show that the assisted individual had been in danger or distress at sea, and the act of facilitation was an act of providing assistance to the individual at any time between (i) the time when the assisted individual was first in danger or distress at sea, and (ii) the time when the assisted individual was delivered to a place of safety on land.

Maritime Enforcement

Crimes of Arrival

The following are not treated as an act of providing assistance:

- the act of delivering the assisted individual to the UK in circumstances where (i) *the UK was not the nearest place of safety* on land to which the assisted individual could have been delivered, and (ii) the person charged with the offence *did not have a good reason for delivering the assisted individual to the UK* instead of to a nearer place of safety on land;
- the act of steering a ship in circumstances where the person charged with the offence was on the same ship as the assisted individual at the time when the individual was first in danger or distress at sea.

Maritime Enforcement

Crimes of Arrival

Facilitation offences: defences relating to stowaways By new s 25BB, in proceedings for a facilitation offence brought against a master of a ship, it is a defence for the master to show that:

(i) the assisted individual was *a stowaway* when the act of facilitation took place, and….

Maritime Enforcement

Crimes of Arrival

Facilitation offences: defences relating to stowaways … (ii) that the master, or a person acting on the master's behalf, reported the presence of the assisted individual on the ship to the Secretary of State or an immigration officer:

- in a case where the ship was scheduled to go to the UK, as soon as reasonably practicable after the time when the ship's next scheduled port of call became a port in the UK, or
- in a case where the ship was not scheduled to go to the UK but the master of the ship decided that the ship needed to go to the UK(whether for reasons relating to the presence of the assisted individual on board or for other reasons), as soon as reasonably practicable after the master made that decision.

Crimes of Arrival

- Third, the Bill alters the *maximum penalty* for assisting unlawful immigration: it is raised from 14 years imprisonment to life imprisonment (clause 45 of the Bill amending section 25 of the Immigration Act 1971).

Maritime Enforcement

Crimes of Arrival

Fourth, the Bill alters the offence of helping asylum seekers enter the United Kingdom so that it captures *not just those who do so for gain but also everyone else* (clause of the Bill amending section 25A of the Immigration Act 1971). Under the amended provision, a person commits an offence if:

- he knowingly facilitates the arrival or attempted arrival in or the entry or attempted entry into, the United Kingdom of an individual, and
- he knows or has reasonable cause to believe that the individual is an asylum-seeker.

Maritime Enforcement

Connected Maritime Enforcement powers

As provided for in the Bill (Clause 49, Sch 7) , an immigration officer or an enforcement officer may exercise specified powers:

- in United Kingdom waters,
- in foreign waters, or
- in international waters.

Maritime Enforcement

Connected Maritime Enforcement powers

- Those powers may be exercised in relation to: (i) a United Kingdom ship, (ii) a ship without nationality, (iii) a foreign ship, or (iv) a ship registered in another British territory.
- Such powers may only be used for the purpose of preventing, detecting, investigating or prosecuting *a relevant immigration-related offence*.

Maritime Enforcement

Connected Maritime Enforcement powers

As a check on the use of these powers, the authority of the Secretary of State is required before an immigration officer or an enforcement officer is able to exercise them in relation to:

- a United Kingdom ship in foreign waters,
- a ship without nationality,
- a foreign ship, or
- a ship registered under the law of a British territory.

Connected Maritime Enforcement powers

A New Definition of Ship

The definition of ‘ship’ is broadened in the Bill so that it extends to fragile and insecure vessels that cross the English Channel. Presently ‘ship’ is defined so that it includes every description of vessel (including a hovercraft) used in navigation. That definition is to be supplemented so that ship also includes any other structure (whether with or without means of propulsion) constructed or used to carry persons, goods, plant or machinery by water.

Connected Maritime Enforcement powers

Pushing Back Asylum Seekers

Thereafter, the Bill expands powers to stop, board, divert and detain a ship. If a relevant officer has reasonable grounds to suspect that a relevant immigration-related offence is being, or has been, committed on the ship, or the ship is otherwise being used in connection with the commission of such an offence, they may:

(i) stop the ship, (ii) board the ship, (iii) require the ship to be taken to any place (on land or on water) in the UK or elsewhere and detained there; and/or (iv) require the ship to leave United Kingdom waters.

Maritime Enforcement

Lack of Duty of Rescue Protection

- When the Bill was introduced into the House of Commons it contained the safeguard that the authority of the Secretary of State was required before an immigration officer or an enforcement officer could exercise powers in relation to maritime enforcement.
- Authority could be given only if the Secretary of State considered that the 1982 United Nations Convention on the Law of the Sea (UNCLOS) permits the exercise of powers in relation to the ship in question (see Schedule 5, paragraph 2 of the Bill introduced to the House of Commons.

Maritime Enforcement

Lack of Duty of Rescue Protection

- UNCLOS contains a large number of provisions, some of which are concerned with freedom of navigation and the limited circumstances in which it may be curtailed. It is also contains provision for the duty of rescue.
- By an amendment laid at the Committee Stage of the Bill in the House of Commons, the Home Office removed a vital safeguard in the Bill that ensures compliance with the duty of rescue where people are in danger of harm or loss of life in such operations.

Lack of Duty of Rescue Protection

There are duties in respect of rescue of persons at sea (Article 98, UNCLOS). The first duty is that every state shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- to render assistance to any person found at sea in danger of being lost,
- to proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him, and
- after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

Lack of Duty of Rescue Protection

- The first duty reflects the well-established position in customary international law. It applies in international waters and there is an analogous provision to like effect applicable in UK territorial waters (Article 18(2), UNCLOS).
- The second duty is that every coastal state (such as the UK) shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring states for this purpose.

Lack of Duty of Rescue Protection

- Critically, there are no public policy limitations on the duty. Therefore, it follows that the fact that a person seeking asylum in the UK may be committing an immigration-related criminal offence in crossing the English Channel makes no difference. There is still a duty to rescue them if they are in danger of being lost, if they are in distress and have sought assistance, or after a collision. Further, the duty extends to Home Office vessels.

Maritime Enforcement

Limited criminal and civil liability

- The Bill immunises Home Office officials from criminal and civil liability arising out of its maritime enforcement operations. As a matter of principle, the Home Office ought to be accountable for any harm to life and limb caused by its actions. However, as matters stand, it seeks to exempt its officials from criminal and civil liability, see Schedule 7 to the Bill.
- Under the Bill, a relevant officer is not liable in any criminal or civil proceedings for anything done in the purported performance of maritime enforcement functions if the court is satisfied that the act was done in good faith, and there were reasonable grounds for doing it.

Maritime Enforcement

Extra-territorial Human Rights

- There is still scope for seeking to challenge (i) the Secretary of State's decision to authorise a maritime enforcement operation, and (ii) the conduct of such an operation.
- In addition to grounds arising on public law principles, the reach of the protection afforded by the Human Rights Act 1998, may assist in brining claims under Article 2 and Article 3 ECHR.

Accommodation for asylum seekers

Irena Sabic and Matthew Ahluwalia
Garden Court Chambers

Clause 12 of the Bill: Accommodation for asylum seekers

(1)In section 97 of the Immigration and Asylum Act 1999 (support for asylum- seekers: supplemental matters), after subsection (3) insert—

"(3A)When exercising the power under section 95 (support for asylum seekers) or section 4 (accommodation for failed asylum seekers) to provide or arrange for the provision of accommodation, **the Secretary of State may decide to provide or arrange for the provision of different types of accommodation** to persons supported under those sections on the basis of either or both of the following matters—

(a)the stage that their claim for asylum has reached, including whether they have been notified that their claim is being considered for a declaration of inadmissibility (see sections 80A and 80B of the Nationality, Immigration and Asylum Act 2002);

(b)their previous compliance with any conditions imposed on them under any of the following—

(i)section 95(9) (conditions for support under section 95);

(ii)Schedule 10 to the Immigration Act 2016 (conditions of immigration bail);

(iii)regulations made under section 4(6) (conditions for support under section 4)."

What does this mean in practice?

- Para 158 of the Explanatory Notes to the original version of the Bill: “The intention of this clause is to allow for the use certain types of accommodation to house certain cohorts of asylum seekers and failed asylum seekers in order to increase efficiencies within the system and increase compliance.”

- Para. 159: “This would mean that the Secretary of State could use different types of accommodation at different stages of an individual’s protection claim.”

- Section 4(2) will also be replaced by a new form of support for failed asylum seekers provided under section 95A or 98A of the 1999 Act, once changes in the Immigration Act 2016 come in to force.

- See also New Plan for Immigration: proposed wider use of ‘reception centres’.

Clause 18 of the Bill: Clarification of basis for support where asylum claim inadmissible

- Cross-refer to Clauses 15 and 16: essentially, asylum claims may be declared 'inadmissible' if:
  - Made by an EU national, or
  - Made by someone with a connection to a safe third state

- Clause 18 would have the effect of treating an asylum claim that has been declared inadmissible as if it were a rejected claim

- i.e. in terms of asylum support, someone who has made an asylum claim declared inadmissible would be treated as a rejected asylum seeker within the meaning of section 4(2) IAA 1999

What has been the response?

- British Medical Association: “urges peers to support amendments to the Bill that would scrap the use of MoD facilities for housing asylum seekers, and that would ensure asylum seekers are housed in humane conditions with accessible healthcare.”

- JCWI: Introduce a centrally funded dispersal system that houses asylum seekers in decent accommodation in communities across the country; reforms should be focused on reducing the long delays that prevent them from moving on, rather than on an institutional accommodation model.

- Refugee Council: Proposals to extend these forms of accommodation are ill-thought out and dangerous, and undermine the UK’s duties to support and protect those making asylum claims. The current dispersal system, whereby people seeking asylum live in regular housing in the community, is much better for supporting future integration and ensuring that people seeking asylum are able to access services they need.

- ECHR: An effective system must be put in place to ensure that accommodation is appropriate to the needs of people sharing protected characteristics, including disabled people and women who have experienced gender based violence.

Foreseeable problems

- Adequacy / suitability of accommodation: sections 95 and 96 IAA 1999
- C.f. challenge to use of Napier barracks: *R (NB & Ors) v Secretary of State for the Home Departmen*t [2021] EWHC 1489 (Admin) – issues around covid and fire safety risks.
- Accessing legal advice and healthcare
- Monitoring of contracted private providers: c.f. *R (DMA & Ors) v The Secretary of State for the Home Department* [2020] EWHC 3416 (Admin)
- … all of which are likely to lead to yet more judicial reviews being brought against the SSHD.

Changes to modern slavery and trafficking law

Gemma Loughran and Emma Fitzsimons

Garden Court Chambers

#NABBConference

29 March 2022

@gardencourtlaw

Nationality and Borders Bill Explanatory Note §33

- "*The Government remains committed to ensuring the police and the courts have the necessary powers to bring perpetrators of modern slavery to justice, while giving victims the support they need to rebuild their lives. The UK is and will remain a signatory of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), which sets out signatory states' international obligations to identify and support victims of modern slavery*".

Impact on Victims of Trafficking

- Part 5 of the Bill: Modern Slavery (Clauses 57-68)
- General Asylum Provisions and their impact on trafficking cases

i. Part 5 of the Bill

Need for new Trafficking provisions?

- NEW PLAN FOR IMMIGRATION - Consultation on the New Plan for Immigration: Government Response:

  In March 2021, the Government published a report on the issues raised by individuals in detention. It shows that 16% of people detained within the UK following immigration offences in 2019 were referred as potential victims of modern slavery (up from 3% in 2017), and that 99% of these detentions ended in release. This raises legitimate concerns that some referrals are being made late in the process to frustrate immigration action and that legitimate referrals are not being made in a timely way.

Need for new Trafficking provisions?

- The Explanatory Notes states that:

> *35 The Government wants to ensure that victims are identified and provided with support, and that any gaps in the system which allow for the NRM to be misused are addressed. This will avoid resources being diverted away from victims who need support and unnecessary impacts on removal actions.*
>
> *36 The measures outlined in this Bill seek to ensure victims are identified as quickly as possible, while enabling decision makers to distinguish more effectively between genuine and non-genuine accounts of modern slavery and enabling the removal of serious criminals and people who pose a threat to UK national security.*

Response: Taskforce on Victims of Trafficking in Immigration Detention

- In a briefing for the House of Lords Committee Stage – Nationality and Borders Bill by Taskforce on Victims of Trafficking in Immigration Detention noted that a Subject Access Request showed:

> *…the overwhelming majority of those who are referred as victims of trafficking from detention to the National Referral Mechanism are found at the first stage of the identification process to have been trafficked:* ***83.2% of referrals in 2020 received a positive first stage trafficking decision*** *(representing 1,053 of 1,265 referrals who received a first stage trafficking decision).*

Response: Independent Anti-Slavery Commissioner

- The Independent Anti-Slavery Commissioner, Dame Sara Thornton DBE QPM responded to the Bill on 7 September 2021:

> *My response to the New Plan for Immigration noted the lack of data about the alleged abuses of the system. Data available at the time showed an increase in the number and proportion of people in immigration detention being referred into the NRM in recent years. Additional data has now been published, showing that 27 percent (1,005) of people exiting immigration detention in 2020 were referred into the NRM whilst detained. I understand concerns about some referrals being made late in order to frustrate immigration processes, but* ***a range of factors could influence these numbers including changes over time in the detained population and improved awareness of modern slavery.*** (emphasis added)

Part 5: Modern Slavery (Clauses 57-68)

- Late Disclosure/Evidence: Clauses 57-58
- Victim Identification: Clause 59
- Recovery Period: Clauses 60-61
- Disqualification from Protection/Support: Clauses 62-63
- Leave to Remain: Clause 64
- Legal Aid: Clauses 65 – 66
- Disapplication of retained EU law deriving from Trafficking Directive: Clause 67

Late Disclosure/Evidence - Clauses 57-58

- Clause 57 will give the SSHD the power to serve a ‘slavery or trafficking notice’ on a person who has made a protection or human rights claim. Will require the applicant to provide the SSHD with any relevant status information by a specified date.

- Clause 58 will introduce a punitive response for late compliance with a slavery or trafficking notice – the Applicant’s credibility *will* be damaged unless there are good reasons why the information is late.

Late Disclosure/Evidence

- Obligation to identify is not on the individual; positive obligation under Art 4 ECHR on the State.
- Recognised barriers to disclosure and self-identification e.g. gender/sex/cultural/mental health/disability/linguistic and social vulnerability.
- Phenomenon of late disclosure: see Statutory Guidance at Annex D and *MN and IXU v SSHD* [2020] EWCA Civ 1746.
- Late identification – see *VCL v UK* (App No 77587/12) and in *TVN v SSHD* [2021] EWHC 3019 (Admin)
- Access to justice - qualified/specialist legal advice, expert evidence, trust/rapport.

Victim Identification – Clause 59

- Amends section 49 of the Modern Slavery Act 2015
- Changes the wording of the test for identification from "*having reason to believe someone may be"* a victim to *"is a victim"* at the reasonable grounds stage.
- Places the standard of proof at the conclusive stage as the "*balance of probabilities*'; the civil standard.
- Explanatory Notes to Bill:

  'This will bring the Modern Slavery Act in line with the test set out in ECAT. This will also bring England and Wales in closer alignment with the Scottish and Northern Irish definitions, both of which provide support when there are reasonable grounds to believe an individual "is" rather than "may be" a victim.'

Recovery Period - Clauses 60-61

- Clause 60 defines the recovery period as the period that starts with a positive reasonable grounds decision and ends with the conclusive decision or after 30 days, whichever is later.
- Provides that the potential victim of trafficking may not be removed during the recovery period.
- However, clause 61 provides that if the potential victim of trafficking has received a 'further reasonable grounds decision' they are not entitled to an additional recovery period, but there is a discretion to determine that they may not be removed during the same period.
- A further reasonable grounds decision is where the reasonable grounds for believing that the person is a victim of slavery or human trafficking arise from things done wholly before the first reasonable grounds decision was made

Disqualification from Protection - Clauses 62-63

- Clause 62 empowers the SSHD to not make a Conclusive Grounds decision, or remove someone from the UK during the NRM process, where the SSHD is satisfised the person is a threat to public order, or has claimed to be a VOT in bad faith.

- Clause 63 permits the SSHD to cease support and assistance to a person with a positive reasonable grounds decision where Clause 62 applies.

- Public order is defined at Clause 62(3) – drafted in very broad terms:

  Terrorist offences; Schedule 4 MSA offences; subject to a TPIM; subject to a Counter-Terrorism and Security Act 2015; "foreign criminal" under the UK Borders Act 2007; deprivation of nationality; excluded under Article 1F of the Refugee Convention; otherwise poses a risk to national security on UK.

Disqualification from Protection

- Article 4 ECHR positive obligation to identify a VOT is an absolute, not qualified right. No permissible derogation under Article 4 ECHR.
- Duty of identification is absolute; *consequence* of identification are different e.g. Article 13 ECAT and public order exception.
- Forced criminality and deportation cases in particular are complex – whole cohort vulnerable to being caught by these provisions e.g. cannabis cultivation, county lines.
- Article 26 ECAT – principle of non-punishment.

GARDEN COURT
CHAMBERS

ii. General asylum provisions and their impact on trafficking victims

Trafficked persons as refugees

"A claim for international protection presented by a victim or potential victim of trafficking can arise in a number of distinct sets of circumstances. The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the State where she or he now is. The victim may have been trafficked within national territory, may have escaped from her or his traffickers and have fled abroad in search of international protection. The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection. In all these instances, the individual concerned must be found to have a "well-founded fear of persecution" linked to one or more of the Convention grounds in order to be recognized as a refugee."

UNCHR Guidelines on International Protection, relating to Victims of Trafficking and Persons at Risk of Being Trafficked

The relationship between identification as a victim of trafficking and protection as a refugee

- The lawful identification of a victim – positive obligation under Article 4 ECHR
- ECAT triggers various rights and protections – including assistance (Art 12) suspension of removal action and a recovery/reflection period (Art 13) and residence permit/discretionary leave (Art 14)
- Refugee status provides greater protection for VOTs, including against refoulement, length of leave and pathway to settlement.
- Being a VOT affects:
  - Credibility and treatment of evidence in the asylum decision making process and Tribunal process
  - Convention reason
  - Past harm and presumption of future risk
  - Adequacy of state protection and ability to relocate
  - Protection from exclusion under s 72 if offending bound up with criminal exploitation.

General asylum provisions and impact on trafficking victims

- Be aware – changes in the Bill for VOTs not confined to to Part 5; VOTs who have asylum or human rights claims are affected by the general provisions of the Bill

- Major countries of origin for NRM referrals also produce refugee claims for trafficking/modern slavery e.g. Albania, Vietnam, China

- Asylum provisions will bite on the Refugee claims for VOTs – be aware of:
  - 'Two tier system'/differential treatment – Clause 11
  - Elevated 'well founded fear' standard for past persecution – Clause 31
  - Cumulative PSG test now relevant for convention reason – Clause 32

Differential treatment for refugees – Clause 11

- Clause 11 will give the SSHD the power to legally discriminate between Groups 1 and 2 refugees – depending on their mode of arrival and timing of their claim. Affects recourse to public funds; family reunion and pathways to settlement.
- 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 documented barriers/challenges for VOTs re: late disclosure; lack of self-identification; interaction of shame/trauma; fear/control of trafficker.
- Runs contrary to recognised best practice in the Statutory Guidance and in API: Gender Issues in the Asylum Claim.

Well Founded Fear – Clause 31

- 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 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.

- Past experiences of trafficking would then be subject to a civil standard (i.e. CG standard) – elevation. Runs contrary to the established standards endorsed in *MS (Pakistan)* [2020] UKSC 9

Particular Social Group – Clause 32

- Clause 32 will reverse the ruling in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC)– 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***

- 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.

Overall impression?

- Fails to achieve stated aim of disincentivising modern slavery/trafficking
- Fails to protect victims
- Basic misunderstandings of the impact/experience of being trafficked
- Discriminatory impacts
- Undermines UK's obligations under Art 4 ECHR an ECAT

GARDEN COURT CHAMBERS

Afternoon Keynote

The Rt Hon Baroness Chakrabarti CBE

Age Assessments

Maria Moodie and Oliver Persey
Garden Court Chambers

Clauses 48 – 58 of the Bill – Age Assessments

Maria:

- **Clauses 48** - Interpretation.
- **Clause 49** - age assessments by a "designated person", undermining role and expertise of Social Workers, strengthening role of SSHD.
- **Clause 50** – role of "designated person", rejecting LA age assessment decision, strengthening role of SSHD.
- **Clause 51** – use of scientific methods and consequences of withheld consent.

Ollie:

- **Clause 52** – Regulations concerning the conduct and use of age assessments.
- **Clause 53** – Appeals to the First Tier Tribunal.
- **Clause 54** - Supplementary Appeal Provisions – Interim Relief and Closed Procedure.
- **Clause 55** – New information following assessment or appeal.
- **Clause 56** – Legal Aid provisions.

Lords Amendment 15 March 2022. After Clause 56 -Lords Amendment 22

"Age assessments: restrictions

(1) Age assessments under section 49 or 50 must **only be undertaken if there is significant reason to doubt the age** of the age-disputed person.

(2) A person conducting age assessments under section 49 or 50 **must be a local authority social worker**.

(3) Age assessments must be **undertaken in accordance with the Association of Directors of Children's Services Age Assessment Guidance or equivalent guidance in Scotland, Wales and Northern Ireland**.

(4) When an age assessment is conducted, a **process must be used that allows for an impartial multi-agency approach**, drawing on a range of expertise, including from—

(a) health professionals,
(b) psychologists,
(c) teachers,
(d) foster parents,
(e) youth workers,
(f) advocates,
(g) guardians, and
(h) social workers.

(5) When making regulations under section 51, the **Secretary of State must not specify scientific methods unless the Secretary of State receives written approval from the relevant medical, dental and scientific professional bodies that the method is both ethical and accurate beyond reasonable doubt** for assessing a person's age.

(6) Any organisation developed to oversee age assessments must be **independent of the Home Office**.

(7) The **standard of proof for an age assessment is reasonable degree of likelihood**.

Commons disagreement to Lords Amendment 22 (23 March 2022)

COMMONS REASON :

"Because the Commons consider that the additional requirements for age assessments, as set out in the new clause, are either inappropriate or unnecessary."

Clauses 48 Interpretation of Part etc.

(1) In this Part, “age-disputed person” means a person—

(a) who requires leave to enter or remain in the United Kingdom (whether or not such leave has been given), and

(b) in relation to whom—

(i) a local authority,

(ii) a public authority specified in regulations under section 49(1)(b), or

(iii) the Secretary of State, has insufficient evidence to be sure of their age.

“decision-maker” means a person who conducts an age assessment under section 49 or 50;

“designated person” means an official of the Secretary of State who is designated by the Secretary of State to conduct age assessments under section 49 or 50

Clause 49 Persons subject to immigration control: **referral or assessment by local authority** etc.

Age assessments by a "designated person"

(1) The following authorities **may refer an age-disputed person to a designated person** for an age assessment under this section—

(a) a local authority;

(b) a public authority specified in regulations made by the Secretary of State *(* regulations subject to negative resolution)*

(2) Where a LA needs to know a YP's age **or** the SSHD notifies the LA in writing that it doubts the YP's claimed age:

(3) The local authority **must**—

(a) refer the age-disputed person to a designated person for an age assessment under this section,

(b) conduct an age assessment on the age-disputed person itself and inform the Secretary of State in writing of the result of its assessment, or

(c) inform the Secretary of State in writing that it is satisfied that the person is the age they claim (or are claimed) to be, without the need for an age assessment.

Clause 49 Continued….

SSHD strengthening its role in relation to AA

(4) Where a local authority—

(a) **conducts an age assessment itself**, or

(b) informs the Secretary of State that it is **satisfied that an age-disputed person is the age they claim** (or are claimed) to be, it must, **on request from the Secretary of State, provide the Secretary of State with such evidence as the Secretary of State reasonably requires for the Secretary of State to consider the local authority's decision under subsection (3)(b) or (c).**

(5) LA required to provide assistance to designated person conducting age assessment.

(6) The standard of proof for an age assessment under this section is the **balance of probabilities.**

(7) An age assessment of an age-disputed person **conducted by a designated person** following a referral from a local authority under subsection (1) or (3)(a) **is binding—**

(a) on the Secretary of State and immigration officers when exercising immigration functions, and

(b) on a local authority that—

(i) has exercised or may exercise functions under relevant children's legislation in relation to the age-disputed person, and

(ii) is aware of the age assessment conducted by the designated person.

Clause 50 Persons subject to immigration control: **assessment for immigration purposes**

(1) **A designated person may conduct an age assessment** on an age-disputed person **for the purposes of deciding whether or how the Secretary of State or an immigration officer should exercise any immigration functions in relation to the person.**

(2) An assessment under subsection (1) may be conducted—

(a) in a case where subsections (3) and (4) of section 49 do not apply, **or**

(b) in a case where those subsections do apply—

(i) at any time before a local authority has referred the age disputed person to a designated person under section 49(3)(a) or has informed the Secretary of State as mentioned in subsection (3)(b) or (c) of that section, or

(ii) **if the Secretary of State has reason to doubt a local authority's decision under subsection (3)(b) or (c) of that section [*i.e. where LA has conducted AA itself or accepted claimed age*].**

(3) An age assessment under this section is binding on the Secretary of State and immigration officers when exercising immigration functions.

Clause 51 – use of scientific methods

Scientific methods for assessing age:

(1) The Secretary of State may make **regulations specifying scientific methods** that may be used for the purposes of age assessments under section 49 or 50 *(*subject to affirmative resolution procedure).*

(2) The types of scientific method that may be specified include methods involving—

(a) **examining or measuring parts of a person's body, including by the use of imaging technology**;

(b**) the analysis of saliva, cell or other samples taken from a person (including the analysis of DNA** in the samples).

(3) A method may not be specified in regulations under subsection (1) **unless the Secretary of State determines, after having sought scientific advice, that the method is appropriate for assessing a person's age.**

(9) This section **does not prevent the use of a scientific method that is not a specified scientific method for the purposes of an age assessment under section 49 or 50 if the decision-maker considers it appropriate to do so and, where necessary, the appropriate consent is given**.

Clause 51 continued….

<u>Consent from YP for scientific method and consequences of withheld consent:</u>

Where consent is withheld and there are no reasonable grounds for that decision:

(7) In deciding **whether to believe any statement made by or on behalf of the age disputed person** that is relevant to the assessment of their age, the decisionmaker **must take into accoun**t, **as damaging the age-disputed person's credibility** (or the credibility of a person who has made a statement on their behalf), **the decision not to consent to the use of the specified scientific method.**

Clause 52 - Regulations

SSHD may make regulations about *(*affirmative resolution procedure)—*

(a) (i) the information and **evidence that must be considered** and the **weight** to be given to it,
(ii) use of **abbreviated age assessments**
(iii) **protections or safeguarding measures** for the age-disputed person, and
(iv) the processes for assessing, seeking and recording a person's capacity to **consent for scientific methods**

(b) **the qualifications or experience of the age assessor**

(c) **the qualifications or experience** necessary for a **person to conduct scientific methods** of age assessment and the settings in which such tests must be carried out;

(d) the **content and distribution of reports** on age assessments;

(e) the **communication of decisions** to the age-disputed person and any other person affected by the decision, and **notification of appeal rights** (see section 53); and

(f) **adverse credibility findings** based on a lack of co-operation with the age assessment

Clause 53 Appeals relating to age assessments

(1) This section applies if—

(a) an age assessment is conducted on an age-disputed person ("P") under section 49 or 50, and

(b) the decision-maker decides that P is an age other than the age that P claims (or is claimed) to be.

(2) P may **appeal to the First-tier Tribunal** against the decision-maker's decision.

(3) On the appeal, the **Tribunal must—**

(a) determine P's age on the balance of probabilities, and

(b) assign a date of birth to P.

(4) In making the determination, **the Tribunal may consider** any matter which it thinks relevant, including—

(a) **any matter of which the decision-maker was unaware**, and

(b) **any matter arising after the date of the decision appealed** against.

Clause 54 Appeals relating to age assessments**: supplementary**

Interim relief and closed procedures

(2) The appeal must be brought from **within the United Kingdom**.

(4) The person who brings the appeal **may make an application to the First-tier Tribunal** for an order that, until the appeal is finally determined, withdrawn or abandoned, **the local authority must exercise its functions under relevant children's legislation in relation to the person** on the basis that they are the age that they claim (or are claimed) to be.

(5) Subsection (6) applies if it is alleged—

(a) that a **document relied on by a party to an appeal is a forgery**, and

(b) that **disclosure to that party of a matter relating to the detection of the forgery would be contrary to the public interest**.

(6) The First-tier Tribunal—

(a) **must investigate the allegation in private**, and

(b) **may proceed in private so far as necessary to prevent disclosure of the matter referred to in subsection (5)(b).**

Clause 55 – New information following assessment or appeal.

This section applies when post-age assessment and/or post-appeal, the decision maker becomes aware of new information relating to YP's age:

(3) In a case where the first age assessment was conducted by a designated person, they must—
(a) decide whether the **new information is significant** new evidence, and
(b) if they decide that it is, conduct a further age assessment on P.

(4) In a case where the first age assessment was conducted by a local authority, it must—
(a) **decide whether the new information is significant** new evidence **or refer the new information to a designated person for a decision on that matter**, and
(b) if it is decided that the new information is significant new evidence—
(i) conduct a further age assessment on P, or
(ii) refer P to a designated person for a further age assessment.

(5) …new information is **"significant new eviden**ce" if there is a **realistic prospect** that, if a further age assessment were to be conducted on P, taking into account the new information, **P's age would be assessed as different from the age determined in the first age assessment or in the appeal proceedings.**

Clause 56: Legal Aid for appeals

(1) Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (civil legal services) is amended as follows.

(2) In Part 1 (services) after paragraph 31A insert—

"Appeals relating to age assessments under the Nationality and Borders Act 2021

31B (1) Civil legal services provided in relation to—

(a) an appeal under section 53(2) of the Nationality and Borders Act 2021 (appeals relating to age assessments),

(b) an application for an order under section 54(4) of that Act (order for support to be provided pending final determination of appeal), and

(c) an appeal to the Upper Tribunal, Court of Appeal or Supreme Court relating to an appeal within paragraph (a) or an application within paragraph (b). Exclusions

(2) Sub-paragraph (1) is subject to the exclusions in Part 2 and 3 of this Schedule."

(3) In Part 3 (advocacy: exclusions and exceptions), in paragraph 13 (advocacy in proceedings in the First-tier Tribunal), after "31A," insert "31B,".

Restriction of appeal rights and third country cases

Sadat Sayeed & Greg Ó Ceallaigh,
Garden Court Chambers

Clause 28: accelerated detained appeals

- This clause effectively reinstates the Detained Fast Track. The old Detained Fast Track was held to be systemically unfair, and therefore unlawful, in *R (Detention Action) v First-tier Tribunal* [2015] EWCA Civ 840, [2015] 1 WLR 5341.

- It operates by imposing a duty on the Tribunal Procedure Rules Committee to make rules for an accelerated timeframe for certain appeals made from detention which are considered suitable for consideration within the accelerated timeframe.

- The explanatory notes to the Bill say that the clause "clause aims to establish an accelerated route for those appeals made in detention which are considered suitable for a quick decision, to allow appellants to be released or removed more quickly".

- Clause 28 is applicable to (i) protection and human rights appeals, (ii) deprivation of citizenship appeals, (iii) citizens' rights appeals, and (iv) EEA appeals under the 2016 EEA Regulations (to the extent they continue to have effect post revocation).

Clause 28: accelerated detained appeals …… (continued)

- The new “accelerated detained appeals” procedure will be available where the appellant was in detention at the time they received the decision which is the subject of the appeal, and remains in detention. The Secretary of State can prescribe the classes of decision to which it potentially applies.

- The procedure will only apply where the Secretary of State certifies the decision, which she may only do if she “considers that any relevant appeal brought in relation to the decision would likely be disposed of expeditiously”. Notably, this criterion for certification makes no mention of whether the appeal can fairly be disposed of expeditiously.

- The time limits are in part left to be determined by Procedure Rules, but some of them are prescribed by the statute. They are somewhat more generous than those which applied under the old Detained Fast Track. The following table provides a comparison of the deadlines under the old and new systems:

Clause 28: accelerated detained appeals – the timetable

Procedural step	Detained Fast Track at the time of *Detention Action*	Accelerated detained appeals (per Clause 28)
Deadline for filing	2 working days after notice given of refusal	5 working days after notice given of refusal
FTT hearing to take place	5 working days (comprised of 2 working days for service of the respondent's bundle, and then 3 working days thereafter)	No deadline given
FTT to give its decision	2 working days after hearing	25 working days after notice of appeal
Deadline for applying to FTT for permission to appeal	3 working days from service of determination	No deadline given
Deadline for applying to UT for permission to appeal	4 working days after FTT sends notice of refusal of permission	No deadline given
FTT and UT to determine application for permission to appeal	No deadline given	20 working days after notice of appeal
UT hearing to take place	2 working days after permission granted if decision granting permission served electronically or in person; otherwise 5 working days.	No deadline given

Clause 28: accelerated detained appeals – same difficulties remain

- Although the deadlines are somewhat longer, it would remain extremely difficult adequately to prepare an appeal within these time limits. The list, in *Detention Action* at [20], of tasks that a legal representative must perform within these strict time limits remains valid under the new system:

  (i) Checking whether the general detention criteria have been properly applied. These are the sole justification for detention post-decision and pending an appeal.

  (ii) Making representations, where appropriate, that the appellant is unlawfully detained.

  (iii) Applying for bail if the representations are rejected. These involve identifying sureties, taking instructions from them, and checking their availability for any bail hearing and finding a bail address.

  (iv) Taking instructions from the appellant on the refusal letter.

  (v) Preparing the appellant's statement, checking it with the appellant and having it signed. The statement will include the appellant's response to the refusal letter which any expert will need to take into account.

  (vi) Arranging for the translation of any documents produced by the appellant which an expert needs to consider.

  (vii) Arranging for any expert evidence, including identifying an appropriate expert, applying for an extension to the controlled legal representation certificate to fund this or any other additional expense, further representations to the legal aid authorities (if necessary in the event of initial refusal), arranging for the expert to attend the appeal hearing.

  (viii) Making an application where appropriate for the appeal to be transferred out of the fast track appeal procedure. Considering the response to such an application from the SSHD.

Clause 28: accelerated detained appeals – justice and vulnerable clients

- Clause 28(5) does give the First-tier or Upper Tribunal power to order that an appeal is to cease to be an accelerated detained appeal "if it is satisfied that it is the only way to secure that justice is done in a particular case". This safeguard, however, does not remedy the problems with an accelerated procedure, for the reasons given in *Detention Action* at [42]-[44]:

- Clause 28 makes no reference to vulnerable asylum-seekers being unsuitable for the detained accelerated appeals procedure, although it is possible that this could be achieved through the Secretary of State exercising her power to prescribe certain classes of decision that are ineligible for the procedure.

- However, even if it did exempt vulnerable groups, this would not be an adequate safeguard. A real concern about this procedure is that psychiatric vulnerabilities such as post-traumatic stress disorder (PTSD), depression, learning disabilities and developmental disabilities are unlikely to be identified and documented prior to the appeal hearing, since there will simply not be time to commission a medico-legal report in most cases.

Clause 28: accelerated detained appeals …… (continued)

- This will mean that the Tribunal is deprived of important evidence, since case law has rightly recognised that a person's psychiatric vulnerabilities care relevant to the assessment of credibility and can provide an explanation for inconsistencies (*AM (Afghanistan)* [2017] EWCA Civ 1123 at [21(d)]; *JL (medical reports-credibility) China* [2013] UKUT 145 (IAC) at [26]-[27]; and *MN and IXU* [2020] EWCA Civ 1746 at [125]-[128]).

- The upshot is that some vulnerable asylum-seekers will be wrongly disbelieved – for example, on the basis that their account is inconsistent, when in truth this is explained by their mental health condition.

- These concerns have been shared by organisations working in the sector: notable are the Public Law Project and JUSTICE's written evidence to Parliament, as well as JCWI's submission to the Joint Committee on Human Rights.

Clause 28: accelerated detained appeals – ultimately a question of culture

- In the end, what we will no doubt see in the new fast track system is the re-emergence of a culture in which:
    - Getting cases in and out of the system are the priority;
    - Principles of fairness and access to justice are seen as annoyances and obstacles to the pursuit of expedition and removal;
    - There is a heightened culture of disbelief in place of a culture of anxious scrutiny.
    - There is a presumption, across the board, that the cases within this system are doomed to fail.
- In short, the consequence of the accelerated detained appeal procedure is the creation of a system that is bound to result in serious miscarriages of justice, in which more people are wrongly refused asylum and returned to face persecution.

Challenging the new fast-track system

- As with the *Detention Action* case, carefully collated evidence of systemic unfairness will be crucial in any attack on the legality of the new, proposed detained fast track regime.

- As before, much will depend on the terms in which the Procedure Rules governing the new regime are framed – in particular, the time that is given to appellants between the refusal and the hearing of the appeal before the FTT, but also flexibility and discretion given to judges in respect of case management.

- However, as referred to earlier, the Rules will only tell part of the story – it is the evidence of appellants and practitioners, about how the system operates, that will help to frame any such challenges.

- Evidence in respect of access to adequate representation (and thus legal aid), the way in which the Tribunal deals with requests for particular cases to exit the accelerated detained process procedure, and how bail, adjournments, expert evidence, and vulnerable appellants are treated, will all be crucial in underpinning a viable challenge to this resurrection of the grossly unfair detained fast track regime.

Clause 29: removal of right of appeal from clearly unfounded claims

- Currently if an asylum claim or human rights claim is determined as being clearly unfounded and certified as such under section 94 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), the claimant is provided with an out-of-country right of appeal (as opposed to an in-country appeal right).

- This clause removes the out-of-country right of appeal from claims which are certifiable as clearly unfounded under section 94 of NIAA 2002.

- At first blush this might seem relatively unimportant, because in the experience of practitioners it is rare for a person to exercise their out-of-country right of appeal. Rather, the challenges to such decisions occur by way of claims for judicial review, with a view to quashing the certificate and thereby opening up a right to appeal in-country.

Clause 29: removal of right of appeal from clearly unfounded claims

- But Clause 29 does in fact deprive asylum-seekers of an important protection. At present, section 92(7) contains a deeming provision:

  > *"(7) Where a person brings or continues an appeal under section 82(1)(a) (refusal of protection claim) from outside the United Kingdom, for the purposes of considering whether the grounds of appeal are satisfied, the appeal is to be treated as if the person were not outside the United Kingdom."*

- Thus currently, if an asylum-seeker is removed, and then brings an out-of-country appeal against the certified refusal of their asylum claim, they are treated as if they were in the UK, even though they are not. This is an important safeguard, because ordinarily a person cannot pursue an asylum claim while they are outside the UK.
- This therefore means that an asylum-seeker whose asylum decision is certified under section 94 after the Bill passes, and who does not challenge the decision successfully at the time by judicial review, will have no remedy at all and no possibility of returning to the UK.

Possible avenues of challenges

- While successful out of country appeals on asylum or human rights grounds are rare, all practitioners know of examples of when they have succeeded.
- Against this backdrop, it would appear that judicial review of certification decisions are all the more crucial.
- There is quite a long line of unhelpful authority in this context, about why judicial review does constitute an effective and adequate remedy in the face of a clearly unfounded certification, even where Article 3 ECHR rights are being asserted.
- However, those decisions have largely taken place in the context of a certification regime in which an out of country appeal right is preserved. Those decisions will now have to be revisited in circumstances where Parliament has decided (or will shortly decide) that there will be no right of appeal whatsoever.

Introduction – Third Country Cases

- This talk aims to:
  - Set out the new regime for third country cases in the Nationality and Borders Bill
  - Consider the implications for our clients
  - Set out possible avenues for challenge

Context – what do the Third Country provisions do?

- Sets out the Home Secretary's intended regime to replace the Dublin III Regulation
- Fleshes out and deepens what has already been put in the Rules at paras 345A-D
- There are two key differences between the new draft legislation and the Dublin III Regulation:
  - The Dublin III Regulations set out a system for allocation of asylum seekers based on where they landed, but also on need, vulnerability and the imperative of family unity
  - Other countries were prepared to be involved in the Dublin III Regulation

Key Third Country changes

- Inadmissibility:
  - s80A of the Nationality, Immigration and Asylum Act 2002 requires asylum claims by EU nationals to be declared inadmissible (clause 15 of the Bill)
  - ss80B and 80C NIAA 2002 will allow the SSHD to declare an asylum claim inadmissible where a person has "*a connection*" with a safe third country (clause 16 of the Bill)
  - Designation of a claim as inadmissible will have certain consequences for support (s18 of the Bill)
- No more out of country appeals for: (i) clearly unfounded claims; and (ii) third country claims

Key Change 1: No asylum claims for citizens of EU Member States

- Currently all EU Member States are in the "First List" of Safe Third Countries in paragraph 2 of Schedule 3 to the 2004 Act
- That creates a conclusive presumption that a person *who is not a national of that state* will not be persecuted or subject to treatment contrary to Article 3 ECHR in that state, or refouled from it
- The new Act will:
  - Require the SSHD to declare inadmissible an asylum claim by an EU national, absent "*exceptional circumstances*"
  - Exceptional circumstances will include: (i) formal derogation from the ECHR; (ii) being subject to proceedings under Article 7 TEU

Key Change 2: A “connection” with a “safe third country”

- Introduces a discretion to declare “inadmissible” an asylum claim by a person with “a connection” to a “safe third country” (clause 16 of the Bill, creating s80B of the 2002 Act)

- “Inadmissible” means: (i) the claim cannot be considered under the Rules; and (ii) the claim has not been refused (hence no ROA)

- “Safe third country” means:
  - A person will not be at risk of persecution there
  - A person will not be removed from there: (i) in breach of the Refugee Convention; and (ii) to a place they would suffer treatment contrary to Article 3 ECHR, and
  - A person may apply to be recognised as a refugee there, and if recognised, receive protection in accordance with the Convention

- An application declare inadmissible may still be considered “*in exceptional circumstances*” or where provided for under the Immigration Rules

Key Change 2: A “connection” with a “safe third country”

- A “connection” to a safe third country means one of 5 conditions are met:
  - Condition 1: C has been recognised as a refugee in that state and can still access RC protection
  - Condition 2: C has (i) been granted protection in that state, and (ii) will not be sent from that state to another in breach of the RC/Article 3 ECHR, and (iii) can still access that protection
  - Condition 3: C has made an RC/protection claim in that state which: (i) has not been determined or (ii) has been refused
  - Condition 4: C (i) was “previously” present in and eligible to make an RC/protection claim in that state and (ii) it would have been “reasonable” for them to make it then and (iii) they failed to do so
  - Condition 5: It would have been reasonable for C to claim in another country in their “particular circumstances”

Condition 1: Recognised refugees

- This was a particular issue for the Home Office in third country litigation – se e.g. *R (SM & Ors) v Secretary of State for the Home Department (Dublin Regulation - Italy)* [2018] UKUT 429 (IAC) – SM was a recognised refugee

- Key issue will be: what does "*can still access*" and "*protection in accordance with the Refugee Convention*" mean in practice?

Condition 2: Those granted subsidiary protection

- Again a particular issue for the Home Office in the Italy litigation (see e.g. *R(Tabrizagh) v SSHD* [2014] EWHC 1914 (Admin)
- E.g. in Italy in 2012 over 60% of asylum seekers were being granted subsidiary protection, however that was little or no use in practice
- Again – "*can still access that protection*" – does that include e.g. protection that fails to meet the standard of the Reception Directives?

Condition 3: Those with applications pending/refused

- Claims from those previously refused has always been a particular issue for the Home Office – the classic case of "asylum shopping"
- However:
  - Very common for those who passed through EU Member States to have had an asylum claim formally registered before moving on
  - Not unusual for clients not to be aware they have formally claimed asylum
  - We know asylum seekers (particularly children/young adults) often do not make the decision as to where a claim will be brought (see e.g. *R (Q & Others) v SSHD* [2003] EWCA Civ 364)
  - What about e.g. people who were removed and ill-treated again?
  - What about places where everybody was refused?

Condition 4: Would have been "*reasonable*" to claim somewhere else previously

- What does "*previously*" mean – in principle very wide indeed – designed to catch those who have left Europe and returned?
- What does it mean that it would have been "*reasonable*" to claim elsewhere? Defining "*reasonable*" will be a key background
    - What about family consideration?
    - What about language considerations?
    - What about e.g. the fact that agents are often making the decisions?
    - What about e.g. countries with different interpretations of the Refugee Convention?

Condition 5: Reasonable to claim elsewhere in "particular circumstances"

- This is astonishingly broad – difficult to think of an asylum claim where it would not, in principle, have been reasonable to claim elsewhere

- Key will be interpretation of "reasonable" - that must mean that it would be unreasonable *not* to have claimed elsewhere

- Key will also be "*particular circumstances*". What should they include?
  - Age
  - Vulnerability
  - Agency
  - Nationality
  - Different approaches to Convention?
  - Compliance with Reception Directive?
  - Hostility to migrants?
  - Is protection illusory? (e.g. in Greece in 2008 UNHCR reported a success rate of 0.04% for asylum and 0.06% for humanitarian protection)

Potential avenues of challenge?

- EU nationals: "*exceptional circumstances*" may
- "A connection" with a safe third country:
  - Are the conditions met?
  - Defining the conditions
- A "safe third country" - no statutory presumption of e.g. compliance with Article 3 ECHR
- No presumption, pure discretion:
  - Difficult to see why factors relevant in DIII cases would not be relevant to the exercise of discretion, e.g. minority, family connection
- Human Rights Act 1998:
  - Challenges on the basis of e.g. Article 8 ECHR
  - Challenges on the basis of e.g. Article 3 ECHR

Key Change 3: No more third country FTT appeals

- It will no longer be possible to have an out of country appeal on the basis of a risk of a breach of human rights in the third country that has been certified as “clearly unfounded” (clause 29)

- It will not be possible to have an out of country appeal based on an allegation that C will be subject to onward removal in breach of the Refugee Convention or the ECHR from a safe third country (Schedule 4)

Priority removal notices, ouster of onward appeals and late disclosure

David Jones, Grace Capel, Eva Doerr
Garden Court Chambers

Part 1: Overview, issues and concerns

Priority Removal Notices - Background

- Addressed in Clauses 19-24 of the Bill. The object is stated to be to prevent people raising late and unmeritorious applications and appeals so as to frustrate removal
- Part of wider proposals to fast-track claims and appeals, and to create a one-stop process
- The Explanatory Notes (EN) highlights reduced rates of enforced returns since 2013 which it attributes largely to *repeated legal challenges impede the Home Office's ability to enforce immigration laws*
- It is asserted that in 2019, new claims, legal challenges or other issues were raised by 73% of people who had been detained within the UK following immigration offences which led to release from immigration detention in 94% of cases instead of removal from the UK
- The EN contends that on full evaluation *very few* of these claims amounted to a valid reason to remain in the UK
- For all issues raised during immigration detention in 2017 it is said 83% were ultimately unsuccessful

Priority Removal Notices – Who is affected?

- PRN's to be served to anyone who is liable for removal or deportation (Clause 19)
- Parameters of operation of the scheme is not yet defined
- Guidance will describe the factors determining who is to be issued with a PRN
- But it will include cases where a person has previously made a human rights or protection claim

Priority Removal Notices – Operation

- When issued the subject of a PRN will be required to (Clause 19) -
  (a) provide a statement, information and/or evidence within the time specified ('the PRN cut-off date'), or
  (b) their reasons for providing evidence after the date
- Any response must set out all of the reasons for wishing to enter or remain in the UK, any grounds on which they should be permitted to do so, and any grounds on which they should not be removed or required to leave the UK
- The PRN will remain in force until which ever is the later of the following (Clause 20) -
  1) 12 months after the cut-off date, or
  2) when the person becomes appeal rights exhausted

Priority Refusal Notices – Non-compliance and certification

- Material that is not provided in compliance with a PRN may be damaging to a claimant's credibility (Clause 21)
  1) mandatory for the Home Office and judges to interpret that person's credibility to be damaged and
  2) evidence given *minimal weight*
- Those consequences are avoidable only if there is a *good reason* for late submission (Clause 21)
- Where a protection or human rights claim is made after the cut off date but whilst the PRN is still in force the Secretary of State is empowered to certify any appeal right which arise subjecting them to expedited processes (Clause 22)
- An amendment to the NIAA 2002 directs that the Secretary of State must certify unless satisfied there are good reasons for the claim being raised beyond the cut off date (Clause 22)

Priority Removal Notices – Access to legal advice

- Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) 2012 is amended to enable recipients of a PRN to receive advice and assistance in the form of civil legal services (Clause 24)
- Some 7 hours of legal advice on PRN issues will be claimable
- The types of advice and assistance which may come into scope for recipients of a PRN includes advice on –

  a) the PRN
  b) the recipient's immigration status
  c) the lawfulness of their removal (to include advice on the NRM if appropriate)
  d) immigration detention

Priority Removal Notices – Expedited appeals I

- Clause 22 inserted section 82A into NIAA 2002 and provides new 'expedited appeal process'

- SSHD must certify a protection/ HR claim made after PRN cut off date but while PRN in force

- Exception: person had a 'good reason' to make a late claim
  - It is for the SSHD, not the Tribunal, to decide whether there are good reasons, subject only to judicial review
  - No detail is provided as to what may be considered good reasons for an application being presented late so as to avoid certification

Priority Removal Notices – Expedited appeals II

- Section 82A(3) specifies that where a certificate is issued any appeal will be to the Upper Tribunal and not the First-tier Tribunal → person will lose the benefit of an appeal from the First-tier Tribunal to the Upper Tribunal

- No procedural deadlines (unlike provisions on detained appeals), however section 82A(4) provides that Tribunal Procedure Rules must make provision to try and ensure that expedited appeals are brought and determined more quickly than an appeal under section 82(1) in the First-tier Tribunal → whether such appeals are procedurally unfair, will depend on how the Tribunal Procedure Rules made by virtue of this clause are cast

Priority Removal Notices – Expedited appeals III

- Cases can be taken out of the expedited process, however, section 82A(5) stating that the Tribunal Procedure Rules must allow for the Upper Tribunal to make such an order when it is 'the only way to secure that justice is done'
  - There is no guidance as to what serious interests of justice may justify taking a case out of the expedited appeal regime
  - In any event, this is not an adequate remedy for an unfair appeal procedure

Priority Removal Notices – Expedited appeals VI

- Where a person brings an expedited appeal under section 82A certain other appeals brought by that person are also to be subject to the expedited procedure as a ‘related appeal’ (Clause 23)
- Those other appeals include nationality deprivation, EEA & EUSS matters
- All of the appeals will then be consolidated before the Upper Tribunal

Priority Removal Notices – Ouster clause I

- See Adrian Berry's analysis *"Priority Removal Notices: The Return of the Ouster Clause in the Nationality and Borders Bill"* on cosmopolismigration.com here
- Section 13(8) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") sets out decisions excluded from right of appeal to Court of Appeal
- Clauses 22(2) and 23(9) NBB respectively insert sub-sections (bza) and (bzb) to section 13(8) TCEA 2007
- Excluded from right of appeal to Court of Appeal:
  - PRN expedited appeals under new section 82A NIAA 2002 – section 13(8)(bza)
  - Joined related appeals – section 13(8)(bzb)

Priority Removal Notices – Ouster clause II

- Impacted of expedited appeals process and ouster clause may be that those with PRN who make a protection/ human rights claim after PRN cut-off date:
    - Lose right of appeal to First-tier Tribunal; and
    - Have no onward appeal to Court of Appeal (and Supreme Court). Upper Tribunal hearing is final.
- Ouster clause inconsistent with the rule of law? See ***R (otao Privacy International) v Investigatory Powers Tribunal and others*** [2019] UKSC 22, especially Lord Carnwath at para 142.
- No other decision from which s 13(8) TCEA 2007 excludes onward appeals to Court of Appeal concerns such fundamental rights as international protection and human rights guaranteed by Refugee Convention and European Convention on Human Rights.

“Late” evidence – Overview

- New provisions concerning the submission of “late” evidence – cl. 19. 20, 27.
- “Evidence notice” requires applicants to submit all evidence in support of their protection or HR claim before a specified date (cl. 19);
- ”Late” evidence – evidence submitted after the date specified in the “evidence notice” or PRN (cl. 19).
- Requires the individual to show “good reason” for the late submission of evidence (cl.19(4)).
- Mandates Home Office decision-makers and judges to take account late submission of evidence as damaging to credibility (cl. 20 – amends s.8 of the 2004 Act).
- Mandates Home Office decision-makers and judges to ‘have regard to’ the principle that 'minimal weight’ should be given to late evidence (cl. 27).

Late evidence – Impact and concerns

- Leaves the Home Office to describe through Guidance the cases which will be subject to the PRN
- Timing of evidence notices/PRNs in the asylum process is unclear
- Extensive nature of the requirements in evidence notices/PRNs
- Timeframe for compliance unclear
- “Good reasons” exception left undefined
- Expedition procedure is unrelated to the merits of the claim and is simply based on whether it is made without good reason
- Inconsistent with established approach to evidence in refugee law
- Consequences raise potentially serious concerns for procedural fairness/right to an effective remedy
- Ouster is restricted to statutory appeals to senior courts. In practice, it will lead to judicial review claims being brought in the High Court
- Risk of exposing refugees to refoulement

Part 2: Suggestions to manage or challenge scheme

Meeting the challenges – Summary

- Highlights importance of early legal advice
- Challenge restrictive interpretations - JT (Cameroon) v Secretary of State for the Home Department [2008] EWCA Civ 878
- Medical evidence/scarring reports in some cases
- Evidence concerning particular difficulties faced by e.g. women, children, LGBT people, victims of torture/sexual violence
- Use of HO's own published policy documents
- Superfluous? – see s. 120 NIAA 2002, s.96 NIAA 2002, para. 353 IR

Meeting the challenges – Further comment I

- Contend for an approach consistent with *JT (Cameroon) v SSHD* [2008] EWCA Civ 878 with regard to the credibility provisions
- In *JT*, the Court apprehending that original section 8 provisions may offend the right to a fair hearing and the doctrine of separation of powers, as it could be seen as Parliament dictating to the Tribunal how it should carry out a judicial function read in a word (*potentially*) so as to entitle the Tribunal to determine for itself the weight given to delay when assessing credibility
- Apply a broad approach to the provision of *good reasons* delay. Consider –
  - difficulties in accessing legal advice
  - lack of understanding of the scheme
  - the emergence of new evidence
  - changes in the law
  - shame and fear of disclosure
  - the impact of trauma on disclosure

Meeting the challenges – Further comment II

- Available guidance offers a platform from which to contend for the exception of victims of modern slavery and other traumatised persons from certification, identification as such furnishing an explanation for delay
- The governments own statements cab be instructive in this regard –
  - The explanatory notes that accompany the Modern Slavery Act 2015 state (under the heading "Background")

    Victims are often unwilling to come forward to law enforcement or public protection agencies, not seeing themselves as victims, or fearing further reprisals from their abusers. In particular, there may be particular social and cultural barriers to men identifying themselves as victims. Victims may also not always be recognised as victims of modern slavery by those who come into contact with them
  - Whilst the government's own Equality Impact Assessment on the Bill acknowledged

    … that vulnerable people… might find it more difficult than others to disclose what has happened to them; to participate in proceedings; and to understand the consequences of non-compliance with legal requirements

Meeting the challenges – Further comment III

- If such approaches don't work, and the *good reasons* provisions are not sufficient to protect victims of trauma, the statutory scheme may be susceptible to challenge under the ECHR
- *V.C.L. and A.N.* (applications nos. 77587/12 and 74603/12) may be used for instance to contend the credibility provisions offend under Article 4 ECHR, or at least the facts of reluctance to self-identify etc., represent a good reason for delay or mean delay should not operate so as to damage credibility -

  > *The State cannot, … rely on any failings by a legal representative or indeed by the failure of a defendant – especially a minor defendant – to tell the police or his legal representative that he was a victim of trafficking. As the 2009 CPS guidance itself states, child victims of trafficking are a particularly vulnerable group who may not be aware that they have been trafficked, or who may be too afraid to disclose this information to the authorities […]. Consequently, they cannot be required to self-identify or be penalised for failing to do so.*

Meeting the challenges – Further comment IV

- Review the case history and preparation. If there have been omissions by previous reps these will need to be flagged the UT in *Onowu* [2016] UKUT 00185 (IAC) recognising –

  > *Particular care needs to taken in appeals concerning claims for asylum and humanitarian protection to ensure that appeals are not frustrated by a failure by a party's legal representatives to comply with time limits. The nature of the proceedings and identification of responsibility for a failure are matters to be considered at the third stage of the process [42]*

  [NB Lack of funds is not likely to be persuasive, nor is the fact a representative is overworked *(Onowu* [42-43], though it will undoubtedly be true]

- It may be necessary to raise applications for judicial review against certification in instances where the Home Office rejects the existence of good reasons as the UT's facility to transfer a matter back to the FTT to secure a just disposal will not cancel the certificate

[Re]-interpreting the Refugee Convention

Mark Symes, Peter Jorro, Zehrah Hasan
Garden Court Chambers

Clause 31 Refugee Convention: general

- Provides that following sections apply for purposes of the determination by any person, court or tribunal whether a person (referred to in those sections as an "asylum seeker") is a refugee within the meaning of Article 1(A)(2) of the Refugee Convention—
  - (a) section 32 (persecution);
  - (b) section 33 (well-founded fear);
  - (c) section 34 (reasons for persecution);
  - (d) section 35 (protection from persecution);
  - (e) section 36 (internal relocation).

- And that section 37 applies for the same purposes whether the provisions of the Refugee Convention do not apply to a person as a result of Article 1(F) of that Convention (disapplication of Convention to serious criminals etc.) and that section 38 applies for same the purposes whether Article 31(1) of the Refugee Convention (immunity from certain penalties) applies in relation to a person who is a refugee within the meaning of Article 1(A)(2) of the Refugee Convention

Clause 31 Refugee Convention: general, cont.

- Revokes the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (S.I. 2006/2525)
- New provisions only to apply only in relation to a determination relating to a claim for asylum where the claim was made on or after the day on which this section comes into force.
- Claim for asylum (as above) includes a claim, in any form or to any person, which falls to be determined as above – so can include any request for international protection as per Immigration Rules, para 327

Clause 11 - Compliance with the Refugee Convention

- Amendment added at beginning of Part 2 on ‘Asylum’ – see whether remains
- Nothing in this Part authorises policies or decisions which do not comply with the United Kingdom’s obligations under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees.
- Purpose to seek to prevent new sections (above and below) from detracting from Refugee protection in UK

Clauses 32, 34, 35 – Article 1(A)(s): persecution

- Effectively repeats the provisions of the revoked Qualification Regulations 2006, regs 3, 4, 5 and 6 re 'actors of persecution', 'actors of protection', 'act of persecution' and 'reasons for persecution' respectively, with some minor differences

- The Qualification Regulations were themselves brought into force to transpose, alongside changes to immigration rules, the provisions of the EU Qualification Directive (Council Directive 2004/83/EC of 29 April 2004) providing for minimum standards inter alia for refugee qualification

- Clause 32 now refers to 'the persecution' instead of to 'act of persecution' – otherwise maintains that persecution can be committed by the State, any party or organisation controlling the State or a substantial part of the territory of the State or by any non-State actor, if it can be demonstrated that the above actors including any international organisation, are unable or unwilling to provide reasonable (new) protection against persecution.

Clauses 32, 34, 35 persecution cont.

- Persecution must be sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Human Rights 15 Convention, or an accumulation of various measures, including a violation of a human right, which is sufficiently severe as to affect an individual in a similar manner

- The persecution *may for example* take the form of an act (singular) of physical or mental violence including sexual violence – though see MI (Pakistan) v SSHD [2014] EWCA Civ 826

- legal, administrative, police or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner; prosecution or punishment which is disproportionate or discriminatory; denial of judicial redress resulting in a disproportionate or discriminatory punishment
- As a specific example - prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts as described in Article 1(F) of the Refugee Convention.

Clauses 32, 34, 35 (cont.) reasons for persecution

- Clause 34: reasons for persecution – race, religion, nationality and political opinions same as QRs reg 6 – religion can include atheistic beliefs; participation in or abstention from worship; forms of forms of personal or communal conduct based on or mandated by any religious belief
- Concept of nationality 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
- 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

- More prescriptive re PSG – must meet both of following conditions: (1) 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 AND (2) the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

Clauses 32, 34, 35 reasons for persecution cont.

- In K v SSHD [2006] UKHL 46 Lord Bingham noted that the requirement (in the then proposed Qualification Directive) that the 'protected characteristics' requirement and the 'social perception' requirement be cumulative, rather than alternative tests, 'propounds a test more stringent than is warranted by international authority'. Lord Hope held that it was not necessary for a PSG to be recognised as such by the society of which it was a part so long as membership of the group could be identified objectively as the reason for the persecution. Lord Brown commented that any Regulations made under the Directive would have to be interpreted consistently with the UNHCR's definition of particular social group in which 'protected characteristics' and 'social perception' were alternative and not cumulative requirements.

- Against the weight of this authority, however, the Tribunal interpreted the QR reg 6 as imposing those requirements cumulatively rather than as alternatives in SB (Moldova) CG [2008] UKAIT 00002, followed by AZ (Thailand) CG [2010] UKUT 118.

Clauses 32, 34, 35 reasons for persecution cont.

- A PSG 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.

Clauses 32, 34, 35 – protection from persecution

- Clause 35 (as per QR reg 4) provides that protection from persecution can be provided by the State or any party or organisation, including any international organisation, controlling the State or a substantial part of its territory

- An asylum seeker is to be taken to be able to avail themselves of protection from persecution if— (a) the State, party or organisation mentioned above takes reasonable steps to prevent the persecution by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution, and (b) the asylum seeker is able to access the protection.

- In effect this promotes the test and approach to sufficiency of protection in Horvath v SSHD [2001] 1 AC 489

Clause 36: internal relocation

- Replicates in effect current immigration rule 339O which in turn transposes QD 2004, art 8
- An asylum seeker is not to be taken to be a refugee if (a) they would not have a well-founded fear of being persecuted in a part of their country of nationality or of their former habitual residence, and (b) they can reasonably be expected to travel to and remain in that part of the country.
- Reasonableness test comes down from Robinson [1998] QB 929 – under 36(2) in considering whether an asylum seeker can reasonably be expected to travel to and remain in a part of a country, a decision-maker (a) must have regard to (i) the general circumstances prevailing in that part of the country and (ii) the personal circumstances of the asylum seeker; (b) must disregard any technical obstacles relating to travel to that part of that country
- (b) as per QD art 8(3) but with *must* disregard rather than *may* – so removal problems to cut off parts of country must be disregarded!

Clause 37: disapplication of Convention in case of serious crime

- Partly replicates Qualification Regs 2006 reg 7(2)
- Committing a crime for the purposes of Article 1(F)(a) or (b) includes instigating or otherwise participating in the commission of the crimes specified in those provisions.
- Reference to a serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective.
- Reference to a crime being committed by a person outside the country of refuge prior to their admission to that country as a refugee includes a crime committed by that person at any time up to and including the day on which they are issued with a relevant biometric immigration document by the Secretary of State

Clause 39 - Article 33(2): particularly serious crime

- Amends NIAA 2002, s 72 by removing the need for Tribunal or SIAC to consider whether a person is 'presumed' to have been convicted by a final judgment of a particularly serious crime where he has been so convicted and sentenced to at least 12 months imprisonment – reduced from 2 years
- So only issue for them to consider is whether such a person, who has been so convicted and sentenced, is to be 'presumed' to constitute a danger to the community of the UK
- Despite EN Serbia v SSHD [2009] EWCA Civ 630, and despite there being no valid order (setting out offences) NIAA 2002, s 72(4) is not repealed

- NIAA 2002, s 72(1) is amended to clarify that what is in issue is exclusion from 'prohibition of expulsion or return' – rather than exclusion from 'protection': see e.g. Essa [2018] UKUT 244 and Dang [2013] UKUT 43 and RY (Sri Lanka) v SSHD [2016] EWCA Civ 81
- Amendments – and so especially relevant to reduction of 'threshold' sentence from 2 years to 12 months – only apply to person convicted on or after the date in which clause 39 comes into force

The Standard of Proof – journey to the current position

R v Home Secretary ex parte Sivakumaran [1988] AC 958 – Lord Keith:

Relying on Lord Diplock in *Reg. v. Governor of Pentonville Prison Ex parte Fernandez* [1971] 1 WLR 987:

> *[B]earing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or the other … A lesser degree of likelihood is, in my view, sufficient … "A reasonable chance", "substantial grounds for thinking", "a serious possibility" – I see no significant difference between these various ways of describing the degree of likelihood…*

Lord Keith summarised this as a 'reasonable degree of likelihood'

The Standard of Proof – journey to the current position

Kaja (Political asylum; standard of proof) (Zaire) [1994] UKIAT 11038:

> *To adopt the two stage test is to make a serious inroad into the focus on the risk or reasonable degree of likelihood which lies at the heart of Sivakumaran. As we were reminded at the hearing and as is well established the "proof" of facts on which an asylum plea is founded is notoriously difficult. In many cases the evidence will be the applicant's own story supported in some instances by reports of various organisations such as Amnesty International. There is therefore the probability of a greater than normal uncertainty as to the establishment of historical facts. While the duty of the adjudicator and the Secretary of State is to evaluate the evidence, that evaluation must be undertaken bearing in mind the stress generated by the nature of the claim and possible consequences if refused, including the highly formalistic atmosphere of interview or court. This does not mean that there should be more ready acceptance of fact as established as more likely than not to have occurred,* ***but a more positive role for uncertainty****. [§27]*

The Standard of Proof – journey to the current position

Karanakaran v SSHD [2000] EWCA Civ 11:

> *The law in this respect is now authoritatively settled in this country by the decision of the House of Lords in Sivakumaran [1988] 1 AC 958. In that case it was held that when deciding whether an applicant's fear of persecution was well-founded it was sufficient for a decision-maker to be satisfied that there was a reasonable degree of likelihood that the applicant would be persecuted for a Convention reason if returned to his own country (see Lord Keith at p 994F and Lord Goff of Chieveley at p 1000F).* [§44]

The Standard of Proof – journey to the current position

Karanakaran v SSHD [2000] EWCA Civ 11:

> *It appears, however, that whatever the majority of the tribunal actually decided in Kaja, their decision has been generally interpreted as meaning that decision-makers are at liberty to substitute a lower standard of proof than that conventionally used in civil litigation when judges make findings about past and present facts. In Horvath [1999] INLR 7, a case in which the correctness of the decision in Kaja was challenged by the Secretary of State before the Immigration Appeal Tribunal (but not subsequently in this court), the tribunal said that whatever the majority may have said in their determination in Kaja, "everyone since that case thinks" [see p 20B] that they decided that an historical event or fact is proved by an asylum-seeker when he or she demonstrates that there is a reasonable likelihood that it occurred.* [§57]

> *For the reasons much more fully explained in the Australian cases, when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur. [§103]*

The Standard of Proof – journey to the current position

Assessing 'reasonable degree of likelihood':

- *Karanakaran v SSHD* [2000] INLR 122: 'positive role for uncertainty'
- *R (Sivakumar) v SSHD* [2003] UKHL 14: a 'global' assessment of credibility is required
- *Horvath* [1999] INLR 7; *MM (DRC - Plausibility) Democratic Republic of Congo* [2005] UKIAT 00019: the plausibility of the Appellant's account must be considered in conjunction with the background evidence, not in a vacuum
- *Ivanov* (12583: 10 October 1996); *Kondo* (10413: 12 November 1993)); and *Y v SSHD* [2006] EWCA Civ 1223 at §27: a claim can be credible even if it is deemed bizarre or vague "from the safety of the Strand", or would be implausible if it had happened in the UK
- *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49: the significance of lies will vary from case to case – is it of no great consequence or is it of great significance? Be alive to the danger of dismissing an appeal merely because A has lied

The Standard of Proof – journey to the current position

Benefit of the doubt:

- *N v Sweden* (23505/09) 20 July 2010
- UNHCR Note on the Burden and Standard of Proof in Refugee Claims 1998

> *"The term 'benefit of the doubt' is used in the context of standard of proof relating to the factual assertions made by the applicant. Given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where the adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the benefit of the doubt."* [§12]

- *KS (benefit of the doubt)* [2014] UKUT 552 (IAC)

The Standard of Proof – journey to the current position

Asylum Policy Instruction, 'Assessing credibility and refugee status', Version 9.0, 6 January 2015:

- Level of proof is a relatively low one
- Caseworker does not need to be ‘certain’ ’convinced’ or even ‘satisfied’ of the truth of the account [p.12]
- Rejection of one fact does not automatically lead to rejection of other material facts [p.12]
- A true account is not always detailed or consistent in every detail [p.13]
- Absence of detail cannot be held against the claimant if little or no opportunity was given at interview to provide it or to clarify information which goes to the core of the claim [p.14]
- Take care of inconsistencies when evidence provided through interpreters [p.15]
- The greater the correlation between aspects of the account and external evidence, the greater the weight caseworkers should attribute to those aspects [p.15]
- Caseworkers must not based implausibility findings on their own assumptions, conjecture, or speculative ideas of what ought to have happened what they might think “someone genuinely fleeing for their life” should have done, what ought to have been possible or not possible, or how “a genuine refugee” would have behaved, or how they think a third party would have acted in the circumstances [p.17]

The Standard of Proof – journey to the current position

Children's asylum claims, Version 4.0, 31 December 2020

- It is not appropriate to draw an adverse credibility inference from omissions in the child's knowledge or account if it is likely that their age or maturity is a factor or if their own ability to construct an account or similar reasons lead to those omissions. [p.53]

- More weight may need to be given to objective evidence of risk than to the child's state of mind or the oral or written evidence they are able to provide. [p.51]

- A child may be less able to produce objective evidence to corroborate their claim, and may in fact have very limited life experience. Decision makers must also be aware that a child may find it difficult to describe details beyond their direct experience… [p.52]

The Standard of Proof – journey to the current position

Reflections from practice – how is the standard of proof currently applied in the FtT?

- No positive role for uncertainty
- Conjecture and assumptions relied upon heavily
- Judges needing to be 'convinced' of the veracity of the A's account
- Global assessment not taken, without considering the A's account in conjunction with the background evidence
- Factors such as age, physical and mental health, emotional trauma, lack of education, feelings of shame, painful memories etc. not taken into account in considering consistency
- Focus on what is *not* there, rather than what *is* there in terms of documentary evidence – despite acknowledged difficulties in the case law re asylum seekers and proof

Clause 33: Well founded fear

- Dramatic change to determination of historical facts
- Differentiation between standard of proof for assessing past events and future risks
- More precisely balance of probabilities will be basis for (Cl 33(2))

    - "Fear" (cross-refers to "AITCA 2004" "section 8" factors) (Cl 33(2)(b))

    - Convention reason (Cl 33(2)(a))

Clause 33: The text 1

- Cl 33(2)

(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).)

Clause 33: The text 2

- Cl 33(4)-(5)

(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 35.

(5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 36 (internal relocation).

Reasonable degree of likelihood

- Reserved for determining

  - Persecution (Cl 33(4)(a))

  - State protection (Cl 33(4)(b))

  - Internal relocation (Cl 33(5))

Clause 33 & refugee status determination

- An unhappy development – the low standard of proof has important rationales

  - Inherent problems of establishing asylum claim: difficulties in proving one's case due to inability to carry documents, uncertainties re events abroad, fallibility of memory, multiple interviews

  - Relative gravity: getting the decision wrong could lead to death/persecution

  - Holistic approach to status determination

Clause 33 & refugee status determination

- Subjective fear a poor benchmark: long discredited (test should be objective expectations rather than presumptions based on how someone might react if fearful, cf. the foolhardy or brave, children and those with mental health issues) (*Assuming* (11530))

> "[W]e understand "fear" in the context of an asylum claim to be nothing more nor less than a belief in that which the appellant states is likely to happen if he returns to his country of origin … one should not approach the issue on the basis of a need to assess whether a person is "afraid" in the sense of being fearful rather than courageous … although logically the establishment of the fear may precede any consideration of whether it is well-founded fear, establishing that it is well-founded will almost always show the existence of fear."

Issues in interpreting Cl 33

- Is it really about historical facts? Focusses on the (possibly) narrower question of "*fear*" as conceived by s8 AITCA 2004 (i.e. failure to claim asylum in safe third country, obstructive behaviour)

- Some questions involve fact-finding but are hard to link to "fear" however broadly that might be defined – availability of internal relocation, existence of job opportunities or family support, involves fact-finding before one reaches the assessment of reasonableness

- Why is there no mention of Humanitarian Protection? HP and refugee claims have tended to "*stand and fall*" together since HP introduced in 2006: but Cl 33 is in the section of the Bill which interprets *Refugee Convention* protection

Differential treatment of asylum seekers

Nicola Braganza QC and Bojana Asanovic,
Garden Court Chambers

Outline

- Clause 11 - what does it say?
- Clause 11 and the Refugee Convention
- Clause 11 and the ECHR Articles 3, 8 & 14

Clause 11 - Groups 1 & 2

(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.

Clause 11 – good cause

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.

Clause 11 - '*Examples*' of Differential treatment

(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**.

11 Differential treatment of refugees

(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 s33 of that Act);"refugee" same meaning as in the Refugee Convention.

Clause 11 – Explanatory Notes

‘Overview’

- Power to treat refugees differently according to criteria under Article 31(1) of the Refugee Convention (Para 142/144)
- Interpretation as per Clause 34
- Article 31(1): 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.

‘Purpose’

- *‘to discourage asylum seekers from travelling to the UK other than via safe and legal routes’*
- *‘Aims to influence the choices that migrants may make when leaving countries of origin’*
- *‘Encouraging individuals to seek asylum in the first safe country they reach’*
- Repeated policy statements that people should claim asylum in the first safe country they reach.
- *“intention is to grant Group 2 refugees a precarious “temporary protection status”, with no possibility of settlement for at least ten years”*

Clause 11 – Equality Impact Assessment

- '*Live document*' - Assessment of polices delivered through NBB, 16/9/21
- Section 149 Public Sector Equality Duty Equality Act 2010
- Considering the protected characteristics outlined in the Equality Act 2010, also '*considered vulnerability, as recommended in the Windrush Lessons Learned Review*'
- Section 29 of EA 2010 (provision of services) - a service-provider must not discriminate
- Ltd exceptions - immigration (Schedule 3 EA 2010) - age, disability, race (nationality, ethnic or national origins) – not colour - religion & belief.

- "*We will enhance our reputation as Global Britain, fixing historical anomalies in British nationality law and strengthening our safe and legal routes, offering a safe haven for refugees fleeing persecution, supporting them to integrate and become self-sufficient in the UK.*"

- Repeated references to *"there is a risk our policies could indirectly disadvantage protected groups"*

Clause 11 –Response

- Lords carried the amendment to remove clause 11, but Commons disagreed:

  Because the Commons consider that it should be possible to accord different treatment to refugees depending on whether they have complied with the criteria set out in clause 11.
- UNHCR Observations on the NBB, Bill 141, 2021-22 , 10/21
- *"UNHCR must therefore regretfully reiterate its considered view that the Bill is fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention and with the country's longstanding role as a global champion for the refugee cause."*
- *"UNHCR reiterates that the attempt to create two different classes of recognised refugees is inconsistent with the Refugee Convention and has no basis in international law"*
- *"There is nothing in the Refugee Convention that defines a refugee or their entitlements under it according to their route of travel, choice of country of asylum, or the timing of their asylum claim"*

Clause 36 Article 31(1): immunity from penalties (1)

(1) A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.
(2) A refugee is not to be taken to have presented themselves without delay to the authorities unless—
(a) in the case of a person who became a refugee while they were outside the United Kingdom, they made a claim for asylum as soon as reasonably practicable after their arrival in the United Kingdom;
(b) in the case of a person who became a refugee while they were in the United Kingdom—
(i) if their presence in the United Kingdom was lawful at that time, they made a claim for asylum before the time when their presence in the United Kingdom became unlawful;
(ii) if their presence in the United Kingdom was unlawful at that time, they made a claim for asylum as soon as reasonably practicable after they became aware of their need for protection under the Refugee Convention.

Clause 36 Article 31(1): immunity from penalties (2)

(3) For the purposes of subsection (2)(b), a person's presence in the United Kingdom is unlawful if they require leave to enter or remain and do not have it.
(4) A penalty is not to be taken as having been imposed on account of a refugee's illegal entry or presence in the United Kingdom where the penalty relates to anything done by the refugee in the course of an attempt to leave the United Kingdom.
(5) In section 31 of the Immigration and Asylum Act 1999 (defences based on Art.31(1) of the Refugee Convention)—
(a) in subsection (2), for "have expected to be given" substitute "be expected to have sought";
(b) after subsection (4) insert—
"(4A) But this section does not apply to an offence committed by a refugee in the course of an attempt to leave the United Kingdom."
(6) In this section—
"claim for asylum" means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention for the claimant
to be removed from, or required to leave, the United Kingdom;
"country" includes any territory;
"refugee" has the same meaning as in the Refugee Convention.

Immigration rules

- §345A – nor substantively considered includes if
  (iii) the applicant could enjoy sufficient protection in a safe third country, including benefiting from the principle of non-refoulement because:
    (a) they have already made an application for protection to that country; or
    (b) they could have made an application for protection to that country but did not do so and there were no exceptional circumstances preventing such an application being made, or
    (c) they have a connection to that country, such that it would be reasonable for them to go there to obtain protection.
- 345C – "will attempt" to remove to country with connection or any other safe country which will accept them
- 345D. When an application has been treated as inadmissible and either
  (i) removal to a safe third country within a reasonable period of time is unlikely; or
  (ii) upon consideration of a claimant's particular circumstances the Secretary of State determines that removal to a safe third country is inappropriate

the Secretary of State will admit the applicant for consideration of the claim in the UK.

- HC118 A person who made a HR claim which is declared inadmissible under part 11, cannot meet the requirement for PL 5.1(b) – cannot make an admissible HR claim
- HC118 If present or connected to a safe third country rules deem them as no having very significant obstacles to integration

Practical consequence

Process:

1) Admissibility decision on “could have claimed” or have a connection (JR)
2) Attempt to remove
3) If removal within reasonable time unlikely or determined inappropriate – admit for consideration
4) Determine whether a refugee (appeal)
5) Determine whether Group 1 or 2 (JR)

Guidance Inadmissibility: Safe third country cases v 5, 31 December 2020 here

- an initial decision whether “appears to meet” §345 – referral to TCU
- issue a “notice of intent” (informing the applicant that SSHD is making enquiries)
- decision “in principle” after enquiries and thorough review
- If met – attempt must be made to secure agreement for return – if agreement secured then formal decision on inadmissibility /?appropriate/
- whether a person has travelled through and could have sought protection in a particular country – balance of probability but this decision and evidence is “wholly separate” from whether country safe
- In the absence of agreement after 6 months will admit the claim unless “removal is still a reasonable prospect and there are clear mitigating factors to justify the extension”

Refugee Convention non-refoulment

- Non- Refoulment Article 33(1) Refugee Convention

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

- Applies to all asylum seekers (*ST (Eritrea) v Secretary of State for the Home Department* [2012] 2 AC 135)
- Must not remove without considering whether they are refugees
- Includes indirect refoulment – to a third country where there is a risk of refoulment- R v SSHD, ex parte Yogathas [2003] 1 AC 920
- Article 2 / 3 /4; see ECHR *Ilias and Ahmed v Hungary* (47287/15) Grand Chamber
- *M.S.S. v. Belgium and Greece* (30696/09) [2011] ECHR 108 *"…the States must make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention."* §342
- In substance must examine whether the receiving country will grant the person access to a fair and efficient procedure for determination of refugee status and international protection needs

Refugee Convention – Article 31 (1)

Art 31(1) Refugee Convention

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Refugee Convention Article 31 (2)- *Adimi*

R. v. Uxbridge Magistrates' Court and Another, ex. parte Adimi [1999] Imm AR 560

- Applies to all asylum seekers
- Visa regime + carrier liability made it "well neigh impossible" for refugees to come / legally
- Purpose "provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law"
- Element of choice where to claim / rational basis for choice
- "the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing".
- Simon Brown LJ rejected the argument that some sort of 'voluntary exonerating act' was required - claiming immediately on arrival

Refugee Convention Article 31 (3) - concepts

- "Coming directly" + "without delay"
  - drafting history and context show intent that failure to comply with administrative procedures of signatories was no barrier to status;
  - the phrase was intended to expand the original expression of this provision which did not contain it so as to exclude persons who were in fact granted protection moving to another country (France / Belgium)
  - "covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there" (UNHCR Revised Guidelines Applicable Criteria and Standards relating to the Detention of Asylum Seekers, Geneva, February 1999 – generalised statement of construction of A31).
  - 'given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression "without delay"' (as above)
  - Makes sense in terms of international system being unworkable if there is no sharing of responsibility; globalisation; multitude of potential reasons for not claiming elsewhere

"Good Cause" – fleeing persecution is a good cause for unlawful entry (coming directly)

Rights of refugees

- Rights of refugees (status in law)
  - not to be expelled, except under strictly defined conditions (Article 32);
  - not to be punished for illegal entry into the territory of a contracting State (Article 31);
  - to work (Articles 17 to 19);
  - to housing (Article 21);
  - to education (Article 22);
  - to public relief and assistance (Article 23);
  - to freedom of religion (Article 4);
  - to access the courts (Article 16);
  - to freedom of movement within the territory (Article 26); and
  - to be issued identity and travel documents (Articles 27 and 28)
  - not to be subject to duties, levies and charges not applied to nationals (Article 29)
  - Assimilation and naturalisation (Art 34)

  - Family reunion - Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, General Assembly, 25 July 1951

Refugee Convention Article 31 (4) – Penalties?

- The offences cl. 38– A. "stopped" + could reasonably be expected to have "sought" protection; B. failed to make a claim before the expiry of leave (*if sur place*); or C. in transit in the UK en route to claim elsewhere (cf. *Asfaw* [2008] 1 AC 1061); arriving without visa
- Penalties for reason of illegal entry
    - *B010 v Canada* (Citizenship and Immigration), 2015 SCC 58, [2015] 3 S.C.R. 704; MacLachlan CJ §57 '[o]bstructed or delayed access to the refugee process is a "penalty" within the meaning of Article 31(1) of the Refugee Convention'
    - Principled approach to denial of economic and social rights- if NPRF beyond the irreducible minimum in conjunction with ECHR/ICCPR, Art 23
    - Art 21 'as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'
    - If further applications are paid - potentially also charges Art 29
    - Art 21 public housing 'as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'
    - If further applications are paid - potentially also charges Art 29
    - Instability of status - effects on impact on health / integration Art 34
    - Explanatory notes – expectation to leave during 10 years as soon as don't need protection or can be removed -
- family unity is an "essential right" *Tanda-Muzinga v France* (App no 2260/10, 10 July 2014) at [75]; *Mugenzi v France* (App no 52701/09, 10 July 2014) at [54].

ECHR

Article 3 – Prohibition against degrading treatment

East African Asians v. United Kingdom 3 EHRR 76 15/12/73 - Husbands of UK citizens, UK resident, denied entry under Commonwealth Immigrants Act of 1962 (and Commonwealth Immigrants Act of 1968 & Immigration Appeals Act of 1969). Subjected to immigration control citizens of the UK & colonies of East Africa of Asian origin. The Act exempted from immigration control wives of Commonwealth citizen resident in UK, but no similar exemption for husbands –

To publicly single out a group of persons for differential treatment on the basis of race may constitute a **special form of affront to human dignity** and might therefore be capable of constituting degrading treatment contrary to Article 3.

Art 14 - Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in the Convention **shall be secured without discrimination** on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth **or other status**.

ECHR– Article 8 and 14

Article 8 –

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

Art 8 + 14

R (Stott) v Secretary of State for Justice [2018] UKSC 59, [2020] AC 51, at [8]:

1 – Does it fall with the ambit of a Convention right

2 – Is the difference in treatment on the ground of one of the characteristics listed in art 14 or "other status".

3 – C and the person who has been treated differently must be in analogous situations

4 - Objective justification for the different treatment will be lacking

Is Article 8 engaged? Detriment?

- Extent of Leave: Refugees 5 years <-> Temporary protection status, 30 months, reassessed, 10 yr route to settlement, no automatic right to settle

- Family reunion rights restricted
- *"the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee" , Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951*

- No recourse to public funds, except if facing destitution – falling on adults and children
- Barred from Universal Credit, Housing Benefit, Child Benefit, Working Tax Credit, Disability Allowance or Income-Based Job Seekers' Allowance, Free School meals, state funded Child Care
- see *ST (a child, by his Litigation Friend VW) & VW v SSHD* [2021] EWHC 1085 - Claim by child & mother, NRPF found to have effect of driving some families into destitution & breached HO's duty to safeguard child welfare under s55 Borders, Citizenship and Immigration Act 2009 – "have regard to the need to safeguard and promote the welfare of children" in matters involving immigration, asylum or nationality

Ambit – of engaging private and family life

- What does the 2 tier system mean for individuals and their families:

⇒ Proactively impedes integration and naturalisation, rather than facilitating (Art 34)
⇒ Ensures precarious status as a barrier to integration
⇒ Barrier to employment, housing, accessing shelters for victims of domestic violence, free school meals
⇒ Creates stigma, affecting homes, families, livelihoods
⇒ Extends forced separation on families
⇒ Exacerbates trauma, treats refugees as unworthy – brutal assault on moral integrity and dignity

Niemietz v Germany (App. No. 13710/88,16 December 1992) - right to establish / develop relationships
Maslov v Austria (2008) 45 EHRR 20 – develop relationships with other human beings and the outside world
Hode and Abdi v UK (App. No. 22341/09, 6 November 2012) - home and family life
Hoti v Croatia (App. No. 63311/14, 26 April 2018) 'individual's social identity'. 'totality of social ties between a migrant and the community in which he or she lives'

Which groups will be hardest hit?

- Those undertaking indirect journeys to the UK - most refugees
- Those delaying in their disclosure for the well known myriad of reasons
- Those more impacted by restrictions on leave/ family reunion/ NRPF
  - Victims of torture
  - Women and girls - less likely to enjoy the socio-economic conditions/ political/civil support in country of origin
  - Victims of gender related persecution
  - Victims of trafficking / at risk of being trafficked.
  - People with mental health issues and disabilities
  - LGBTQI+ (HO Policy–API on Sexual Orientation; A, *B, and C v. Staatssecretaris van Veiligheid en Justitie* joined Cases C-148/13 to C150/13, (2 December 2014)) Not declaring sexual orientation on the first occasion should not lead to adverse credibility
  - Children - including within the family

=> Essentially, **those most vulnerable** will be affected in the way they present, in the uncertainty they're left with and in the restrictions imposed on them.

Other status and Less favourable treatment

Other status? Refugees arriving the UK unlawfully, those delay , those not by direct route

R (Stott) v SSJ [2015] AC 51, para 81 – apply a broad approach
Hode and Abdi
The fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an "other status" for the purposes of Article 14 [para 47]

Less favourable treatment ?

R (SC) v Secretary of State for Work and Pensions [2019] 1 WLR 5687, para 65
"may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group"
See also, *Horvath v Hungary* (App. No. 11146/11, 29 January 2013), para 105.

The Essential Question:
Can the difference in treatment withstand scrutiny?

- Is the disproportionate impact of the measure objectively justified?
- Plainly not - “coming directly” requirement, the temporary protection regime is contrary to Article 31 as are other restrictions contrary to the Refugee Convention
- Even with the margin of appreciation afforded to the State, how can a regime be justified which indirectly penalised unauthorised arrivals in a way that is proscribed by the Refugee Convention.
- Refugees are entitled to non-discrimination - not being treated less favourably than those refugees travelling directly, claiming without delay and lawful arrival.

Conclusion

So does this 2 tier system withstand scrutiny?

It doesn't even start to.

SIAC: Expanded review jurisdiction, & detention powers in terrorism cases

Amanda Weston QC, Ed Grieves & David Sellwood
Garden Court Chambers

#NABBConference

29 March 2022

@gardencourtlaw

Introduction

- Brief overview of two potential changes:
  - (1) Extension of SIAC's judicial review jurisdiction (Clause 82); and
  - (2) Extension of counter terrorism questioning powers (Clause 83).
- Amendments, if (when) passed, increase scope for use of secret evidence & hearings in SIAC, & detention of those suspected of being involved in terrorism
- Part of wider trend focusing on judicial review principles in SIAC?

Clause 82, proposed text

"2F Jurisdiction: review of certain immigration decisions

(1) Subsection (2) applies in relation to ***any decision*** *of the Secretary of State* ***which—***
(a) relates to a person's entitlement to enter, reside in or remain in the United Kingdom, or to a person's removal from the United Kingdom*,*
(b) is not subject—
(i) to a right of appeal, or
(ii) to a right under a provision other than subsection (2) to apply to the Special Immigration Appeals Commission for the decision to be set aside, and
(c) is certified by the Secretary of State acting in person as a decision that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public—
(i) in the interests of national security,
(ii) in the interests of the relationship between the United Kingdom and another country, or
(iii) otherwise in the public interest."

...

Clause 82, proposed text continued

...
(2) The person to whom the decision relates may apply to the Special Immigration Appeals Commission to set aside the decision.

(3) In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.

(4) If the Commission decides that the decision should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings."
...

Clause 82, expanded review jurisdiction

Motive & scope:

- Amendment intends to close 'SIAC gap'
- Potentially *very* broad in scope, not just decisions made under the Immigration Acts (compare with Lord Chancellor's Direction Regarding the Transfer of Immigration and Asylum Judicial Review Cases to the UT (IAC)).
- But in *practice*, how frequently is it likely to be used?
- Part of a wider focus on JR principles within SIAC?

Clause 83, counter terrorism questioning

83 Counter-terrorism questioning of detained entrants away from place of arrival

Schedule 7 to the Terrorism Act 2000 (port and border controls) is amended as follows.

In paragraph 1(2) (definitions), in the definition of "ship", after "hovercraft" 5 insert "and any floating vessel or structure".

In paragraph 2 (power to question person about involvement in terrorism in port or border area or on ship or aircraft), after sub-paragraph (3) insert—

"(3A) This paragraph also applies to a person if—

(a) the person is—

(i) being detained under a provision of the Immigration Acts, or

(ii) in custody having been arrested under paragraph 17(1) of Schedule 2 to the Immigration Act 1971,

(b) the period of 5 days beginning with the day after the day on which the person was apprehended has not yet expired, and

(c) the examining officer believes that—

(i) the person arrived in the United Kingdom by sea from a place outside the United Kingdom, and

(ii) the person was apprehended within 24 hours of the 20 person's arrival on land.

Clause 83, counter terrorism questioning

...
(3B) For the purposes of sub-paragraph (3A)(b) and (c), a person is "apprehended"—
(a) in a case within sub-paragraph (3A)(a)(i) where the person is arrested (and not released) before being detained as 25 mentioned in that provision, when the person is arrested;
(b) in any other case within sub-paragraph (3A)(a)(i), when the person is first detained as mentioned in that provision;
(c) in a case within sub-paragraph (3A)(a)(ii), when the person is arrested as mentioned in that provision."

Clause 83, counter terrorism questioning

Motive & scope:

- Motive is clear: increase the locations & circumstances where counter terrorism questioning can take place
- What is the amendment likely to bring in practice?
  - Focus on individuals arriving by irregular sea routes?
  - Likely scope of increased powers? Between 2010 & 2019, 420,000 people stopped under Schedule 7 of the Terrorism Act 2000…

Thank you

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw