Nationality and Borders Bill

Briefing for House of Lords Second Reading

December 2021

Introduction

The Helen Bamber Foundation (HBF) is a specialist clinical and human rights charity that works with survivors of trafficking, torture and other forms of extreme human cruelty and believes that all survivors should have safety, freedom and power. Our work alongside survivors shows us that, with early and appropriate care and support, survivors build the strength to move on with their lives (or strength to fly). Our multidisciplinary and clinical team provides a bespoke Model of Integrated Care for survivors which includes medico-legal documentation of physical and psychological injuries; specialist programmes of therapeutic care; a medical advisory service; a counter-trafficking programme; housing and welfare advice; legal protection advice; and community integration activities and services.

The Nationality and Borders Bill ('the Bill') seeks to change the UK asylum and trafficking systems in ways that will significantly curtail the rights of survivors and deny many the protection and support they need. It will increase the numbers of survivors at risk of exploitation and re-trafficking.

The Bill will effectively punish refugees and survivors of human trafficking for behaviour and actions that are inextricably linked to the human rights violations and trauma they have experienced and the means by which they have had to reach safety. Refugees who have come to the UK by land and sea will be given fewer rights (even though no alternative 'safe and legal routes' are being proposed in the Bill). Many survivors of human trafficking who have been imprisoned for crimes they were forced to commit will be given no protection at all. All survivors risk not being identified and supported if they do not disclose what happened to them immediately. The Bill will establish large-scale accommodation centres in the UK and offshore asylum processing sites, which will cause lasting and profound harm to the health and wellbeing of people seeking asylum.

The Helen Bamber Foundation has collective decades of working in the field of asylum and human trafficking. We are concerned that the Bill undermines established international protection rules and practices and breaks international law. The United Nations Refugee Agency has described the Bill as "a recipe for mental and physical ill-health".

Many people who claim international protection, who have fled war, torture and human cruelty, are under the control of human traffickers or are dependent on people smugglers, risking abuse

and exploitation to reach safety in any way they can. These proposals will not 'deter' them from seeking safety and they will do nothing to 'break the business model' of smugglers and criminal networks, as acknowledged in the government's own Equalities Impact Assessment on the Bill. Instead, provisions in the Bill will drive those who are vulnerable away from protection of the trafficking and asylum systems and into the hands of criminal networks and individuals who would exploit them further after arrival to the UK. We need a Bill that strengthens the identification and support of survivors – instead we have one that undermines the multi-agency system of protection built up over the years and increases the risk that survivors will be exploited or re-trafficked.

This briefing focuses on the key areas of concern for HBF in parts 2 and 5 of the Bill:

- A two-tier system will be introduced whereby refugees with successful asylum claims are treated differently based on how they arrived in the UK, granted only a temporary form of status with restricted rights to family reunification and financial support (clauses 11 and 15).
- 'Accommodation centres' will be used to house those seeking asylum (clause 12).
- The introduction of 'offshoring', where people will be removed to another country to have their asylum claims decided (clause 28 and schedule 3).
- 'Late' evidence and late claims will be treated as lacking in credibility or unmeritorious, ignoring evidence on the impact of trauma and why survivors of human rights violations have difficulty in disclosing without sufficient time and support (clauses 25, 57, 58).
- Clauses to disqualify survivors of trafficking from protection (clause 62).
- The failure to properly address existing gaps in legal aid provision and grants of leave to remain for survivors of trafficking, (clauses 64, 65 and 66).

A two-tier system of refugee protection (clauses 11 and 15)

Clause 15 states that an individual's asylum claim can be classed as inadmissible if they have travelled through, or have a connection to, a 'third safe country'. The Home Office has the power to remove these people to a 'safe' country that agrees to receive them, even if they have never been there or have any connections to it. The inadmissibility process will impose a prolonged period of limbo and anxiety upon refugees who are refused entry to the asylum system while officials attempt to find some other country willing to receive the person. This will worsen existing delays and backlog, already at a ten year high.

Clause 11 introduces a new system that will reduce the rights of those arriving in the UK to claim asylum. Someone who has not travelled directly from a country or territory where their life or freedom is threatened, and/or has not made an asylum claim 'without delay' and is subsequently recognised as a refugee, will be considered a 'Group 2' refugee. 'Group 2' refugees will only be granted temporary leave to remain (for up to just 30 months compared to the 5 years they currently receive) with no access to public funds and reduced family reunion rights.

Granting only short periods of leave to remain will worsen the insecurity and anxiety already faced by too many survivors of torture and trafficking waiting for decisions and living in perpetual limbo and in fear of being forcibly returned. It will have significant negative impact on their mental health, and prevent their long-term integration and recovery. Ongoing insecurity about their immigration

status and having no recourse to public funds will increase the number of survivors facing destitution and increase the risk of their being exploited or re-trafficked.

Case Study: Sarita

Sarita grew up in Nigeria with her parents and siblings. The family scraped a living by selling bean cakes by the side of the road. Over five years, Sarita and her mother were befriended by a man who would regularly buy their goods. Trusting the man, the family agreed to Sarita travelling with him to Europe to find work as a waitress or a nanny. Sarita was presented with a passport and travel documents with a different name and date of birth. The man explained this was simply to overcome the fact she was too young to work abroad.

Before leaving Nigeria, Sarita was taken to a ritualistic "juju" ceremony in Nigeria to make her afraid of disobeying the man. Along with four other young women, Sarita travelled with her trafficker to Germany, where they were taken to a large house. The trafficker became instantly aggressive and told the women that they would have to work as prostitutes to pay back their travel costs. Sarita was threatened with violence and humiliation to her family should she ever try to escape.

Brought to the UK, her exploitation continued. One day, she was able to escape and went to a police station. Sarita was referred to a safehouse she received much needed counselling and legal support (and was granted refugee status).

This case study is taken from the government's own Modern Slavery Strategy, and yet under the Bill's proposals Sarita would no longer receive the same protection and support. Having travelled through Germany before coming to the UK she would be seen as a 'group 2' refugee and only granted temporary status with no recourse to public funds, leaving her at risk of destitution and further exploitation.

The introduction of asylum accommodation centres (clause 12)

Clause 12 creates new powers to place people who are at different stages in the asylum process, or who have 'inadmissible' claims, in 'accommodation centres'. The government has confirmed that it intends to use the disused army barracks at Napier to test and pilot new arrangements and to "inform the final design of how accommodation centres will operate".

The use of large-scale institutional accommodation – including the use of disused army barracks since September 2020 - to hold people in the asylum system has received widespread criticism.

Our evidence shows that features of institutional accommodation of this type are extremely harmful to survivors of torture, trafficking and other extreme human cruelty, including isolation from communities, shared facilities, lack of privacy and freedom to move within and outside. These forms of accommodation have the same impact as open prisons with groups of people with little to motivate or occupy themselves becoming increasingly desperate. In light of the significant delays in asylum decision-making, survivors could end up living in such centres for years.

Rather than expanding the use of harmful institutional accommodation, the government should be making a full commitment to housing people seeking asylum in communities in appropriate accommodation that is safe, secure and meets their needs.

Off-shore processing (clause 28)

Clause 28 introduces schedule 3, which allows the government to remove people seeking asylum to outside the UK whilst their claims are being processed. Limited details of the government's plans have been shared but we are extremely concerned that off-shore processing poses a serious risk to the human rights of survivors. Australia has implemented a policy of offshoring refugees and asylum seekers on Manus and Nauru Islands since 2012, resulting in severe and well documented harm to people's physical and mental health whilst concealing their suffering from public scrutiny. The policy led to a system of violence, physical and sexual abuse of those detained and led to more than 1,200 people being medically evacuated from Nauru to Australia to receive medical care. It has been shown not to act as a deterrent and instead leaves thousands detained in perpetual limbo.

Interpretation of 'late' evidence (clauses 25, 57 and 58)

Clause 25 outlines that where evidence is provided 'late' by a claimant in relation to an asylum claim or a human rights claim the deciding authority should give it "minimal weight". This is repeated in Part 5 (modern slavery) where, under clause 57, survivors may be served with 'Trafficking Information Notices' requiring them to produce 'status information' (information relevant to their case) within a specified period. Under clause 58, providing that information late and "without good reason", would give the Home Office grounds to refuse their trafficking claim on the basis of credibility.

These provisions will result in survivors not being recognised as refugees or victims of trafficking and not receiving the support and protection that comes with such recognition. There are many reasons why someone in the asylum system may not be possible for someone to present all relevant information in support of their claim at the earliest opportunity, such as poor quality interviews or difficulty accessing quality legal advice. Research has highlighted that those seeking asylum "need time to process past traumatic events and to establish a sufficient level of trust and confidence to reveal the potentially painful and shaming details of their experiences".

It is well documented, including in the government's own Modern Slavery Act Statutory Guidance, that survivors of trafficking may not recognise themselves as victims and factors including trauma or fear of the authorities can result in delayed disclosure and difficulty recalling facts. Survivors become used to concealing, denying or minimising physical and psychological injury in order to survive. HBF's research has shown the effect of trauma on memory for all survivors; the effect of shame on disclosure; the narrative dilemmas that victims of trafficking often face; and that "often false assumptions [are] made by decision makers regarding the credibility and reliability of testimony and there is well established research to show trauma impacts on memory recall and the ability of victims to verbalise what has happened to them." It is vital that this understanding is reflected in any domestic law and policy.

Public order exemption (clause 62)

Under clause 62, if the Home Office is satisfied that the potential victim is a "threat to public order" (the definition of which includes those who are sentenced to a period of imprisonment of 12 months or more) or has made a claim in "bad faith" then there will be no prohibition on forcibly removing that person from the UK and no requirement to grant them leave to remain.

The term 'bad faith' is worryingly vague and the exclusion of those with a conviction of 12 months or more is far too wide. It is likely to further penalise many victims who have already been through the criminal justice system and wrongly convicted of offences they were compelled to commit by traffickers – we work with a number of clients who were sentenced for offences committed as a consequence of having been trafficked, including document offences and cannabis offences. We know from our long term experience of multi-disciplinary work with survivors that one of the most effective ways to keep victims in fear is to force them to commit crimes, so they will be criminalised if they come forward to the authorities.

Furthermore, those leaving prison are often targeted by exploiters due to their vulnerability as seen in the recent Operation Fort, the dismantling of the UK's biggest modern slavery network where traffickers 'targeted the most desperate from their homeland, including the homeless, ex-prisoners and alcoholics'). We believe that this clause will lead to an increase of such targeting. If vulnerable adults and children are denied support and protection on the basis of previous convictions they are unlikely to come forward in the first place and their exploitation will not be addressed, nor will traffickers be prosecuted.

Granting survivors secure status (clause 64)

Clause 64 aims to establish in law the basis on which confirmed victims of trafficking are eligible for leave to remain. This does narrows further the current policy on Discretionary Leave for Victims of Modern Slavery which is already extremely restrictive.

Currently the number of applications for leave granted is extremely low – from 2016 to 2019, 4,695 adults subject to immigration control were confirmed as victims of trafficking but just 521 adults were granted discretionary leave to remain in the UK – just one in ten.

Instead of providing leave "to provide protection and assistance to that victim, owing to their personal situation" as in the current policy and in accordance with the Council of Europe Convention on Action against Trafficking in Human Beings ('ECAT'), under the Bill leave would only be granted to assist survivors "in their recovery from any physical or psychological harm arising from the relevant exploitation". This does not accord with the ECAT which provides a much wider range of situations to consider when deciding whether to be grant leave, including "safety, state of health, [and] family situation". In the experience of our multi-disciplinary and clinical team at HBF, it is impossible to separate needs that arise directly from exploitation from those arising from pre-existing vulnerabilities and these criteria do not consider the risk of re-exploitation.

Although there is a separate ground for granting leave to support police investigations, many victims need certainty about their future including immigration status, housing and basic necessities before feeling safe enough to be able to engage with criminal justice investigations.

This clause does not provide that certainty and is a missed opportunity to enable more victims to provide the evidence essential to increasing trafficking convictions. As Sir Iain Duncan Smith MP highlighted in Report Stage in the Commons, the National Crime Agency figures show that between 6,000 and 8,000 modern slavery offenders are in the UK, but there were just 331 prosecutions in 2020 under the Modern Slavery Act (only 49 convictions), but "with the right support, people…lose their fear, they understand that they are protected and they will give evidence".

The government has given assurance that "all those who receive a positive conclusive grounds decision and are in need of tailored support will receive appropriate individualised support for a minimum of 12 months" (emphasis added) but this does not address the granting of leave which should be automatic. Our work has shown that it is only once granted leave to remain in the UK, with the sense of safety and security that this brings, that survivors are truly able to benefit from therapeutic care and begin to recover from the trauma they have experienced

The regularisation of a survivor's immigration status is also a key component of ensuring a survivor is not subject to further abuse and exploitation or re-trafficked, as highlighted by the Independent Anti-Slavery Commissioner. The Bill should be amended so that leave to remain is provided to all confirmed victims with irregular immigration status, with the option of granting longer periods of leave and a route to settlement.

Access to legal aid (clauses 65 and 66)

In light of potential changes to the identification of survivors of trafficking outlined above, it is all the more vital that they are able to access legal advice at the earliest opportunity. The government has claimed that clauses 65 and 66 of the Bill will ensure that potential victims of modern slavery or human trafficking receive advice on referral into the National Referral Mechanism (NRM) to understand what it does, how it could help them and to provide informed consent to be referred into it. However, as currently written these clauses would not achieve that aim. They would ensure only that an individual who is *already* receiving legally-aided advice on their asylum, immigration or public law matter (either because it is in scope or because Exceptional Case Funding (ECF) has successfully been applied for) could receive advice on referral into the NRM as an 'add on'.

This does not address the crux of the problem - that people do not understand the NRM nor immigration issues and that, because nearly all immigration advice is no longer covered by legal aid, it is extremely difficult to get quality expert advice at the outset, where it is most needed. The ECF scheme has been shown to be complex, lengthy and unworkable for many legal providers and is not a meaningful way to ensure access to justice. So gaps will continue to exist for those without a lawyer already.

Advice on referral to the NRM should be covered by legal aid regardless of the immigration status of the individual and without them already having to be eligible for legal aid - it should be brought into scope not as an 'add on' to an immigration/asylum matter or ECF application. Legal aid should also cover full advocacy and representation, including for interviews and immigration advice.

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