BINGHAM CENTRE FOR THE RULE OF LAW

Nationality and Border Bill: A Rule of Law Analysis of Clauses 9 and 11

Dr Ronan Cormacain, 26 January 2022

BIICL
British Institute of International and Comparative Law

Executive Summary

This Report analyses Clauses 9 and 11 of the Nationality and Borders Bill from a Rule of Law perspective.

Clause 9 allows the Secretary of State to deprive a British citizen of their British citizenship without giving them notice. With no judicial or parliamentary oversight of the dispensation of notice, it undermines effective right of access to a court, legal certainty and the right to a fair trial.

Clause 9(5) retroactively validates previously unlawful attempts to deprive citizens of citizenship without notice.

Clause 11 seeks to establish a two-tier system for refugees, with Group 2 refugees having fewer of the rights granted or contemplated by the Refugee Convention than Group 1 refugees.

Clause 11 breaches international law as has been made clear by the United Nations High Commissioner for Refugees. There is no justification in the Refugee Convention for establishing a category of second class refugees depending, in effect, on their mode of arrival.

Clause 11 is also contrary to the notion of equality before the law because it pursues an aim which is contrary to our international obligations and wrongly proceeds on the basis that there is a requirement on refugees to seek refuge in the “first safe country”.

Clause 11 requires the refugee not lucky enough to have a legal route of entry to the UK to achieve the near impossible, and then penalises them for failing to do so.

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About the Bingham Centre for the Rule of Law

The Bingham Centre is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large." The Rt Hon Lord Bingham of Cornhill KG was the pre-eminent UK judge of his generation, who crowned his judicial career by leaving us arguably the best account of what the Rule of Law means in practice and why it is so important in any civilised society - too important to remain the exclusive preserve of courts and lawyers. One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.

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Rule of Law Monitoring of Legislation Project

This Report is part of the Rule of Law Monitoring of Legislation Project. The project aims to systematically scrutinise Government Bills from the perspective of the Rule of Law, and to report on Bills which have significant Rule of Law implications. The goal is to provide independent, high quality legal analysis to assist both Houses of Parliament with its Rule of Law scrutiny of legislation. The project is being led by Dr Ronan Cormacain.

We are grateful to Raza Husain QC (of Matrix Chambers), Eleanor Mitchell (of Matrix Chambers) and Sarah Dobbie (of 5 Essex Court) for their assistance in the preparation of this Report.

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Introduction

The House of Lords will consider clauses 1 to 16 of the Nationality and Borders Bill in Committee Stage on Thursday the 27th of January 2022. Clause 9 of that Bill allows the Secretary of State to dispense with the requirement to give a citizen notice that they will be deprived of their citizenship. Clause 11 establishes a two-tier system of refugees, with Group 2 refugees having substantially more limited rights than Group 1 refugees.

This Report provides a Rule of Law analysis of these two clauses.

This Report is Part 1 in a series of Reports on this Bill, and is confined to clauses that will be debated on Day 1 of Committee Stage.

Future Reports will consider the rest of this Bill, including the gloss put upon the concept of a refugee coming "directly" to the UK by the Bill, which serves to exacerbate the impact of Clause 11

Clause 9: Deprivation of citizenship without notice

What does clause 9 do?

Section 40 of the British Nationality Act 1981 allows the Government the power to deprive a person of their British citizenship. The power cannot be exercised if it would make a person stateless[1], although this safeguard has been reduced if the Secretary of State has reasonable grounds for believing the person could become the national of another country.[2] This is already a significant power. No longer are the criteria that the person is a terrorist or a traitor, all that is now necessary is that removal of citizenship is considered to be conducive to the public good. Section 40 contains some procedural safeguards on how this power may be exercised. As the Court of Appeal has explained, section 40:

> represents a balance between the public interest in permitting the Home Secretary to deprive a person of their citizenship, and the individual's rights to know that has occurred, why, and what avenues are open to them.[3]

Clause 9 seeks to remove one of the key safeguards from this process. It would amend section 40 to allow the Secretary of State to dispense with the requirement to give the person notice that their citizenship is about to be taken away. A person can be deprived of citizenship without being told:

- That they are being deprived of citizenship
- The reasons for that deprivation
- That they have a right to appeal against this deprivation[4]

The grounds for dispensing with the requirement to notify the person are any of the following:

1. The Secretary of State does not have the information needed to give notice
2. It is otherwise not reasonably practicable to give notice, or
3. Notice should not be given:
    - in the interests of national security,
    - in the interests of the relationship between the UK and another country
    - otherwise in the public interest

Rule of law issues: breach of effective access to court, fair trial and legal certainty

The effect of these changes is that a person can be deprived of their British citizenship; without being told it is happening, why it is happening, without an opportunity know the nature of the case against

[1] Section 40(2), British Nationality Act 1981.
[2] Section 40(3).
[3] *The Queen (on the application of D4) (Notice of Deprivation of Citizenship) v Secretary of State* [2022] EWCA Civ 33, paragraph 53.
[4] These are the current safeguards in section 40(5) of the British Nationality Act 1981.

them, and without an opportunity to make their case. It is also unclear how they could effectively appeal against a decision of which they were never informed.

The decision to dispense with the requirement to give notice is solely one for the Secretary of State to make in the exercise of their discretion. As Lord Anderson pointed out in the debate on 2nd Reading of this Bill,

> if it is necessary to remove citizenship without notice, why is the prior permission of a judge not required—the safeguard that applies to more transient measures such as TPIMs and, formerly, control orders?[5]

There is no judicial safeguard and no requirement to account to Parliament about the exercise of this power.

The powers are extremely broad. For example, one reason given for dispensing with notice is that it is in the interests of the relationship between the UK and another country. Under this test, if Country X would be upset if the UK deprived a British citizen of their citizenship, that is sufficient to deny citizenship without notice. The first duty of the UK Government ought to be to its own citizens, not to a foreign state.

This provision undermines many Rule of Law values.

Firstly, there is no **effective access to a court**. The Venice Commission Rule of Law Checklist asks "does an individual have an easily accessible and effective opportunity to challenge a private or public act that interferes with his / her rights?".[6] It also asks if access to justice is easy in practice,[7] and whether appeal procedures are available.[8] This provision is far below the minimum internationally recognised Rule of Law standards articulated by the Venice Commission. As Lord Justice Baker has dryly observed in relation to deprivation of citizenship notice, "There are a number of ways in which notice can be given but putting the document in a drawer is not one of them".[9]

Secondly, there is no **legal certainty** because the person will not be told of the fact of their deprivation. The absence of information about one's status is the very essence of uncertainty. The lack of legal certainty is exacerbated by the breadth of the proposed powers – which the Government does not appear to propose constraining by means of a detailed published policy about the circumstances in which they will be used – and the absence of any requirement to report on how they are used in practice.

Thirdly, there is potentially a breach of the right to a fair trial under Article 6 of the European Convention on Human Rights (although some legal cases have disputed whether this is an Article 6 matter); and certainly a breach of the common-law requirements of procedural fairness. What are termed the "rules of natural justice" have been part of the UK system of justice for so long that they can still be framed in Latin – *audi alteram partem* – meaning hear the other side. The person will not be told about the decision being made or know the arguments or facts being used against them. How can they possibly mount a defence, or bring forward evidence to show their side of the argument? In Franz Kafka's *The Trial*, Joseph K may not know what the charge is against him, but at least he knows that there is a charge.

Jeremy Ogilvie-Harris carried out a comparative study looking at how dispensation of notice on deprivation of citizenship was handled under this Bill, in New Zealand and in Australia.[10] His starting question was "what if the executive used the deprivation and dispensation powers arbitrarily?". His findings were that in Australia there were the following safeguards:

- clearly defined grounds for deprivation and dispensation of notice,
- continuous internal review,

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[5] Hansard House of Lords Vol 817 (5 January 2022) Col 602.
[6] Venice Commission Rule of Law Checklist, Benchmark E2(a)(i).
[7] Benchmark E2(a)(v).
[8] Benchmark E2(c)Iviii).
[9] *D4*, paragraph 65.
[10] Jeremy Ogilvie-Harris: "A Comparative Perspective on the Constitutionality of Clause 9 of the Nationality and Borders Bill" U.K. Const. L. Blog (12th January 2022) (available at https://ukconstitutionallaw.org/))

- a time limitation of six years,
- reporting to Parliament, and
- independent oversight and review.

New Zealand has judicial oversight:

- requirement to apply to the High Court for dispensation and
- full merits review of the deprivation decision.

Clause 9 has none of these important safeguards against the risk of arbitrary use of the power. As Lord Anderson concluded:

> There is already apprehension, especially and understandably among people of mixed heritage, about this country's unusually far-reaching powers to remove citizenship. The proposal to allow the use of those largely unmonitored powers to be kept secret, even from a subject who could perfectly easily be told, has predictably compounded those fears.[11]

The House of Lords Constitution Committee has also noted the lack of safeguards, for example the unfettered power of the Secretary of State to dispense with notice, with no obligation to first seek the permission of an independent court before engaging on this course of action.[12]

Clause 9 departs from the requirements of the Rule of Law by allowing a British citizen to be deprived of their citizenship without even being warned about it, or told the grounds for it. There is zero judicial or parliamentary oversight of the dispensation of notice, and the grounds can be as insubstantial as the mere administrative inconvenience that it is not reasonably practicable to give notice.

Members concerned about the Rule of Law implications of this clause should support the motion tabled by Lords Anderson, Rosser and Paddick and Baroness Warsi that Clause 9 not stand part of the Bill.

Explainer – the D4 case

The Court of Appeal has decided today (26 January 2022) that there is no existing power, under the legislation currently in force, to deprive a citizen of their citizenship without notice.[13] The citizen, referred to as D4, was born in the UK, had British citizenship from birth, and also has Pakistani citizenship. She is currently detained in a camp in Syria. On 28 September 2020, her solicitors asked the Foreign and Commonwealth Office for assistance for repatriating her. On 14 October 2020 the reply came that she had been deprived of her citizenship on 27 December 2019. According to the Court of Appeal "This was the first time that the deprivation of citizenship had been communicated to D4 or her advisor".[14]

Upon a judicial review hearing, Chamberlain J held that there was no power to dispense with the requirement to give notice, and that the purported power was *ultra vires* (outside the powers) of the British Nationality Act 1981, and that accordingly it was void and had no effect.

On appeal, the Court of Appeal agreed with the trial judge and held that section 40 of the British Nationality Act 1981 did not permit the Secretary of State to dispense with the requirement to give notice before a person was deprived of their citizenship.

The amendment in Clause 9 seeks to over-turn that decision.

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[11] Hansard House of Lords Vol 817 (5 January 2022) Col 603.
[12] House of Lords, Select Committee on the Constitution, 11th Report of Session 2021-22 "Nationality and Borders Bill" (21 January 2021) HL Paper 149.
[13] *The Queen (on the application of D4) (Notice of Deprivation of Citizenship) v Secretary of State* [2022] EWCA Civ 33.
[14] *D4*, paragraph 6.

Clause 9(5) and retroactive law-making

There is an additional Rule of Law concern as regards clause 9(5). This is a provision which is retroactive. It goes back in time to before this Bill will be enacted and says that the power to dispense with notice applies even before this Bill was made. It is retroactive law-making at its worst as it deems an unlawful past event to be lawful, and that is to now be regarded as if it had always been lawful.

and that it was always lawful. This provision is being introduced because the Government lost the *D4* case where it did not give notice to a person who was deprived of their citizenship.[15] It is a gross interference with the right to a fair trial and the responsibility of the courts to apply the law as it legislatively deems lawful that which a court has already found to be unlawful.

Retroactive law-making offends the Rule of Law. There are a limited range of circumstances in which it can be done. When it comes to retroactively changing the law to penalise a person this limited range becomes even narrower. Those circumstances do not fall within the scope of this provision. The Constitution Committee have reached this same conclusion, stating that

> We have previously commented on the unacceptability of retrospective legislation other than in very exceptional circumstances and no justification has been offered in this case. The House may conclude that this clause is unacceptable and should be removed from the Bill.[16]

Clause 9(5) retroactively changes the law to strip people of citizenship where a court has already found them to have been unlawfully deprived of their citizenship in the past. That deprivation, which a court has previously determined to be unlawful, is retroactively validated by deeming that it has always been lawful to deprive a person of citizenship without giving them notice. This is an additional reason why Clause 9 should not stand part of the Bill.

Clause 11: Two-tier system for refugees

What does Clause 11 do?

Clause 11 of the Bill seeks to establish a two-tier system for refugees: Group 1 refugees and Group 2 refugees.

A Group 1 refugee is someone who:

- Has come directly to the UK, and
- Has presented themselves without delay to the authorities, and
- Where they are unlawfully in the UK, has shown good cause for entering or remaining in the UK unlawfully

A Group 2 refugee is any other refugee.

Both Groups must still pass the other tests for being refugees, i.e. that they are unable to return to their country of origin owing to a well-founded fear of persecution for reasons of race, religion or nationality etc.

Clause 11 allows for "differential treatment" of Group 1 and Group 2 refugees, in particular that Group 2 refugees may be treated less favourably in a number of significant ways. It goes on to set out specific examples of what that differential treatment might be:

- the length of any period of limited leave to enter or remain which is given to the refugee
- the requirements that the refugee must meet in order to be given indefinite leave to remain
- whether a condition of no recourse to public funds is attached to any period of limited leave to enter or remain that is given to the refugee

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[15] *The Queen (on the application of D4) (Notice of Deprivation of Citizenship) v Secretary of State* [2022] EWCA Civ 33.

[16] House of Lords, Select Committee on the Constitution, 11th Report of Session 2021-22 "Nationality and Borders Bill" (21 January 2021) HL Paper 149. Paragraph 22.

- whether leave to enter or remain is given to members of the refugee's family

If the family members of Group 2 refugees are not themselves refugees, then they may also be treated less favourably. This, and the power to refuse leave to remain to the refugee's family, would have a serious impact upon family reunification rights.

Article 31 of Refugee Convention

According to the Explanatory Notes, this clause is based upon Article 31 of the Refugee Convention. Article 31 is entitled "refugees unlawfully in the country of refuge". The meaning of this concept is set out in the body of the Article when it refers to refugees "present in the territory without authorisation". These refugees cannot have penalties imposed upon them arising out of their illegal entry or presence in a country if the satisfy three conditions, that is that they:

- Come "directly" to the UK,
- Present themselves without delay to the authorities, and
- Show good cause for their illegal entry or presence

(The Bill also seeks to reinterpret the meaning of coming "directly" to the UK. Future Reports will analyse this in more detail- suffice to say for now that this reinterpretation appears to be in conflict with international law.)

Clause 11: international law and equality before the law

The breach of international law

A more fundamental point than the mistake in transcribing Article 31 of the Refugee Convention, is that the whole premise of creating two tiers of refugees is in breach of international law. It is worth setting out in full the opinion of the United Nations High Commissioner for Refugees:

> The 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. The Refugee Convention contains a single, unitary definition of refugee, which is found at Article 1A(2). This defines a refugee solely according to their need for international protection because of feared persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion. Anyone who meets that definition, and is not excluded (see Articles 1D, 1E and 1F of the Convention), is a refugee and entitled to the protections of the Refugee Convention. 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.[17]

Karolina Szopa of the University of Winchester echoes this point in a paper entitled "Condemning the Persecuted: Nationality and Borders Bill (2021) and Its Compatibility with International Law". In her view "in its current form, the Bill not only fails to achieve its proclaimed aim of improving the immigration system, but it also falls short of meeting the international law standards".[18] The Law Society of England and Wales,[19] and the Law Society of Scotland[20] are both of the view that the two-tier system is not compatible with international law.

The purpose of Article 31 is to offer protection to refugees who have entered a country unlawfully, by providing that they should not be penalised if they presented themselves without delay and had a good reason for being there unlawfully. But Clause 11 turns this on its head by using it to divide refugees into two groups, harking back to the Elizabethan idea of the "deserving poor" and the "idle poor". The Joint Committee on Human Rights in its Report on this Bill stated that

[17] UNHCR, "UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22" (October 2021)
[18] K. Szopa, 'Condemning the Persecuted: Nationality and Borders Bill (2021) and Its Compatibility with International Law', U.K. Const. L. Blog (6th January 2022) (available at https://ukconstitutionallaw.org/))
[19] Law Society, Parliamentary Briefing: Nationality and Borders Bill: Committee Stage (19 October 2021),
[20] Law Society of Scotland, Nationality and Borders Bill: Second Reading Briefing (19 October 2021).

> Clause 11 would, therefore, make a significant and unprecedented change in the law, resulting in the UK treating accepted refugees less generously based on the journey they have taken to reach the UK and the timeliness of their asylum claim.[21]

Clause 11 moves us back to the paradigm in force before the Refugee Convention was made. That paradigm was based on the premise of pre-authorisation – that a refugee could only be accepted in a country if they were authorised in advance. Clause 11 reintroduces the concept of pre-authorisation by treating a refugee less favourably unless they have authority to be in the UK before arrival.

Creating two tiers of refugees based on how they arrived in the UK is incompatible with international law. The purpose of the Refugee Convention is the protection of refugees and it does not allow their rights to be lessened based, in effect, upon their mode of arrival.

Further provisions of the Bill also undermine the Refugee Convention, in particular by changing the meaning of a refugee coming "directly" to the UK. Future Bingham Centre Reports will deal with that point.

The Rule of Law and International Law

The Rule of Law is one of the cornerstones of the constitutional legal order of the UK. The Rule of Law requires the State to act in accordance with the law and does not distinguish between national law and international law for this purpose: in Lord Bingham's words: "the rule of law requires compliance by the state with its obligations in international law as in national law."

In his book, *The Rule of Law*, Lord Bingham explained the reason for including this principle in any contemporary account of the Rule of Law:[22]

> … although international law comprises a distinct and recognisable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends ; and observance of the rule of law is quite as important on the international plane as on the national perhaps even more so. … the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large.

The UK has long been a global leader in advocating for a rules-based international order. Its credibility as such depends on it leading by example. Lord Bingham again:[23]

> However much any of us as individuals might relish the opportunity to live our lives free of all legal constraints … we know quite well that acceptance of these constraints is the necessary price to be paid for their observance by others and that a society in which no one was subject to such constraints would not be a very congenial one. … The same is true in the international sphere. However attractive it might be for a single state to be free of legal constraints that bind all other states, those states are unlikely to tolerate such a situation for very long and in the meantime the solo state would lose the benefits and protections that international agreement can confer. The rule of the jungle is no more tolerable in a big jungle.

Introducing a Bill which deliberately breaches international law is also a breach of the Ministerial Code, which requires ministers to comply with the law, including international law. As Lord Bingham also pointed out in his account of the Rule of Law, this recognition in the Ministerial Code that ministers must comply with international law flows from the acceptance that the Rule of Law requires States to comply with their international obligations as well as national law.

To legislate a breach of international law is to breach the Rule of Law. Regardless of the perceived merits of an individual proposal, if it breaches the Refugee Convention, it should not be done. A breach of international law will have negative implications for the UK's hard

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[21] House of Lords, House of Commons, Joint Committee on Human Rights "Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4) – Asylum , Home Office Decision-Making, Age Assessments and Deprivation of Citizenship Orders" (Twelfth Report of Session 2021-22, 12 January 2022) HC 1007, HL Paper 143, paragraph 48.

[22] Tom Bingham, *The Rule of Law* (2010), chapter 10, "The Rule of Law in the International Legal Order", pp. 110-111.

[23] *The Rule of Law*, p. 112.

earned reputation for global Rule of Law leadership. Parliament rejected the attempt in the United Kingdom Internal Market Bill to break international law, it should do the same here.

Members concerned about the Rule of Law implications of clause 11 should support the motion tabled by Lords Paddick, Rosser and Blunkett and the Lord Bishop of Durham that Clause 11 not stand part of the Bill.

Mistake in the application of Article 31 in Clause 11

There is a clear technical discrepancy between what Article 31 says, and what Clause 11 represents Article 31 as saying.

Article 31 applies to a refugee who is unlawfully in the UK. It imposes conditions before the refugee cannot be penalised.

But Clause 11 applies to all refugees. It straight away imposes a condition that they must present themselves without delay to the authorities. The second condition applies if they are unlawfully in the UK, in which case they must show good cause. The mistake is in imposing a new requirement upon all refugees to present themselves without delay, when under Article 31, this requirement only applies to refugees unlawfully in the UK.

This is a straightforward breach in transcribing the test of Article 31 into Clause 11, and if not rectified, would represent a clear breach of international law. Even if the rest of Clause 11 were unproblematic, it should in this regard have said:

A group 1 refugee is someone who has

- Come directly to the UK, and
- Where they have come unlawfully, they have:
    - Presented themselves without delay to the authorities, and
    - Shown good cause for entering or remaining in the UK unlawfully

Clause 11 contains a basic legal error in its attempt to transcribe the Refugee Convention. At the very minimum, this error ought to be reversed and the clause amended so that the obligation for a refugee to present themselves without delay to the authorities ought only to apply where the refugee has entered the UK unlawfully.

Equality before the law and discriminating against different categories of refugee

Equality before the law is part of the Rule of Law. Tom Bingham explained it in this way

> The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.[24]

Long before Bingham set out this principle, Dicey, the "grandfather" of the idea of the British constitution wrote that "it means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts".[25]

Clause 11 is very clear in stating that it allows for "differential treatment" of Group 1 and Group 2 refugees. Differential treatment is allowed under the Rule of Law, provided there is a good reason for it, or as human rights jurisprudence puts it, an objective justification for it. Objective justification exists if there is a legitimate aim for pursuing differential treatment, and the means employed to achieve that aim are proportionate.[26] Clause 11 will have a direct impact on the right to family life under Article 8 of the European Convention on Human Rights as it will restrict the rights of refugees to be united, or reunited with their families.

It is therefore necessary to consider the stated aim of this differential treatment. The aim is clear from the Explanatory Notes:

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[24] T Bingham, *The Rule of Law* (Penguin UK 2011)
[25] AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885).
[26] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

> This Bill introduces a comprehensive set of measures to discourage irregular entry and improve the Home Office's ability to remove those with no right to remain in the UK. … The proposals in this Bill will create a differentiated approach: how someone arrives in the UK will have an impact on the type of status granted in the UK if their asylum claim is successful.[27]

It may not use the language of the now defunct "hostile environment" policy, but the purpose is exactly the same – to dissuade refugees from coming to the UK unlawfully, by treating them unfavourably. Another aspect of this aim was set out by the Home Secretary in introducing this Bill in the House of Commons

> People should be claiming asylum in the first safe country they reach, and not using the UK as a destination of choice.

How do these stated aims of differential treatment stack up with the UK's international commitments as set out in the Refugee Convention?

The UN High Commissioner for Refugees could not be clearer:

> The Bill is based on the premise that "people should claim asylum in the first safe country they arrive in". This principle is not found in the Refugee Convention and there is no such requirement under international law.[28]

As well as being contrary to the Convention, the UNHCR points out that such a policy is unworkable, as it places a disproportionate burden on developing countries. Put simply, refugees will end up in countries adjacent to the country of origin which are extremely unlike to include the UK.

To seek an outcome contrary to international law cannot possibly be a good reason or a legitimate aim. Without a legitimate aim, there can be no justification for differential treatment, and therefore the two-tier system breaches the requirement of equality before the law.

Requiring the impossible

American academic Lon Fuller wrote *The Morality of Law* many years ago, one of the most important sources of our present understanding of the meaning of the Rule of Law. He stated

> On the face of it, a law commanding the impossible seems such an absurdity that one is tempted to suppose no sane lawmaker, not even the most evil dictator, would have any reason to enact such a law.[29]

As sadly predicted by Fuller, sometimes laws do require the impossible, and Clause 11 is one example of this. The problem is that for many refugees it is impossible to lawfully arrive as an asylum seeker. To get "entry clearance", a person must be entitled to a visa under one of the categories set out in the immigration rules. But those rules do not include a category of "seeking asylum". The Home Office have already explained (and justified) this as follows

> As a signatory to the 1951 Refugee Convention, the UK fully considers all asylum applications lodged in the UK. However, the UK's international obligations under the Convention do not extend to the consideration of asylum applications lodged abroad and there is no provision in our Immigration Rules for someone abroad to be given permission to travel to the UK to seek asylum.

The practical difficulty this causes has already been recognised by the courts. In *Adimi*, the court noted that

> The combined effect of visa requirements and carriers' liability has made it well-nigh impossible for refugees to travel to countries of refuge without false travel documents.[30]

According to the Explanatory Notes:

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[27] Explanatory Notes, paragraphs 17, 18.
[28] UNHCR, "UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22" (October 2021)
[29] Lon Fuller, *The Morality of the Law* (Yale University Press 1969).
[30] *R (Adimi) v Uxbridge Magistrates Court & Anor* [2001] QB 667, 674.

> In the 12 months ending September 2019, around 62% of asylum applicants to the UK had entered the country irregularly (40% clandestinely, 22% without relevant documentation) with the remainder largely thought to have arrived regularly (e.g. on a visa), before subsequently applying for asylum.[31]

In giving evidence to the Joint Committee on Human Rights on this Bill, Madeleine Sumption, Director of the Migration Observatory stated that "legal routes do not really exist or are not accessible for most people", that "resettlement is effectively a lottery" and that "it is a tiny percentage of refugees who are resettled, less than 1% in a given year." She went on: "It is not really possible for people to get in that queue and therefore substitute from the illegal to the legal routes...".[32]

The system is unfair. Some very lucky refugees will be able to find a safe and legal route to enter the UK lawfully. For the majority, there is no lawful route. The absence of a lawful route will automatically place them at a significant risk of being treated as Group 2 refugees, if they cannot satisfy either the overly stringent "coming directly" requirement or the overly broad requirement of prompt presentation to the authorities. Clause 11 requires most refugees to achieve the near impossible, and then penalises them when they fail to do so. A law requiring the impossible undermines the Rule of Law.

[31] Explanatory Notes, paragraph 15.
[32] All quotes taken from para 57 of the JCHR Report.

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