

Nationality and Borders Bill: A Rule of Law Analysis of Clauses 29 to 39

Dr Ronan Cormacain, 31 January 2022



Executive Summary

This Report analyses Clauses 29 to 39 of the Nationality and Borders Bill from a Rule of Law perspective, to be debated in Committee Stage in the House of Lords on Tuesday 1st and Thursday 3rd of February. It follows our previous report on Clauses 9 and 11 of the Bill.

Clauses 29 to 37 purport to interpret the Refugee Convention. However, the way in which they do so is not in compliance with that Convention. The proposed reinterpretations are not merely a neutral codification of the existing law, but in many significant places an attempt to overturn the established meaning of the terms in that law.

These Clauses go against the interpretation of key terms in the Refugee Convention, as declared by the Courts. They are contrary to the spirit and intention of the Refugee Convention. They are not a good faith attempt to define these terms, but an attempt to recast international law.

The following are particular breaches of international law (the Refugee Convention):

- Clause 31 changes the required standard of proof for important parts of the test for whether a person is a refugee. The Clause would create two limbs of the test and increase one limb from “reasonable likelihood” to “the balance of probabilities”.
- Clause 32 changes the definition of membership of a particular social group by changing the previous requirement to satisfy one of two criteria, into a requirement to satisfy both criteria.
- Clause 33 changes the approach to “protection from persecution” – an important component part of the refugee definition – from a focus on meaningful and effective protection against persecution, to a focus on the existence of a reasonable system to prevent, investigate and prosecute instances of persecution (whether or not that system was likely to protect the individual concerned).
- Clause 36 turns a requirement that a refugee must have come “directly” to the UK to avoid penalties for their unlawful entry or presence into a requirement that a refugee cannot have “stopped” in any safe country en route to the UK.

In clauses 29 to 37, it is contrary to the Rule of Law requirement that the State comply with its international obligations for Parliament to unilaterally seek to redefine the meaning of terms in an international treaty.

The proposed redefinitions are a legislative over-ruling of judgements in major immigration cases which the Government has lost in the courts over the last two decades. This undermines the role of the courts in adjudicating upon the law and creates legal uncertainty. This fact of legislative over-ruling of the courts has not been made clear in the Bill.

Clause 39 breaches legal certainty by creating an offence of being in contravention of immigration rules when these rules are so complex and so shifting that even the Government does not understand and has been incapable of implementing them.

Clause 39 requires those asylum seekers unlucky enough to not have a visa to achieve the impossible – to criminalise those who arrive unlawfully whilst at the same time providing no lawful route to arriving in the UK to seek asylum.

This Report lists a number of amendments that peers concerned about these measures may wish to support.



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We are particularly grateful for the assistance of 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

On Tuesday 1 February and Thursday 3 February the House of Lords will continue with Committee Stage of the Nationalities and Borders Bill.

Clauses 29 to 37 of the Bill seek to provide definitions for terms set out in the Refugee Convention. Clause 39 seeks to create new criminal offences in relation to immigration law.

This Report analyses these Clauses from a Rule of Law perspective and identifies amendments which have been tabled by peers which may remove some Rule of Law deficiencies in the Bill. This is Part 2 of our Report into this Bill. Part 1 was published last week and considered Clauses 9 and 11.

Breaches of the Refugee Convention

There are a number of places where Clauses of the Bill breach the Refugee Convention. It does so by defining the words in the Convention, and concepts which have become central to its interpretation and application, in a way which is:

- Contrary to the spirit and intention of the Convention
- Contrary to the internationally accepted meaning of that Convention, and
- Contrary to the meaning of the Convention as given by the UK courts

Clauses 29 to 37: The “Interpretation” of the Refugee Convention

Unlike the United Kingdom Internal Market Bill, this Bill does not expressly set out a power to act contrary to international law. The text of the Bill, and the information set out in the Explanatory Notes, both claim that the legislation respects international law, and in particular the Refugee Convention.

The Bill announces, rather innocuously, that it is interpreting the Refugee Convention. The cross heading to clauses 29 to 37 is “Interpretation of the Refugee Convention”. Clause 29 states that these clauses apply for the purposes of any determination, by any court or other person, on the meaning of any of the words of the Convention set out in these clauses. In the Explanatory Notes, this is portrayed as a technical exercise of simply consolidating the existing law. Those notes go on to state that

The Refugee Convention, which sets out the international legal framework for the protection of refugees, contains broad concepts and principles, many of which are open to some degree of interpretation as to exactly what they mean in practice.¹

However, the Bill is not a neutral restatement or consolidation of the law. It is instead a rewrite of the accepted meaning of that law. This rewrite contravenes both the spirit and intention of the Refugee Convention and also the case law that has built up on the meaning of the concepts used in the Convention.

Clause 31: Standard of proof

The Refugee Convention does not prescribe the standard of proof that must be met by an asylum-seeker in order to be recognised as a refugee. The United Nations High Commissioner for Refugees has stated that

The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.²

The UK courts have for more than 20 years applied a “reasonable likelihood” standard of proof for all elements of the refugee definition (and therefore to the holistic question of whether a person meets that definition).³ As Freedom from Torture have pointed out, the adoption of a “reasonable likelihood”

¹ Explanatory Notes, paragraph 318.

² UNHCR Handbook, 196-197

³ *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449; *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] AC 958

standard reflects the unique features of a decision regarding refugee status, the inherent difficulties faced by an applicant for international protection in establishing their claim, the relative gravity of the consequences of an erroneous decision, the vulnerability of the claimant, and the promotion of a welfare consideration, where the state is not supposed to be the antagonist of the individual.⁴ The Supreme Court in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596, confirmed that the “reasonable degree of likelihood” threshold is less demanding than a balance of probabilities test because of the interests at stake.

Clause 31 of the Bill overturns this established interpretation of the law. It does so:

- by dividing the question of a refugee’s status into a series of sub-questions, and
- by applying different standards of proof to each of these sub-questions.

Clause 31(2) states that the decision-maker first has to (a) make an assessment about whether the asylum seeker has a particular characteristic which could cause them to fear persecution, and then (b) make an assessment about whether in fact they (subjectively) fear persecution as a result of that characteristic. The standard of proof required for this is “the balance of probabilities”.

Clause 31(4) then requires the decision-maker to consider whether, if the asylum seeker were returned to their country of origin, (a) they would (objectively) face persecution, and (b) there would be a lack of State protection. The standard of proof required for this remains that of a “reasonable likelihood”.

Firstly, this mechanical, step-by-step approach is inconsistent with the current holistic approach which considers all these questions in the round. It allows for rejection of a person as a refugee because they failed one of the steps, whereas if the test was taken in its totality, the person may have been accepted as a refugee. Stuart MacDonald MP addressed this point eloquently in the House of Commons stating:

The Bill seeks to muddy the waters by applying a higher legal threshold. The claimant now has to prove, on the balance of probabilities, that they do belong to one of the protected convention groups and that they fear persecution based on that characteristic. That not only undermines the cautious approach in the convention, justified by the dangers that exist for asylum seekers, but pays no regard to just how difficult it is to prove events that happened in faraway countries.

In addition, by having two different standards of evidence in the same proceedings, it makes life harder for already struggling caseworkers. The judge or decision maker may be certain that the proselytising Christian convert will face the death penalty or torture on return, but now the “real possibility” that the claimant is such a proselytising Christian convert is not enough. If the judge is only 49% satisfied that the person is a proselytising Christian convert, the claim is going to be rejected, even though the risk of torture or death is absolutely certain if the decision maker has got that assessment wrong. I find that deeply troubling, and it is clearly inconsistent with the refugee convention.⁵

The other example MacDonald gives is the difficulty that a person coming from certain countries might have in “proving” on the balance of probabilities that they are LGBT.⁶ How easy would it be to prove something that is unlawful in their country of origin, or which could cause emotional or family harm if that information came to light?

Secondly, imposing a balance of probabilities test under clause 31(2) is directly in contravention of the reasonable likelihood test. It (deliberately) imposes a much higher hurdle for the asylum seeker to overcome, thus increasing the chance of rejection. The consequences of failing to clear this hurdle can be devastating for the asylum seeker, hence the reason why the test has always been one of reasonable likelihood.

⁴ See further the full legal opinion of Raza Husain QC, available on the website of Freedom From Torture, available at <https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf>

⁵ Hansard, House of Commons, Monday 19 July 2021, Vol 699 Col 732.

⁶ Hansard, House of Commons, Tuesday 26 October 2021, Public Bill Committee, Col 399

The JCHR have recommended that clause 31 be amended to confirm that the standard of proof for establishing a well-founded fear of persecution remains a composite standard of reasonable likelihood.⁷

Members concerned about the Rule of Law implications of this clause should support the motion tabled by Lord Dubs and Baroness Ludford that clause 31(2) and (3) should be left out, and that clause 31(4) be amended.

In the alternative, members should support the motion of Baronesses Chakrabarti and McIntosh that clause 31 not stand part of the Bill.

Clause 32: Meaning of “a particular social group”

The concept of being a member of a “particular social group” has long been defined in international and UK domestic case law. There are two approaches. The protected characteristic approach is that the person possesses certain characteristics which are innate or so foundational to their identity or conscience that they should not be forced to renounce it. The social perception approach is that the group is perceived to be different by the rest of society.

The established methodology in international and domestic law is a disjunctive (or alternative) test: a person is a member of a particular social group if they satisfy EITHER the protected characteristic test OR the social perception test. Lord Bingham, acting in a judicial capacity stated that to take the conjunctive approach (i.e. this criterion AND that criterion) would be wrong as “it propounds a test more stringent than is warranted by international authority”.⁸ The Upper Tribunal reiterated this point in 2020, ruling that “the test for a PSG [particular social group] under the Refugee Convention is a disjunctive test”.⁹ This conforms with the position taken by the UNHCR in its *Guidelines on International Protection: Membership of a Particular Social Group*.¹⁰

Clause 32 seeks to legislatively over-rule this meaning, stating:

- (2) A group forms a particular social group for the purposes of Article 1(A)(2) of the Refugee Convention only if it meets both of the following conditions.
- (3) [protected characteristics condition]
- (4) [social perception condition]

This rewrites the law to suit the UK Government’s preferences, as well as making it harder for asylum seekers to satisfy its requirements than the Refugee Convention has ever warranted. The result will inevitably be to refuse protection to people who, as a matter of international law, are refugees.

Members concerned about the Rule of Law implications of this clause should support the motion tabled by Baronesses Lister and Coussins, The Lord Bishop of Gloucester and Lord Paddick that Clause 32 be amended.

In the alternative, members should support the motion of Baroness Chakrabarti that Clause 32 not stand part of the Bill.

Clause 33: Meaning of “protection from persecution”

The concept of State protection forms part of the refugee definition, which requires that a person be unable or unwilling to avail themselves of the protection of the country they have fled. The autonomous meaning of “protection from persecution” or “state protection” has been interpreted as entailing effective and practical protection from persecution in the person’s home country. The UK courts explained this concept in *Horvath* as follows:

⁷ *Ibid*, paragraph 136.

⁸ *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412.

⁹ *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC)

¹⁰ UNHCR, “Guidelines on International Protection No. 2: “Membership of a Particular Social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/02) (7 May 2002).

There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of [acts] contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.¹¹

This requires more than the notional idea that, if a person is killed by the security forces in their own state, there will be some form of investigation. It requires actual protection, not the theory of protection – avoiding the risk of persecution, rather than punishment of persecution after the fact.

But Clause 33 weakens this protection – by replacing a general test with room for fact-sensitivity, with an absolute test, with none :

(2) 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 in subsection (1) 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.

The family of a victim of state persecution will not take much comfort in knowing that reasonable steps will be taken to identify the perpetrators. A person in this position, whose country of origin could not offer the kind of meaningful protection identified in the existing authorities (as summarised above), satisfies this element of the refugee definition as a matter of international law – but may be refused protection under the approach mandated by the Bill. This provision, in rewriting the law, does not comply with the domestically and internationally accepted (and common-sense) meaning of protection from persecution.

Members concerned about the Rule of Law implications of this Clause should support the motion of Baroness Chakrabarti that Clause 33 not stand part of the Bill.

Clause 36: Coming “directly” to the UK

Article 31 of the Refugee Convention protects refugees from penalties if they come “directly” from a territory where they were persecuted. With the atrocities of World War 2 fresh in their mind, the framers of the Convention wanted to protect those fleeing from persecution.

Clause 36 of the Bill seeks to put a gloss on this which is contrary to the original meaning and intention of Article 31. Clause 36(1) in full states (with emphasis added):

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

The new concept is to add a requirement that a refugee is not allowed to have stopped in any country along the way to reaching the UK, save in the narrow circumstances identified. This is most clearly not the intention set out in the Refugee Convention for a number of reasons.

Firstly, as set out in the case law on Article 31, the requirement of coming “directly” was inserted to prevent a person who had been granted a settled status or recognised as a refugee in one country, later on deciding they wanted to switch to another country. According to Feller, “the drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country.”¹²

Secondly, consider the appalling need of refugees arising out of World War 2. The intention was not to preclude a Jew fleeing persecution in Nazi Germany from coming to the UK merely because they

¹¹ *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 510.

¹² “Summary of Conclusions” *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Feller, Türk and Nicholson (eds), 3.2, p 255.

had stopped in France, Belgium or the Netherlands on their way to the UK. In an era before commercial air travel, stopping in intermediate countries was inevitable. The key question was whether the person had found protection elsewhere, or whether they were effectively still in flight.

Thirdly, the domestic case law of the UK follows this international reasoning, and has already decided that a refugee is not precluded from seeking protection in the UK if they have stopped somewhere else along the way. In *Adimi*, the court held that

Any merely short term stopover en route to such an intended sanctuary cannot forfeit the protection of [Article 31] ... [T]he 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.¹³

Fourthly, the ethos of the Refugee Convention is not that the burden of and responsibility for looking after those fleeing persecution rests solely on neighbouring countries. In fact, the Preamble to the Convention specifically refers to the risk of the grant of asylum placing an unduly heavy burden upon certain countries. But to preclude those who have stopped in another country from being granted protection in the UK (subject only to a tightly defined exception) is to introduce a new principle into international law – that the obligation to look after refugees falls overwhelmingly upon neighbouring countries.

The Note on International Solidarity and Refugee Protection EC/SCP/50 (13 July 1988), under the sub-heading “Co-operation between States - international solidarity” goes on to state,

The drafters of the 1951 Convention envisaged not only States' co-operation with UNHCR but, more broadly, international co-operation among States in the field of asylum and resettlement. The Conference of Plenipotentiaries which completed the Convention adopted unanimously, amongst other recommendations, the following Recommendation D:

“Considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position,

Recommends that Governments continue to receive refugees in their territories and that they act in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement”.

This idea of co-operation and solidarity comes through in the Global Compact on Refugees (2018), which “emanates from fundamental principles of humanity and international solidarity, and seeks to operationalize the principles of burden- and responsibility-sharing to better protect and assist refugees and support host countries and communities.”¹⁴

The rewriting of the meaning of “directly” in Clause 36 is a 180 degree change from “international solidarity” to “they are closer to you, so it’s your problem”.

Fifthly, from a practical perspective, if this provision came to pass, a substantially smaller number of people could claim refugee status in the UK. This appears to be the intention. Only a person who has taken a flight / boat straight from the country of their persecution, without stopping anywhere along the way, would be entirely safe from the potential imposition of penalties; all others would need to show that they could not reasonably have been expected to seek protection in any of the countries in which they stopped, a potentially onerous test with no proper basis in the Refugee Convention. The combined effect of a lack of a safe legal route to claim asylum (a refugee visa) and carriers’ liability, means that even those who can afford to take direct flights face significant legal obstacles in doing so.

Consider the family of an interpreter for the British Army in Afghanistan. If the family were not lucky enough to get a direct flight out of Kabul when the Taliban took over, they would maybe travel first to Pakistan, then Turkey, then through Europe, before arriving in the UK. But their misfortune in not getting that last flight out of Kabul puts them at real risk of being deprived of protection against

¹³ *R (Adimi) v Uxbridge Magistrates Court & Anor* [2001] QB 667, 678.

¹⁴ Affirmed by the United Nations General Assembly, 17 December 2018.

penalties associated with their flight to the UK. Because they “stopped” along the way, they have not – unless they could bring themselves within the narrow exception for which the clause provides – come “directly” to the UK, and therefore, they are:

- Treated as second-class refugees with limited rather than full Convention rights and benefits in the UK
- Upon arrival (and regardless of any declarations they make upon arrival) liable to be found guilty of the offence established in clause 39 (see further below on this point) and liable to imprisonment for up to 4 years

Clause 36 seeks to overturn the accepted meaning of the Refugee Convention and in doing so breaches international law.

Members wishing to follow the most straightforward route to rectifying this breach of the Refugee Convention should support the amendment tabled by Baroness Chakrabarti that Clause 36 not stand part of the Bill.

In the alternative, the amendments proposed by Lord Dubs, Baroness Ludford and Lord Etherton to Clause 36 go some way to ameliorating this breach.

The Rule of Law and International Law

As stated in our previous Report on this Bill, 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:¹⁵

... 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:¹⁶

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.

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

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

¹⁵ Tom Bingham, *The Rule of Law* (2010), chapter 10, “The Rule of Law in the International Legal Order”, pp. 110-111.

¹⁶ *The Rule of Law*, p. 112.

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.

Members concerned about the Rule of Law implications of Parliament reinterpreting international law in a way which goes against the established meaning of the Refugee Convention should support the motion tabled by Baroness Chakrabarti, and Lords Pannick, Judge and Dubs to insert a new Clause entitled “Compatibility with Refugee Convention”.

The constitutional difficulty with Parliament reinterpreting treaties

Parliament has a range of functions in relation to treaties. As explained in more detail below, its main functions are to implement them, and to have an input into their ratification. They have on occasion also interpreted terms in treaties. However, this Bill (in the clauses set out above) does not interpret the Refugee Convention, rather it seeks to reinterpret it in a way which is contrary to the spirit and intention of the Convention and also contrary to the established case law on the Convention. As well as being in breach of international law, this is constitutionally inappropriate.

Explainer – Parliament, the courts and treaties

The Rule of Law recognises and respects the doctrine of the separation of powers. This doctrine can be seen in the Venice Commission Rule of Law Checklist in the discussion on the independence of the judiciary¹⁷ and the importance of the executive conforming with the law.¹⁸

The separation of powers doctrine can be simply expressed. Parliament makes the law, the executive implements the law, and the courts interpret the law. It has long been the model upon which the UK, and most western liberal democracies, operate. Once the legislation is made, it is for courts to decide its meaning. If Parliament does not like that interpretation, it is fully entitled to make new legislation setting out its preferred meaning.

When it comes to international law, as set out in treaties, the position is different. Each state has its own approach. In the UK, it is the executive which signs and ratifies the treaty, following negotiations with other states. So, the job of making the law does not rest with Parliament, but with the executive in partnership with the other states who jointly agree the text of the treaty. The courts (both domestic and international) then have the role of interpreting that treaty. Parliament too can pass legislation to interpret that legislation. But in all instances, this must be a genuine attempt to interpret the words of the treaty, rather than attempt to redefine those words in a way which is not in harmony with meaning of the treaty. The closest a state gets to redefining the meaning of a term in a treaty is when it makes a formal declaration, normally when the treaty is being signed, that it has a particular and specific understanding of what a specified treaty term means. A treaty does not mean what an individual state says it means, a treaty has its own autonomous meaning.

To use a hypothetical example. Suppose the UK signed up to the Dogs Convention granting certain rights to dogs. Parliament has the power to pass a law stating that for the purposes of the Dogs Convention a poodle was not a dog. The UK courts would be bound to follow that law. But in any international forum, that domestic law would have no effect, and the fact of passing it would mean that the UK is in breach of international law.

Explainer – International law and the interpretation of treaties

International law governs the making, interpretation and implementation of international treaties. The framework is set out in the Vienna Convention on the Law of Treaties 1969, which the UK signed in 1970 and ratified in 1971,¹⁹

Article 31 of the Vienna Convention governs the interpretation of treaties and states:

¹⁷ Paragraph 77 of the Checklist.

¹⁸ Benchmark A1(iv) of the Checklist.

¹⁹ See United Nations Treaty Collection - Vienna Convention on the Law of Treaties – Ratifications. available at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en>.

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 31 also allows interpretation to take into account agreements between parties to the treaty and accepted practices between parties to the treaty. No part of Article 31 authorises unilateral actions of one state to revise the meaning of the terms in a treaty.

Article 27 does make reference to the domestic law of a party to a treaty. It states:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Interpretation of treaties is therefore a good faith endeavour, informed by the views of all parties to the treaty. It is not a matter of personal preference of the individual states who have signed up to a treaty.

Explainer – International law and the duty to abide by treaties

Article 26 of the Vienna Convention provides:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This Article reflects the very long-standing principle of international law *pacta sunt servanda* – agreements must be kept. That is a basic principle of customary international law and, as such, is also part of English common law. The importance of this principle to the very existence of a rules-based international order cannot be stressed enough. The International Court of Justice in 1974 restated the importance of the Vienna Convention rule stating:

‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith [T]he very rule of *pacta sunt servanda* in the law of treaties is based on good faith’.²⁰

Even more specifically on the point raised by the clauses in this Bill, the predecessor court to the International Court of Justice stated:

a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.²¹

As set out in the Appendix on the role of Parliament in implementing treaties, this is the way that Parliament has invariably acted in relation to treaties – implementing them in domestic law in order to comply with the international obligations that we have signed up to.

The role of Parliament

This is not to say that Parliament is frozen out when it comes to treaties.

Firstly, they can attempt to influence the executive’s negotiating position during the process of making the treaty.

Secondly, since 2010, Parliament has had the opportunity to effectively block ratification of a treaty. Parliament can do this in practice by repeatedly passing a motion against ratification, forcing continual 21 day delays in ratification.²² This power to block ratification was contained in the Constitutional Reform and Governance Act 2010.

Thirdly, Parliament has the power to give effect to a treaty in UK domestic law. The Appendix gives some examples of how Parliament has exercised this third function. This third function arises because the UK is a dualist state – meaning that international law only has effect domestically if there is some domestic law which implements it. In a monist state, international law is automatically part of the domestic law of the land.

²⁰ *Nuclear Tests* (1974) ICJ Rep page 278.

²¹ Permanent Court of International Justice, *Exchange of Greek and Turkish Populations*, Advisory Opinion of 21 February 1925, Series B No. 10, page 20.

²² This procedure is very helpfully summarised in Arabella Lang “How Parliament treats treaties” (House of Commons Library Briefing Paper, Number 9247, 1 June 2021).

Fourthly, as a specific way of implementing a treaty, Parliament can supplement the treaty by filling in additional detail which is not set out in the treaty. It can do this, for example, by interpreting key terms of the treaty. Parliament has exercised his power in the past, for example in the Immigration Act 2014 which set out various factors to consider in determining what the meaning of “the public interest” was in relation to Article 8 of the European Convention on Human Rights. Providing that this interpretation is within the scope of the treaty, or within the margin of appreciation that each state has, there is nothing wrong in principle with this.

However, the key point is **Parliament does not have the unilateral power to draft or rewrite international law**. As the House of Commons Library briefing paper puts it “Parliament cannot amend treaties”.²³ This makes practical sense. There would not be much point in negotiating a deal with the UK Government, if the UK Parliament could simply change the terms of the deal afterwards.

The domestic power of a sovereign Parliament and its international effect

As ever in points to do with international law, the question is not - does Parliament have the power to pass this law? It does have that power. Nor is the question - if Parliament passes this law, will the UK courts respect it? The UK courts will (probably reluctantly) respect an Act of Parliament. The question is - should Parliament pass a law which is in breach of our international obligations, the treaties and Conventions that we have signed up to and solemnly sworn to obey? The answer is that Parliament should not do so. Breaking international law is breaking the Rule of Law.

The other aspect of this is what Professor Mark Elliot has referred to as parochialism, or legal exceptionalism.²⁴ This is the idea that if Parliament legislates to breach international law, then this exercise of parliamentary sovereignty makes its actions lawful. This is correct as a matter of domestic law, but incorrect as a matter of international law. If we want to be a part of the rules-based international order, then we have to abide by those rules. If we want to be taken seriously on the international stage, then we can't pretend that there is a “democratic shield” which somehow protects us if we break international law. Professor Elliot was considering breach of the Northern Ireland Protocol, but his words are equally relevant to the Nationality and Borders Bill. He stated:

The bottom line, then, is that this is not an issue that the UK Government — however sovereign Parliament might be — can circumnavigate merely by enacting domestic legislation. Thus the ultimate problem with the Government's apparent plan is its parochialism. It rests on the assumption that the UK can make domestic law so as to evade its obligations under international law. But this is legally illiterate.

During the passage of what became the United Kingdom Internal Market Act 2020, Parliament very clearly took the view that it would not legislate to break international law. That Act originally contained provisions authorising or validating a breach of international law. Parliament rejected these provisions as it should reject the provisions in this Bill breaching international law.

Why is it wrong for Parliament to reinterpret an international treaty?

Although it is perfectly appropriate for the Government to rewrite a domestic law that it does not like, it is not acceptable to unilaterally rewrite an international law that it does not like. An opportunity to define the concepts in the Refugee Convention is not an opportunity to amend long-standing principles of international law. The courts have repeatedly said that the Convention has its own autonomous meaning. Lord Steyn explained it in this way:

It follows that the inquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision.²⁵

²³ Arabella Lang ‘Parliament's role in ratifying treaties’ (House of Commons Library Briefing Paper, Number 5855, 17 February 2017).

²⁴ Mark Elliot “Legal exceptionalism in British political discourse: International law, parliamentary sovereignty and the rule of law” (10 October 2021) (available at <https://publiclawforeveryone.com/>)

²⁵ *R v Secretary of State for the Home Department; ex parte Adan* [2001] 2 AC 477, 515.

Remedying the attempt to reinterpret international law

There are two ways that this attempt to reinterpret international law could be remedied. The first is to amend the individual clauses as set out above, or to excise those clauses from the Bill. The second is to reaffirm that nothing in the Bill is intended to deviate from, or undermine the established meaning of the words set out in the Refugee Convention. An amendment to this effect has been tabled by Baroness Chakrabarti and Lords Pannick, Judge and Dubs. That proposed new clause states

Nothing in this Act is intended to undermine the obligations of the United Kingdom under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees.

This is a laudable effort to restrain the attempt to reinterpret the Refugee Convention in a way which is contrary to its spirit and intention. It would admittedly cause some strain to be placed on the meaning of the words in the Bill – words which clearly demonstrate an intention to deviate from the Refugee Convention would now have to be interpreted in a way which supported the Convention. But as a catch-all way of complying with international law, there is much to be admired about it.

Members concerned about the Rule of Law implications of Parliament reinterpreting international law in a way which goes against the established meaning of the Refugee Convention should support the motion tabled by Baroness Chakrabarti, and Lords Pannick, Judge and Dubs to insert a new Clause entitled “Compatibility with Refugee Convention”.

Overtaking established domestic case law

The courts have the job of interpreting law that Parliament has made. If Parliament disagrees with that interpretation, there is no doubt that a sovereign Parliament has the right to overturn that interpretation by passing a new Act of Parliament. There is nothing inimical to the Rule of Law in Parliament setting out a new law which changes existing case law.

However, there are two factors which may give parliamentarians reason to pause before passing legislation which overturns the UK case law interpreting the Refugee Convention. These are in addition to the points made above around the problem of breaching international law.

The first is that Parliament is not being clearly told that this Act is overturning domestic case law. The Explanatory Notes make reference to there being a substantial body of case law.²⁶ They go on to say that they “intend to consolidate the legislation which underpins the system to make it easier to navigate for all those who use it”,²⁷ and that the Convention is “open to some degree of interpretation as to exactly what they mean in practice”.²⁸

But there is no general statement that the interpretation clauses in the Bill actually overturn the existing case law. The closest is an oblique reference that Clause 31 will “raise the standard of proof”,²⁹ but without mentioning that this is overturning established case law. In discussing Clause 36, the Explanatory Notes state that the “Refugee Convention does not explicitly define what is meant by ‘coming directly’”.³⁰ However, the Notes omit to mention the clear UK case law which does interpret that term, and which makes it clear that there is no requirement to stop in the first safe country. The Notes give the impression that these Clauses are merely tidying up and clarifying the law, but fail to inform parliamentarians that they seek to overturn a large body of UK domestic case law. This information is relevant information for Parliament to consider in deciding whether or not to enact this legislation.

Secondly, there is a diminution of the right of effective access to a court. These clauses overturn many cases which the Home Office has lost over the years. One prime function of the courts is to protect the individual from government overreach. Their ability to do so is compromised if Parliament simply legislates to overturn all cases that the Government has lost. What then is the point of an

²⁶ Explanatory Notes, paragraph 316.

²⁷ Explanatory Notes, paragraph 317.

²⁸ Explanatory Notes, paragraph 318.

²⁹ Explanatory Notes, paragraph 337.

³⁰ Explanatory Notes, paragraph 363.

independent judiciary? Even if an individual wins a case, the Government will just come back and change the law. Going to court starts to look like a pointless exercise.

According to reports in 2021, Secretary of State for Justice Dominic Raab MP was considering a legislative proposal granting the Government the power to overturn cases that it lost by way of an annual interpretation bill.³¹ Professor Mark Elliot called this proposal extraordinary – the idea that a mechanism could be created to ‘correct’ court judgements that the Government concluded that the courts got wrong substantially undermines the Rule of Law.³² But this is the approach that the Nationality and Borders Bill seeks – overturning the court cases on immigration law that the Government has lost over the last two decades. Put very simply, the Government has lost cases on the meaning of the Refugee Convention, now under the guise of clarifying the law, it is legislating to reverse its losses on a grand scale.

Recent Reports by the Secondary Legislation Scrutiny Committee³³ and the Delegated Powers and Regulatory Reform Committee³⁴ both complained about the Executive expanding its power at the expense of Parliament. These proposals would amount to the Executive expanding its power at the expense of the courts.

Clause 39: Legal certainty and new criminal offences

Clause 39 would create a number of new offences applying to immigrants. These offences include an offence relating to leave to enter the UK:

(B1) A person who—

- (a) requires leave to enter the United Kingdom under this Act, and
- (b) knowingly enters the United Kingdom without such leave,

commits an offence.

There is offence in relation to leave to remain:

(C1) A person who—

- (a) has only a limited leave to enter or remain in the United Kingdom, and
- (b) knowingly remains beyond the time limited by the leave,

commits an offence.

There is also include an offence for entry in breach of the immigration rules

(D1) A person who—

- (a) requires entry clearance under the immigration rules, and
- (b) knowingly arrives in the United Kingdom without a valid entry clearance,

commits an offence.

The penalty for these offences, if found guilty on indictment, is up to four years in jail.

One of the basic Rule of Law requirements is legal certainty. “Legal certainty” is Benchmark B of the Venice Commission Checklist on the Rule of Law. In terms of human rights law, this means a requirement that a criminal penalty is in accordance with the law.

³¹ Andrew Woodcock ‘Raab threat to ‘correct’ court judgments is ‘deeply troubling’, warn legal experts’ *The Independent* (17 October 2021)

³² Mark Elliot ‘Undermining the rule of law? A comment on the Justice Secretary’s Sunday Telegraph interview’ (October 2021). Available at <https://publiclawforeveryone.com/>

³³ Government by Diktat: A call to return power to Parliament (24 November 2021).

³⁴ Democracy Denied: The urgent need to rebalance power between Parliament and the Executive (24 November 2021)

The enormous practical difficulty here is knowing when a person requires leave to enter the UK, and knowing whether they require entry clearance under the immigration rules. Lord Justice Beatson made this criticism of the immigration rules

The detail, the number of documents that have to be consulted, the number of changes in rules and policy guidance, and the difficulty advisers face in ascertaining which previous version of the rule or guidance applies and obtaining it are real obstacles to achieving predictable consistency and restoring public trust in the system, particularly in an area of law that lay people and people whose first language is not English need to understand.³⁵

In discussing immigration law, Jackson LJ stated that the “provisions have now achieved a degree of complexity which even the Byzantine emperors would have envied”.³⁶ Immigration law barrister Colin Yeo has pulled together a seemingly limitless series of quotes from the judiciary setting out their despair at ever understanding the complexity of immigration law. The point of the article is clear from its title “How complex is immigration law and is this a problem?”.³⁷

Immigration law is so voluminous, and changes so quickly that not even judges can be sure what it means. How then can an immigrant be expected to be au fait with its details? And how fair is it to jail them for up to four years if they fail to understand it?

Consider the Windrush scandal, when the Home Office failed to apply immigration law to various members of the Windrush generation. This mistreatment was so gross that the Home Office, which wrote the immigration rules, was forced to apologise and launch a major compensation scheme. If the new offence C1 was applied to members of the Windrush generation, they would be treated as if they had committed a criminal offence, and jailed for up to four years. **How fair would it be to jail an immigrant for up to four years for failure to understand a law which not even the Home Office, who wrote the law, could get right?**

In the Explanatory Notes to the Bill, the Government refers to the Windrush scandal and states that it “has expressed its commitment to transformative change across the entire Home Office”.³⁸ It is difficult to square this commitment with the text of the Bill. Criminalising individuals for breaking immigration rules in the wake of a decades long practice of falsely treating people as if they had broken immigration rules does not seem like learning lessons.

Clause 39 and laws requiring the impossible

Part 1 of this Report referred to the perils of a law which required the impossible.

Previously, the weight of the criminal law was applied to a person who unlawfully “entered” the UK, rather than one who “arrived” in the UK. These two concepts are obviously linked, but have important differences. “Entry” under section 11 of the Immigration Act 1971 means disembarking and subsequently leaving the immigration control area. “Arrival” is the stage directly before that, covering the person who has physically landed in the UK, but has presented themselves to the authorities, and not yet passed through immigration control. The courts have summarised this distinction as follows:

It can be said a person arriving at an airport or port with immigration facilities shall be deemed not to enter the United Kingdom whilst waiting to pass through immigration or whilst detained, temporarily admitted or released whilst liable to detention.³⁹

Clause 39 amends this for certain cases, so that the criminal law will apply to a person who “arrives” without the proper permission, as well as one who “enters” without the proper permission. So, the new offence in (D1) will criminalise someone who arrives without a valid entry clearance. This will include a person who arrives on a plane, and straight away presents themselves to the authorities as a refugee.

The problem is that safe and lawful routes to arriving in the UK for the purpose of seeking asylum are almost non-existent. To get “entry clearance”, a person must be entitled to a visa under one of the

³⁵ *Hossain v Secretary of State for the Home Department* [2015] EWCA Civ 207 at [30].

³⁶ *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568

³⁷ Colin Yeo “How complex is immigration law and is this a problem?” (Free Movement Blog, 24 January 2018). Available at <https://www.freemovement.org.uk/>

³⁸ Explanatory Notes, paragraph 79.

³⁹ *Kapoor and Ors v R* [2012] 1 WLR 3569, para 23.

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.⁴⁰

Arrival in the UK is necessary to claim asylum. Arrival without a visa is now to be a crime. But there is no “asylum seeking” visa route to entry clearance. This provision requires the impossible.

Members concerned about the Rule of Law implications of Clause 39 should support the motion of Lord Dubs and Baroness Ludford to leave out the new offence of (D1). They should also support the related amendments to Clause 39 tabled by Baroness McIntosh and Baroness Hamwee which have the combined effect of removing “arrival” as an element of the offence.

An historical example - Myer Silverman and his voyage to the UK

One final example of many from the immigrant history of the UK.

Myer Silverman was a Jew living in Jassy, Romania towards the end of the 19th century. Given the history of pogroms, persecution and discrimination against Jews in Eastern Europe at the time, he took the decision to flee to the UK. Like so many other Jews at that time, he made his way here by foot, by train, and by whatever form of transport he could find. He came directly to the UK, but he stopped in other multiple European countries along the way. He settled in England, found a job, and raised a family. His son was Sydney Silverman who went on to become an MP for Nelson and Colne from 1935 until 1968, making a substantial contribution to the political life of the UK.

This story is passed upon the personal testimony of Meyer’s grandson. It is the same story as so many other British families. Under this Bill, if Meyer Silverman and his ilk turned up today, they would have committed a criminal offence purely by virtue of arriving here, have their claim treated as inadmissible, be subject to attempts by the Government to process their claim offshore, and even if they were recognised as a refugee, still not entitled to rights guaranteed under the Refugee Convention.

⁴⁰ *R (Adimi) v Uxbridge Magistrates Court & Anor* [2001] QB 667, 674.

Appendix: Parliamentary power to implement treaties by way of domestic law

The following list sets out different ways that Parliament can implement treaties. The list is not exhaustive, and some of the categories overlap. It also gives some examples of the exercise of this power.

1. Parliament can give effect to a treaty in domestic law. For example, Part 1 of the Civil Jurisdiction and Judgements Act 1982 is entitled “Implementation of the Conventions” and section 3C states:

(1) The 1996 Hague Convention shall have the force of law in the United Kingdom.

2. Parliament can implement a treaty domestically. This means giving effect to the treaty requirements by way of domestic law provisions. For example, the long title of the Wreck Removal Convention Act 2011 is “An Act to implement the Nairobi International Convention on the Removal of Wrecks 2007”.

3. Parliament can incorporate a treaty into domestic law. This was done with the Human Rights Act 1998 which incorporated the rights set out in the European Convention on Human Rights into the domestic law in the UK. The actual text of the Convention is set out in Schedule 1 to that Act.

4. Parliament can amend domestic law to give effect to new rights and duties contained in a treaty. See for example the International Transport Conventions Act 1983. The long title of that Act is:

An Act to give effect to the Convention concerning International Carriage by Rail signed on behalf of the United Kingdom on 9th May 1980; and to make further provision for the amendment of Acts giving effect to other international transport conventions so as to take account of revisions of the conventions to which they give effect.

5. Parliament can take a commitment which has been agreed internationally and turn that into a target in domestic law. This was done with the Climate Change Act 2008 which legislated for the Kyoto Protocol targets on climate change.

6. Where an international agreement sets out a range of things which may be done under it, or a base level of obligation, domestic legislation may go further and introduce higher standards. More colloquially, this is known as ‘gold-plating’, where the legislature introduces extra protections. Pre-Brexit, official Government policy was to avoid gold-plating for EU obligations. See for example the Gold-Plating Review by the Department for Business, Innovation and Skills in 2013.⁴¹

7. Parliament can require UK courts to interpret domestic law in accordance with a treaty. This was also done in the Human Rights Act 1998.

8. Parliament can require the UK courts to interpret a treaty in accordance with the decisions of non-UK courts. See for example section 3B of the Civil Jurisdiction and Judgements Act 1982

In determining any question as to the meaning or effect of a provision of the Lugano Convention, a court in the United Kingdom shall, in accordance with Protocol No. 2 to that Convention, take account of any principles laid down in any relevant decision delivered by a court of any other Lugano Contracting State concerning provisions of the Convention.

⁴¹ Department for Business, Innovation and Skills, “Gold-plating Review: The Operation of the Transposition Principles in the Government’s Guiding Principles for EU Legislation” (March, 2013).

9. Parliament can spell out in legislation what it considers is necessary in order to implement a treaty obligation, which may require it to interpret treaty provisions. See for example the amendments set out in Section 19 of the Immigration Act 2014 on the interpreting the meaning of “the public interest” when it came to Article 8 of the European Convention on Human Rights. This included the following provision:

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

10. Parliament cannot rewrite the terms of a treaty.

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