BINGHAM CENTRE FOR THE RULE OF LAW

# Nationality and Borders Bill (Lords Consideration of Commons Amendments): A Rule of Law Analysis

Dr Ronan Cormacain, 1 April 2022

BICL
British Institute of International and Comparative Law

## Executive Summary

This Report analyses the Commons Amendments to the Nationality and Borders Bill to inform the House of Lords Consideration of them on Monday 4th April. The Report focuses only on amendments that engage the Rule of Law. It supplements our three previous Reports analysing the Bill in greater detail.

The Commons amendment moved in lieu of Lords Amendment 1 grants certain citizenship rights to descendants of persons born in the Chagos Islands. It rectifies some aspects of the historic injustice suffered by them and is to be welcomed from a Rule of Law perspective.

We recommend that peers vote in favour of Commons amendment 1.

Commons amendments 4A to 4F (moved in lieu of Lords Amendment No. 4) create safeguards for the exercise of the power (in clause 9 of the Bill) to deprive a British citizen of their citizenship without notice. Although this remains a draconian power, we welcome these safeguards.

We recommend that peers vote in favour of Commons amendments 4A to 4F (although see below).

However, one aspect of clause 9 continues to seriously undermine the Rule of Law. Subsections (5) to (7) retroactively validate deprivations of citizenship without notice that were made unlawfully. Retroactively penalising citizens ought to be exceptional, and no justification has been offered. It undermines legal certainty, the right to a fair trial and interferes in the exercise of justice in individual cases if the Government can change the law to legitimise its past unlawful conduct in relation to individuals after it loses a case.

We recommend that peers vote for the Baroness D'Souza amendment to clause 9 to remove subsections (5) to (7).

Lords Amendment 5 dealt with compliance with the Refugee Convention and was rejected by the Commons. The Baroness Chakrabarti amendment provides that Part 2 of the Bill is compliant with the Refugee Convention, and is to be read and given effect to as such. We remain gravely concerned that provisions in the Bill would breach the Convention. The Chakrabarti amendment would help make clear to courts that Parliament does not intend Part 2 of the Bill to breach the Refugee Convention. On the basis that all sides of the debate seek compliance with the Convention, there is no valid reason for not stating this on the face of the Bill.

We recommend that peers vote for the Baroness Chakrabarti amendment relating to Lords Amendment 5.

Lords Amendment 6 rejected a provision that allowed for a two-tier refugee system, with Group 1 refugees having full rights, and Group 2 refugees having lesser rights. We agree with the United Nations High Commissioner for Refugees that this approach is inconsistent with the Refugee Convention. Refugees should not face differential treatment based on how they arrive in the UK, nor what countries they pass through on their way to the UK. The amendment by Lord Kerr provides that all refugees are entitled to their rights under the Refugee Convention, and that clause 11 does not affect the ability to maintain the unity of families.

We recommend that peers vote for the Lord Kerr amendment to clause 11.

## 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.

- We carry out independent, rigorous and high quality research and analysis of the most significant Rule of Law issues of the day, both in the UK and internationally, including highlighting threats to the Rule of Law.
- We make strategic, impartial contributions to policy-making, law making or decision-making in order to defend and advance the Rule of Law, making practical recommendations and proposals based on our research.
- We hold events such as lectures, conferences, roundtables, seminars and webinars, to stimulate, inform and shape debate about the Rule of Law as a practical concept amongst law makers, policy makers, decision-makers and the wider public.
- We build Rule of Law capacity in a variety of ways, including by providing training, guidance, expert technical assistance, and cultivating Rule of Law leadership.
- We contribute to the building and sustaining of a Rule of Law community, both in the UK and internationally.

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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.

Although this Report has been written by the Bingham Centre, we have consulted with other institutions with expertise in this area. With their permission, we have included their endorsement of some of our specific recommendations in this Report. We are grateful for input from Public Law Project, Refugee Council, Reprieve, JUSTICE, Immigration Law Practitioners' Association, and Freedom from Torture.

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## Introduction

On 4 April, the House of Lords will consider amendments made by the House of Commons to the Nationality and Borders Bill, as previously amended by the House of Lords.

This Report supplements our three previous reports (26 January, 31 January and 7 February) which examined the Bill in detail from a Rule of Law perspective. This Report focuses only on those issues raising Rule of Law concerns where the House of Lords have previously passed an amendment which was rejected by the House of Commons.

## Citizenship rights for Chagossians (Lords Amendment 1)

Baroness Lister, Lord Ramsbotham, Baroness Altman and Baroness Ludford had tabled an amendment granting certain citizenship rights to descendants of persons who were citizens of the UK and Colonies through their birth in the Chagos Islands. The House of Lords agreed to that amendment.

The House of Commons disagreed with that amendment, but inserted their own amendment in lieu which has the effect of granting those persons certain citizenship rights.

**The Commons amendment rectifies some aspects of the historic injustice suffered by the Chagossians and is to be welcomed from a Rule of Law perspective.** We welcome the Government introducing this amendment, and we recognise the work of Henry Smith MP, Baroness Lister and other members of the Chagos Islands (BIOT) APPG in achieving this result.

**We recommend that peers vote in favour of the Commons amendment moved in lieu of Lords Amendment 1.**

## Deprivation of citizenship without notice (Lords Amendment 4, Commons Amendments 4A to 4F)

The Bill originally included a power in clause 9 to deprive a British citizen of their citizenship without notice. The House of Lords passed consecutive amendments on this power. The first amendment, proposed by Lord Anderson, added substantial safeguards to the exercise of this power. The second amendment was to leave out the clause altogether.

The House of Commons disagreed with the amendment to leave out this clause, but inserted their own amendments in lieu, Amendments 4A to 4F. The House of Commons amendments restored the power to deprive citizenship without notice, but with substantial safeguards, along the lines of those originally agreed by the House of Lords. These safeguards include:

- A higher hurdle to be overcome before citizenship can be taken away without notice
- A right to notice if the citizen subsequently gets in touch with the Home Office
- Judicial oversight of deprivation of citizenship without notice

**Although deprivation of citizenship without notice remains a draconian power, these safeguards go some way to mitigating the Rule of Law objections to its exercise**. We welcome the Government introducing these amendments. If this power is to remain in the Bill, then it is much better that it remains with these safeguards in place.

**Subject to what we say below, we recommend that peers vote in favour of Commons Amendments 4A to 4F.**

### Retroactive validation of unlawful deprivation of citizenship without notice

There remains one discrete point where clause 9 is still incompatible with the Rule of Law, and which is untouched by the Government's amendment. The re-inserted clause 9 will include subsections (5) to (7). These subsections retroactively validate existing deprivations of citizenship, unlawfully made without notice, including those which have already been declared by the courts to be invalid. Overall,

clause 9 can be described as Janus-faced legislation, looking both forwards and backwards.[1] Most of clause 9 is prospective, setting out the safeguards to be applied from this point in time forwards. But subsections (5) to (7) are retroactive only; they go back in time and change the law, so that what was an invalid deprivation of citizenship made under an unlawful regulation[2] is now valid, and is always to be regarded as having been valid.

The purpose of these subsections is to retroactively change the decision, and the outcome of the case of *D4*. In *D4*, the High Court,[3] and then the Court of Appeal[4] ruled that a regulation[5] allowing deprivation of citizenship without notice was unlawful as it was beyond the powers set out in the British Nationality Act 1981, and an order to deprive the claimant of British citizenship was therefore void and of no effect. Clause 9 prospectively changes the law by allowing deprivation without notice, with the various safeguards set out, but it also retrospectively changes the law, by allowing deprivation without notice, with none of those safeguards set out.

In summary, the timeline is:

1. The Home Office has deprived British citizens of their citizenship without giving them any notice.
2. The courts rule that it is unlawful to deprive such persons of their citizenship without giving them notice, therefore:
    a. The citizen in *D4* remains a British citizen.
    b. All other citizens who have been treated like D4 remain citizens.
3. This Bill becomes an Act.
4. Clause 9(5) to (7) goes back in time and declares that the previous deprivation order is valid and is to be treated as always having been valid.
5. The British citizen is no longer a citizen, and was not a citizen from the time the original deprivation order was made, so
    a. D4 is to be treated as having been deprived of her citizenship from the time of the original deprivation.
    b. All other citizens in the same position as D4 are to be treated as having ceased to be citizens from the time of the original deprivation.

As well as being manifestly unfair, this is incompatible with the Rule of Law in three ways.

Firstly, this is retroactive law-making pure and simple. It deems a past Government action, which was unlawful, to now be lawful. Not only that, but it also goes back in time and deems an invalid order to have been valid back when it was made.

Unsurprisingly, retroactive legislation of this kind is not in accordance with the Rule of Law. Tom Bingham said that law must be (generally) prospective.[6] Lon Fuller stated that retroactive laws are a monstrosity.[7] He states that laws are there to govern human conduct, and we can't govern today's conduct by tomorrow's rules. Limited exceptions to this do exist, but these are 'curative' exceptions

[1] Ronan Cormacain, "Retroactivity, Retrospectivity, and Legislative Competence in Northern Ireland: Determining the Validity of Janus-Faced Legislation" (2015) 36 Statute Law Review 134.
[2] Regulation 10(4) of the British Nationality (General) Regulations 2003.
[3] *R (on the application of D4) v Secretary of State for the Home Department* [2021] EWHC 2179
[4] *R(on the application of D4) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department* [2022] EWCA Civ 33
[5] ibid.
[6] T Bingham, *The Rule of Law* (Penguin UK 2011).
[7] LL Fuller, *The Morality of Law: Revised Edition* (Revised, Yale University Press 1969). Desideratum 3, no retroactive law.

for the benefit of citizens,[8] or for recognising war crimes.[9] The Israeli Supreme Court listed the problems caused by retrospective legislation

> the application of a statute retroactively may cause an injustice, violate rights that have been acquired, undermine stability and certainty in interpersonal relationships and harm just expectations.[10]

The Constitution Committee of the House of Lords has already recommended voting against this provision, stating

> We have previously commented upon the unacceptability of retrospective legislation other than in very exceptional circumstances and no justification has been offered in this case.[11]

Secondly, this retroactive provision ignores all the safeguards that the Government have already recognised as important in current cases of deprivation of citizenship without notice. It is illogical for the Government to accept that the safeguards introduced in its amendment are fair and just, but to then argue that they ought not to apply to existing cases. Most concerningly, the judicial oversight which the Government has conceded will "enable us to protect the rights of the individual while delivering on our security objectives"[12] will in fact only protect the rights of some, whilst these subsections ringfence older decisions beyond the judicial scrutiny in the Bill.

Thirdly, these subsections breach the separation of powers doctrine by interfering in the outcome of a judicial determination. If Parliament does not like a precedent set by the courts, then it is perfectly entitled to change that precedent by making a new law. That is what the rest of clause 9 does – it changes the law to allow for circumstances when it is permissible to deprive a person of citizenship without notice. But subsections (5) to (7) do something altogether different. The Government don't seek to create a new law and apply that law retroactively (bad as that is). Instead, the Government seek to invoke the sovereignty of Parliament to change a decision that it has lost in the High Court and lost in the Court of Appeal.

Parliament is fully justified in making a new law with prospective effect. But it usurps the function of the courts if Parliament simply undoes a court decision. According to CJ Knight "where the state legislates retrospectively on a matter which effectively determines the substance of an existing dispute, making it pointless for proceedings to continue, that can be a breach of Article 6".[13] Similarly, there can be no right to a fair trial under Article 6 of the European Convention on Human Rights if the legislature can go back in time and change the outcome of a case. What is the point in any citizen bringing a case against the Government if, when the Government loses, it retroactively changes the laws so that it now deemed to have won the case? It also undermines legal certainty if a settled judicial case is retroactively overturned by the legislature.

If the legislature retroactively changed the law to pre-determine the outcome of a particular case, that would infringe Article 6 unless there was a compelling public interest.[14] These subsections don't just prejudice existing cases where the Government have acted unlawfully, they also overturn cases that have already been decided. Furthermore, they create an arbitrary distinction between two tiers of oversight: citizens deprived of citizenship before these safeguards come into force (who will not benefit from the safeguards) and citizens deprived after these safeguards come into force (who will benefit from the safeguards).

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[8] For example, the Child Support, Pensions and Social Security Act (Northern Ireland) 2000 deemed certain provisions to have retroactive effect for the purposes of preserving certain pension rights of individuals.
[9] See for example the War Crimes Act 1991, International Criminal Court Act 2001. Both these Acts had retroactive effect in criminalising conduct that amounted to war crimes.
[10] *Ganis v Ministry of Building and Housing* [2004] Israel Law Reports 505, 522.
[11] House of Lords, Select Committee on the Constitution, Nationality and Borders Bill (11th Report of Session 2021-22) HL Paper 149.
[12] HC Deb (22 March 2022). Vol. 711. Col. 183.
[13] CJ Knight, 'Taking an AXA to Acts of the Scottish Parliament' [2010] JR 163. 166.
[14] *Zielinski & others v France* (2001) 31 EHRR 19

**Clause 9(5) to (7) undermines the Rule of Law by retroactively changing the rules after the Government has lost a case the detriment of individuals already subject to no notice deprivation orders, it interferes with the right to a fair trial and usurps the function of the courts in determining the outcome of individual cases.**

Baroness D'Souza has tabled an amendment that the Lords do not insist on Lords Amendment No. 4, do agree with Commons Amendments 4A to 4F, with the additional amendment to leave out clause 9(5) to (7).

**We recommend that peers vote that clause 9(5) to (7) not stand part of the Bill and that they therefore vote for the D'Souza amendment to clause 9.**

Following consultations with them, this recommendation has been endorsed by:

- Public Law Project
- Reprieve
- JUSTICE
- Immigration Law Practitioners' Association

## Compliance with the Refugee Convention (Lords Amendment 5)

In the House of Lords, Baroness Chakrabarti, Lord Judge, Lord Pannick and Baroness Hamwee tabled the following amendment which was passed as a new clause.

> **Compliance with the Refugee Convention**
>
> Nothing in this Part authorises policies or decisions which do not comply with the United Kingdom's obligations under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees.

The House of Commons rejected this amendment giving the following reason:

> Because the Commons consider that the provisions of Part 2 are compliant with the Refugee Convention, and that it is therefore not necessary to provide expressly that this is so.

In response, Baroness Chakrabarti has tabled an amendment that the Lords do not insist on Lords Amendment 5 and does propose the following amendment in lieu:

> **Interpretation of Part 2**
>
> For the avoidance of doubt, the provisions of this Part are compliant with the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, and must be read and given effect as such.

### How will the courts interpret the Bill?

The UK is a dualist state, meaning that international law does not form part of our domestic law unless that international law is incorporated in some way (for example by legislation) into our domestic law. Our courts are duty bound to follow UK domestic law, meaning that they will strictly follow the wording of this Bill. The courts only have the option of looking at international law if there is some ambiguity in the domestic law. Lord Diplock stated that

> There is a prima facie presumption that Parliament does not intend to act in breach of [public] international law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred.[15]

If the language of the Bill is clear and unambiguous, the courts must apply it, even if the Bill is in breach of international law.

[15] *Salomon v Customs and Excise Comrs* [1967] 2 QB 116 at 143.

## Legal effect of extra-statutory statements

Ministers have stated in Parliament, and the Government have stated in order papers, that the Government does not intend to act in breach of international law, and that it does not consider that the Bill is in breach of international law. The legal effect of these words is negligible. The thing that matters is the actual words of the legislation. There are circumstances where it is possible to examine the Hansard debates to shed light on the meaning of vague terms.[16] But if the statutory language itself is plain and unambiguous, the words uttered during the debate are of precisely zero consequence. To be crystal clear, a ministerial statement that the Bill complies with the Refugee Convention will have no weight in a court.

## Does the Bill breach the Refugee Convention?

At the heart of the debate on this amendment is a straightforward legal dispute – does the Bill comply with the Refugee Convention? In our view, the Bill breaches the Convention in a number of ways, and will result in protection wrongly being denied to people at genuine risk of persecution. Our previous Reports set out these in detail, including:

- Changing the law by introducing a two tier system of refugees, based on how they arrived in the UK, in contravention of the Convention
- Changing the single standard of proof for determining whether a person is a refugee, by introducing a two-limb test and raising the standard for the first limb of this test (from "reasonable likelihood" to "balance of probabilities") will result in refusals of protection to genuine refugees, in contravention of the Convention
- Changing the test for membership of a particular group from a disjunctive test (protected characteristics condition OR social perception condition) to a conjunctive test (protected characteristics condition AND social perception condition) will result in refusals of protection to genuine refugees, in contravention of the Convention
- Changing the test for "protection from persecution" from *actual* protection to *reasonable steps* to prevent persecution, and permitting this test to be fulfilled by prosecution of acts of persecution in contravention of the Convention
- Changing the requirement to come directly to the UK to avoid penalties for unlawful entry or presence, to a provision which penalises a refugee for "stopping" in any country en route, in breach of the Convention
- Changing the law to state that refugees will be treated differently for not seeking asylum in the first safe country, in breach of the Convention

There have been a great many legal opinions and briefings, from different sources, which have made the point that the Bill breaches the Refugee Convention or increases the risk of the UK acting in breach of its international obligations. These include:

- The Law Society of England and Wales[17]
- The Law Society of Scotland[18]
- Garden Court Barristers (on behalf of Women for Refugee Women)[19]
- Raza Husain QC and others (on behalf of Freedom from Torture)[20]

[16] This is known as the rule in *Pepper v Hart* [1993] AC 593.
[17] Law Society, Parliamentary Briefing: Nationality and Borders Bill: Committee Stage (19 October 2021),
[18] Law Society of Scotland, Nationality and Borders Bill: Second Reading Briefing (19 October 2021).
[19] Stephanie Harrison QC, Emma Fitzsimons Ubah Dirie, Hannah Lynes, The Nationality and Borders Bill – Legal Opinion prepared by Garden Court Barristers for Women for Refugee Women, (25 November 2021) available at https://www.gardencourtchambers.co.uk/news/the-nationality-and-borders-bill-legal-opinion-prepared-by-garden-court-barristers-for-women-for-refugee-women

- A coalition of 27 organisations working with people seeking asylum or those representing them [21]
- Professor David Cantor (and others) at Refugee Law Initiative at the School of Advanced Study, University of London[22]
- United Nations High Commissioner for Refugees[23]

This last opinion, from the UNHCR is crucial. The UNHCR is officially charged under the Refugee Convention, with the task of supervising international conventions for the protection of refugees. The body that the UK has mandated with the duty to protect refugees, has stated that the Bill breaches the Refugee Convention.

As against these detailed critiques, the Government has relied upon a bland assertion that the Bill is in compliance with the Convention.

## The importance of compliance with international law

As has been reiterated many times, by members of all political parties, the UK is a proud member of the rules-based system of international law. This system works only if it is trusted and respected by all states. The UK has quite rightly criticised the outrageous breach of international law by Russia in invading another state. We have to be firm about our own obligations to comply with international law. As the UK government recently acknowledged, it is vital that we come together to help those in greatest need.[24] President Joe Biden echoed this sentiment when he commented, on the shared obligation to resettle Ukrainian refugees, "this is an international responsibility".[25]

## The merits of the Chakrabarti amendment

As Lord Judge remarked in the debate in the House of Lords,[26] this argument is degenerating into a pantomime, with one side saying "oh yes it is in compliance" and the other side "oh no it isn't".

The great benefit of the Chakrabarti amendment as well as the Lords Amendment 5 that preceded it, is that it sidesteps the question of whether the Bill complies with international law. The amendment works regardless of which side of the debate one favours.

If the Bill is not in compliance with the Refugee Convention, then this amendment will help to rectify this breach, and provides clear statutory language that nothing in the Bill is intended to deviate from the Convention. Rather than relying upon extra-statutory expressions of opinion with no weight, there is a clear indication on face of the Bill itself of Parliament's intention to comply with the Convention. Furthermore, there is a direction to the courts from Parliament that the courts are to give effect to the Convention.

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[20] Raza Husain QC, Jason Pobjoy, Eleanor Mitchell, Sarah Dobbie, Nationality and Borders Bill – Joint Opinion (7 October 2021) available at https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf

[21] Joint Briefing on Clause 31 Well-founded Fear Test Nationality and Borders Bill, House of Lords Report Stage

[22] David Cantor, Eric Fripp, Hugo Storey and Mark Symes "Clause 11, Nationality and Borders Bill: Why Two-Tier Refugee Status is a Bad Idea" Refugee Law Initiative, School of Advanced Study, University of London (28 March 2022) available at https://rli.blogs.sas.ac.uk/2022/03/28/clause-11-nationality-and-borders-bill-why-two-tier-refugee-status-is-a-bad-idea/

[23] UNHCR, "UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22" (October 2021), available at https://ilpa.org.uk/wp-content/uploads/2022/02/ILPA-Women-for-Refugee-Women-and-Others-Joint-Briefing-Clause-31.pdf

[24] Minister Cleverly at the Global Compact High Levels Officials meeting December 2021 https://www.gov.uk/government/speeches/minister-cleverly-intervention-at-global-compact-on-refugees-high-level-officials-meeting

[25] Remarks by President Joe Biden, Press Conference (24 March 2022) NATO Headquarters, Brussels, available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/24/remarks-by-president-biden-in-press-conference-7/

[26] HL Deb (28 February 2022). Vol. 819. Col. 606.

If the Bill is in compliance with the Refugee Convention, then this amendment, at worst, adds three lines to the Bill which are merely aspirational statements of intent. If the Government are confident that the Bill is compliant, then this amendment merely reiterates the Government's own position.

**A clear legislative statement that the Bill complies with the Refugee Convention enhances respect for the Rule of Law. It provides a concrete statutory provision which can be relied upon in court. It is only objectionable if the intention is that we are to deviate from international law**.

**We recommend that peers vote in favour of the Chakrabarti amendment.**

Following consultations with them, this recommendation has been endorsed by:

- Freedom from Torture
- Refugee Council
- Immigration Law Practitioners' Association

## Differential treatment of refugees (Lords Amendment 6)

The Bill previously contained a provision (in what was clause 11) allowing for the differential treatment of refugees. This provision would 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, can show good cause for entering or remaining in the UK unlawfully.

A Group 2 refugee is any other refugee.

Clause 11 would allow 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
- 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 enter or remain to the refugee's family, would have a serious impact upon family reunification rights.

Lords Amendment 6 left out clause 11. The House of Commons rejected this amendment giving the following reason:

> Because the Commons consider that it should be possible to accord different treatment to refugees depending on whether they have complied with the criteria set out in clause 11

Lord Kerr of Kinlochard has proposed an amendment that the Lords do not insist on Lords Amendment 6, and instead propose the following amendment in lieu

> Page 14, line 7, leave out subsections (5) to (8) and insert-
>
> (5) The Secretary of State must make provision within the Immigration Rules to—

(a) guarantee Group 1 and Group 2 refugees all of their rights under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and international law, without distinction;

(b) ensure that the classification of a refugee as a Group 1 or a Group 2 refugee does not affect the ability to maintain the unity of that person's family."

## The two-tier system is incompatible with international law

Clause 11 is a specific example of a provision that is inconsistent with the Refugee Convention.

The framework it proposes for creating two tiers of refugees is inconsistent with 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.[27]

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".[28]

Professor David Cantor of the Refugee Law Initiative agrees, recently stating that this clause

> plainly contravenes key principles of international and UK law, creates perverse outcomes for refugees, and will only increase the burden of bureaucracy and litigation for an asylum system that is already creaking at the edges.[29]

The purpose of Article 31 of the Refugee Convention 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. The Joint Committee on Human Rights in its Report on this Bill stated that

> 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.[30]

**Creating two tiers of refugees based on how they arrived in the UK, and the timing of their claim, 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.**

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[27] UNHCR, "UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22" (October 2021)
[28] 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/))
[29] David Cantor, Eric Fripp, Hugo Storey and Mark Symes "Clause 11, Nationality and Borders Bill: Why Two-Tier Refugee Status is a Bad Idea" Refugee Law Initiative, School of Advanced Study, University of London (28 March 2022) available at https://rli.blogs.sas.ac.uk/2022/03/28/clause-11-nationality-and-borders-bill-why-two-tier-refugee-status-is-a-bad-idea/
[30] 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.

## The merits of the Kerr amendment to clause 11

The Kerr amendment helps to secure compliance with the Refugee Convention by providing that all categories of refugees must be granted their full rights, without distinction. In a very real way, it would also help to protect a Ukrainian refugee who travelled across Europe and managed to arrive in the UK without first having obtained a visa.

**We recommend that peers vote in favour of the Kerr amendment.**

Following consultations with them, this recommendation has been endorsed by:

- Freedom from Torture
- Refugee Council
- Immigration Law Practitioners' Association

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