Nationality and Borders Bill 2021-22

Written evidence to the Public Bill Committee

October 2021

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

Introduction

1. The Nationality and Borders Bill makes significant changes to the UK asylum and trafficking systems that HBF believes will significantly curtail the rights of survivors and put them at a greater risk of being denied the protection and support they need. This evidence focuses on the key areas of concern for HBF in parts 2 and 4 of the Bill:
    - The introduction of a two-tier system where refugees who have not benefited from a place on a resettlement programme may have their claim deemed inadmissible and be expelled to another country, or eventually granted a temporary status with restricted rights to family reunification and financial support (clauses 10 and 14).
    - Provisions for the use of 'accommodation centres' to house those seeking asylum (clause 11).
    - The introduction of offshore processing of asylum applications (clause 26).
    - Measures in the Bill that would mean late evidence and late claims are seen as lacking in credibility or unmeritorious, ignoring established evidence on the impact of trauma on disclosure (clauses 16, 17, 23, 46 and 47).
    - Changes to decision-making thresholds that would make it harder or impossible to be identified and provided with support as a survivor of trafficking (clauses 48 and 51).
    - Proposals to further entrench the inadequate discretionary leave system for survivors of trafficking (clause 53).

- The failure to properly address existing gaps in legal aid provision for survivors of trafficking, all the more important in light of potential changes to the system of identification (clauses 54 and 55).

2. These proposals will not 'break the business model' of smugglers and criminal networks. Indeed, the government's own Equalities Impact Assessment on the Bill, in relation to this objective and that of deterring unauthorised entry to the UK acknowledges that "evidence supporting the effectiveness of this approach is limited".[1] People making irregular journeys to the UK are driven by the need for safety and the absence of alternative routes to protection. Instead, provisions in the Bill will drive those who are vulnerable away from protection of the trafficking and asylum systems and into the hands of criminal networks and individuals who would exploit them further after arrival to the UK.

3. It is important to recognise the significant cross-over between the asylum and NRM systems: at least half of our clients who have an NRM claim also have an asylum claim and many of the proposals included in both parts 2 and 4 of the Bill will have a grave impact on survivors of trafficking. We need a Bill to strengthen the identification and support of survivors – instead we have one that undermines the multi-agency system of protection that has been built up over the years.

A two-tier system of refugee protection (clauses 10 and 14)

4. Since 31st December 2020, under a new Immigration Rule an individual's asylum claim can be classed as inadmissible if they have travelled through, or have a connection to, what is deemed a 'third safe country'.[2] The new rule also gives the Home Office the power to remove people seeking asylum to a 'safe' country that agrees to receive them, even if they have never been there or have any connections to it. Under this rule, if someone has not been removed from the UK after six months their asylum claim will be heard here. Clause 14 aims to put this system in primary legislation.

5. Clause 10 introduces a new system that will reduce the rights of those arriving in the UK to claim asylum. Someone who has not travelled directly from a country or territory where their life or freedom is threatened, and/or has not made an asylum claim 'without delay' and is subsequently recognised in the UK as a refugee, would be considered a 'Group 2' refugee. The Bill allows for 'Group 2' refugees to be granted temporary leave to remain (for just 30 months) with no access to public funds and on a ten year route to settlement, leaving survivors living in limbo and perpetual fear of removal.

6. We believe that the inadmissibility regime and proposed two tier-system breach the UK's human rights obligations. Many people who claim international protection are under the

[1] The Nationality and Borders Bill: equality impact assessment, September 2021, para 21
[2] Statement of changes to the Immigration Rules: HC 1043, 10 December 2020

control of people smugglers and human traffickers, risking abuse and exploitation on route and are powerless to deviate from the planned method of entry. The Bill serves to blame and punish refugees, who have fled war, torture and human cruelty, for the means by which they reached safety. This completely undermines the principle of asylum protection in the UK and runs counter to one of the basic tenets of the 1951 Refugee Convention– that someone's mode of arrival should have no influence on whether they have a right to make an asylum claim, or whether they are recognised as a refugee. [3] The differential treatment of refugees based on their mode of entry is also a potential breach of Article 14 of the ECHR, read with Article 8.

7. Granting an inferior form of status will only serve to worsen the insecurity and anxiety already faced by too many survivors of torture and trafficking who are waiting for decisions in their cases and living in permanent fear of being forcibly returned.[4] It will leave people languishing, potentially for years, in a system that is not fit for purpose, and create a 'second class' of refugees who are unable to integrate or build safe lives. Granting only short and insufficient periods of leave to remain results in continuing insecurity and uncertainty, and has a significant negative impact on survivors' mental health.[5] A sense of (long-term) safety and security is a prerequisite for psychological treatment to be effective and for sustained recovery to be achieved. It is only with a grant of secure immigration status that a survivor of extreme human cruelty will be able to address their significant mental health issues, including PTSD and associated depressive and persecutory symptoms. Short terms of leave to remain can prevent access to housing, education and employment and therefore create obstacles to survivors' safety, social inclusion, and financial independence and increases their risk of further exploitation, abuse and re-trafficking.

8. Clause 14 will impose a prolonged period of limbo and anxiety upon a refugee who is refused entry to the asylum system while officials attempt to find some other country willing to receive the person. If they have not been removed after six months their asylum claim will then be heard here. This will only serve to worsen the existing delays in the asylum system, which is already at a ten year high.[6]

The introduction of asylum accommodation centres (clause 11)

9. Clause 11 creates new powers to place people who are at different stages in the asylum process, or who have 'inadmissible' claims, in 'accommodation centres'. No definition of 'accommodation centres' is provided but the government has confirmed that it intends to use

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[3] Article 31, 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention)
[4] See The Violence of Uncertainty - Undermining Immigrant and Refugee Health NEMJ https://pubmed.ncbi.nlm.nih.gov/30184446/ The results of study show a direct link between asylum waiting times and poorer self-report health upon grants of RS and a persistence effect almost 2 years later.
[5] 'Mental health of forced migrants recently granted leave to remain in the United Kingdom', Waler et ors, International Journal of Social Psychiatry, 1-9 (2020)
[6] Refugee Council, Living In Limbo – A decade of delays in the UK asylum system, July 2021

the disused army barracks at Napier to test and pilot new arrangements and to "inform the final design of how accommodation centres will operate".[7]

10. The use of large-scale institutional accommodation – including the use of disused army barracks since September 2020 - to hold people in the asylum system has received widespread criticism. In June 2021 a High Court judgment in a case brought by six asylum seekers[8] who had been housed in the Napier Barracks in Kent found inadequate health and safety conditions, a failure to screen victims of trafficking and other vulnerabilities, and false imprisonment of residents in breach of Article 5 of the ECHR. The judgment came after the Independent Chief Inspector of Borders (ICIBI) and Her Majesty's Inspectorate of Prisons (HMIP) published an emergency report which raised "serious safeguarding concerns."[9]

11. HBF believes that the use of institutional accommodation of this type is extremely harmful to survivors of torture, trafficking and other extreme human cruelty. Survivors are an inherently more vulnerable population, with a high prevalence of trauma symptoms (including post-traumatic stress disorder [PTSD], anxiety and depression). HBF's research has shown that contingency accommodation has a significant negative mental health impact on them. The features of this type of accommodation that contribute to worse mental health outcomes include isolation from communities, perceptions of being unwelcome, shared facilities, lack of privacy and freedom to move within and outside. These forms of accommodation have the same impact as open prisons with groups of people with little to motivate or occupy themselves becoming increasingly desperate.[10] In light of the significant delays in asylum decision-making, survivors could end up living in such centres for years.[11]

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

Off-shore processing (clause 26)

13. Clause 26 introduced schedule 3, which allows the government to remove people seeking asylum to outside the UK whilst their claims are being processed. Limited details of the government's plans have been shared but we are extremely concerned that off-shore processing would pose a serious risk to the human rights of survivors.

14. Off-shore processing has been used in Australia where those seeking asylum have been transported to Nauru and Manus island. There they have been detained in remote places

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[7] https://committees.parliament.uk/publications/7159/documents/75641/default/

[8] *NB and others v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin)

[9] https://www.gov.uk/government/news/an-inspection-of-the-use-of-contingency-asylum-accommodation-key-findings-from-site-visits-to-penally-camp-and-napier-barracks

[10] Helen Bamber Foundation Submission to the APPG on Immigration Detention inquiry into 'Quasi-detention', June 2021

[11] See Refugee Council, Living In Limbo – A decade of delays in the UK asylum system, July 2021

where standards of welfare, protection and ability to engage meaningfully in any asylum process cannot be guaranteed. Those detained have suffered very poor mental health and there have been a number of suicides. Over seven years, the Australian Government has spent $7.6 billion on just over 3,000 people and on a policy that fails to act as a deterrent and instead leaves thousands detained on in perpetual limbo.[12] Given what we know about the impact of detention on the welfare of those seeking protection,[13] the introduction of any system whereby the government would have even less control over how detainees were treated must be resisted.

Interpretation of 'late' evidence (clauses 16 to 23 and 46 to 47)

15. Clauses 16 and 17 of the Bill provide for the 'one-stop process' that would compel survivors who have made a protection/human rights claim to raise all the reasons why they need protection at the outset. If they fail to do so, their credibility could be damaged.[14] In addition, Home Office decision-makers and judges are instructed to give "minimal weight" to later evidence unless there is a "good reason" why it has been provided late.[15] This could include independent expert medical evidence – such as a medico-legal report - that often proves determinative in asylum appeals involving our clients.

16. Problems with Home Office decision-making are well-documented.[16] The proportion of asylum appeals allowed in the year to March 2021 was 41%[17] and has been steadily increasing over the last decade (up from 27% in 2010).[18] Over the past three years HBF has supported 178 clients who have subsequently had a grant of status post a fresh claim (just under 50% of our clients). In our experience a number of cases have ultimately been successful once expert evidence has been secured – many claims initially seen by the Home Office as unmeritorious turn out otherwise following proper scrutiny.

17. Furthermore, the Bill fails to take account the reality of survivors' experiences. There are many reasons why someone in the asylum system may not be possible for someone to present all relevant information in support of their claim at the earliest opportunity. These include failings within the process, such as a poor quality interview[19] or difficulty accessing quality legal advice. The applicant may be too traumatised to recall coherently the events that led to their flight, particularly if they are a survivor of torture or trafficking.[20] Research has highlighted that those

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[12] Refugee Council of Australia, Seven years on: An overview of Australia's offshore processing policies, July 2020
[13] Prof Cornelius Katona M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason. The impact of immigration detention on mental health: A systemic review, BMC Psychiatry, December 2018
[14] Part 2, clause 17
[15] Part2, clause 23 (2)
[16] See, for example, Freedom from Torture and ors, Lessons Not Learned: The failures of asylum decision-making in the UK, 2019
[17] https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-appeals
[18] House of Commons Library, Asylum Statistics, September 2021
[19] Freedom from Torture, Beyond Belief: How the Home Office fails survivors of torture at the asylum interview
[20] http://pc.rhul.ac.uk/sites/csel/wp-content/uploads/2019/09/Bogner-Herlihy-Brewin-2007.pdf

seeking asylum "need time to process past traumatic events and to establish a sufficient level of trust and confidence to reveal the potentially painful and shaming details of their experiences" and that the asylum and immigration process needs to be sensitive to this.[21]

18. The same lack of understanding is repeated in part 4 of the Bill. Under clause 46, survivors may be served with Trafficking Information Notices requiring them to produce 'status information' (information relevant to their case) within a specified period. Under clause 47, providing that information late and "without good reason", would give the Home Office grounds to refuse their trafficking claim on the basis of credibility. These provisions increase the likelihood of survivors not being recognised as victims of trafficking and not receiving the support and protection that comes with such recognition.

19. It is well documented, including in the government's own Modern Slavery Statutory Guidance,[22] that survivors of trafficking may not recognise themselves as victims and factors including trauma or fear of the authorities can result in delayed disclosure and difficulty recalling facts. This has also been documented in the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings 'Report on Trafficking in Human Beings Amounting to Torture and other Forms of Ill Treatment', which outlines that survivors are often only able to disclose (fully or partially) once a relationship of trust has been established as shame and stigma preclude 'full revelation'. [23] The European Convention Against Trafficking in Human Beings (ECAT) also clearly recognises that a victim of trafficking will require time to be able to reveal their story, to assist with a prosecution and to get support, and will be in fear of their trafficker.[24]

20. HBF's own research has shown the effect of trauma on memory; the effect of shame on disclosure; the narrative dilemmas that victims of trafficking often face; and that "often false assumptions [are] made by decision makers regarding the credibility and reliability of testimony and there is well established research to show trauma impacts on memory recall and the ability of victims to verbalise what has happened to them."[25] It is vital that this understanding is reflected in any domestic law and policy.

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[21] Bögner, D., Herlihy, J., & Brewin, C. (2007). Impact of sexual violence on disclosure during Home Office interviews. British Journal of Psychiatry, 191(1), 75-81.

[22] Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland Version 2.3

[23] Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment, 2013

[24] See Explanatory Report to ECAT at https://rm.coe.int/16800d3812

[25] Helen Bamber Foundation, The mental health difficulties experiences by victims of human trafficking (modern slavery) and the impact this has on their ability to provide testimony, February 2017

Changes to the reasonable grounds threshold (clause 48)

21. Clause 48 raises the evidence threshold for deciding whether someone is a potential victim of trafficking, from reasonable grounds believe that a person "may be" a victim of trafficking to believe that a person "is" a victim.

22. Data from the National Referral Mechanism (NRM) end of year report for 2020 shows that 92% of reasonable grounds decisions were positive and 89% of conclusive rounds decisions were positive.[26] Research has also shown that 81% of reconsidered claims at initial reasonable grounds stage were also later found to be positive.[27] So it is unclear why the reasonable grounds test would need to be made more stringent. Our concern is that these changes would only lead to potential victims not entering the NRM at all and being denied access to support, with more people left in dangerous situations and at risk of re-trafficking.

Public order exemption (clause 51)

23. Under clause 51, if the Home Office is satisfied that the potential victim is a "threat to public order" (the definition of which includes those who are sentenced to a period of imprisonment of 12 months or more)[28] or has made a claim in "bad faith" then it will no longer have to make a conclusive grounds decision and any prohibition on removing that person from the UK will cease to apply.

24. The exclusion of those with a conviction of 12 months or more is far too wide. It is likely to further penalise many victims who have already been through the criminal justice system and wrongly convicted of offences they were compelled to commit as a result of their experience of exploitation – we work with a number of clients sentenced for trafficking related document offences and cannabis offences. Furthermore, we know that those leaving prison are often targeted by exploiters due to their vulnerability (this was seen with Operation Fort, the dismantling of the UK's biggest modern slavery network where traffickers 'targeted the most desperate from their homeland, including the homeless, ex-prisoners and alcoholics')[29] and we are concerned that this clause could lead to an increase of such targeting.

25. The government has provided no evidence to demonstrate that changes are needed to prevent what is has described as 'vexatious accounts' of modern slavery made by serious criminals to evade deportation. A very small number of 'Foreign National Offenders' have

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[26] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970995/modern-slavery-national-referral-mechanism-statistics-end-year-summary-2020-hosb0821.pdf

[27] After Exploitation, New data: Majority of trafficking claims found to be 'positive' after reconsideration, July 2021

[28] Part 4, clause 51

[29] BBC News, UK slavery network 'had 400 victims', July 2019

raising the issue of NRM referral in detention – just 79 people in 2018 (1% of those detained) and 182 people in 2019 29 (3%).[30]

26. We know from our work with survivors that one of the most effective ways to keep victims in fear is to force them to commit crimes, so they will be criminalised if they come forward to the authorities. If vulnerable adults and children are denied access to the NRM system on the basis of previous convictions they are unlikely to come forward in the first place and their exploitation will not be addressed, nor will traffickers be prosecuted. This will create a new level of vulnerability as traffickers will target those disqualified from support.

Granting survivors secure status (clause 53)

27. Clause 53 aims to establish in law the basis on which confirmed victims of trafficking are eligible for leave to remain. This does not expand but rather narrows further the current policy on Discretionary Leave for Victims of Modern Slavery which is extremely restrictive, especially around leave granted for personal circumstances.[31] This is not reflective of Article 14 of ECAT nor its Explanatory Report which provides a wide view as to the granting of leave taking into account all circumstances.[32]

28. Currently the number of applications for leave granted is extremely low – from 2016 to 2019, 4,695 adults and children subject to immigration control were confirmed as victims of trafficking but just 521 adults (and even more shockingly just 28 children) were granted discretionary leave to remain in the UK – just one in ten.[33] Even in cases at HBF, where clients are usually very well documented, clients routinely receive no leave to remain with their positive conclusive grounds decision. Furthermore, where leave is granted it is usually provided for just 12 months – these short term periods of leave result in survivors feeling in constant limbo and blocked from education, training, employment and housing, hindering recovery and integration.

29. Instead of providing leave "to provide protection and assistance to that victim, owing to their personal situation" as in the current policy, the Bill restricts leave to victims with recovery needs *arising specifically from their exploitation which are not capable of being met in a third country*. It is unclear how this will be determined nor how the risks to survivors of trafficking of returning to countries from where they were trafficked will be assessed.

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[30] Home Office Data on Detention Section 5 Table 2 (b) Issues raised by people facing return in immigration detention - GOV.UK (www.gov.uk)

[31] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941844/dlfor-victims-of-modern-slavery-v4.0ext.pdf

[32] Explanatory Report to ECAT paragraph 184 which states "The personal situation requirement takes in a range of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account."

[33] https://www.ecpat.org.uk/news/government-failing-child-victims-of-trafficking-exclusive-data-reveals

30. Although there is a separate ground for granting leave to support police investigations, many victims need certainty about their future including immigration status, housing and basic necessities before being able to engage with investigations. This clause does not provide that certainty and is a missed opportunity to enable more victims to provide the evidence essential to increasing trafficking convictions.

31. HBF firmly believes that the regularisation of a survivor's immigration status with recourse to public funds is crucial to enable them to access the services they need, to make progress in their recovery and to integrate. As well as a being a crucial component of ensuring a survivor is not subject to further abuse and exploitation or re-trafficked. We recommend the Bill is amended so that leave to remain is provided to all confirmed victims with irregular immigration status, with the option of granting longer periods of leave and a clear route to settlement.

Access to legal aid (clauses 54 and 55)

32. In light of potential changes to the process for identifying and recognising survivors of trafficking outlined above, it is all the more vital that they are able to access legal advice at the earliest opportunity. Clauses 54 and 55 of the Bill rightly *aim* to identify and support individuals who may be potential victims of modern slavery or human trafficking by ensuring they receive advice on referral into the NRM to understand what it does and how it could help them and provide informed consent to be referred into it. However, as currently written these clauses would not achieve that aim. Instead they would ensure only that an individual who is *already* receiving legally-aided advice on their asylum, immigration or public law matter (either because it is in scope or because Exceptional Case Funding (ECF) has successfully been applied for) could receive advice on referral into the NRM as an 'add on'.

33. This does not address the crux of the problem - that people do not understand the NRM nor immigration issues and that, because nearly all immigration advice is no longer covered by legal aid, it is extremely difficult to get quality expert advice at the outset, where it is most needed. The ECF scheme has been shown to be complex, lengthy and unworkable for many legal providers and is not a meaningful way to ensure access to justice.[34] So gaps will continue to exist for those without a lawyer already.

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

[34] https://publiclawproject.org.uk/resources/legal-aid-for-immigration-bring-it-back/