Nationality and Borders Bill
PLP Briefing for House of Commons Second Reading

July 2021

About Public Law Project

Public Law Project (PLP) is a national legal charity founded in 1990 with the aim of improving access to public law remedies for the disadvantaged. Our vision is a world in which state decision making is fair and lawful and each person has the power to hold public bodies to account.

Introduction

The Bill was preceded by a deeply flawed consultation on the 'New Plan for Immigration'. In PLP's response to that consultation,[1] we highlighted serious concerns with the timescale for, content and methodology of the New Plan consultation. We were not alone in raising those concerns. The Government has yet to publish its response to that consultation, or stakeholder responses, and it is therefore impossible to know to what extent the proposals in this Bill have taken account of stakeholder views.

It is unfortunate that, like the New Plan consultation, in presenting this Bill there is a lack of focus on the need to improve the fairness of Home Office procedures and get decisions right first time. In 2019/20, 50% of appeals against Home Office decisions were successful and around a third of judicial reviews against the Home Office are either allowed or settle favourably. Improving the quality of Home Office decision making is the best way to improve the fairness, efficiency and effectiveness of the system. Ensuring timely and effective access to legal advice for those who are subject to immigration control is also vitally important and while the Bill makes some provision for this (in **clause 22**) it does not go far enough.[2]

In this briefing we identify a series of issues with the Bill, focusing on the procedural and access to justice issues in respect of which PLP has relevant expertise and experience. The absence of comment on any particular part of the Bill does not indicate an absence of concern on our part.

[1] Public Law Project, *PLP Response to New Plan for Immigration*, 10 May 2021, available at https://publiclawproject.org.uk/latest/new-plan-for-immigration-plp-consultation-response/?utm_source=rss&utm_medium=rss&utm_campaign=new-plan-for-immigration-plp-consultation-response

[2] See paragraphs 10 and 13-28, *PLP Response to New Plan for Immigration*, above.

Placeholder clauses

The Bill contains a number of "placeholder clauses". The Human Rights Memorandum states that "the intention is to replace… the clause[s] by way of amendment at the Committee stage". **Clause 42, 44, 58, 59, 60 and 61** have been identified as such clauses,[3] covering subjects including transfer of prisoners, age assessments and national security appeals.

Currently, each of these clauses contains simple provisions giving the Secretary of State extraordinarily broad powers to legislate by regulations. The Government is asking parliamentarians to consider the principle of these clauses without any substance, and with the express intention of amending them. The principle of introducing a Bill to Parliament before it is ready, without any cited need for urgency, is unacceptable on grounds of democratic legitimacy and Parliamentary sovereignty. We are particularly concerned that the Government is taking this approach in areas that engage human rights issues and against the background of a flawed consultation to which it has not yet published a response.[4]

We strongly criticise the use of such placeholder clauses and, in any event, urge the final provisions to be placed before Parliament as soon as possible.

Access to Justice and Rule of Law

We have attached a ***short Appendix*** to this briefing, setting out our concerns with specific clauses in the draft bill. We are seriously concerned that a number of proposed changes, such as implementing very short windows for lodging appeals, removing appeals to higher courts in some circumstances, and allowing some removals to be effected without notice, would significantly limit access to justice in practice.

Legal safeguards are useless if they cannot meaningfully be relied upon by those affected when things go wrong. We believe that aspects of this bill would create a real risk that those affected by immigration decisions would be unable to access or participate effectively in procedures to enforce their legal rights, and that it will be difficult if not impossible for unlawful or mistaken decisions be brought to light and corrected. It is of concern that through this Bill the Home Secretary seeks to circumscribe the right of access to justice of those who wish to challenge her decisions.

Human Rights Compliance

Although the government has published its Human Rights Memorandum alongside the draft bill, this does not sufficiently address the danger many clauses in the bill pose for human rights standards. We urge Parliamentarians to consider the human rights implications on:

- Freedom from modern slavery (especially as regards to the changes to obligations under the Modern Slavery Act under **Clauses 46 to 57**)

[3] *Nationality and Borders Bill: European Convention on Human Rights Memorandum*, paragraph 7. Available to download from https://bills.parliament.uk/bills/3023/publications

[4] Previous uses of 'placeholder clauses' are for example on flood insurance in the Water Bill 2013 and on fees for courts and tribunals in the Antisocial Behaviour, Crime and Policing Bill 2013

- the right to a fair hearing (especially as regards to short ‘cut off dates’ for challenging decisions under **Clause 18** and **Clause 46**);
- freedom from ill-treatment and right to a private and home life (especially as regards limiting of accommodation duties under **Clause 11**); and
- freedom from discrimination (especially as regards differential treatment of different types of refugee under **Clause 10**).

Appendix: specific aspects of the Bill which merit attention

Priority Removal Notices

Clauses 18-22 concern 'priority removal notices' (PRN). They would empower an immigration officer to serve anyone liable for removal with a notice containing a cut-off date for raising any challenges to removal, alongside any evidence to be relied on as part of that challenge (Clause 18). In contrast to the new statutory duty to serve notice of removal, the Bill does not stipulate a minimum period which must elapse between service of the notice and the cut-off date. Clause 18 should be amended to stipulate a minimum period, which should be long enough to ensure those served with a PRN are able to access legal advice, gather evidence and advance any proper grounds for challenging removal.

The Bill imposes two significant consequences following the service of a PRN and expiry of the 'cut-off date': first, the credibility of any claim or evidence provided on or after that date is damaged by the failure to provide it before the cut-off date, absent a good reason (**Clause 20**) and second, an 'expedited appeals' process applies to those who wish to challenge a removal decision on or after the cut-off date (**Clause 21**). In such circumstances, individuals no longer have access to the standard appeals process, and could only make a special expedited appeal to the Upper Tribunal. **Clause 21(2)** removes any right of appeal from such a decision to the Court of Appeal. The result is that these expedited appeals are entirely insulated within the tribunal system.

As we explained in our response to the government's earlier consultation on tribunal appeals,[5] such a result would be highly undesirable. Appeals from the Tribunal into the ordinary court system are vital for the proper and just application of the law; closing off avenues for appeals risks closing off access to justice. An incorrect decision in this field can cost an individual their safety, security and livelihood.[6]

The stated justification for these provisions is 'to reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action' (Explanatory Notes, para 220). However, a right of appeal under s82 of the Nationality, Immigration and Asylum Act 2002 (to which the expedited appeals process applies) is only available in respect of decision to refuse human rights or protection claims which are either (a) first claims or (b) fresh claims which the Home Secretary accepts have a realistic prospect of success, and which she has not certified as clearly unfounded. Therefore, this provision will not tackle abusive, repetitious or unmeritorious claims but will severely circumscribe the right of appeal in cases which the Home Secretary accepts have a real prospect of success on appeal. It should be removed from the Bill.

Clause 22 increases the availability of legal aid for those served with a PRN, by entitling them to 7 hours of non-means tested non-merits tested legal aid on any aspect of immigration law. PLP

[5] Public Law Project, *Submission to Ministry of Justice consultation Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal*, available at https://publiclawproject.org.uk/content/uploads/2021/01/Consultation-submission-PLP.pdf The Ministry of Justice has not yet published its response to this consultation.

[6] See *Wiles v Social Security Commissioner* [2010] EWCA Civ 258 at [47] (Dyson LJ)

welcomes this proposal which it considers is essential to ensure the fairness of the PRN scheme. However, absent a minimum period between service of a PRN and the cut-off date, or any requirement that a person served with a PRN must have been able to access advice under clause 22 before the cut-off date, it is impossible to know whether people will be able to access such advice in practice.

'No Notice' Removals

Clause 43 makes clear in statute the duty on the Home Office to tell people in advance when they are going to be removed from the UK. For more than 10 years, the courts have recognised that this duty to give notice of removal is essential to access to justice and the rule of law.

However, clause 43(8) creates two exceptions to that right to notice which will lead to 'no notice' removals, removing the courts' ability to supervise the Home Secretary's use of her power to enforce removal. This power can have profound consequences for people's lives, and it is vitally important that when officials decide people should be removed, they can access the courts to challenge that decision if they have an arguable case that it's wrong. These exceptions should be removed from the Bill.

Accelerated Detained Appeals

Clause 24 would allow the Home Secretary to certify an immigration decision relating to a detained person as an "accelerated" case. One of the results of this would be that anyone wishing to challenge an 'accelerated' decision must appeal within just 5 working days of that decision being made (see **clause 24(3)(a)**). We are concerned that this incredibly small window undermines access to justice for individuals and gives rise to a significant risk that unlawful decisions will go unchallenged.

Fairness is the cardinal aspect of any appeals system; whilst the government is entitled to advocate for greater expediency, it should bear in minds the words of Sedley LJ, warning that it "is not entitled to sacrifice fairness on the altar of speed and convenience".[7] The Court of Appeal has previously declared invalid a system where certain asylum seekers were given just seven days to appeal asylum decisions, describing it as "so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases".[8] The court held that the policy did not sufficiently appreciate "the problems faced by legal representatives of obtaining instructions from individuals who are in detention",[9] nor did it "adequately take into account of the complexity and difficulty of many asylum appeals [and] the gravity of the issues that are raised by them".[10] There are many legitimate reasons as to why those subject to immigration decisions may not raise claims

[7] *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 at [8]
[8] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at [38]
[9] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at [38]
[10] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at [45]

immediately (including due to trauma, lack of knowledge, or following bad or non-existent legal advice).[11]

Nothing in the Bill provides adequate safeguards for the basic standards of fairness of which this country is rightly proud, and which the Home Secretary says it is the objective of this legislation to promote.

Removal of appeal rights

Clause 25 removes the right of appeal for cases which are certified as 'clearly unfounded'. At present, where the Home Secretary certifies a case as 'clearly unfounded', any appeal may only be brought after removal from the UK. In cases concerning protection claims or Article 3 human rights claims such appeals are incapable of providing an effective remedy because the feared harm will have eventuated before the appeal can be heard. As the Explanatory Notes (para 285) acknowledge, the right of appeal is rarely exercised and instead challenges are brought by way of judicial review. This section therefore contributes to a general trend in immigration and asylum law away from rights of appeal to the First-tier Tribunal and towards unappealable decisions which are amenable to judicial review.

Co-operation and good faith clauses

There are a number of provisions which seem to expressly compel good behaviour on the part of the applicant. For example, bail can be refused to those in immigration detention if an individual has "failed to cooperate with any process" involved (**Clause 45**). Further, any applicant must act in "good faith" and a failure to do so can be held against them (**Clause 64**).

Whilst any immigration decision should take into account the whole context of the situation, including, where relevant, the actions of those involved, it is unclear what the 'co-operation' and 'good faith' requirements add to the law. There is a significant risk that these widely-drawn obligations will be used to penalise those who resist sanctions or exercise their right to mount a legal challenge.

If applicants are given the impression that any resistance to a decision of the Home Office, including pursuing legitimate routes of challenge and appeal, may be held against them, this would not only increase unfairness but would have a significant chilling effect on those bringing legitimate legal challenges.

We note that there is no corresponding provision requiring cooperation and good faith on the part of the Home Office.

[11] Public Law Project, *PLP Response to New Plan for Immigration*, 10 May 2021, available at https://publiclawproject.org.uk/latest/new-plan-for-immigration-plp-consultation-response/?utm_source=rss&utm_medium=rss&utm_campaign=new-plan-for-immigration-plp-consultation-response, at paragraph 10.d.

Collective punishment

Notwithstanding the fact that **Clause 59** is a "placeholder clause" and is subject to change at some future point (see "Placeholder clauses" above), we consider that the clause is concerning enough to warrant opposition at this stage. It allows the Home Secretary to place certain countries which "do[…] not co-operate" with removals from the United Kingdom onto a list; visa applications made by nationals of countries on this list can then be treated less favourably, including being made to pay additional fees, having their applications suspended or even treated as invalid.

In our view this subjects legitimate applicants to a form of collective punishment, with individuals being effectively penalised for the actions of their governing powers. Further, this is likely to have a disproportionate effect on those who are most likely to succeed in obtaining a visa on humanitarian grounds: those coming from oppressive, anti-democratic states which, by their very nature, are less likely to be co-operative. Individuals fleeing persecution should not be punished for the actions of their persecutors.

Clause 59 should be removed from the Bill.

Human Rights and Human Trafficking

We have particular concerns about the parts of the bill which deal with victims of human trafficking and modern slavery. The collective result of **Clause 51 and 53** is that legitimate victims of trafficking can be denied the basic protections in the Modern Slavery Act where they are considered to pose a risk to "public order", which is defined extremely widely. This applies even where an individual has already been conclusively identified as a trafficking victim. These provisions are framed very widely, lack certainty, and are palpably unjust. There is a significant risk that denying protection to genuine victims breaches both Article 4 of the European Convention on Human Rights and the Council of Europe Convention on Action against Trafficking Human Beings.

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