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Welcome to Landmark Chambers' 'Webinar – Nationality and Borders Act, Part 1' webinar

Wednesday 18 May 2022

The recordings may be accessed here.

Your speakers today are…

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Richard Drabble QC (Chair)

Topic:
Local authority duties

Alex Goodman

Topic:
Asylum provisions: offshoring, priority and short-notice removals, and inadmissibility

Natasha Jackson

Topic:
Asylum provisions: criminalisation provisions

Charles Bishop

Topic:
Interpretation of the Refugee Convention

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Asylum provisions: offshoring, priority and short-notice removals, and inadmissibility

Alex Goodman

Watch Alex's section here.

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Asylum provisions: criminalisation provisions

Natasha Jackson

Part 3, NABA 2022 – 'Immigration Control'

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- Section 40:
  - Makes it a criminal offence to 'arrive in' (and not just to 'enter') the UK without valid entry clearance or an ETA, and to facilitate someone arriving in the UK without prior authorisation.
  - Increases the max penalties for: (i) those returning breaching a deportation order (to 5 years) and (ii) for entry without clearance / overstaying (to 4 years).

- Section 41:
  - Amends the facilitation offences, removing the requirement that assistance is 'for gain' from s.25A of the Immigration Act 1971.
  - Increases max penalties for facilitation (to life imprisonment).

Purpose of criminalisation provisions

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"It is unacceptable that people seeking to enter our country illegally, including those who have crossed the Channel by small boat, are not appropriately penalised for breaking the law. Tougher penalties would also deter some people from undertaking these dangerous journeys altogether, especially where they originate from manifestly safe European countries with well-functioning asylum systems like France."

'New Plan for Immigration: Policy Statement' (March 2022)

Art 31(1), Refugee Convention

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"Article 31 - Refugees unlawfully in the country of refuge

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

Art 31(1) defences

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- Limited defences in UK law relating to deception and the use of false documents, principally under s.31, Immigration & Asylum Act 1999.

- *R (Pepushi) v CPS* [2004] EWHC 798 (Admin)*:*

> *"There is no room to apply the scope of Article 31 as interpreted and declared by this Court in Adimi ; we are bound to apply the narrower provisions of s 31 , even if in so doing it has the consequence that the UK is in breach of international obligations under a human rights treaty."*

Art 31(1): defences II

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"*The longer sentence length will ensure that the police, prosecutors and the courts consider the offence as serious enough to take through the Criminal Justice System.*"

HL Bill 82 Explanatory Notes to the Bill, §398

NB: Section 37, NABA 2022 concerns immunity from penalties under Art 31(1).

Section 40: criminalising 'arrival'

- s.24(1)(1), Immigration Act 1971: offence of knowingly entering the UK.
- s.11(1), 1971 Act: "entry" = "*disembarking and subsequently leaving the immigration control area.*"
- A person has not entered the UK if they claim asylum before attempting to pass immigration control or are rescued at sea: *Kakaei v R* [2021] EWCA Crim 503 at [51]; *Kapoor v R* [2012] 1 WLR 3569 at [23]; *Bani v R* [2021] EWCA Crim 1958 at [94].

Section 40

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"Entering the UK without leave is no longer considered entirely apt given the changes in the way people have sought to come to the UK through irregular routes."

Explanatory Notes to the Bill, §392

Section 40: 2x new offences

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s.40 creates two new offices:

1. ss.40(1) and (2) insert new subsections into s.24 of the 1971 Act to criminalise those who arrive in the UK without valid ec or an ETA.

2. s.40(4) amends s.25 of the 1971 Act to add ‘arrive’ to the definition of ‘immigration law’.

Section 40 – some points of interest

1. No visa route to seek asylum in the UK. So most applicants will be criminalised or deterred.

2. Is penalising those seeking asylum consistent with Art 31(1)?

3. Proportionality of increased penalties.

Section 41: facilitation offences

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- Amends the facilitation offences in ss.25 and 25A of the 1971 Act.
- Facilitation: may "*include behaviour linked to recruiting, transporting, transferring, harbouring, receiving or exchanging control over another person*": Explanatory Notes to the Bill, §407.
- s.41(3) omits the requirement that assistance is 'for gain' from s.25A of the 1971 Act.

Section 41: international obligations / perspectives

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Supreme Court of Canada in *B010 v Canada*:

Penalising a refugee under anti-smuggling laws for helping another refugee to arrive by boat was incompatible with international obligations under Art 31(1) of the Refugee Convention and inconsistent with the *Protocol against the Smuggling of Migrants by Land, Sea and Air*. It was also 'inadmissible' and "*absurd*" under Canadian law.

Section 41: defences / Section 42: stowaways

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- s.41 introduces new exceptions and defences to protect rescuers and with respect to stowaways.

- s.42 introduces a new penalty for failure to secure a goods vehicle.

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Interpretation of the Refugee Convention

Charles Bishop

30 Refugee Convention: general

(1) The following sections apply for the purposes of the determination by any person, court or tribunal whether a person (referred to in those sections as an "asylum seeker") is a refugee within the meaning of Article 1(A)(2) of the Refugee Convention—

(a) section 31 (persecution);

(b) section 32 (well-founded fear);

(c) section 33 (reasons for persecution);

(d) section 34 (protection from persecution);

(e) section 35 (internal relocation).

(2) Section 36 applies for the purposes of the determination by any person, court or tribunal whether the provisions of the Refugee Convention do not apply to a person as a result of Article 1(F) of that Convention (disapplication of Convention to serious criminals etc).

(3) Section 37 applies for the purposes of the determination by any person, court or tribunal whether Article 31(1) of the Refugee Convention (immunity from certain penalties) applies in relation to a person who is a refugee within the meaning of Article 1(A)(2) of the Refugee Convention.

(4) The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (S.I. 2006/2525) are revoked.

(5) Subsections (1) and (2), and sections 31 to 36, apply only in relation to a determination relating to a claim for asylum where the claim was made on or after the day on which this section comes into force.

(6) For the purposes of subsection (5), a claim for asylum includes a claim, in any form or to any person, which falls to be determined as mentioned in subsection (1).

Definition of refugee under art 1A(2) of the RC

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- A refugee is any person who:

"owing to a well-founded fear of being persecuted for reasons of race religion nationality membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it."

- The NABA in ss 30 - 35 establishes for the purposes of domestic law how these concepts should be approached. Most of this is carried over from the provisions that were previously in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006/2525, which implemented in domestic law the Qualification Directive (2004/83/EC). Those Regulations are revoked by s30(4).

Key changes

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- There have been some minor amendments to the language of the provisions in the carrying over process, and some amendments reflect the fact that these new provisions relate only to refugee status determination and not humanitarian (subsidiary) protection determination. However, there are a number of critical additions and changes. I will focus on two and flag a third.

- **1. Standard of proof (s32):** the Act introduces a balance of probabilities assessment to determine whether the applicant has a Convention characteristic and whether they in fact fear persecution as a result of that characteristic, before then moving on to the well-known lower standard of proof for assessing actual risk.

Key changes

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- **2. Membership of a particular social group (s33(2)-(4)):** the Act changes the approach from one that focuses on “protected characteristics” to one that incorporates “social perception”.

- **3. State protection (s34):** the Act introduces a presumption that an asylum-seeker is “to be taken to be able to avail themselves of protection from persecution” where the requirements in s34(2) are met. While the requirements remain the same as in reg. 4(2) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, the presumption is a departure in approach.

When will these changes take place?

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- The changes only apply in relation to a *determination* relating to a *claim for asylum* where *the claim* was made on or after the day on which s30 comes into force, which is 28 June 2022.

- So the changes do not affect claims made before then – and do not effect determinations on appeal for claims made before then.

- The question of when an asylum claim is “made” will be governed by s14 of the Act when that provision comes into force (no commencement regulations yet). For now it is determined by paragraph 327 of the Immigration Rules. There are consequential amendments to the Immigration Rules being made from 28 June 2022.

- As there can currently be significant delays between phoning the Asylum Intake Unit and a screening appointment, this may be quite important.

Standard of proof – background

- The established position in UK law prior to the Act is that an applicant has a well-founded fear of persecution if there is a reasonable degree of likelihood that they would be persecuted for one of the Convention reasons if returned: *R v SSHD ex p Sivakumaran* [1988] AC 958.

- It has on other occasions been expressed instead as a "real as opposed to a fanciful risk": *MH Iraq v SSHD* [2007] EWCA Civ 852, approved by Lord Walker in *HJ (Iran) v SSHD* [2011] 1 AC 596 at [89]. At [90], Lord Walker pithily said *"[w]here life or liberty may be threatened, the balance of probabilities is not an appropriate test."*

- In *Kaja v SSHD* [1995] Imm AR 1, the AIT rejected an attempt to introduce a two-stage test of a determination of past and present facts on the balance of probabilities and an assessment of real risk in relation to future possibilities. They held that the test of reasonable degree of likelihood should be applied to all aspects of the determination.

- While there was a suggestion, *obiter*, in *Horvath v SSHD* [2000] INLR 15 that the position might be otherwise, *Kaja* was confirmed in *Karanakaran v SSHD* [2000] 3 All ER 449. It has been affirmed in many later cases.

Standard of proof – section 31

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(1) In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum seeker's fear of persecution is well-founded, the following approach is to be taken.

(2) The decision-maker must first determine, on the balance of probabilities—

(a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and

(b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.

(See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant's credibility).)

(3) Subsection (4) applies if the decision-maker finds that—

(a) the asylum seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and

(b) the asylum seeker fears persecution as mentioned in subsection (2)(b).

(4) The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—

(a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and

(b) they would not be protected as mentioned in section 34.

(5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 35 (internal relocation).

Standard of proof – more humanitarian protection?

- The revised standard only applies in respect of determination of refugee status: see section 30. However, claims made on the basis of article 3 ECHR (i.e. humanitarian protection claims) remain subject to a lower standard. That has for a long time been that *"substantial grounds have been shown for believing"* that expulsion would result in the person being exposed to a *"real risk"* of torture or inhuman or degrading treatment or punishment: *Soering v UK* (1989) 11 EHRR 439 at [91].

- One effect of the change may therefore be that more individuals will move from refugee status to humanitarian protection, a status which is being reformed now that the Qualification Regulations are being revoked.

- Recent changes to Immigration Rules align humanitarian protection with the "group 2" refugees under the Act. This means, for example, being granted leave for up to 30 months at a time rather than 5 years.

Standard of proof – humanitarian protection

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- In *MA (Somalia) v SSHD* [2011] 2 All ER 65, the Supreme Court, *obiter*, indicated they were *"inclined to the view there is no practical difference"* between the *Sivakumaran* standard and the ECHR standard ([13]). Sir John Dyson SCL went on to state:

  > *"It would add considerably to the burdens of hard-pressed immigration judges, who are often called upon to decide claims based both on the Refugee Convention and the ECHR at the same time, if they were required to apply slightly different standards of proof to the same facts when considering the two claims."*

- And at [20]:

  > *"Nevertheless, the approach in Jonah and Horvath to the ascertainment of past facts may also be seen as consistent with the requirement for 'substantial grounds' or 'serious reasons'. The argument before us, however, proceeded on the basis that 'real possibility' was the correct test to apply to past and present facts both in Refugee Convention and Article 3 cases. Without deciding the point, we are content to do the same in this appeal. We express no view on the issue which is both difficult and important. We think it would be desirable for the point to be decided authoritatively by this court on another occasion."*

Standard of proof – problems

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

Why is Clause 31 a serious concern?

In summary, the proposed test:

1) Imposes an even higher hurdle for asylum claimants to overcome and will result in people wrongly being denied refugee protection in the UK;
2) Disproportionately affects particularly vulnerable groups, who already struggle to have their claims for refugee protection correctly determined by the UK's asylum system;
3) Contravenes international obligations under the 1951 Refugee Convention as recognised by UNHCR;
4) Reverses decades of settled jurisprudence of our courts without adequate justification; and
5) Will cause confusion in decision making, resulting in an increased number of appeals, and increased costs and delays in an already back-logged asylum system.

Standard of proof – government position

- During the passage of the Bill, Lord Wolfson QC, as Parliamentary Under-Secretary of State (now resigned), wrote to Peers on 24 February 2022 to explain the reasoning behind the provision. He referred to the decisions in *Horvath* and *Jonah* as well as the UNHCR and academic views. He concluded:

> *"The need for clarity and consistency, and for only genuine refugees to be granted access to the benefits of refugee status in the UK, is driving the need for change. The test still ensures however that genuine refugees can be recognised in the UK and therefore the test in the Bill is a good faith, compatible interpretation of the Refugee Convention and supports the Convention's core purpose. Consequently, the well-founded fear test, as drafted in the Bill, is compliant with the Convention and appropriate for operation in the UK asylum system."*

Standard of proof – government position

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- Tom Pursglove MP, the Minister for Justice and Tackling Illegal Migration, said in a letter to Olivia Blake MP on 1 March 2022:

"We already have specific Asylum Policy instructions on considering sexual orientation, and gender identity issues in asylum claims which set out in some detail how decision-makers should fully investigate the key issues through a focused, professional and sensitive approach to questioning. As part of the operationalisation of the programme, ***we will seek to update the training and guidance provided to decision-makers, and we will concentrate on ensuring that interviews are sufficiently detailed to enable claimants to meet the higher standard required regardless of the nature of their claim****."*

Particular social group – section 33

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(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) The first condition is that members of the group share—

(a) an innate characteristic,

(b) a common background that cannot be changed, or

(c) a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.

(4) The second condition is that the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

Particular social group – changes

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- Those two limbs originate from the Qualification Directive and its implementation in the domestic regulations.
- It had been a matter of some debate whether both the two limbs must be met. In *Fornah v SSHD* [2007] 1 AC 412 it was held, *obiter*, that only one needed to be met.
- The debate distinguishes between the so-called "social perception" approach and the "protected characteristics" (or *eiusdem generis*) approach. Broadly, social perception defines the group by reference to how it is treated in society at large. Protected characteristics defines the group by reference to the identity of the group itself.
- *Fornah* found that either approach is appropriate. This was confirmed in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC).
- However, the Act now requires *both* features to be present.

Particular social group – consequences?

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- Lord Wolfson in his 24 February 2022 letter said:

  "Clause 32 aims to clarify an area where there has been a degree of contradiction and confusion for many years. We are not changing our policy or position on the 'test' for establishing if someone is part of a 'Particular Social Group'. We are clarifying the original intention of the drafting contained in the Qualification Directive and the existing definition in the 2006 Regulations which transposed, at the time, the applicable EU law in to domestic law."

Particular social group – consequences?

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- In the House of Lords Debate on 2 March 2022, Lord Wolfson expanded:

"Victims of gender-based violence may still be considered to be members of a particular social group for the purposes of making an asylum claim ***if they meet the conditions in Clause 32(3) and (4)****. ... this clause does not therefore mean that women who are victims of gender-based violence are* ***less likely to be accepted*** *as a member of a particular social group: all cases are assessed on a case-by-case basis.*

I cannot say, of course, that all women fleeing gender-based violence will always be found to be refugees, if that was the nature of the point that was being put to me. What I can say with certainty is that the structure of the definition does not preclude it."

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Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
Cornwall Buildings
45 Newhall Street
Birmingham, B3 3QR
+44 (0)121 752 0800

Contact
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

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