



Joint Briefing on Amendment to Clause 32 - 'Particular Social Group' Nationality and Borders Bill, House of Lords Report Stage

Summary

This briefing addresses Clause 32 of Part 2 of the Nationality and Borders Bill ('the Bill'), which seeks to introduce a regressive definition of a ground in the Refugee Convention that survivors of gender-based violence frequently rely on to access protection.

Over the last year, the UK Government has sought to reassure women and girls, and the specialist organisations which support them, that addressing violence against women and girls is a priority. The Government's Tackling Violence Against Women and Girls strategy, published in July last year, committed to 'bring[ing] about real and lasting change', recognising that violence against women and girls (VAWG) is 'still far too prevalent and there are too many instances of victims and survivors being let down.'¹

¹ HM Government, Tackling Violence against Women and Girls (July 2021)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005

The Home Secretary has stated: 'Women and girls have said enough is enough. And the Conservative Party agrees.'²

When the New Plan for Immigration was presented in Parliament, she once again spoke in support of women and asked 'Where are the vulnerable women and children that the [asylum] system should exist to protect?'.³

Since then, the Home Office has continued to suggest that this Bill will protect women seeking asylum, whilst pushing through measures that will disproportionately harm them. No meaningful attempt has been made by the department to address or listen to the serious concerns that our organisations have voiced, raising serious questions about the Government's commitment to tackling VAWG.

Our 41 organisations have significant expertise in working with women seeking asylum or those representing them. Throughout this Bill's passage, we have warned that the Bill will result in more women being wrongfully refused asylum, retraumatised and forced into further danger.

We are especially concerned about the change in Clause 32 to the definition of 'particular social group', membership of which forms one of the grounds of persecution in the Refugee Convention under which a person may qualify as a refugee. This change will result in protection being wrongly denied to women at genuine risk of persecution. The UK's Domestic Abuse Commissioner has specifically warned of the damaging impact of Clause 32 on victims of domestic abuse who 'without routes to asylum...will face significant insecurity and destitution'.

If adopted, Clause 32 would set back hard-won victories for survivors who have had to fight for the legal recognition of gender-based violence and the immense harm it inflicts. Minister Lord Wolfson indicated at Committee Stage that Clause 32 is part of the Government's agenda 'to toughen up on illegal migration'.⁴ Why does this Government wish to toughen up on women and girls fleeing gender-based persecution, whilst continuing to suggest that the Bill will somehow benefit them?

[630/Tackling Violence Against Women and Girls Strategy-July 2021-FINAL.pdf](#)> accessed 15 February 2022, pages 14 and 3.

² Conservatives, 'Taking the tough decision to cut crime: CPC21 Speeches' (5 October 2021) <<https://www.conservatives.com/news/2021/taking-the-tough-decisions-to-cut-crime>> accessed 15 February 2022.

³ HC Deb 24 March 2021, Vol 691, Col 921.

⁴ HL Deb 8 February 2022, Vol 818, Col 1451.

We strongly urge members of the House of Lords to vote for the amendment tabled by the Lord Bishop of Gloucester to Clause 32, supported by Baroness Lister of Burtersett. That amendment, as detailed below, would maintain the approach to ‘particular social group’ recently endorsed by our judiciary, and would be in keeping with the Government’s commitment to tackling violence against women.

Why is the definition of a ‘particular social group’ important?

A number of elements must be satisfied in order to successfully claim asylum. A person must first show that they have a well-founded fear of persecution for one of the five reasons set out in the 1951 Refugee Convention: race, religion, nationality, political opinion, and membership of a particular social group.

Since ‘gender’ is not explicitly listed as a reason, survivors of gender-based violence often rely on ‘particular social group’ to claim asylum. Victims of trafficking, those fleeing persecution based on their sexual orientation or gender identity, and persons with disabilities, among others, may also rely on the ground of belonging to a ‘particular social group’.

What does Clause 32 do?

Clause 32 of the Bill introduces a regressive definition of ‘particular social group’.

UNHCR and UK courts have defined a ‘particular social group’ as a group which meets at least **one** of the following conditions:

1. A group of persons who share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it;
2. A group that has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

In contrast, Clause 32 of the Bill requires **both** of these ‘protected characteristic’ and ‘social perception’ conditions to be fulfilled, rather than requiring them to be met in the alternative.

Why is Clause 32 a serious concern?

In summary, the proposed definition:

- 1) Imposes an additional hurdle for survivors of gender-based violence, and other vulnerable persons, to overcome, and will result in people being wrongly denied refugee protection in the UK;**
- 2) Disproportionately affects women and girls who rely on the ground of ‘particular social group’ when claiming asylum;**
- 3) Contravenes UNHCR standards;**
- 4) Reverses UK case law;**
- 5) Reinstates the minimum standard in EU law, which our Upper Tribunal rejected;**
- 6) Was not detailed in the New Plan for Immigration and, therefore, not subject to public consultation;**
- 7) Was not addressed in the Government’s Equality Impact Assessment; and**
- 8) Will result in an increased number of appeals, and increased costs and delays in an already back-logged asylum system.**

Clause 32 will create an additional barrier for vulnerable persons to overcome when relying on the ‘particular social group’ ground. **This means that more people, including women who have survived sexual and gender-based abuse, will be wrongly refused refugee protection in the UK.**

Not all vulnerable persons seeking to rely on the ‘particular social group’ ground will be able to satisfy both limbs, as Clause 32 now requires. For instance, survivors of gender-based abuse will generally fulfill the first limb - because of their gender - but could fall foul of the second limb in proving that they are perceived as a distinct group in their country of origin.

Whether a person is part of a distinct group will inevitably vary from country to country, and will depend on the availability of up-to-date and objective information. Yet certain forms of gender-based violence are often poorly documented in human rights reports, specifically violence that is inflicted by community or family members, such as domestic and so-called ‘honour’-based abuse. By its nature this form of violence is often hidden and as a result it can be very difficult for survivors to show that they are perceived as a distinct group in their country as the group may be veiled from sight.

Over the years, there has been substantial research on the reasons why many women who flee gender-based persecution may be wrongly denied protection.⁵ This can be due to severe challenges in disclosure, as acknowledged in the Home Office's own policy,⁶ but also in evidencing their claims, especially when the abuse was inflicted by community or family members, as opposed to the state.

This research has also shown how decision-makers have failed to understand that gender-based abuse falls within the remit of the Refugee Convention and can engage the UK's protection obligations. **Instead of introducing changes that would support survivors to access safety, the Government proposes to change the definition of a 'particular social group' to make it even harder for survivors.**

As well as survivors of gender-based abuse, victims of trafficking are also likely to be excluded from protection as a result of Clause 32. Barristers from Garden Court Chambers have explained how under Clause 32 a trafficked woman would need to show not only that her status as a trafficked woman is a protected characteristic through sharing a share a common background or past experience with other victims, 'but also that trafficked women as a group are perceived as having a distinct identity in her country of origin. The latter is of course much more difficult to establish than the former because this is judged by the perceptions of the society in her country, and it can be very challenging to find objective evidence on women as a distinct group.'⁷ Male

⁵ See, for example:

Freedom From Torture, *Lessons Not Learned: The Failures of Asylum Decision Making in the UK* (2019) <<https://www.freedomfromtorture.org/news/lessons-not-learned-report-september-2019>> accessed 13 January 2022;

Women for Refugee Women, *Refused: The experiences of women denied asylum in the UK* (2012) <<https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-reports-refused.pdf>> accessed 13 January 2022;

Asylum Aid, *Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims* (January 2011) <<https://www.refworld.org/docid/4d3435d12.html>> accessed 13 January 2022;

European Parliament, Directorate-General for Internal Policies, *Gender Related Asylum Claims in Europe* (2012) <[https://www.europarl.europa.eu/RegData/etudes/etudes/ajoin/2012/462481/IPOL-FEMM_ET\(2012\)462481_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/ajoin/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf)> accessed 13 January 2022.

⁶ Home Office, *Gender Issues in the Asylum Claim* (version 3.0, 10 April 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699703/gender-issues-in-the-asylum-claim-v3.pdf> accessed 16 February 2022.

⁷ Stephanie Harrison QC, Ubah Dirie, Emma Fitzsimons, and Hannah Lynes, 'Nationality and Borders Bill: Advice to Women for Refugee Women' (23 November 2021) page 11, para 25 <<https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf>> accessed 13 January 2022.

survivors of modern slavery have the same concern, and frequently rely on the ground of particular social group in support of their asylum claims.

It should be noted that proving membership of a ‘particular social group’ is just the first step in obtaining refugee protection. Once that is established the person will then need to show that they subjectively fear persecution, that there is a nexus between their membership and the persecution they fear, and that they are likely to be persecuted and would not be protected if returned. These elements are all part of assessing whether someone has a ‘well-founded fear of persecution’ and should be granted refugee status. But the Bill also heightens that test, in Clause 31, which will make it even harder for survivors and other vulnerable groups to prove their need for protection in the UK.

Taken together, the changes to decision-making in **Clauses 31 and 32 will result in a greater number of incorrect decisions, and will disproportionately affect women seeking asylum**, as leading barristers have warned. As well as retraumatising vulnerable women and increasing their risk of facing further violence, a greater number of incorrect decisions will result in wasted judicial resources and prolonged decision-making in a system already rife with delays.

What is the Government’s justification for this change?

The Government has argued that the purpose of Clause 32 *‘is to make sure that all decision-makers, including both the Home Office and the courts, understand and operate to the same definitions’*.⁸ Whilst we laud this aim, this is no justification for the tougher cumulative test which the Government now seeks to impose.

The change to ‘particular social group’ seems to have come from nowhere.

In 2020, the Upper Tribunal confirmed the correct approach to ‘particular social group’. Referring to the Refugee Convention’s objective, the Tribunal agreed with the approach of UNHCR and the comments of the Appellate Committee of the House of Lords.⁹ It

⁸ HL Deb 8 February 2022, Vol 818, Col 1449

<<https://hansard.parliament.uk/lords/2022-02-08/debates/1AB52848-6E2A-49BE-9D95-9221298E14C3/NationalityAndBordersBill>> accessed 14 February 2022.

⁹ UNHCR, ‘UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted’ (COM(2009)551, 21 October 2009) page 8 <<https://www.unhcr.org/4c5037f99.pdf>> accessed 16 February 2022; UNHCR, ‘UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or

stated that requiring both criteria to be met ‘can give rise to protection gaps which is contrary to the obligations of signatories to the Convention’.¹⁰

The Government has argued that it is difficult to attack the definition in Clause 32 ‘as something utterly wrong’, or an ‘unfair, unworkable or inapt interpretation when it is actually reflected in the EU jurisprudence’.¹¹ However, that is exactly what our specialist tribunal has done. The Upper Tribunal has found that ‘[a]lthough the European Union can make its own provisions in relation to granting international protection those provisions, such as those in the Directive, **cannot provide less protection than that recognised in the Refugee Convention as clarified by the UNHCR**’.¹²

The Upper Tribunal confirmed that ‘the approach to the definition of membership of a [particular social group] in the Qualification Directive¹³ does not accurately reflect international refugee law’.¹⁴ As the title of that Directive explicitly states, its purpose was simply to lay *minimum* standards for refugee qualification, rather than conclusive ones. In fact, the Directive expressly permits member states to adopt ‘more favourable provisions’ for people in need of international protection.

The Home Office did not appeal the Upper Tribunal’s decision in 2020, and we heard nothing more on the matter. Fast forward to 2021, the Home Office released its New Plan for Immigration, but again there was no mention of the change to the definition of a ‘particular social group’ in that 52-page document. **As a result, the change was not subject to public or expert feedback.**

Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted’ (OJ L 304/12 of 30.9.2004) page 23
<<https://www.unhcr.org/uk/protection/operations/43661eee2/unhcr-annotated-comments-ec-council-directive-200483ec-29-april-2004-minimum.html>> accessed 16 February 2022;
UNHCR, ‘UNHCR Updated Observations on the Nationality and Borders Bill, as amended - updated January 2022’ page 70-72 <<https://www.unhcr.org/61e7f9b44>> accessed 16 February 2022;
Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department [2006] UKHL 46 see Lord Bingham at [16] and Lord Brown at [118].

¹⁰ *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) at [59] (hereinafter ‘DH’)

¹¹ *ibid.*

¹² *DH* [70].

¹³ Council Directive 2004/83/EC of 29 April 2004 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

¹⁴ *DH* [67].

Nor is the change explained or justified in the Government’s Equality Impact Assessment on the Bill, which barristers have described as ‘superficial and inadequate’.¹⁵ That assessment acknowledges that entire cohorts of vulnerable people – including women – may be disadvantaged by the Bill, but does not adequately engage with those concerns. It merely states that ‘[w]ith adequate mitigation, we anticipate that many potentially adverse impacts will be removed, and that any remaining would be justified and proportionate’.¹⁶

The Government has attempted to ‘provide reassurance’ by stating that *‘we will be monitoring equality impacts as the Bill is put into operation’*.¹⁷ Given the repeated warnings voiced by expert organisations and legal practitioners on the implications of Clause 32, this is simply not an acceptable response. It seems that the Government does not collect the required statistics on women and survivors,¹⁸ and so how can it possibly come to the conclusion that the adverse impacts on these vulnerable groups are justified and proportionate? How will the Government monitor the impact upon them? Given the advanced stage of the Bill in its passage through Parliament, the Government should by now have concrete plans to monitor adverse impacts, but no such information has been shared. This suggests that the Government is inadequately prioritising the impact on survivors.

¹⁵ (n 7) page 34, para 80.

¹⁶ Home Office, ‘New Plan for Immigration Overarching Equality Impact Assessment of polices being delivered through the Nationality and Borders Bill’ (16 September 2021) <<https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment>> accessed 16 February 2022.

¹⁷ HL Deb 8 February 2022, Vol 818, Col 1450.

¹⁸ See Home Office, ‘Immigration Statistics Quarterly Release’ <<https://www.gov.uk/government/collections/immigration-statistics-quarterly-release>> accessed 16 February 2022. See also this inadequate response to a written question put to the Home Secretary about the comparative assessment she has made of the treatment of men and women in the asylum system: <<https://questions-statements.parliament.uk/written-questions/detail/2022-02-07/119400>> accessed 16 February 2022. During Committee Stage, Baroness Lister asked the Minister for various statistics relating to survivors: ‘Can the Minister also provide some information about statistics, if necessary, in a subsequent letter? First, do the Government collect statistics on the number of women who claim asylum based on sexual or gender-based violence in their country of origin? If yes, what proportion of overall claims did these represent? Secondly, do they collect statistics on when survivors of gender-based violence make an asylum application? If yes, what do those statistics show? Thirdly, do they collect statistics on the number of women subject to sexual abuse on their journeys to the UK? Again, if so, what do they show?’ HL Deb 1 February 2022, Vol 818, Col 872-873. The Minister did not have these statistics to hand, but said she would try to get them (Col 880). At the time of writing, these questions have not been answered.

The approach of the 2004 Qualification Directive to defining a ‘particular social group’, which the Government endorsed in Committee stage,¹⁹ specifically required due consideration to be given to issues arising from gender, gender identity, and sexual orientation for the purposes of defining a particular social group.²⁰ It is noteworthy that although carving a welcome provision for sexual orientation in Clause 32(5) of the Bill, the Government has specifically omitted gender and gender identity. This must be remedied by amending Clause 32 to ensure the test is either/or rather than cumulative, so groups formed on the basis of gender, gender identity, as well as age, disability, health, and victims of former trafficking are not excluded from refugee recognition.

The Government has stated that there is a ‘mismatch between how the concept of a “particular social group” is defined in current legislation, government policy and some tribunal judgments, and also in how the definition has been interpreted by some courts.’²¹ Referring to the cumulative test, the Government ‘[believes] that setting it out in this way will make it clearer.’²²

However, as Baroness Lister stated in Committee stage,²³ a cumulative test is no simpler than the existing either/or test it is overruling, the one affirmed by the Upper Tribunal in 2020. If there is a mismatch between the approach of tribunals and courts on the one hand and legislation or policy guidance on the other, the Government is free to make the necessary amendments in order to make clear the either/or test should be applied.

There is no reason - and indeed no reason has been provided - why the Government should discard the definition recently confirmed by our independent judiciary, especially when that definition is in line with UNHCR standards.

The Government argues ‘[t]here is no authoritative or universally agreed definition of “particular social group” among state parties to the convention’.²⁴ However, will it admit that there is no imperative to impose the higher test in Clause 32? It had ‘an opportunity to look at the matter afresh’,²⁵ and chose to impose this higher test.

¹⁹ HL Deb 8 February 2022, Vol 818, Col 1449, ‘It is an EU interpretation; it comes from the approach in the EU qualification directive, which underpins the Common European Asylum System. We are very happy to look at EU interpretations; we do not have a closed mind – when they get it right, they get it right’.

²⁰ Council Directive 2004/83/EC of 29 April 2004, recital [30].

²¹ HL Deb 8 February 2022, Vol 818, Col 1449.

²² *ibid.*

²³ HL Deb 8 February 2022, Vol 818, Col 1450.

²⁴ HL Deb 8 February 2022, Vol 818, Col 1449.

²⁵ HL Deb 8 February 2022, Vol 818, Col 1433.

One of the Government's stated objectives of the Bill is to *'increase the fairness and efficacy of our system so that we can better protect and support those in genuine need of asylum'*.²⁶ If it is serious about this objective it should focus on the consistent and clear standards espoused by the Refugee Convention's supervising guardian, the UNHCR, rather than imposing a higher hurdle for women and other vulnerable groups, who already struggle to have their asylum claims correctly recognised.

The Government has stated that our amendment would *'erode the concept that people deserve and need protection based on fundamental characteristics that go to the core of who they are'* and that it does not want a *'definition to cover potentially transient factors that could perhaps be changed, such as an individual's occupation'*.²⁷ If that is the case, then Clause 32 need not be a two-limb test. It could be defined solely by a person's protected characteristics.

However, in that case, the Government would need to face the groups that would be excluded who may, depending on the situations in the country of return, meet the definition of 'particular social group' on the basis of 'social perception' but who would find it far harder if not impossible to show 'protected characteristics'.

To rely on the broad 'particular social group' of 'women' in a certain country, a woman would need to show documentary evidence of discrimination against all women in that country or that all women would be unable to access protection or assistance from the state.²⁸ If she could not prove this, she would have to rely on a more narrow 'particular social group'. For example, a woman abused for refusing to wear traditional dress, even though setting herself against the cultural practices of the society, may not have a particular or imputed political opinion or other belief, and would find it much harder to prove that her attire is a protected characteristic.²⁹

²⁶ HM Government, *Consultation on the New Plan for Immigration: Government Response* (July 2021) page 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005042/CCS207_CCS0621755000-001_Consultation_Response_New_Plan_Immigration_Web_Accessible.pdf> accessed 15 February 2022.

²⁷ HL Deb 8 February 2022, Vol 818, Col 1449.

²⁸ *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 0002 at [53(b)], followed in *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC), where it was found that all women in Thailand did not form a particular social group, as there was not sufficient documentary evidence 'that all women in Thailand face discrimination or that all women would be unable to access protection or assistance from the state'.

²⁹ See T. Alexander Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group"' in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, 2003) page 298

If persecutors see these groups as needing to be suppressed, and are willing to inflict serious harm in carrying out that suppression, why should the United Kingdom turn its back?

The criteria for assessing whether someone is a member of a ‘particular social group’ must be alternatives, not cumulative. Why is the Government following an EU interpretation that is contrary to the objective of the Refugee Convention and is likely to result in fewer vulnerable people receiving the protection to which they are entitled? Why is the Government departing from the shared clear interpretation of UNHCR and the Upper Tribunal in 2020? Why does the Government wish to adopt a definition that would disproportionately affect women, when it has committed to tackling violence against women? These questions remain unanswered.

What does the amendment do?

Page 35, line 47, leave out “only if it meets” and insert “if it meets one or”, such that Clause 32 reads:

(2) A group forms a particular social group for the purposes of Article 1(A)(2) of the Refugee Convention **if it meets one or 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

Further information/briefings on Clause 32:

Joint Briefing of ILPA and Women for Refugee Women:

<https://ilpa.org.uk/wp-content/uploads/2022/01/ILPA-and-WRW-Part-2-Clause-32-Particular-Social-Group-Amendment.pdf>

<<https://www.refworld.org/docid/470a33b30.html>> accessed 14 February 2022. Other examples provided at page 272 include ‘private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, or members of a labour union’.

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