

## Briefing on Clause 37 of the Nationality and Borders Bill

***This extremely harmful clause seeks to exclude many more people from the Refugee Convention on the basis of ever more minor criminal offences. It is also incompatible with the Refugee Convention. We propose that it should be deleted.***

Clause 37 of the Nationality and Borders Bill redefines “particularly serious crime” for the purpose of article 33(2) of the Refugee Convention. Under Article 33(2), those who are deemed to have committed a ‘particularly serious crime’ do not benefit from the principle of non-refoulement and can be expelled from the country of refuge.

Clause 37 seeks to lower the threshold length of prison sentence at which an individual can be excluded from the Refugee Convention on the grounds of criminality, from 2 years to 12 months. Secondly, it changes the rebuttable presumption that any crime accruing such a sentence is a ‘particularly serious crime’ into an assertion that cannot be challenged. This will mean that every single individual who receives a 12 month sentence for whatever crime is automatically deemed (rather than presumed) to have committed a ‘particularly serious crime’, and face being excluded from the Refugee Convention on that basis.

### Incompatibility with the Refugee Convention

It is irrational and grossly disproportionate to create a blanket assertion that every crime accruing a 12-month sentence is a ‘particularly serious crime’. In addition, such a blanket exclusion is incompatible with the Refugee Convention. The UNHCR’s Handbook<sup>1</sup> states that Article 33 paragraph 2 of the convention is for ‘extreme cases’. The Joint Committee on Human Rights has previously considered this issue when the government introduced a list of “particularly serious crimes” for the purposes of article 33(2), in 2004<sup>2</sup>. In that instance, the Committee stated that

*“Article 33(2) applies to refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them. It aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses a major actual or future threat. For this reason, Article 33(2) has always been considered as a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual—a threat such that it can only be countered by removing the person from the country of asylum.”*

The committee recommended that “the exceptions to the principle of non-refoulement in Article 33(2) should be given a restrictive interpretation, not an interpretation which expands their scope and correspondingly weakens the principle itself.”

In *EN (Serbia)*<sup>3</sup>, the Court of Appeal found that the Secretary of State’s regulations defining what constituted a “Particularly Serious Crime” included several offences that could not rationally be described as “particularly serious” – including theft or trespassing offences.

Clause 35 of the Nationality and Borders Bill goes further than previous government attempts that were also incompatible with the Refugee Convention, because it includes every single crime that leads to a 12 month sentence.

### Removal of the rebuttable presumption:

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<sup>1</sup> UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees

<sup>2</sup> *Joint Committee on Human Rights, Twenty-Second Report, Session 2003-04*  
<https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/190/19002.htm>

<sup>3</sup> *EN (Serbia) v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 630



This removes an important safeguard and prevents the Home Office from exercising discretion in considering the particular circumstances of the case. That is incompatible with the Refugee Convention – according to the JCHR, states are required to interpret the exclusion clauses with great caution, and only after a full assessment of the individual circumstances of the case.<sup>4</sup> In the case of *EN (Serbia)*<sup>5</sup>, the Court of Appeal found that it would be incompatible to make the presumption that a 2-year sentence indicates a particularly serious crime irrebuttable. In that case, Stanley Burton LJ wrote at paragraph 69<sup>6</sup>:

*“I do not think that every crime that is punished with a sentence of 2 years imprisonment is particularly serious. One only has to appreciate that determinate sentences may be many times longer than 2 years for it to be obvious that a sentence of 2 years’ imprisonment is not necessarily indicative of a particularly serious crime.”*

#### How this will operate in practice:

In practice this provision could exclude many people from the protections afforded to them under the refugee convention, and could lead to individuals being removed to situations where they face persecution or death. As the JCHR has pointed out, those individuals would still be likely to be protected against return by Article 3 ECHR provided that they are aware of their right to rely on it. However, even if such individuals cannot be returned due to Article 3 ECHR, this clause would still deny them the protections and entitlements that flow from access to refugee status. It would allow for the officials to apply the Home Office restricted leave policy in which leave and conditions on leave are granted at the discretion of the SSHD for a maximum of 6 months with a view to ‘removal as soon as possible’<sup>7</sup> and would leave people trapped in a harmful limbo situation.

It is also a unilateral reinterpretation and distortion of an international treaty that could encourage other states to renege on their international obligations on similarly spurious grounds, in the context of the Refugee Convention and others<sup>8</sup>.

These proposals are even more alarming when considered alongside the new criminal offences and harsher sentences for existing offences that this bill introduces, such as those contained in part 3 of the bill. In addition, the Policing, Crime, Sentencing and Courts bill introduces new criminal offences and increases sentences for existing offences. So the government is increasing offences and sentence lengths and simultaneously excluding people from protection for less serious sentences than before.

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<sup>4</sup> Ibid.

<sup>5</sup> *EN (Serbia) v Secretary of State for the Home Department & Anor* [2009] EWCA Civ 630

<sup>6</sup> Cited in *Free Movement 16TH JULY 2021* [https://www.freemovement.org.uk/nationality-and-borders-bill-and-the-refugee-convention/#Clause\\_35\\_lowering\\_the\\_8220particularly\\_serious\\_crime8221\\_threshold](https://www.freemovement.org.uk/nationality-and-borders-bill-and-the-refugee-convention/#Clause_35_lowering_the_8220particularly_serious_crime8221_threshold)

<sup>7</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/711142/restricted-leave-v3.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711142/restricted-leave-v3.0ext.pdf)

<sup>8</sup> *Amnesty International and Migrant Voice*, Nationality and Borders Bill 2021-22 House of Commons Second Reading July 2021

