The Nationality and Borders Bill and the Refugee Convention 1951:

Where the Joint Committee on Human Rights goes wrong

Richard Ekins, John Finnis and Simon Murray

About the Authors

Richard Ekins is Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government in the University of Oxford

John Finnis FBA, QC (Hon) is Professor Emeritus of Law & Legal Philosophy in the University of Oxford.

Simon Murray is a barrister at 39 Essex Chambers.

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The Nationality and Border Bill's Explanatory Memorandum affirms (para. 146) that under the Bill "all individuals recognised as refugees by the UK will continue to be afforded the rights and protections required under international law, specifically those afforded by the 1951 Refugee Convention." What rights and protections does the Convention require the UK to afford to persons it recognises as Convention refugees? In answering this question, the Ninth and Twelfth Reports of the Joint Committee on Human Rights on the Bill fundamentally misunderstand the Convention, unwarrantably truncate its text, and misread – or fail to read – the UK Court decisions on which these Reports rely. This research note traces some of the Joint Committee's missteps.

1. Non-refoulement

The Joint Committee, like the UNHCR and many other persons and bodies, extends "the principle of non-*refoulement*" far beyond what was established by art. 33(1) Refugee Convention,[1] considered in its original public meaning and context.[2] Nevertheless, very significantly, even the Joint Committee finally admits (Ninth Report, para. 64) that "Pushbacks to France, on the information currently available, would not necessarily breach the non-refoulement obligations under the Refugee Convention or the provisions of the ECHR prohibiting return on the grounds of Arts. 2, 3 or 4 ECHR."

The decisive facts are that France (like Belgium and other North Sea coastal states) is safe in itself and that it is a state that does not engage in *refoulement* contrary to either Convention however loosely interpreted. That makes unnecessary any discussion of whether the non-*refoulement* obligation of the Refugee Convention applies only inside the territory of the UK itself, only inside its territorial sea, or (as the UNHCR contends) wherever the UK happens to exercise its power or jurisdiction. The Refugee Convention's non-*refoulement* obligation, authentically interpreted, only engages actions that result in asylum-seekers being returned to a state that is unsafe for them.

In short, the UK non-*refoulement* obligations are fully satisfied by deportation to safe territories, whether from outside or inside the UK's territorial waters, or from inside the UK itself.[3]

2. The structuring principle of the Refugee Convention

The fundamental principle for understanding the Refugee Convention is that the states party to it have no obligation to admit refugees, even persons whom they recognise to be entirely genuine refugees as defined by the Convention (Convention refugees). Each state also retains the right to expel genuine Convention refugees, provided it does not expel them to an unsafe territory and does not, without due process of law and serious grounds, expel refugees whom it has previously given leave to settle.

This is plainly explained in one of the UNHDR-sponsored commentaries on art. 31(2) of the Convention, a provision which the Ninth and Twelfth Reports (like other critics)[4] avoid quoting or even

1. Article 33(1): "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."
2. See John Finnis and Simon Murray, *Immigration, Strasbourg and Judicial Overreach* (Policy Exchange, 2021), pp. 20-23, 51-61.
3. Australia's evident working assumption that its interception operations since 2012/13 should only be outside the territorial sea is, we think, sound only to the extent that those operations were sometimes intended to result in the return of the passengers to territories that were or might well be regarded as unsafe for those passengers. To the extent that their purpose was to transfer them to the safe states, Nauru and/or Papua New Guinea, there was no need for those operations to be restricted to the high seas or the contiguous zone, or indeed to be outside Australia's mainland (and some at least were not).
4. Karolina Szopa, "Condemning the Persecuted: Nationality and Borders Bill (2021) and Its Compatibility with International Law" U.K. Const. L. Blog (6th January 2022).

mentioning, essential though it is to understanding art. 31(1) and the Convention as a whole:

> **31. REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE**
>
> 1. 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**.
>
> 2. The Contracting States shall not apply to the movements of **such** refugees restrictions other than those which are necessary and such **restrictions shall only be applied until their status in the country is regularized** or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. (emphases added)

Art. 31(2) pointedly provides that even "*such* refugees" as satisfy the three requirements specified in art. 31(1) – and now in cl. 11(2) and (3) of the Bill – may be restricted in their movements, though no longer than is necessary and only "until their status in the country is regularized." It thus leaves the position of other genuine Convention *refugees* subject to wider restrictions on movement and regularization, provided these are compatible with maintenance of the provisions of arts. 3–30. The total effect of all this is stated in Paul Weis's UNHDR-published analysis of and commentary (c. 1967) on the Convention's *travaux préparatoires*. Commenting on art. 31(1), Weis says:

> The term 'coming directly' has acquired considerable importance because, while it relates in Article 31 to penalties only, *Contracting States frequently* use it as the criterion for entertaining an asylum request. (emphasis added)

And again, in relation to the "regularization" mentioned in art. 31(2), which means (as he says) being given leave/permission to (enter-and)-stay, Weis says:

> Paragraph 1 [of art. 31] *does not impose an obligation to regularize the situation of the refugee... , the Article does not provide what should happen to a refugee whose situation is not regularized* and who is unable to comply with an expulsion order. Article 3 of the 1933 Convention provided that in such a case the Contracting Parties *reserve the right to apply such internal measures as they deem necessary. This would also seem to apply now* and as regards such internal measures paragraph 2 of Article 31 applies. (emphases added)

To repeat: art. 31(2) only applies to "such refugees" as, over and above being genuine and recognised Convention refugees, satisfy the three additional requirements (more strictly: have the three further characteristics mentioned) in art. 31(1)). Weis goes on:

> Paragraph 2 [of art. 31] speaks of restrictions to the movement of refugees which are necessary but does not define what restrictions may be considered as necessary. Restrictions for reasons of national security were mentioned. *The question whether one could keep a refugee in custody, who had entered illegally, was raised by the President of the Conference but not answered.* …
>
> Regularization of status means the grant of a residence permit, *even if of a temporary character*. (emphases added)

What critics of the Nationality and Borders Bill (and of much else) forget is that *the Refugee Convention* (as Weis here reminds the attentive reader) *does not confer on refugees, even those who fully satisfy the Convention's definition and comply with its requirements, any right to be admitted or any Convention right not to be expelled to a safe state*. In relation to grant of leave to enter-and-stay, the only right conferred by the Convention – and it is a very valuable right – is not to be returned (expelled, *refouled*) to an unsafe state or territory.

The Convention does not create, embody or guarantee a right to asylum: it was intended, designed and worded throughout *not* to do so. On all matters of admission and permission to stay (as distinct from removal), it relies on the generosity and cooperativeness of states, acting in full autonomy. Those people who come within the Convention's definition of refugee have a claim and a right to be *recognised as refugees*, but that right, status and/or recognition does *not* confer on them a Convention right to be admitted and/or allowed to stay, or to be "granted refugee status" in the sense used in the Immigration Rules.

3. *First safe country: mistakes about art.* 31, **Adimi *and* Asfaw**

The Ninth and Twelfth Reports work hard but unsuccessfully to find an inconsistency between the Bill and the Refugee Convention in relation to the question of entry into the UK.[5] A prime example, from the Twelfth Report:

> 67. While the Bill seeks to avoid clashing with Article 31 of the Refugee Convention— it also seeks to reinterpret its protections. In clause 36 of the Bill the Government sets out a new binding statutory interpretation of Article 31. This means that whether or not refugees are treated as "coming directly" for the purposes of the differentiation policy in clause 11 will be determined in accordance with clause 36(1):

5. Whether it is compatible with the Convention to grant a refugee leave to stay but not the whole panoply of Convention rights is a different issue, as is the question whether that is what the Bill's distinction between Group 1 and Group 2 refugees involves.

> A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.

> 68. This interpretation of Article 31 is consistent with the Government's view that all asylum seekers should claim asylum in the first safe country they reach. It would not allow for the penalisation of asylum seekers who pass through unsafe states, but it could nevertheless, in practice, exclude from the protection of Article 31 almost any asylum seeker who travels to the UK by means other than air travel from the persecuting state. The UK's immediate neighbours are all states that respect the rule of law and operate asylum systems that purport to comply with the Refugee Convention. It will therefore be very difficult for any asylum seeker who reaches the UK having passed through, for example, France, Ireland, Belgium, the Netherlands, Germany or any Scandinavian country to show that they could not 'reasonably be expected to have sought protection' there and therefore should be entitled to protection from penalisation under Article 31. Such a position is starkly inconsistent with the interpretation of Article 31 preferred by experts assembled by the UNHCR in 2001, who concluded, following analysis of the travaux préparatoires, that "the drafters [of the Refugee Convention] only intended that immunity from penalty should not apply to refugees who found asylum, or were settled, temporarily or permanently, in another country."

Experts "assembled by the UNHCR" can be expected to reach conclusions lopsidedly favourable to refugees and their supporting NGOs (including the UNHCR), and cool towards the right of states to maintain their borders. This 2001 group, whose findings were searchingly criticised in *R v Asfaw* [2008] UKHL 31 by Lord Rodger and again by Lord Mance, did not disappoint that expectation. Purporting to interpret art. 31(1)'s phrase "coming directly from a territory where their life or freedom was threatened", the experts announced:

> (a) Article 31(1) requires that refugees shall not be penalized solely by reason of unlawful entry or because, being in need of refuge and protection, they remain illegally in a country.
> (b) Refugees are *not required to have come directly from territories where their life or freedom was threatened*.
> (c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or

> countries to which they flee.
> *The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country.* (emphases added)

No wonder that the Bill proposes a more responsible approach to the text of the Convention. In *Asfaw*, the judgments of Lords Rodger and Mance each show the baselessness of the italicised passages.[6] But the Committee, professing to rely on *Asfaw*, is serenely unaware even of these judgments' existence. Referring first to the main judgment in the Queen's Bench Divisional Court in *Adimi* [2001] QB 667, a case which did not ascend to the Court of Appeal, the Twelfth Report says (para. 69):

> the Court of Appeal [*sic*] concluded "that some element of choice is indeed open to refugees as to where they may properly claim asylum [and] that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of [Article 31]…

In footnote 87, the Report adds:

> This interpretation[7] *was not questioned when it was discussed by the House of Lords* in the subsequent case of *R v Asfaw* [2008] UKHL 31… According to Lord Bingham: "It seems to me that *Adimi* is fully supported by such authority as there is, both before and since, and was rightly decided." (emphasis added)

This is a bundle of mistakes. The *Adimi* interpretation, though supported by Lord Bingham (with whom Lord Carswell simply concurred), was devastatingly refuted by pages of argument and analysis of the recorded intentions of the Convention drafters, in the judgments of Lords Rodger and Mance, to which Lord Bingham offered no counter-argument at all. (Lord Hope agreed with the result favoured by Lord Bingham but by a route that avoided approving *Adimi*.)

The *Adimi* "element of choice" approach is ripe for legislative reversal. *No one disputes that refugees have the choice to go to any country they choose*, if that country is willing to take them. But every country has the right, carefully left to states by the Convention and overlooked by the Joint Committee, to refuse entry to even genuine Convention refugees. Accordingly, every country has the right to decide that it will use, as *one* of its own criteria for refusing leave to enter, the fact that the applicant refugee has *chosen* not to apply for asylum in safe countries through which he or she has passed. *That is the decision, right and authority* of the UK as a sovereign state party to the Convention.

The Twelfth Report (para. 73) is quite correct when it says "There is no requirement under the Refugee Convention for asylum seekers to claim asylum in the first safe country they reach." But it misleads itself when it continues: "The Bill should not establish in domestic law

6. See *Asfaw* paras. 147, 149 and 153-155 for the decisive statements of French delegates in the drafting meetings July 1951). The words of para. (b) of the experts' conclusions do have a true sense: refugees are not required by the Convention to do anything except (art. 2) conform to the laws of the country in which they find themselves. But in the context of expounding art. 31(1), the main *requirement for immunity* from penalties for violating the duty of compliance mentioned in art. 2 is precisely that the refugee has "come directly from a territory in which his life or freedom is threatened."
7. As the Twelfth Report put it, in the same sentence of para. 69:

   Furthermore, the new test in clause 36 is inconsistent with the well-established interpretation of Article 31 made by the domestic courts in *R (Adimi and others) v CPS and Secretary of State for the Home Department*, when the contention that Article 31 allows the refugee no element of choice as to where he should claim asylum was expressly rejected. Having taken into account the travaux préparatoires of the Refugee Convention, conclusions adopted by UNHCR's executive committee, and the analysis of well-respected academics and commentators, the Court of Appeal concluded...

an interpretation of Article 31 of the Refugee Convention that explicitly or implicitly says the opposite." The "interpretation" of art. 31 in cl. 36 and elsewhere in the Bill neither explicitly nor implicitly "says the opposite". It says that if you exercise your right to choose the UK as your destination after passing through one or more safe countries where you could reasonably be expected to apply for asylum, the UK will exercise its right to choose whether or not to take you in, its right to penalise you if you use deception or other criminal means of entry, and its right to deport you unless the only place to send you is unsafe in the sense of art. 33(1) or some provision of the ECHR.

Art. 31 Refugee Convention, like cl. 36 of the Bill, is concerned with a different topic: penalties for unlawful entry or use of false documents and so forth. Art. 31(1) authorises each state to impose such penalties on those refugees who chose to violate its criminal law *after choosing* not to apply for asylum in a safe country or countries through which they passed, *unless*, in the words of cl. 36(1) of the Bill, "they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country" – in which case art. 31(1) withdraws its authorisation or permission of penalties. Cl. 36(1) is in fact a *generous* and humane interpretation of art. 31(1)'s phrase "coming directly from territories where their life or freedom is threatened".

There would be nothing inconsistent with the Refugee Convention in saying that no refugee can enter the UK by small boat or other irregular means from any of the safe countries listed by the Joint Committee, and that the UK will entertain refugee claims to family connection etc. by regular means, and discharge its obligations under art. 35, to cooperate with the UNHDR, by appropriate participation in UNHDR resettlement schemes.

4. *Refusal of admission*

The Twelfth Report (para. 99) asserts:

> There is no basis in the Refugee Convention to refuse to consider a claim because the receiving State decides that it would have been more reasonable for the claimant to have claimed elsewhere.

But the Refugee Convention's whole structure demonstrates that receiving states do not need any "basis in the Convention" for deciding not to consider a claim. States parties to the Convention have no Convention obligation to consider any refugee's claim to enter. They have no obligation to consider any refugee's request of or claim to leave to stay *except* a claim that by refusing or failing to grant the request/claim the state would be in breach of its Convention obligation under art. 33(1) not to return a refugee to an *unsafe* state or territory (or of its Convention obligation under art. 32(1) not to expel refugees lawfully in the country – that is, already given leave to stay – except "on grounds of national security or public order" after due process of law).

The same Report claims (para. 97) that "the UK cannot divest itself of all its obligations under the Refugee Convention simply by declaring an application inadmissible." That is of course literally true. But, once again, the *only* Convention obligation in relation to admissibility is not to refuse a claim (or declare it inadmissible) where doing so would result in the applicant refugee being returned to an unsafe state. Nothing in the Bill contemplates any such refusal, declaration or purported divestment or evasion of any of the UK's Convention obligations in relation to the control of its borders.

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Policy Exchange
8 – 10 Great George Street
Westminster
London SW1P 3AE

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