The Nationality and Borders Bill: Delegated Powers

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For further information please contact:

Dr Brigid Fowler (Senior Researcher) - brigid.fowler@hansardsociety.org.uk

Dr Ruth Fox (Director) - ruth.fox@hansardsociety.org.uk

Dheemanth Vangimalla (Researcher) - dheemanth.vangimalla@hansardsociety.org.uk

The Hansard Society

1.17, 1st Floor Millbank Tower,

21-24 Millbank,

London, SW1P 4QP

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Introduction

This briefing has been produced to inform detailed consideration of the Nationality and Borders Bill ('the Bill')[1] – primarily its Committee stage in the House of Commons from 19 October 2021.

The paper focuses exclusively on some of the delegated powers in the Bill. While these might at first glance appear to be merely technical matters, in this as in most Bills they raise important questions of constitutional, legal, and procedural principle that matter, regardless of party allegiance or views on the policy merits of the Bill. MPs should be clear about the level of authority they are delegating to government Ministers and be confident that they will not regret forgoing their ability to fully scrutinise future government decisions.

Hansard Society Review of Delegated Legislation

The Hansard Society has long argued that the delegated legislation system – delegated powers in Bills and the resulting Statutory Instruments – is flawed and now represents one of the most significant constitutional challenges of our time. With the support of the Legal Education Foundation, we have therefore embarked on a Review of Delegated Legislation.

As part of the Review, we will be examining the delegation of powers in a range of government Bills and drawing attention to some of the clauses of greatest concern.[2]

Our analysis draws heavily on 'legislative standards' which we have derived from reports of the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC). The DPRRC is an influential committee and provides the nearest thing to a form of 'jurisprudence' (or 'legisprudence') in the area of delegated powers.

Structure of this briefing

This briefing falls into two main parts, followed by two appendices:

- Part 1: an overview of the Bill and a summary of our key concerns about five clauses, because of the delegated powers they contain.
- Part 2: a detailed analysis of the five clauses of concern, drawing on the Bill and the accompanying Explanatory Notes (EN)[3] and Delegated Powers Memorandum (DPM)[4].
- Appendix I: a list of key questions that MPs may wish to consider when scrutinising the scope and design of the delegated powers sought in any Bill.
- Appendix II: a glossary of key procedural terms.

[1] The *Nationality and Borders Bill*, HC Bill 141, 2021-22 (as introduced) ('Bill'). All references to the Bill in this briefing are to this version.
[2] For example, Hansard Society (September 2021), *The Health and Care Bill: Delegated Powers* (London)
[3] House of Commons, *Nationality and Borders Bill*, 2021-22, Explanatory Notes on the Bill as introduced, 6 July 2021 (HC Bill 141–EN) (EN)
[4] Home Office, *Delegated Powers Memorandum – Nationality and Borders Bill*, 6 July 2021 (DPM)

1. Overview and Key Concerns

Overview of the Bill

The Bill proposes to make changes to several existing Acts and introduce measures relating to British nationality law, illegal migration, the asylum system, supporting victims of modern slavery and disrupting criminal networks behind people-smuggling. The Bill contains 71 clauses and five Schedules.

The DPM states that the Bill contains a total of 13 substantive clauses creating new or amending existing delegated powers, three of which include powers that can be exercised to amend primary legislation ('Henry VIII powers').[5]

The Bill also includes six placeholder clauses. The placeholder clauses are drafted as regulation-making powers that the government has said it intends to "*replace … with substantive provisions ahead of Committee stage in the House of Commons*".[6] However, as of midday on 12 October 2021, the government amendments containing the proposed new substantive clauses have yet to be published. The Hansard Society has commented separately on the way in which the government's use of placeholder clauses in this Bill hampers effective scrutiny,[7] and – given that they are to be amended – this briefing does not analyse any of the placeholder clauses.

Clauses of concern

In this briefing we have chosen to focus on just five of the substantive clauses that contain powers that are of particular concern:

- Clause 10: Differential treatment of refugees (page 7);
- Clause 12: Requirement to make asylum claim at 'designated place' (page 9);
- Clause 24: Accelerated detained appeals (page 11);
- Clause 26 and Schedule 3: Removal of asylum seeker to safe country (page 12);
- Clause 67: Transitional and consequential provision (page 14).

Four thematic questions run through these clauses:

- Are MPs content with the use of the 'negative' rather than the 'affirmative' scrutiny procedure, given that the former will provide little or no opportunity for Members to effectively scrutinise the exercise of these powers in the future by Ministers of this or any future government?
- Are MPs content with the least rigorous level of scrutiny – the 'negative' procedure – being applied to the exercise of powers which are functionally equivalent to a 'Henry VIII power'? (That is, although the power is not one that can be exercised directly to 'amend, repeal or revoke' primary legislation previously approved by Parliament, the way the power is exercised has the effect of doing so indirectly.)
- Are MPs content with the lack of detail on the face of the Bill in relation to the way in which some of these powers may be exercised? If so, are the proposed scrutiny procedures for the

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[5] DPM, paras. 4-5
[6] *Ibid.*, para. 7
[7] Vangimalla, D., *Placeholder clauses in the Nationality and Borders Bill: an impediment to effective scrutiny* (London: Hansard Society), 24 September 2021 [accessed on 12 October 2021: https://www.hansardsociety.org.uk/blog/placeholder-clauses-in-the-nationality-and-borders-bill-an-impediment-to]

exercise of these powers sufficient to ensure the desired degree of parliamentary control when the powers eventually come to be used?
- Are MPs content with the proposed delegation of power in areas where there is concern that Ministers may, by delegated legislation, breach international law?

Clause 10: Differential treatment of refugees (see page 7)

- This clause provides for a distinction between 'Group 1' and 'Group 2' refugees. Clause 10(8) allows for Immigration Rules to make provision for the differential treatment of Group 1 and Group 2 refugees and their family members.
- Many commentators have raised concerns about this clause's compatibility with certain international law provisions. Therefore, MPs may wish to consider whether it is appropriate to delegate to Ministers powers that when exercised may breach relevant international law.
- MPs should also consider whether it is appropriate that almost all aspects of what will constitute differential treatment between the two groups of refugees are proposed to be left to delegated legislation.
- As the power is a power to include provision in Immigration Rules, it will be subject to the scrutiny procedure which is applied to those Rules. This is similar to the 'negative' scrutiny procedure, whereby provisions can be made into law without requiring active parliamentary approval. But if MPs consider that the exercise of this power warrants a higher degree of parliamentary scrutiny, then precedent alone should not dictate a lower one.

Clause 12: Requirement to make asylum claim at 'designated place' (see page 9)

- Clause 12 provides a list of 'designated places' where asylum claims must be made in person and clause 12(2)(f) confers a power on the Secretary of State to designate other places, or descriptions of places, by regulations subject to the 'negative' procedure.
- Although the power contained in this clause is not one that can be exercised to 'amend, repeal or revoke' primary legislation, it is functionally equivalent to a 'Henry VIII power'.
- MPs may consider it beneficial for a higher degree of parliamentary scrutiny to apply to the exercise of this power, as the DPRRC has previously highlighted on numerous occasions that there is a strong presumption for the 'affirmative' procedure to apply to the exercise of 'Henry VIII powers'.

Clause 24: Accelerated detained appeals (see page 11)

- Clause 24 imposes a duty on the Tribunal Procedure Rules Committee to make new Tribunal Procedure Rules providing for an accelerated timeframe for certain asylum claim appeals made in detention.
- While some criteria for cases eligible for the accelerated route are provided on the face of the Bill, the substantive criteria for determining which cases can be subject to the accelerated process are to be prescribed by regulations made by the Secretary of State.
- The exercise of this power is subject to the 'negative' procedure, whereby regulations can be made into law without requiring active parliamentary approval. Given the paucity of criteria on the face of the Bill for determining which cases will be subjected to the accelerated process, MPs may wish to have the opportunity actively to debate and approve the substantive criteria in regulations before they are made into law. If so, then the clause would need to be amended to require the use of the 'draft affirmative' scrutiny procedure.
- Additionally, MPs may consider a higher degree of parliamentary scrutiny for the exercise of this power pertinent given the proposed interplay between regulations made under this power and the new Tribunal Procedure Rules that in a previous iteration were found to be unlawful.

Clause 26 and Schedule 3: Removal of asylum seeker to safe country (see page 12)

- This clause and Schedule confer an order-making power on the Secretary of State to be able to remove countries from the list of safe countries specified in paragraph 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.
- Although this is a 'Henry VIII power', the DPM does not identify this power as one of the 'Henry VIII powers' in the Bill, and its exercise is subject to the 'negative' procedure only. As a legislative standard, the DPRRC has previously highlighted in several reports that there is a strong presumption for the 'affirmative' procedure to apply to powers where their exercise amends, repeals, or revokes primary legislation.

Clause 67: Transitional and consequential provision (see page 14)

- This clause confers a regulation-making power on the Secretary of State to amend, repeal or revoke any enactment (both primary and delegated legislation, and including Acts of the devolved legislatures), so long as the Secretary of State considers it *"appropriate in consequence"* of the Bill.
- The DPRRC has previously highlighted that a power to make consequential provision should be restricted by some type of objective test of necessity, rather than leaving this to the subjective judgment of the Secretary of State.
- Additionally, MPs may wish to consider whether the exercise of the power to amend legislation passed by devolved bodies should at the very least be subject to a requirement to consult the devolved administrations.

2. Five Clauses of Concern: Detailed Analysis

Clause 10: Differential treatment of refugees

Overview of the clause

An overarching policy objective of the Bill is to deter illegal entry into the UK. As stated in the EN and the DPM, the purpose of this clause is to *"discourage asylum seekers from travelling to the UK other than via safe and legal routes. It aims to influence the choices that migrants may make when leaving their countries of origin - encouraging individuals to seek asylum in the first safe country they reach after fleeing persecution, avoiding dangerous journeys across Europe"*.[8]

Under existing provision, most asylum seekers have their claims processed in the same way and receive the same entitlements, if granted refugee status in the UK, irrespective of their route to the UK. Clause 10 would provide the Secretary of State with a broad power to treat refugees differently, depending on their route to the UK.

Clauses 10(1), (2), (3) and (4) provide for a distinction between 'Group 1' and 'Group 2' refugees. A refugee is a Group 1 refugee if they have come to the UK directly from a country or territory where their life or freedom was threatened and have presented themselves without delay to the authorities. Where a refugee has entered, or is present in, the UK unlawfully, the additional requirement for them to fall into Group 1 is that they can show good cause for their unlawful entry or presence. Otherwise, a refugee is a Group 2 refugee.

Clause 10(8) allows for Immigration Rules to make provision for the differential treatment of Group 1 and Group 2 refugees and their family members. Clause 10 does not limit the ways in which refugees and their family members may be treated differently between the two groups. Rather, it contains non-exhaustive lists of examples of ways in which the two groups could be treated differently (clauses 10(5) and (6)).

The parliamentary procedure applicable to the exercise of the power in clause 10(8) is the procedure applicable to statements of changes to the Immigration Rules, which is similar to the 'negative' procedure (section 3(2) of the Immigration Act 1971).

Government position

The Department provides three main arguments for taking the delegated power and making its use subject to a procedure that is similar to the 'negative' procedure:

- *"The Immigration Rules set out the details of the conditions attached to refugee leave… It would therefore be inconsistent to have conditions of leave set out in the Bill for those in group 2, whilst the conditions attached to group 1 were in the Immigration Rules"*;[9]
- *"Including the details in the Immigration Rules also allows for changes to the conditions attached to a grant of temporary protection to be amended more easily in future"*;[10]
- *"As the power is a power to include provision in immigration rules, the appropriate procedure is the one set out in section 3(2) of the Immigration Act 1971, which applies*

[8] EN, para. 145; DPM, para. 12
[9] DPM, para. 13
[10] *Ibid.*

whenever the Secretary of State makes changes to the rules. This is therefore consistent with previous practice".[11]

Analysis

Clause 10(8) gives rise to three main concerns:

1) MPs should consider whether it is appropriate to delegate to Ministers powers that when exercised may breach relevant international law.

The provisions in this clause and their policy implications are highly controversial. The Department's position is that the provisions in this clause are compatible with the UK's international obligations. However, many observers have raised concerns about this clause's compatibility with certain international law provisions.[12]

Ultimately, it is the provisions in the Immigration Rules that will determine whether the UK's international obligations are breached. The question for this paper is whether it is appropriate to delegate to Ministers a wide power to make Immigration Rules that may include provisions that breach the UK's international obligations. In the context of the United Kingdom Internal Market Bill in 2020, the DPRRC suggested that it is inappropriate to delegate to Ministers powers to make legislation that might breach relevant international law, as the exercise of such powers:

- involves matters of the highest public interest, engaging questions of law, politics, diplomacy, and integrity;
- may open the UK to diplomatic or reputational consequences;
- creates uncertainty and may open Ministers to legal challenge on grounds that are inapplicable to Acts of Parliament;
- may contravene Ministers' overarching duty under the Ministerial Code to comply with the law and to protect the integrity of public life;
- represents a disregard for the rule of law.[13]

2) MPs may wish to consider whether it is appropriate that almost all aspects of what will constitute differential treatment between the two groups of refugees are to be left to delegated legislation.

This power concerns the implementation of a policy that is highly controversial both nationally and internationally. The delegated power in clause 10 is very wide and, by the nature of the subject matter, its exercise may be very intrusive in individuals' lives. However, Parliament is being asked to approve this power without any detail about the substance of the differential treatment of the two groups being set out on the face of the Bill. Almost all provision about the way in which the two groups of refugees and their family members may be treated differently is proposed to be left to Ministers to make into law using Immigration Rules that do not require active parliamentary approval.

The Bill does include examples of provisions that may be included in the Immigration Rules (clauses 10(5) and (6)), but these are non-exhaustive lists. As the DPRRC has previously stated (for example, in the context of the Pension Schemes Bill in 2020), although specific matters may be listed on the face of a Bill, relating to provisions that may be imposed through the exercise of a power, if the list is not

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[11] *Ibid.*, para. 15
[12] For example, United Nations High Commissioner for Refugees (UNHCR), *UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22,* 21 September 2021 [accessed on 6 October 2021: https://www.unhcr.org/uk/publications/legal/6149d3484/unhcr-summary-observations-on-the-nationality-and-borders-bill-bill-141.html?query=nationality%20and%20borders]
[13] House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) (2019-21), 24th Report, HL Paper 130, para. 38

exhaustive of the provisions that may be included in the exercise of a power, the list does not have the effect of limiting the power.[14]

Powers should be judged not on how the government says that it will exercise them, but on their actual scope and how they are capable of being used. In the EN to the present Bill, the Department does provide an outline for the intended use of this power.[15] However, policy can change, and it is therefore important that powers are considered on the basis of what they will in fact allow, rather than on the basis of what Ministers may say they will be used for.[16]

MPs should be clear about the level of authority they are delegating to government Ministers and be confident that they will not regret forgoing their ability to fully scrutinise the exercise of the power by a future government, particularly one of a different political complexion.

> **3) MPs should consider whether the exercise of this power warrants a higher degree of parliamentary scrutiny. If so then precedent alone should not dictate a lower level of scrutiny.**

MPs should consider whether they are content with a situation in which Immigration Rules providing for the differential treatment of different groups of refugees can be made into law without requiring active parliamentary approval – the procedure under section 3(2) of the Immigration Act 1971. Given the controversial nature of the policy, might MPs wish to debate and approve the actual substance of the differential treatment before the provisions become law?

The Department argues that as existing Immigration Rules set out the details of the conditions attached to refugee leave, it would be inconsistent to have conditions relating to the differential treatment of the two groups set out in the Bill. However, this argument presents a false dichotomy by suggesting that the only alternative to including the provisions in Immigration Rules is to include them on the face of the Bill. Such provisions could instead be included in regulations made subject to a higher degree of parliamentary scrutiny than is afforded by the 'negative' procedure. The DPRRC has on numerous occasions highlighted that powers conferred by clauses in a Bill and the degree of parliamentary scrutiny applied to the exercise of those powers should be considered on their own merits. They should not be determined by precedent alone.[17]

Clause 12: Requirement to make asylum claim at 'designated place'

Overview of the clause

Clause 12 provides that an asylum claim made in accordance with the Immigration Rules must be made in person at a designated place. Clause 12(2) goes on to list what is meant by a 'designated place' in the UK. Clause 12(2)(f) confers a power on the Secretary of State to designate other places, or descriptions of places, by regulations subject to the 'negative' procedure.

Government position

The Department provides three main arguments for taking the delegated power and making its use subject to the 'negative' procedure:

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[14] DPRRC (2019-21), 7th Report, HL Paper 28, paras. 4, 7

[15] EN, para.19

[16] For example, DPRRC (2019-21), *1st Report*, HL Paper 3, para. 15(c); DPRRC (2019-21), *4th Report,* HL Paper 17, paras. 2, 40; DPRRC (2019-21), *5th Report*, HL Paper 24, paras. 7, 13; DPRRC (2019-21), *13th Report,* HL Paper 69, para. 19; DPRRC (2019-21), *19th Report,* HL Paper 109, para. 26; DPRRC (2019-21), *24th Report*, HL Paper 130, paras. 10(c), 12(c), 15, 19, 28

[17] For example, DPRRC (2019-21), 5th Report, HL Paper 24, para. 4; DPRRC (2019-21), 37th Report, HL Paper 258, para. 7(b)

- "*migrant behaviour may evolve in future, and therefore this power will provide the flexibility to add designated places where asylum claims may be accepted in the future, where appropriate*";[18]
- "*there is greater operational efficiency in designating that place by way of regulations made under this power, rather than requiring primary legislation to make any future changes*";[19]
- "*The fact that the Secretary of State has the power to specify procedure to be followed in making or pursuing an application or claim is uncontroversial and therefore the negative procedure is considered appropriate*".[20]

Analysis

Clause 12(2)(f) gives rise to one main concern:

1) **MPs should consider whether a higher degree of parliamentary scrutiny should apply to the exercise of the power in clause 12(2)(f), as it is functionally equivalent to a 'Henry VIII power'.**

Given the legislative standards that the DPRRC says should be applied to 'Henry VIII powers' and to powers that can be used to keep lists that define terms in primary legislation up to date, MPs should consider whether the 'affirmative' scrutiny procedure would be a more appropriate form of parliamentary control on the exercise of this power.

Although the power contained in this clause is not one that can be exercised to 'amend, repeal or revoke' primary legislation, it is functionally equivalent. Clause 12 defines 'designated place' using a list on the face of the Bill. Clause 12(2)(f) confers a regulation-making power that can 'designate' other places, or descriptions of places. Therefore, the regulation-making power can have the effect of amending what is meant by 'designated place' – a matter which is otherwise specified on the face of the primary legislation. In relation to the Pension Schemes Bill in 2020, the DPRRC described how a power can be in substance a power to amend primary legislation, if the exercise of the power can have the effect of amending matter which is otherwise specified on the face of primary legislation.[21] Given the practical effect of clause 12(2)(f), the power may therefore be considered in essence a 'Henry VIII power'. The DPRRC has asserted on numerous occasions that there is a strong presumption for the 'affirmative' procedure to apply to the exercise of 'Henry VIII powers'.[22]

Another factor favouring the use of the 'affirmative' scrutiny procedure is that this power is to be used as a 'backstop', to keep a list up to date.[23] On the question of lists, the DPRRC said in relation to the Domestic Abuse Bill in 2020 that:

"*A comprehensive list set out in primary legislation can—where it is necessary to do so—be kept up to date by a power to amend the list by regulations made by statutory instrument. Since this would be a Henry VIII power, we would expect any such regulations to be made by the affirmative procedure*".[24]

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[18] DPM, para. 25
[19] *Ibid.*
[20] *Ibid.*, para. 26
[21] DPRRC (2019-21), 4th Report, HL Paper 17, paras. 18, 19
[22] For example, DPRRC (2019-21), 1st Report, HL Paper 3, paras. 8, 11; DPRRC (2019-21), 9th Report, HL Paper 42, paras. 12, 13
[23] DPM, para. 25
[24] DPRRC (2019-21), 21st Report, HL Paper 117, paras. 5-7, 10, 13

Clause 24: Accelerated detained appeals (accelerated route for asylum claim appeals made in detention)

Overview of the clause

An overarching policy objective of the Bill is to streamline asylum claims and the appeals process. As stated in the EN, the purpose of this clause is to "*establish an accelerated route for those appeals made in detention which are considered suitable for a quick decision, to allow appellants to be released or removed more quickly*".[25]

Clause 24 inserts a new section 106A into section 106 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). There are two separate aspects to the clause:

- a duty on the Tribunal Procedure Rules Committee to make new Tribunal Procedure Rules providing for an accelerated timeframe for appeals against asylum decisions that are to count as 'accelerated detained appeals' (newly inserted section 106A(3)) – this is not a new delegated power; and
- a description of cases that will be 'accelerated detained appeals' and thus subject to the new accelerated appeals process under the new Tribunal Procedure Rules. While some criteria for cases eligible for the accelerated process are provided on the face of the Bill (in newly inserted sections 106A(1) and (5)), the substantive criteria for determining such cases are to be prescribed in regulations made by the Secretary of State (under newly inserted sections 106A(1)(b)(i) and (7)). The exercise of this regulation-making power would be subject to the 'negative' procedure. It is this regulation-making power in the clause that is of particular concern.

Government position

The Department provides five main arguments for taking the delegated power and making its use subject to the 'negative' procedure:

- "*to provide flexibility so that the Government can ensure that over time the measure continues to deliver its objective of improving speed and certainty for appellants in detention while also ensuring fairness*";[26]
- to ensure that the "*government's handling of cases is fit-for-purpose and responsive to the types of cases and issues that emerge or become more or less common over time*";[27]
- "*By setting out suitability criteria in regulations, the Department will be able to respond to operational information about the types of cases which tend to be removed from the accelerated route by the Tribunal, and amend the criteria so that they are not put into the route in the first place, improving certainty and fairness*";[28]
- "*in view of the flexibility required, and the need to change the regulations quickly, the negative procedure is more appropriate*";[29]
- "*The cohort who will be eligible for inclusion in the accelerated appeals route is already limited in the primary legislation, and so it is considered proportionate that further limitation by way of these regulations is realised by way of the negative procedure*".[30]

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[25] EN, para. 279
[26] DPM, para. 36
[27] *Ibid.*, para. 40
[28] *Ibid.*, para. 37
[29] *Ibid.*, para. 41
[30] *Ibid.*, para. 42

Analysis

The regulation-making power in clause 24 gives rise to one main concern:

1) **MPs should consider the appropriateness of the 'negative' scrutiny procedure for the use of this power, given the paucity of criteria on the face of the Bill for determining the cases that will be subject to the accelerated detained appeals process.**

The Department has stated that the cohort of people to whom the accelerated detained appeals process will apply has been limited on the face of the Bill. However, much of the basis for determining which cases will be subject to the accelerated process is still being left entirely to regulations that can be made into law without requiring active parliamentary approval. The only criteria that are specified on the face of the Bill are that the case must be an appeal under section 82 of the 2002 Act and that a relevant detention provision (specified in newly inserted section 106A(5)) applies.

The DPM details some of the provisions that the Department anticipates will be included in regulations under this power.[31] However, on the face of the Bill, the power is much wider in scope than the examples outlined in the DPM. Powers should be judged not on how the government says that it will exercise a power, but on the power's actual scope and how it is capable of being used.[32]

Given the paucity of criteria on the face of the Bill, MPs may wish to have the opportunity to actively debate and approve these criteria when they materialise in regulations and before they are made into law. The Bill does specify that the courts must be given the ability to remove specific cases from the accelerated detained appeals process, if they are satisfied that it is in the interest of justice to do so. However, as the DPRRC has previously highlighted, in the context of the European Union (Withdrawal Agreement) Bill in 2020, the scrutiny ability of the courts should not be conflated with applying the appropriate degree of parliamentary scrutiny to the exercise of a delegated power.[33]

In addition, the regulations made under this power will interact with the new Tribunal Procedure Rules. A previous set of Tribunal Procedures Rules, providing for 'fast-track' asylum claim appeals, were found to be unlawful.[34] Given the prospective interplay between this regulation-making power and the new Tribunal Procedure Rules, as a matter of caution MPs should consider whether the 'affirmative' scrutiny procedure would be a more appropriate form of parliamentary control on the exercise of this power.

Clause 26 and Schedule 3: Removal of asylum seeker to safe country

Overview of the clause

As stated in the EN, the changes made by this clause and Schedule are to support "*the future object of enabling asylum claims to be processed outside the UK and in another country. The purpose of such a model is to manage the UK's asylum intake and deter irregular migration and clandestine entry to the UK*".[35]

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[31] *Ibid.*, paras. 33-35

[32] For example, DPRRC (2019-21), *1st Report*, HL Paper 3, para. 15(c); DPRRC (2019-21), *4th Report,* HL Paper 17, paras. 2, 40; DPRRC (2019-21), *5th Report*, HL Paper 24, paras. 7, 13; DPRRC (2019-21), *13th Report,* HL Paper 69, para. 19; DPRRC (2019-21), *19th Report,* HL Paper 109, para. 26; DPRRC (2019-21), *24th Report*, HL Paper 130, paras. 10(c), 12(c), 15, 19, 28

[33] DPRRC (2019-21), 1st Report, HL Paper 3, para. 10

[34] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840, para. 45

[35] EN, para. 291

This clause and Schedule make amendments to the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Act') in relation to the removal of asylum seekers, and those individuals who have had their asylum claim refused, to safe third countries.

Paragraph 9 of Schedule 3 to the Bill amends the 2004 Act to confer an order-making power on the Secretary of State to be able to remove countries from the list of safe countries specified in paragraph 2 of Schedule 3 to the 2004 Act, subject to the 'negative' procedure. The Secretary of State already has a power under the 2004 Act to add countries to the list of safe countries, subject to the 'affirmative' procedure.

Government position

The Department provides four main arguments for taking the delegated power and making its use subject to the 'negative' procedure:

- *"Taking a power to amend this list by Order allows the Secretary of State to act quickly to update legislation if there were a rapid change in a country's situation"*;[36]
- *"It ensures that paragraph 2 remains entirely relevant and up-to-date, and that it can be relied upon by the Courts"*;[37]
- *"Having to amend paragraph 2 via primary legislation would likely be too slow and leave the list open to inaccuracies, thereby leaving countries not considered safe on the list for longer than is necessary";*[38]
- In proposing that the 'negative' procedure apply to the exercise of the new power, the Department argues that this provides sufficient parliamentary oversight because *"the act of removing a country from the list means that the provisions in the 2004 Act which relate to removals to the listed countries, will no longer apply to those countries which have been removed".*[39]

Analysis

The order-making power in clause 26 and Schedule 3 gives rise to one main concern:

1) **MPs should consider whether this 'Henry VIII power' ought to be subject to the 'affirmative' scrutiny procedure, given existing legislative standards and the policy implications.**

The exercise of this power removes countries from a list of countries provided on the face of primary legislation. It is a power that amends primary legislation – a 'Henry VIII power'. However, the DPM does not identify this power as one of the 'Henry VIII powers' in the Bill.[40]

The DPRRC has highlighted in numerous reports that there is a strong presumption for the 'affirmative' procedure to apply to powers where their exercise amends, repeals, or revokes primary legislation.[41]

The government contends that amending the list of countries via primary legislation would be too slow a process. However, the DPRRC has previously made clear that where Ministers seek a delegation of power because of the delay that would be caused by using primary legislation then

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[36] DPM, para. 47
[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*, para. 48
[40] *Ibid.*, para. 5
[41] For example, DPRRC (2019-21), 1st Report, HL Paper 3, paras. 8, 11; DPRRC (2019-21), 9th Report, HL Paper 42, paras. 12, 13

empirical evidence should be offered to substantiate the government's claim.[42] The DPRRC has also made clear that if the 'affirmative' procedure is the appropriate level of parliamentary scrutiny for the exercise of a power, an alternative procedure should only be applied to the power for cogent reasons. Enabling the government to act quickly is not a sufficient justification for using the 'negative' rather than the 'affirmative' scrutiny procedure.[43]

Since the Asylum and Immigration (Treatment of Claimants, etc.) Act was granted Royal Assent in 2004, primary legislation has been the only means by which countries could be removed from the list in paragraph 2 of Schedule 3 of the 2004 Act. The government now proposes that in future countries should be removed from the list by an order subject to the 'negative' procedure and thus without active parliamentary approval. MPs may wish to consider whether such a swing in scrutiny – from requiring primary legislation to requiring only the 'negative' procedure – is appropriate, or whether the 'affirmative' scrutiny procedure would be more satisfactory.

The government argues that the 'negative' procedure provides sufficient parliamentary oversight as "*the act of removing a country from the list means that the provisions in the 2004 Act which relate to removals to the listed countries, will no longer apply to those countries which have been removed*".[44]

While it is true that an order removing a country from the safe list removes it from the scope of the provisions in the 2004 Act, MPs may nonetheless consider it beneficial to debate the political implications of deeming a country 'unsafe'. The potential diplomatic ramifications of doing so may justify requiring Ministers to seek active parliamentary approval prior to making such an order.

The stated purpose of clause 26 and Schedule 3 is to support "*the future object of enabling asylum claims to be processed outside the UK and in another country*",[45] sometimes referred to as the contentious practice of 'off-shore processing'.[46] As the new order-making power is being sought in the context of these wider and highly contentious policy intentions,, MPs may also wish to actively debate and approve its exercise. If so, the power would need to be subject to the 'affirmative' rather than the 'negative' scrutiny procedure.

The 'affirmative' procedure would not be a barrier to ensuring that the list remains relevant and up to date. Furthermore, the use of the 'affirmative' rather than 'negative' procedure would mean that the applicable scrutiny process for exercising a power to *remove* countries from the list would be consistent with that for *adding* countries to the list.

Clause 67: Transitional and consequential provision

Overview of the clause

Clause 67 confers regulation-making powers on the Secretary of State to be able make transitional and consequential provision. It is the scope of the power to make consequential provision that is of particular concern in this clause.

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[42] For example, DPRRC (2019-21), 8th Report, HL Paper 40, paras. 7, 12
[43] For example, DPRRC (2019-21), 14th Report, HL Paper 74, paras. 20-23, 25; DPRRC (2019-21), 19th Report, HL Paper 109, paras. 36-38
[44] DPM, para. 48
[45] EN, para. 291
[46] For example, House of Commons Home Affairs Committee, *Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU*, HC 705, 11 November 2020, Q408; UNHCR, *UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom*, 11 May 2021 [accessed on 06 October 2021: https://www.unhcr.org/uk/publications/legal/609a67794/unhcr-observations-on-the-new-plan-for-immigration-policy-statement-of.html?query=Observations%20on%20the%20New%20Plan%20for%20Immigration%20policy%20statement%20of%20the%20Government%20of%20the%20United%20Kingdom]

With regards to consequential provision, regulations can be made that amend, repeal or revoke any enactment (both primary and delegated legislation), as long as the Secretary of State considers the provision to be *"appropriate in consequence"* of the Bill.

Regulations that make such consequential provision can amend Acts of Parliament, Acts of the Scottish Parliament, Measures or Acts of Senedd Cymru, Northern Ireland legislation, and retained direct principal EU legislation, subject to the 'affirmative' procedure. Otherwise, regulations making consequential provision are subject to the 'negative' procedure.

Government position

The Department acknowledges that the power to make consequential provision is, on the face of it, wide. The Department provides two main arguments for taking the delegated power:

- *"any consequential amendment made under this power must be genuinely consequential on the provisions in the Bill"*;[47]
- *"The Department considers it appropriate to enable true consequential amendments to be made by regulation in order to ensure that the changes effected by this Bill can be effectively delivered, mitigating the risk of undermining the immigration and asylum system if a provision were missed resulting in the need for immediate rectification"*.[48]

Analysis

The power in this clause to make consequential provision gives rise to two main concerns:

1) **MPs may wish to consider whether the subjective test of 'appropriateness' is too permissive a test for making consequential amendments.**

It is common for Bills to include a clause, usually at the end of a Bill, enabling Ministers to make regulations to tidy up the statute book in consequence of substantive changes in the law made by earlier clauses in the Bill. Typically, where there is a clause of this kind, the Bill itself makes consequential amendments and the power to make further such amendments by regulations is a sort of 'backstop', a narrowly drawn power to be able to make amendments of a similar kind that may have been missed in the Bill.[49]

In the present Bill, while some consequential amendments are provided on the face of the Bill, the exercise of the delegated power to make consequential amendments is to be left to the subjective judgement of the Secretary of State, rather than confined to cases where such amendments are objectively necessary.

The DPRRC has previously commented on the use of the subjective test of 'appropriateness' for governing the exercise of delegated powers to make consequential amendments. In the context of the Neighbourhood Planning Bill in 2017, for example, the DPRRC considered such a test to be inappropriate:

"… we observe that that the power has a very wide scope: it is to make whatever provisions – including ones amending and repealing Acts of Parliament – the Secretary of State considers appropriate in consequence of the Bill…We are far from convinced that it is appropriate for Ministers to be given such loosely-drawn powers. We therefore invite the House to consider whether a power

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[47] DPM, para. 95
[48] *Ibid.*, para. 96
[49] DPRRC (2019-21), 22nd Report, HL Paper 118, paras. 16-19, 28

to make consequential provision should be restricted by some type of objective test of necessity, rather than leaving this to the subjective judgment of the Secretary of State".[50]

While the Department does provide reassurances in the DPM that amendments made by regulations under this power will be genuinely consequential on the provisions in the Bill, powers should be judged not on how the government says that it will exercise them, but on their actual scope and how they are capable of being used. Government policy can change, and it is therefore important that powers are considered on the basis of what they will in fact allow, rather than on the basis of what Ministers say they will be used for.[51]

Where it amends primary legislation, the exercise of this power is subject to the 'affirmative' procedure. However, as the DPRRC stated in the context of the Immigration and Social Security Co-ordination (EU Withdrawal) Bill in 2020, applying the 'affirmative' procedure to a power in a Bill cannot remedy an inappropriate delegation of legislative power.[52] MPs may wish to explore how a power which the Department itself acknowledges to be a wide one will be restricted to matters that are genuinely consequential to the Bill rather than those that might be deemed to be 'appropriate' according to the subjective judgement of this or a future Secretary of State.

2) MPs should consider whether the exercise of the power to amend legislation passed by devolved bodies should at the very least be subject to a requirement to consult the devolved administrations.

Under clause 67, regulations that make consequential provision can amend legislation passed by the devolved bodies. While almost all the provisions in the Bill deal with matters that are reserved to the UK Parliament, the Bill does contain some provisions that deal with policy areas that are within the legislative competence of the devolved legislatures.[53] On numerous occasions both the DPRRC and the House of Lords Select Committee on the Constitution have highlighted the inappropriateness of conferring a power on the Secretary of State to amend legislation passed by the devolved bodies, even if the amendments are made in consequence of Bill provisions, without being required at least to consult the devolved administrations.[54]

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[50] DPRRC (2016-17), 15th Report, HL Paper 104, para. 54-55
[51] For example, DPRRC (2019-21), *1st Report*, HL Paper 3, para. 15(c); DPRRC (2019-21), *4th Report,* HL Paper 17, paras. 2, 40; DPRRC (2019-21), *5th Report*, HL Paper 24, paras. 7, 13; DPRRC (2019-21), *13th Report,* HL Paper 69, para. 19; DPRRC (2019-21), *19th Report,* HL Paper 109, para. 26; DPRRC (2019-21), *24th Report*, HL Paper 130, paras. 10(c), 12(c), 15, 19, 28
[52] DPRRC (2019-21), 22nd Report, HL Paper 118, para. 43
[53] EN, page 82
[54] For example, DPRRC (2016-17), 5th Report, HL Paper 54, para. 43; DPRRC (2016-17), 11th Report, HL Paper 89, para. 10; House of Lords Select Committee on the Constitution (2016–17), 7th Report, HL Paper 96, para. 7; DPRRC (2016-17), 15th Report, HL Paper 104, para. 53

Appendix I: The role of MPs in the scrutiny of delegated powers

The scope and design of the delegation of power sought in any Bill raise important questions for MPs that go to the heart of their role as legislators. For example:

- To what extent are MPs willing to continue accepting the troubling arrogation of power by the executive (by successive governments) at the expense of Parliament?
- What scrutiny or other safeguards do MPs think are desirable or necessary to constrain the use of delegated powers? Given the inadequacy of scrutiny procedures that apply to delegated legislation in the House of Commons, can they really remedy a delegation of legislative power otherwise deemed unacceptable?
- If Parliament accepts controversial powers in a Bill, it creates a precedent that may be used by government to justify taking similar powers in other Bills in the future. However, if Parliament has reluctantly accepted a power in exceptional circumstances - for example, during the Brexit process when there was a need to legislate at speed - are MPs content for Ministers to rely on that precedent for the establishment of new powers?
- The inclusion of 'Henry VIII powers' enabling Ministers to amend or repeal primary legislation by Statutory Instrument challenges the constitutional principle that Parliament is sovereign; that it is the sole legislative authority with the power to create, amend or repeal any law. How content are MPs for such powers to continue to be a relatively common feature of the law?
- How much discretion do MPs think should be conferred on Ministers by the legislature? Ministers may use broadly defined and ambiguously worded powers in ways that that go beyond the original intention of the legislation. How content are MPs that such powers continue to be claimed by the executive, particularly when in many instances such powers will be available to Ministers in future governments of a different political stripe, possibly decades later, and may therefore be used by Ministers with radically different policy objectives from those who sought the powers in the first place?
- Do MPs think that government should be granted 'reserve' or 'holding' powers, the use of which is not fully explained or defined, simply because it is administratively convenient or because Ministers may desire freedom to act at a later date? Are MPs content that Ministerial claims of exigency and convenience should trump parliamentary scrutiny?
- When Ministers acknowledge that the relevant policy development process - particularly the consultation stage - is unfinished, should they nonetheless be granted powers to act in that area of policy?

If MPs are solicitous of the proper role and function of Parliament and their responsibilities as legislators, then the answers to these questions should inform the debate about the scope of, and safeguards applied to, each clause in a Bill that contains a proposed delegation of power. Changes which tighten the use of powers, limit the extent of discretion, incorporate scrutiny safeguards, or resist the gravitational pull of precedent, are designed to buttress the role of Parliament in scrutinising future executive action and regulations; they need not interfere with or prevent the implementation of the intended policy.

Appendix II: Glossary

Affirmative procedure: Parliamentary scrutiny procedure under which delegated legislation requires the active approval of the House of Commons and in most cases also the House of Lords. Under the 'draft affirmative' procedure, delegated legislation is laid before Parliament as a draft, and cannot be made into law by the Minister unless and until it has been approved by the House of Commons and in most cases also the House of Lords. Alternatively, delegated legislation may be subject to an 'urgent' 'made affirmative' procedure, whereby it is laid before Parliament after it has been made – signed – into law by the Minister but cannot remain law unless it is approved by the House of Commons and in most cases also the House of Lords within a statutory period – usually 28 or 40 days.

Delegated legislation (also known as secondary or subordinate legislation): Law made by Ministers (and sometimes other authorised individuals and bodies) under delegated powers deriving from Acts of Parliament. Statutory Instruments (SIs) are the most common form of delegated legislation. Orders and Regulations are among the categories of delegated legislation enacted in SIs.

Delegated powers: Powers to make delegated legislation which are conferred on Ministers (and sometimes other authorised individuals and bodies) in Acts of Parliament.

Delegated Powers Memorandum (DPM): The document produced by the relevant government department identifying every delegated power in a Bill, its justification, and the parliamentary scrutiny procedure that is proposed for it. The DPM is published when the relevant Bill is introduced and is scrutinised by the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC).

Delegated Powers and Regulatory Reform Committee (DPRRC): Select committee appointed by the House of Lords to examine almost all Bills on their introduction to the House in order to determine whether they contain any inappropriate delegation of power or subjects those powers to an inappropriate level of scrutiny.

Henry VIII power: A delegated power that enables Ministers to amend or repeal primary legislation by delegated legislation.

Immigration Rules: A type of delegated legislation (but not technically a Statutory Instrument) that sets out the practices to be followed in the administration of immigration law in the UK.

Negative procedure: Parliamentary scrutiny procedure under which the measure concerned does not require active parliamentary approval. Under the 'made negative' procedure, a piece of delegated legislation is laid before Parliament after it has been made – signed – into law by the Minister but it may be annulled if a motion to do so – known as a 'prayer' – is passed by either House within 40 days of it being laid before Parliament. A small share of delegated legislation is subject to the 'draft negative' procedure, whereby delegated legislation is laid in draft and cannot be made into law if the draft is disapproved within 40 days.

Statutory Instruments (SIs): The most common form of delegated legislation. The term 'Statutory Instrument' was given to most, but not all, form of delegated legislation made after the Statutory Instruments Act 1946 came into force in 1948.

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1.17, 1st Floor Millbank Tower,
21-24 Millbank,
London, SW1P 4QP

Tel: 0203 925 3979
Email: contact@hansardsociety.org.uk

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