The UK’s Securitisation and Criminalisation of Migration and Asylum

Emilie McDonnell 2021-11-11T09:05:39

On 6 July 2021, the UK Home Secretary, Priti Patel, introduced the highly controversial Nationality and Borders Bill into the House of Commons. Leading UK barristers have concluded that the Bill “represents the biggest legal assault on international refugee law ever seen in the UK”.

In this article, I argue that this Bill is the culmination of the UK government’s increasingly securitised, criminalised and hostile approach to asylum and migration post-9/11. While 9/11 served to *solidify* the highly dubious nexus between migration and terrorism, the UK (alongside other destination states) has for decades been implementing restrictive migration policies and practices designed to deter and prevent asylum seekers and other migrants from reaching its territories and accessing safety.

The Impact of 9/11 on UK Asylum

The 9/11 terror attacks are often viewed as the defining event for global security and the securitisation of migration, having been “immediately politicised as an exceptional and global threat to the United States and the Western World more generally”. In the UK context, various scholars identified how post-9/11, politicians began to label asylum seekers as potential or suspected terrorists that may seek to exploit the asylum system in order to gain entry to the UK (see for an overview and on the European Union), even though not a single one of the 9/11 hijackers entered the US as a refugee or filed an asylum claim in the US.

This led to adoption of the draconian Anti-terrorism, Crime and Security Act 2001, which permitted the indefinite detention of suspected terrorists without trial, even where the person cannot be deported due to practical considerations, or where this would amount to *refoulement*, and excluding substantive consideration of their asylum claim and thus from protection under the 1951 Refugee Convention, even where the refugee only has “links” to a terrorist group. After the 2005 London bombings, the Prevention of Terrorism Act 2005 and Immigration, Asylum and Nationality Act 2006 were passed, the latter including expanded grounds for deportation and exclusion from refugee status, deprivation of British citizenship if “conducive to the public good”, and the collection of advance passenger information from airlines and ships.

Today, counterterrorism remains a top priority for the UK government, with the continuing introduction of sweeping and harsh anti-terror laws that often excessively restrict human rights and reinforce a permanent state of emergency.

Although the aftermath of 9/11 saw immigration, asylum and border control through a lens of security, counterterrorism and risk, the UK and various other destination states in the Global North have been restricting access to their territory for asylum seekers for decades, engaging in diverse forms of externalised migration control, including Australia, the EU and US. As Fitzgerald traces, visas and passports have long been used to obstruct movement, whereby "Liberal European states and governments throughout the Americas [in the 1930s and 1940s] adopted increasingly restrictive visa policies on Jewish refugees and pressured their neighbours to do the same […] Since the 1980s, many countries, such as Canada, Germany, and the UK, have continued to impose visa requirements on nationalities with the open goal of deterring asylum-seeking".

Nevertheless, 9/11 and subsequent terrorist attacks on British soil set into motion an approach to migration and asylum that has served to increasingly restrict, deter and penalise asylum seekers and other migrants, rather than protect such vulnerable persons. The Nationality and Borders Bill is the natural, though very extreme, continuation of such trends.

The Nationality and Borders Bill

The Bill is proclaimed to be the most significant overhaul of the asylum system in decades. The proposed system is supposedly "fair but firm" and one that "takes back control of our borders". During the second reading speech, Home Secretary Patel said "*enough*" of "dinghies arriving illegally on our shores, directed by organised crime gangs", "economic migrants pretending to be genuine refugees", "people trying to gain entry illegally, ahead of those who play by the rules" and "foreign criminals – including murderers and rapists – who abuse our laws and then game the system so we can't remove them".

With the Bill sitting at 87 pages long, it is impossible to outline the myriad ways its clauses are inconsistent with international law and domestic UK law (see for detailed analysis the UNHCR's legal observations on the Bill and Freedom from Torture joint opinion). Overarchingly, the Bill strikes at the core principles of the Refugee Convention and international refugee regime. A number of clauses, if implemented, would severely undermine the right of individuals to seek and enjoy asylum, including by restricting access to territory, failing to effectively protect against direct and indirect *refoulement,* discriminating against certain categories of refugees, and criminalising individuals simply for seeking asylum.

Such a securitised and punitive approach to migration and asylum is ostensibly justified because those who cross the English Channel and seek asylum through irregular means are "illegal migrants" "dangerous foreign criminals" and potential "radical terrorists" that pose a national security risk.

Clause 10 of the Bill would allow refugees to be treated differently depending on their mode of arrival, creating two groups of refugees depending on how they arrived in the UK. Those who travelled through a 'safe' third country and failed to claim asylum there, or those who fail to show good cause for why they entered the UK irregularly, would be granted lesser rights in relation to the length of time they would be allowed to stay in the UK, access to mainstream welfare benefits and housing assistance, and family reunification rights. This raises clear compatibility issues with the prohibition on non-discrimination and obligations under the right to family life enshrined in international and domestic law.

The Bill also seeks to criminalise irregular entry, penalising asylum seekers who arrive in the UK without entry clearance through the imposition of fines and/or imprisonment for up to 12 months or four years on indictment (clause 37). Individuals can also be sentenced to *life imprisonment* for assisting an asylum seeker enter the UK irregularly (clause 38). It removes the requirement for this to be done for gain or profit, going beyond the narrow definition of smuggling contained in the Palermo Smuggling Protocol to criminalising forms of "humanitarian smuggling" and conflicting with the duty imposed by the law of the sea on all states and shipmasters to rescue persons in distress. Such provisions clearly target asylum seekers crossing the English Channel, with over 17,000 people having crossed by boat so far in 2021.

The criminalisation and differential treatment of asylum seekers and refugees shows "contempt" for the non-penalisation principle enshrined in Article 31 of the Refugee Convention and section 31 of the Immigration and Asylum Act 1999, which prohibits the penalisation of asylum seekers for unlawful entry or stay, in recognition that many refugees have to resort to unlawful means in order to seek asylum. Clause 34(1) of the Bill amends the generally accepted interpretation of Article 31, specifying that "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 have sought protection under the Refugee Convention in that country" (emphasis added).

Under clause 14, those who have a connection to a safe third state can have their asylum claims declared inadmissible, accompanied by no right of appeal, seemingly targeting everyone who arrives by boat or lorry from France. Alarmingly, the Bill allows asylum seekers to be removed to *any other* 'safe' country for offshore processing, while their asylum claim is pending (clause 26). As the UNHCR detailed in its observations, "the primary responsibility for identifying refugees and affording international protection rests with the State in which an asylum-seeker arrives and seeks that protection". "[R]equiring refugees to claim asylum in the first safe country they reach would undermine the global, humanitarian, and cooperative principles on which the refugee system is founded".

The UK would also be empowered to undertake maritime enforcement against ships suspected of committing an immigration offence (clause 41 and schedule 5). In doing so, the Bill sanctions the pushback of migrant vessels while failing to detail how, if at all, asylum seekers can raise their specific protection needs and effectively challenge being pushed back from the UK. Perhaps most worryingly, border force

officials that engage in pushbacks in the English Channel which leads to drownings or endangerment will be given immunity "in any criminal or civil proceedings for *anything done* in the purported performance of functions" if the court is satisfied that the act was done in good faith and there were reasonable grounds for doing it (schedule 5, Part A1, J1, emphasis added). As barrister Colin Yeo has argued, "How can there ever be reasonable grounds for pushing back a small boat loaded with refugees in one of the world's busiest shipping lanes?".

Given the recent withdrawal of US and NATO troops from Afghanistan – with the 2011 US-led invasion of Afghanistan *part of the declared* '*War on Terror*' – many asylum seekers that the UK plan to criminalise or push back may well be Afghans fleeing Taliban persecution. While the UK's Afghan Citizens Resettlement Scheme and Afghan Relocations and Assistance Policy are much welcomed, it is inevitable that Afghans who cannot access such schemes will need to resort to irregular means to seek safety in neighbouring countries and further afield, including the UK.

Several provisions also directly advance the securitised approach to migration and border control. An Electronic Travel Authorisation scheme is being introduced (as exists in Australia, Canada and the US) "to block the entry of those who present a threat to the UK", which is not without its human rights implications. The Bill would also make it easier to remove refugees who have been convicted of a particularly serious crime and deemed to constitute a danger to the community, even when they would face persecution on return. Clause 35 lowers the threshold (as set out in Article 33(2) of the Refugee Convention on exclusion from *non-refoulement* protection) of "particularly serious crime" from crimes receiving at least a two-year sentence to those only attracting a one-year sentence. Clause 51 operates to disqualify victims of modern slavery or human trafficking from protection if they are considered a threat to public order, including those who engaged in a terrorism-related activity *because they were trafficked by a terrorist organisation*. This clause is said to have been introduced to prevent the return of British women and children that were trafficked to Syria by ISIS.

Rediscovering International Law

With the Nationality and Borders Bill likely to become law, the UK is now at an extreme point of departure from its obligations under international law.

9/11 has accelerated restrictive approaches to migration and asylum, fuelling xenophobia, Islamophobia and "othering". However, such approaches only serve to increase the risks to migrants and render them more vulnerable. As the Australian 'model' has shown, offshore processing and pushbacks are costly, unlawful and lead to immense suffering. Such externalisation measures are also often ineffective and counterproductive, serving to push migrants into the hands of people smugglers and traffickers and increasing the risk of loss of life as they are left with no other option than to take more hidden, more dangerous routes. The UK's decision to close "legal" and "orderly" pathways by imposing restrictive visa measures on states that do not cooperate in the return of their nationals (see clause 59 of the Bill) and limiting family reunification pathways, as discussed above, will only perpetuate this.

The UK and other governments must take seriously their obligations under international law and reaffirm their commitment to upholding the rights of all asylum seekers, refugees and other migrants, regardless of how they sought asylum or arrived in the UK and without fear-mongering and labelling migrants as a threat. At the most basic level, they must respect the right of asylum seekers to flee by any means, not criminalise asylum seeking, and uphold their *non-refoulement,* collective expulsion and right to life obligations. Securitisation, criminalisation and externalisation are not the answer.
