

## UNHCR RECOMMENDATIONS ON THE IMPLEMENTATION OF THE ILLEGAL MIGRATION ACT 2023

6 OCTOBER 2023

1. On 18 July 2023, Parliament passed the Illegal Migration Act. It received Royal Assent on 20 July 2023. UNHCR welcomes those amendments made during the Act's passage which reduced the risk of violations of international law in certain limited respects.<sup>1</sup> In spite of these amendments, UNHCR maintains its position that the core provisions of the Act are inconsistent with the UK's obligations under international law.<sup>2</sup>
2. However, UNHCR understands that when the Act was passed, it was the view of the Government that it "*does not require any act or omission that conflicts with the obligations of the United Kingdom under the European Convention of Human Rights or other listed international instrument. . .*" including the 1951 UN Convention relating to the Status of Refugees and the 1967 Protocol (together, "the Refugee Convention"); the 1954 Convention relating to the Status of Stateless Persons ("1954 Stateless Persons Convention"); and the 1961 UN Convention on the Reduction of Statelessness ("1961 Statelessness Convention").<sup>3</sup>
3. UNHCR therefore offers below a series of recommendations intended to assist the UK authorities, where possible, to bring implementation of certain aspects of the IMA 2023 closer to conformity with the UK's international obligations. UNHCR makes these recommendations as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent

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<sup>1</sup> These include: the removal of the clauses that would have applied the Bill's penalties to the partners, children and dependent relatives of people who come within the Act's duty to remove, set out at Section 2; limitations on the circumstances in which unaccompanied children will be removed from the UK; and some limitations on the detention of unaccompanied children and pregnant women. In addition, some provisions of the Act only come into force from 20 July 2023 at the earliest (rather than 7 March 2023).

<sup>2</sup> UNHCR, *Legal Observations on the Illegal Migration Bill*, 02 May 2023 (updated), available at: <https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023>. UNHCR's key concerns about the lawfulness of the Act include: 1. it all but extinguishes the right to claim asylum in the UK for the vast majority of people in need of international protection; 2. it creates a real and foreseeable risk of refoulement by empowering the Secretary of State to remove asylum-seekers to any country listed in Schedule 1 to the Act, without first enquiring whether the country has a functioning asylum system and, if so, whether the person would be admitted to it, or if there are any other reasons that the individual would be at risk of persecution or serious harm there; 3. the onus will be on the individual to raise any risk of harm from removal and the mechanisms for doing so are highly likely to provide insufficient safeguards; 4. nationals of a separate list of "safe States" – at present EEA countries plus Albania – can be removed directly to their own countries and any human rights or asylum claim will not be considered unless there are "exceptional circumstances" – again raising refoulement risks; 5. those who cannot be removed will be trapped in limbo in the UK, with implications for the enjoyment of rights under the Refugee Convention and other human rights instruments; and 6. judicial oversight of the decision to detain and of the reasonableness of continued detention is significantly curtailed.

<sup>3</sup> *Illegal Migration Bill: Commons Reasons, Amendments in Lieu and Amendments to the Words so Restored to the Bill*, Reason 1A, available at: <https://bills.parliament.uk/publications/52204/documents/3802>. See also the statement of the Immigration Minister to the House of Commons on 11 July 2023: "let me be clear, if further reassurance is required, that the Government take our international law obligations extremely seriously. We believe that all the matters outlined in the Bill are within our international legal obligations [ . . . ]" It goes without saying that the Government obey our international obligations, as we do with all pieces of legislation." Hansard, *Illegal Migration Bill*, Volume 736: debated on Tuesday 11 July 2023, available at: <https://hansard.parliament.uk/commons/2023-07-11/debates/5D96460C-A67B-4782-B74B-89BDD8ACE51A/IllegalMigrationBill>

solutions to the problem of refugees,<sup>4</sup> and pursuant to its duty to supervise the application of the Refugee Convention.<sup>5</sup> The UN General Assembly has also entrusted UNHCR with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness,<sup>6</sup> and UNHCR thus has a direct interest in national legislation affecting stateless persons and in the implementation of the 1954 Convention and the 1961 Convention.<sup>7</sup>

4. UNHCR's recommendations focus on four key policy areas at this time:

- (i) The Secretary of State's discretionary power to grant leave to remain in the UK to people who are normally ineligible for any leave because they are subject to the "duty to remove" established by Section 2 of the IMA 2023. This discretion may be exercised under two circumstances: where required by international law; and with regard to those who enter the UK between 7 March 2023 and the date when the duty to remove is brought into effect;
- (ii) The definition of "come directly" for the purposes of defining who is subject to the duty to remove;
- (iii) The definition of "exceptional circumstances" in which an asylum or human rights claim is admissible even though a person comes from a safe State, as defined in Section 80AA of the Nationality, Immigration and Asylum Act 2002 (as introduced by Section 59 of the IMA 2023); and
- (iv) The UK's duty to carry out an individualized assessment of the safety of removal prior to removing an asylum-seeker to a third country.

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<sup>4</sup> See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1, available at <https://www.unhcr.org/3b66c39e1.pdf>. As set forth in its Statute, UNHCR fulfils its international protection mandate by, inter alia, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Ibid.*, para. 8(a)

<sup>5</sup> UNHCR's supervisory responsibility is also reflected in Article 35 of the Refugee Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR's duty of supervising the application of these instruments. *Convention and Protocol relating to the Status of Refugees*, available at: <https://www.unhcr.org/3b66c2aa10>

<sup>6</sup> UNGA, Resolution A/RES/50/152 of 9 February 1996, available at: <http://www.unhcr.org/refworld/docid/3b00f31d24.html>, which also specifically requested UNHCR "to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States". See also, UNGA, Resolution A/RES/61/137 of 25 January 2007, available at: <https://www.refworld.org/docid/45fa902d2.html>; UNGA, Resolution A/RES/62/124 of 24 January 2008, available at: <https://www.refworld.org/docid/47b2fa642.html>; and UNGA, Resolution A/RES/63/148 of 27 January 2009, available at: <https://www.refworld.org/docid/52fb51bb4.html>. UNHCR's role has been recognized by the UK Supreme Court in *Pham v Secretary of State for the Home Department*, [2015] UKSC 19, para. 22, available at: <https://www.bailii.org/uk/cases/UKSC/2015/19.html>

<sup>7</sup> UNGA, *Convention relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html>; UNGA, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <http://www.refworld.org/docid/3ae6b39620.html>; see also UNHCR, Executive Committee (ExCom), *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons* No. 106 (LVII), 6 October 2006, paras. (i) and (j), available in UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusions No. 1 – 114)*, HCR/IP/3/Eng/REV.2017, October 2017, available at: <https://www.refworld.org/docid/5a2ead6b4.html>

## The Secretary of State should exercise her discretion to grant leave to remain to refugees and stateless persons in the UK

5. **UNHCR urges the Secretary of State to adopt Immigration Rules and published policies confirming that she will exercise her new discretionary powers under the IMA 2023 by granting refugees and stateless people in the UK a form of leave to remain that complies with the UK’s obligations under the Refugee Convention and the 1954 Stateless Persons Convention.**
6. The IMA 2023 provides that if a person who meets the conditions set out in its Section 2<sup>8</sup> makes a protection claim or a human rights claim,<sup>9</sup> that claim cannot be considered and the Secretary of State “must make arrangements for their removal”.<sup>10</sup> They may be removed to a country listed in Schedule 1 of the Act -- countries that are described in the Explanatory Notes to the Act as “safe” third countries<sup>11</sup> -- if they “embarked for the United Kingdom” from there, or “there is reason to believe” that they would be admitted there. In addition, nationals of Member States of the European Union, the European Economic Area and Albania may be removed either to a third country or to their own country, unless there are “exceptional circumstances”.
7. At present, the UK’s ability to remove individuals to third countries is extremely limited.<sup>12</sup> Even if arrangements to remove individuals in larger numbers were to become operational, reception capacity is unlikely to match the number of individuals to whom the duty to remove will apply. It is foreseeable that many people who are unwilling or unable to return to their countries of origin will remain in the UK. However, Section 30(3) of the IMA 2023 amends the Immigration Act 1971 to prohibit the Secretary of State from granting leave to enter or remain in the UK to anyone who has ever met the conditions for the duty to remove under Section 2. As a result, people who meet the conditions for the duty to remove but cannot be removed to a third country listed in Schedule 1 will remain in the UK but be unable to regularize their status.
8. Given that the determination that a person is a refugee or is stateless is a declaratory rather than a constitutive act, many people who remain in the UK but are made ineligible for a grant of leave to remain by Section 30(3) will be refugees or stateless and have rights as such under international law, even if their claims are never formally

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<sup>8</sup> The conditions are that they: (i) arrived at or entered the UK irregularly; (ii) did not come directly from a country in which their life and liberty were threatened on a Refugee Convention ground, as defined in the IMA 2023; (iii) do not have leave to enter or remain in the United Kingdom, or have leave to remain solely on the basis of being an unaccompanied child; and (iv) arrived or entered on or after the date the Act was passed, i.e. 18 July 2023. For a discussion of how this clause will operate to ban all but a small minority of refugees and stateless persons from seeking protection in the UK, see UNHCR, *Legal Observations on the Illegal Migration Bill* (n 2), para. 20-36.

<sup>9</sup> A “protection claim” is defined by Section 82(2) of the Nationality, Immigration and Asylum Act 2002 (the NIAA 2002) as “a claim made by a person (“P”) that removal of P from the United Kingdom— (i) would breach the United Kingdom’s obligations under the Refugee Convention, or (ii) would breach the United Kingdom’s obligations in relation to persons eligible for a grant of humanitarian protection”. <https://www.legislation.gov.uk/ukpga/2002/41/section/82>. A “human rights claim” is defined by Section 113(1) of the NIAA 2002 as a claim that to remove a person from the UK would violate their rights under the European Convention on Human Rights (ECHR). <https://www.legislation.gov.uk/ukpga/2002/41/section/113>

<sup>10</sup> See Section 5 (entitled “Disregard of certain claims, applications etc”) and Section 2(1).

<sup>11</sup> *Illegal Migration Act 2023, Explanatory Notes*, para. 1 and 58, available at: <https://www.legislation.gov.uk/ukpga/2023/37/notes/division/1/index.htm>. Nothing in the Act itself describes the 57 countries listed in Schedule 1 as “safe third countries”.

<sup>12</sup> Between 1 January 2021 and 31 March 2023, there were 23 forced removals of asylum claimants whose claims were considered to be inadmissible. <https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-march-2023/how-many-people-do-we-grant-protection-to#inadmissibility>

considered by the UK. However, if they are not granted any form of lawful status in the UK, they will have little or no access to those rights.

9. Moreover it is likely that some of those made ineligible for leave to remain will, in fact, have been determined to be refugees or stateless people by the Home Office. This is for two reasons. First, the new Section 8AA(1) of the 1971 Act makes a person who meets the conditions for the duty to remove ineligible for a grant of leave to remain if they entered the UK on or after 7 March 2023,<sup>13</sup> but the duty to remove itself (and the accompanying prohibition on consideration of an asylum claim in the UK) has not yet come into force.<sup>14</sup> In consequence, the protection claims of people who entered the UK on or after 7 March 2023 are, at the present time, still being processed within the existing asylum system. Those whose claims are refused may be removed to their own countries; those whose claims are granted, however, will be recognized as refugees but ineligible for leave to remain under the Immigration Rules.<sup>15</sup> Secondly, nothing in the IMA 2023 prevents stateless people from applying to the Statelessness Determination Procedure, regardless of their date and manner of entry to the UK.
10. As UNHCR set out in its *Legal Observations on the Illegal Migration Bill*, it would be inconsistent with the UK's international obligations to bar refugees and stateless people in the UK from accessing their positive rights under the Refugee Convention and the 1954 Stateless Persons Convention (see paragraph 12 below for examples).<sup>16</sup> In addition, although Section 9 of the IMA 2023 provides that people subject to the duty to remove will receive financial assistance and accommodation through the Asylum Support system, concerns have been raised in the past as to whether this system operates effectively even to prevent destitution and exploitation, and whether it takes proper account of the best interests of children, as required by the UNCRC and domestic law.<sup>17</sup> Should refugees faced with the prospect of indefinite limbo and

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<sup>13</sup> Under Section 68(3)(a), Section 30 came into force on the day the Act was passed, that is, 18 July 2023.

<sup>14</sup> Section 2(3) of the IMA 2023 provides that one condition for the duty to remove to apply is that a person entered or arrived in the UK on or after the day the Act was passed, that is, 18 July 2023. However, Section 68(1) provides that, unless otherwise specified, the Act comes into force "on such day as the Secretary of State may by regulations appoint."

<sup>15</sup> The number of people in this situation is likely to be significant. The profiles of people who arrive by small boat and claim asylum is a partial indication, because although the duty to remove will apply to many people who arrived by other means, it is expected to be interpreted as applying to everyone who arrives by small boat. In April, May and June 2023, 3,692 people were recorded as crossing the Channel to reach the UK by small boat. Among those recorded as claiming asylum during this period were 567 people from Afghanistan (15% of arrivals), 375 people from Eritrea (10%), 313 from Syria (8%), 238 from Sudan (6%), 30 from Libya (.8%), and seven people recorded as stateless. See, UK Home Office, *Irregular Migration to the UK: detailed datasets*, available at: <https://www.gov.uk/government/statistical-data-sets/irregular-migration-detailed-dataset-and-summary-tables#detailed-datasets>. Many if not all of these people would be likely to qualify for a grant of international protection in the UK under current policies, but they will no longer be eligible for leave to remain under the Immigration Rules. Between 1 July 2023 and 30 September 2023, a further 13,397 people were recorded as crossing the Channel in small boats, although these figures are not broken down by nationality. See, UK Home Office, *Migrants detected crossing the English Channel in small boats*, available at: <https://www.gov.uk/government/publications/migrants-detected-crossing-the-english-channel-in-small-boats>

<sup>16</sup> See para. 72-83 of UNHCR, *Legal Observations on the Illegal Migration Bill* (n 2).

<sup>17</sup> The British Red Cross and UNHCR, *At risk: exploitation and the UK asylum system*, August 2022, available at: <https://www.redcross.org.uk/about-us/what-we-do/we-speak-up-for-change/at-risk-exploitation-and-the-uk-asylum-system>. See also, e.g., *HA & Ors v Secretary of State for the Home Department* [2023] EWHC 1876 (Admin) (21 July 2023), <http://www.bailii.org/ew/cases/EWHC/Admin/2023/1876.html>; *CB, R. (On the Application Of) v The Secretary of State for the Home Department* [2022] EWHC 3329 (Admin) (21 December 2022), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2022/3329.html>



potential destitution eventually decide to return home in spite of a real risk of persecution, this could constitute constructive refoulement.<sup>18</sup>

11. The IMA gives the Secretary of State the discretion to avoid violations of international law in such cases. The new Section 8AA(4)(a) of the 1971 Act provides that the Secretary of State

*may give the person limited leave to remain [...] if— (a) the Secretary of State considers that failure to do so would contravene the United Kingdom’s obligations under the Human Rights Convention or any other international agreement to which the United Kingdom is a party.*<sup>19</sup>

12. The clear purpose of this Section is to prevent the UK from contravening its international obligations with regard to individuals covered by the duty to remove who nonetheless remain in the UK. In order to fulfill this purpose, as far as possible within the constraints of the other provisions of the IMA 2023, the following rights should be attached to the form of leave to remain that is granted:

- (i) The right to engage in wage-earning employment and self-employment, and to practice a profession, in accordance with Articles 17, 18 and 19 of the Refugee Convention and of the 1954 Stateless Persons Convention;
- (ii) Access to public funds and to the NHS on the same terms as nationals, in accordance with Article 23 of the Refugee Convention and of the 1954 Stateless Persons Convention;<sup>20</sup>
- (iii) Access to housing, in accordance with Article 21 of the Refugee Convention and of the 1954 Stateless Persons Convention;<sup>21</sup>
- (iv) An unrestricted right to rent residential property, in accordance with Article 13 of the Refugee Convention and of the 1954 Stateless Persons Convention;<sup>22</sup>
- (v) Freedom of movement, in accordance with Article 26 of the Refugee Convention and of the 1954 Stateless Persons Convention;

<sup>18</sup> UNHCR defines “constructive refoulement” as occurring when “host countries deliberately deny persons their economic, social and cultural rights in order to leave them with no choice but to return to a territory where they would be at risk of persecution or of being moved to another territory where they are at risk of persecution.” See UNHCR, *Master glossary of terms*, available at: <https://www.unhcr.org/glossary>

<sup>19</sup> Emphasis added. The discretion to grant permission to enter the UK is more limited and may only be exercised where a grant is required by the ECHR or there are “exceptional circumstances”, while a grant of settlement or citizenship can only be made on ECHR grounds.

<sup>20</sup> When Article 23 was drafted, “public relief and assistance” was clearly understood to include public medical assistance. See Paul Weis, *The Refugee Convention, 1951: the Travaux Préparatoires Analysed with a Commentary*, p. 124-125, available at: <https://www.refworld.org/pdfid/53e1dd114.pdf>.

<sup>21</sup> These require States to grant refugees and stateless people lawfully staying in a country rights with regard to housing that are “as favourable as possible” and at least as favourable as “aliens generally in the same circumstances”. This should be interpreted as requiring, at a minimum, a grant of the same rights as are generally available to other non-citizens granted leave to remain in the UK. For a discussion of the meaning of “aliens generally in the same circumstances”, see James C. Hathaway, *The Rights of Refugees Under International Law* (2d. ed.), Section 3.2.1, pp. 222-25. It is also relevant here that a “No Recourse to Public Funds” condition would be separately prohibited by Article 23. With regard to why individuals granted leave to remain under Section 30 of the IMA 2023 should be considered to be “lawfully staying in” the country within the meaning of the Refugee Convention, see UNHCR, *Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom*, May 2021, para. 45 and note 73, available at: <https://www.unhcr.org/uk/media/unhcr-observations-new-plan-immigration-uk>

<sup>22</sup> These commit States to granting refugees and stateless people rights with regard to movable and immovable property, including leases, that are “as favourable as possible” and at least as favourable as “aliens generally in the same circumstances”.

- (vi) Travel documents, in accordance with Article 28 of the Refugee Convention and of the 1954 Stateless Persons Convention;
- (vii) Protection against expulsion except on national security and public order grounds, in accordance with Article 32 of the Refugee Convention and Article 31 of the 1954 Stateless Persons Convention;
- (viii) Sufficient security of status to facilitate integration, in accordance with Article 34 of the Refugee Convention and Article 32 of the 1954 Stateless Persons Convention;<sup>23</sup>
- (ix) Free access to the courts, on equal terms with nationals with regard to legal assistance, in accordance with Article 16 of the Refugee Convention and of the 1954 Stateless Persons Convention.<sup>24</sup>

13. In addition, the right to family life and the principle of family unity must be protected by providing access to family reunification. Although the body of the Refugee Convention and the 1954 Stateless Persons Convention do not refer directly to family unity, refugees and stateless people are entitled to the right to family life under international human rights law.<sup>25</sup> The Final Act of the Conference of Plenipotentiaries at which the

<sup>23</sup> This would also be in the interest of host communities, as insecure status has been shown to reduce prospects of employment. See, e.g. Australian Human Rights Commission, *Lives on Hold: Refugees and asylum-seekers in the 'Legacy Caseload'*, 2019, pp. 73-77, available at: <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>; Yevgeniya Averhed, *The breathing space or impact of temporary protection on integration from the perspective of refugees*, School of Advance Study, University of London, December 2020, available at: <https://sas-space.sas.ac.uk/9453/>; and Migration Advisory Committee (MAC) Annual Report 2021, pp. 31-32, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040877/2021\\_Annual\\_Report\\_combined\\_FINAL\\_v3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040877/2021_Annual_Report_combined_FINAL_v3.pdf).

<sup>24</sup> Article 16(1) protects free access to the courts for all refugees and stateless people, while Article 16(2) provides that a refugee or stateless person “shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance [...]” As discussed in the *travaux préparatoires*, the reference to “habitual residence” was inserted to clarify that refugees would not have access to certain rights if they were transient, or temporarily resident for “just a few days”. Moreover, it was intended to describe a factual situation, rather than a particular legal status. See, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons : summary record of the 8th meeting, held at the Palais des Nations, Geneva, on Thursday, 5 July 1951*, A/CONF.2/SR.7, 21, available at: <https://digitallibrary.un.org/record/696356?ln=en> and A/CONF.2/SR.8, 6-8, available at: <https://digitallibrary.un.org/record/696357?ln=en> In the view of the UK delegate, “the phrase “habitual residence” implied much less than permanent residence.” *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons : summary record of the 23rd meeting, held at the Palais des Nations, Geneva, on Monday, 16 July 1951*, A.CONF.2/SR.23, 26, available at: <https://digitallibrary.un.org/record/696437?ln=en> See also Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4<sup>th</sup> ed.), pp. 598-99 and Hathaway (n 21), pp. 210-12 (describing “habitual residence” as “requiring more than simple physical presence [... but not] dependent on the formal recognition of refugee status” or on “having been formally authorized to stay [... in an asylum country] on an ongoing basis.”)). Refugees granted permission to stay under Section 30 of the IMA 2023 are likely to meet this test.

<sup>25</sup> *Universal Declaration of Human Rights* (10 December 1948) 217 A (III) (UDHR), Articles 2, 12, 16(1) and (3), [www.refworld.org/docid/3ae6b3712c.html](http://www.refworld.org/docid/3ae6b3712c.html). *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171 (ICCPR), Articles 2(1), 23(1) and (2), [www.refworld.org/docid/3ae6b3aa0.html](http://www.refworld.org/docid/3ae6b3aa0.html). *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 993 UNTS 3 (ICESCR), Articles 2(2) and 10(1), [www.refworld.org/docid/3ae6b36c0.html](http://www.refworld.org/docid/3ae6b36c0.html). *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3 (CRC), preambular para. 5 and Articles 5, 7, 8, 9, 10, 16, and 22, [www.refworld.org/docid/3ae6b38f0.html](http://www.refworld.org/docid/3ae6b38f0.html). *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (18 December 1990) 2220 UNTS 3 (CRMW), Articles 14 and 44, [www.refworld.org/docid/3ae6b3980.html](http://www.refworld.org/docid/3ae6b3980.html). *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 (CRPD), preambular para. (x) and Articles 22 and 23, [www.refworld.org/docid/4680cd212.html](http://www.refworld.org/docid/4680cd212.html). *International Convention on the Elimination of All Forms of Racial Discrimination* (21 December 1965) 660 UNTS 195 (ICERD), Article 5, [www.refworld.org/docid/3ae6b3940.html](http://www.refworld.org/docid/3ae6b3940.html). *Convention on the Elimination of All Forms of Discrimination Against Women* (18 December 1979) 1249 UNTS 13 (CEDAW), Article 16(1), [www.refworld.org/docid/3ae6b3970.html](http://www.refworld.org/docid/3ae6b3970.html). Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the*

1951 Convention was adopted affirms “that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee”, and adopts a strongly worded recommendation that States “take the necessary measures for the protection of the refugee’s family, especially with a view to ensuring that the unity of the refugee’s family is maintained”.<sup>26</sup> UNHCR’s governing Executive Committee, of which the UK is a member, has repeatedly highlighted the need to protect the unity of the refugee family and has adopted a series of Conclusions that reiterate the fundamental importance of family reunification.<sup>27</sup> The European Court of Human Rights has also recognized “a consensus at international and European level” on the need for generous family reunification procedures for refugees.<sup>28</sup>

14. In order for the rights outlined above to be effective, there must be a fair and transparent mechanism for individuals to access them within a reasonable period of time. Such a mechanism already exists for stateless persons, in the form of the UK’s Statelessness Determination Procedure. UNHCR stands ready to assist the UK authorities in the design of such a mechanism for refugees.
15. Section 30(4) confers an additional discretion on the Secretary of State with regard to those who entered between 7 March 2023 and the date the duty to remove is brought into effect:

*Until section 2(1) [duty to remove] comes into force in relation to a person, section 8AA of the Immigration Act 1971 has effect in relation to that person as if it also permitted the Secretary of State to give the person limited leave to*

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*Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, para. 5, [www.refworld.org/docid/45139bd74.html](http://www.refworld.org/docid/45139bd74.html). Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14 and 15, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16* (4 November 1950) ETS 5, Article 8, [www.echr.coe.int/documents/d/echr/convention\\_ENg](http://www.echr.coe.int/documents/d/echr/convention_ENg). Council of Europe, *European Social Charter (Revised)* (3 May 1996) ETS 163, Part I, para. 16 and Part II, Article 16, [www.refworld.org/docid/3ae6b3678.html](http://www.refworld.org/docid/3ae6b3678.html). For the applicability of these laws to stateless people, see and UNHCR, *Handbook on Protection of Stateless Persons*, 2014, para. 140-143, available at: <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR-Handbook-on-Protection-of-Stateless-Persons.pdf>

<sup>26</sup> *UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1, 25 July 1951, available at: <https://www.unhcr.org/protection/travaux/40a8a7394/final-act-United-nations-conference-plenipotentiaries-status-refugees-stateless.html> and 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*, February 2019 (reissued), HCR/1P/4/ENG/REV. 4, Annex 1 and para. 182, available at: <https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

<sup>27</sup> The Executive Committee is elected by the UN Economic and Social Council and consists of representatives of Member States and of specialist agencies. While not legally binding on State Parties its Conclusions are adopted by consensus by the States which are Members of the Executive Committee of UNHCR and represent statements of opinion that are broadly representative of the views of the international community. In Conclusions adopted in 1981, for example, the Executive Committee stated: “It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.” UNHCR ExCom, Family Reunification No. 24 (XXXII) - 1981, 21 October 1981, available at: <https://www.refworld.org/docid/3ae68c43a4.html>. In a further set of Conclusions adopted in 1998, the Executive Committee exhorted States: “[I]n accordance with the relevant principles and standards, to implement measures to facilitate family reunification of refugees on their territory, especially through the consideration of all related requests in a positive and humanitarian spirit, and without undue delay.” UNHCR ExCom, Conclusion on International Protection No. 85 (XLIX) - 1998, 9 October 1998, available at: <https://www.refworld.org/docid/3ae68c6e30.html>

<sup>28</sup> *Tanda-Muzinga c. France*, Council of Europe: European Court of Human Rights (ECHR), Requête no 2260/10, 10 July 2014, para. 75, available at: <https://www.refworld.org/cases/ECHR,53be80094.html>; *Mugenzi c. France*, Requête no 52701/09, Council of Europe: ECHR, para. 54, available at: <https://www.refworld.org/cases/ECHR,53be81784.html>. See also UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of J. K. v. Switzerland (Appl. No. 15500/18) before the European Court of Human Rights*, 28 May 2019, available at: <https://www.refworld.org/docid/5dced8884.html>

*enter or limited leave to remain in the United Kingdom in any other circumstances [...]*

16. With regard to refugees, stateless persons and others determined to be in need of international protection who enter the UK within this timeframe, the Secretary of State should exercise her discretion and grant leave to remain under Parts 11 (asylum) or Part 14 (stateless persons) of the Immigration Rules. This would have the advantages of transparency and efficiency.
17. UNHCR notes that with regard to settlement and naturalization, the Secretary of State is only expressly authorized to exercise her discretion to grant indefinite leave to remain or citizenship where this is required by the European Convention on Human Rights.<sup>29</sup> UNHCR notes in this regard that security of status is essential to refugees' integration and employment, such that long-term precarity is in the interests of neither refugees and stateless people, nor of their host communities. The ECtHR, moreover, has found that lack of secure status or the denial of nationality can engage Article 8, depending on the adverse consequences for a person's enjoyment of their rights to family or private life.<sup>30</sup> Those consequences are likely to be particularly significant for refugees and stateless persons, who do not have access to the protection of their country, or countries, of nationality or former habitual residence.<sup>31</sup> UNHCR therefore urges the UK to adopt rules and guidance that ensure that applications for settlement and naturalization by stateless persons and refugees subject to the duty to remove are viewed in a humanitarian spirit, in line with the UK's obligations under Article 34 of the Refugee Convention and Article 32 of the 1954 Statelessness Convention, and with due consideration of all relevant personal circumstances.

**“Come directly” should be defined in accordance with international law for the purpose of the duty to remove**

18. **UNHCR urges the Secretary of State to interpret “come directly to the United Kingdom”, as set out at Section 2(4) of the IMA 2023, in a purposive spirit, reflecting, as far as possible, the intention of the drafters of the Refugee Convention and international practice.<sup>32</sup>**
19. One condition for the duty to remove is that:

*in entering or arriving [in the UK...], the person did not come directly to the United Kingdom from a country in which the person's life and liberty were*

<sup>29</sup> As noted at para. 87 of UNHCR's *Legal Observations on the Illegal Migration Bill* (n 2), this runs counter to Article 34 of the Refugee Convention and Article 32 of the 1954 Stateless Persons Convention.

<sup>30</sup> See, e.g. *Genovese v. Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011, para. 30, available at: [https://www.refworld.org/cases/ECHR\\_509ea0852.html](https://www.refworld.org/cases/ECHR_509ea0852.html); *AHMADOV v. AZERBAIJAN* - 32538/10 (Judgment : Right to respect for private and family life : Fifth Section) [2020] ECHR 96 (30 January 2020), para. 42, available at: <http://www.bailii.org/eu/cases/ECHR/2020/96.html>.

<sup>31</sup> See, e.g. the opinion of Lord Mance (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed) in *Pham v Secretary of State for the Home Department* (n 6). He noted that the deprivation of British nationality was “a radical step, particularly if the person affected has little real attachment to the country of any other nationality that he possesses and is unlikely to be able to return there. A correspondingly strict standard of judicial review must apply [...]” The same consideration should be taken into account, *mutatis mutandis*, in any decision to deny settlement or nationality to a stateless person or refugee resident in the UK.

<sup>32</sup> For the avoidance of doubt, UNHCR maintains its position that the IMA 2023's multiple penalties for irregular entry or presence in the UK are fundamentally inconsistent with the Refugee Convention, and in particular, with Article 31. See, UNHCR, *Legal Observations on the Illegal Migration Bill* (n 2), para. 95-104. A purposive interpretation of “come directly” in this context would reduce the violations of the Refugee Convention in some individual cases, but would not be sufficient to bring the IMA 2023 as a whole into compliance with it.



*threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.*

At Section 2(5), this is further defined as “they passed through or stopped in another country outside the United Kingdom where their life and liberty were not so threatened.”

20. UNHCR urges the Secretary of State to set out in Immigration Rules or published guidance that “passed through or stopped” should continue to be defined in accordance with the international consensus, which UK courts have played a key role in shaping.<sup>33</sup> This consensus is that the term “directly” should be interpreted broadly and not necessarily in a literal (geographical or temporal) sense. Mere transit in an intermediate country cannot be considered to interrupt “coming directly”.<sup>34</sup> Each case must be assessed on its own facts and circumstances, taking into account the realities of flight and the context in which such travel takes place – often through circuitous routes, over land or by sea, frequently with interruptions. There can be good reasons for delay, stopovers and stays in intermediate countries.<sup>35</sup> Such reasons may include, for example, advice or coercion from agents or smugglers, acquiring the means to travel onwards, or particular constraints limiting the ability to move on.<sup>36</sup>
21. In addition, UNHCR urges the authorities to adopt Immigration Rules, policies and procedures that ensure that the question of whether a person’s life and liberty were threatened within the meaning of the IMA 2023 (for ease of reference, whether they were at risk) in a particular country is carefully explored, taking into account the person’s individual circumstances and the human rights situation in that country. The risk must be assessed not simply at the moment of transit, moreover, but in the medium and long term; this would reflect the rationale underlying the legislation that the people subject to the duty to remove and asylum ban have had a genuine opportunity to seek protection in the transit country, and should have done so rather than continuing their journey to the UK.<sup>37</sup>

<sup>33</sup> See *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 18, available at: [www.refworld.org/cases/GBR\\_HC\\_QB\\_3ae6b6b41c.html](http://www.refworld.org/cases/GBR_HC_QB_3ae6b6b41c.html). *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 15, available at: [www.refworld.org/cases/GBR\\_HL\\_4835401f2.html](http://www.refworld.org/cases/GBR_HL_4835401f2.html). *R. and Koshi Pitshou Mateta and others*, [2013] EWCA Crim 1372, United Kingdom: Court of Appeal (England and Wales), 30 July 2013, LJ Leveson, para. 21(iv), available at: [www.refworld.org/cases/GBR\\_CA\\_CIV\\_5215e0214.html](http://www.refworld.org/cases/GBR_CA_CIV_5215e0214.html). *Decision KKO:2013:21*, Finland: Supreme Court, 5 April 2013, available at: [www.refworld.org/cases/FIN\\_SC\\_557ac4ce4.html](http://www.refworld.org/cases/FIN_SC_557ac4ce4.html).

<sup>34</sup> FMS, FNZ (C-924/19 PPU) SA, *SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, [2020], CJEU, 14 May 2020, para. 158–160, where the Court concluded that transit cannot constitute a “connection” for the purpose of declaring an application for asylum inadmissible on the basis of a safe third country (available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=51040B2AB1862418E9A0B8E0E758B1A7?text=&docid=226495&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2509142>). *R v. Jaddi* [2012] EWCA Crim 2565, para. 16, available at: <http://www.bailii.org/ew/cases/EWCA/Crim/2012/2565.html>.

<sup>35</sup> There is no obligation under international law for a person to seek international protection at the first effective opportunity; at the same time, refugees do not have an unfettered right to choose the country that will determine their claims and provide asylum. See UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, available at: [www.refworld.org/docid/5d8a255d4.html](http://www.refworld.org/docid/5d8a255d4.html), including paras 1-9 and 14.

<sup>36</sup> *Adimi* [1999] (n 33) para. 18, considering acquiring the means to travel onward as a good reason delaying onward travel. *BVerfG, Beschluss der 2. Kammer des Zweiten Senats vom 08. Dezember 2014 - 2 BvR 450/11 - Rn. (1-65)*, ECLI:DE:BVerfG:2014:rk20141208.2bvr045011, Germany: Bundesverfassungsgericht, 8 December 2014, para. 32, available at: [www.refworld.org/cases/DEU\\_BUNDESVERFASSUNGSGERICHT\\_5b33531d4.html](http://www.refworld.org/cases/DEU_BUNDESVERFASSUNGSGERICHT_5b33531d4.html), considering using the time spent in the intermediate country to arrange onward movement.

<sup>37</sup> See, e.g., *Illegal Migration Bill: Explanatory Notes*, 07 March 2023, para. 15, available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf> (describing the duty to remove as designed “to incentivise people to seek protection by safe and legal routes or in the first safe country”).

22. In particular, a refugee must be considered to have been at risk in a transit country if in that country they would have been unable to have effective access to international protection and so would have been at risk of direct or indirect refoulement, including constructive refoulement.<sup>38</sup> In identifying risks of chain or constructive refoulement, it is also important to take into account any bilateral or regional return agreements, such as the Dublin III Regulation, which would have mandated an individual's return from one particular transit country to another.
23. In addition, in keeping with the fundamental purposes of international refugee and human rights law, a person must not be expected to hide a protected characteristic or forfeit a fundamental human right in order to live safely in a transit country.<sup>39</sup>
24. Finally, any new risks arising in the transit country (i.e. threats to life or freedom of a different kind from those feared in the country of origin) must be considered, both individually and cumulatively. A person who had been at risk of persecution in their own country on account of their political opinions, for example, might face new risks in a transit country on the basis of their gender, race, religion, alienage, or other personal characteristic, or might be at risk of serious harm from traffickers.

**“Exceptional circumstances” under Part 4A of the Nationality, Immigration and Asylum Act 2002 should be interpreted as including individualized as well as systemic risks of harm**

25. **UNHCR urges the Secretary of State to adopt Immigration Rules, guidance and policies that provide for an individualized assessment of whether an asylum or human rights claim by a person from a “safe State” should be considered in the UK.**
26. Section 59 of the IMA amends Part 4A of the Nationality, Immigration and Asylum Act 2002 (the NIAA 2002) so as to make asylum and human rights claims by nationals of a second group of “safe States” inadmissible in the absence of “exceptional circumstances”.
27. As UNHCR noted in its observations on the Nationality and Borders Act 2022 and the IMB, UNHCR acknowledges the need for States to uphold the integrity of their asylum systems by ensuring that claims that appear on their face to be clearly abusive or manifestly unfounded can be processed in accelerated procedures.<sup>40</sup> UNHCR therefore does not oppose designating countries as “safe countries of origin” *per se*.<sup>41</sup>

<sup>38</sup> The drafters of the Convention explicitly considered the situation of a refugee who “after leaving a country of persecution, arrived in another country where they possibly might remain unmolested for a certain period, but would then again be in danger of persecution,” and agreed that such a person must still be considered to have come directly within the meaning of Article 31. See Weis (n 20), p. 215-216.

<sup>39</sup> See, e.g. *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, United Kingdom: Supreme Court, 25 July 2012, available at: [https://www.refworld.org/cases\\_UK\\_SC\\_500fdacb2.html](https://www.refworld.org/cases_UK_SC_500fdacb2.html); *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, available at: [https://www.refworld.org/cases\\_UK\\_SC\\_4c3456752.html](https://www.refworld.org/cases_UK_SC_4c3456752.html).

<sup>40</sup> These are defined as claims that are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Refugee Convention or to any other criteria justifying the granting of asylum. See UNHCR ExCom, *Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum* (ExCom 30), No. 30 (XXXIV) – 1983, 20 October 1983, para. (d), available at: <https://www.refworld.org/docid/3ae68c6118.html> and UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.html>

<sup>41</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, para. 39, available at: <https://www.refworld.org/docid/3b36f2fca.html>

However, the designation of a country as a safe country of origin does not establish, and may not under international law be deemed to establish, an absolute guarantee of safety for nationals of that country, and it may be that despite general conditions of safety, for some individuals, members of particular groups or relating to some forms of persecution, the country remains unsafe.<sup>42</sup> It is important for the safe country of origin concept to be applied on a case-by-case basis, ensuring an individual assessment that takes into account the specific circumstances of the case.

28. It is therefore essential that the Immigration Rules and Home Office guidance recognize that “exceptional circumstances” may be particular to an individual, and are not confined to the types of systemic failures in human rights protections listed as non-exhaustive examples at Section 80A(5) of the NIAA 2002.<sup>43</sup> The acknowledgment of individualized as well as systemic risks would be consistent with the UK’s long-established practice with regard to safe countries of origin.<sup>44</sup> As the UK Supreme Court has held in the context of Article 3 of the ECHR:

*There is nothing intrinsically significant about a systemic failure which marks it out as one where the violation of fundamental rights is more grievous or more deserving of protection. And, as a matter of practical experience, gross violations of article 3 rights can occur without there being any systemic failure whatsoever.*<sup>45</sup>

### **An individualized and pro-active assessment should be carried out prior to any removal to a third country**

29. **UNHCR urges the Secretary of State to introduce Immigration Rules, policies and procedures that require the UK authorities to carry out a thorough and individualized assessment of the potential risks of serious harm, prior to any removal to a third country.**
30. Section 6 of the IMA 2023 authorizes the removal of anyone subject to the duty to remove to any country listed in Schedule 1, as long as the person “embarked for the

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<sup>42</sup> See UNHCR, *UNHCR Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and withdrawing refugee status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, p. 41, available at: <http://www.unhcr.org/refworld/docid/42492b302.html> See also UNHCR ExCom, General Conclusion on International Protection, Conclusion No. 87 (L), 1999, available at: <https://www.unhcr.org/excom/exconc/3ae68c6ec/general-conclusion-international-protection.html>, para. (j): “[...] notions such as “safe country of origin”, [...] should be applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of non-refoulement.”

<sup>43</sup> These are that the State of which the person is a national is “derogating from any of its obligations under the Human Rights Convention, in accordance with Article 15 of the Convention; [or] is the subject of a proposal initiated in accordance with the procedure referred to in Article 7(1) of the Treaty on European Union [. . . .]” <https://www.legislation.gov.uk/ukpga/2002/41/part/4A>

<sup>44</sup> Home Office, *Certification of protection and human rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims)*, Version 6.0, p. 7 (“A protection and / or human rights claim made by someone from a designated state must still be considered on its individual merits”), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1150432/Clearly\\_unfounded\\_claims\\_-\\_certification\\_under\\_section\\_94.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1150432/Clearly_unfounded_claims_-_certification_under_section_94.pdf)

<sup>45</sup> *EM (Eritrea), R (on the application of) v Secretary of State for the Home Department* [2014] UKSC 12 (19 February 2014), para. 48, available at: <http://www.bailii.org/uk/cases/UKSC/2014/12.html>. See also *C.K. v Republika Slovenija*, Case C-578/16 PPU, CJEU (16 February 2017), para. 91-93, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0578>

United Kingdom” from there or “there is reason to believe” that they would be admitted there.

31. There is nothing in the IMA itself that requires the UK authorities to carry out any assessment of whether removal would put a particular individual at risk of persecution or other serious harm in a Schedule 1 country.<sup>46</sup> The Explanatory Notes to the IMA 2023 state that: “A person will not be relocated to an otherwise safe country if they make a human rights-based claim and the Home Office concludes in respect of that claim that there is a real, imminent and foreseeable risk of serious and irreversible harm were that person to be so removed.”<sup>47</sup> However, this is in the context of describing the “suspensive claim” mechanism established by Sections 38 to 51 of the IMA 2023. In UNHCR’s view, these mechanisms are unlikely to provide effective protection against refoulement. They operate on an extremely tight timescale, with limited procedural safeguards, and consider only a narrow range of potential harms arising from removal. Moreover, the burden is placed on each individual to put forward evidence of the risks they would face in the country of removal, a country with which they are likely to have no prior connection and know little or nothing about.<sup>48</sup>
32. UNHCR is aware that the UK Home Office intends to conduct an initial screening interview to determine whether a person who appears to have arrived in the UK irregularly is subject to the duty to remove. Although this interview may play a crucial role in identifying vulnerabilities that need to be taken into account while a person is in the UK (for example, vulnerabilities that make detention inappropriate), to the best of UNHCR’s understanding, it is not designed to gather information relevant to assessing whether a person would be at real risk of serious harm if removed to a Schedule 1 country.
33. Even if the initial intake interview were to be redesigned and expanded so as to consider risks of harm on removal, moreover, it is UNHCR’s view that this would not provide the UK authorities with sufficient, reliable information to make a properly informed assessment. The UK’s current intake and screening practices already face a

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<sup>46</sup> This is in contrast to the legal principles under which the initial decisions to remove asylum-seekers to Rwanda were taken in 2022. These were set out at Para. 345B of the Immigration Rules, which are no longer in force. They required the Secretary of State to decide that the country of removal was a “safe third country for a particular [asylum] applicant, and set out the following minimum requirements for her to so decide: “(i) the applicant’s life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country; (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention; (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law, is respected in that country; and (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country.” See *R (AAA) and others v. The Secretary of State for the Home Department* [2023] EWCA Civ 745, United Kingdom: Court of Appeal (England and Wales), 29 June 2023, para. 33, available at: [https://www.refworld.org/cases.GBR\\_CA\\_CIV.64b16aaa4.html](https://www.refworld.org/cases.GBR_CA_CIV.64b16aaa4.html).

<sup>47</sup> *Illegal Migration Act, Explanatory Notes* (n 11), para. 19.

<sup>48</sup> As set out at paragraph 56 of UNHCR’s *Legal Observations on the Illegal Migration Bill* (n 2), the likely ineffectiveness of the “suspensive claim” procedure arises from a number of factors, including that: (i) individuals facing removal are likely to be detained, where access to legal advice and means of communication are limited; (ii) the claim must be brought within seven days after receiving notice of removal, unless the individual presents compelling evidence of compelling reasons for making a late claim; (iii) it must be made in the form and manner as will be prescribed by the Secretary of State in regulations, and contain “prescribed” information, all of which will be more challenging for someone with limited access to legal advice and limited knowledge of English; (iv) “compelling evidence” in support of the claim must be submitted at the time it is made; (v) where the risk of harm would arise in the country of removal, collecting this evidence within seven days will be made especially difficult by the fact that the country will not be the person’s own (and they therefore may have no prior knowledge of it) and may not even be identified until the removal notice is issued; (vi) once made, the claim must be decided by the Secretary of State within four days and, normally, heard and decided by the Upper Tribunal within a further 23 days; and (vii) normal rights of appeal are made unavailable, and the new rights of appeal provided for are subject to a series of significant procedural and substantive limitations.



number of challenges in accurately collecting and recording the information that would be essential for an adequate assessment of the risks a particular person would face if removed to a third country, including basic details of their personal profile, any history of trauma or trafficking, mental ill health, or other vulnerabilities.<sup>49</sup> The IMA 2023 intake interview will face a number of additional challenges in collecting such information. It is highly likely to be conducted before the interviewee has had access to independent legal advice<sup>50</sup> or psychosocial support, and often very shortly after a dangerous and exhausting journey. In addition, building the rapport necessary to collect reliable information and encourage disclosure may be difficult, given the fundamentally adversarial nature of the interview: its fundamental purpose is to confirm that a person is *not* eligible for international protection in the UK.<sup>51</sup>

34. As currently designed, therefore, the procedures for implementing the IMA 2023 do not include any mechanism that would enable the UK authorities to conduct their own, individualized assessment of the risks a particular individual would face on removal, such as is required by both the Refugee Convention<sup>52</sup> and the ECHR.<sup>53</sup> As set out above, moreover, the opportunities for individuals to present the evidence of such risks themselves are likely to be ineffective. This creates a real risk that individuals will, in fact, face serious and irreversible harm as a result of removal – in other words, that they will be subject to refoulement in violation of international law.
35. UNHCR understands that it is not the intention of the UK authorities to place individuals at risk of serious harm.<sup>54</sup> In order to implement the IMA 2023 in accordance with this intention and, so far as possible, in compliance with the UK's international obligations, it would therefore be necessary for the UK to introduce a new investigative process, subsequent to the initial intake interview and prior to any decision to remove. This process should be fair, transparent, sensitive to the situation and needs of vulnerable individuals, conducted by suitably trained officials and designed to collect sufficient

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<sup>49</sup> See UNHCR, *Asylum Screening in the UK* (May 2023), available at: <https://www.unhcr.org/uk/publications/asylum-screening-uk>

<sup>50</sup> Individuals who seek protection at an airport or seaport, including at Dover, will have no access to their own telephones and very limited access to other means of communication while detained. In addition, information about how to access legal advice is limited and has been shown in some cases to be incorrect. See, e.g., HMIP, *Short-term holding facilities at Western Jet Foil, Manston and Kent Intake Unit*, June 2023, available at: <https://www.justiceinspectors.gov.uk/hmiprison/inspections/short-term-holding-facilities-at-western-jet-foil-manston-and-kent-intake-unit/>

<sup>51</sup> For a discussion of the importance of building rapport in order to collect reliable information, see, e.g. UK Ministry of Justice and National Police Chiefs' Council, *Achieving Best Evidence in Criminal Proceedings*, January 2022, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1164429/achieving-best-evidence-criminal-proceedings-2023.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1164429/achieving-best-evidence-criminal-proceedings-2023.pdf) and College of Policing, *Investigative Interviewing*, available at: <https://www.college.police.uk/app/investigation/investigative-interviewing/investigative-interviewing>

<sup>52</sup> See, e.g. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi) available at: [www.refworld.org/docid/51af82794.html](http://www.refworld.org/docid/51af82794.html); UNHCR, *Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement*, 08 June 2022, para. 14, available at: <https://www.unhcr.org/62a317d34>

<sup>53</sup> *Case of Ilias and Ahmed v. Hungary*, Council of Europe: ECHR (Grand Chamber), Application no. 47287/15, available at: <https://www.refworld.org/cases,ECHR,5dd6b4774.html>, para. 134, 139-141 (“*in all cases of removal of an asylum seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU Member State or not or whether it is a State Party to the Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against refoulement.*”)

<sup>54</sup> See, e.g. UK Home Office, *Illegal Migration Bill: overarching factsheet*, updated July 2023, available at: <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-overarching-factsheet>: “If, exceptionally, there is a real risk that someone would suffer serious and irreversible harm if they were sent to Rwanda they would not be removed until it was safe to do so.”

information to support an informed individualized assessment of the real risk of refoulement.

UNHCR

6 October 2023