UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR OBSERVATIONS ON THE BORDER SECURITY, ASYLUM AND IMMIGRATION BILL

05 MARCH 2025

EXECUTIVE SUMMARY

1. The United Nations High Commissioner for Refugees (UNHCR) Representation for the United Kingdom would like to provide observations on the Border Security, Asylum and Immigration Bill, Bill 173 2024-25, as introduced to the House of Commons on 30 January 2025.[1]

2. UNHCR offers these Observations 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 solutions to the problem of refugees,[2] and pursuant to its duty to supervise the application of the 1951 Convention relating the Status of Refugees and its 1967 Protocol (together, "the Refugee Convention").[3] 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.[4] UNHCR thus has a direct interest in national legislation affecting stateless persons and in the implementation of the 1954 Convention relating to the Status of Stateless Persons ("1954 Convention") and the 1961 Convention on the Reduction of Statelessness ("1961 Convention").[5] These Observations focus on the matters of greatest relevance to UNHCR's mandate, and do not seek to address every aspect of the Bill.

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[1] The Bill is available at https://bills.parliament.uk/bills/3929

[2] 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. 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)

[3] 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*.

[4] UNGA, Resolution A/RES/50/152 of 9 February 1996, 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; UNGA, Resolution A/RES/62/124 of 24 January 2008; and UNGA, Resolution A/RES/63/148 of 27 January 2009. 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.

[5] UNGA, *Convention relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117; *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175; 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.

Repeal of existing legislation

3. UNHCR welcomes that the Bill, once enacted, would repeal the Safety of Rwanda Act 2024 and most provisions of the Illegal Migration Act 2023 (IMA). As UNHCR has previously observed, the Safety of Rwanda Act and the IMA are inconsistent with the UK's international obligations under the Refugee Contention and the Statelessness Conventions. In particular, UNHCR welcomes that the Bill will repeal the 'duty to remove' and bar on access to asylum in the UK by certain individuals who have arrived irregularly set out in the IMA.

4. UNHCR notes however that certain provisions of concern will not be repealed. These include Section 12 (the period of detention) and Section 59 (Inadmissibility of asylum and human rights claims by people of certain nationalities).

5. **Section 12** of the IMA enables continued detention even when the purpose for which detention has been authorised cannot be carried out for an unspecified "time being" and even after the Home Secretary has formed the opinion that it cannot be carried out within a "reasonable period of time". Detention of asylum-seekers and refugees should be a measure of last resort and both necessary and proportionate in each individual case. The retention of Section 12 leaves in place a risk of arbitrary detention of asylum-seekers, refugees and stateless persons and as such UNHCR encourages that this provision be repealed.

6. **Section 59** of the IMA, if commenced, would mean that nationals on a list of countries deemed 'safe' by the Home Secretary could be removed to those countries without consideration of their asylum claim. Previously this list was limited to EU countries, however section 59 permitted the addition of non-EU countries. If section 59 were commenced, this list would include nationals of Albania, Georgia and India, as well as all EEA states and Switzerland. UNHCR acknowledges that upholding the integrity of the asylum system may call for measures to process claims that are clearly abusive or manifestly unfounded through accelerated procedures. However, while designation of safe countries may be used as a procedural tool to prioritise or accelerate the examination of applications in carefully circumscribed situations, it does not displace the requirement for an individualised assessment of an asylum claim. Section 59 therefore gives rise to a risk of *refoulement,* and UNHCR encourages that it be repealed.

7. UNHCR welcomes that the Bill proposes to repeal provisions of the IMA that rendered individuals entering the UK through 'illegal and irregular' means ineligible for British citizenship. This is a positive step that recognises the importance of naturalisation, both for the individuals concerned and for social cohesion. However recent changes to the Home Office *Nationality: good character requirement* guidance place similar constraints on access to citizenship by refugees and stateless people. UNHCR encourages that the guidance be amended to ensure that it is applied in a manner consistent with the UK's international obligations.

New offences in relation to the preparatory acts to commit an immigration offence

8. **Clauses 13-17** would create new criminal offences of supplying or handling items to be used in connection with illegal immigration, and of collecting information to be used for arranging an unauthorised journey to the UK.

9. UNHCR recognises the government's efforts to prevent and combat transnational organised crime and ultimately reduce exploitation and abuse of migrants and refugees. However, UNHCR is concerned that the proposed new offences may not contain

sufficient safeguards to prevent the prosecution of people other than those the clauses are designed to target.

10. UNHCR encourages that amendments be introduced to ensure that the offences at Clauses 13-17, which by their nature require compliance with the Smuggling Protocol and the UN Transnational Organized Crime Convention, can only be used to prosecute those who seek to obtain a financial or material gain from people-smuggling.

New offence of endangering another person at sea

11. **Clause 18** would create a new offence of endangering another person during a sea crossing from France, Belgium, or the Netherlands to the UK. Endangering is defined as doing an act that causes or creates a risk of death, or serious physical or psychological injury, to another person. This offence can only be committed by somebody who commits the existing offence of knowingly entering the UK without permission. Unlike the new offences in clauses 13-17, it is drafted with the express intention of capturing acts committed by those undertaking dangerous journeys (including refugees moving in search of protection).

12. UNHCR is concerned that without amendments to clearly define the scope of the "endangering" offence, the breadth of the provision as currently drafted may have the consequence of criminalising acts carried out by passengers aboard unsafe boats, potentially in fraught and life-threatening circumstances, without sufficient clarity as to the nature of the acts that would give rise to criminal responsibility, including the level of risk required. Further, unlike the other new offences in this bill, it does not contain any defences. UNHCR encourages that amendments be introduced to ensure that the scope is clearly defined.

DETAILED OBSERVATIONS

Previous legislation repealed by the Bill

Repeal of the Safety of Rwanda (Asylum and Immigration) Act 2024

13. UNHCR welcomes the repeal of the Safety of Rwanda (Asylum and Immigration) Act 2024. The Act was intended to enable removals of asylum-seekers to Rwanda under the UK-Rwanda Partnership, following the 2023 judgment of the UK's Supreme Court that such removals would be unlawful.

14. As previously outlined by UNHCR, the UK-Rwanda arrangement failed to meet the required standards relating to the legality and appropriateness of transfer of asylum-seekers and was incompatible with well-established and binding norms of international refugee law.[6]

Repeal of certain provisions of the Illegal Migration Act 2023

15. UNHCR further welcomes the Bill's repeal of most provisions of the IMA. While much of this Act has not been commenced, UNHCR considers that the Act was inconsistent with the UK's obligations under the Refugee Convention, the 1954 Convention, the 1961 Convention and international human rights law.

16. In particular, UNHCR welcomes the repeal of Sections 2-10 of the IMA, which include the "Duty to make arrangements for removal" of anyone meeting specified conditions relating to their mode of arrival in the UK and the requirement at Section 5 to disregard any asylum or human rights claim. It also welcomes the repeal of the bar on access to citizenship for such persons set out in sections 31-35.[7]

17. The repeal of these provisions of the IMA follows the Home Secretary's decision to restart asylum case processing for such persons, facilitated by the Illegal Migration Act 2023 (Amendment) Regulations 2024.[8] UNHCR welcomes the Government's commitment to ensuring that asylum-seekers can make a claim for asylum in the UK and have that claim determined in an efficient and fair manner.

[6]UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement: an update, January 2024, see https://www.unhcr.org/uk/media/unhcr-analysis-legality-and-appropriateness-transfer-asylum-seekers-under-uk-rwanda-1; UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement, June 2022, see https://www.unhcr.org/uk/media/unhcr-analysis-legality-and-appropriateness-transfer-asylum-seekers-under-uk-rwanda; UK-Rwanda asylum law: UN leaders warn of harmful consequences, https://www.unhcr.org/news/press-releases/uk-rwanda-asylum-law-un-leaders-warn-harmful-consequences (accessed 27 February 2025).
[7] Illegal Migration Act 2023.
[8] The Illegal Migration Act 2023 (Amendment) Regulations 2024.

Retention of certain provisions of the Illegal Migration Act 2023

18. UNHCR notes that a number of provisions of the IMA will nonetheless be retained. These are: Section 12 (period for which persons may be detained); Section 29 (modern slavery, amendment of Section 63 of the Nationality and Borders Act 2022); Section 52 (Judges of First-tier Tribunal and Upper Tribunal); Section 59 (inadmissibility of certain asylum and human rights claims); Section 60 (cap on number of entrants using safe and legal routes); Section 62 (credibility of claimant: concealment of information, etc.); and Sections 63 to 65 and 67 to 69 (relevant final provisions of the IMA).

19. In relation to its supervisory role in relation to the Refugee Convention, and under its mandate for preventing and reducing statelessness, UNHCR is specifically concerned about the retention of Section 12 and Section 59 as detailed below.

20. Further, while the Bill proposes to repeal sections 31-35 of the IMA, recent updates to the *Nationality: good character requirement* guidance would similarly constrain access to citizenship for refugees and stateless persons who have arrived irregularly in the UK on the basis of their having made a 'dangerous journey'.[9] While the updated policy guidance is not within the scope of the proposed Bill, comments are provided below in view of its relevance to the revised statutory scheme.

Retention of Section 12 Illegal Migration Act 2023: period of detention

> **UNHCR is concerned that the retention of Section 12 may result in refugees and stateless people being detained for periods beyond what is necessary, proportionate, and consistent with binding principles of international refugee and human rights law. UNHCR encourages that this section be repealed.**

21. The Bill retains the power of the Home Secretary, established by Section 12 of the IMA, to detain a person pending removal for "such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the examination or removal to be carried out […] regardless of whether there is anything that for the time being prevents the examination or removal from being carried out, the decision from being made, or the directions from being given."

22. The effect of Section 12, which is already in force, is to give the Home Secretary power to decide what is a reasonable length of detention and continue to detain someone even when the purpose for which detention has been authorized (pending examination or removal) cannot be carried out for an unspecified "time being". In so doing, Section 12 limits the long-standing ability of the courts to determine reasonable length of detention with reference to the Hardial Singh principles.

23. UNHCR provided comments on Section 12 (what was then Clause 11) of the IMA in its legal observations prior to its enactment (see pages 28-33).[10] These are set out below:

> *"120. The effect of these provisions is to allow detention to be maintained even when the purpose for which detention has been authorized cannot be carried out for an unspecified "time being" and even after the Secretary of State has formed the opinion that it cannot be carried out within a "reasonable period of time". Detention for purposes that cannot be carried out is arguably not only unnecessary and disproportionate but*

[9] Home Office, *Nationality: good character requirement,* Version 6.0, 11 February 2025
[10] UNHCR Legal Observations on the Illegal Migration Bill, 02 May 2023 (Updated).

> *even arbitrary. More narrowly, creating a power to detain even when it is not possible for the Secretary of State to carry out the function for which detention is authorized, and for a further period to allow her to make "arrangements" for release would permit violations of the principle that administrative detention must not be prolonged due to inefficient processing modalities or resource constraints*.[11]
>
> *121. Detention for the purpose of making arrangement for release, moreover, is arguably not permissible under Article 5 ECHR, which sets out an exhaustive list of the "cases" in which a person can be deprived of their liberty. These include:*
>
> *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*[12]
>
> *122. The references throughout these clauses to the "opinion" of the Secretary of State, moreover, is specifically intended to reduce judicial scrutiny of the length of detention. There is a considerable body of domestic law that empowers courts to assess when the length of detention has made it unlawful, predominantly under common law principles of reasonableness but also in terms of proportionality under Article 5 ECHR.*[13] *The Bill expressly seeks to overturn this body of law, and introduce the principle that "it is for the Secretary of State, rather than the Courts, to determine what is a reasonable period to detain an individual" for a particular purpose."*

24. UNHCR's comments on what became Section 12 of the IMA were largely concerned with the impact of such provisions on persons who fell under the duty to remove – that is, persons who had not had their asylum claim considered in the UK and were detained pending removal to a third country. The proposed repeal of the duty to remove is welcomed, and UNHCR notes that, as a result, the number of people to whom Section 12 is likely to apply has been reduced. However, UNHCR remains concerned that refugees and stateless people may still be detained for periods beyond what is necessary, proportionate, and consistent with binding principles of international refugee and human rights law. Persons impacted by this section include people who make an asylum claim while in detention and also people whose asylum claim has been deemed inadmissible and are in detention.

25. In view of the hardship which detention entails, and consistent with international refugee and human rights law and standards, detention should be an exceptional measure of last resort, and only used when prescribed by law, and when necessary and proportionate for a legitimate purpose as an exceptional measure of last resort, for the shortest possible period of time.[14] Where detention is lawful, alternatives to detention should be sought and applied in lieu of detention.[15]

26. Noting that the Bill would repeal all other detention provisions of the IMA, UNHCR encourages that section 12 also be repealed.

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[11] *VL v Ministerio Fiscal*, Case of C-36/20, European Union: Court of Justice of the European Union, 25 June 2020, paras. 105-107 (VL v Spain).
[12] European Convention on Human Rights.
[13] See e.g. A, *R (On the Application Of) v The Secretary of State for the Home Department* [2007] EWCA Civ 804 (30 July 2007).
[14] UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012); UNHCR, Stateless Persons in Detention: A Tool for their Identification and Enhanced Protection (2010).
[15] See UNHCR, Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention, 2012, Guideline 4.3; UNHCR, Unlocking rights: towards ending immigration detention for asylum-seekers and refugees, September 2024.

Section 59 - Inadmissibility of asylum and human rights claims by people of certain nationalities

UNHCR considers that Section 59 creates a risk of *refoulement* of nationals from countries listed as being 'safe', whose claim for asylum will be deemed inadmissible without an assessment of their individual circumstances. UNHCR encourages that this section be repealed in its entirety.

27. Section 59 of the IMA, if brought into force, would mean that asylum-seekers who are nationals of 'safe countries' listed in Section 80AA(1) of the Nationality, Immigration and Asylum Act 2002 (NIAA) can be removed to their own country without having had their asylum claim considered.

28. UNHCR notes that, currently, Section 80A of the Nationality, Immigration and Asylum Act 2002 (NIAA) requires the Home Secretary to declare asylum claims by EU nationals inadmissible and prohibits their consideration under the immigration rules unless "there are exceptional circumstances as a result of which the Home Secretary considers that the claim ought to be considered."[16] The presumption that EU States will refrain from persecuting their own nationals was adopted by EU Member States via the *Protocol on asylum for nationals of Member States* ("The Spanish Protocol").[17]

29. When considering the issue of asylum claims from nationals of EU member states, UK courts were content that such claims could be deemed inadmissible, subject to an exception provision (requiring an individualized consideration of a claim notwithstanding the presumption of non-persecution by EU member states in accordance with the Spanish Protocol) which operated only at a very high threshold. In interpreting the meaning of the Spanish Protocol, the Court of Appeal in *ZV (Lithuania)* stated that "compelling reasons" capable of triggering this exception would be limited to circumstances where: the EU member state was derogating from obligations which they had undertaken as a signatory to the European Convention on Human Rights; EU-internal processes in relation to a potential breach, serious enough to lead to the suspension of a Member State, had been initiated under Article 7(1) of the Treaty on European Union; or in similar circumstances, short of a formal process having been initiated, but where there was "plainly cogent evidence (typically of some systemic default)".[18]

30. As EU Member States, the presumption of safety in part reflected their inclusion in a shared system of refugee and human rights law.[19]

31. Section 59 of the IMA, which was not fully brought into force, amended Section 80A of the NIAA so as to apply not just to EU Member States but to any State listed in a new Section 80AA. The list included not just EU Member States, but all EEA States, Switzerland, and Albania. [Section 59(3)]. The extension of the application of inadmissibility to nationals of countries on this new list does not currently operate, as the relevant part of Section 59 of the IMA was not commenced.

[16] Section 80A, Nationality, Immigration and Asylum Act 2002.
[17] "Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters." Sole Article, EU Protocol on asylum for nationals of Member States, 2004.
[18] *ZV (Lithuania) v Secretary of State for the Home Department* [2021] EWCA Civ 1196.
[19] Ibid, para. 34 (referring to "the level of protection of fundamental rights and freedoms to be expected in an EU member state") and para. 39 ("the application of a rebuttable presumption that a particular country of origin is safe; and the presumption is plainly a reasonable one in the case of a member state of the EU").

32. The part of Section 59 of the IMA which has been brought into force (on 28 September 2023) gives the Home Secretary the power to make Regulations adding new states to the list in Section 80AA of the NIAA (or removing them from the list). The Home Secretary can now, simply by making Regulations, add further countries to the list at Section 80AA. To do so, Section 59 of the IMA requires that she[20] be satisfied that—

> *(a) there is in general in that State no serious risk of persecution of nationals of that State, and*
>
> *(b) removal to that State of nationals of that State will not in general contravene the United Kingdom's obligations under the Human Rights Convention.*

33. In making such an assessment, the Home Secretary:

> *(a) must have regard to all the circumstances of the State (including its laws and how they are applied), and*
>
> *(b) must have regard to information from any appropriate source (including member States and international organisations).*

34. The power to add states to the list at Section 80AA of the NIAA granted by Section 59 of the IMA was exercised on 16th April 2024, by the then Home Secretary. Through *The Nationality, Immigration and Asylum Act 2002 (Amendment of List of Safe States) Regulations 2024*, India and Georgia were added to the list of safe countries.

35. However, the rest of Section 59 of the IMA has not yet been brought into force. Therefore, only the EU member states on the list are currently treated as safe countries of origin for the purposes of declaring an asylum claim inadmissible. The additional countries would also be, if, at any time, the rest of Section 59 were to be commenced.

36. Challenge to such an inadmissibility decision would only be available through Judicial Review and an injunction would be required to suspend removal to the country in which the person claimed they faced persecution.

37. The retention, in this Bill, of Section 59 of the IMA suggests that the intention is to bring this section fully into force.

38. As observed[21] in relation to the inadmissibility rules for EU nationals inserted into the NIAA 2002 by the Nationality and Borders Act 2022 (NABA), UNHCR acknowledges the need for States to uphold the integrity of the asylum system by ensuring that claims that are clearly abusive or manifestly unfounded can be processed in accelerated procedures.[22]

39. However, while UNHCR does not oppose designating a country as a "safe country of origin" *per se*, it may not be safe for everyone. The designation should therefore only be used as a procedural tool to prioritise or accelerate the examination of applications in

[20] These Observations refer to the Home Secretary as "she" or "her" in accordance with the UK legal convention which refers to the gender of the current Home Secretary at the time of writing. No reference is intended to any Home Secretary as an individual.
[21] UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022.
[22] 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); UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union, 25 July 2018.

carefully circumscribed situations, not to displace the requirement for an individualised assessment of an asylum claim.[23]

40. Were the list in Section 80A NIAA 2002, originally intended for EU countries only, to be extended well beyond those parameters by the coming into force of Section 59 of the IMA 2023, the "exceptional circumstances" provision at 80A(4) NIAA 2002[24] would not be an adequate safeguard to protect individuals from *refoulement* in relation to those new countries. This was noted by UNHCR at pages 17-19 of its legal observations on Section 59 of the IMA (what was then Clause 57 of the Illegal Migration Bill) prior to its enactment[25] The "exceptional circumstances" provision does not allow for the possibility of an individualized assessment of a person's circumstances prior to the decision to deem the claim inadmissible.[26] Therefore, a person would be at risk of being denied access to the UK asylum process even if there were compelling evidence showing that they as an individual were at risk of persecution.

41. Exceptional circumstances, in this context, were interpreted in the case of *ZV (Lithuania)* to mean circumstances where there was "plainly cogent evidence (typically of some systemic default)"[27] in the context of EU member states. Absent the formal procedures which operate in the EU when default occurs, an asylum-seeker from a non-EU country is liable to face an unreasonable burden to prove matters relating to the functioning of their own country. Furthermore, whereas in *ZV (Lithuania)*, the Court of Appeal reasoned that "[o]n ordinary public law principles the SSHD will be expected to take into account information of which she is aware which casts doubt on the sufficiency of protection in an EU state before making a decision whether to admit an asylum claim by a national of that country", [28] the SSHD may have significantly less information about the functioning of non-EU States.

42. UNHCR observes that Section 59 of the IMA 2023 goes beyond what UNHCR considers to be an appropriate way of dealing with manifestly unfounded claims.

43. UNHCR notes that the Home Secretary already operates an abbreviated procedure for determining asylum claims which are considered to be "manifestly unfounded". Section 94 of the Nationality, Immigration and Asylum Act 2002[29] empowers her to do so. She also has the power, by order, to add and remove from the list at Section 94. By contrast to Section 80A, every asylum or human rights claim from a person entitled to reside in a Section 94 country must still be considered on its individual merits.[30] This is an important safeguard against *refoulement*.

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23 "In UNHCR's view, despite the designation of a country as a "safe country of origin" in general, it may be that the country is not safe in a particular case because of a certain profile. It is therefore important for the concept to be applied on a **case-by-case basis**, ensuring an individual assessment that takes into account the specific circumstances of the case. In this regard, the determining authority must ensure that the applicant has an effective **opportunity to rebut any presumption of safety**, including providing him or her with all the necessary information to do so. The procedure must therefore be an **in-merits** procedure, which ensures **all procedural safeguards**, including a personal interview, legal assistance and representation, and the right to an effective remedy." UNHCR Comments on the European Commission's Proposal for an Asylum Procedure Regulation, COM (2016) 467, April 2019, p. 43.

[24] "Subsection (1) does not apply if there are exceptional circumstances as a result of which the Secretary of State considers that the claim ought to be considered." S.80A Nationality, Immigration and Asylum Act 2002.

[25] UNHCR Legal Observations on the Illegal Migration Bill, 02 May 2023 (Updated).

[26] Ibid.

[27] *ZV (Lithuania) v Secretary of State for the Home Department*, [2021] EWCA Civ 1196, para. 35.

[28] ibid, para. 40.

[29] Section 94 of the Nationality, Immigration and Asylum Act 2002.

[30] Section 94 creates a presumption that there will be no right of appeal but does not affect consideration of the claim (Section 94(3A)). See also Home Office, Certification of protection and human rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims), Version 5.0, p. 7.

44. Furthermore, if a State decides to establish a list of safe countries of origin, the procedure for adding or removing countries from any such list should be transparent, as well as responsive to changing circumstances in countries of origin.[31]

Clauses 13-17: Offences relating to articles or information for use in immigration crime

UNHCR notes that a key aim of the legislation is to facilitate the prevention, investigation and prosecution of organised immigration crime and to provide additional deterrents and penalties for the criminals involved. However, Clauses 13-17 may contain insufficient safeguards to prevent the prosecution of people other than those they are designed to target. UNHCR encourages that amendments be introduced to ensure that the offences at Clauses 13-17, which by their nature require compliance with the Smuggling Protocol and the UN Transnational Organized Crime Convention, can only be used to prosecute those who seek to obtain a financial or material gain from people-smuggling.

45. The Bill, at Clauses 13-17, introduces a series of new offences which relate to making preparations for an unauthorised and dangerous journey to the UK. These include "Supplying articles for use in immigration crime" (Clause 13) and "Handling articles for use in immigration crime" (Clause 14), as well as "Collecting information for use in immigration crime" (Clause 16). "Articles" are defined in Clause 15 as "any thing or substance" other than a narrow list of items which are limited to things such as food, drink, medicine, clothing, bedding or temporary shelters, or items designed to preserve the life of a person in distress at sea. "Information" is defined in Clause 16 as "information of a kind likely to be useful to a person organising or preparing for a relevant journey or part of such a journey".

46. The Home Secretary, when introducing the Bill, stated that it would "*provide law enforcement with the powers they need to protect the integrity of the UK border, including earlier intervention to detect, prevent and prosecute people smugglers, thereby disrupting their ability to carry out small boat crossings.*"[32]

47. The Impact Assessment states the that the policy objective of these Clauses is to *"create new, stronger powers for law enforcement agencies to pursue, disrupt and deter OIC [Organised Immigration Crime]."*[33]

48. UNHCR notes that the Government is clearly alert to the need to provide safeguards to ensure that the new offences do not result in the prosecution of persons who they were not intended to target. For example, the Clauses 13, 14 and 16 contain a safeguard to protection humanitarian workers from prosecution. Each offence contains a defence where:

> *the person was acting on behalf of an organisation which—*
>
> *(i) aims to assist asylum-seekers, and*
> *(ii) does not charge for its services*[34]

49. Furthermore, the "Information" offence at Clause 16 contains a defence where the

[31] UNHCR Global Consultations on International Protection, EC/GC/01/12, 31 May 2001, para. 39.
[32] Ministerial Statement on the Border Security, Asylum and Immigration Bill, 30 January 2025.
[33] Home Office Impact Assessment: Border Security, Asylum and Immigration Bill, para. 40.
[34] **Clauses 13, 14 and 16**, Border Security, Asylum and Immigration Bill, Bill 173 2024-25.

information was gathered for the purposes of organising a non-prohibited journey; carrying out work as a journalist; academic research; carrying out, or preparing for the carrying out of, a rescue of a person from danger or serious harm; or providing, or preparing for the provision of, medical care or emergency shelter or supplies.

50. UNHCR welcomes the inclusion of such defences to mitigate the potential for innocent parties to be caught by the provisions of the offences, particularly given their extra-territorial effect.

51. UNHCR notes however that that there is no corresponding defence for a person who is themselves being smuggled to the UK who assists a fellow migrant along the way – including family members, or compatriots with whom they have formed a bond during their journey.

52. The prevention, investigation and prosecution of the crime of people smuggling, should not affect the rights, obligations and responsibility of States and individuals under, inter alia, the 1951 Convention as provided for in Article 19 of the Smuggling Protocol[35], to which the UK is a signatory.[36] Article 5 provides that "*Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol*"[37] (emphasis added). This includes asylum-seekers and refugees who resort to the services of smugglers to access safety and seek international protection.[38]. Article 6 of the Protocol stipulates that, in order to be the subject of criminal conduct, that conduct should be "*committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit*". [39]

53. UNHCR recalls also that the *Travaux préparatoires* of the UN Transnational Organized Crime Convention include an important Interpretative Note in relation to the scope of the offences established under the Smuggling Protocol:

> *[T]he reference to 'a financial or other material benefit' as an element of the definition [..] [[of migrant smuggling] was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.*[40]

54. UNHCR recommends that States do not introduce criminal offences related to smuggling or facilitation of irregular entry, transit or stay that would have a wider scope than those contained in the Smuggling Protocol or the UN Transnational Organized Crime Convention, and which might have the unintended effect of penalizing persons exercising the fundamental right to seek and enjoy asylum.[41]

55. UNHCR highlights the importance of the saving clause (Article 19) in the UN Smuggling Protocol, designed to safeguard the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law, international

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[35] United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (The Smuggling Protocol), 2000.
[36] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18.
[37] Article 5, Smuggling Protocol.
[38] UNHCR Comments on the European Commission Proposal for a Facilitation Directive, para. 7.
[39] Article 6, Smuggling Protocol.
[40] UNODC, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations, 2006) 469.
[41] Para. 9; UNHCR Comments on the European Commission Proposal for a Facilitation Directive.

human rights law, refugee law and the law of the sea. In order that those who are being smuggled (rather than those who are smuggling) are not prosecuted in variance with that saving clause, UNHCR recommends including a similar saving clause in this Bill, perhaps immediately preceding Clause 13.

56. It should also be noted, in relation to Section 14, that smugglers may threaten those who they are smuggling in order to compel them to dispose of items which might incriminate the smugglers themselves:

> *14. (1) A person ("P") commits an offence if, in the circumstances mentioned in subsection (2)—*
> *[…]*
> *(b) P removes or disposes of a relevant article for the benefit of another person, or*
>
> *(c) P assists another person to remove or dispose of a relevant article.*

57. UNHCR encourages the Government to amend the Bill to ensure that the offences at Clauses 13-17, which by their nature require compliance with the Smuggling Protocol and the UN Transnational Organized Crime Convention, can only be used to prosecute those who seek to obtain a financial or material gain from people-smuggling.

Clause 18: Endangering another during sea crossing to the United Kingdom

Unlike the new offences in clauses 13-17, Clause 18 is drafted with the explicit intention of capturing acts committed by those undertaking dangerous journeys. However, UNHCR is concerned that without amendments to clearly define the scope of the "endangering" offence, the breadth of the provision as currently drafted may have the consequence of criminalising acts carried out by passengers aboard unsafe boats, potentially in fraught and life-threatening circumstances, without sufficient clarity as to the nature of the acts that would give rise to criminal responsibility, including the level of risk required. Further, unlike the other new offences in this bill, it does not contain any defences. We encourage that amendments be introduced to ensure that the scope is clearly defined.

58. The new offence of "endangering another" set out in the Bill at Clause 18 carries a maximum sentence of five years (six years for someone who enters the UK in breach of a deportation order). It is committed by anyone entering the UK irregularly who "at any time [during a sea crossing from Belgium, France or Netherlands to the UK], did an act that caused, or created a risk of, the death of, or serious personal injury to, another person". [Clause 18(2)(c)]

59. In the European Convention on Human Rights Memorandum on the Bill, the Government explains the introduction of the new offence by reference to Article 2 ECHR, which incorporates a positive duty on States to protect life.[42] UNHCR shares the UK Government's concern regarding the number of persons resorting to dangerous journeys across the Channel, noting the increased numbers of fatalities over the past 12 months, and welcomes the Government's commitment to preventing loss of life and serious harm at sea.

[42] UK Government, Border Security, Immigration and Asylum Bill, European Convention on Human Rights Memorandum, p. 10.

60. The Clause 18 offence can only be committed by someone who also commits the pre-existing offence of knowingly entering the UK without permission, as defined in subsection (A1), (B1), (D1) or (E1) of Section 24 of the Immigration Act 1971.[43] It therefore clearly targets acts by people undertaking dangerous journeys, including asylum seekers and victims of trafficking.

61. UNHCR has previously conveyed its concerns regarding the provision of the Immigration Act 1971 which underpins the Clause 18 offence.[44] Under Article 31(1) of the 1951 Convention, States must "*not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*[45]

62. UNHCR notes that, whereas there are statutory defences based on Article 31(1) of the Refugee Convention to offences relating to the use of false documentation or information to enter the UK, no such defences exist to the offences at Section 24 IA 1971 relating to illegal entry.

63. With regards to the Clause 18 offence, UNHCR is concerned, firstly, that there is insufficient clarity concerning what may constitute "an act that caused, or created a risk of, the death of, or serious personal injury to, another person" and the nature of the conduct that would fall within its scope. Notably, the conduct need not actually cause serious injury or death; it is sufficient that a risk is created.

64. The Home Secretary, when introducing the Bill, stated that prosecutions would be aimed at *"[t]hose involved in physical aggression, intimidation or coercive behaviour, including preventing offers of rescue while at sea".*[46]

65. However, many other acts might well "cause or create a risk". As currently drafted, the Clause 18 offence does not require that the risk reaches a certain level, nor that the prospect of death or serious injury be reasonably foreseen by the individual concerned. For example, an act which created even a relatively remote risk of death or serious personal injury might make an individual liable to prosecution.

66. This risks infringement of the "principle of legal certainty" inherent in Article 5 ECHR and underscored by the European Court of Human Rights, which has stated that legislation should be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[47] A criminal penalty must also respect Article 7 ECHR, which has been interpreted as requiring that "offences and the relevant penalties must be clearly

[43] A1: A person who knowingly enters the UK in breach of a deportation order; B1: A person who requires leave to enter the UK under the Act, and knowingly enters the United Kingdom without it; D1: A person who requires entry clearance under the immigration rules and enters knowingly arrives in the UK without valid entry clearance; E1: A person who is required under immigration rules not to travel to the UK without an ETA valid for their journey to the UK, and knowingly arrives in the UK without one. See section 24 of the Immigration Act 1971, https://www.legislation.gov.uk/ukpga/1971/77/section/24.

[44] For UNHCR's full observations on that matter, please see here at pages 80-82.

[45] Article 31(1) of the 1951 Convention. See also UNHCR *Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees*.

[46] Ministerial Statement on the Border Security, Asylum and Immigration Bill, 30 January 2025.

[47] European Court of Human Rights, Guide on Article 5 of The Convention: Right to Liberty and Security, 2014.

defined by law."[48]

67. UNHCR is also concerned that it is not clear on the face of the Bill whether a person, without deliberately creating a risk of harm, and without being objectively reckless, might still be convicted of the offence. By way of illustration of the uncertainty involved, the Home Office's Impact Assessment envisages that "*overcrowding of small boats where the vulnerable are placed in the middle and are more susceptible to being trampled*"[49] might lead to prosecution. If it is the case that instructing someone to sit in the middle of the boat would endanger a person's life, for example by making them more susceptible to being trampled, many people may not know this, nor that they could be held criminally responsible for an such act.

Amendments relating to British Citizenship for refugees and stateless persons

UNHCR welcomes that the Bill proposes to repeal Sections 31-35 of the IMA which rendered individuals entering the UK through 'illegal and irregular' means ineligible for British citizenship. This is a positive step that recognises the importance of naturalisation, both for the individuals concerned and for social cohesion. However recent changes to the Home Office *Nationality: good character requirement guidance* place similar constraints on access to citizenship by refugees and stateless people. UNHCR encourages that the guidance be amended to ensure that it is applied in a manner consistent with the UK's international obligations.

68. UNHCR previously set out in its legal observations on the Illegal Migration Bill 2023 that the bar on citizenship as provided for in Sections 31-35 of the Act would constitute a penalty under Article 31 of the Refugee Convention and be in breach of that provision. It further stated that the provisions ran counter to Article 34 of the Refugee Convention and Article 32 of the 1954 Convention on Statelessness which requires States to "as far as possible facilitate the assimilation and naturalization of" refugees and stateless people, respectively.

69. Despite the proposed repeal of these provisions, updates to the *Nationality: good character requirement guidance*[50] issued in February 2025 appear to limit this important pathway for refugees and stateless persons. The guidance directs that applications for citizenship made by persons who have arrived irregularly, having made a dangerous journey should 'normally' be refused. UNHCR notes that the guidance (unlike the IMA) provides for some discretion, suggesting that there will be some circumstances in which refusal will not be appropriate. However, it is not clear from the guidance whether or how this discretion will be exercised in relation to refugees and stateless persons. The link in the illegal and overstaying part of the guidance referring to 'additional considerations for refugees' connects to an unrelated part of the guidance, with no considerations specified.

70. UNHCR is concerned that the denial of citizenship to a refugee or stateless person arising from the application of this presumption may result in breaches of Article 31 of the 1951 Refugee Convention. Indeed, communicating that their applications will 'normally' be refused is likely in itself to deter applications, given the high (non-refundable) fees. Article 31 is central to the object and purpose of the Refugee Convention because it ensures that

[48] "This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account", *Del Rio Prada v Spain*, 42750/09, European Court of Human Rights – Grand Chamber, para. 79.
[49] Home Office Impact Assessment: Border Security, Asylum and Immigration Bill, para. 53.
[50] Home Office, Nationality: good character requirement, Version 6.0, 11 February 2025.

refugees can gain access to international protection and the rights associated with it without being penalized for breaches of immigration and other laws (Article 31(1)):

> *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*

71. Notwithstanding the requirement under Article 2 of the 1951 Convention that refugees conform to the laws and regulations of the country in which they find themselves, Article 31(1) of the 1951 Convention acknowledges that, in seeking asylum from persecution, refugees are often compelled to arrive, enter or stay in a territory without authorization or documents, or with documentation which is insufficient, false or obtained by fraudulent means, or by using clandestine modes of entry.

72. UNHCR recognises that it is for states to determine who is suitable for citizenship and notes that UK legislation requires that citizenship through naturalisation be extended only to persons of good character. However, UNHCR is concerned that the policy allows for the mode of entry to be an indicator of character and raises a presumption that persons who have arrived irregularly having taken a dangerous journey should not be naturalised on this basis. While the guidance provides for a limited form of discretion, acknowledging that there will be some circumstances in which refusal will not be appropriate, no further considerations are set out that would ensure that the circumstances of a person's arrival are fully examined, *inter alia* to ensure that those falling within the scope of Article 31 are not penalised through a denial of citizenship.

73. Further, Article 34 of the Refugee Convention and similarly, Article 32 of the 1954 Convention relating to the Status of Stateless Persons, oblige states to facilitate the assimilation and naturalization of refugees and stateless persons "as far as possible". The conferral of citizenship in a country of refuge is one of the possibilities for putting an end to an individual's refugee or stateless character. The facilitation of naturalisation also has positive impacts for the host community, contributing to economic, social and cultural integration and promoting social cohesion. Measures limiting access to citizenship run counter to these objectives.

74. Failing to provide further direction in the guidance may not only impact the decision-making process, but may mean that persons to whom the UK would normally consider a grant of citizenship will simply not apply, assuming that because they crossed by small boat they are no longer eligible. This would have a detrimental impact on the ability of those individuals to properly integrate but also on the broader government objectives of social inclusion and cohesion.

75. UNHCR therefore recommends that the guidance be revisited in line with the observations set out above to ensure that it is applied in a manner consistent with the UK's international obligations and in view of the wider public policy considerations.