

UNHCR LEGAL OBSERVATIONS ON THE ILLEGAL MIGRATION BILL

02 MAY 2023 (UPDATED)

EXECUTIVE SUMMARY

1. The United Nations High Commissioner for Refugees (UNHCR) Representation for the United Kingdom would like to provide updated observations on the Illegal Migration Bill, HL Bill 133, as brought from the House of Commons on 27 April 2023. This is the third version of UNHCR's Observations on the Bill. The first was published on 22 March 2023, in response to the draft of the Bill as introduced in Parliament on 07 March 2023 (Bill 262 2022-23), while the second, published on 11 April 2023, reflected amendments made in committee on 28 March 2023 (Bill 284 2022-23).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 on 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 and 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

¹ All three versions of the Bill are available at <https://bills.parliament.uk/bills/3429/publications>

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, 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)

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*, available at: <https://www.unhcr.org/3b66c2aa10>

⁴ 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>

⁵ 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>



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3. These Observations focus on the matters of greatest concern to UNHCR. Because the Bill is making its way through Parliament on an accelerated schedule, it has not been possible to comment on every aspect of the Bill that will affect the rights of refugees, asylum-seekers, stateless people or others in need of international protection. Lack of comment on any particular provision should therefore not be taken as endorsement of it.
4. The Bill, if enacted, would breach the UK's obligations under the Refugee Convention, the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention for the Reduction of Statelessness and international human rights law and would significantly undermine the international refugee protection system. Some of the amendments introduced during the committee stage are welcome; these include, in particular, the removal of provisions that would have penalized individuals – including children and vulnerable adults – not for their own but for their relatives' method of entry to the UK. UNHCR also welcomes amendments that will encourage greater clarity to the discussion of existing and potential future "safe and legal" routes to accessing protection in the UK. Nonetheless, the Bill's core provisions remain unchanged.
5. UNHCR shares the UK Government's concern regarding the number of asylum-seekers resorting to dangerous journeys across the Channel. This Bill, however, fails to take into account or address the central drivers of such journeys, including a lack of protection and solutions for refugees in countries neighbouring those in crisis. Moreover, it limits access to asylum for a far broader category of those in need of protection, including the many who apply for asylum after arriving by air or through other safe routes. Measures to combat human trafficking, exploitation and people smuggling must not violate the rights of refugees and asylum-seekers or result in protection being denied to those who need it.
6. This Bill would bar anyone who arrives in the UK irregularly from claiming asylum, if they have passed through a country where they did not face persecution, regardless of whether they will be admitted to a third country and guaranteed effective access to international protection there. In a significant extension of the UK's current inadmissibility rules, the bar would apply regardless of whether a person could have sought protection in another country prior to seeking it in the UK.
7. The bar is triggered by all forms of irregular entry or unauthorized arrival, including arriving at a port without prior permission (a visa or an electronic travel authorization) or arriving with permission (such as a tourist or student visa) but being found to have obtained it by deception because the person intended to seek asylum. It also covers those who enter clandestinely, as well as those travelling by boat.
8. This Bill is inconsistent with the UK's obligations under the Refugee Convention as it effectively extinguishes the right of refugees to be recognized and protected in the UK, for all but a few. The reality is that for most asylum-seekers there are no safe and legal routes to enter the UK. There is no 'asylum' visa or 'humanitarian' visa under UK law that a person can apply for. Nothing in the Bill proposes the creation of any such 'safe and legal' routes. It would set a cap, but no minimum, on the number of entrants using such routes. UNHCR emphasizes, moreover, that the provision of safe and legal routes to enter the UK cannot replace international obligations to individuals who arrive in the UK or at its borders through other means.
9. The majority of asylum-seekers do not have the option of a direct flight from a country of origin where they are at risk of persecution. Those at risk often lack access to passports and visas, and multiple journeys are often required to find safety. Due to its geography, accessible, direct routes to the UK for refugees are in any event exceptionally rare.
10. By seeking to close its borders to people fleeing persecution, and to require them to seek protection elsewhere, the UK would be retreating from the principles of international cooperation on which the global refugee system is based and acting inconsistently with the object and purpose of the Refugee Convention. Of the 34.4 million refugees and asylum-seekers worldwide, the vast majority - 73% - are already hosted in countries neighbouring



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their countries of origin. To insist that refugees stay in the “first safe country they reach” would impose an even more disproportionate responsibility on those countries, as well as others through which refugees may travel, and threaten the capacity and willingness of those countries to provide protection and long-term solutions. It is when hosting capacity is overwhelmed that onward movement often ensues.

11. Whilst UNHCR recognizes that the UK asylum system is under strain and that there are pressures on accommodation and other services, attempts to relieve this pressure by denying access to asylum are neither effective nor sustainable. Refugee status determination procedures allow governments to decide who is in need of international protection and who is not, ensuring that those who need protection are provided a status that enables them to rebuild their lives and contribute to their host communities, whilst those who do not can be returned home. Under this Bill, no such determination will take place. The majority of those claiming asylum will be left in indefinite limbo whilst the government seeks arrangements with third countries for removal (for which there are currently no viable arrangements in place).⁶ The strain on housing, medical care and schools will increase rather than diminish.
12. Moreover, the Bill does not apply only to those who come to the UK to seek asylum, but to anyone who arrives irregularly and indirectly, as defined in the Bill. This will include people who are stateless. UNHCR is concerned that the Bill will not be in conformity with the UK’s separate and additional obligations under the Statelessness Conventions in respect of people arriving in the UK who may be stateless, whether or not they are also refugees.
13. Those who meet the conditions for the asylum ban, including children and families, will be liable to detention in the UK for as long as the Secretary of State considers reasonable, although the circumstances in which unaccompanied children will be detained will be subject to future regulations (the content of which is not specified). Judicial oversight will be significantly curtailed, and existing statutory limits on the detention of children and pregnant women disappplied. Without time limits on detention and given the limited prospects of removal, there is a real risk that asylum-seekers, refugees and stateless people, including children and vulnerable adults, will be subject to indefinite detention in violation of international law.
14. Under the Bill, the SSHD will have a legal duty to arrange for the removal from the UK of everyone subject to the asylum ban, including both adults and children. Those who arrive as unaccompanied children will not normally be removed before they turn 18, unless it is for the purposes of reunion with a parent or to a designated safe country of origin.
15. Those subject to removal can be sent to any country listed in the Bill as safe “in general” if they travelled from there or if there is “reason to believe” that they will be admitted there. The Secretary of State will not be required to assess whether removal would be safe or reasonable for a particular individual or whether they will be able to claim asylum there. Individuals would have very limited opportunities to present evidence of the risks they would face. The duty placed on the SSHD to make arrangements to remove those subject to the asylum ban thus creates real and foreseeable risks of refoulement.
16. The Refugee Convention does not prohibit responsibility-sharing arrangements between States, subject to specific safeguards to protect the rights of asylum-seekers and refugees and ensure that all States involved are acting in compliance with their responsibilities under international law. However, the Bill requires the removal of asylum-seekers from the UK to third countries without reference to any such safeguards.
17. In addition, the Bill would create a second list of safe countries whose citizens can be returned home without any consideration of their asylum or human rights claim, regardless of whether they are subject to the asylum ban. UNHCR is concerned that the list includes

⁶ As set out in more detail below at paragraphs 64-71, nationals of countries on a list of safe countries of origin can be returned there, but also without consideration of their asylum claims, in the absence of “exceptional circumstances”.



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Albania, despite UK published country guidance and decisions of UK courts which recognize that certain groups of Albanian citizens may be at risk of persecution.

18. Those whom the government cannot remove will be left in indefinite limbo in the UK. They will be ineligible for leave to remain, and without leave to remain they will be prohibited from working or opening a bank account, and from renting private accommodation in England without Home Office permission. They will have limited access to health care and be at risk of destitution. They will also be permanently barred from settling in the UK and being granted citizenship.

19. There are ways to reduce dangerous journeys while still protecting refugees and asylum-seekers from harm and complying with international law. Making the asylum system work, rather than shutting it down, is key to tackling this challenge. Fast, fair and efficient decision making would accelerate the integration of those found to be refugees and facilitate the swift return of those who have no legal basis to stay. The UK should also prioritize a new asylum cooperation agreement with its European neighbours, to replace the Dublin mechanism, from which the UK withdrew when it left the EU. It should also continue to address the root causes of displacement through peacebuilding and humanitarian and development aid.

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The Bill all but extinguishes the right to claim asylum in the UK

20. As summarized in **Clause 1(2)**, the Bill requires the Secretary of State to “make arrangements for the removal of certain persons who enter or arrive in the United Kingdom in breach of immigration control as soon as is reasonably practical”, and provides that while in the UK, those persons will be barred from seeking recognition as refugees or exercising their rights under the Refugee Convention, and have extremely limited access to their rights under the European Convention on Human Rights, the European Convention Against Trafficking in Persons, or domestic statutory and common law human rights protections.⁷ The details of how it does so are set out in the further sections of the Bill and described in more detail below.

21. **Clause 2(1)** sets out the duty to remove, and **Clauses 2(2)-(7)** define those to whom it applies. They are individuals who have:

- (i) arrived at or entered the UK irregularly, as set out in detail in **Clause 2(2)**, discussed immediately below;⁸ for ease of reference, we will refer to this as the “irregular entry or arrival condition”;
- (ii) did not come directly from a country in which their life and liberty were threatened on a Refugee Convention ground [**Clause 2(4)**], as defined at **Clause 2(5)**] (“the coming directly condition”); and
- (iii) do not have leave to enter or remain in the United Kingdom [**Clause 2(6)**], or have leave to remain solely on the basis of being an unaccompanied child (“the irregular status condition”) [**Clause 2(7)**]; and
- (iv) arrived or entered on or after 7 March 2023, the date the Bill was introduced in Parliament [**Clause 2(3)**].

22. **Clause 2(2)** lists the relevant forms of entry or arrival:

⁷ See paragraphs 46-50 and 78-93 below for further detail about how the Bill would curtail these rights.

⁸ See paragraphs 22 and 27-29.



- (a) entry to the UK by a person who is required to hold leave to enter:
 - (i) without leave to enter or
 - (ii) with leave to enter that was obtained by deception by any person; the reference to deception by “any person” makes it possible to extend this condition to children;
- (b) entry in breach of a deportation order;
- (c) arrival without valid entry clearance (where entry clearance is required); the *Explanatory Notes* confirm that this would include entry clearance obtained by deception⁹ and
- (d) arrival without an electronic travel authorisation (where an ETA is required), including an ETA obtained by deception.¹⁰

There is no requirement that this irregular arrival or entry was by an unsafe route.¹¹

23. Anyone subject to the removal duty is banned from claiming asylum by **Clause 4. Clause 4(1)** provides that a person who meets the conditions set out in **Clause 2** must be removed from the UK regardless of whether they make a claim for asylum or humanitarian protection (called a “protection claim” under UK law¹²) or claim that to remove them from the UK would violate their rights under the European Convention on Human Rights (ECHR) (called a “human rights claim” under UK law¹³). For further discussion of the Bill’s removal provisions, see paragraphs 39-63 below.

24. **Clauses 4(2)-(3)** provide that if such a person makes a protection or human rights claim, it must be declared inadmissible and cannot be considered under the immigration rules. There is no right of appeal against an inadmissibility decision [**Clause 4(4)**].

25. Although this ban on claiming asylum is described as one on seeking protection “under the immigration rules”, there is no other way to ask to be recognized as a refugee or access one’s rights under the Refugee Convention in the UK. The entirety of the UK’s system for identifying refugees and granting them access to their rights under international law is set out within Part 11 of the immigration rules.¹⁴ The ban on the claim being considered under the rules is thus a ban on claiming asylum in the UK.¹⁵

26. This ban would in practice exclude the vast majority of people who have been forced to flee their homes to escape conflict and persecution, because they are likely to fall foul of all four of the conditions set out at **Clause 2**. Each condition is addressed in turn below, with the exception of the condition of having entered or arrived on or after 07 March 2023, which is self-explanatory.

27. The vast majority of people in need of international protection who seek it in the UK will fall within the scope of the “irregular entry or arrival condition” because there is “no asylum visa” under UK law. Some discussion of the Bill has proceeded on the assumption that refugees can make an application to come to the UK to seek asylum by approaching UNHCR. This is

⁹ *Illegal Migration Bill: Explanatory Notes*, para. 40, available at: <https://bills.parliament.uk/bills/3429/publications>

¹⁰ *Ibid.*

¹¹ By contrast, see the criteria for being eligible for transfer to Rwanda set out in the Home Office guidance, *Inadmissibility: safe third country cases*, Version 7.0 (28 June 2022), p. 17, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1084315/inadmissibility.pdf

¹² **Clause 3(11)** defines a “protection claim” by reference to Section 82(2) of the Nationality, Immigration and Asylum Act 2002 (the NIAA 2002), which states “(a) a “protection claim” is 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>

¹³ **Clause 3(11)**, applying the definition found at Section 113(1) of the NIAA 2002.

¹⁴ <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

¹⁵ This is set out in *Explanatory Note* (n 9), at para. 49: “Where a protection claim or a human rights claim falling within subsection (5) is made by such a person, it will be declared inadmissible by the Secretary of State and **will not be considered in the UK**”. [emphasis added]



not the case. UNHCR is able to refer a limited number of refugees to the UK for resettlement, but at present there are only three active resettlement schemes. One is for citizens of Afghanistan. In June 2022, the UK Government agreed to receive up to 2,000 refugees under pathway two of the Afghan Citizens Resettlement Scheme (ACRS) by March 2023. The second one is the UK Resettlement Scheme (UKRS). This was launched in 2020 with the aim of creating a global scheme, following the end of the Vulnerable Persons Resettlement Scheme, which between 2015 and 2020 had offered resettlement to refugees fleeing the conflict in Syria. UNHCR has not been provided with a resettlement quota for the UKRS since 2020 and has been requested by the Government not to submit new cases other than in extremely compelling circumstances and on an ad-hoc basis, amounting to a handful per year. There are still refugees whose cases were submitted to the UKRS pre-pandemic who are arriving in the UK at a rate of around 100 per month. The third one is the Mandate Resettlement Programme, which provides a pathway for refugees with exceptionally serious protection needs if they have a relative in the UK who is a British citizen, is settled in the UK, or who has an immigration status that leads to settlement, and is able to maintain and accommodate them. An average of fewer than 25 people a year come to the UK on this route. In addition, no one can apply to UNHCR for resettlement -- they must be identified and referred by UNHCR in accordance with criteria agreed upon with the receiving State. Resettlement is also by definition not available to people who have not yet fled their own country.

28. The Nationality and Borders Act (NABA 2022), moreover, criminalized important pre-existing routes, including safe ones, significantly reducing the opportunities to seek protection in the UK without triggering the irregular entry or arrival condition. Prior to the passage of the NABA 2022, it was possible for a refugee to come to the UK to seek asylum without breaching the immigration rules, as long as they presented themselves at the border and claimed asylum before entering the country. Thousands of people claimed asylum in the UK in this way every year, and many are likely to have done so after having completed a safe journey by air.¹⁶
29. Under the proposed legislation a refugee who arrives at a UK border and immediately claims asylum will still be considered to have breached immigration rules if they require entry clearance (a visa) but do not have it, or have obtained their visa by deception (e.g. arriving on a student or tourist visa and asking for asylum at the port of entry).¹⁷ Because there is no asylum visa, this means that no one who needs a visa can come to the UK to claim asylum without arriving irregularly. Ninety-six per cent of refugees, asylum-seekers and others in need of international protection come from the 108 countries whose nationals require entry clearance to come to the UK and therefore cannot come to the UK to claim asylum without breaching immigration rules.¹⁸ The Electronic Travel Authorisation scheme

¹⁶ The published statistics on asylum claims are only broken down into claims made “at port” or “in country”. Prior to the increase in the numbers of people crossing the Channel and claiming asylum on arrival in Dover, which began in 2018, it is likely that the majority of person recorded as claiming asylum “at port” arrived at an airport. In the five years leading up to 2018, 26,301 people are recorded as claiming asylum “at port”. Not all of them will have made an asylum claim before attempting to enter the UK, but the option to avoid breaching immigration law by doing so will have been available to them.

¹⁷ Section 24(D1)-(E1) of the Immigration 1971 Act, available at:

<https://www.legislation.gov.uk/ukpga/1971/77/section/24>

¹⁸ <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-visa-national-list>;

<https://www.unhcr.org/refugee-statistics/download/?url=1FQ4hJ>

Stateless people also require a visa to come to the UK, and make up at least a further 0.17% (statistics on the number of stateless people granted asylum are approximate and likely to be an underestimate, as some stateless people are initially recorded in Home Office systems according to their country of habitual residence; for example, a stateless Kurd from Syria may be recorded as “Syrian”). In some cases, the requirement to obtain a visa in order to travel to the UK has been introduced specifically in order to prevent applications for asylum, even where those claims were likely to be well-founded. See, e.g. *Explanatory Memorandum to the Statement of Changes in Immigration Rules Presented to Parliament on 11 May 2022* (HC 17), para. 31 (“Considering the increasing levels of asylum claims, a visa regime is being imposed on El Salvador.”), available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074272/Explanatory_memorandum_of_changes_in_immigration_rules_HC17.pdf.

Of the 1,076 asylum claims from El Salvador that had been decided in the preceding five years, 57% had resulted in a grant of international protection. Home Office, *Outcome analysis of asylum applications*, available at: <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets> See also, *EMAP (Gang violence – Convention Reason) El Salvador CG* [2022] UKUT 00335 (IAC), available at: <https://tribunalsdecisions.service.gov.uk/utiac/2022-ukut-00335>.



will eventually¹⁹ place nationals of all other countries in the same position: they will be required to obtain an ETA prior to arrival and will breach immigration laws if they arrive without it (or obtain it by deception), and ETAs cannot be granted for the purpose of claiming asylum.²⁰

30. The vast majority of people in need of international protection will also meet the third condition for being banned from seeking it in the UK (the “coming directly” condition). Almost 90% of people in need of international protection globally come from countries from which it is impossible to come to the UK directly because there are no direct flights.²¹ In addition, even where there are direct flights, these may be infrequent and are often more expensive. It is impossible to board an international flight, moreover, without obtaining travel documents and visas and passing through the border controls of an international airport, all of which may bring an individual to the attention of the authorities or other agents of persecution.
31. The Bill also significantly expands the UK’s current definition of coming directly by providing that a person has not come directly if they “passed through” a country in which they were not at risk of persecution for a Refugee Convention reason. Under the NABA 2022, not coming directly was defined as having “stopped” in another country where a person could “reasonably be expected to have sought protection under the Refugee Convention.”²² Current Home Office guidance, in turn, accepts that a range of individual and systemic factors are relevant to whether it was reasonable for a person to claim asylum in a particular country, such as “the time a claimant spent in a third country”, whether the country had “a functioning asylum system which was accessible to the claimant and has safeguards to prevent wrongful refoulement”, and whether there were “necessary protections in place for claimants with protected characteristics or vulnerabilities”.²³
32. To be barred from claiming asylum under the Bill, by contrast, the only thing that appears to be relevant is whether the person would have been at risk of persecution for a Refugee Convention reason in a country they passed through, however briefly.²⁴ Under **Clause 4**, asylum-seekers would be barred from claiming asylum in the UK, even if they had had no opportunity to claim asylum in the country they passed through, or if they would have been at risk of destitution or other serious harm not amounting to persecution, or even if they faced persecution in that country for reasons falling outside the refugee definition found at Article 1A(2) of the Refugee Convention.
33. Finally, refugees who have travelled to the UK in order to claim asylum will normally be without leave to enter or remain, whether they travel by safe or unsafe routes. In the absence

¹⁹ Although in late 2022, the Government announced that this would be rolled out for all countries from mid-2023 onwards (<https://www.gov.uk/government/publications/new-plan-for-immigration-legal-migration-and-border-control-strategy/new-plan-for-immigration-legal-migration-and-border-control-accessible>), immigration rules introduced on 09 March 2023 suggest this may not happen until 2024. <https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc-1160-9-march-2023>

²⁰ The applicant must be seeking permission to come to the UK either as a visitor, for a maximum of six months, or as a creative worker. Para ETA 1.1(f) of Appendix Electronic Authorisation of the Immigration Rules. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1141160/E028755_09_-_Immigration_Rules_changes_-_HC_1160_Print_Ready_.pdf Although the ETA scheme could in theory be amended so as to make an ETA available for the purpose of claiming asylum, this appears unlikely.

²¹ See <https://www.heathrow.com/travel-guides/route-map>; <https://www.flightsfrom.com/explorer/LGW?mapview>; <https://fly.manchesterairport.co.uk/destinations/>; <https://birmingham.airportdirecttravel.co.uk/>; <https://www.stanstedairport.com/destinations-and-guides/a-z-list-of-destinations/>; <https://www.edinburghairport.com/flights/destinations>; <https://www.glasgowairport.com/destinations/all-destinations/>; <https://www.belfastairport.com/flights/destination-map>

²² Section 37, NABA 2022, available at: <https://www.legislation.gov.uk/ukpga/2022/36/section/37/enacted>

²³ Home Office, *Assessing credibility and refugee status in asylum claims lodged on or after 28 June 2022*, Version 11.0 [sic], p. 69, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1086137/Assessing_credibility_and_refugee_status_post_28_June_2022.pdf

²⁴ This is a significant departure from international practice. See *LH v Bevándorlási és Menekültügyi Hivatal*, European Union: Court of Justice of the European Union, Case C-564/18, para. 51, available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=4073A92D43091E82AED6B6122C524FE2?text=&docid=224585&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8994431>

of an “asylum visa”, many will be forced to arrive without leave, and even those who have arrived – safely and apparently regularly - holding some other status will normally have it cancelled on the grounds that, having in fact intended to claim asylum, they either no longer qualify for the leave they were granted or have tacitly admitted to obtaining it by deception.²⁵

34. Consequently, the Bill would all but extinguish the possibility of coming to the UK to claim asylum. In fact, the Government routinely describes the Bill as barring asylum claims from anyone who has come to the UK irregularly.²⁶ This acknowledges that the Bill will achieve this effect because, in practice, everyone who wishes to come to the UK to seek asylum will meet the other three conditions for being subject to the removal duty.
35. Consideration of asylum claims will largely be limited to those who were already in the country with lawful status when a change in their circumstances or in their country of origin put them at risk of persecution. This is a rejection of the principles of international cooperation on which refugee law is founded, because it expects the rest of the world’s refugees to seek asylum elsewhere. Such an approach would also be inconsistent with the right to seek and enjoy asylum, a basic human right under Article 14(1) of the Universal Declaration of Human Rights²⁷ and supported by the legal framework of the Refugee Convention. UNHCR recalls that, under international law, primary responsibility for identifying and assessing international protection needs and ensuring appropriate reception conditions and procedural standards during asylum procedures, rests with the State in which an asylum applicant arrives and seeks protection. States have a duty to make inquiries as to the need for international protection of persons seeking asylum and to provide them with access to fair and efficient asylum procedures. Transfers to a third country can only take place if asylum-seekers will receive adequate protection there, a requirement that is not found in the Bill.

²⁵ See, e.g. *R v. Secretary of State for the Home Department, Ex parte Bugdaycay; Regina v. Same, Ex parte Nelidow Santis; Regina v. Same, Ex parte Norman*, [1986] 1 All ER 458, [1986] 1 WLR 155, [1986] Imm AR 8, United Kingdom: Court of Appeal (England and Wales), 5 November 1985, available at: https://www.refworld.org/cases.GBR_CA_CIV.3ae6b6230.html and Home Office, *Liability to administrative removal under section 10 (non EEA)*, p. 12 available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/552477/EIG_50_a_dmin_removal_under_section_10_v13.pdf In an audit of UK intake and screening procedures conducted in 2021, UNHCR observed that Immigration Officers generally treated asylum applicants who had entered the UK as visitors or students as likely to have committed “illegal entry by deception” if they had already been at risk of persecution when they arrived. The alternative to “illegal entry by deception” was considered to be a “change of circumstances” after arrival. This practice reflected Home Office training materials, which set out the following example of a student who would not be found to have committed illegal entry by deception in spite of later claiming asylum: “young students entering the UK who are homosexual and their parents from their home country where homosexuality is a crime/punishable etc. find out about their sexuality.” The training on this topic concludes by reiterating that “It is key that the new found fear of persecution arises whilst the claimant is in the UK, as if this was to arise before they entered the UK then there could already be a pre-intention of claiming asylum, and another contention avenue would need to be explored.”

²⁶ See, e.g. the statement of the Secretary of State for the Home Department (SSHD) on 07 March 2023: “Two months ago, the Prime Minister made a promise to the British people that anyone entering this country illegally will be detained and swiftly removed—no half measures. The Illegal Migration Bill will fulfil that promise.” <https://hansard.parliament.uk/commons/2023-03-07/debates/87B621A3-050D-4B27-A655-2E44AAE6481/IllegalMigrationBill>; Explanatory Notes, para. 1 (“*The purpose of the Bill is to create a scheme whereby anyone arriving illegally in the [...] UK will be promptly removed....*”)

²⁷ The right to seek and enjoy asylum is affirmed in Article 14 of the Universal Declaration on Human Rights and various regional legal instruments and is implemented in part by States’ obligations to provide international protection to refugees in accordance with the 1951 Convention and its 1967 Protocol, as well as regional refugee law instruments. See: Article 14 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”. <https://www.un.org/en/about-us/universal-declaration-of-human-rights> Organization of American States, American Declaration on the Rights and Duties of Man, 2 May 1948, Article XXVII, www.unhcr.org/refworld/docid/3ae6b3710.html, referring to the right to seek and receive asylum. Organization of American States, American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, Article 22(7), www.unhcr.org/refworld/docid/3ae6b36510.html, referring to the right to seek and be granted asylum. African Charter on Human and Peoples’ Rights (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 12(3), www.refworld.org/docid/3ae6b3630.html, referring to the right to seek and obtain asylum. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 18, www.refworld.org/docid/3ae6b3b70.html (EU Charter of Fundamental Rights), referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law.

The Bill breaches the UK's obligations towards stateless people under international law

36. Many of the reasons refugees cannot travel regularly or “directly” to the UK apply with equal force to stateless people, who often lack identity documents or documents valid for international travel. They are therefore likely to meet the conditions for being subject to the removal duty. The consequences would lead to breaches of their rights under international human rights laws and under the 1954 Convention, to which the UK is a party, as set out below.

The Bill would lead to violations of the principle of non-refoulement

37. Article 33(1) of the Refugee Convention provides that:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

As the reference to “territories” makes clear, return is prohibited to any territory in which a person would face persecution, not simply to their own country. The principle of non-refoulement also prohibits indirect refoulement, namely sending a person to a country that will, in turn, force them to move onwards to a third country where they would face persecution.

38. Non-refoulement is a principle of customary law, and is incorporated into numerous other international and regional human rights and refugee instruments, including the Convention Against Torture,²⁸ the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War,²⁹ the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa,³⁰ the Cartagena Declaration on Refugees,³¹ and regional human rights conventions in Africa and the Americas.³² It is inherent in the prohibition on inhuman and degrading treatment at Article 3 of the European Convention on Human Rights.³³ As such, it also applies to those who are not refugees, including stateless people who are not also refugees.³⁴

39. The Bill creates real and foreseeable risks of direct and indirect refoulement. At **Clause 2** it requires the SSHD to make arrangements for the removal from the UK of anyone subject to the removal duty, with a few limited exceptions, the most important of which is with regard to unaccompanied children (discussed below at paragraphs 72-73).³⁵

²⁸ Article 3, UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>

²⁹ Article 45, available at: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf

³⁰ Article II (3), available at: <https://www.unhcr.org/uk/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html>

³¹ Available at: <https://www.unhcr.org/uk/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>

³² Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 4th ed., p. 435, p. 249.

³³ See, e.g.: *Soering v the United Kingdom*, Application no. 14038/88, para. 90-91, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57619%22%5D%7D>

³⁴ It is precisely for this reason that the 1954 Convention does not contain a separate “non-refoulement” clause. The Final Act of the Conference that drafted the 1954 Convention contains the following explanation, which was unanimously accepted: “*Being of the opinion that Article 33 of the Convention Relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, [the Conference h]as not found it necessary to include in the Convention Relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention Relating to the Status of Refugees of 1951.*” <https://treaties.un.org/doc/Publication/UNTS/Volume%20360/v360.pdf>, p. 124.

³⁵ The exceptions are set out at **Clause 2(11)**. In addition to unaccompanied children, they are: if the Secretary of State sets out other exceptions in future regulations; where a Minister of the Crown has decided to comply with a direction of the European Court of Human Rights prohibiting removal; and where the Secretary of State considers that there are compelling circumstances which, exceptionally, require a victim of modern slavery who is cooperating with a criminal investigation or prosecution to remain in the United Kingdom.

40. If a person subject to the removal duty makes a protection claim with regard to their country of nationality or a country that issued them a passport or identity document, they will not be removed there [**Clause 5(8)**] (unless they are nationals of defined “safe countries”, as discussed immediately below). Instead, they can be removed to any country listed in the Schedule to the Bill. [**Clause 5(7)** and **Clause 5(9)**].
41. In addition, individuals subject to the removal duty who are nationals of “safe countries” listed at Section 80AA(1) of the NIAA 2002, as amended by **Clause 57(3)**, can also be removed to their own countries or to any country from which they obtained a passport or identity document. [**Clause 5(4)**]. The additional risks of refoulement to them are discussed separately below at paragraphs 64-71.
42. The Schedule of third countries to which those subject to the removal duty may be removed includes:
- (i) Member States of the European Economic Area (European Union Member States plus Iceland, Liechtenstein, and Norway);
 - (ii) Switzerland;
 - (iii) Countries at present listed as safe countries of origin under Section 94 of the NIAA 2002, with the exception of Ukraine and Macedonia; and
 - (iv) Rwanda.
43. Nothing in the Bill makes removal dependent on the receiving country having an effective asylum procedure, or agreeing to admit a person to such a procedure. **Clause 5** sets out only two conditions for removal to a third country under the Bill:
- (i) that a person embarked for the UK from the country, or that there is reason to believe that they will be admitted to it [**Clause 5(3)(c) and (d)**] and
 - (ii) that the country is listed in the Schedule to the Bill. [**Clause 5(7)** and **Clause 5(9)**]
44. The Bill is silent on what would happen if a person is not readmitted to the country from which they embarked and, if they are admitted or readmitted to a third country, on what should happen thereafter. The references in the European Convention in Human Rights Memorandum and the Explanatory Notes to removal to “a safe third country for consideration of any asylum or humanitarian protection claim” or to “the third country where the asylum claim legally must be heard” thus do not reflect the contents of the Bill.³⁶
45. Nor does the Bill require the Secretary of State to consider whether removal would be safe or reasonable for a particular individual.
46. In addition, individuals will have extremely limited opportunities to raise protection claims to prevent their removal to a third country. Currently, a person facing removal from the UK can make a claim to the Secretary of State that their removal would put them at risk of persecution or other serious harm (a “protection claim” under UK law) or that it would violate their human rights (“a human rights claim” under UK law). Typically, a human rights claim asserts that removal would put the person at real risk of death or inhuman and degrading treatment (in violation of Article 2 or 3 or the ECHR), or that it would be a disproportionate interference with their family and private life (in violation of Article 8 ECHR). As noted above, **Clause 4(2)** requires the Secretary of State to treat protection claims from persons subject to the asylum ban as inadmissible and refuse to consider them, and there is no right of appeal against the inadmissibility decision [**Clause 4(4)**]. A human rights claim could be made with regard to a third country removal but, as set out in more detail below at paragraph 51-53, the Secretary

³⁶ *Explanatory Notes* (n 9), paras. 1, 5, 15 and 95. *Illegal Migration Bill: European Convention on Human Rights (ECHR) Memorandum*, para. 3(a), available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf>

of State would not be required to consider it prior to removal.

47. The Bill does not make applications for leave to remain as a stateless person³⁷ inadmissible or specifically provide that removal can proceed even if such a claim is pending. However, such claims do not suspend removal under UK law.³⁸

48. There would still be an opportunity to bring an application for judicial review of the lawfulness of an inadmissibility decision or the decision to remove, but **Clause 4(1)(d)** provides that the person must be removed “regardless” of such a claim and **Clause 52** prohibits UK courts from issuing interim remedies that would delay or prevent removal.

49. The Bill also prevents anyone subject to the removal duty who is also a victim of trafficking or modern slavery from accessing the protections against removal that would otherwise be available to them under the NABA 2022. Section 61 of the NABA 2022 protects potential victims of trafficking and modern slavery from removal from the UK for a minimum 30 days’ “recovery period” or until a decision has been made as to whether they are in fact a victim, whichever is longer,³⁹ while Section 65 requires the Secretary of State to grant leave to remain to a recognized victim if this is necessary for, inter alia, “assisting the person in their recovery from any physical or psychological harm arising from the relevant exploitation”.⁴⁰ These provisions are intended to incorporate Articles 13 and 14 of the European Convention Against Trafficking in Persons into UK law.⁴¹ However, the Bill both provides that a claim to be a victim modern slavery cannot prevent the removal of a person subject to the removal duty [**Clause 4(1)(c)**] and specifically excludes them from these protections on the grounds that they are a threat to public order [**Clauses 21(2) and Clause 29(3)**].⁴²

50. The only challenge to removal that would remain would therefore appear to be under Section 6 of the Human Rights Act 1998, which prohibits a public authority from acting inconsistently with the UK’s obligations under the European Convention on Human Rights (a “human rights claim”).⁴³ A claim that removal would be incompatible with the prohibition on inhuman and degrading treatment found at Article 3 ECHR could, in theory, offer a mechanism for a refugee or stateless person subject to the removal duty to resist refoulement. However, although the Bill does not expressly disapply the Human Rights Act, it does narrow its scope, in three distinct ways:

- (i) **Clause 1(5)** reduces the effectiveness of the Human Rights Act 1998 by disapplying the general rule that legislation should, wherever possible, be interpreted and given effect so as to be consistent with ECHR rights.⁴⁴
- (ii) Under **Clause 4(1)(b)** human rights claims cannot prevent removal, where removal is required by the Bill; and
- (iii) **Clause 53** provides that if the European Court of Human Rights (ECtHR) indicates an

³⁷ These are made under Part 14 of the Immigration Rules, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons>

³⁸ See, Home Office, *Stateless leave*, Version 3.0 (30 October 2019) p. 11, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843704/stateless-leave-guidance-v3.0ext.pdf

³⁹ Available at: <https://www.legislation.gov.uk/ukpga/2022/36/section/61/enacted>

⁴⁰ <https://www.legislation.gov.uk/ukpga/2022/36/section/65/enacted>

⁴¹ See, *Nationality and Borders Act 2022: Explanatory Notes*, paras. 612 and 637, available at: <https://www.legislation.gov.uk/ukpga/2022/36/notes/division/10/index.htm>

⁴² It is arguable that a blanket disqualification from the protections of UK law is inconsistent with ECAT, which may be understood as requiring that the individual excluded continues to pose a current threat. See, e.g. the comments of the Independent Anti-Slavery Commissioner on similar provisions in the NABA 2022, available on her official website at <https://www.antislaverycommissioner.co.uk/news-insights/dame-sara-comments-on-clause-62-of-the-nationality-and-borders-bill-in-the-times/> The application of the exclusion to persons subject to the removal duty and their families, however, does not allow for any individualized assessment. In addition, Article 4 ECHR does not allow derogation on the grounds of public order (see Article 15 ECHR), such that to the extent that the Bill would deny the protection of Article 4 to victims of trafficking or slavery, it is inconsistent with the ECHR.

⁴³ Section 6 of the Human Rights Act (HRA) 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/section/6>

⁴⁴ Section 3 of the HRA 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/section/3>

interim measure prohibiting a person's removal from the UK in accordance with the Bill, this must be disregarded unless a Minister of the Crown personally decides otherwise. The ECtHR indicates such measures under Rule 39 of its Rules of Court if there is an imminent risk of irreparable harm, such as death or inhuman and degrading treatment.⁴⁵

51. As a consequence of these various exclusions from existing human rights protections, persons subject to the removal duty have limited means for challenging their removal. Two of these are non-suspensive, meaning that a person could be removed before a decision was made. These are:

- (i) an application for judicial review, or
- (ii) a human rights claim with regard to removal to a third country.

52. The ECtHR has repeatedly held that a challenge to removal on the grounds that it would violate Article 2 or 3 ECHR must be suspensive in order to be effective.⁴⁶ In addition, out of country remedies are generally ineffective in practice,⁴⁷ and are especially likely to be so where the claimant or appellant is in an unfamiliar third country, or in one of the many countries from which they will be prohibited from giving oral evidence by videolink.⁴⁸

53. There are three other ways to challenge removal, which would prevent removal from being carried out:

- (i) By making a “factual suspensive claim”, on the grounds that the Secretary of State or an immigration officer made a mistake in deciding that one of the conditions for removal was met [**Clause 37(3)**], for example a mistake as to their nationality or the circumstances of their arrival.
- (ii) By making a “serious harm suspensive claim” regarding removal to a third country, as defined by **Clause 38**.
- (iii) By making a human rights claim or protection claim with regard to one's own country; in this case, removal cannot take place to that country (although the claim cannot be considered), but may still take place with regard to a safe third country.

54. A “serious harm suspensive claim” is one that

- (i) the claimant would “face a real, imminent and foreseeable risk of serious and irreversible harm” if removed from the UK to a third country; and
- (ii) this harm would occur within the “relevant period”, defined as the period of time it would take for a human rights claim to be made in relation to the removal, the claim to be decided by the Secretary of State and challenged by way of judicial review. [**Clause 38(9)**]. This implicitly relies on an assumption that an out-of-country judicial review will effectively prevent serious irreversible harm, such that the only actual risk is of harm that would occur before such a judicial review can be concluded. As noted above, however, this assumption is mistaken; out of country remedies are unlikely to be effective.⁴⁹

⁴⁵ ECtHR, *General presentation of interim measures*, available at: https://www.echr.coe.int/documents/pd_interim_measures_intro_eng.pdf

⁴⁶ *S.H. v Malta* (Application no. 37241/21) (20 December 2022), para. 52, (citing *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 293, ECHR 2011, and *De Souza Ribeiro v. France* [GC], no. 22689/07, § 82, ECHR 2012), available at: <https://hudoc.echr.coe.int/fre?i=001-221838>.

⁴⁷ *Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 42 (14 June 2017), para. 61-62, 72-74. (noting challenges in obtaining legal advice, communicating with legal representatives, giving oral evidence, and obtaining expert evidence from abroad), available at: <https://www.bailii.org/uk/cases/UKSC/2017/42.html>

⁴⁸ See, e.g., *Presidential Guidance Note No 4 of 2022: Taking oral evidence from abroad*, available at: <https://www.judiciary.uk/wp-content/uploads/2022/02/20220712-Guidance-FtT-IAC-witnesses-giving-evidence-from-abroad.pdf>

⁴⁹ Moreover, it is unclear how a person pursuing a “serious irreversible harm claim” will have the time or the necessary

55. Although UNHCR has concerns about the definition of “serious harm” set out in the Bill,⁵⁰ there would be a real risk of refoulement even if the definition were amended or interpreted so as to bring it more closely into line with the international law. The risk of refoulement arises because the Secretary of State will not be required to make her own assessment of whether an individual would face persecution in the country of removal; removal is permitted under **Clause 5(7) Clause 5(9)** to any country in the Schedule, without any conditions other than it not be the country of the person’s nationality (unless it is a safe country under **Clause 57**). Instead, the burden of proving the risk of persecution is placed on the individual facing removal, in circumstances in which it is clearly foreseeable that they will be unable to meet that burden. This is for the following reasons, amongst others:

- (i) the Bill provides that those subject to removal may be detained, regardless of their vulnerabilities, where access to legal advice and means of communication are limited;⁵¹
- (ii) the claim must be brought within seven days after receiving notice of removal [**Clause 41(7)**], unless the individual presents compelling evidence of compelling reasons for making a late claim [**Clause 45**];
- (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 [**Clause 41(5)(b) and (c)**], 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 [**Clause 41(5)(a)**];
- (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 [**Clause 41(7)**] and, normally, heard and decided by the Upper Tribunal within a further 23 days [**Clause 48(1)(b)**]; and
- (vii) normal rights of appeal are made unavailable [**Clause 39(2)**], and the new rights of appeal provided for are subject to a series of significant procedural and substantive limitations. [**Clauses 43-45 and Clauses 47-49**].

56. In addition, an amendment introduced at committee allows for a person to be removed to a third country even during the seven-day period for making a suspensive claim if they notify

support to simultaneously make a human rights claim and then lodge a judicial review against its refusal, often following their removal. It is reasonably likely that even individuals and families who would only be subject to serious harm after the expiry of the “relevant period” will be unable to lodge a claim against the UK to prevent it.

⁵⁰ In particular, UNHCR is concerned that the broad definition of serious harm set out at **Clause 38(4)** is subject to a series of exclusions at **Clause 38(5)-(8)**. These state that persecution does **not** constitute serious harm if it does not meet the definition at Section 31(2)(a) or (b) of the NABA 2022. As set out in our observations on the NABA 2022, this definition would inappropriately deny international protection to a person who was at risk of persecution by a non-State actor unless they can demonstrate that the State or “any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State” is unable or unwilling to provide them protection. Generally, national protection can only be provided by the State, and not by non-State actors. UNHCR, *Updated Observations on the Nationality and Borders Bill, as amended*, January 2022, para. 223-224, available at: <https://www.unhcr.org/uk/media/unhcr-updated-observations-nationality-and-borders-bill-amended> <https://www.unhcr.org/61e7f9b44.pdf> In addition, **Clause 38(5)(c) and 38(7)** would exclude any harm caused by lower standards of medical care or any pain or distress caused by a lack of medical care in the receiving State. This could result in refoulement if medical care would be unavailable for a Convention reason, or when lack of medical care would prevent a person from regularizing their status or accessing State protection that would otherwise be available, or force them to move onwards.

⁵¹ See, e.g. Bail for Immigration Detainees, *Autumn Legal Advice Survey* (December 2022) available at: https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/716/221205_LAS.pdf; See also HM Inspectorate of Prisons (HMIP), *Report on an unannounced inspection of the detention of migrants at Dover and Folkestone Detention facilities: Tug Haven, Kent Intake Unit and Frontier House, 08 October and 1-3 November 2021* (November 2021) (HMIP, *Dover and Folkestone 2021*), para. 2.46, p.23, available at: <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2021/12/Kent-detention-facilities-web-2021.pdf>

the Secretary of State that they do not intend to make such a claim [**Clause 7(3)(b)**]. The fact that this notification can be made orally as well as in writing raises a risk that individuals may be removed in error or without making a free and informed decision not to contest their removal.

57. The risk of refoulement is increased by the criteria by which the presumptively “safe” third countries listed in the schedule appear to have been selected. Although these criteria are not set out in the Bill or in the Explanatory Notes, many of the non-EEA countries appear to have been imported from Section 94 of the NIAA 2002. Under UK law a country may be listed in Section 94 if there is “in general” no real risk of persecution even if there is a demonstrable risk of persecution for certain individuals or even entire groups.⁵² To guide against refoulement in these circumstances, every asylum or human rights claim from people entitled to reside in a Section 94 country must still be considered on its individual merits.⁵³ Reflecting the need for such individual consideration, between 2018 and 2022, 8,177 main applicants claimed asylum from the non-EU or EEA countries listed in the Schedule, and 1,683 were granted leave at first instance, for an initial grant rate of 20.58%.⁵⁴

58. In addition, the Section 94 countries are selected on the basis that that there is “in general [...] no serious risk of persecution of persons entitled to reside in that State” and “removal to that State [...] of persons entitled to reside there will not in general contravene the United Kingdom’s obligations under the Human Rights Convention.”⁵⁵ There is no indication that any consideration has been given to whether there is in general no risk to the people whom the Bill will require the SSHD to remove to a scheduled country, namely people not entitled to reside in those States previously (or at all), and who may, in addition, be members of religious, ethnic or other minorities who have not heretofore been present in those States in significant numbers, or be stateless.

59. In particular, there will have been no consideration of risks to asylum-seekers and stateless people specifically, including the risk of onward refoulement or the risk of inhumane asylum reception conditions, such as is required by Article 3.⁵⁶ Four of the 24 non-European countries on the list are not signatories to either the 1951 Refugee Convention or 1967 Protocol, and nine are not signatories to the 1954 Convention relating to the Status of Stateless Persons.⁵⁷

60. With regard to Rwanda, which was not listed at Section 94, UNHCR has set out in detail

⁵² See, e.g.: *R (on the application of Jamar Brown (Jamaica)) (Respondent) v The Secretary of State for the Home Department (Appellant)*, [2015] UKSC 8, available at: <https://www.supremecourt.uk/cases/docs/uksc-2013-0162-judgment.pdf> and *R (MD) (Gambia) v Secretary of State for the Home Department* [2011] EWCA Civ 121, para. 21, available at: https://www.refworld.org/cases,GBR_CA_CIV_4d6391d52.html (“The persecution must be sufficiently systematic properly to be described as a ‘general feature’ in that country, and this in turn requires that it should affect a significant number of people.”)

⁵³ 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, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1082508/Clearly_unfounded_claims_-_certification_under_section_94.pdf

⁵⁴ UK Home Office, *Asylum applications, initial decisions and resettlement* (updated 23 February 2023), available at: <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-applications-decisions-and-resettlement>. The statistics for appeal outcomes are not comparable, as they are not broken down by sex. However, they show that of the 3,440 appeals lodged by asylum-seekers who applied for asylum from these countries from 2017-2021, 1,009 were allowed, for an appeal success rate of just under 30%. *Outcome analysis of asylum applications* (n 18).

⁵⁵ Section 94 (5) of the NIAA 2004, available at: <https://www.legislation.gov.uk/ukpga/2002/41/section/94> (emphasis added)

⁵⁶ *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.”)

⁵⁷ <https://treaties.un.org/pages/Treaties.aspx?id=5&subid=A&clang=en>

elsewhere why it considers that asylum-seekers removed there would be at real risk of refoulement.⁵⁸

61. In summary, allowing removal to many of the countries listed in the Schedule thus creates a risk of either direct or chain refoulement, because:

- (i) countries have been included in the Schedule in accordance with UK laws that permit a country to be deemed safe “in general” even where there is a recognized risk to certain groups or individuals there, but there is no individualized assessment by which the Secretary of State is required to consider such risks when removing an individual under the Bill;
- (ii) there is no indication that consideration was given to whether countries chosen on the basis of the lack of risk “in general” to people entitled to reside there would be safe for asylum-seekers, refugees, or stateless people returned or admitted there; in particular, there is nothing in the definition of safety that refers to the existence of a fair and effective asylum system; and
- (iii) removal is required regardless of whether a particular person will have access to any asylum system that may exist in the country.

62. **Clause 6** will empower the Secretary of State to add new countries to the Schedule by regulation, if she⁵⁹ is satisfied that:

- (i) *there is in general in that country or territory, or part, no serious risk of persecution, and*
- (ii) *removal of persons to that country or territory, or part, pursuant to the duty in section 2(1) will not in general contravene the United Kingdom’s obligations under the Human Rights Convention.*

Although this should require consideration of risks to persons not entitled to reside in the country, the assessment will continue to be made on an “in general” basis, perpetuating the risk to groups and individuals who are at risk for reasons that are not considered “general”, such as their membership in a minority, their holding of particular religious or political beliefs, or their lack of nationality or lawful status. There is no reference to whether the country is a signatory to the Refugee Convention, or whether there is access to a fair and effective asylum system.

63. Moreover, there is a risk that the SSHD’s decision to add States to the Schedule would be subject to limited independent scrutiny. Designation does not depend on the country being in fact one in which there is “in general” no risk of persecution but instead on what the Secretary of State “is satisfied” to be the case after having had “regard to” relevant information.

Nationals of countries listed at Clause 57 are at additional risk of refoulement and violations of fundamental human rights

64. **Clause 57(3)** would amend Section 80A of the NIAA 2002, which currently requires the SSHD 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 Secretary of State considers that the claim ought to be considered.”⁶⁰ This clause was introduced by Section 14 of the NABA 2022 in order to replicate the UK’s former obligations

⁵⁸ UNHCR, *Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement*, 08 June 2022, available at: <https://www.unhcr.org/62a317d34>

⁵⁹ These Observations refer to the SSHD as “she” in accordance with UK legal conventions. No reference is intended to any Secretary of State as an individual.

⁶⁰ <https://www.legislation.gov.uk/ukpga/2002/41/section/80A> <https://www.legislation.gov.uk/ukpga/2002/41/section/80A> Clause 52 was Clause 50 when the Bill was introduced on 07 March 2023.

under the Spanish Protocol to the Treaty on the Functioning of the European Union.

65. The Bill amends Section 80A so as to apply not just to EU Member States but to any State listed in a new Section 80AA. This new list includes not just Member States of the European Union, but all EEA States, Switzerland, and, most notably, Albania. **[Section 57(3)]** Here too, the Secretary of State will have the power to add further countries to the list if “satisfied” that there is “in general” no risk of persecution after having had “regard to” relevant information. **[Section 57(3) and (4)]**

66. There are two distinct ways in which being included on the new Section 80AA list may put a person at risk of refoulement:

- (i) For persons subject to the asylum ban contained at **Clause 4(2)** who are nationals of a Section 80AA country:
 - (i) they can be removed to that country, or to any country that issued them a passport or identity document, as well as to a third country. **[Clause 5(3)-5(7)]**;
 - (ii) If they make a protection or human rights claim with regard to their own country, it will be inadmissible unless the Secretary of State considers that there are “exceptional circumstances that prevent their removal to that country.” **[Clause 5(4)]**; and
 - (iii) they cannot make “serious harm suspensive claims” to resist removal to their own country, as these can only be made with regard to removal to a third country.⁶¹
- (ii) When the conditions for the asylum ban are not met (if the person arrived lawfully or directly as defined in the Bill, or is in lawful status) any protection or human rights or asylum claim will still be declared inadmissible **[Section 57(2)]** unless there “are exceptional circumstances as a result of which the Secretary of State considers that the claim ought to be considered”.⁶²

67. As UNHCR observed about the inadmissibility rules for EU nationals introduced by the NABA 2022:

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.⁶³ UNHCR therefore does not oppose designating countries as “safe countries of origin” per se, as long as the designation is used as a procedural tool to prioritise or accelerate the examination of applications in carefully circumscribed situations. However, the general assessment of certain countries of origin as safe must be based on reliable, objective and up-to-date information from a range of sources, and the procedure for adding or removing countries from any list of safe countries of origin should be transparent, open to legal challenge, and reviewable in light of changing circumstances.⁶⁴

In addition, the designation of a country as a safe country of origin does not 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

⁶¹ **Clause 38(2)** provides that this can be made by a person who has been served with a third country removal notice.

⁶² This exception is found at Section 80A(4) of the NIAA 2002, which has not been amended by the Bill. <https://www.legislation.gov.uk/ukpga/2002/41/section/80A>

⁶³ 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](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>

⁶⁴ 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>

to some forms of persecution, the country remains unsafe.⁶⁵

68. UNHCR is concerned that the “exceptional circumstances” provisions that would allow a protection or human rights claim by a person from a Section 80AA country to be considered are too restrictive to protect individuals who may be at risk even though they come from a country that is otherwise considered safe. This is because UK courts set a very high threshold for the consideration of EU asylum claims under the former immigration rules that gave effect to the Spanish Protocol: there must be “compelling reasons to believe that there is a clear risk that [an asylum-seeker] will be liable to persecution in the country of origin” and “plainly cogent evidence (typically of some systemic default).⁶⁶ These do not appear to permit an individualized assessment.

69. UNHCR would be particularly concerned if these interpretive principles governing asylum claims from EU countries were applied to individuals from other countries. When the countries on the list were confined to the EU Member States, the presumption of safety in part reflected their inclusion in a shared system of refugee and human rights law⁶⁷ in which the UK itself had participated. This body of law not only set high minimum standards but was published in English and known to British courts and decision-makers, being the same law that applied, or had applied until recently, within the UK. Deviations from those standards were also uniquely visible to UK courts and decision-makers, as they could be reflected not only in the procedures under Article 7 of the Treaty on the Functioning of the European Union (TFEU) specifically referenced in UK law but also in the decisions of the Court of Justice of the European Union and ECtHR (which also formed part of the UK legal system). By expanding the list beyond the EU, countries may be included whose laws and systems are not as effective at protecting fundamental rights, and this may not be fully understood by British decision-makers. There is a clear risk that the presumption that a country’s human rights system is so effective that little individualized scrutiny is required will be incorrect.

70. **Clause 57(2)** is also inconsistent with the UK’s international obligations under Article 3 of the Refugee Convention and Article 14 of the ECHR insofar as it renders inadmissible all human rights claims from citizens of listed countries. In contrast to asylum claims, in many human rights claims – especially those made on the basis of family and private life – the proposed country of return is not determinative.⁶⁸ The separation of a young child from one of their parents, for example, cannot be presumed to be a proportionate interference in their family life or to have less of an adverse impact on the child’s best interests simply because the parent faces removal to a country within rather than outside the EEA, or to Albania.

71. Moreover, in the current legal context within the UK, the inclusion of Albania in particular on this list raises concerns inter alia about a possible breach of Article 3 of the Refugee Convention, which prohibits discrimination on the basis of nationality. Although claims from

⁶⁵ 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) (Comments on the PD 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.”

⁶⁶ *ZV (Lithuania) v Secretary of State for the Home Department*, [2021] EWCA Civ 1196, para. 21, 39, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1196.html>

⁶⁷ *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”).

⁶⁸ See, for example, the leading cases of *Üner v the Netherlands* - 46410/99 [2006] ECHR 873 (18 October 2006), para. 62-64 available at: <http://www.bailii.org/eu/cases/ECHR/2006/873.html>; *Maslov v Austria* - 638/03 [2008] ECHR 546 (23 June 2008), para. 97, available at: <http://www.bailii.org/eu/cases/ECHR/2008/546.html>; *Jeunesse v the Netherlands* - 12738/10 - Grand Chamber Judgment [2014] ECHR 1036 (03 October 2014), available at: <http://www.bailii.org/eu/cases/ECHR/2014/1036.html>, para. 199, all of which assess the proportionality of removal with reference to the applicant’s or their family members’ ties to the country of removal, rather than the human rights situation there more generally.

nationals from certain countries of origin may properly be considered in simplified or accelerated procedures, with appropriate procedural safeguards, this is permissible where it reflects a presumption, based on impartial and up-to-date evidence from a range of sources, that such claims are likely (or unlikely) to be successful and which may be rebutted in individual cases. By contrast, by including Albania on the list at **Clause 57(3)**, the Government has made all asylum claims from citizens of Albania inadmissible in the absence of “exceptional circumstances”, in direct contradiction to the view of the UK’s country of origin information department⁶⁹ and the specialist domestic tribunal charged with setting out “country guidance” that certain groups of Albanian citizens may be at real risk of persecution.⁷⁰

The new limitations on the removal of unaccompanied children do not eliminate the risks of refoulement

72. Under **Clause 3**, the Secretary of State is not required to remove unaccompanied children who meet the conditions for the removal duty until they turn 18, at which time she will be required to do so. She may, however, remove them even while they remain children under certain circumstances:

- (i) “for the purposes of reunion” with a parent (presumably, this would only take place in a country to which **Clause 2** permits removal, although this is not expressly stated);
- (ii) to their own country, if it is designated as “safe” under Section 80AA of the NIAA 2002;
- (iii) to their own country, if they have not made a protection claim; or
- (iv) in other circumstances that the Secretary of State may specify in regulations at a future date.

73. These limitations on the power to remove unaccompanied children were introduced at committee stage. Although some limitations on this power are welcome, in UNHCR’s view, they are insufficient to protect children from refoulement. Children’s protection and human rights claims will still be inadmissible, and, as with adults, the Secretary of State is not required to make an individualized assessment of whether removal is safe or appropriate in each case. Unaccompanied children from countries listed at Section 80AA will face the same risks as set out directly above, while it is unclear what would prevent the removal of a child to rejoin a parent under circumstances where that would put the child at risk of serious harm (either from the parent or for other reasons).⁷¹ The Home Office policy paper *Illegal Migration Bill: children fact sheet* states that children will only be removed if “adequate reception conditions are in place”,⁷² this limitation is not found on the face of the Bill and therefore offers limited protection against refoulement or other serious harm in the future.⁷³

The Bill would deny refugees and stateless people access to their rights under international law

74. Many of those whom the Bill would exclude from the UK’s asylum system will nonetheless be

⁶⁹ Home Office, *Country Policy and Information Note: Albania: Human trafficking*, Version 14.0, February 2023, para. 3.2.4, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1135644/ALB_CPI_N_Human_trafficking.pdf

⁷⁰ *TD and AD (Trafficked women) (CG)*, [2016] UKUT 00092 (IAC), available at: <https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-92> and *EH (blood feuds) Albania CG* [2012] UKUT 00348 (IAC) available at: <https://tribunalsdecisions.service.gov.uk/utiac/2012-ukut-348>.

⁷¹ The *Supplementary ECHR Memorandum* states: “removal under these provisions would not breach Articles 2 or 3 ECHR since the individuals would be removed to a place where they would be safe, whether that is a return to their family or where it has been deemed that they would not be at risk such that it would breach those articles.” Para. 9. However, there is nothing in the Bill itself that requires an assessment of whether the place of removal would be safe for the individual child. Similarly, the

⁷² Available at: <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-children-factsheet>

⁷³ For the limited legal effect of extra-legislative statements about a statute’s purpose, see, e.g., *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, available at: <https://www.bailii.org/uk/cases/UKHL/1992/3.html>; *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, para. 2-6, available at: <https://www.bailii.org/uk/cases/UKHL/2002/38.html>

refugees with rights as such. This is because it is well established in international and UK law that a person becomes a refugee as soon as they meet the criteria set out in Article 1A(2) of the Refugee Convention,⁷⁴ and the legal recognition of a person as a refugee is declaratory, not determinative.⁷⁵ This is clear from the plain language of Article 1A(2) and of the other articles of the Convention, which expressly limit some rights to those refugees “lawfully in” or “lawfully staying in” a country,⁷⁶ but enshrine others as held by all refugees.⁷⁷ Other people subject to the Bill will be stateless, regardless of whether they have been recognized as such, by virtue of meeting the definition of statelessness set out at Article 1 of the 1954 Convention: “a person who is not considered a national by any State under the operation of its law.”⁷⁸

75. The Preamble to the Refugee Convention declares that one of its key purposes is to “assure refugees the widest possible exercise of [...] fundamental rights and freedoms”. This part of the Preamble was the subject of considered debate among the drafters of the Convention. The delegates expressed “strong support” for this commitment on the grounds that it expressed “precisely what the Conference [of Plenipotentiaries charged with drafting the Convention] had tried to achieve”, and a proposed draft that would have omitted it was withdrawn in the face of strong opposition.⁷⁹ The Preamble to the 1954 Convention on the Status of Stateless Persons contains an identical commitment.

76. The Bill contravenes this purpose by eliminating or obstructing access to rights under the Refugee Convention, the 1954 Stateless Persons Convention and under the UK’s domestic human rights laws.

77. Many of the provisions of the Refugee Convention and the 1954 Convention are drafted in identical terms. Among the rights that all refugees and stateless people in the United Kingdom will continue to be entitled to regardless of their lawful status and regardless of the date of arrival in the UK are Article 3: Non-discrimination, and Article 16(1): Access to courts. More generally, Article 34 of the Refugee Convention and Article 32 of the 1954 Convention require States to “as far as possible facilitate the assimilation and naturalization of” refugees and stateless people, respectively.

78. In addition, the Bill would reduce access to the UK’s domestic human rights laws by refugees and stateless people subject to it. The Bill was introduced by a formal declaration by the Secretary of State for the Home Department that “I am unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the Convention [ECHR] rights, but the Government nevertheless wishes the House to proceed with the Bill.”⁸⁰ The Bill

⁷⁴ “For the purposes of the present Convention, the term “refugee” shall apply to any person who [...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

⁷⁵ A person is a refugee within the meaning of the Refugee Convention as soon as she or he fulfils the criteria contained in any of these definitions. This would necessarily occur prior to the time at which the person’s refugee status is formally determined, see: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Refugee Handbook)*, April 2019, HCR/1P/4/ENG/REV. 4, www.refworld.org/docid/5cb474b27.html, para. 28. and ExCom Conclusion No. 6 (XXVIII) 1977, para. (c); *G v G* [2021] UKSC 9, [2021] UKSC 9, United Kingdom: Supreme Court, 19 March 2021, available at: <https://refworld-internal.unhcr.org/cgi-bin/texis.exe/refworld/intranet/rwmain?docid=6061de2d4> paras 81-82.

⁷⁶ These include, for example, the rights to employment and self-employment set out in Articles 17-19.

⁷⁷ These are Article 3 (Non-Discrimination), Article 4 (Religion), Article 12 (Personal Status), Article 13 (Movable and immovable property), Article 14 (Artistic rights and industrial property), Article 16(1) (Access to courts), Article 20 (Rationing), Article 22 (Public Education), Article 27 (Identity papers), and Article 33 (non-refoulement).

⁷⁸ UNHCR, *Handbook on Protection of Stateless Persons (Stateless Persons Handbook)*, 2014, para. 126., available at: https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf

⁷⁹ UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, available at: <https://www.refworld.org/docid/53e1dd114.html>, pp. 29-31.

⁸⁰ Section 19 of the Human Rights Act 1998 requires the Government Minister in charge of a bill to make a statement to Parliament as to whether the bill is, in their view, compatible with the UK’s obligations under the European

carves out specific exclusions from the protections of the ECHR for the individuals it affects: **Clause 1(5)** disappplies the general rule that all legislation must be read and given effect, as far as possible, so as to be compatible with the ECHR,⁸¹ while **Clause 53** establishes bespoke limitations on the effectiveness of interim measures indicated by the ECtHR. As noted above at paragraphs 46-50, the Bill also removes the normal means of access to the courts to challenge violations of the Human Rights Act 1998, and disappplies the protections for victims of trafficking and modern slavery set out in the NABA 2022. As set out below at paragraph 137, it also disappplies policies intended to comply with the UK's obligations under the UN Convention on the Rights of the Child.

79. The exclusion of refugees and stateless people from the protection of domestic human rights laws of general application clearly contravenes the intention to assure them the widest possible exercise of fundamental rights and freedoms. Where the Bill bars access to the courts that would otherwise be available or limits the ability of courts to take into account the human rights of those falling within its scope in the usual way, it is also arguably in direct violation of Article 16(1) of both the Refugee Convention and the 1954 Convention. These provide that refugees and stateless people, respectively, “shall have free access to the courts of law on the territories of the Contracting States”. This is a “guarantee that refugees [and stateless persons] may access whatever judicial remedies exist in the state party,”⁸² and is not dependent on lawful status in the country.⁸³
80. The Bill is also inconsistent with Article 34 of the Refugee Convention and Article 32 of the 1954 Convention and undermines those Conventions’ object and purpose by trapping refugees and stateless people who remain in the UK in a legal limbo, unable to access their Convention rights. As summarized by Lord Rodger in the leading UK House of Lords case of *Asfaw*:

the spirit behind the Convention is one of treating refugees humanely, as people having a recognised place in the legitimate world, not as beings who can exist only on the margins [. . .] That is why the Convention deals with a whole range of topics which relate to the position of refugees in society: for example, freedom to practice their religion (article 4), personal status (article 12), property rights (article 13), artistic rights and industrial property (article 14), right of association (article 15), access to the courts (article 16), employment (articles 17 and 18), liberal professions (article 19), housing (article 21), public education (article 22), public relief and assistance (article 23) and social security (article 24). The aim behind including these provisions is to ensure that refugees enjoy a measure of dignity.⁸⁴

81. Refugees and stateless persons cannot, in practice, exercise their fundamental rights and freedoms without a means by which to ask to be recognized as such. For this reason, access to a recognition procedure is implicit in the Refugee Convention and the 1954 Convention, as is the grant of a lawful status following those procedures.⁸⁵ Access to such procedures need not necessarily be in the first country of asylum; transfers of refugees between countries are

Convention on Human Rights. <https://www.legislation.gov.uk/ukpga/1998/42/section/19> In the House of Lords, this statement is made by Lord Murray of Blidworth, Parliamentary Under Secretary of State at the Home Office.

⁸¹ This is set out at Section 3 of the Human Rights Act 1998. <https://www.legislation.gov.uk/ukpga/1998/42/section/3>

⁸² See also *Krishnapillai v. Canada (Minister of Citizenship and Immigration)*, [1997] I.A.D.D. No. 636 (QL), finding that Article 16(1) grants refugees “the right to equal treatment before the courts”.

⁸³ See, e.g. *R v. Secretary of State for the Home Department, Ex parte Jahangeer and Others*, [1993] Imm AR 564, United Kingdom: High Court (England and Wales), 11 June 1993, available at: https://www.refworld.org/cases_GBR_HC_QB_3ae6b65e2c.html [accessed 7 March 2023], considering Article 16(1) and finding that it must apply to the “aspirant” refugee, and not just to those whose refugee status “has already been established”. UNHCR, *Stateless Persons Handbook* (n 74), para. 133.

⁸⁴ *R v. Asfaw*, [2008] UKHL 31, para. 94, available at: https://www.refworld.org/cases_GBR_HL_4835401f2.html Lord Rodger argued that the purpose of Article 31(1) in particular was to encourage refugees to present themselves to the authorities “and regularise their position, rather than eking out an existence in an unlawful twilight world on the fringes of society” (para. 93). Lord Mance, similarly, found that “The drafters of the Convention contemplated that refugees who unlawfully entered a country where they could claim asylum would do so without delay and would then have their situation regularised.” *Ibid.*, para. 121.

⁸⁵ See, e.g. Goodwin-Gill and McAdam (n 32), p. 435. UNHCR, *Stateless Persons Handbook* (n 74), para. 144-147.

permissible under certain conditions.⁸⁶ Similarly, States may explore solutions abroad for stateless migrants, as long as they will receive protection consistent with the standards in the 1954 Convention.⁸⁷

82. What States cannot do is deliberately place people in need of international protection who remain in their territory in a legal limbo, unable to exercise their human rights in their own countries due to a well-founded fear of persecution or due to their statelessness, and unable to exercise them in their countries of asylum. As set out above, **Clause 4(3)** would have this effect for refugees because it bars the consideration of their protection claims under the immigration rules, and this is the only way in which refugees in the UK can seek recognition as such and be granted a status that allows them to access their rights.

83. In addition, **Clause 29** would make anyone who had ever been subject to the removal duty ineligible for any form of leave to enter or remain in the United Kingdom, subject to the limited exceptions set out below.⁸⁸ This would place stateless people in the same limbo as refugees, because although the Bill does not prevent the *consideration* of an application for leave to remain as a stateless person, the only benefit of making such an application would be a formal decision that the person is stateless. They could not be granted the leave to remain that would normally follow such a decision.

84. It is entirely foreseeable – and in **Clauses 29-36**, expressly foreseen -- that many refugees and stateless people who will be ineligible for any form of leave to remain will nonetheless remain in the UK for extended periods of time, if not indefinitely, trapped “on the margins” of society. At present, the UK is effectively unable to remove asylum-seekers to third countries; since the inadmissibility rules were introduced in January 2021, only 21 people have been removed following a finding of inadmissibility.⁸⁹ Even were the arrangement for removals from the UK to Rwanda to be found lawful, it requires transfers to be limited according to the capacity of Rwanda’s asylum system.⁹⁰

85. If they remain in the UK without leave to remain – and, as noted above, it appears likely that

⁸⁶ See, e.g. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: www.refworld.org/docid/51af82794.html; UNHCR, *Observations on the Proposal for amendments to the Danish Alien Act (Introduction of the possibility to transfer asylum-seekers for adjudication of asylum claims and accommodation in third countries)*, 8 March 2021, available at: <https://www.refworld.org/docid/6045dde94.html>

⁸⁷ UNHCR, *Stateless Persons Handbook* (n 74), para. 153.

⁸⁸ If they leave or are removed from the UK, they would be unable to return to the UK lawfully for any purpose [**Clause 29(3)**], including to be reunited with family members or seek protection via a “safe and legal route”.

⁸⁹ <https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-do-we-grant-protection-to#inadmissibility>

⁹⁰ There is good reason to believe that the capacity is at present limited. See UNHCR, UNHCR, *Analysis of the UK-Rwanda arrangement* (n 58). On 19 March 2023 the arrangement was expanded to allow for the transfer of “all categories of people who pass through safe countries and make illegal and dangerous journeys to the UK”. *UK and Rwanda strengthen agreement to deal with global migration issues*, 18 March 2023, available at: <https://www.gov.uk/government/news/uk-and-rwanda-strengthen-agreement-to-deal-with-global-migration-issues>

the majority will – they will be prohibited from working,⁹¹ obtaining a driving license⁹² or opening a bank account,⁹³ and from renting private accommodation in England without Home Office permission.⁹⁴ They may have limited access to health care.⁹⁵ As set out in more detail below, they will be at risk of indefinite detention; if granted bail, their bail conditions may include a restriction on where they can live and an obligation to report to the Home Office or to a police station on a regular basis,⁹⁶ or to wear an electronic tag.⁹⁷ Although they will be eligible for Asylum Support on the same terms as those whose asylum claims have been finally refused, this may put them at risk of destitution and exploitation.⁹⁸

86. The Bill does contain a limited safeguard in these cases, which is that **Clause 29(3)** gives the Secretary of State the discretion to grant a person leave to enter, an ETA or leave to remain under certain limited circumstances. With regard to leave to enter or an ETA, the person must have left or been removed from the UK and the Secretary of State must consider that failure to grant leave to enter or an ETA would contravene the UK’s obligations under the ECHR or that there are “compelling circumstances”. With regard to leave to remain, the discretion is wider: leave can be granted if the Secretary of State considers that failure to do so would contravene the UK’s obligations under the ECHR “or any other any other international agreement” to which the UK is a party, as well as if leave to enter or an ETA has already been granted and there are “other exceptional circumstances”. Indefinite leave to remain (settlement), however, can only be granted if this is required by the ECHR. Neither other international agreements nor compelling circumstances are relevant here.

⁹¹ Paragraph 360 of the Immigration Rules provides that “An asylum applicant may apply to the Secretary of State for permission to take up employment if a decision at first instance has not been taken on the applicant’s asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in the Secretary of State’s opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant.” However, Paragraph 360A clarifies that the right to work will be restricted to jobs on the Shortage Occupation List (SOL), and that self-employment and engagement in business are prohibited, see: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11b>. Until December 2021, the SOL has been limited to a small number of highly specialist jobs, covering around 1% of UK employment, for which asylum-seekers were accepted to be very unlikely to be qualified, see *LJ (Kosovo), R (On the Application Of) v Secretary of State for the Home Department*, [2020] EWHC 3487 (Admin), paras. 31-32, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3487.html>. On 24 December 2021, however, the Government announced that care workers and home carers would be added to the Shortage Occupation list, initially for one year only; see: https://www.gov.uk/government/news/biggest-visa-boost-for-social-care-as-health-and-care-visa-scheme-expanded?mc_cid=676b7e4d88&mc_eid=677e0c5cb8. They remain on the list as of March 2023. <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-shortage-occupation-list>. Because “inadmissible” claims are not being considered under the immigration rules, however, it is unclear whether asylum-seekers whose claims are “inadmissible” will be able to apply for the limited right to work available under Paragraph 360 of the Immigration Rules.

⁹² Section 97A of the Road Traffic Act 1988, as amended by the Immigration Act 2014, available at: <https://www.legislation.gov.uk/ukpga/1988/52/section/97A>.

⁹³ Section 40 of the Immigration Act 2014, available at: <https://www.legislation.gov.uk/ukpga/2014/22/section/40>.

⁹⁴ Under Part 3, Chapter 1 of the Immigration Act 2014, a person who requires leave to enter or remain in the United Kingdom but does not have it cannot rent residential premises unless they have applied for and been granted such a right by the SSHD. Landlords face fines of up to £3,000 for leasing property to someone without a right to rent. <https://www.legislation.gov.uk/ukpga/2014/22/part/3/chapter/1>.

⁹⁵ In Scotland and Wales, asylum-seekers and refused asylum-seekers are entitled to free secondary health care on the same terms as any other ordinary resident. In England, however, refused asylum seekers are only entitled to free secondary health care if they receive: section 4(2) support from the Home Office; section 21 support from a local authority; or support under Part 1 (care and support) of the Care Act 2014. See <https://www.gov.uk/guidance/nhs-entitlements-migrant-health-guide#:~:text=In%20Scotland%20and%20Wales%2C%20asylum.support%20from%20the%20Home%20Office>. As in many ways inadmissible asylum-seekers are treated similarly to refused asylum-seekers, they may have similarly restricted access to the NHS in England.

⁹⁶ The potential conditions of immigration bail are set out at section 2 of Part 1 of Schedule 10 of the Immigration Act 2016, available at: <https://www.legislation.gov.uk/ukpga/2016/19/schedule/10>.

⁹⁷ On 15 June 2022, the Home Office announced a 12-month pilot by which asylum-seekers would, for the first time, be subjected to electronic tagging, if they “arrive in the UK via unnecessary and dangerous routes”. Home Office, *Immigration bail conditions: Electronic monitoring (EM) expansion pilot*, Version 1.0, p. 5, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1082956/Immigration_bail_conditions_-_Electronic_Monitoring_EM_Expansion_pilot.pdf

⁹⁸ 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>

87. For the reasons set out above, it will in fact be necessary to grant leave to remain to refugees and stateless people in the United Kingdom in order to comply with the UK's obligations under the Refugee Convention and the 1954 Convention. Article 8 of the ECHR is also likely to frequently require grants of leave to enter to their family members, whether or not they have ever been subject to the Bill's removal duty. It is, however, incompatible with the Refugee Convention and the 1954 Convention that the Secretary of State's exercise of this power is couched in discretionary terms and the refusal to exercise discretion may not be capable of effective challenge. UNHCR also notes with regret that the first version of the Bill empowered the Secretary of State to grant leave to enter, an ETA and indefinite leave to remain if this was required by "another international agreement" other than the ECHR, but that this power has been removed.

88. **Under Clause 31**, even if the Secretary of State were to exercise her discretion to grant some form of leave, finally, anyone who had ever been subject to the removal duty would be permanently ineligible from becoming a British citizen through several of the main routes available under the British Nationality Act 1981:

- (i) Through naturalization, which is the primary route by which adults obtain British nationality;⁹⁹
- (ii) As a child, in the exercise of the Secretary of State's discretion;
- (iii) As a child born outside the UK to a parent who was a British citizen by descent, where that parent or the child meets additional conditions with regard to residence in the UK or the child is stateless; normally, British citizens by descent cannot pass on their nationality to their children born abroad¹⁰⁰

89. This runs counter to Article 34 of the Refugee Convention and Article 32 of the 1954 Convention.

90. With regard to children, the ineligibility for British nationality also runs counter to Articles 3 and 7 of the UN Convention on the Rights of the Child, which set out respectively that "In all actions concerning children [...] the best interests of the child shall be a primary consideration", and "that every child shall have [...] the right to acquire a nationality." These obligations are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, including through residence.¹⁰¹

91. In addition, Article 4(1) of the 1961 Convention on the Reduction of Statelessness provides:

*A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State.*¹⁰²

As a result, Contracting States to the 1961 Convention are required to provide for automatic acquisition of their nationality at birth by a child who would otherwise be stateless and is born abroad to a national or, for States which have an application procedure, to grant nationality

⁹⁹ Since the first quarter of 2013, 95% of adults who were granted British citizenship had applied for naturalization. Home Office, Citizenship detailed dataset, available at: <https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-continue-their-stay-in-the-uk-or-apply-to-stay-permanently>

¹⁰⁰ Section 2(1) of the British Nationality Act 1981 provides that a person born outside the UK shall be a British citizen only if one of their parents is either a British citizen otherwise than by descent, or a British citizen serving abroad in Crown Service or other government service designated by the Secretary of State. <https://www.legislation.gov.uk/ukpga/1981/61/section/2>

¹⁰¹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>; UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012, HCR/GS/12/04, para. 11, available at: <https://www.refworld.org/docid/50d460c72.html>

¹⁰² 1961 Convention (n 5).

shortly after birth. Section 3(2) of the BNA 1981 gives effect to the UK's obligations in this regard, by exempting stateless children born abroad to a British citizen by descent from the normal residence requirements of that section. In violation of Article 4(1) of the 1961 Convention, this route is one that children will be ineligible for if they have ever been subject to the removal duty.

92. However, applications for registration as a British citizen would continue to be possible under Schedule 2 of the BNA 1981. This makes people who have always been stateless eligible to apply for British citizenship if they are either born in the UK and are under 21 years of age or born abroad to a British citizen by descent and they themselves have lived in the UK for three continuous years prior to their application. By preserving these routes to nationality for some stateless people, the UK has acted here in accordance with its international obligations.

93. **Clause 35** gives the Secretary of State the discretion not to treat a person as ineligible for British citizenship if she considers that this is necessary to comply with the ECHR; here, too, the power to grant nationality if this is required by "another international agreement to which the United Kingdom is a party" or if there are compelling circumstances has been removed. This amendment appears to have eliminated an avenue for stateless people, refugees and others to obtain for British nationality in reliance either on the Refugee Convention the 1954 Convention, or the UN Convention on the Rights of the Child.¹⁰³

94. In order to bring this section of the Bill into line with the UK's obligations under international law, the exceptions to the ineligibility for all forms of leave and for citizenship should be based on compliance (or lack thereof) with the European Convention on Human Rights and other international agreements and those decisions should not be left at the discretion of the Secretary of State.

The Bill violates Article 31(1)

95. Article 31 is central to the object and purpose of the Refugee Convention because it ensures that refugees can gain access to international protection without being penalized for breaches of immigration laws (Article 31(1)).¹⁰⁴ It provides:

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.

96. This article 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. In the UK context, many of the specific reasons for this are set out in detail above at paragraphs 27-29.

¹⁰³ See, e.g. *Vanriel & Anor, R (On the Application Of) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin) (16 December 2021), available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2021/3415.html>

¹⁰⁴ *Asfaw* (n 84), para. 9, available at: www.refworld.org/cases,GBR_HL_4835401f2.html. I/A Court H.R., *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)*, Advisory Opinion OC-25/18 of May 30, 2018, Series A No. 25, para. 99, recalling that the right to seek and receive asylum imposes certain specific duties on States, including the obligation not to penalize or sanction for irregular entry or presence. Under the Vienna Convention on the Law of Treaties, States have an obligation not to defeat the object and purpose of a treaty and to perform the treaty in good faith, *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331, Articles 18 and 26.

97. For Article 31(1) to be effective, it must apply to any person who is or who claims to be a refugee,¹⁰⁵ for whom no decision on the merits has been made. This includes asylum-seekers, including those who have not yet formally applied for asylum but have expressed the intention to do so, and those who have otherwise expressed a fear of returning to their country or origin,¹⁰⁶ whether or not their claims are considered “inadmissible” under domestic law.¹⁰⁷ It therefore protects individuals subject to the Bill’s asylum ban.

98. In accordance with the purpose of Article 31(1) and given its unqualified use of the word “penalties”, the term should be interpreted broadly, referring to any criminal or administrative measure imposed by the State on account of irregular entry or presence that is unfavorable to the refugee.¹⁰⁸ Penalties prohibited under Article 31(1) are measures that are punitive, discriminatory, retributive or deterrent in character¹⁰⁹ and may include pecuniary sanctions; restrictions on freedom of movement; deprivation of liberty; restrictions on economic or social rights, such as education, employment and social as well as immigration support services; and any discriminatory treatment or procedural detriment to the refugee, including denial, obstruction, delay or limits on access to the territory or asylum procedure or applying limitations on due process guarantees and limiting duration of status, or a decision to declare

¹⁰⁵ Due to the declaratory character of refugee status determination, a person is a refugee within the meaning of the 1951 Convention, its 1967 Protocol, the 1969 OAU Convention or the 1984 Cartagena Declaration as soon as she or he fulfils the criteria contained in any of these definitions. This would necessarily occur prior to the time at which the person’s refugee status is formally determined, see: UNHCR, *Refugee Handbook* (n 75), para. 28 and ExCom Conclusion No. 6 (XXVIII) 1977, para. (c).

¹⁰⁵ *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, para. 10(g), available at: <https://www.refworld.org/docid/470a33b20.html>, (“Summary Conclusions 2003”). *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 (BVerfG, 2 BvR 450/11)*, 8 December 2014, para. 27, available at: http://www.refworld.org/cases.DEU_BUNDESVERFASS.5b33531d4.html, indicating that Article 31 applies to asylum-seekers in a non-technical sense, including that who have not yet formally applied for asylum, but who have entered Germany and expressed the intention to seek asylum as the earliest possibility. *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. 16, available at: https://www.refworld.org/cases.GBR_HC_QB.3ae6b6b41c.html. G Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, p.193, available at: <http://www.refworld.org/docid/470a33b10.html>.

¹⁰⁶ UNHCR encourages States to extend under domestic law the application of Article 31(1), in addition to refugees, to people otherwise in need of international protection, including people entitled to complementary forms of protection. They are similarly situated to refugees, face comparable challenges in seeking asylum and entering a safe country in a regular manner, and often have equally serious international protection needs, which warrant extending them the same protections as refugees concerning penalties for irregular entry or stay. Any difference in treatment must be objectively and reasonably justifiable so as not to be discriminatory. Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, (“Costello et al”), p.13, available at: <http://www.refworld.org/docid/59ad55c24.html>; *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, para. 50, available at: www.refworld.org/cases.ECHR.509b93792.html considering “that the requirement to demonstrate an “analogous situation” does not require that the comparator groups be identical. Rather, ..., they had been in a relevantly similar situation to others treated differently”. UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.A. v. Denmark (Application no. 6697/18) before the European Court of Human Rights*, 21 January 2019, section 3.3, available at: www.refworld.org/docid/5c4591164.html

¹⁰⁷ *Summary Conclusions 2003* (n 105), para. 10(g); *BVerfG, 2 BvR 450/11* (n 105); *Adimi* (n 105), para. 16; G S Goodwin-Gill, *Article 31* (n 105), p.193; UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Alizada v. Armenia (application no. 2439/18) before the European Court of Human Rights*, 26 October 2018, para. 1.3.1., available at: www.refworld.org/docid/5bd313884.html.

¹⁰⁸ ExCom Conclusion No. 22 (XXXII) 1981, para. II.B.2.(a). The French language version of Article 31(1) of the 1951 Convention refers to ‘*sanctions pénales*’; possibly a narrower concept. However, in this context, in line with Article 33(4) of the Vienna Convention on the Law of Treaties, the broader concept of “penalties” from the English language version is to be preferred in accordance with the 1951 Convention’s object and purpose of protecting fundamental rights and freedoms. Goodwin-Gill and McAdam (n 32), p. 277. Goodwin-Gill (n 105), p. 204, referencing a decision from the Social Security Commissioner accepting that any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds. Noll in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011), p. 1264. J.C. Hathaway, *The Rights of Refugees under International Law*, (Cambridge University Press, 2021), p. 515, referring to “any detriment for reasons of their [refugees] unauthorized entry or presence in the asylum country”.

¹⁰⁹ Goodwin-Gill and McAdam (n 32), p. 278, referring to Costello et al (n 106), p. 38 and UNHCR, *Note on International Protection (submitted by the High Commissioner)*, 9 August 1984, A/AC.96/643, para. 29, available at: www.refworld.org/docid/3ae68c040.html.

an application for international protection inadmissible for the sole reason of the applicant's irregular entry or presence.¹¹⁰

99. The Bill, taken as a whole, unquestionably comes within the ambit of Article 31(1). It is clearly intended to penalize irregular entry or presence in the UK and would not apply to anyone who was not (or had not previously been) in the UK without leave. Moreover, although some have argued that Article 31(1) does not prohibit expulsion, taken alone,¹¹¹ the consequences of the Bill's asylum ban go far beyond expulsion. They include, at a minimum, at least eight other penalties:

- (i) expulsion without an individualized consideration of the risk of refoulement or violations of human rights (see paragraph 55 and 61);
- (ii) significantly narrowed access to justice to challenge expulsion (see paragraphs 50-55);
- (iii) potentially indefinite detention, as well as the barring of access to existing means to seek release from detention and the disapplication of laws limiting the detention of children and pregnant women (as set out in further detail below at paragraphs 113-127);
- (iv) denial of access to asylum procedures or any other any effective means for accessing rights under the Refugee Convention even for those who remain in the UK (see paragraph 25);
- (v) restricted access to Asylum Support while in the UK (see paragraph 85);
- (vi) permanent ineligibility for leave to enter or remain except under limited circumstances (see paragraph 81-87); and
- (vii) permanent ineligibility for British citizenship (see paragraphs 88-94);
- (viii) disapplication of some of the protections of the UK's domestic human rights laws (see paragraphs 49-50).

100. The breadth and significance of these penalties are such that they would violate the Refugee Convention even if the conditions for being protected from the imposition of a penalty under Article 31(1) were not met. Article 31(1) is intended as a protective clause, not an exclusion clause. It would be inconsistent with the object and purpose of the Refugee Convention, its structure, and its plain language to invoke it to justify denying a person all protections under it.¹¹²

101. Even if, however, these penalties were permissible, the Bill would still violate Article 31(1) because it fails to enquire whether the conditions for non-penalization are met. Under **Clause 2**, individuals can be penalized regardless of whether they can show good cause for their illegal presence or present themselves without delay to the authorities. It is entirely foreseeable, moreover, that many will meet the requirement to have come "directly from a country coming directly from a territory where their life or freedom was threatened in the sense of Article 1", as that term was intended to be understood by the drafters of the Refugee Convention and has been consistently applied by States, including the UK.

¹¹⁰ ExCom Conclusion No. 15 (XXX) 1979, para. (i). ExCom Conclusion No. 22 (XXXII) 1981, para. B.2(a). *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, paras. 57 and 63, available at: http://www.refworld.org/cases/CAN_SC.56603be94.html. European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, recital 20, available at: <http://www.refworld.org/docid/51d298f04.html>. European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (EU Receptions Conditions directive (recast))*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, recital 15, available at: <http://www.refworld.org/docid/51d29db54.html>.

¹¹¹ Hathaway (n 108), Section 4.2.3.

¹¹² UNHCR, *Updated Observations on the Nationality and Borders Bill* (n 50), para. 12, 124; UNHCR, *Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom*, May 2021, para. 49, available at: <https://www.unhcr.org/uk/publications/legal/60950ed64/unhcr-observations-on-the-new-plan-for-immigration-uk.html>

102. Refugees have obviously “come directly” when they have come straight from a territory¹¹³ where their life or freedom was threatened or if they come from a country where they have stayed for a short time without being able to find protection.¹¹⁴ In many circumstances, they must also be understood to have come directly if they have transited through or stayed in an intermediate country or countries.¹¹⁵ In determining whether, despite passage or stay in another country, a person can be considered to have been “coming directly,” elements to consider include: the length of stay in any such country or countries; the reasons for delaying moving onward; and whether or not the refugee sought or found international protection there.¹¹⁶ Mere transit in an intermediate country cannot be considered to interrupt “coming directly”.¹¹⁷ The “directness” of travel needs to be looked at in 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.¹¹⁸ 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.¹¹⁹

103. The Bill is fundamentally at odds with this established body of law. It defines coming directly as nothing more than having “passed through” a country where a person was not at risk of persecution for a Refugee Convention reason. It does not ask if the person did, or even could have, sought protection there, let alone consider any other factors outlined above.

104. In summary, the Bill violates Article 31(1) by:

- (i) Imposing penalties for unlawful presence that effectively exclude refugees from their rights under the Convention; and
- (ii) Applying a fundamentally incorrect definition of “coming directly”.

The Bill’s detention provisions violate Article 31(2) of the Refugee Convention and international human rights law

105. Article 31(2) protects all refugees who have entered or are present irregularly (i.e. unlawfully or without authorization) in the host country¹²⁰ from restrictions on their freedom of

¹¹³ This can be their own country or an intermediate country. G Goodwin-Gill, *Article 31* (n 105), p.189.

¹¹⁴ See, e.g.: Weis, *Travaux* (n 74), p. 219, summarizing the *travaux* as follows: “The term ‘coming directly’ refers, of course, to persons who have come directly from their country of origin or a country where their life or freedom was threatened, but also the persons who have been in an intermediary country **for a short time without having received asylum there.**” [emphasis added]

¹¹⁵ Summary Conclusions 2003 (n 105), para. 10(b). Goodwin-Gill, *Article 31* (n 105), pp. 192 and 217–218, referring, inter alia, to the drafting history of the 1951 Convention, where it was mentioned that transits or stays in intermediate countries may be necessary; see remarks of the UN High Commissioner for Refugees, van Heuven Goedhart, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting*, 22 November 1951, A/CONF.2/SR.14, available at: www.refworld.org/docid/3ae68cdb0.html.

¹¹⁶ *Adimi* (n 105), para. 18; *Asfaw* (n 84), para. 15.; *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.

¹¹⁷ *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] (FMS and Others), CJEU, 14 May 2020, para. 158 – 160, available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0924> (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); *R v. Jaddi* [2012] EWCA Crim 2565, para. 16, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2012/2565.html>

¹¹⁸ There is no obligation under international law for a person to seek international protection at the first effective opportunity; but at the same time, refugees do not have an unqualified 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, including paras 1-9 and 14.

¹¹⁹ *Adimi* (n 105), para. 18, considering acquiring the means to travel onward as a good reason delaying onward travel. *BverfG, 2 BvR 450/11* (n 105), para. 32, considering using the time spent in the intermediate country to arrange onward movement.

¹²⁰ A Grahl-Madsen, *The Status of Refugees in International Law, Volume II* (Sijthoff Leiden, 1972), pp. 419-420, taking

movement, other than those that are necessary and only until either their status is regularized in the host country, or they obtain admission into another country. Under the heading “refugees unlawfully in the country of refuge” it provides:

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

106. The authority for States to restrict the freedom of movement of “such refugees” is thus strictly provisional and temporally limited. As set out above, the term “refugees” here must be understood to include asylum-seekers due to the declaratory nature of refugee status. The phrase “such refugees” also includes refugees to whom Article 31(1) applies. As such, despite the prohibition on imposing penalties on account of their irregular entry or presence under Article 31(1), their freedom of movement may nonetheless be restricted, on an exceptional, provisional and temporary basis, under Article 31(2).

107. In accordance with Article 31(2), the freedom of movement of refugees who have entered or are present unlawfully may be restricted when “necessary”. In addition, under international human rights law, as an exception to the general human right to liberty¹²¹ and freedom of movement, Article 31(2) must be interpreted narrowly and applied cautiously. It requires an assessment of the purpose of measures to restrict a refugee’s freedom of movement, as well as their reasonableness, including in light of any specific individual needs and circumstances of the refugee,¹²² and proportionality, i.e. requiring an evaluation of whether less restrictive measures are available to fulfil the purpose of the restriction, in an individual case.¹²³ Automatic, routine or collective measures to restrict the freedom of movement of unlawfully present refugees would be in violation of Article 31(2).¹²⁴

108. Many of the principles informing the interpretation of Article 31(2) that are set out below are drawn from international human rights law and apply with equal force to the detention of stateless people, even in the absence of an equivalent article in the 1954 Convention.

109. The burden is on the State to show that a restriction on freedom of movement is necessary, reasonable and proportionate in the individual case.¹²⁵ Detention is the most far-reaching restriction on freedom of movement.¹²⁶ It is governed by human rights law standards

a textual and contextual approach, as well as referring to the Convention’s drafting history and concluding: ‘it seems justified to conclude that the term ‘such refugees’ in the first sentence of Article 31(2) merely means what it meant from the outset, namely ‘refugees who enter or are present in [the] territory [of a Contracting State] without authorization’, period’. See also: A Grahl-Madsen, *Commentary on the refugee convention 1951: articles 2-11, 13-23, 24-30 & schedule, 31-37* (UNHCR Geneva, 1997), pp. 179-180. Noll (n 108), pp. 1267-1268; and Costello et al (n 106), p. 44.

¹²¹UN General Assembly, *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, ICCPR, Article 9(1), available at: <https://www.refworld.org/docid/3ae6b3aa0.html>

¹²² Such specific individual needs and circumstances can concern inter alia children, disabled people, pregnant women, single parents with minor children, victims of trafficking, people with serious illnesses or mental disorders, and persons subjected to torture, rape or other serious forms of psychological, physical or sexual violence. See, for example, Article 21 of the EU Receptions Conditions directive (recast) (n 110).

¹²³ UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 18, available at: www.refworld.org/docid/553e0f984.html.

UNHCR, *Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention*, 15 March 2017, Roundtable, para. 24, available at: www.refworld.org/docid/5b18f6740.html.

¹²⁴ *Attorney-General v. Refugee Council of New Zealand, Inc.*, [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, para. 97, available at: www.refworld.org/cases/NZL_CA_40cec4c84.html.

¹²⁵ *Arse v Minister of Home Affairs*, (25/2010) [2010] ZASCA 9 (12 March 2010), South Africa: Supreme Court of Appeal, 12 March 2010, para. 5, available at: www.refworld.org/cases/SASCA_4c933be42.html. Human Rights Committee General Comment No. 35 (n 123), paras. 15 and 18.

¹²⁶ *Guzzardi v. Italy*, Application no. 7367/76, Council of Europe: European Court of Human Rights, 6 November 1980, paras. 92-93, available at: www.refworld.org/cases/ECHR_502d42952.html. *Medvedyev and Others v. France*, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, para. 73,

on deprivation of liberty and must only be used on an exceptional and individual basis, namely as a measure of last resort when no alternative exists.¹²⁷ It is unlawful to detain an individual for the purpose of deterring other people from seeking asylum,¹²⁸ or on a discriminatory basis.

110. Further, the duration of detention in accordance with Article 31(2) should be as short as possible.¹²⁹ For example, while a minimal period of detention may be lawful in order to carry out checks where identity is undetermined or in dispute, or public health or security risks exist, such detention must last only as long as reasonable efforts are required and made to establish identity, carry out such checks, or mitigate such risks.¹³⁰
111. It is impermissible to prolong immigration-related administrative detention due to inefficient processing modalities or resource constraints.¹³¹ Decisions to detain, including decisions to extend the duration of detention, must be taken on an individual basis and be subject to minimum procedural safeguards, including the right for the individual concerned to be informed about the reasons for detention,¹³² access to legal counsel, and access to prompt and periodical judicial review of the lawfulness of the decision to detain or extend the detention.¹³³
112. Children, including those who are unlawfully present, should not be detained for immigration-related purposes, including when accompanied by parents or legal guardians who have entered or are present irregularly.¹³⁴ The detention, when solely or exclusively based on the irregular entry or presence of the child and/or their parents or legal guardians, or to ensure attendance at asylum proceedings, would exceed the requirement of necessity and is not in a child's best interests.¹³⁵ The detention of pregnant women and nursing mothers should also be avoided.¹³⁶ In all such cases, when restrictions on freedom of movement are

available at: www.refworld.org/cases.ECHR.502d45dc2.html. *De Tommaso v Italy*, Application no. 43395/09, Council of Europe: European Court of Human Rights, 23 February 2017, para. 80, considering that “[t]he difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance”.

¹²⁷ Human Rights Committee General Comment No. 35 (n 123), para. 18; *Commission v Hungary (Accueil des demandeurs de protection internationale)* C-808/18, ECLI:EU:C:2020:1029, European Union: Court of Justice of the European Union, 17 December 2020, paras. 174-175, available at: www.refworld.org/cases.ECJ.5fdb914e4.html. *FMS and Others* (n 117), para. 221; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, (“UNHCR Detention Guidelines”), Guideline 4.3, para. 35, available at: www.refworld.org/docid/503489533b8.html. Notably, while alternatives to detention need to be considered over detention, they must still be demonstrably necessary in the individual case before being lawfully applied.

¹²⁸ Deterrence is not a legitimate purpose for detention as seeking asylum is a universal right (see note 29); See also: *Attorney-General v. Refugee Council of New Zealand, Inc.*, [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, para. 101, available at: www.refworld.org/cases.NZL_CA.40cec4c84.html; Hathaway (n 108), pp. 526-527.

¹²⁹ *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9.4, available at: www.refworld.org/cases.HRC.3ae6b71a0.html. Summary Conclusions 2003 (n 105), para. 11(d).

¹³⁰ UNHCR Detention Guidelines (n 127), para. 24.

¹³¹ *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*), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI:3AEU%3AC%3A2020%3A495>.

¹³² ICCPR (n 121), Article 9(2); Human Rights Committee General Comment No. 35 (n 123), paras. 24 to 30.

¹³³ ICCPR (n 121), Article 9(4); *A. v. Australia* (n 129), para. 9.4; UNHCR Detention Guidelines (n 127), Guidelines 6 and 7.

¹³⁴ Articles 9(4) and 37, Convention on the Rights of the Child (n 101). UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 11, available at: www.refworld.org/docid/5a903b514.html. UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, paras. 5, 7 and 10, available at: www.refworld.org/docid/5a12942a2b.html. *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrTHR), 19 August 2014, para. 154, available at: www.refworld.org/cases.IACRTHR.54129c854.html. *R.K. et autres c. France*, Requête no 68264/14, Council of Europe: European Court of Human Rights, 12 July 2016, para. 88, available at: www.refworld.org/cases.ECHR.5784e8574.html. UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: www.refworld.org/docid/5885c2434.html.

¹³⁵ *Advisory Opinion OC-21/14* (n 134), para. 154.

¹³⁶ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on*

necessary, other restrictions should be applied in lieu of detention including, for example, appropriate care arrangements and community-based programmes to ensure adequate reception and treatment of irregular child and pregnant and nursing women refugees and their families.¹³⁷

113. The detention provisions of the Bill are fundamentally inconsistent with these binding principles of international refugee and human rights law because they authorize detention without regard to the requirement to consider whether detention is necessary or proportionate in all of the following circumstances, set out at **Clause 10(2)** (which applies to detention under the authority of an immigration officer on entry to the UK)¹³⁸ and **Clause 10(6)** (which applies to detention by the Secretary of State):¹³⁹

- (i) If an immigration officer or the Secretary of State suspects that a person meets the four conditions under **Section 2(2)** to be subject to the asylum ban, pending a decision as to whether that is the case;
- (ii) If an immigration officer or the Secretary of State suspects that the Secretary of State has a duty to make arrangements for a person's removal under **Clause 2(1)**, pending a decision as to whether that is the case; and
- (iii) if the Secretary of State does have a duty to remove a person, pending their removal.

114. These provisions apply equally to adults and children. With regard to unaccompanied children, the Bill creates additional powers to detain pending a decision whether to exercise the discretion to remove them before they turn 18 and pending a decision whether to grant them any form of leave. The exercise of the powers to detain unaccompanied children will be subject to regulations to be issued by the Secretary of State at a later date.

115. These powers to detain are so sweeping that it is arguable that they are also unlawful because they are, in effect, automatic, routine or collective.

116. In addition, the Bill specifically disapplies existing legislation that would only allow the power to detain "pending a decision of a particular kind by the Secretary of State" to be exercised "where the Secretary of State has reasonable grounds to suspect that he may make a decision of that kind." [**Clause 10(9)**] This expressly authorizes detention even where the Secretary of State is acting under an unreasonable belief, which creates a clear risk that detention will be arbitrary.

117. **Clause 10** also violates international law because it authorizes the detention of children without the considerations of necessity, proportionality and the child's best interests set out above at paragraph 112. As noted above, the Bill expressly authorizes detention of unaccompanied children, and although this will be subject to future regulations, the content of those regulations is left undefined. Moreover, the detention of accompanied children is authorized by the provisions for the detention of anyone subject to the removal duty, with no exception made for children, as well by references to the place that a "person (of any age)" may be detained.¹⁴⁰ There is no requirement that the detention of accompanied children be circumscribed by future regulations.

118. **Clause 11** sets out the periods of time for which individuals may be detained under a

the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32, para. 49, available at: www.refworld.org/docid/54620fb54.html 49, available at: www.refworld.org/docid/54620fb54.html

¹³⁷ UN CMW, *Joint general comment No. 4 and No. 23* (n 134), para. 11; UNHCR, *UNHCR's position regarding the detention of refugee and migrant children* (n 134).

¹³⁸ This creates a new Section 16(2C) of Schedule 2 of the Immigration Act 1971. The current schedule is available at: <https://www.legislation.gov.uk/ukpga/1971/77/schedule/2>

¹³⁹ This creates a new Section 62(2A) of the NIAA 2002. The current version of Section 62 is available here: <https://www.legislation.gov.uk/ukpga/2002/41/section/62>

¹⁴⁰ See the new Section 16(2G) of Schedule 2 to the 1971 Act, introduced by **Clause 11(2)**, and the new Section 62(2E) of the NIAA 2002, introduced by **Clause 11(6)**.

range of UK immigration laws. These clauses apply to all statutory immigration detention powers.¹⁴¹ They thus will have a negative impact on the rights of anyone subject to immigration detention, including refugees, asylum-seekers and stateless people who are not subject to the removal duty.

119. In all cases, these clauses:

- (i) Permit detention for “such period as, in the opinion of the Secretary of State, is reasonably necessary to carry out” the purpose for which that particular legislation has authorized detention, regardless of whether there is “anything that for the time being prevents” that purpose from being carried out;
- (ii) Permit detention to continue even after “the Secretary of State considers that the purpose cannot be carried out “within a reasonable period of time” “for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the purpose of the person’s release as the Secretary of State considers to be appropriate.”

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 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.¹⁴²

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.*¹⁴³

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.¹⁴⁴ 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.¹⁴⁵

123. Nothing in the Bill protects accompanied children from these risks of prolonged detention, while existing limitations on the detention of children and families are disapplied. **Clause 10(4)** amends Section 147 of the Immigration and Asylum Act 1999, which sets time limits for detention in “a place used solely for the detention of detained children and their families” so as to authorize detention “for any period” where it is under the new powers created by the Bill.

¹⁴¹ This is clear from the list of existing legislation being amended, and is confirmed in the *ECHR Memorandum* (n 37) at para 3(c).

¹⁴² *VL v Spain* (n 128), paras. 105-107.

¹⁴³ https://www.echr.coe.int/documents/convention_eng.pdf

¹⁴⁴ 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), available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2007/804.html>.

¹⁴⁵ *Explanatory Notes* (n 9), para. 89; see also *ECHR Memorandum* (n 36), para. 31

The Bill empowers the Secretary of State to issue regulations specifying time limits for the detention of unaccompanied (but not accompanied) children but does not require her to do so.¹⁴⁶

124. With regard to pregnant women, Section 60 of the Immigration Act 2016 limits the period they can be detained to a maximum of 72 hours, or for up to 7 days where authorized by a Minister of the Crown, but only where they are being held under a “relevant power” as defined at Section 60(8).¹⁴⁷ **Clause (10)(10)** and **Clause (10)(11)** amend existing legislation specifically to ensure that the new detention powers created by the Bill are not “relevant powers”. The subsequent references in **Clause 11** to various detention periods being limited by Section 60 of the Immigration Act 2016 must, therefore, not be taken as limiting the detention of pregnant women who are subject to the removal duty.

125. **Clause 12**, finally, further undermines the international legal principle there must be access to prompt and periodic judicial review of the lawfulness of the decision to detain or extend detention. It does so by preventing review of the decision to detain to detain during the first 28 days of detention, by:

- (i) Prohibiting the First-tier Tribunal (Immigration and Asylum Chamber) from granting bail [**Clause 12(3)(b)**] and
- (ii) Providing that during that period the decision to detain “is final and is not liable to be questioned or set aside in any court”, by way of judicial review, unless an immigration officer or the Secretary of State has acted “in bad faith” or “in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice” **Clause 12(4)**.

126. Although the Bill would not extinguish the common law remedy of *habeas corpus* for those covered by these provisions, this would likely provide a very limited safeguard. *Habeas corpus* is a challenge to the existence of a lawful power to detain. As summarized by the European Court of Human Rights, “In habeas corpus proceedings, in examining an administrative decision to detain, the court’s task is to inquire whether the detention is in compliance with the requirements stated in the relevant legislation and with the applicable principles of the common law.”¹⁴⁸ As set out above, the Bill creates sweeping new powers of detention, and, by defining reasonableness according to the Secretary of State’s “opinion”, expressly narrows the courts’ ability to apply established common law principles. Nor does *habeas corpus* give effect to the protections of Article 5 ECHR; the European Court of Human Rights has specifically found that the scope of its review is too narrow to do so.¹⁴⁹

127. For all of these reasons the Bill will lead to refugees being detained in violation of Article 31(2), and to refugees, asylum-seekers, stateless people, other people in need of international protection and migrants more generally being detained in violation of Article 5 ECHR and other principles of international human rights law.

The Bill puts at risk the safety and welfare of children

128. The Bill is inconsistent with the UK’s obligations under the UN Convention on the Rights of the Child (UNCRC) because of the many ways it threatens or undermines the safety and welfare of children. Most of these have been set out above but are summarized again here.

¹⁴⁶ The references to para

¹⁴⁷ See s.60 of the Immigration Act 2016, available at: <https://www.legislation.gov.uk/ukpga/2016/19/section/60/enacted>

¹⁴⁸ *X v. the United Kingdom* - 7215/75 [1981] ECHR 6 (5 November 1981), para. 56, available at: <https://www.bailii.org/eu/cases/ECHR/1981/6.html>

¹⁴⁹ See, e.g.: *H.L. v. the United Kingdom* – 45508/99 [2004] ECHR 471 (5 October 2004), para. 137, available at: <https://www.bailii.org/eu/cases/ECHR/2004/471.html>. The statement in the *ECHR Memorandum* that “the courts will ensure compliance with Article 5 when determining applications for a writ of *habeas corpus*” thus appears to be incorrect. *ECHR Memorandum* (n 36), para. 34.

129. The Bill exempts children from none of its penalties, including effective denial of protection under domestic and international refugee and human rights laws,¹⁵⁰ including anti-trafficking laws,¹⁵¹ and permanent ineligibility for leave to remain or citizenship.¹⁵² It imposes these penalties directly on children themselves regardless of whether they did or, given their age, even could play any active role in pursuing the irregular entry or presence that the penalties seek to deter.¹⁵³ Existing statutes and regulations limiting the detention of accompanied children are specifically disappplied,¹⁵⁴ and no new protections are created.
130. These penalties are likely to place children at risk of direct harm, including from detention, refoulement, and removal to countries with which they have no prior connection.
131. Unaccompanied children are subject to all of the same penalties, with four exceptions:
- (i) Under **Clause 10(2)** and **Clause 10(6)**, the Secretary of State will be required to issue regulations specifying the circumstances under which they can be detained;
 - (ii) Under the same clauses, the Secretary of State will have the power – although not a duty – to issue regulations limiting the length of their detention.
 - (iii) Under **Clause 3**, the Secretary of State may only remove an unaccompanied child before they turn 18 “for the purposes of reunion with a parent” (although this is not specified, presumably this is only to a country where removal is allowed under **Clause 2**, namely, to a “safe” country listed in the Schedule to the Bill); to their own country, if it is listed in Section 80AA (at present, EEA countries, Switzerland and Albania); or under other circumstances to be specified by regulations; and
 - (iv) They may be granted limited leave to remain until they turn 18 [**Clause 29(3)**].
132. Article 20(1) of the UNCRC provides that “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” The Bill’s provisions for unaccompanied children are insufficient to comply with that duty. Unaccompanied children would still be at risk of refoulement and of detention in violation of international law. In addition, we note with concern that the new provisions limiting the removal of unaccompanied children do not require that a best interests assessment be conducted prior to removal.
133. Should the Bill be enacted, it is essential that the further regulations it provides for are issued promptly, expanding protections against detention and removal for unaccompanied children, in line with Article 20(1).
134. Children who remain in the UK are likely to be adversely affected by the lack of secure legal status and, as they become old enough to understand it, the knowledge that their insecure status will be permanent; if they are accompanied, they are permanently ineligible for a grant of any form of leave,¹⁵⁵ and if unaccompanied, they will become ineligible for leave and subject to removal as soon as they turn 18.¹⁵⁶ Insecure status is a significant source of stress and anxiety for refugee children, has a negative impact on their well-being, and prevents them from overcoming past trauma and rebuilding their lives. In a study of asylum-seeking and refugee children in the UK, UNHCR found that the stress of waiting for an asylum decision “led many children to drop out of school, disengage from other social and recreational activities, and become less interested in interacting with others, socializing and

¹⁵⁰ See paragraphs 23-25 and 46-50 above.

¹⁵¹ **Clauses 4(1)(c), 21(2) and 29(3)**.

¹⁵² **Clauses 29-33**.

¹⁵³ **Clause 2(2)** refers to leave to enter “that was obtained by means which included deception by any person”.

¹⁵⁴ **Clause 10(4) and Clause 13**.

¹⁵⁵ **Clause 29**.

¹⁵⁶ **Clause 3(1)**.

making new friends”.¹⁵⁷ The *ECHR Memorandum* acknowledges, moreover, that by the time a child turns 18 and becomes subject to mandatory removal, they may have built up “some considerable family and/or private life”, which will be disrupted by removal.¹⁵⁸

135. Given their dependency, children in families will also be at risk of harm from the penalties imposed on their parents, such as ineligibility for leave to remain (and with it, the right to work) or mainstream benefits or Section 95 Asylum Support, putting the family at risk of destitution, or separation from their parent as a result of the parent’s detention or removal.
136. Children whose parents are EEA nationals, Swiss or Albanian are at increased risk of separation from a parent or of constructive removal from the UK, regardless of their own nationality or status, because the parent will be unable to resist removal on the grounds that it would be a disproportionate interference with their family life together, unless there are “exceptional circumstances”.¹⁵⁹
137. Nothing in the Bill indicates that the Secretary of State would be required (or in some cases, even allowed) to exercise her discretion if this was in the best interests of a child, although it is possible that there may be reference to this duty in the future regulations governing the detention and removal of unaccompanied children. Instead, existing legislation designed to protect the welfare of children has been expressly disapplied – including limits on where and for how long children can be detained¹⁶⁰ and the obligation to consult the Family Returns Panel, which “provides advice on the safeguarding and welfare plans for the removal of families with children”¹⁶¹ The Bill is thus inconsistent with the duty under Article 3 of the UNCRC and Section 55 of the 1999 Act to take the best interests of the child into account as a primary consideration.
138. Finally, the Bill increases the risk that children will be wrongly treated as adults.¹⁶² It forecloses judicial challenge to the assessment of the age of a person subject to the removal duty by eliminating the right of appeal that would otherwise become available when Section 54(2) of the NABA 2022 is implemented [**Clause 55(2)**], while at the same time confirming that a judicial review of an age assessment cannot delay a person’s removal under the Bill [**Clause 55(4)**]¹⁶³ and, cannot quash the decision on the grounds that it was wrong in fact

¹⁵⁷ UNHCR, “*A Refugee and Then: Participatory Assessment of the Reception and Early Integration of Unaccompanied Refugee Children in the UK*”, 2019, pp 78-79, available at:

<https://www.unhcr.org/uk/publications/legal/5d271c6a4/a-refugee-and-then.html> See also UNHCR, *A journey towards safety: A report on the experiences of Eritrean refugees in the UK*, August 2018, available at: <https://bit.ly/2Xscqz4>; All Party Parliamentary Group on Refugees, *Refugees Welcome? The Experience of New Refugees in the UK*, April 2017, available at: <https://bit.ly/2lueeXt>. The many accompanied children affected by the Bill who are in theory removable but cannot be removed will face a similar damaging state of prolonged insecurity. For the unaccompanied children affected by it, the impact of a time-limited status -- followed either by removal, detention or an insecure status in the UK -- is likely to be even more negative.

¹⁵⁸ *ECHR Memorandum* (n 36), para. 11.

¹⁵⁹ **Clause 57**, and see discussion at para.70.

¹⁶⁰ Section 16(2I) of Schedule 2 of the 1971 Act and Section 62(2G) of the NIAA 2002, as inserted by **Clause 10**, and **Clause 110(4)(e)**.

¹⁶¹ *Explanatory Notes* (n 9), para. 95. The disapplication of this duty to consult is found at **Clause 13**.

¹⁶² UNHCR has directly observed cases in which young people were assessed by Immigration Officers to be over 25 when they arrived in the UK and placed in the adult asylum system, including in detention. There is some evidence that this See, e.g.: Human Rights Network, Helen Bamber Foundation, and Asylum Aid, *Disbelieved and denied: Children seeking asylum wrongly treated as adults by the Home Office*, April 2023, available at: https://www.helenbamber.org/sites/default/files/2023-04/Children%20treated%20as%20adults_HBF_HFRN_AA_April23.pdf; Refugee Council, *Identity Crisis: How the age dispute process puts refugee children at risk*, September 2022, available at: <https://www.refugeecouncil.org.uk/information/resources/identity-crisis/>

¹⁶³ The *Supplementary ECHR Memorandum* states that “The appropriate support and facilities will need to be in place in the country of removal to ensure that the individual can effectively participate in their judicial review from abroad.” (para. 25) However, nothing in the Bill would require this, and in the absence of any suspensive remedies, it is unclear how a young person challenging their age assessment would be able to show that this would not be the case for them. In addition, for the reasons set out above at paragraph 52 and footnotes 47-48, out of country remedies are unlikely to be effective. Similarly, paragraph 27 states that “appropriate safeguards will be put in place for the removal process of those who fall within this clause, including ensuring procedural safeguards in respect of an

[**Clause 55(5)(b)**]. The Government accepts that these provisions may not be consistent with Article 6 ECHR¹⁶⁴ (which protects the right to a fair and public hearing). To the extent that it would prevent refugees and stateless people subject to the Bill from access to the courts, it may also violate Article 16(1) of the Refugee Convention and the 1954 Stateless Persons Convention.

139. UNHCR is also concerned that young people will effectively be required to undergo “scientific” methods of age assessment by **Clause 56**. This allows the Secretary of State to make regulations specifying when a person who refuses to consent to such methods may, in consequence, be deemed to be an adult. UNHCR does not support the use of medical age assessment methods. They are subject to a high margin of error and their evidential value remains contested by courts and by medical professionals and associations. They can also be potentially harmful, as they may involve radiation or exacerbate emotional or psychological distress. Moreover, consent to medical assessment procedures must be fully informed and freely given,¹⁶⁵ something that may not be the case if the consequence of a refusal of consent is to be deemed to be an adult. UNHCR also notes that this clause appears to rest on an unfounded assumption that refusal to consent to scientific age assessment methods is a reliable indicator that a young person is not, in fact, a child. Children may be reluctant to consent to age assessment procedures for reasons other than deception. They may, for example, be fearful of procedures which are unfamiliar, uncomfortable and/or invasive.

The Bill would increase the pressure on the UK asylum system

140. As noted above, the Bill would prevent refugees and stateless people from accessing their rights to work under the Refugee Convention and the 1954 Convention and make them generally ineligible for any other form of leave to remain. This would prevent them from participating in the formal economy and becoming self-reliant for as long as they remain in the UK. They would, however, have access to the same level of Asylum Support as is currently made available to asylum-seekers whose claims have been rejected and who cannot leave the country. This would create an entirely avoidable additional burden on the Asylum Support and accommodation system.

141. At the same time, the Bill would prevent the removal from the UK of almost everyone who claims to be in need of international protection but is not. This is because **Clause 5(9)** provides that if a person subject to the removal duty makes a protection or human rights claim, they may not be removed to their country of nationality or to a country that has issued them a passport or identity document, unless they are a national of a country listed as a safe country of origin (currently, EEA countries, Switzerland and Albania). **Clause 4(3)**, however, prohibits the consideration of their human rights or protection claim under the immigration rules. A claim that cannot be considered cannot be refused, with the result that the person cannot be removed. Although some may choose to leave, many will not. They will remain in the UK, unable to work but entitled to Asylum Support and accommodation.

individual participating in a hearing from abroad.” This assurance is inadequate to protect the rights of children, for three reasons: nothing in the Bill requires the creation of such safeguards; it is unclear what power the Home Office or UK courts and Tribunals will have to safeguard the procedural rights of children and young people who have been removed from the UK; and even if procedural safeguards were effective, the UK-based tribunal would still not have the right to quash the decision on the grounds that it was wrong in fact.

¹⁶⁴ Ibid, para. 24.

¹⁶⁵ For a detailed discussion of UNHCR’s concerns about medical methods of age assessment, see UNHCR, *Update Observations on the Nationality and Borders Bill* (n 50), para. 272-275.