

UNHCR Updated Observations on the Nationality and Borders Bill, as amended¹

January 2022

Introduction

1. When introduced in July 2021, the Nationality and Borders Bill² followed almost to the letter the Government's New Plan for Immigration Policy Statement,³ issued on 24 March 2021, in some cases adding further restrictions on the right to claim asylum and on the rights of refugees. In October 2021,⁴ UNHCR therefore regretfully reiterated its considered view that the Bill is fundamentally at odds with the Government's avowed commitment to upholding the United Kingdom's international obligations under the Refugee Convention⁵ and with the country's long-standing role as a global champion for the refugee cause.
2. Since UNHCR published those observations a large number of amendments have been proposed, both by the Government and by other Members of Parliament. All of the Government amendments have been adopted.
3. UNHCR notes that none of the amendments that were adopted responded to the concerns expressed in its Observations, while some have only heightened those concerns. As the Bill makes its way through the Parliamentary process, UNHCR continues to stand ready to work with the Government to make the amendments necessary to bring the Bill into conformity with the United Kingdom's obligations under the Refugee Convention and international law.
4. We set out below our main areas of concern about the Bill, as amended, reflecting our supervisory role with regard to the 1951 Convention and its 1967 Protocol (together, "the Refugee Convention").⁶

¹ *Bill 141 2021-22*, amended/HL Bill 82, available at: <https://bills.parliament.uk/bills/3023/publications>

² *Bill 141 2021-22*, as introduced, available at: <https://bills.parliament.uk/bills/3023/publications>

³ Available at: <https://www.gov.uk/government/consultations/new-plan-for-immigration>

⁴ Available at: <https://www.unhcr.org/publications/legal/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021.html>

⁵ *Nationality and Borders Bill Explanatory Notes (HL Bill 82 Explanatory Notes)*, 9 December 2021, paras. 79 and 312, available at: <https://bills.parliament.uk/bills/3023/publications>. The Government published an initial set of Explanatory Notes when the Bill was first introduced in the House of Commons on 06 July 2021 (*Explanatory Notes Bill 141 EN 2021-22*). These are mostly identical to the HL Bill 82 Explanatory Notes, and they are also available at <https://bills.parliament.uk/bills/3023/publications>. These Observations refer to the 09 December 2021 Explanatory Notes, except where otherwise specified. UNHCR, *UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom*, May 2021, available at: <https://www.unhcr.org/uk/publications/legal/60950ed64/unhcr-observations-on-the-new-plan-for-immigration-uk.html>.

⁶ Under the 1950 Statute of the Office of the High Commissioner (UN General Assembly (UNGA), Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V)), UNHCR has been entrusted with the responsibility for providing international protection to refugees, and together with governments, for seeking permanent solutions to their problems. As set out in the Statute (paragraph 8(a)), UNHCR fulfils its 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". 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 relating to the Status of Refugees (1951 Convention)*, 189 UNTS 137, available at: <https://www.unhcr.org/3b66c2aa10>



5. We also add our observations on several new provisions of the Bill, introduced at committee stage, that allow for the deprivation of citizenship without notice, or otherwise potentially without a fair hearing. UNHCR's offers these observations in its capacity as the Agency entrusted by the UN General Assembly with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.⁷ The UN General Assembly has specifically requested UNHCR "to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States".⁸ UNHCR thus has a direct interest in national legislation impacting on the prevention and reduction of statelessness and protection of stateless persons, including the implementation of the safeguards contained in international human rights treaties as well as the 1954 Convention relating to the Status of Stateless Persons ("1954 Convention") and the 1961 Convention on the Reduction of Statelessness ("1961 Convention").⁹ The UN General Assembly has also entrusted UNHCR with the specific role foreseen in Article 11¹⁰ of the 1961 Convention.
6. Due to the length and complexity of the Bill, it has not been possible to respond to all of its clauses in the limited time available. Our lack of comment on any particular clause of the Bill should not be construed as expressing tacit endorsement of it.

The "first safe country" concept is unworkable and would undermine global cooperation

7. The Bill is based on the premise that "people should claim asylum in the first safe country they arrive in".¹¹ This principle is not found in the Refugee Convention and there is no such requirement under international law.¹² On the contrary, in international law, the

⁷ UNGA, Resolution A/RES/50/152 of 9 February 1996, available at: <http://www.unhcr.org/refworld/docid/3b00f31d24.html>; reiterated in subsequent resolutions, inter alia, 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 recognised 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>

⁸ UNGA, Resolution A/RES/50/152, (ibid), para. 15.

⁹ 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>

¹⁰ Article 11 of the 1961 Convention provides for the creation of a "body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority."

¹¹ See, for example, the comments of the Secretary of State for the Home Department during the introduction of the New Plan for Immigration in Parliament on 24 March 2021, in which she said: "People should claim asylum in the first safe country they arrive in. That is the point that we are making again and again.", available at: <https://hansard.parliament.uk/Commons/2021-03-24/debates/464FFFBB-ECA5-4788-BC36-60F8B7D8D9D1/NewPlanForImmigration> and her speech introducing the second reading of the Bill on 19 July 2021, available at: <https://www.gov.uk/government/speeches/home-secretary-opening-speech-for-nationality-borders-bill> ("People should be claiming asylum in the first safe country they reach, and not using the UK as a destination of choice."); UK Home Office, *Inadmissibility: safe third country cases*, Version 5.0, 31 December 2020, page 5, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf; and *HL Bill 82 Explanatory Notes* (n 5), paras. 22, 24 and 159.

¹² See UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9 and 10 December 2002), February 2003, para. 11, available at: www.refworld.org/docid/3fe9981e4.html



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primary responsibility for identifying refugees and affording international protection rests with the State in which an asylum-seeker arrives and seeks that protection.¹³

8. Requiring refugees to claim asylum in the first safe country they reach would undermine the global, humanitarian, and cooperative principles on which the refugee system is founded. It is also at variance with the preamble of the 1951 Convention, which acknowledges that asylum may place burdens on certain countries, requiring international cooperation among states to address this challenge. The United Kingdom played a key role in developing these principles 70 years ago when it helped draft the Refugee Convention, and, together with the other members of the United Nations General Assembly, it recently reaffirmed them in the Global Compact on Refugees.¹⁴ Asylum laws designed around the maxim that asylum-seekers “should claim asylum in the first safe country they reach” and can be penalised if they do not (including by being designated ‘Group 2’ refugees), impact not only refugees but also fellow host States and the ability to seek global, cooperative solutions to global challenges.
9. The expectation that refugees should claim asylum in the first safe country they reach is also unworkable in practice. There are 34.4 million refugees and asylum-seekers worldwide, and the vast majority of them - 73% - are already hosted in countries neighbouring their countries of origin. Eighty-six percent are hosted in middle income and developing countries.¹⁵ To insist that refugees claim asylum in the “first safe country they reach” would impose an even more disproportionate responsibility on “first” safe countries both in Europe and further afield and threaten the capacity and willingness of those countries to provide protection and long-term solutions. When hosting capacity is overwhelmed onward movement often ensues.¹⁶ Even within Europe, most of the countries that refugees pass through on their way to the UK already host significantly more refugees and asylum-seekers per population than the UK does.¹⁷

The Bill would deny recognised refugees rights that are guaranteed to them under the Refugee Convention and international law

10. The Bill would also create a series of significant civil and criminal penalties that would target the majority of the refugees who will seek asylum in the United Kingdom. As set out in detail below, these penalties target those who have entered the UK irregularly or overstayed; those who have not come directly to the UK – regularly or irregularly - from

¹³ UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries (Legal considerations regarding access to protection)*, April 2018, para. 2, available at: <https://www.refworld.org/docid/5acb33ad4.html>; UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 1, 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, para. 17, available at: <https://www.refworld.org/docid/6045dde94.html>

¹⁴ 1951 Convention, (n 6), Preambular Paragraph 4; UNGA, *Report of the United Nations High Commissioner for Refugees, Part II: Global compact on refugees*, A/73/12, 17 December 2018, as part of its Resolution on the Office of the High Commissioner for Refugees, A/RES/73/151, paras. 2, 4, 64, 67 and 70, available at: www.unhcr.org/gcr/GCR_English.pdf

¹⁵ UNHCR, *Refugee data finder*, available at: <https://www.unhcr.org/refugee-statistics/>

¹⁶ UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, paras. 44 and 49, available at: www.refworld.org/docid/5d8a255d4.html (noting that onward movement can be encouraged where refugees see “no viable solutions within reach” and by poor reception conditions).

¹⁷ Combining UNHCR’s figures for refugees and asylum-seekers in Europe in 2020 (<https://www.unhcr.org/refugee-statistics/download/?url=rEf0rO>) and Eurostat population figures (https://ec.europa.eu/eurostat/databrowser/view/demo_pjan/default/table?lang=en) shows that out of 42 European countries, the UK is 21st in the number of refugees and asylum-seekers per population, behind Turkey, Malta, Austria, Germany, Greece, Switzerland, Luxembourg, France, Belgium, the Netherlands, Spain, Bulgaria and Ireland, among others.



a country or territory where their life or freedom was threatened; those who have delayed claiming asylum and even those who arrive without prior authorisation and claim asylum immediately upon arrival.

11. At the heart of the Bill is the creation of two tiers of refugee status under UK law, in which only those refugees who meet specific additional “requirements” will be considered “Group 1” refugees and benefit from the rights guaranteed to all refugees by the Refugee Convention. [**Clause 11(1)**] These requirements are that they:
 - (i) “have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention)” [**Clause 11(2)(a)**], and
 - (ii) “have presented themselves without delay to the authorities,” defined elsewhere as “as soon as reasonably practicable” [**Clause 11(2)(b)**] and
 - (iii) “where a refugee has entered or is present in the United Kingdom unlawfully, the additional requirement is that they can show good cause for their unlawful entry or presence”; good cause is not defined in the Bill or elsewhere.”¹⁸ [**Clause 11(3)**]
12. UNHCR reiterates that the attempt to create two different classes of recognised refugees is inconsistent with the Refugee Convention and has no basis in international law. The Refugee Convention contains a single, unitary definition of refugee, which is found at Article 1A(2). This defines a refugee solely according to their need for international protection because of feared persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion. Anyone who meets that definition, and is not excluded (see Articles 1D, 1E and 1F of the Convention), is a refugee and entitled to the protections of the Refugee Convention. There is nothing in the Refugee Convention that defines a refugee or their entitlements under it according to their route of travel, choice of country of asylum, or the timing of their asylum claim.
13. As a party to the Refugee Convention, the United Kingdom has binding legal obligations towards all refugees under its jurisdiction. These must be reflected in domestic law, regardless of the refugees’ mode of arrival, or the timing of their asylum claim. These obligations are set out at Articles 3-34 of the Convention. They include, but are not limited to, the following obligations directly undermined by the Bill: providing refugees who are lawfully staying in the country with “public relief” on the same terms as nationals (Article 23); not expelling refugees who are lawfully in the territory except on grounds of national security or public order, and in accordance with due process safeguards (Article 32); and facilitating all refugees’ integration and naturalisation (Article 34). The Bill, however, would empower the Secretary of State to enact immigration rules discriminating between “Group 1” and “Group 2” refugees and their family members, and gives the following examples of potential areas for discrimination: the length of the periods of limited leave to remain granted; the conditions for qualifying for settlement; a prohibition on access to public funds; and whether immediate family members are allowed to enter or remain in the UK.¹⁹

¹⁸ “Good cause” is not defined in Bill, and in the context of the Bill’s overall emphasis on the criminalisation of seeking asylum, UNHCR is concerned that it may be defined very narrowly in rules or policy.

¹⁹ The Bill specifically mentions the possibility of discrimination in terms of the length of periods of limited leave, [**Clause 11(5)(a)**]; the requirements for settlement, [**Clause 11(5)(b)**]; and whether family will be given leave to enter or remain in the United Kingdom, [**Clause 11(5)(d)**]; but these are given as examples only of a more general power to discriminate. **Clause 11(6)** would give the Secretary of State the same power to discriminate against the family members of Groups 2 refugees. At present, the Secretary of State’s powers in this regard are constrained by Section 2 of the Asylum and Immigration Act 1993, which provides: “Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention” which would appear to preclude the adoption of some of the immigration rules suggested in the Explanatory Notes.



14. The official Explanatory Notes published alongside the Bill set out that the intention is to grant Group 2 refugees a precarious “temporary protection status”, with no possibility of settlement for at least ten years.²⁰ This would deliberately impede their integration and naturalisation, rather than facilitating it as required by Article 34 of the Refugee Convention.
15. During these ten years, a refugee would “be expected to leave the UK as soon as they are able to or as soon as they can be returned or removed, once no longer in need of protection,” according to the Explanatory Notes.²¹ Although the language of this phrase is not entirely clear, UNHCR understands that the intention is to remove even recognised refugees if and when transfer to a third country becomes possible. The precise legal mechanism by which this would be done is not specified.²² UNHCR reiterates that the Refugee Convention prohibits the expulsion of refugees lawfully in the country except on grounds of national security or public order (Article 32) and also sets out clear standards for when refugee status shall be considered to have ceased because a person is no longer in need of protection (Article 1C). Any “expectation” that a refugee leave the United Kingdom under any other circumstances, if enforced, would breach the Refugee Convention.
16. The Explanatory Notes further clarify that the Government intends to use the powers created by the Bill so as to “restrict” the rights of the family members of Group 2 refugees to enter or remain in the UK.²³ This would be at variance with the right to family life and the principle of family unity and would run counter to decades of international consensus, in which the UK has consistently participated, “that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee”²⁴ and that refugees should “benefit from a family reunification procedure that is more favourable than that foreseen for other aliens”.²⁵
17. In the UK, the right to respect for family life is protected by Article 8 of the European Convention on Human Rights, to which the UK is a party and with which public authorities must comply in accordance with Section 6 of the Human Rights Act 1998. In October 2018, the Parliamentary Assembly of the Council of Europe (of which the United Kingdom remains a member) adopted Resolution 2243 (2018) on *Family reunification of refugees and migrants in the Council of Europe member States*. This concluded:

²⁰ *HL Bill 82 Explanatory Notes* (n 5), para. 20.

²¹ *Ibid.*

²² This would be in line with the New Plan for Immigration Policy Statement, which proposed both that recognised refugees would be “reassessed for return to their country of origin or removal to another safe country” after each period of 30 months’ limited leave to remain and, more broadly, that they would be “expected to leave the UK as soon as they are able to or as soon as they can be returned or removed” [emphasis added]. *New Plan for Immigration Policy Statement* (n 3), p. 20. In assuming that the intention of the Bill is the same as that announced in the Plan, we also rely on the Government’s formal response to the consultation on the Plan, which stated that “we do not propose any changes to the underlying policies” with regard to two-tier status. *Consultation on the New Plan for Immigration: Government Response (Consultation Response)*, p. 10, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005042/CCS_207_CCS0621755000-001_Consultation_Response_New_Plan_Immigration_Web_Accessible.pdf.

²³ *HL Bill 82 Explanatory Notes* (n 5), para. 20.

²⁴ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1, 25 July 1951, available at: <https://www.unhcr.org/protection/travaux/40a8a7394/final-act-United-nations-conference-plenipotentiaries-status-refugees-stateless.html>

²⁵ *Tanda-Muzinga c. France*, Council of Europe: European Court of Human Rights (ECHR), Requête no 2260/10, 10 July 2014, para. 75, available at: https://www.refworld.org/cases_ECHR_53be80094.html; see also, *FH (Post-flight spouses)*, [2010] UKUT 275, paras. 23-25, available at: <https://tribunalsdecisions.service.gov.uk/utiac/37657> This found that the de facto five-year bar on sponsoring a post-flight spouse that arose after refugees were granted limited leave to remain rather than Indefinite Leave to Remain would require clear justification and was likely to be a disproportionate interference with Article 8.



*Hindrances to the protection of family life are not admissible under Article 8 of the European Convention on Human Rights to deter migrants or refugees and their family members.*²⁶

18. The European Court of Human Rights has held that Article 8 requires that decision-making in refugee family reunion applications be “flexible, swift and effective”.²⁷ Any “restriction” on refugee family reunion as a penalty for claiming asylum in the UK rather than elsewhere, for delaying a claim or for unlawful entry or presence is likely to breach the UK’s obligations under Article 8 and violate Article 6 of the Human Rights Act.²⁸
19. It is therefore difficult to see how the assertion that under the Bill “[a]ll individuals recognised as refugees by the UK will continue to be afforded the rights and protections required under international law, specifically those afforded by the 1951 Refugee Convention” can be sustained.²⁹ The express intention is to deny them many of those rights.

Practical consequences of Group 2 status

20. The Bill envisions that Group 2 status will be imposed on recognised refugees – that is, on people who are at risk of persecution, who have been forcibly separated from their homes, their families, and their livelihoods, and who in many cases have suffered trauma. The mental health challenges they face are well documented,³⁰ yet the Bill will stigmatise them as unworthy and unwelcome and, if the intentions expressed in the Explanatory Notes were carried out, maintain them in precarious status for ten years, deny them access to public funds unless they were destitute, and restrict their access to family reunion.
21. The initial challenges refugees in the UK face in re-entering the workforce are also well-documented:³¹ their skills, qualifications and work experience may not be recognised,

²⁶ Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25185&lang=en>

²⁷ For this reason, a processing time of over three years was found to be unlawful. *Tanda-Muzinga* (n 25), para. 82.

²⁸ We note that at para. 12 of its *Nationality and Borders Bill European Convention on Human Rights Memorandum*, July 2021, available at: <https://publications.parliament.uk/pa/bills/cbill/58-02/0141/ECHRmemo.pdf>, the Government suggests that the proposed restrictions on refugee family reunion are consistent with Article 8 because the UK has a “legitimate interest” in discouraging “forum shopping” and encouraging asylum-seekers to claim asylum in the first safe country they arrive in”, “encouraging asylum-seekers to present themselves to the authorities and make claims at the first available opportunity”, and promoting “lawful methods of entry”. However, it is axiomatic that identifying a legitimate interest is not sufficient to make an interference with Article 8 lawful. The interference must also be rationally designed to promote that interest and be proportionate in its application. See, e.g. *MM (Lebanon) v SSHD*, [2017] UKSC 10, available at: <https://www.supremecourt.uk/cases/docs/uksc-2015-0011-judgment.pdf>. The existence of a general consensus (as there is in favour of refugee family reunion), moreover, is likely to limit a State’s “margin of appreciation” under Article 8. *Case of MA v Denmark* (Application no. 6697/18), Council of Europe: ECHR (Grand Chamber), para. 151, available at: <http://hudoc.echr.coe.int/fre?i=001-211178>

²⁹ *HL Bill 82 Explanatory Notes*, (n 5), para. 160.

³⁰ See, e.g. Public Health England, *Mental health: migrant health guide*, available at: <https://www.gov.uk/guidance/mental-health-migrant-health-guide>; World Health Organization, *Mental health promotion and mental health care in refugees and migrants: Technical guidance*, 2018, available at: https://www.euro.who.int/data/assets/pdf_file/0004/386563/mental-health-eng.pdf

³¹ See UNHCR, *Tapping Potential: Guidelines to Help British Businesses Employ Refugees*, 2019, available at: <https://www.unhcr.org/publications/brochures/5cc9c7ed4/tapping-potential-guidelines-to-help-british-businesses-employ-refugees.html>; Tweed, A., & Stacey, S., *Refugee Employment Support in the UK: Insights into services, barriers, and best practice to support refugees into employment across the UK*, commissioned by the Refugee Employment Network, March 2018, available at: <https://transitions-london.co.uk/wp-content/uploads/2019/02/Refugee-Employment-Support-2018.pdf>; Kone, Z. et al, *Refugees and the UK Labour Market*, April 2019, ECONREF, COMPAS, University of Oxford, <https://www.compas.ox.ac.uk/wp-content/uploads/ECONREF-Refugees-and-the-UK-Labour-Market-report.pdf>, Vargas-Silva, C. and Ruiz, I, *Differences in labour market outcomes between natives, refugees and other migrants in the UK*, 2018, *Journal of Economic Geography*, available at: <https://doi.org/10.1093/jeg/lby027>



and they will have had little or no opportunity for work or training while awaiting a decision on their asylum claims.³² Multiple studies have shown, moreover, that precarious status itself is a barrier to integration and employment.³³ Yet, in spite of these challenges, the Bill will specifically empower the Secretary of State to attach a “No Recourse to Public Funds” condition to the grant of leave of Group 2 refugees, and, according to the Explanatory Notes, their status “may only allow access to public funds in cases of destitution”.³⁴

22. The adverse consequences of a “No Recourse to Public Funds” condition will fall not only on the refugees themselves, but also on their families, including on any children who travel with them, are able to join them later, or are born in the UK. These consequences have been documented in numerous studies as well as in the context of litigation. They include difficulty accessing shelters for victims of domestic violence,³⁵ denial of free school meals where these are linked to the parents’ benefit entitlement,³⁶

³² 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) (available here: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-shortage-occupation-list>), and that self-employment and engagement in business are prohibited, see: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11b>. Until very recently, 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 in early 2022, 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. This has the potential to provide some asylum-seekers with access to employment.

³³ Australian Human Rights Commission, *Lives on Hold: Refugees and asylum-seekers in the ‘Legacy Caseload’*, 2019, pp. 73-77, available at: <https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>; Yevgeniya Averhed, *The breathing space or impact of temporary protection on integration from the perspective of refugees*, School of Advance Study, University of London, December 2020, available at: <https://sas-space.sas.ac.uk/9453/>. The Home Office’s own Indicators of Integration Framework identifies “secured immigration status” as a key outcome indicator for stability which “is necessary for sustainable engagement with employment or education and other services.”, see UK Home Office, *Indicators of Integration framework 2019*, Third Edition, p. 52, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835573/home-office-indicators-of-integration-framework-2019-horr109.pdf. In its 2021 annual report, the UK’s official Migration Advisory Committee (MAC) recommended that asylum-seekers be given the right to work, in light of widespread evidence of the negative impact of denial of access to the labour market on refugees’ long-term integration, coupled with significant delays in asylum decision-making. MAC, *Annual report December 2021*, pp. 31-32, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040877/2021_Annual_Report_combined_FINAL_v3.pdf

³⁴ *HL Bill 82 Explanatory Notes*, (n 5), para. 20. The official ECHR Memorandum accompanying the Bill further clarifies that this power “will not be exercised where to do so would lead to destitution that would otherwise breach Article 3 ECHR,” which prohibits inhuman and degrading treatment. *ECHR Memorandum*, (n 28), para. 11.

³⁵ The No Recourse to Public Funds (NRPF) Network, *Submission to consultation on delivery of support in accommodation-based services*, August 2019, available at: <https://www.nrpfnetwork.org.uk/-/media/microsites/nrpf/documents/policy/submission-to-consultation-on-domestic-abuse-bill-accommodation-provision.pdf?la=en&hash=A3FC30B199DEFF35EEE1D0A42CF47993C1E30A17>; Women’s Aid, *Nowhere to Turn 2021*, p. 25, available at: https://www.womensaid.org.uk/wp-content/uploads/2021/07/Nowhere-to-Turn-2021-WIP-4-copy_FINAL.pdf (describing NRPF as a “key barrier” to accessing domestic violence refuges) and *Nowhere to Turn for Children and Young People*, Women’s Aid, 2020, p. 31, available at: <https://www.womensaid.org.uk/wp-content/uploads/2021/09/Nowhere-to-Turn-for-Children-and-Young-People-Updated-July-2021.pdf> (reporting that only 4% of vacancies listed on Routes to Support are open to those with NRPF, and even in those cases, victims may need to have other forms of financial support in place before being accommodated).

³⁶ NRPF, *Assessing and Supporting children and families who have NRPF; Practice guide for local authorities*, April 2018, sec. 13.6, available at: <https://guidance.nrpfnetwork.org.uk/reader/practice-guidance-families/eligibility-for-other-services/#136-free-school-meals>



and de facto exclusion from the job market for single parents (largely women) who have limited access to government-subsidised childcare, as well as significant risks of food poverty, severe debt, sub-standard accommodation, and homelessness.³⁷ These consequences, in turn, hinder integration and increase financial costs to local authorities, who in many cases have statutory obligations towards children and adults with care needs.³⁸ It is also worth noting that among the public relief measures defined as “Public Funds” in this context are those specifically intended to support children, such as Child Benefit, and the particularly vulnerable, such as carer’s allowance and personal independence payment.³⁹

23. Children born to Group 2 refugees in the UK, moreover, will normally have no right to British nationality for ten years, or until their parents are granted settlement.⁴⁰ Given that refugees may put their status and perhaps security at risk were they to approach the embassy of their country of origin to register their children, many will have no effective nationality at all.⁴¹
24. With the possibility of applying for family reunion foreclosed, moreover, more women and children are likely to attempt dangerous journeys, either at the same time as the men who might previously have sponsored them under current rules, or to join them afterwards.⁴² This risk has been recognized by the Council of Europe,⁴³ among others, and has been borne out in Australia, where the abolition of family reunion rights for holders of “Temporary Protection Visas” was followed by a threefold increase in the percentage of refugees trying to reach Australia who were women and children.⁴⁴

³⁷ Woolley, A., *Access Denied: The cost of the ‘no recourse to public funds’ policy*, Unity Project and Deighton Pierce Glynn, June 2019, available at: <https://static1.squarespace.com/static/590060b0893fc01f949b1c8a/t/5d0bb6100099f70001faad9c/1561048725178/Access+Denied+-+the+cost+of+the+No+Recourse+to+Public+Funds+policy.+The+Unity+Project.+June+2019.pdf>; Morris, M. and Qureshi, A., *Locked out of a Livelihood: The Case for Reforming ‘No Recourse to Public Funds’*, Institute for Public Policy Research, September 2021, available at: <https://www.ippr.org/files/2021-09/locked-out-of-a-livelihood.pdf>

³⁸ Morris and Qureshi (ibid), p. 2. See also, *ST & Anor v Secretary of State for the Home Department*, [2021] EWHC 1085 (Admin), para. 116, available at: <https://www.bailii.org/cgi-bin/format.cgi?doc=%2Ffew%2Fcases%2FEWHC%2FAdmin%2F2021%2F1085.html> (reporting that “The Home Office had been told anecdotally that many children of parents who were subject to a NRPf condition were supported by local authorities under section 17 of the Children Act 1989.”)

³⁹ UK Visas and Immigration, Guidance; Public funds, 17 February 2014, available at: <https://www.gov.uk/government/publications/public-funds--2/public-funds>

⁴⁰ Children born in the UK are not British by birth unless one of their parents is either British or settled at the time of their birth, although they will be entitled to apply for registration as a British citizen if one of their parents is later granted settlement, or if they have lived in the United Kingdom for ten years without being absent from the country for more than 90 in any of those years. British Nationality Act 1981, section 1, <https://www.legislation.gov.uk/ukpga/1981/61>. The cost of an application for registration as a British citizen is currently £1012, see: <https://www.gov.uk/government/publications/fees-for-citizenship-applications/fees-for-citizenship-applications-and-the-right-of-abode-from-6-april-2018>

⁴¹ Where the parents’ nationality requires registration of births abroad, the children will be stateless.

⁴² Over 90% of refugee family reunion grants are for women and children. See UK Home Office, *Family Reunion Visa Grants, Year Ending September 2021*, available at: <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#family-reunion>; see also, UNHCR, *Position on Safe and Legal Pathways*, 8 February 2019, para. 24, available at: <https://www.refworld.org/docid/5ce4f6d37.html>

⁴³ Parliamentary Assembly of the Council of Europe, Resolution 2243(2018) (n 26), para. 2.

⁴⁴ Senate Legal and Constitutional Affairs Committee, *Questions Taken on Notice, Budget Estimates Hearing 21–24 May 2012*, Immigration and Citizenship Portfolio, available at: http://www.aph.gov.au/~media/Estimates/Live/legcon_ctte/estimates/bud_1213/diac/BE12-0265.ashx; Kaldor Research Centre, UNSW Sydney, *Research Brief: Temporary Protection Visas (TPVs) and Safe Haven enterprise Visas (SHEVs)*, November 2020, available at: https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research%20Brief_TP_V_SHEV_Aug



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25. In short, “Group 2” status is not only inconsistent with the Refugee Convention. It is also a recipe for mental and physical ill health, social and economic marginalisation, and exploitation. The human cost to the refugees and their families (including their children) is obvious enough and – given the deterrent purpose of the Bill set out in the Explanatory Notes⁴⁵ and the ECHR Memorandum⁴⁶ – deliberate. Because by definition refugees cannot “go home”, the economic and social costs of their immiseration will ultimately be borne by local authorities, communities, and the National Health Service.

The Bill relies on a fundamental misapplication of Article 31(1) of the Refugee Convention

26. Because the additional requirements to qualify for “Group 1” status use some of the same phrases as Article 31 of the Refugee Convention, the Government describes the Bill as “aligned with”, “based on” and “consistent with” Article 31(1).⁴⁷ It is not.
27. Article 31(1) of the Refugee Convention prohibits penalising refugees for their unlawful entry or presence if they come directly from a country where their life or freedom was threatened, present themselves to the authorities without delay, and show good cause for their unlawful entry or presence. This article was intended to address the situation of refugees who were often unable to secure the necessary authorisation to enter a country. The exemption in their favour could not, however, be claimed by those who were lawfully settled, temporarily or permanently, in another country and had already found protection there and who decided to move onward irregularly for reasons unconnected to their need for international protection. To them, administrative penalties for unlawful entry or presence could be applied. It has since been understood also to apply to those who failed to seek asylum in a timely fashion or at all, in a country where they could reasonably have done so.⁴⁸ The UK High Court in *Adimi* introduced three benchmarks to interpret “coming directly”: 1) the length of stay in the intermediate country; 2) the reason for the delay; and 3) whether or not the refugee sought or found protection *de jure* or *de facto*.⁴⁹
28. However, any penalties for unlawful entry or presence must not undermine the right to seek and enjoy asylum or be at variance with other provisions of the 1951 Convention (or, more broadly, with international human rights standards), and in particular must not exclude refugees from the benefit of entitlements under the Convention or other international human rights instruments.
29. The Bill is inconsistent with Article 31(1) in six significant ways:

[2018.pdf](#); Hoffman, S., *Temporary Protection Visas & SIEV X*, , 6 February 2006, available at: <http://sievx.com/articles/challenging/2006/20060206SueHoffman.html>; Hoffman, S., *The Myths of Temporary Protection Visas*, 14 June 2011 available at: <https://www.abc.net.au/news/2011-06-14/hoffman---the-myth-of-temporary-protection-visas/2757748>

⁴⁵ *HL Bill 82 Explanatory Notes* (n 5), para. 159: “The purpose of differentiation is to discourage asylum-seekers from travelling to the UK other than via safe and legal routes. It aims to influence the choices that migrants may make when leaving their countries of origin - encouraging individuals to seek asylum in the first safe country they reach after fleeing persecution, avoiding dangerous journeys across Europe.”

⁴⁶ *ECHR Memorandum* (n 28), para.12, describing the three purposes of Clause 10 [now Clause 11] as “discouraging ‘forum shopping’ and encouraging asylum-seekers to claim asylum in the first safe country they arrive in”; “encouraging asylum-seekers to make claims at the first available opportunity”, and “promoting lawful methods of entry.”

⁴⁷ *HL Bill 82 Explanatory Notes*, (n 5) para.19, 156 and 162 and *ECHR Memorandum*, (n 28), para. 12.

⁴⁸ UNHCR, *Observations on the New Plan for Immigration* (n 5), para. 13.

⁴⁹ *R v. Uxbridge Magistrates Court and Another, Ex Parte Adimi*, [1999] EWHC Admin 765; [2001], Q.B. 667, p.773, available at: https://www.refworld.org/cases.GBR_HC_QB_3ae6b6b41c.html



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- (i) It targets “Group 2” refugees not only for unlawful entry or presence, but also for their perceived failure to claim asylum elsewhere or to claim asylum promptly, even if they entered and are present in the UK lawfully [**Clause 11(2)**];
 - (ii) It would empower the Secretary of State to impose a type of penalty for belonging to “Group 2” that is at variance with the Refugee Convention: namely, the denial of rights specifically and unambiguously guaranteed by the Convention to recognised refugees [**Clause 11(5)(a)-(c)**];
 - (iii) It would further empower the Secretary of State to impose a penalty on Group 2 refugees that would be inconsistent with international human rights law, namely, restrictions on their right to family unity [**Clause 11(5)(d) and Clause 11(6)(a)**];
 - (iv) It creates new offences of “arriving” in the UK without a visa or Electronic Travel Authorisation (where one is required) [**Clause 39(2)**], to which there would be no defence based on Article 31(1);⁵⁰
 - (v) It would clarify that there is no defence under section 31 of the Immigration and Asylum Act 1999 (which is entitled “Defences based on Article 31(1) of the Refugee Convention”) for offences committed while seeking to leave the UK [**Clause 36(4)**] - something that the House of Lords found would be inconsistent with the Refugee Convention.⁵¹ In UNHCR’s view, refugees who leave a country in contravention of exit rules and who are present without authorization may be protected from penalization under Article 31(1) of the 1951 Convention, particularly when they are transiting en route elsewhere to claim asylum, and despite the fact that they have not presented themselves to the authorities without delay when entering; and
 - (vi) It would allow for the prosecution of asylum-seekers who provide assistance to each other when travelling together to the United Kingdom, by eliminating the requirement that such assistance must be provided for gain in order to constitute a criminal offence [**Clause 40(3)**] and it denies them an otherwise applicable defence, relating to acts of rescue at sea [**Clause 40(4)**].
30. UNHCR also notes with regret that at the same time as it amends section 31 of the 1999 Act so as to make its defences unavailable for offences committed while leaving the UK, **Clause 36(4) of the Bill** does not amend that section to comply with Article 31(1) of the Refugee Convention by bringing within its scope the very offences named in that Article: illegal entry and illegal presence (offences under Section 24(1) of the Immigration Act 1971).⁵²
31. Finally, at **Clause 36(1)**, the Bill would interpret Article 31(1) to mean that “A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.” As set out in our observations of May 2021, this definition of “coming directly” would be inconsistent with Article 31(1) of the Convention unless it continued to be interpreted in line with the current UK jurisprudence. This defines the term “directly” broadly and purposively, such that refugees who have crossed through, stopped over or

⁵⁰ The UK’s “Defences based on Article 31(1) of the Refugee Convention” are found at of the Immigration and Asylum Act 1999, Section 31, available at: <https://www.legislation.gov.uk/ukpga/1999/33/section/31> They are not available for any offences committed under Sections 24 of 1971 Immigration Act.

⁵¹ *R v. Asfaw*, [2008] UKHL 31, paras. 26 and 59, available at: https://www.refworld.org/cases_GBR_HL_4835401f2.html

⁵² Section 24 of the Immigration Act 1971 is available at: <https://www.legislation.gov.uk/ukpga/1971/77/section/24>. In the leading case of *Asfaw* in the House of Lords, Lord Bingham noted this significant omission, commenting, “I am at a loss to understand why . . . [the offence of illegal entry under Section 24(1) of the 1971 Act] has been omitted from section 31 of the 1999 Act] since section 24, like section 24A, falls four-square within the terms of article 31. Article 31 is designed indeed for precisely that kind of offence.” *R v. Asfaw* (n 51), para. 77.

stayed in other countries en route to the country of intended sanctuary may still be exempt from penalties.⁵³

The Bill would impermissibly externalise the UK’s obligations to refugees and asylum-seekers within its jurisdiction

32. The Bill would lay the legislative basis for externalising the UK’s obligations under the Refugee Convention by authorising the transfer of asylum-seekers to “safe countries” (which may include territories that are not, legally, States), without clearly stipulated requirements that they offer minimum reception conditions, access to a fair and efficient asylum procedure, or international protection where needed, in line with obligations under the Refugee Convention or, indeed, protection against any human rights abuses other than persecution on Refugee Convention grounds, inhuman and degrading treatment in violation of Article 3 ECHR, or removal to face these human rights abuses elsewhere.
33. Nor would there be any requirement for a consideration of whether the transfer was safe or reasonable in the individual asylum-seeker’s circumstances, or of any prior connection between the asylum-seeker and the territory. A “connection” to another State (in the limited sense given to that term by the Bill) is only required in the context of a finding of inadmissibility, as discussed below. The possibility of the transfer of asylum-seekers to third countries appears in a separate clause of the Bill and is not confined – either in its own terms or the Explanatory Notes – to those whose claims have been found inadmissible.
34. The most immediate method of externalisation set out in the Bill are its provisions on “inadmissibility”, which would deny access to asylum procedures in the UK to asylum-seekers with any one of five different types of “connection” to a “safe third State”.⁵⁴ UNHCR recognises that the onward movement of refugees and asylum-seekers creates significant challenges for States and for the international protection system as a whole. Where asylum-seekers lodge multiple claims in different States, move onwards after claiming asylum or receiving protection, or refrain from seeking international protection in a State where they had an effective opportunity to do so, it results in inefficiencies, administrative duplication, delays and significant costs, as well as additional demands on reception capacities and asylum systems in different countries.⁵⁵
35. However, the UK’s inadmissibility rules have a far broader reach. [**Clause 15**] In the first place, they create a low standard for when a State would be considered “safe” for a particular claimant. The criteria for a State to be considered “safe” in this context for a particular claimant are that their “life and liberty are not threatened there by reason of their race, religion, nationality, membership of a particular social group or political opinion”, that the State is one from which “a person” will not be removed in breach of non-refoulement obligations under the Refugee Convention or the ECHR, and that “a person” may apply for refugee status there and, if recognized, receive protection in

⁵³ *Ex parte Adimi* (n 49), para. 18; *R v. Asfaw* (n 51), para. 15 and 36; *R. and Koshi Pitshou Mateta and others*, [2013] EWCA Crim 1372, paras. 12-15 and 21(iv), available at: www.refworld.org/cases,GBR_CA_CIV,5215e0214.html; *Decision KKO:2013:21*, Finland: Supreme Court, available at: www.refworld.org/cases,FIN_SC,557ac4ce4.html; also see UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 16), para. 39.

⁵⁴ These largely enact into legislation the immigration rules on inadmissibility that have been in effect since 11 pm on 31 December 2020, but there are some significant changes, most notably the abolition of the requirement under Para. 345D(i) to consider an asylum claim if a person cannot be removed within a reasonable time and the deletion of references to “effective protection” in Para. 345A. See Paragraphs 345A-345D of the Immigration Rules, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

⁵⁵ UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 16), para. 1.



accordance with the Refugee Convention.⁵⁶ Thus, a country could still be considered safe even if the applicant had been, and perhaps continues to be, at real risk of being subjected to human rights violations there that either fall short of threats to life and liberty, or to which they were not exposed for reasons of a Refugee Convention ground. In addition, although the State must be one in which in general “a person may” apply for refugee status and receive protection “in accordance with the Refugee Convention”, it is not clear from the terms of the Bill that this possibility needs be available to the particular applicant. From the wording of the Bill (“a person” at subclauses (b) and (c) as distinct from “the claimant” at subclause (a)) it appears it may arguably be sufficient that in general there is the possibility of applying for refugee status in that State.

36. In addition, in order to be found to have a “connection” to a safe third State, the particular applicant need not have had a reasonable opportunity to access refugee status there. Although the State would have to be one in which, in general, the possibility existed for a person to apply for refugee status, an individual claimant could be found to be inadmissible because they had received nothing more than protection against removal in violation of the Refugee Convention or Article 3 ECHR, or had made or had a reasonable opportunity to make a “relevant claim” for such protection there. [**Clause 15, Section 80C(2)-(6)**]
37. Moreover, mere presence in a “safe” State where it would have been reasonable to expect the applicant to make a “relevant claim” would be sufficient to establish a “connection” and trigger inadmissibility,⁵⁷ as would an otherwise unelaborated “connection” such that, in the claimant’s particular circumstances, it would have been reasonable for them to have gone there to make such a claim, even if they have never been there.⁵⁸
38. In a significant and highly problematic departure from international practice and UK caselaw,⁵⁹ it is irrelevant whether the claimant would be admitted to the safe third State in question. While a “connection” (in the limited sense of proposed new Section 80C) between the applicant and the “safe third State” is required for a claim to be declared inadmissible, the Secretary of State may still remove the applicant to any other “safe”

⁵⁶ The definition of a safe State would be contained in a new Section 80B of the Nationality, Immigration and Asylum Act 2002, introduced by **Clause 15** of the Bill, while the five connections to such a State that would trigger inadmissibility are listed at Section 80C.

⁵⁷ Mere transit of a safe third country has been found to be an insufficient connection to ground a finding of inadmissibility under European law, 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>

⁵⁸ Condition 5 is: “in the claimant’s particular circumstances, it would have been reasonable to expect them to have made a relevant claim to the safe third State (instead of making a claim in the United Kingdom).”

⁵⁹ *RR (Refugee - Safe Third Country) Syria v. Secretary of State for the Home Department*, [2010] UKUT 422 (IAC), available at: https://www.refworld.org/cases,GBR_UTIAC,4cfa9892.html states: “the type of case with which we are concerned here, involving intended expulsion of a refugee, tends only to arise as a matter of international state practice in situations where the person concerned has some connection with the third state which is said to be safe, based on nationality, prior residence, marriage, entitlement to residence, historical ties etc. it [sic] does not arise simply because there is a safe third country somewhere.” Although the EU Procedures Directive allows for a finding of inadmissibility on the grounds of ties to a third State, this must be a State to which the asylum-seeker will be admitted. The finding of meaningful connections to one safe State cannot, under European law, legally found the transfer to another. Nor, in fact, are the “safe third country” rules permitted by the Procedures Directive reflected in most countries’ national laws or, even where reflected in law, normally employed in practice. UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010 (*Improving Asylum Procedures*), p. 60, available at: <https://www.refworld.org/docid/4bab55752.html>



- third State. The ‘connection’ requirement therefore appears to be meaningless in terms of ensuring the reasonableness and appropriateness of actual transfers.
39. The result of a finding of inadmissibility is that, unless the Secretary of State decides there are “exceptional circumstances” or for other reasons to be set out by the Secretary of State in immigration rules at a later date, the claimant will be denied access to the UK asylum system.
 40. Nor would it be only those whose claims are declared inadmissible who would be at risk of transfer to a third country. **Schedule 3**⁶⁰ of the Bill would permit the removal of an asylum-seeker to any “safe” territory. Although the Explanatory Notes suggest the intention is to provide for “extraterritorial processing models to be developed in the future”,⁶¹ there is nothing in the language of the Bill itself that would limit removals to such a purpose.
 41. The minimum standards for a safe country of transfer under Schedule 3 are even lower than those for a “safe third State” to which the applicant has a prior “connection” (whether a country in which the applicant was previously present or not) under Clause 15. The Secretary of State will be empowered to designate “safe countries” – whether States or territories - where (i) “a person’s life and liberty are not threatened” on Refugee Convention grounds, (ii) from which a person will not be removed elsewhere other than in accordance with the Refugee Convention; (iii) where a person can be transferred without being put at real risk of inhuman and degrading treatment (in violation of Article 3 ECHR); and (iv) from which they will not be removed in violation of their ECHR rights.⁶² There is no requirement that the territory be a State or a party to the Refugee Convention,⁶³ or that it offer the possibility of applying for refugee status or otherwise recognise the rights guaranteed to refugees in the Refugee Convention. There is no consideration of the reasonableness of the transfer in any individual case, and in direct contradiction to established international practice and UK caselaw, the law provides an opportunity for a person to show that “in their particular circumstances” they would be at risk only of violations of their rights under the ECHR. It provides no such opportunity with regard to the risk of persecution or onward refoulement or expulsion prohibited under the Refugee Convention.⁶⁴
 42. Transferring asylum-seekers or recognised refugees⁶⁵ to territories with which they have no prior connection and without an individualised consideration of safety, reasonableness or access to fair and efficient asylum procedures and international protection is at odds with international practice and risks denying them the right to seek and enjoy asylum, exposing them to human rights abuses and other harm, delaying

⁶⁰ This would amend section 77 of the Nationality, Immigration and Asylum Act 2002 (no removal while claim for asylum pending) to allow removal to any “State” that met the conditions set out in a new subsection 77(2A). These “States” – which could include territories that are not States – would be identified by the Secretary of State for the Home Department and published in lists laid before Parliament.

⁶¹ *HL Bill 82 Explanatory Notes*, (n 5), para. 22.

⁶² Section 77(2B) (created by Schedule 3 of the Bill).

⁶³ Section 77(2C)(c) and (d) and Schedule 3(5).

⁶⁴ New Section 77(2C)(a). For caselaw establishing that presumptions of compliance with international obligations must be rebuttable in individual cases, see, e.g. *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, European Union: Court of Justice of the European Union, C-411/10 and C-493/10, para. 104, available at: https://www.refworld.org/cases_ECJ_4ef1ed702.html; *M.S.S. v. Belgium and Greece*, Council of Europe: ECHR, Application 30696/09 [2011] ECHR 108, available at: <https://www.bailii.org/eu/cases/ECHR/2011/108.html>; *R (on the application of EM (Eritrea)) v Secretary of State for the Home Department*, [2014] UKSC 12, para. 41, available at: <https://www.supremecourt.uk/cases/docs/uksc-2012-0272-judgment.pdf>

⁶⁵ See the concerns expressed above at paragraph 12 about the possibility that the Bill would allow Group 2 refugees to be removed to “safe” countries, in line with intentions expressed in the New Plan for Immigration.



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durable solutions to forced displacement, and encouraging onward movement. To transfer asylum-seekers and refugees to countries that are not parties to the Refugee Convention, and without any expectation, let alone commitment, that they will provide a fair asylum procedure and treatment in line with the Refugee Convention would be an abdication of the United Kingdom's responsibilities under international law towards refugees and asylum-seekers under its jurisdiction.

A late amendment to the Bill would allow the UK to keep asylum-seekers in limbo indefinitely, effectively denying them their fundamental right to seek and enjoy asylum

43. The Bill would give the Home Office the power to keep asylum-seekers whose claims have been deemed inadmissible in an indefinite limbo, as there will be no requirement for the UK to consider their claims if they cannot be removed to another country within a reasonable timeframe. This would be in violation of asylum-seekers' rights under international law including the Refugee Convention, and risk causing significant harm to them, their families, and their host communities.
44. The current immigration rules make inadmissibility dependent on a realistic prospect of removal to another "safe" country by requiring the UK to consider an asylum claim that had been deemed inadmissible if it has not been possible to remove the claimant within a reasonable period⁶⁶ (defined in Home Office policy as six months⁶⁷), and allowing the realistic prospect of removal to be taken into account when deciding to treat a claim as inadmissible.⁶⁸ The first version of the Bill repeated this deadline, albeit in discretionary rather than mandatory terms.⁶⁹ However, this safeguard was removed from the Bill by a Government amendment proposed on 1 December 2021.⁷⁰
45. It is unclear how the current Government intends in practice to treat "inadmissible" asylum claims if the claimant cannot be removed from the United Kingdom within a reasonable period. It has suggested both that there will be no "power" to consider the claims in the UK for this reason,⁷¹ and that there will be such a power, but it will be set out in the immigration rules.⁷² What is clear is that by making consideration of whether an asylum claimant will in fact be removed from the UK discretionary rather than mandatory, and by deleting the consideration from primary legislation, the UK is formally breaking the legal link between inadmissibility to its asylum system and the prospect of accessing protection elsewhere. The underlying assumption appears to be that the UK may, contrary to its obligations under international law, deny a person any effective

⁶⁶ Paragraph 345D, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

⁶⁷ UK Home Office, *Inadmissibility: safe third country cases* (n 11), p. 15 and 17.

⁶⁸ *Ibid*, p. 12.

⁶⁹ "(7) An asylum claim that has been declared inadmissible under subsection (1) may nevertheless be considered under the immigration rules— (a) if the Secretary of State determines that it is unlikely to be possible to remove the claimant to a safe third State within a reasonable period of the declaration of inadmissibility." See UNHCR, *Observations on the Nationality and Borders Bill* (n 4), p.30.

⁷⁰ The Nationality and Borders Bill, As Amended (Amendment Paper), 1 December 2021, p. 22, available at: https://publications.parliament.uk/pa/bills/cbill/58-02/0187/amend/natbord_rm_rep_1201.pdf

⁷⁰ Available at: https://publications.parliament.uk/pa/bills/cbill/58-02/0187/amend/natbord_rm_rep_1201.pdf

⁷¹ The Home Secretary's official explanatory statement (*ibid*) when tabling the amendment was: "This amendment removes the power of the Secretary of State to consider an asylum claim that she has previously declared inadmissible where she determines that it is unlikely to be possible to remove the claimant to a safe third State within a reasonable period."

⁷² "We are removing the power to consider an asylum claim that has been declared inadmissible in the UK where it is unlikely to be possible to remove the claimant to a safe third country within a reasonable period. Instead, this will be set out in the immigration rules.", Tom Pursglove, Parliamentary Under Secretary of State (Ministry of Justice and Home Office), House of Commons Debate on the Border and Nationality Bill, 7 December 2021, available at: <https://www.theyworkforyou.com/debates/?id=2021-12-07b.289.0>



exercise of their fundamental right to seek and enjoy asylum or any access to the protections set out in the Refugee Convention.

46. The UK's current inadmissibility rules came into effect at 11:00PM on 31 December 2020, when the UK left the Dublin system. In the following nine months, the Home Office issued 6,598 "notices of intent", putting asylum claims on hold pending a decision on inadmissibility. During that time, only 48 inadmissibility decisions were made, and only 10 people removed, while 2,126 individual claimants were subsequently admitted into the UK asylum system.⁷³ This means that at least 4,462 asylum claimants (and an unknown number of dependants) remained in limbo without any progress on their asylum claims - 67% of all of those being considered for inadmissibility. Moreover, there are indications that in practice an even larger percentage of asylum claimants – including everyone who arrives by small boat or from the Republic of Ireland, and many who have changed planes in Europe while travelling directly from their country of origin – are being treated as inadmissible, at least initially. As their numbers far exceed 6,598, this suggests there may be more asylum-seekers (and dependants) affected by the inadmissibility rules than have been served with a formal notice of intent and reflected in the statistics. If thousands of claims were placed in limbo for at least the six months permitted under current rules, and while there is a policy in place to take the six-month deadline into account when making inadmissibility decisions, it is reasonable to expect that thousands more asylum claimants and their families could be placed in limbo for significantly longer periods of time once the deadline is abolished.
47. In common with other asylum-seekers, at present those deemed "inadmissible" are normally granted "immigration bail" and given access to health care, primary education and minimal financial support and accommodation. As a matter of UK law, however, they are not considered to be "lawfully in" the country as defined in the Convention.⁷⁴ They are prohibited from working,⁷⁵ and because they do not have leave to remain, they are prohibited from renting private accommodation in England without Home Office permission,⁷⁶ as well as from obtaining a driving license⁷⁷ or opening a bank account.⁷⁸ 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.⁷⁹ In addition, as discussed below at paragraphs 130-132, the Bill would allow for those in the inadmissibility process to be given more limited financial support than other asylum-seekers and to be accommodated indefinitely in "basic" reception centres. Depending on the rules governing residence in these accommodation centres, they may also contravene Article 33(2) of the Convention, which provides that "the Contracting States

⁷³ UK Home Office, *Immigration statistics: Year ending March 2021*, 18 June 2021, available at: <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2021/how-many-people-do-we-grant-asylum-or-protection-to#inadmissibility>

⁷⁴ *ST Eritrea, R (on the application of) v Secretary of State for the Home Department*, [2012] UKSC 12, para. 56-57, available at: <https://www.supremecourt.uk/cases/uksc-2010-0149.html>.

⁷⁵ Because "inadmissible" claims are not being considered under the immigration rules, 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. For details of asylum-seekers' right to work, see n 32.

⁷⁶ 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>.

⁷⁷ 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>.

⁷⁸ Section 40 of the Immigration Act 2014, available at: <https://www.legislation.gov.uk/ukpga/2014/22/section/40>.

⁷⁹ 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>. They include the power to require a person on immigration bail to wear an electronic tag; this condition is not at present routinely imposed on asylum-seekers.



shall not apply to the movements of ... refugees [who are penalised for unlawful entry or presence] restrictions other than those which are necessary.”

48. The practical consequences will be bad for host communities and worse for refugees, asylum-seekers and their families, for the reasons discussed above at paragraphs 20-25. It is well established that prolonged insecurity of status is damaging to refugees' mental health, and it is likely to be even more damaging when there is no clear end in sight. Because family reunion cannot be applied for until refugee status is granted, this indefinite limbo period will also mean indefinite family separation, potentially encouraging vulnerable family members, including women and children in need of protection, to make dangerous journeys to the UK themselves, rather than waiting for family reunion through regular routes.
49. It will also cost millions of additional pounds in asylum support and accommodation for those who will eventually qualify for refugee status and be permitted to study, work and support themselves, as well as for those who do not qualify for leave to remain and should be helped to return home.
50. Finally, to the extent that the Bill is designed primarily to deter asylum-seekers from travelling to the United Kingdom, it is doubtful that the elimination of the six-month deadline will achieve this. The backlogs in the UK asylum system have been increasing rapidly since 2018, and at the end of September 2021, there were more than 80,000 people awaiting a decision on their initial asylum claim, of whom over 56,000 had been waiting more than six months.⁸⁰ This has not coincided with any decrease in the number of new claims.

The Bill would criminalise seeking asylum

51. The Bill would make it a criminal offence for an asylum-seeker who requires entry clearance (a visa) or an Electronic Travel Authorisation (ETA) to arrive in the United Kingdom without one, even if they claimed asylum immediately upon arrival and regardless of their mode of travel.⁸¹ Although the Explanatory Notes state that “This will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don't technically “enter” the UK”⁸² its reach is much wider. Given that there is no possibility under UK law of applying for entry clearance in order to claim asylum, no one from a country whose citizens normally need a visa would be able to come to the UK to seek asylum without potentially committing a criminal offence.⁸³ 90% of those who are granted asylum in the United Kingdom are from countries whose nationals must hold entry clearance (a visa) to enter the UK.⁸⁴ Depending on how the future ETA scheme is designed and implemented, asylum-

⁸⁰ UK Home Office, *Immigration Statistics year ending September 2021: Asylum and Resettlement – Asylum applications awaiting a decision*, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1011721/asylum-applications-awaiting-decision-datasets-jun-2021.xlsx

⁸¹ **Clause 39 (2)**, creating new Sections 24(D1) and 24(E1) of the Immigration Act 1971.

⁸² *HL Bill 82 Explanatory Notes* (n 5), para. 394.

⁸³ The list of visa nationals is found at Paragraph VN.1 of Appendix Visitor to the Immigration Rules. It contains 111 of the world's 195 countries, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-visa-national-list>

⁸⁴ UK Home Office, *Immigration Statistics year ending September 2021*, available at: <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-applications-decisions-and-resettlement>; *ibid.*



- seekers from countries whose nationals do not require a visa may also face criminal penalties for arriving in the UK to seek protection.⁸⁵
52. The maximum sentence for these offences would be four years' imprisonment, which would also become the maximum sentence for the existing offences of entering the UK unlawfully or remaining in the UK without leave.⁸⁶ There would be no defences based on Article 31(1) of the Refugee Convention for any of these offences.
 53. Facilitating another person's arrival in the UK without entry clearance would also be made a criminal offence. The most obvious target is refugees who assist each other to come to the United Kingdom to claim asylum, although the Canadian Supreme Court has found that their prosecution would violate Article 31 of the Refugee Convention.⁸⁷ Friends, family members and others with purely humanitarian motives would also be criminalised.⁸⁸ Even trafficking victims could face criminal penalties under this new provision.⁸⁹ The maximum sentence of imprisonment for this offence will rise from 14 years to imprisonment for life.⁹⁰
 54. Finally, it would no longer be an element of the criminal offence of assisting an asylum-seeker to come to the UK to claim asylum (lawfully or unlawfully) that the assistance was provided "for gain".⁹¹ There would be two limited exceptions: the existing exception where the person is acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services,⁹² and a new exception where the act is committed by or on behalf of, or is coordinated by, Her Majesty's Coastguard. There would also be a defence to prosecution where the assisted individual was in danger or distress at sea, the act of assistance took place between when the danger or distress arose and when the individual was delivered to "a place of safety on land", and, if the UK was not the "nearest place of safety", the rescuer had "good reason" for delivering them to the UK. This defence would not be available, however, to a person who had been a passenger on the ship in distress, even if they had performed an act of rescue at sea.⁹³
 55. Although these protections from prosecution for rescuers at sea are welcome, the limitations as to the timing and location of the rescue could deter or delay rescue attempts, potentially increasing the risk to life. The blanket denial of the defence to anyone who was a passenger on the boat, moreover, compounds the inconsistency of

⁸⁵ This could be the case, for example, if the ETA application form required travellers to declare the purpose of their travel, unless claiming asylum on arrival was accepted as a lawful purpose.

⁸⁶ **Clause 39(2)**, Section 24(F1) of the Immigration Act 1971

⁸⁷ *R. v. Appulonappa*, Canada: Supreme Court, 2015 SCC 59, para. 43, available at: https://www.refworld.org/cases,CAN_SC,56603caa4.html; *B010 v. Canada (Citizenship and Immigration)*, Canada: Supreme Court, 2015 SCC 58, available at: www.refworld.org/cases,CAN_SC,56603be94.html

⁸⁸ See, e.g. *Sternaj v. Director of Public Prosecutions*, [2011] EWHC 1094 (Admin), available at: https://www.refworld.org/cases,GBR_HC_QB,535e75c54.html in which a parent who had claimed asylum in the UK was prosecuted for facilitating the illegal entry of his two-year-old son, on whose behalf he also made an asylum claim.

⁸⁹ Schedule 4(17) of the Modern Slavery Act 2015 expressly prevents those charged under section 25 of the Immigration Act 1971 from relying on the defence that they were compelled to commit the offence because they were victims of slavery or trafficking. *Modern Slavery Act 2015*, Section 45, available at: <https://www.legislation.gov.uk/ukpga/2015/30/section/45/enacted> and Schedule 4, available at: <https://www.legislation.gov.uk/ukpga/2015/30/schedule/4/enacted>

⁹⁰ **Clause 40(2)**.

⁹¹ **Clause 40(3)**.

⁹² Section 25A(3) of the 1971 Act, available at: <https://www.legislation.gov.uk/ukpga/1971/77/section/25A>

⁹³ **Clause 40(4)**, creating a new section **25BA(3)(b)** of the Immigration Act 1971.



the 1971 Act with Article 31(1) of the Refugee Convention. In the absence of the defences required by that article, it reaffirms the criminalisation of seeking asylum.

The Bill would increase the risk of the tragic loss of lives in the English Channel

56. Schedule 6 of the Bill creates a range of maritime enforcement powers, exercisable by immigration and enforcement officers and assistants acting under their supervision⁹⁴ if they believe a “relevant” immigration offence⁹⁵ is being or has been committed on a ship, or that the ship is “otherwise being used in connection with the commission of a relevant offence.”⁹⁶ These include the power to stop the ship, board it, require it to be taken to “any place (on land or on water) in the United Kingdom and detained there, and require it to “leave United Kingdom waters.”⁹⁷

57. Article 98 of the UN Convention on the Law of the Sea requires States parties, including the United Kingdom, to “render assistance to any person found at sea in danger of being lost”, “proceed with all possible speed to the rescue of persons in distress” and “promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.”⁹⁸ The International Convention on Maritime Search and Rescue,⁹⁹ in turn, provides that:

“2.1.10 Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.”

58. As the recent tragic deaths in the Channel have underlined, asylum-seekers travelling to the United Kingdom by sea frequently do so in unstable, overcrowded or even unseaworthy Rigid-hulled Inflatable Boats (RHIBs.) The risk that any act of stopping, boarding or redirecting such a boat could endanger those on board is obvious. UNHCR is therefore concerned that amendments to the Bill at committee stage could be interpreted as not fully recognising the primacy of the search and rescue duty. These include:

- (i) The criminalisation of acts of rescue at sea performed by asylum-seekers themselves, and the limited protections against prosecution for other rescuers; as discussed above at paragraphs 53-55;¹⁰⁰

⁹⁴ **Schedule 6(10)**, creating a new Schedule A1 to the 1971 Immigration Act, subsection **(G1)**.

⁹⁵ Relevant offences include committing, attempting to commit or facilitating entry to the United Kingdom in breach of a deportation order or without leave; arriving in the United Kingdom without required prior authorisation (a visa or an Electronic Travel Authorisation); or remaining in the United Kingdom without leave; assisting an asylum-seeker to arrive in the United Kingdom; and knowingly employing a person who is disqualified to work by reason of their immigration status. **Schedule 6(8)**.

⁹⁶ **Schedule A1(B1)(1) of the 1971 Act**, as introduced by **Schedule 6(10)**.

⁹⁷ **Schedule A1(B1)(2) of the 1971 Act**, as introduced by **Schedule 6(10)**. The Explanatory Notes clarify that there would also be a power to “disembark non-compliant passengers”, including in locations outside the UK. *Explanatory Notes Bill 141 EN 2021-22* (n 5), para. 449, and *HL Bill 82 Explanatory Notes* (n 5), para. 436. In keeping with the amendment to Part A1 (B1) of Schedule 4A of the 1971 Act set out at note 102 below, the reference in the original Explanatory Notes to such disembarkation being “subject to agreement by relevant receiving states” has been deleted from the HL Bill 82 version.

⁹⁸ 1833 UNTS 397, 10 December 1982, available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁹⁹ 1403 UNTS, 27 April 1979, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf>

¹⁰⁰ **Clause 40(4)**, Section 25BA(2)-(3).



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- (ii) The deletion of the obligation to take into account the United Kingdom's obligations under the UN Convention on the Law of the Sea when exercising enforcement powers at sea;¹⁰¹
 - (iii) The power to seek to return a boat to another country without that country's consent,¹⁰² which, if exercised, could hamper rather than reinforce the effective coordination of rescue efforts; and
 - (iv) The conferral of immunity from criminal and civil penalties for anything done by a relevant officer in the purported performance of their maritime enforcement powers, if it is done in good faith and there were "reasonable grounds for doing it."¹⁰³
59. In addition, the principle of non-refoulement applies wherever a State exercises jurisdiction, including in the context of maritime search and rescue operations or interceptions at sea, and whether within or outside its territorial waters. Whenever a State exercises territorial jurisdiction or effective control over a ship or its passengers, it must not, by its conduct or conduct attributable to it, summarily turn back or otherwise return rescued or intercepted persons to a country of departure, where to do so would deny them a fair opportunity to seek asylum or subject them to the risk of a serious threat to their life, physical integrity or freedom. It is, moreover, the responsibility of the State concerned to ensure that there are sufficient protections against these risks in individual cases in the proposed country of return.¹⁰⁴ UNHCR is concerned that nothing in the Bill's maritime enforcement powers reflects these principles.
60. UNHCR believes that in order to prevent further loss of life in the Channel while respecting the principle of non-refoulement, the UK should prioritise cooperating with France and the European Union on asylum, ideally seeking an agreement on safe two-way transfers of some asylum-seekers. Such an agreement should include a mechanism for those with compelling reasons to come to the UK (notably family ties) legally and safely without having to board boats.¹⁰⁵ The deletion of the prohibition on

¹⁰¹ This would have been found at Section 28LA of the 1971 Immigration Act, as introduced by Schedule 5(2) (now Schedule 6(2) of the Bill). This read "(3) the authority of the Secretary of State is required before an immigration officer or an enforcement officer may exercise Part A1 powers [...] enforcement powers in relation to ships" in relation to – (a) a United Kingdom ship in foreign waters; (b) a ship without nationality; (c) a foreign ship; or (d) a ship registered under the law of a relevant territory. (4) Authority for the purposes of subsection (3) may be given only if the Secretary of State considers that the Convention permits the exercise of Part A1 powers in relation to the ship." Subsection (4) was deleted by Government amendment.

¹⁰² The requirement of the other State's consent would have been included in a new subsection Schedule A1(B1) of the 1971 Act, introduced at Schedule 5(2) (now Schedule 6(2) of the Bill). The Bill originally would have introduced the following subsections of a new Part A1 of Schedule 4A of the 1971 Act, which creates powers to "stop, board, divert and detain" ships: "(6) The authority of the Secretary of State is required before a relevant officer may exercise the power under sub-paragraph (2)(c) [to require the ship to be taken to any place (on land or on water) in the United Kingdom or elsewhere and detained there] to require the ship to be taken to any place – (a) within a State other than the United Kingdom, or (b) within a relevant territory. (7) The Secretary of State may give authority for the purposes of subparagraph (6) only if the State, or the relevant territory, is willing to receive the ship." Subsection (7) was deleted by Government amendment.

¹⁰³ **Section 6(10)**, creating **Schedule A1(J1)** of the 1971 Act.

¹⁰⁴ UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea (UNHCR SAR Considerations)*, November 2017, paras. 1, 5-6, available at: <https://www.refworld.org/docid/5a2e9efd4.html>; UNHCR, *Submission by the UNHCR in the case of S.S. and Others. v. Italy (Appl. No. 21660/18) before the European Court of Human Rights*, 14 November 2019, available at: <https://www.refworld.org/docid/5dcebff54.html>. See also, *Hirsi Jamaa and Others v. Italy*, Council of Europe: ECHR, Application no. 27765/09, paras. 122-123 and 146-147, available at: <https://www.refworld.org/cases,ECHR,4f4507942.html> (reiterating these principles with regard to the risk of treatment in violation of Article 3 ECHR).

¹⁰⁵ The minimum standards for such an agreement are discussed below at paragraph 194. In UNHCR's view, they must be undertaken with the aim of strengthening, rather than limiting, access to protection for those in need of it and sharing, rather than shifting, responsibilities for doing so. They should be governed by a formal, legally binding and public agreement which sets out the responsibilities of each State involved, along with the rights and duties of



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seeking to return ships to another country without that country's consent undermines rather than promotes such cooperation.

The Bill would make it harder for refugees who are admitted to the UK to access international protection

61. This array of measures meant to deter refugees from seeking protection in the UK and to externalise the UK's obligations towards those who nonetheless arrive is supplemented by a series of changes that would make it more difficult for refugees who are admitted to the UK to be recognised as such. These include: departing from well-established principles of UK law by importing the higher standard of proof used in civil litigation into the refugee determination process¹⁰⁶ and narrowing the definition of "particular social group";¹⁰⁷ creating accelerated appeal procedures for reasons unrelated to the merits of the claim¹⁰⁸ and determining claims within them even when it is not in the interests of justice to do so;¹⁰⁹ directing decision-makers (including judges) to consider giving "minimal weight" to evidence¹¹⁰ or make adverse credibility findings¹¹¹ under circumstances that carry a real risk of unfairness; and lowering the standard for when a crime would be considered serious enough to justify removing a recognised refugee even where doing so would put them at risk of persecution.¹¹²

The Bill risks harm to children

62. Most of the concerns expressed above apply with equal if not greater force to children, given their specific needs and vulnerabilities. This includes unaccompanied asylum-seeking children and the children of asylum-seekers and refugees whose asylum claims will be delayed, suspended, or wrongly denied, as well as the children of Group 2 refugees.
63. In addition, the Bill would introduce significant changes to the way age assessment is conducted for those claiming asylum as unaccompanied children in the UK. The amendments include changes which would lower the threshold for when age assessments are conducted, introduce a new standard of proof and make provisions for the use of 'scientific methods' to assess age (including medical methods such as x-rays). In addition to being subject to a significant margin of error, medical methods used for age assessment can be invasive and potentially harmful.
64. The evidentiary burden on local authorities assessing age is increased, and they may be compelled to provide evidence to the Home Office even where no doubts have been raised about a child claimant's age. These changes together have the potential to increase the number of unnecessary age assessments conducted and the risk that children are incorrectly assessed as adults and diverted to adult reception and immigration processes (including detention).

the asylum-seekers affected. Further, the transferring State will be responsible for ensuring that international protection obligations are clearly assumed by the receiving State in law and met in practice, prior to entering into sharing arrangements and effecting any transfer, as well as for monitoring conditions in the receiving State thereafter. See UNHCR, *Legal considerations regarding access to protection* (n 13), UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements* (n 13), and UNHCR, *Observations on the Proposal for amendments to the Danish Alien Act* (n 13), para. 23.

¹⁰⁶ **Clause 31(2).**

¹⁰⁷ **Clause 32(2)-(4).**

¹⁰⁸ **Clauses 22, 23, and 26.**

¹⁰⁹ **Clause 22(1) and 26(5).**

¹¹⁰ **Clause 25(2).**

¹¹¹ **Clauses 18(4), 21, and 51(7).**

¹¹² **Clause 37.**



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65. The Bill paves the way for a National Age Assessment Board which, in certain circumstances, may take responsibility away from local authorities to conduct age assessments. The Board would also have the power to override local authority age assessments. UNHCR recommends that any centralised approach should remain multidisciplinary and continue to draw on the expertise of those who play a role in the young person's life at the local level (e.g. social workers, health professionals, psychologists, teachers, foster parents, youth workers, advocates, and guardians).
66. UNHCR welcomes the introduction of an appeal right in age assessment cases (previously assessments could only be challenged through judicial review).

The Bill is not well designed to reduce dangerous journeys, tackle human trafficking or fix a “broken” asylum system

67. UNHCR notes that in spite of the Government's repeated references to deterring dangerous journeys and targeting criminal gangs, few of the Bill's punitive provisions are clearly related to the safety of a refugee's journey or how it was facilitated. Instead, they focus on punishing the asylum-seekers themselves.¹¹³
68. The Bill is premised on the claim that the asylum system is “broken”¹¹⁴ and in need of “urgent” reform.¹¹⁵ Such reform, however, is already underway at the Home Office, which is currently piloting a broad range of expedited and more efficient asylum procedures. The First-tier Tribunal, similarly, introduced fundamental procedural reforms in 2020, and these are already leading to improvements in speed and efficiency, including a significant increase in the number of asylum appeals that are resolved without the need for a full hearing.¹¹⁶ These reforms – and others which UNHCR proposed in February 2021¹¹⁷ - have the potential to determine asylum claims more fairly as well as more quickly, reducing the costs to the public of asylum support and litigation, moving those in need of international protection towards integration more swiftly, and discouraging unmeritorious asylum claims through rapid but fair refusal decisions.

Resettlement programmes cannot compensate for the UK's proposed abdication of responsibilities towards refugees within its jurisdiction

69. Resettlement programmes, while welcome, are, by themselves, an inadequate means for fairly distributing global responsibilities towards refugees and sharing the burden currently shouldered by major host countries. Between 2017 and 2021, the UK resettled just over 19,000 refugees, including 823 in 2020, and 1,163 in the first three quarters of 2021.¹¹⁸ Although we welcome its generous response to the current crisis in Afghanistan, it has made no firm commitment as to how many refugees overall it may

¹¹³ According to the Explanatory Notes, only 40% of asylum applicants in 2019 arrived clandestinely, see *HL Bill 82 Explanatory Notes* (n 5), para. 15. Many of the Bill's punitive measures are entirely unrelated to the nature of the journey. These include the criminalization of arriving in the United Kingdom without entry clearance, and the imposition of the penalty of Group 2 status on refugees who have overstayed their visas or delayed in claiming asylum, and the possibility of finding a claim inadmissible because a person has a “connection” to a “safe” country, including one where they have never been.

¹¹⁴ See the speech of the Home Secretary introducing the Bill (n 11).

¹¹⁵ *Consultation Response* (n 22), pp. 4 and 10.

¹¹⁶ Ministry of Justice, *Tribunals statistics*, available at: <https://www.gov.uk/government/collections/tribunals-statistics>

¹¹⁷ UNHCR, *UNHCR's Guide to Asylum Reform in the United Kingdom*, 23 February 2021, available at: <https://www.unhcr.org/uk/publications/legal/60942d8e4/unhcrs-guide-to-asylum-reform-in-the-united-kingdom.html?query=asylum%20reform>

¹¹⁸ <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets>



resettle in the future.¹¹⁹ To put this in context, there are 26.4 million refugees worldwide today, while another 48 million people are displaced within their own country.¹²⁰ With States unable or unwilling to accept more than a handful of refugees through resettlement programmes, many will inevitably continue to seek asylum on their own initiative.

70. For all of these reasons, the Bill undermines, rather than promotes, the Government's stated goal of improving the United Kingdom's "ability to provide protection to those who would be at risk of persecution on return to their country of nationality."¹²¹

The Bill would increase the risk of individuals, including children, being made stateless

71. The Universal Declaration of Human Rights, adopted by the United Nations on 10 December 1948, provides in Article 15 that "Everyone has the right to a nationality," and that no one shall be arbitrarily deprived of it.¹²² There is a strong international consensus that the right to a nationality and the prohibition of arbitrary deprivation of nationality are fundamental principles of international law.¹²³ The object and purpose of the 1961 Convention is to protect and promote the fundamental right to a nationality by preventing and reducing statelessness.¹²⁴ It reflected a widespread recognition that statelessness should be avoided to the greatest extent possible, not only because of its significant adverse impact on stateless individuals but also because it created legal, administrative and political problems for host States and for the international order more generally. These concerns were balanced, however, against States' legitimate interest in maintaining their right to regulate their relations with their own citizens.¹²⁵ The Convention therefore allows for the loss or deprivation of nationality, but only in limited circumstances and subject to a fair hearing. UNHCR is concerned that Clause 9 "Notice of decision to deprive a person of citizenship" would increase the risk of UK citizens, including children, being made stateless, in contravention of the UK's international obligations. It would do so by allowing the Secretary of State to deprive a person of their British Citizenship without giving them notice, if it appeared to her that it was in the public

¹¹⁹ The Government's consultation response acknowledged a desire for a numerical resettlement target but explained that it did not consider this possible. *Consultation Response* (n 22), p. 7.

¹²⁰ UNHCR, *Refugee data finder* (n 15).

¹²¹ *HL Bill 82 Explanatory Notes* (n 5), para. 13.

¹²² 10 December 1948, available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

¹²³ A number of domestic and international courts have confirmed the fundamental nature of the right to a nationality. See e.g., *KV v Secretary of State for Home Department*, [2019] EWCA Civ 1796, para. 18; *Anudo Ochieng Anudo v Republic of Tanzania*, African Union: African Court on Human and Peoples' Rights, Application No. 012/2015, para. 76; and *Case of Expelled Dominicans and Haitians v Dominican Republic*, Organization of American States: Inter-American Court of Human Rights, Series C No. 282, paras. 253 and 255. See also *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, UN: International Court of Justice, [1980] ICJ Reports 3, para. 91: In this judgment, the ICJ affirmed that the principles of the Universal Declaration of Human Rights are of a fundamental character.

¹²⁴ UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness (Guidelines on Loss and Deprivation)*, HCR/GS/20/05, May 2020, para. 11, available at: <https://www.refworld.org/docid/5ec5640c4.html>

¹²⁵ *Convention on the Status of Stateless Persons* (n 9), Preamble ("Considering that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of. . . fundamental rights and freedoms."). See also UN Ad Hoc Committee on Refugees and Stateless Persons, *A Study of Statelessness*, E/1112/Add.1, 1 August 1949, <https://www.refworld.org/docid/3ae68c2d0.html>. This study shows that statelessness was a matter of significant international concern even before the drafting of the 1954 Convention, and that it was perceived as "a source of difficulties for the reception country, the country of origin and the stateless person himself." See also *UN Conference on the Elimination or Reduction of Future Statelessness (Geneva, 24 March to 18 April 1959 and New York, 15-28 August 1961)*, Vol. II: *Summary Records*, available at: https://legal.un.org/diplomaticconferences/1959_statelessness/vol2.shtml



interest to do so. It would also retroactively validate deprivation orders already made without notice.

72. This would eliminate any effective right of appeal against the deprivation decision. This is in itself a violation of the fundamental right to a fair hearing and creates a real risk of arbitrary deprivation of nationality.
73. Without a right of appeal, moreover, there is an increased risk that British citizens will be made stateless outside of the very narrow circumstances permitted by international law.¹²⁶ This could happen either because the SSHD has erred about whether a person would be made stateless by her decision or because if a person does not know of that decision they may not take the steps necessary to acquire or retain another nationality to which they would be entitled.
74. Clause 9 would also increase the risk of children being born or becoming stateless. Many States limit the ability of their citizens to pass on their nationality to their children if, for example, the child or the citizen parent is born abroad or if the parents are not married; many severely restrict the acquisition of nationality through mothers. A dual national British citizen may therefore be left only with a nationality that they cannot pass on to their children. Many States also require children to be registered or to apply for nationality within a narrow time frame, such as within six months or a year of birth, or within one year of attaining majority; this may be the case, in particular, if the child is born to foreign parents, is born to citizen parents abroad, or is perceived to be a dual national.¹²⁷ If the child is perceived – erroneously – to have been born British by descent from a (formerly) British parent, these steps may not be taken, and the child made stateless.
75. In addition, by retroactively validating deprivation orders that have already been made without notice, Clause 9 risks automatically depriving children who are currently British of their nationality, if the retroactively validated deprivation order was made prior to their birth.
76. For all of these reasons, in UNHCR's view, Clause 9 risks contravening the United Kingdom's obligations under the 1961 Convention and international law.

¹²⁶ For details of when States are permitted to make a person stateless, see paragraphs 90 – 93 below.

¹²⁷ For further details, see paragraphs 100 – 105 below.

**Annex: Detailed legal observations****Contents**

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This annex sets out our detailed legal observations on the Bill in greater detail. It reiterates, expands on and adds to the observations made above, for the most part following the order of the Bill for ease of reference.

Due to the length and complexity of the Bill, this annex focusses on UNHCR’s key areas of concern. As noted above, our lack of comment on any particular clause of the Bill should not be construed as expressing tacit endorsement of it.

A. Deprivation of nationality without notice, in violation of the 1961 Convention on the Reduction of Statelessness and international law: Clause 9

9 Notice of decision to deprive a person of citizenship

(1) In this section, “the 1981 Act” means the British Nationality Act 1981.

(2) In section 40 of the 1981 Act (deprivation of citizenship), after subsection (5) (which requires notice to be given to a person to be deprived of citizenship) insert—

“(5A) Subsection (5) does not apply if it appears to the Secretary of State that—

- (a) the Secretary of State does not have the information needed to be able to give notice under that subsection,
- (b) it would for any other reason not be reasonably practicable to give notice under that subsection, or
- (c) notice under that subsection should not be given—



- (i) in the interests of national security,
- (ii) in the interests of the relationship between the United Kingdom and another country, or
- (iii) otherwise in the public interest.

(5B) In subsection (5A), references to giving notice under subsection (5) are to giving that notice in accordance with such regulations under section 41(1)(e) as for the time being apply.”

- (3) In section 40A of the 1981 Act (appeals against deprivation of citizenship), for subsection (1) substitute—

“(1) A person—

- (a) who is given notice under section 40(5) of a decision to make an order in respect of the person under section 40, or
- (b) in respect of whom an order under section 40 is made without the person having been given notice under section 40(5) of the decision to make the order, may appeal against the decision to the First-tier Tribunal.”

- (4) In the British Nationality (General) Regulations 2003 (S.I. 2003/548), in regulation 10 (notice of proposed deprivation of citizenship), omit paragraph (4).

- (5) A failure to comply with the duty under section 40(5) of the 1981 Act in respect of a pre-commencement deprivation order does not affect, and is to be treated as never having affected, the validity of the order.

- (6) In subsection (5), “pre-commencement deprivation order” means an order made or purportedly made under section 40 of the 1981 Act before the coming into force of subsections (2) to (4) (whether before or after the coming into force of subsection (5)).

- (7) A person may appeal against a decision to make an order to which subsection (5) applies as if notice of the decision had been given to the person under section 40(5) of the 1981 Act on the day on which the order was made or purportedly made.

Purpose of Clause 9

77. Under Section 40(5) of the British Nationality Act 1981 (“the BNA 1981”), the Secretary of State for the Home Department (SSHD) is required to give a person notice when she decides to deprive them of their citizenship. That notice must inform them of the decision, the grounds for the decision, and their right of appeal.¹²⁸
78. Clause 9 would allow the SSHD not to give notice where it “appears” to her that it is not practicable or not in the public interest to do so. The clause responds to a recent High Court ruling that found that Regulation 10(4) of the British Nationality (General) Regulations 2003¹²⁹ was *ultra vires* the BNA 1981 and thus void and of no effect, as was the deprivation order made after a decision letter had been “served to file”.¹³⁰ Regulation

¹²⁸ British Nationality Act (BNA) 1981, available at: <https://www.legislation.gov.uk/ukpga/1981/61/section/40>

¹²⁹ Regulation 10(4) of the British Nationality (General) Regulations 2003 (inserted by the British Nationality (General) (Amendment) Regulations 2018), available at: <https://www.legislation.gov.uk/uksi/2003/548/regulation/10>

¹³⁰ *D4 v SSHD*, [2021] EWHC 2179 (Admin), para. 68, available at: <https://www.judiciary.uk/wp-content/uploads/2021/07/D4-v-SSHD-judgment.pdf>



10(4) allowed the service of “notice” of a deprivation decision by placing it on a person’s file where:

- (a) *“the person’s whereabouts are not known; and*
- (b) *either—*
 - (i) *no address has been provided for correspondence and the Secretary of State does not know of any address which the person has used in the past; or*
 - (ii) *the address provided to the Secretary of State is defective, false or no longer in use by the person; and*
- (c) *no representative appears to be acting for the person or the address provided in respect of that representative is defective, false or no longer used by the representative.”*

The SSHD told the High Court that she had identified 63 cases where the deprivation decision had been ‘served to file’.

79. The High Court found that Regulation 10(4) was *ultra vires* the statute (i.e. the BNA 1981 did not authorise the making of regulations which dispensed with the requirement to give notice). Section 40(5) of the BNA 1981 unequivocally requires written notice to be given to the affected person prior to the making of a deprivation order and:

“as a matter of ordinary language, you do not “give” someone “notice” of something by putting the notice in your desk drawer and locking it. No-one who understands English would regard that purely private act as a way of ‘giving notice’.”¹³¹

80. Clause 9 responds to that ruling by asking Parliament to go even further than the regulation that was held to be void, and to allow the SSHD not to give notice under a much wider set of circumstances, as noted above.
81. Clause 9 would also retroactively validate any deprivation orders made where notice had not been given, notwithstanding the High Court’s judgment that deprivation orders made in such circumstances are void and of no effect.

Scope of application of Clause 9

82. Under Section 40(2) of the BNA 1981 the Secretary of State has the power to by order deprive a person of their British citizenship status¹³² if she “is satisfied that deprivation is conducive to the public good.”¹³³
83. The Home Office’s published policy defines “conduciveness to the public good” as:

“depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours.”¹³⁴

¹³¹ *D4* (ibid), para. 49. The ruling in *D4* was appealed by the Secretary of State to the Court of Appeal, and the appeal was heard on 7 December 2021. Judgment is pending.

¹³² This is defined at Section 40(1) of the BNA 1981 (n 128) as including the status of (a) a British citizen, (b) a British overseas territories citizen, (c) a British Overseas citizen, (d) a British National (Overseas), (e) a British protected person, or (f) a British subject.

¹³³ Section 40(2) of the BNA 1981 (n 128). It is arguable that this provision is not sufficiently precise to prevent the arbitrary deprivation of nationality. See UNHCR, *Guidelines on Loss and Deprivation* (n 124), para. 92.

¹³⁴ UK Visas and Immigration, *Deprivation and nullity of British citizenship: nationality policy guidance*, para. 55.4.4, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631643/deprivation-nullity-Chapter-55.pdf



Thus, although some of the most high-profile cases of deprivation of citizenship have involved British citizens assessed by the Secretary of State to have been involved in terrorism or war crimes, the potential scope for deprivation is much broader. It is for the Secretary of State to decide what types of “unacceptable behaviours” make someone’s presence in the United Kingdom “unconducive”, and there is arguably no legal requirement for them to be as serious as the specific examples given.¹³⁵

84. The SSHD may not make a deprivation order on this broad ground if she is satisfied that it would make a person stateless (section 40(4)), unless (section 40(4A)):
- (i) the citizenship status results from the person’s naturalisation; and
 - (ii) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
 - (iii) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.
85. In addition, under Section 40(3) the Secretary of State can make an order depriving a person of citizenship status which results from his registration or naturalisation if the registration or naturalisation was obtained by fraud, false representation, or omission of a material fact, even if the effect is to make the person stateless.
86. Under the current law, according to Section 40(5), before making an order depriving a person of their citizenship, the Secretary of State must give them notice of the decision, the reasons for it, and their right of appeal against it. The appeal is not suspensive, however, and the order can be made immediately after notice of the decision to make it has been given.¹³⁶
87. Clause 9 would waive the notice requirement where it “appears” to the Secretary of State that either:

¹³⁵ A similar issue arose with regard to the interpretation of the former Paragraph 332(5) of the Immigration Rules, which gave the SSHD the discretion to refuse a person leave to remain where their presence in the UK was undesirable due to their “conduct (including convictions which do not fall within Paragraph 322(1C)), character or associations or the fact that he represents a threat to national security.” The Home Office’s published guidance stated that, “The main types of cases you need to consider for refusal under Paragraph 322(5) or referral to other teams are those that involve criminality, a threat to national security, war crimes or travel bans.” UK Home Office, *General grounds for refusal, Section 4 of 5: considering leave to remain*, p.30, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/341114/GGFR_Sec4v17.0_EXT.pdf A number of people who were refused Indefinite Leave to Remain because they were believed to have under-reported their self-employed income to the HMRC challenged the refusals on the grounds that this alleged misconduct was not as serious as the examples given in the guidance. This argument was flatly dismissed by the Court of Appeal in *Balajigari v The Secretary of State for the Home Department*, [2019] EWCA Civ 673, para. 32, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2019/673.html>: “The Guidance does not purport to, nor could it, restrict the meaning of paragraph 322 (5). . . . Although the examples given include cases involving criminality, a threat to national security, war crimes or travel bans, it is clear both from the Guidance itself and from the terms of the rule that it is not restricted to such types of case. We are aware that there has been concern expressed both in Parliament and elsewhere that paragraph 322 (5) may be being used for a purpose for which it was not intended. In particular, there have been suggestions that it may have been intended to apply only to cases where there is a threat to national security. In our view, it is clear from its terms that that is not so.”

¹³⁶ The suspensive effect of an appeal against the deprivation of citizenship was removed by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. *D4* (n 12), para. 17. The SSHD made a decision to deprive D4 of her British citizenship and an order depriving her of her citizenship on the same day, 27 December 2019. The SSHD – in accordance with the regulations since held to be unlawful – placed the decision on D4’s file without attempting to notify her. It was not until after D4’s solicitors sent the SSHD a pre-action protocol letter requesting assistance with her repatriation from Syria to the UK that the SSHD informed her solicitors that she was no longer a British citizen. This was on 14 October 2020 *D4*, para. 6-7.



- (i) she does not have the information necessary to give notice, or
- (ii) it is not “reasonably practicable” to give notice, or
- (iii) it is not in the public interest to do so.

There would be no obligation on the SSHD to take reasonable steps to acquire the information necessary to serve notice, or to serve notice in the future should it become possible to do so.

88. Home Office statements in support of Clause 9 suggest that the new power to deprive a person of their citizenship without notice would only be used in “exceptional circumstances” where it “is not possible” to give them notice “because we do not know where they are, or because they are in a war zone where we can’t get in touch with them, or because informing them would reveal sensitive intelligence sources”.¹³⁷ The power, however, is in fact much broader. Nor is it confined to deprivation decisions on the grounds that a person has conducted themselves in a manner seriously prejudicial to the vital interests of the United Kingdom, or on national security or counter-terrorism grounds more generally. It is available in all deprivation cases.

The general prohibition on loss and deprivation of nationality where it would make a person stateless

89. The drafters of the 1961 Convention sought to balance the legitimate interests of States and individuals in nationality matters, as these respective interests were understood at the time.¹³⁸ Reflecting the widespread recognition that statelessness had adverse impacts upon individuals, host States and the international order, and should be avoided to the greatest extent possible,¹³⁹ there is a general prohibition on any loss or deprivation of nationality that would make a person stateless:

(i) Article 7(6): *“Except in the circumstances mentioned in this Article [which do not arise in British law], a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.”*

(ii) Article 8(1): *“A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.”*

90. Reflecting the interests of States in regulating their relationship with their own citizens, there are four permissible exceptions to these general prohibitions. Two are regarding the automatic loss of nationality by dual nationals or naturalised citizens under specific

¹³⁷ Home Office, *Nationality and Borders Bill: Deprivation of Citizenship Factsheet*, available at: <https://www.gov.uk/government/publications/nationality-and-borders-bill-deprivation-of-citizenship-factsheet/nationality-and-borders-bill-deprivation-of-citizenship-factsheet> and <https://mobile.twitter.com/ukhomeoffice/status/1466777357910433797>

The Explanatory Notes, by contrast, describe the Bill as creating a very broad power “to disapply the requirement to give notice of a decision to deprive a person of their nationality where notice of the decision would be impractical or a threat to national security.” *HL Bill 82 Explanatory Notes* (n 5), para. 9.

¹³⁸ UNHCR, *Guidelines on Loss and Deprivation* (n 124), para. 11.

¹³⁹ *Convention on the Status of Stateless Persons*, 360 UNTS 117 (n 9), Preamble (“Considering that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of . . . fundamental rights and freedoms.”) See also UN Ad Hoc Committee on Refugees and Stateless Persons (n 125) and *UN Conference on the Elimination or Reduction of Future Statelessness* (n 125).



circumstances; these do not arise under UK law.¹⁴⁰ Two are regarding deprivation of nationality, and are directly relevant here:

- (i) Where the nationality has been obtained by misrepresentation or fraud (Article 8(2)(b)); and
- (ii) Where a State, at the time it becomes a party to the Convention, specifies that it will retain an existing law that provides for deprivation of nationality on the following grounds:
 - (a) that, inconsistently with his duty of loyalty to the Contracting State, the person
 - (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
 - (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;
 - (b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State. (Article 8(3)).

91. The UK duly made a declaration under Article 8(3)(a),¹⁴¹ and Section 40(4A)(2)(b) reflects the language of Article 8(3)(a)(ii).

92. Even in these narrow circumstances, deprivation must be in accordance with the law, and there must be a right to a “fair hearing by a court or other independent body.” (Article 8(4)).

93. Moreover, while Article 8(4) of the 1961 Convention requires that individuals be afforded a fair hearing specifically in situations where deprivation of nationality would result in statelessness, all decisions by States which infringe upon a person’s right to a nationality are subject to due process protections as a matter of international law. The minimum content of the requirement of due process in this context is that an individual is able to understand the reasons why their nationality has been withdrawn and has access to an effective remedy, including a right of appeal and a fair hearing before a court or another independent body.¹⁴²

Risks of violations of international law created by Clause 9 of the Nationality and Borders Bill

94. In UNHCR’s view, Clause 9 risks breaching international law in three ways:

- (i) It could result in a breach of the UK’s obligations under Article 8(4) of the 1961 Convention, because withholding notice of deprivation of nationality would render the right to a fair hearing illusory;

¹⁴⁰ Article 7(4) permits the automatic loss of nationality by a naturalised person who has resided abroad for at least seven consecutive years and has not declared that they wish to retain their nationality, while Article 7(5) permits the automatic loss of nationality by dual nationals born abroad who neither reside in a country nor declare their intention to retain their second nationality within one year of attaining majority.

¹⁴¹ *Declarations and Reservations to the 1961 Convention on the Reduction of Statelessness; As of 20 September 2006*, p. 2, available at: <https://www.unhcr.org/416113864.pdf>

¹⁴² UNHCR, *Guidelines on Loss and deprivation* (n 124), para. 99-105, citing Human Rights Council, *Human rights and arbitrary deprivation of nationality: Report of the Secretary-General*, A/HRC/25/28, 19 December 2013, paras. 31-32; International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries*, Yearbook of the International Law Commission, 1999 Vol. II (Part Two), Article 17, available at: <https://www.refworld.org/docid/4512b6dd4.html>; *European Convention on Nationality*, 1997 ETS 166, Article 11, available at: <https://rm.coe.int/168007f2c8>; *Anudo Ochieng Anudo* (n 123), para. 116, and *Case of Expelled Dominicans and Haitians* (n 123), para. 444.



- (ii) For the same reason, it would allow the SSHD to contravene the general prohibition under international law of the arbitrary deprivation of nationality; and
- (iii) It would create a significant risk that individuals may be deprived of their citizenship and made stateless outside the narrow circumstances permitted under Article 8(2) and (3) of the 1961 Convention, in violation of Article 8(1) of the same Convention.

95. Although subsection (7) of Clause 9 provides that there continues to be a right of appeal against deprivation decisions that are made without notice, it is impossible to have an effective right of appeal against a decision of which one is unaware.¹⁴³ Deprivation without notice is thus effectively in violation of Article 8(4), and of the more general prohibition on arbitrary deprivation of nationality, which requires due process protections to be in place for deprivations not to be arbitrary.¹⁴⁴ The practical importance of an effective right of appeal in the UK context is borne out by statistics showing that in a significant number of cases, Tribunals have overturned the SSHD's deprivation decisions. In the past six years, 40% of appeals against deprivation of nationality have been allowed by the First-tier Tribunal, and 46% in 2020/21.¹⁴⁵

96. In addition, Article 8 of the 1961 Convention prohibits the UK from depriving a person of their nationality and making them stateless on any other grounds than those set out at Article 8(2) and 8(3). Before depriving a person of their nationality on the grounds that to do so is conducive to the public good, the UK must therefore assess whether this will make them stateless. Any deprivation without such a prior assessment would risk making the prohibition set out in Article 8(1) ineffective and put individuals at risk of statelessness for a much wider set of reasons than is permissible.

97. In the UK, Courts and Tribunals have played a vital role in ensuring that this assessment is properly made. This is partly because whether a person possesses a second nationality is inevitably a question of foreign nationality laws and how they are applied – a question with regard to which expert evidence is normally necessary.¹⁴⁶ Courts and Tribunals are also vital because Section 40(4) has been interpreted as requiring only a “degree of investigation by the Home Office” into the issue of statelessness, a burden that will be “comparatively easy” to discharge.¹⁴⁷ There is no requirement that the SSHD be satisfied that the deprivation will not make a person stateless; the only requirement is that she not

¹⁴³ In addition, the right of appeal against the decision will be exercisable as if notice had been given on the day the decision was made, not on the day on which the person received actual notice. The deadline to appeal will therefore run within 14 days of the decision being made (First-tier Tribunal (Immigration and Asylum Chamber) Rules Consolidated version – as in effect from 21 July 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926550/consolidated-fft-iac-rules-20200721.pdf), unless it is to be heard by the Special Immigration Appeals Commission, in which case the deadline is 10 working days (The Special Immigration Appeals Commission (Procedure) Rules 2003, Rules 8 and 51, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/421503/Consolidated_text_of_SIAC_Rules_2003.pdf) By the time the person learns of the decision, the deadline to appeal is likely to have passed, requiring an application to be made for permission to appeal out of time. Even if that application is successful, the appeal will be against the correctness of the decision when it was made, and the lapse of time is likely to make presenting evidence in support of the appeal more difficult.

¹⁴⁴ See, e.g. Human Rights Council, *Human rights and arbitrary deprivation of nationality* (n 142), para. 31.

¹⁴⁵ Ministry of Justice, Tribunal Statistics Quarterly: April to June 2021, available at: <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-april-to-june-2021>

¹⁴⁶ See, e.g.: *C3, C4 and C7 v SHHD*, SI//2020, SI//2020, and SI//2020, paras. 21, and 75-81, available at: <http://siac.decisions.tribunals.gov.uk/Documents/outcomes/documents/C3,C4%20&%20C7%20-%20Open%20Judgment%20-%2018.03.2021%20-%20JA.pdf>; *Al-Jedda v SSHD*, [2012] EWCA Civ 358, para. 47-51, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2012/358.html>; *KV, R (On the Application Of) v Secretary of State for the Home Department*, [2018] EWCA Civ 248, para. 31, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2018/2483.html>

¹⁴⁷ *The Secretary of State for the Home Department v E3 & Anor*, [2019] EWCA Civ 2020, para. 59, available at <https://www.bailii.org/ew/cases/EWCA/Civ/2019/2020.html>



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be satisfied that it will do so.¹⁴⁸ In this legal context, the right of appeal to an independent tribunal is essential to the UK's compliance with Article 8(1).¹⁴⁹

98. For this reason, UNHCR also has concerns about Clauses 23(2)(b) and 26(6)(b) of the Bill, which would allow for the hearing of appeals against deprivation of citizenship in accelerated processes.

Risk of increasing child statelessness

99. Because the right to a nationality is often contingent on the nationality of one's parents, any deprivation of nationality has the potential to make children stateless. In making deprivation decisions, therefore, a State should take into account not only the general prohibitions on making individuals stateless set out above, but also every child's right to a nationality under Article 24(3) of the International Covenant on Civil and Political Rights and Article 7(1) of the Convention on the Rights of the Child, both of which the UK is also a party to.

100. The British Nationality Act 1981 (as amended) makes a child's British nationality dependent on the British nationality of one of its parents if:

- (i) the child is born in the UK, and the other parent is neither British nor settled at the time of the child's birth; or
- (ii) the child is born abroad, and the child's other parent is not British otherwise than by descent.

101. As a result of Clause 9, the child of a formerly British parent could potentially be born stateless even if neither of their parents was stateless. This is because many States do not provide for nationality by descent in one or more of the following circumstances:

- (a) The child is born abroad and the citizen parent was also born abroad;
- (b) The child is born abroad and the child or citizen parent has not resided in the country for a set number of years;
- (c) The child is born abroad and is not registered with the State's authorities;
- (d) The citizen parent is a woman; or
- (e) The child is born out of wedlock.

102. Clause 9 would increase the risk of child statelessness in two important ways. First, by eliminating the requirement to give notice of deprivation, it creates the possibility that children will be born and raised in the belief that they are British when they are not. As noted above, this could include children born in the UK if their other parent is neither British nor settled there. They or their parents might then neglect to take the steps necessary to obtain other nationalities that may be available to them. Many of those steps are time limited, moreover, meaning that the child will remain stateless even if the deprivation of their parent's British citizenship later comes to light. It is not uncommon, for example, for States to limit the ability of unmarried parents to pass on their nationality

¹⁴⁸ C3, C4 and C7 (n 146), para. 16.

¹⁴⁹ The scope of the review of the SSHD's decision on the issue of statelessness is unsettled at the moment. Although courts and Tribunals have decided the issue of statelessness on the balance of the probabilities based on the evidence before them (see, e.g., *SSHD v E3 & Anor* (n 147), para. 69), there is some question whether, following the decision of the Supreme Court in *Begum v SSHD*, their review of the issue of statelessness should be limited to public law principles, such as the fairness or rationality of the SSHD's decision, see *R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant)*, [2021] UKSC 7, para. 69-71, available at: <https://www.supremecourt.uk/cases/uksc-2020-0157.html> It is arguable that it would not be in accordance with Article 8(1) of the 1961 Convention for the review of the SSHD's decision on the statelessness issue to be limited to public law grounds, as this would mean that no UK authority would be required to be satisfied that a person would not be made stateless before they were deprived of their British nationality on non-conductive grounds.



to their children.¹⁵⁰ Many States also require children born to foreign parents or born to citizens abroad to be registered or to apply for nationality within a narrow time frame, such as within six months or a year of birth, or one year¹⁵¹

103. Because a child's lack of British nationality may not be disclosed, moreover, other States may reasonably view them as British nationals and therefore deny them access to the only nationality to which they are in fact entitled. Some States – such as China¹⁵² – deny nationality to children born abroad who automatically acquire another nationality (which will appear to be the case when a child's parent appears to be British but is not); others require those who are born abroad or born dual nationals to make a declaration of loyalty or to renounce their other nationality by the age of 21.¹⁵³ Children who believe themselves to be British will have no reason to make such a declaration and therefore risk being perceived as having abandoned their only actual nationality.¹⁵⁴
104. In addition, by retroactively validating deprivation orders that have already been made without notice, Clause 9(5) risks automatically depriving children who are currently British of their nationality, if the retroactively validated deprivation order was made prior to their birth. In the absence of a provision that would protect the nationality of British children, this would be a violation of Article 6 of the 1961 Convention, which provides that:

“If the law of a Contracting State provides for loss of its nationality by a person's spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality.”

105. It could also lead to violations of Article 7(6) of the 1961 Convention, which prohibits the loss of nationality, where this would render a person stateless: “Except in the circumstances mentioned in this Article [relating to extended absences from a country by person who are naturalised or born abroad],¹⁵⁵ a person shall not lose the nationality

¹⁵⁰ These include the Bahamas, Cameroon, Cote d'Ivoire, Finland, Indonesia, Malaysia, Malta and Turkey, among others. Vink, M. (et al), *GLOBALCIT Citizenship Law Dataset*, Robert Schuman Centre for Advanced Studies, Country-Year-Mode, Data Acquisition; Loss, available at: <https://hdl.handle.net/1814/73190>

¹⁵¹ Some States allow children born in the country to foreign parents to acquire the nationality of that country only if they apply for it within six months to one year before or after reaching majority (e.g. the Bahamas, Cameroon, Chile, Egypt, Italy, Mali, Suriname, Yemen); before reaching majority (e.g. the Central African Republic); or before the age of 23 (Finland). Other States require the children born to citizens abroad to register for nationality within one year of birth. These include Libya, Malaysia, Singapore, and Sri Lanka. *Ibid.*

¹⁵² *Ibid.*

¹⁵³ States that require dual nationals to renounce their other nationality by a certain age (usually between 18 and 21) include Bangladesh, Botswana, Cameroon, Ethiopia, Georgia, Indonesia, Japan, Liberia, Lithuania, Mauritania, Micronesia, Nepal, Papua New Guinea, Singapore, South Korea, Sri Lanka, Tanzania, and Vanuatu. States that require citizens born abroad to declare their intention to retain their nationality by a certain age include Eswatini and Trinidad and Tobago. *Ibid.*

¹⁵⁴ Although it may seem unlikely that a child would not know of a parent's loss of nationality for 18 years, it is conceivable that if the deprivation decision is not served on the parent, it will not be known to the Passport Office or other relevant authorities either, and the child may be erroneously treated as British based on the fact of birth to an apparently British parent. Children who do not seek to travel internationally, moreover, may not be required to prove their nationality until they start to work or attend higher education and therefore may not request evidence of it until they are near the age of majority.

¹⁵⁵ Article 7(4): “A naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.” Article 7(5): “In the case of a national of a Contracting State, born outside its territory, the law of that State may make the retention of its nationality after the expiry of one year from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority.”



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of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.”

B. The creation of an unlawful two-tier system of refugee status, in which most refugees are denied rights guaranteed by the Refugee Convention and essential to their integration: Clause 11

11 Differential treatment of refugees

- (1) For the purposes of this section—
- (a) a refugee is a Group 1 refugee if they have complied with both of the requirements set out in subsection (2) and, where applicable, the additional requirement in subsection (3);
 - (b) otherwise, a refugee is a Group 2 refugee.
- (2) The requirements in this subsection are that—
- (a) they have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention), and
 - (b) they have presented themselves without delay to the authorities.
- Subsections (1) to (3) of section 34 apply in relation to the interpretation of paragraphs (a) and (b) as they apply in relation to the interpretation of those requirements in Article 31(1) of the Refugee Convention.
- (3) Where a refugee has entered or is present in the United Kingdom unlawfully, the additional requirement is that they can show good cause for their unlawful entry or presence.
- (4) For the purposes of subsection (3), a person’s entry into or presence in the United Kingdom is unlawful if they require leave to enter or remain and do not have it.

106. Clause 11 would create two tiers of refugee status under UK law, in which only those refugees who meet specific additional “requirements” will be considered “Group 1” refugees and benefit from the rights guaranteed to all refugees by the Refugee Convention. These requirements are that they:

- (i) *“have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention)”*, and
- (ii) *“have presented themselves without delay to the authorities”* and
- (iii) *“where a refugee has entered or is present in the United Kingdom unlawfully, the additional requirement is that they can show good cause for their unlawful entry or presence”*. **[Clause 11(1)-(3)]**

107. The rest will be designated as “Group 2” refugees, and the Secretary of State will be empowered to draft rules discriminating against them with regard to their enjoyment of the rights to which they are entitled under the Refugee Convention, as well as with regard to the fundamental human right to family unity.

108. UNHCR reiterates that the attempt to create two different classes of recognised refugees is inconsistent with the Refugee Convention and has no basis in international law. The Refugee Convention contains a single, unitary definition of refugee, which is found at Article 1A(2). This defines a refugee solely according to their need for international protection because of feared persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion. Anyone who meets that definition, and is not excluded (see Articles 1D, 1E and 1F of the Convention), is a refugee and entitled to the protections of the Refugee Convention. There is nothing



in the Refugee Convention that defines a refugee or their entitlements under it according to their route of travel, choice of country of asylum, or the timing of their asylum claim.

11 Differential treatment of refugees [cont'd]

- (5) The Secretary of State or an immigration officer may treat Group 1 and Group 2 refugees differently, for example in respect of—
 - (a) the length of any period of limited leave to enter or remain which is given to the refugee;
 - (b) the requirements that the refugee must meet in order to be given indefinite leave to remain;
 - (c) whether a condition under section 3(1)(c)(ii) of the Immigration Act 1971 (no recourse to public funds) is attached to any period of limited leave to enter or remain that is given to the refugee;
 - (d) whether leave to enter or remain is given to members of the refugee's family.
 - (6) The Secretary of State or an immigration officer may also treat the family members of Group 1 and Group 2 refugees differently, for example in respect of—
 - (a) whether to give the person leave to enter or remain;
 - (b) the length of any period of limited leave to enter or remain which is given to the person;
 - (c) the requirements that the person must meet in order to be given indefinite leave to remain;
 - (d) whether a condition under section 3(1)(c)(ii) of the Immigration Act 1971 (no recourse to public funds) is attached to any period of limited leave to enter or remain that is given to the person;
 - (7) But subsection (6) does not apply to family members who are refugees themselves.
 - (8) Immigration rules may include provision for the differential treatment allowed for by subsections (5) and (6).
 - (...)
109. As a party to the Refugee Convention, the United Kingdom has binding legal obligations towards all refugees under its jurisdiction. These must be reflected in domestic law, regardless of the refugees' mode of arrival, route of travel, or the timing of their asylum claim. These obligations are set out at Articles 3-34 of the Convention. They include, but are not limited to, the following obligations directly undermined by the Bill:
- (i) providing refugees who are lawfully staying in the country with "public relief" on the same terms as nationals (Article 23);
 - (ii) not expelling refugees who are lawfully in the territory except on grounds of national security or public order, and in accordance with due process safeguards (Article 32); and
 - (iii) facilitating all refugees' integration and naturalisation (Article 34).
110. The Bill, however, would empower the Secretary of State to enact immigration rules discriminating between "Group 1" and "Group 2" refugees and their family members.
111. In UNHCR's view, the Bill is in direct conflict with the Convention because it expressly empowers the Secretary of State to impose a "no recourse to public funds" condition on recognised refugees who do not meet the additional criteria to qualify for "Group 1" status [**Clause 11(5)(c)**]. In the *European Convention on Human Rights Memorandum*, published alongside the Bill, the Government says at para. 66: "Articles 23 and 24 of the Refugee Convention require the UK to afford refugees "lawfully staying" in its territory the same treatment as is afforded to nationals, as regards entitlements to public relief (welfare benefits) and social security. Clause 10 [now Clause 11] (differential treatment of refugees) permits differentiation when it comes to the use of no recourse to public



funds conditions, and the Department will ensure that the powers in clause 10 are implemented in a way which is compatible with Articles 23 and 24.”¹⁵⁶

112. There is, however, no way to implement a rule imposing a no recourse to public funds condition on refugees that is consistent with the Refugee Convention, because it is by definition a ban on access to public funds on the same terms as nationals: nationals do not need to be at risk of destitution to access public funds, do not need to apply to the Secretary of State for the Home Department for permission to access public funds, and cannot be indefinitely refused access to public funds as a penalty for adverse conduct unrelated to the benefit itself.¹⁵⁷
113. The Bills gives several further examples of potential areas for discrimination between Group 1 and Group 2 refugees: the length of periods of limited leave [**Clause 11(5)(a)**]; the conditions for qualifying for settlement [**Clause 11(5)(b)**]; and whether members of their family will be given leave to enter or remain in the United Kingdom [**Clause 11(5)(d)**]. These are given as examples only of a more general power to discriminate. This would create sweeping powers, restricted only by the negative resolution procedure, for this or any future Home Secretary to discriminate against “Group 2” refugees as they saw fit.¹⁵⁸ **Clause 11(6)** would give the Secretary of State the same power to discriminate against the family members of Groups 2 refugees.
114. The Explanatory Notes set out that the intention is to grant Group 2 refugees a precarious status, with no possibility of settlement for at least ten years.¹⁵⁹ This would deliberately impede their integration and naturalisation, rather than facilitating it as required by Article 34.
115. During these ten years a refugee would “be expected to leave the UK as soon as they are able to or as soon as they can be returned or removed, once no longer in need of protection,” according to the Explanatory Notes.¹⁶⁰ The structure of this sentence leaves it unclear if refugees would only be considered “able” to leave the UK or liable to removal if they were no longer in need of international protection, i.e. if their refugee status under international law has ceased. However, UNHCR understands that the intention is to implement Group 2 status in such a way that even recognised refugees could be removed if and when transfer to a third country became possible, and even if they continued to be in need of international protection. This would be in line with the New Plan for Immigration Policy statement, which proposed both that recognised refugees would be “reassessed for return to their country of origin or removal to another safe country” after each period of 30 months’ limited leave to remain and, more broadly, that they would be “expected to leave the UK as soon as they are able to or as soon as they

¹⁵⁶ *ECHR Memorandum* (n 28), para. 66.

¹⁵⁷ They can only be denied access to benefits for which they would otherwise qualify either as a consequence of a conviction for or formal admission to serious benefit fraud, or for failure to comply with the fundamental conditions for receipt of the benefit (such as looking for work). There are no circumstances in which benefits are withdrawn as a penalty for adverse conduct that is unrelated to the benefit itself, as is proposed here. Refugees granted “Group 2” status, moreover, will clearly meet the definition of “lawfully staying” set out in the Convention, as confirmed by the UK Supreme Court, in that they will have been granted leave to enter or remain. *ST Eritrea* (n 74), para. 34. For further detail, see our *Observations on the New Plan for Immigration* (n 5), para. 5.

¹⁵⁸ At present, the Secretary of State’s powers in this regard are constrained by Section 2 of the Asylum and Immigration Act 1993, which provides: “Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention,” which would appear to preclude the adoption of some of the immigration rules suggested in the Explanatory Notes.

¹⁵⁹ *HL Bill 82 Explanatory Notes* (n 5), para. 20.

¹⁶⁰ *HL Bill 82 Explanatory Notes* (n 5), para. 20.



can be returned or removed” [emphasis added].¹⁶¹ In the first scenario described here, leave would simply not be renewed, while in the second, it would be curtailed.

116. UNHCR reiterates that the Refugee Convention prohibits the expulsion of refugees lawfully in the country except on grounds of national security or public order (Article 32) and also sets out clear standards for when refugee status shall be considered to have ceased because a person is no longer in need of protection (Article 1C). Any “expectation” that a recognised refugee leave the United Kingdom under any other circumstances, if implemented, would breach the Refugee Convention.
117. In addition, although the right to family unity is not set out within the body of the Refugee Convention, the Final Act of the Conference of Plenipotentiaries at which the 1951 Convention was adopted affirmed “that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee”, and adopted a strongly worded recommendation that States “take the necessary measures for the protection of the refugee’s family, especially with a view to ensuring that the unity of the refugee’s family is maintained”.¹⁶² UNHCR’s governing Executive Committee, of which the UK is a member, has repeatedly highlighted the need to protect the unity of the refugee family and has adopted a series of Conclusions that reiterate the fundamental importance of family reunification.¹⁶³ Among the 42 out of 44 States of the Council of Europe that have included refugees’ rights in their domestic legislation, only two (Russia and Azerbaijan) do not grant them a formal right of family reunification.¹⁶⁴
118. In the UK, the right to respect for family life is protected by Article 8 of the European Convention on Human Rights, to which the UK is a party and with which public authorities must comply in accordance with the Human Rights Act 1998. The European Court of Human Rights has recognised “a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens”.¹⁶⁵

¹⁶¹ *New Plan for Immigration Policy Statement* (n 3), p. 20. In assuming that the intention of the Bill is the same as that announced in the Plan, we note that in its formal response to the consultation on the Plan, the Government announced that “we do not propose any changes to the underlying policies” with regard to two-tier status. *Consultation Response* (n 22) p. 10.

¹⁶² *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (n 24); and UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, February 2019 (reissued), HCR/1P/4/ENG/REV. 4, Annex 1 and para. 182, available at: <https://www.unhcr.org/publications/legal/5ddfc4c47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

¹⁶³ The Executive Committee is elected by the UN Economic and Social Council and consists of representatives of Member States and of specialist agencies. While not legally binding on State Parties its Conclusions are adopted by consensus by the States which are Members of the Executive Committee of UNHCR and represent statements of opinion that are broadly representative of the views of the international community. In Conclusions adopted in 1981, for example, the Executive Committee stated: “It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.” UNHCR ExCom, Family Reunification No. 24 (XXXII) - 1981, 21 October 1981, available at: <https://www.refworld.org/docid/3ae68c43a4.html>. In a further set of Conclusions adopted in 1998, the Executive Committee exhorted States: “[I]n accordance with the relevant principles and standards, to implement measures to facilitate family reunification of refugees on their territory, especially through the consideration of all related requests in a positive and humanitarian spirit, and without undue delay.” UNHCR ExCom, Conclusion on International Protection No. 85 (XLIX) - 1998, 9 October 1998, available at: <https://www.refworld.org/docid/3ae68c6e30.html>

¹⁶⁴ *Case of MA v Denmark* (n 28), para. 69.

¹⁶⁵ *Tanda-Muzinga* (n 25), para. 75; *Mugenzi c. France*, Requête no 52701/09, Council of Europe: ECHR, para. 54, available at: <https://www.refworld.org/cases,ECHR,53be81784.html> This consensus is also reflected in EU Directives, requiring Member States to “ensure that family unity can be maintained” for refugees (Article 24 of the



119. The Explanatory Notes clarify that the Government intends to use the powers created by the Bill so as to “restrict” the rights of the family members of Group 2 refugees to enter or remain in the UK.¹⁶⁶ Any reduction of refugee family reunion rights, however, would be likely to fall foul of Article 8. UK courts have recognised that refugees are likely to face “insurmountable obstacles” to enjoying family life in their country of origin,¹⁶⁷ and that when there is no country in the world other than the UK where a refugee and their family can live together, any rule that bars family members from entry will require strong justification, even if the bar has the potential to be temporary.¹⁶⁸
120. There is an international consensus that delaying refugee family reunion is likely to violate Article 8: the European Court of Human Rights has held that Article 8 requires that decision-making in refugee family reunion applications be “flexible, swift and effective,” and a processing time of over three years was found to be unlawful;¹⁶⁹ the EU’s Directive on Family Reunification exempts refugees from the minimum residence requirements for family reunion that may be imposed on other migrants;¹⁷⁰ and the Council of Europe Commissioner on Human Rights has expressed the view that “swift family reunification is imperative to avoid prolonging . . . [refugees] suffering and allowing them to rebuild their lives in their new homes”.¹⁷¹ In October 2018, the Parliamentary Assembly of the Council of Europe (of which the United Kingdom remains a member) adopted Resolution 2243 (2018) on *Family reunification of refugees and migrants in the Council of Europe member States*. This concluded:
- Hindrances to the protection of family life are not admissible under Article 8 of the European Convention on Human Rights to deter migrants or refugees and their family members.*¹⁷²
121. A provision that allows for a case-by-case assessment of individual circumstances would be an inadequate protection; as the European Court of Human Rights has noted, case-by-case examinations can “give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness.”¹⁷³

Qualification Directive, which the UK opted into, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0083>) and prohibiting states from imposing minimum residence or financial requirements on family reunification applications by refugees (Article 12 of the Family Reunification Directive, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0086>).

¹⁶⁶ *HL Bill 82 Explanatory Notes* (n 5), para. 20.

¹⁶⁷ *MM (Lebanon)* (n 28), para. 105.

¹⁶⁸ See *FH (Post-flight spouses)* (n 25), paras. 23-25. This found that the de facto five-year bar on sponsoring a post-flight spouse that arose after refugees were granted limited leave to remain rather than Indefinite Leave to Remain would require clear justification and was likely to be a disproportionate interference with Article 8.

¹⁶⁹ *Tanda-Muzinga* (n 25), para. 82, <http://hudoc.echr.coe.int/eng?i=001-145358>

¹⁷⁰ *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification*, Article 12(2), Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003L0086>

¹⁷¹ Council of Europe: Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, p. 47, available at: <https://rm.coe.int/prems-052917-qbr-1700-realising-refugees-160x240-web/1680724ba0> We note that at paragraph 12 of its *ECHR Memorandum* (n 28), the Government suggests that the proposed restrictions on refugee family reunion are consistent with Article 8 because the UK has a “legitimate interest” in discouraging “forum shopping” and encouraging asylum-seekers to claim asylum in the first safe country they arrive in”, “encouraging asylum-seekers to present themselves to the authorities and make claims at the first available opportunity”, and promoting lawful methods of entry”. However, it is axiomatic that identifying a legitimate interest is not sufficient to make an interference with Article 8 lawful. The interference must also be proportionate. For the reasons set out above, preventing refugee families from reuniting would not be proportionate. The existence of a general consensus (as there is in favour of refugee family reunion), moreover, is likely to limit a State’s “margin of appreciation” under Article 8. *MA v Denmark* (n 28), para. 151.

¹⁷² Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25185&lang=en>

¹⁷³ *MA v Denmark* (n 28), para. 148. This general observation is borne out by the example of United Kingdom litigation: by the time the Court of Appeal found that the denial of entry clearance to a refugee’s post-flight spouse

Misapplication of Article 31

122. We note that the Bill selectively echoes the language of Article 31 of the Refugee Convention in its description of the additional requirements refugees will need to meet in order to qualify for “Group 1” status. The mere use of the same words – but in a different order, in a different context and for a different purpose - does not make the creation of a second-tier refugee status a lawful “penalty” under Article 31. In UNHCR’s view, it is not.
123. Most simply, Article 31 prohibits penalising refugees for their unlawful entry or presence if they come directly from a country where their life or freedom was threatened, present themselves to the authorities without delay, and show good cause for their unlawful entry or presence. This article was intended to address the situation of refugees who were lawfully settled, temporarily or permanently, in another country and had already found protection there and who decided to move onward irregularly for reasons unconnected to their need for international protection. To them, administrative penalties for unlawful entry or presence could be applied. It has since been understood also to apply to those who failed to seek asylum in a timely fashion or at all, in a country where they could reasonably have done so.¹⁷⁴ The UK High Court in *Adimi* introduced three benchmarks to interpret “coming directly”: 1) the length of stay in the intermediate country; 2) the reason for the delay; and 3) whether or not the refugee sought or found protection *de jure* or *de facto*.¹⁷⁵
124. However, any penalties for unlawful entry or presence must not undermine the right to seek and enjoy asylum or be at variance with other provisions of the 1951 Convention (or, more broadly, with international human rights standards), and in particular must not exclude refugees from the benefit of entitlements under the Convention or other international human rights instruments.
125. The Bill is inconsistent with Article 31(1) in six significant ways:
- (i) It targets “Group 2” refugees not only for unlawful entry or presence, but also for their perceived failure to claim asylum elsewhere or to claim asylum promptly, even if they entered and are present in the UK lawfully [**Clause 11(2)**];
 - (ii) It would empower the Secretary of State to impose a type of penalty for belonging to “Group 2” that is at variance with the Refugee Convention: namely, the denial of rights specifically and unambiguously guaranteed by the Convention to recognised refugees [**Clause 11(5)(a)-(c)**];
 - (iii) It would further empower the Secretary of State to impose a penalty on Group 2 refugees that would be inconsistent with international human rights law, namely, restrictions on their right to family unity [**Clause 11(5)(d) and Clause 11(6)(a)**];
 - (iv) It creates new offences of “arriving” in the UK without a visa or Electronic Travel Authorisation (ETA) (where one is required) [**Clause 39(2)**], to which there would be no defence based on article 31(1);¹⁷⁶ and
 - (v) It would clarify that there is no defence under section 31 of the Immigration and Asylum Act 1999 (which is entitled “Defences based on Article 31(1) of the Refugee

violated Article 8 in *A (Afghanistan) v Secretary of State for the Home Department*, [2009] EWCA Civ 825, the couple’s application to be reunited had been pending for over 2.5 years. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2009/825.html> In *FH (Post-flight spouses)* (n 25), the couple had been pursuing entry clearance for 17 months before the Upper Tribunal (Immigration and Asylum Chamber) found in their favour. Available at: <https://tribunalsdecisions.service.gov.uk/utiac/37657> We note that in its

¹⁷⁴ UNHCR, *Observations on the New Plan for Immigration* (n 5), para. 13.

¹⁷⁵ *Ex parte Adimi* (n 49).

¹⁷⁶ See the Immigration and Asylum Act 1999 (n 50), Section 31. They are not available for any offences committed under Section 24 of 1971 Immigration Act.



Convention”) for offences committed while seeking to leave the UK [**Clause 36(4)**] - something that the House of Lords found would be inconsistent with the Refugee Convention.¹⁷⁷ In UNHCR’s view, refugees who leave a country in contravention of exit rules and who are present without authorization may be protected from penalization under Article 31(1) of the 1951 Convention, particularly when they are transiting en route elsewhere to claim asylum, and despite the fact that they have not presented themselves to the authorities without delay when entering.

- (vi) It would allow for the prosecution of asylum-seekers who provide assistance to each other when travelling together to the United Kingdom, by eliminating the requirement that such assistance must be provided for gain in order to constitute a criminal offence [**Clause 40(3)**] and it denies them an otherwise applicable defence, relating to acts of rescue at sea [**Clause 40(4)**].

126. UNHCR also notes with regret that at the same time as it amends section 31 of the 1999 Act so as to make its defences unavailable for offences committed while leaving the UK, **Clause 36(4)** of the Bill does not amend that section to comply with Article 31(1) of the Refugee Convention by bringing within its scope the very offences named in that Article: illegal entry and illegal presence (offences under Section 24(1) of the Immigration Act 1971).¹⁷⁸

127. Finally, at **Clause 36(1)**, the Bill would interpret Article 31(1) to mean that “A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.” As set out in our observations of May 2021, and addressed above, this definition of “coming directly” would be inconsistent with Article 31(1) of the Convention unless it continued to be interpreted in line with the current UK jurisprudence. This defines the term “directly” broadly and purposively, such that refugees who have crossed through, stopped over or stayed in other countries en route to the country of intended sanctuary may still be exempt from penalties.¹⁷⁹

C. The unprecedented scope and consequences of the concept of inadmissibility: Clauses 12(1), 12(9), 14, 15 and 16(2)

128. The Bill proposes to designate as “inadmissible” asylum claims from:

- (i) A national of a Member State of the European Union [**Clause 14**].
- (ii) Persons with a “connection” to a “safe third State”. [**Clause 15**].

129. For ease of reference when considering the Bill, we will set out our concerns about each of the Bill’s provisions related to inadmissibility in the order in which they appear.

¹⁷⁷ *Asfaw* (n 51), paras. 26 and 59.

¹⁷⁸ Immigration Act 1971, Section 24, available at: <https://www.legislation.gov.uk/ukpga/1971/77/section/24> In the leading case of *Asfaw* in the House of Lords, Lord Bingham noted this significant omission, commenting, “I am at a loss to understand why . . . [the offence of illegal entry under Section 24(1) of the 1971 Act] has been omitted from section 31 of the 1999 Act] since section 24, like section 24A, falls four-square within the terms of article 31. Article 31 is designed indeed for precisely that kind of offence.”, see *Asfaw* (n 51) para. 77.

¹⁷⁹ *Ex parte Adimi* (n 49), para. 18; *Asfaw* (n 51), paras. 15 and 36; *Mateta* (n 53); *Decision KKO:2013:21* (n 53); also see UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 16), para. 39.



130. The Bill's first mention of inadmissibility is at **Clause 12(1)**, which creates a new section subsection (97)(3A)(a) of the Immigration and Asylum Act 1999.¹⁸⁰ This makes it possible for asylum-seekers in the inadmissibility process to be offered different accommodation than those whose claims are being actively considered. The Explanatory Notes clarify that this may be in accommodation centres that will also house those whose claims have been certified as clearly unfounded or have already been rejected. The centres will be “basic” and designed to resolve asylum claims quickly and facilitate removal.¹⁸¹
131. As noted above, the effect of the implementation of inadmissibility procedures in the absence of readmission or transfer agreements has been to suspend the processing of “inadmissible” asylum claims for at least six months, a period that the Bill would allow to become indefinite. Moreover, nothing in the Bill would require those whose claims drop out of the inadmissibility process to be rehoused outside of this “basic” accommodation while their claim is being considered (a period that at present is between one and three years).¹⁸²
132. In addition, the Bill would empower the Secretary of State to remove the current six-month maximum for residence in a reception centre. [**Clause 12 (9)**].¹⁸³ Prolonged accommodation in “basic” accommodation centres is therefore a clear possibility. We are concerned that unless “basic accommodation” includes necessary safeguards and support for asylum-seekers’ mental and physical health and wellbeing, this is likely to harm refugees’ wellbeing, increase their need for support in the future and delay their integration. If residence in accommodation centres is subject to restrictions on freedom of movement that go beyond what is necessary and proportionate in each individual case, this is likely to violate Article 31(2).¹⁸⁴

14 Asylum claims by EU nationals: inadmissibility

(1) After Part 4 of the Nationality, Immigration and Asylum Act 2002 insert—

¹⁸⁰ “(3A) When exercising the power under section 95 or 95A to provide or arrange for the provision of accommodation, the Secretary of State may decide to provide or arrange for the provision of different types of accommodation to supported persons on the basis of either or both of the following matters—

(a) the stage that their protection claim has reached, including whether they have been notified that their claim is being considered for a declaration of inadmissibility (see sections 80A and 80B of the Nationality, Immigration and Asylum Act 2002)”.

¹⁸¹ *HL Bill 82 Explanatory Notes* (n 5), para. 21.

¹⁸² According to a Freedom of Information request made by the Refugee Council to the Home Office, in 2020 33,016 claimants had been waiting more than a year for an asylum decision. According to the Refugee Council’s analysis, the average waiting time was between one and three years, see Refugee Council, *Thousands seeking asylum face cruel wait of years for asylum decision – fresh research shows*, 2 July 2021, available at: <https://refugeecouncil.org.uk/latest/news/thousands-seeking-asylum-face-cruel-wait-of-years-for-asylum-decision-fresh-research-shows/>

¹⁸³ Section 25 of the Nationality, Immigration and Asylum Act 2002, available at: <https://www.legislation.gov.uk/ukpga/2002/41/section/25>, currently provides:

“(1) The Secretary of State may not arrange for the provision of accommodation for a person in an accommodation centre if he has been a resident of an accommodation centre for a continuous period of six months. . . .

(4) The Secretary of State may by order amend subsection (1) or (2)(b) so as to substitute a shorter period for a period specified. “ <https://www.legislation.gov.uk/ukpga/2002/41/section/25> The Bill would make the following amendment: “In section 25 of that Act (length of stay in accommodation centre), in subsection (4), for “shorter” substitute “different”.

¹⁸⁴ 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, <https://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, (“Summary Conclusions 2017”), <http://www.refworld.org/docid/5b18f6740.html>

**“PART 4A****INADMISSIBLE ASYLUM CLAIMS****80A Asylum claims by EU nationals**

- (1) The Secretary of State must declare an asylum claim made by a person who is a national of a member State inadmissible.
- (2) An asylum claim declared inadmissible under subsection (1) cannot be considered under the immigration rules.
- (3) A declaration under subsection (1) that an asylum claim is inadmissible is not a decision to refuse the claim and, accordingly, no right of appeal under section 82(1)(a) (appeal against refusal of protection claim) arises.
- (4) Subsection (1) does not apply if there are exceptional circumstances as a result of which the Secretary of State considers that the claim ought to be considered.
- (5) For the purposes of subsection (4) exceptional circumstances include where the member State of which the claimant is a national—
 - (a) is derogating from any of its obligations under the Human Rights Convention, in accordance with Article 15 of the Convention;
 - (b) is the subject of a proposal initiated in accordance with the procedure referred to in Article 7(1) of the Treaty on European Union and—
 - (i) the proposal has yet to be determined by the Council of the European Union or (as the case may be) the European Council,
 - (ii) the Council of the European Union has determined, in accordance with Article 7(1), that there is a clear risk of a serious breach by the member State of the values referred to in Article 2 of the Treaty, or
 - (iii) the European Council has determined, in accordance with Article 7(2), the existence of a serious and persistent breach by the member State of the values referred to in Article 2 of the Treaty.

(...)

133. The Bill contains two separate provisions with regard to safe countries of origin. The first makes asylum claims by nationals of Member States of the European Union inadmissible unless there are “exceptional circumstances as a result of which the Secretary of State considers” that the claim should be considered in the United Kingdom. At present, Paragraph 326F¹⁸⁵ of the Immigration Rules contains a similar provision:

An EU asylum application will only be admissible if the applicant satisfies the Secretary of State that there are exceptional circumstances which require the application to be admitted for full consideration. Exceptional circumstances may include in particular:

¹⁸⁵ Available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

(a) *the Member State of which the applicant is a national has derogated from the European Convention on Human Rights in accordance with Article 15 of that Convention;*¹⁸⁶

(b) *the procedure detailed in Article 7(1) of the Treaty on European Union has been initiated, and the Council or, where appropriate, the European Council, has yet to make a decision as required in respect of the Member State of which the applicant is a national; or*

(c) *the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national, or the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national.*¹⁸⁷

This reflects the Spanish Protocol to the Treaty on the Functioning of the European Union, by which the UK is no longer bound.¹⁸⁸ The Bill would enact this rule into legislation, with two changes. The first is that phrase “Exceptional circumstances may include in particular” would be replaced with “exceptional circumstances include”. The second is that the reference to the applicant satisfying the Secretary of State as to the existence of exceptional circumstances has been deleted.

134. 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.¹⁸⁹ 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

¹⁸⁶ This allows states parties to the ECHR to derogate from their obligations under the Convention, other than those under Articles 2, 3, 4 and 7, “in time of war or other public emergency threatening the life of the nation”, see *European Convention on Human Rights*, 4 November 1950, available at: https://www.echr.coe.int/documents/convention_eng.pdf

¹⁸⁷ Article 7 sets out the formal steps that may be taken by the institutions of the EU when there is a “clear risk of a serious breach by a Member State” of one of the fundamental values of the Union: “Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” It is initiated by a “reasoned proposal” by one third of the Members States, the European Parliament, or the European Commission.

¹⁸⁸ The Spanish Protocol to the Treaty on the Functioning of the European Union (originally a protocol to the 2004 Treaty of Amsterdam) contains similar language to the current rule, but at condition (d) it allows a member State to decide to nonetheless consider an asylum claim from a citizen of another member State. Moreover, although it dictates that the claim should be considered as “manifestly unfounded” it at the same time concedes that this will not affect “in any way, whatever the cases may be, the decision-making power of the Member State”. Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - *Protocol (No 24) on asylum for nationals of Member States of the European Union*, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E%2FPRO%2F24> In practice, this allows a degree of flexibility in individual cases, which many European states have exercised. See Immigration and Refugee Board of Canada, *European Union (EU) Member States: Application of the “Protocol on Asylum for Nationals of Member States”*, ZZZ102549.E, 12 October 2007, available at: <https://www.refworld.org/docid/474e89551e.html> As the UK Court of Appeal recently commented: “the Protocol recognises that that rule cannot trump the obligations of member states under the Refugee Convention and accordingly cannot be absolute,” and any presumption of safety must be rebuttable. *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>

¹⁸⁹ These are defined as claims that are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Refugee Convention or to any other criteria justifying the granting of asylum. See UNHCR ExCom, *Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum* (ExCom 30), No. 30 (XXXIV) – 1983, 20 October 1983, para. (d), available at: <https://www.refworld.org/docid/3ae68c6118.html> and UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.html>



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.¹⁹⁰

135. 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 to some forms of persecution, the country remains unsafe.¹⁹¹
136. UNHCR therefore welcomes the recent clarification that the list of exceptional circumstances at sections 80A(4) and (5) is not intended to be exhaustive.¹⁹² We remain concerned, however, that this clarification is contained in the Explanatory Notes only, and that there is no express requirement that the applicant's individual circumstances or the current situation in the EU Member State in question be assessed or taken into account. This concern is reinforced by the elimination of the reference in Paragraph 326F to the *individual applicant* satisfying the Secretary of State as to the existence of exceptional circumstances, which could be seen as implicitly removing the right of individual asylum-seekers to provide evidence rebutting a presumption of safety.
137. Without any requirement for an individualised or up-to-date assessment of safety, there is a risk that this provision will operate in practice so as to automatically exclude citizens of most EU Member States from the benefits of the Refugee Convention by reason of their nationality alone. This would introduce a geographical limitation to the refugee definition, which would be incompatible with the 1967 Protocol, as well as contravening the Article 3 of the Refugee Convention.¹⁹³ The risk of refoulement in individual cases would be exacerbated by the fact there would be no right of appeal against the decision.

15 Asylum claims by persons with connection to safe third State: inadmissibility

In Part 4A of the Nationality, Immigration and Asylum Act 2002 (as inserted by section 13), after section 80A insert—

“80B Asylum claims by persons with connection to safe third State

- (1) The Secretary of State may declare an asylum claim made by a person (a “claimant”) who has a connection to a safe third State inadmissible.
- (2) Subject to subsection (7), an asylum claim declared inadmissible under subsection (1) cannot be considered under the immigration rules.

¹⁹⁰ 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>

¹⁹¹ 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.”

¹⁹² The Explanatory Notes published when the Bill was introduced in the Commons stated that the list of exceptions at 80A(4) and (5) were meant to be “exhaustive”. *Bill 141 EN 2021-22* (n 5), para. 182. The current Explanatory Notes say the opposite, describing the list as “non-exhaustive”. *HL Bill 82 Explanatory Notes* (n 5), para. 196.

¹⁹³ UNHCR, *UNHCR's Position on the Proposal of the European Council concerning the Treatment of Asylum Applications from Citizens of European Union Member States*, 1 January 1997, para. 4, available at: <https://www.refworld.org/docid/3ae6b31d2b.html>.



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(3) A declaration under subsection (1) that an asylum claim is inadmissible is not a decision to refuse the claim and, accordingly, no right of appeal under section 82(1)(a) (appeal against refusal of protection claim) arises.

(...)

(5) For the purposes of this section a claimant has “a connection” to a safe third State if they meet any of conditions 1 to 5 set out in section 80C in relation to the State.

(...)

138. As noted above at paragraph 34, UNHCR recognises the legitimate purposes of fair inadmissibility procedures, with appropriate safeguards, as a response to the challenges of the onward movement of refugees and asylum-seekers for reasons unrelated to their need for international protection.

139. However, UNHCR has several substantial concerns about the inadmissibility procedures contained in the Bill:

- (i) The low standard for considering a third State “safe” for a particular claimant;
- (ii) The lack of a formal inadmissibility procedure or appeal in which the asylum-seeker has a meaningful right to be heard;
- (iii) The possibility that refugees whose claims are declared “inadmissible” will be sent to any “safe country”, and not only to a country to which they have a connection, and without any requirement to consider whether their transfer there would be reasonable;
- (iv) The tenuousness of the connection to a “safe” State that would allow for a declaration of inadmissibility; and
- (v) The potential for asylum claims to be treated as inadmissible for an indefinite period, leading to the effective denial of the right to seek and enjoy asylum anywhere.

15 Asylum claims by persons with connection to safe third State: inadmissibility

“80B Asylum claims by persons with connection to safe third State [cont’d]

- (4) For the purposes of this section, a State is a “safe third State” in relation to a claimant if—
- (a) the claimant’s life and liberty are not threatened in that State by reason of their race, religion, nationality, membership of a particular social group or political opinion,
 - (b) the State is one from which a person will not be sent to another State—
 - (i) otherwise than in accordance with the Refugee Convention, or
 - (ii) in contravention of their rights under Article 3 of the Human Rights Convention (freedom from torture or inhuman or degrading treatment), and
 - (c) a person may apply to be recognised as a refugee and (if so recognised) receive protection in accordance with the Refugee Convention, in that State.”

140. Under this provision, a State could be considered “safe” even if the applicant had been, and perhaps continues to be, at real risk of being subjected to human rights violations there that either fall short of threats to life and liberty, or to which they were not exposed for reasons of a Refugee Convention ground. Nor would inhuman and degrading treatment make a State unsafe, unless it were in the context of removal to a further country. It is regrettably often the case, however, that asylum-seekers are subject to significant restrictions on their fundamental rights, detained in inhuman and degrading conditions, or at risk of destitution, but there is nothing in the Bill that would take such risks into consideration.



141. UNHCR is also concerned that only the first of the elements of the definition of a “safe third State” refers expressly to the claimant. Protection against refoulement or removal in violation of Article 3 and the opportunity to apply for “protection in accordance with the Refugee Convention” must be available to “a person” in the country, but not specifically to the claimant. Although lists of safe countries are, for practical reasons, drafted according to the general availability of international protection, their application in practice requires a concrete, individualised assessment.¹⁹⁴ The question of whether an asylum-seeker may be sent to a third country for determination of their claim must be answered on an individual basis. If not, the risk of chain refoulement or other serious harm may arise.¹⁹⁵ There is no indication that such an individualised assessment would be required here. This omission becomes particularly concerning when seen in the context of the rest of Clause 15, according to which, as set out below, a person may be denied access to the UK’s asylum system even if they have never had an opportunity to apply for refugee status elsewhere.
142. Nor does the Bill include any express minimum standards as to the accessibility or fairness of the asylum procedures in the “safe” State. All that is required is that “a person” “may” apply for recognition as a refugee and “may” receive “protection in accordance with the Refugee Convention”. This fails notably to require an up-to-date assessment of how the asylum system is operating in practice.¹⁹⁶
143. “Protection in accordance with the Refugee Convention” is not defined. In addition, the Bill specifies that “a reference to anything being done in accordance with the Refugee Convention is a reference to the thing being done in accordance with the principles of the Convention, whether or not by a signatory to it,” but there is no definition of what the “principles of the Convention” are understood to be or what it would mean to act “in accordance” with them. **[80B(8)(b)]**
144. In UNHCR’s view, any definition of a country’s safety should include explicit benchmarks in line with the standards outlined in the Refugee Convention and under international human rights law,¹⁹⁷ and these must be met in both law and practice.¹⁹⁸ At a minimum, therefore, the definition of a “safe” State must include that the following are guaranteed in law and met in practice: appropriate reception arrangements and protection against threats to physical safety or freedom; protection against refoulement; access to fair and efficient asylum procedures, or to a previously afforded protective status; the legal right to remain during the asylum procedure; an appropriate legal status if found to be in need of international protection; and standards of treatment commensurate with the Refugee Convention and international human rights law. This includes recognition of the positive rights enshrined in the Refugee Convention, and not merely protection against refoulement.¹⁹⁹ Furthermore, the capacity of the third State to provide protection in practice should be taken into consideration, particularly if the third State is already hosting large refugee populations.²⁰⁰

¹⁹⁴ UNHCR, *UNHCR Statement on safe country concepts and the right to an effective remedy in admissibility procedures*, September 2019, available at: <https://www.refworld.org/docid/5d7b842c4.html>

¹⁹⁵ UNHCR, *Comments on the PD 2004* (n 191), p. 37.

¹⁹⁶ In the recast EU Asylum Procedures Directive, by contrast, a similarly general statement is coupled with a requirement that national law include the methodology by which the national authorities will satisfy themselves that a country is, in practice, safe, see *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*, Article 38(2)(b), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=en#d1e2163-60-1>

¹⁹⁷ UNHCR, *Summary Conclusions on the Concept of "Effective Protection"* (n 12).

¹⁹⁸ UNHCR, *Comments on the Comments on the PD 2004* (n 191), p. 33.

¹⁹⁹ UNHCR, *Observations on the Proposal for amendments to the Danish Alien Act* (n 13), para. 23.

²⁰⁰ UNHCR, *Improving Asylum Procedures*, (n 59), p. 59.



145. The risks of failing to set out specific standards of safety or mechanisms for scrutiny of whether they are met in practice is borne out by the policy statements that have been made in support of the Bill. These include the sweeping description of “EU countries” as “manifestly safe . . . with well-functioning asylum systems”.²⁰¹ This ignores the many occasions on which UK and European courts and Tribunals have found that individual refugees and asylum-seekers were at real risk of inhuman and degrading treatment or refoulement precisely in other European countries.²⁰² They are further borne out by Schedule 3 of the Bill, discussed below at paragraphs 189 – 197, which would make unrebuttable the presumption that there is no risk of refoulement in any listed State despite numerous court judgments establishing precisely such a risk in some of them.²⁰³

15 Asylum claims by persons with connection to safe third State

“80B Asylum claims by persons with connection to safe third State [cont’d]

- (6) The fact that an asylum claim has been declared inadmissible under subsection (1) by virtue of the claimant’s connection to a particular safe third State does not prevent the Secretary of State from removing the claimant to any other safe third State.
- (7) An asylum claim that has been declared inadmissible under subsection (1) may nevertheless be considered under the immigration rules—
- (a) if the Secretary of State determines that there are exceptional circumstances in the particular case that mean the claim should be considered, or
 - (b) in such other cases as may be provided for in the immigration rules.”
- (...)

146. UNHCR also has grave concerns about the consequences of a finding of inadmissibility. The most significant of these is the possibility of the involuntary transfer of an asylum-seeker to a “safe” third State with which they have no pre-existing connection, and without any assessment of whether it would be reasonable for them to go there. [**Section 80B(6)**].

147. In the first place, this could result in refugees being effectively deprived of their right to seek and enjoy asylum anywhere. This is because, although the “safe third State” in question is defined at Section 80B(1)(c) as one where, in general, there is a possibility to apply for refugee status, under Section 80C(2)-(5), it is not a requirement for a finding of inadmissibility that an individual asylum-seeker ever had an opportunity to do so (see paragraphs 155 – 156, below). According to **Section 80B(6)**, they could nonetheless be transferred to a different “safe” State, but **Schedule 3** (discussed below at paragraphs

²⁰¹ *New Plan for Immigration Policy Statement* (n 3), p.18.

²⁰² See, e.g. *M.S.S. v. Belgium and Greece* - 30696/09, Council of Europe: ECHR, available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103050&filename=001-103050.pdf&TID=cwvzdogrzt>; *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, European Union: Court of Justice of the European Union (Grand Chamber), Joint cases C-411/10 and C-493/10, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0411>; *R (on the application of SM & Others) v Secretary of State for the Home Department (Dublin Regulation – Italy)*, [2018] UKUT 429, available at: <https://tribunalsdecisions.service.gov.uk/utiac/2018-ukut-429>; *European Commission v Hungary*, European Union: Court of Justice of the European Union, Case C-808/18, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0808>; *R.R. and others v Hungary*, Council of Europe: ECHR, Application no. 36037/17, available at: <https://www.refworld.org/cases,ECHR,604265c74.html>; *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>; *Ibrahimi & Anor v The Secretary of State for the Home Department*, [2016] EWHC 2049, para. 163, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2016/2049.html>

²⁰³ *Ibid.*



189 – 197) defines such a State, and does not require that it offer any opportunity to apply for refugee status.

148. In addition, there is no requirement of any connection between the asylum-seeker and the State that would make it reasonable for them to go there. This would be a significant break from established international practice. As was recognised by the United Kingdom’s Upper Tribunal in the leading case of *RR (Refugee – Safe Third Country) Syria v SSHD*:

*“the type of case with which we are concerned here, involving intended expulsion of a refugee, tends only to arise as a matter of international state practice in situations where the person concerned has some connection with the third state which is said to be safe, based on nationality, prior residence, marriage, entitlement to residence, historical ties etc. it does not arise simply because there is a safe third country somewhere.”*²⁰⁴

149. This continues to be the case. Although the EU Procedures Directive allows for a finding of inadmissibility on the grounds of ties to a third State, this must be a State to which the asylum-seeker will be admitted. The finding of meaningful connections to one safe State cannot, under European law, legally found the transfer to another. Nor, in fact, are the “safe third country” rules permitted by the Procedures Directive reflected in most countries’ national laws nor, even where reflected in law, normally employed in practice.²⁰⁵
150. There is nothing in the Bill that requires the reasonableness of a particular transfer to be taken into account. A claim that has otherwise been declared inadmissible will only be considered in the United Kingdom if the Secretary of State determines that there are “exceptional circumstances in the particular case that mean the claim should be considered”, or in “such other cases as may be provided for in the immigration rules”. As there is no inadmissibility procedure or right of appeal against a decision on inadmissibility,²⁰⁶ there is no clear mechanism for an individual claimant to be heard with regard to any exceptional circumstances. It is also a matter of concern that in UK law the threshold of “exceptional circumstances” is normally understood to be a high one, significantly exceeding the threshold of reasonableness,²⁰⁷ with the potential consequence that “inadmissible” claims could still be denied consideration in the UK even when this would be unreasonable.
151. Because there is no longer any requirement that the Secretary of State take into account whether a person is likely to be removable to a safe third State before deciding to refer them into the inadmissibility process, or any deadline for how long she can keep them there, there is a risk that asylum-seekers will be trapped in the inadmissibility process indefinitely. They will not be considered to be lawfully in the country, and they will be subject to “immigration bail” conditions, including potentially accommodation in “basic” reception centres. They may be excluded even from the very limited right to work available to other asylum-seekers.²⁰⁸ They will be denied their right to seek asylum

²⁰⁴ *RR (Refugee - Safe Third Country)* (n 59).

²⁰⁵ UNHCR, *Improving Asylum Procedures* (n 59), p. 60.

²⁰⁶ UK Home Office, *Inadmissibility: safe third country cases* (n 11), p. 24.

²⁰⁷ See, e.g.: *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department*, [2017] UKSC 11, paras. 54-60, available at: <https://www.supremecourt.uk/cases/docs/uksc-2015-0129-judgment.pdf>

²⁰⁸ Because the claims of those in the “inadmissibility process” are not being considered under the immigration rules, it is unclear that they would be eligible to apply for the limited right to work available to other asylum-seekers under Paragraph 360. For details of asylum-seekers’ limited rights to work, see n 32.



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under international law and they, their families and their host communities will be at risk of the serious adverse consequences outlined above at paragraphs 20 – 25.

15, 80C Meaning of “connection” to a safe third State

- (1) Condition 1 is that the claimant—
 - (a) has been recognised as a refugee in the safe third State, and
 - (b) remains able to access protection in accordance with the Refugee Convention in that State.
- (2) Condition 2 is that the claimant—
 - (a) has otherwise been granted protection in a safe third State as a result of which the claimant would not be sent from the safe third State to another State—
 - (i) otherwise than in accordance with the Refugee Convention, or
 - (ii) in contravention of their rights under Article 3 of the Human Rights Convention, and
 - (b) remains able to access that protection in that State.
- (3) Condition 3 is that the claimant has made a relevant claim to the safe third State and the claim—
 - (a) has not yet been determined, or
 - (b) has been refused.
- (4) Condition 4 is that—
 - (a) the claimant was previously present in, and eligible to make a relevant claim to, the safe third State,
 - (b) it would have been reasonable to expect them to make such a claim, and
 - (c) they failed to do so
- (5) Condition 5 is that, in the claimant’s particular circumstances, it would have been reasonable to expect them to have made a relevant claim to the safe third State (instead of making a claim in the United Kingdom).
- (6) For the purposes of this section, a “relevant claim” to a safe third State is a claim—
 - (a) to be recognised as a refugee in the State for the purposes of the Refugee Convention, or
 - (b) for protection in the State of the kind mentioned in subsection (2)(a).

(...)

152. The low standard for what constitutes a safe third State is combined here with a low threshold for the type of connection with such a State that would ground a finding of inadmissibility. For an asylum-seeker’s claim to be found inadmissible, they would not need to have had an effective opportunity to apply for “protection in accordance” with the Refugee Convention in another State; the references to “effective protection” in the current rules have been deleted. It would be enough that they had had the opportunity to apply for protection against removal to face persecution on Refugee Convention grounds or treatment in violation of Article 3. This is because, although the definition of a safe third State under **Section 80B(1)(c)** includes the fact that “a person may apply to be recognised as a refugee and (if so recognised) receive protection in accordance with the Refugee Convention” there, **Section 80B(5)** then sets out that a particular claimant can be found inadmissible based on any one of the five types of connection to such a State set out at **Section 80C**. Only one of these (Condition 1) requires that particular claimant to have had access to protection in accordance with the Refugee Convention. Condition 2 is that they were previously granted protection against refoulement or



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- removal in violation of Article 3, while Conditions 3 through 5 all refer to a “relevant claim” that was or could have been made, and Section **80C(6)** clarifies that such a claim is *either* for refugee protection *or* merely for protection against removal to face refoulement or inhuman and degrading treatment elsewhere.
153. Although the New Plan for Immigration was presented as an effort to deter asylum claims from those who “have travelled through France and other EU countries – manifestly safe countries with well-functioning asylum systems”,²⁰⁹ the Bill seeks to bar claims from individuals who have travelled through countries that offered them nothing more than protection against expulsion to face persecution or inhuman and degrading treatment (Conditions 2-4). [**Clause 15 Section 80C(2-4)**]. Under Condition 5, they would not even have had to travel through such a country. [**Section 80C(5)**].
154. Arguably, if an asylum-seeker was at risk of human rights violations (for a non-Refugee Convention reason or falling short of a threat to life or liberty) and has been or would be denied the benefits of the Refugee Convention in a third State, they could show that it would not be “reasonable” for them to be expected to claim asylum there. The Bill could then be read as implicitly creating a higher standard of either the safety of the previous State or of the nature of the connection to it necessary to found a finding of inadmissibility. However, the impact of such a reading would be limited by the language of the Bill: reasonableness is said to be relevant only to why a person may not have claimed asylum in a “safe” State and to whether they ought to have claimed asylum in some other State in which they have never been. It is not treated as relevant to why they moved on from a State in which they had been granted some form of protection or in which they made a “relevant claim” that remains pending or has been refused.
155. UNHCR also opposes the significant expansion of the safe third country concept represented by the proposed **Section 80C(4)**, which provides for inadmissibility where an applicant has merely been present in a State and had a reasonable opportunity to apply for asylum there. In UNHCR’s view, transit alone ought not be regarded as a “sufficient” connection or meaningful link to a third country to justify a finding of inadmissibility, particularly outside the context of formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection.²¹⁰ In making mere transit sufficient to ground a finding of inadmissibility, the Bill would make the UK an international outlier. The Court of Justice of the European Union has repeatedly found that “the transit by an applicant for international protection through the third country concerned cannot constitute a ‘connection’” under EU inadmissibility rules.²¹¹
156. Even where a third country is safe in general, moreover, some refugees may have legitimate reasons to seek protection in a specific country, including family ties or other meaningful links. There may in addition be particular reasons that a State that is in general safe would not be safe for them. We therefore observed in May 2021 that for all

²⁰⁹ *New Plan for Immigration Policy Statement* (n 3), p. 18.

²¹⁰ UNHCR, *Comments on the PD 2004* (n 191), p. 34

²¹¹ *Joined Cases C-924/19 PPU and C-925/19 PPU*, European Union: Court of Justice of the European Union (Grand Chamber), available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=EA0380EEA66009652711640474584AC9?text=&docid=226495&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5341442> In terms of international State practice, in the United States, a Trump Administration policy of sending back all asylum-seekers who had passed through Guatemala to that country was abandoned by the Biden Administration within weeks of taking office, see U.S. Department of State Press Release, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala and Honduras*, 6 February 2021, available at: <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>



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- cases where inadmissibility and transfer procedures are pursued, the UK authorities must in practice be able to properly identify the circumstances in which return or transfer to a safe third country would not be appropriate for any particular individual and where it may be more appropriate to assess the individual's claim in the UK. These circumstances include family links or relationships of dependency in the UK, compassionate grounds and the best interests of children.
157. For all of these reasons, an assessment of inadmissibility should be done through a formal procedure,²¹² in which the individual has a meaningful opportunity to rebut the presumption that the proposed transfer will be safe and reasonable, based on their particular circumstances.²¹³
158. No such individualised assessment is envisioned here. Nor is there any mechanism for meaningful input by the asylum-seeker or independent review of the Secretary of State's decision, nor any safeguard ensuring that all relevant issues are taken into account in the decision or that it complies with the United Kingdom's duties under the Refugee Convention, the ECHR, or the International Convention on the Rights of the Child.
159. The Bill would thus authorise sending an asylum-seeker to a "safe third country somewhere" (in the words of the UK's Upper Tribunal). This would be fundamentally at odds with international practice, as well as incompatible with respect for human dignity. It undermines the Refugee Convention's fundamental goal of achieving durable solutions for refugees in which they can enjoy the "widest possible exercise of ... fundamental rights and freedoms". This goal is a practical as well as a humanitarian one. If refugees are sent to countries with which they have no connection and where it is not reasonable for them to go, many will simply seek ways to move onwards.
160. The proposed inadmissibility system would have several further practical consequences that threaten to undermine refugees' health and wellbeing, delay or impede their integration, impose unnecessary costs on the public purse and encourage irregular journeys by their family members. The first of these is that by breaking the link between inadmissibility and readmission, it allows asylum claims to be treated as inadmissible even in the absence of any return or transfer agreement with any third State. The result is an indefinite period of avoidable delay, at additional cost to individual wellbeing, as well as in terms of financial asylum support and accommodation for both those whose claims would otherwise have been refused during that time and been liable to removal and to those whose claims would have been granted and who would have then begun the transition to integration and employment. The longer refugees are prevented from working while awaiting decisions on their claims, moreover, the worse their future prospects of employment and integration.²¹⁴ The prospect of an indefinite delay to a decision – and therefore to family reunion – may also encourage close family members – including women and children with protection needs of their own – to attempt unsafe, irregular journeys to the UK.
161. In addition to housing in "basic" accommodation centres, as discussed above at paragraphs 130-132, the Bill would give those waiting in the inadmissibility process the

²¹² UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate*, 2020, p. 15, available at: www.refworld.org/docid/5a2657e44.html See also: UNHCR, *UNHCR Discussion Paper Fair and Fast* (n 189), pp. 3-4.

²¹³ See *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, available at: www.refworld.org/cases_UK_SC_5304d1354.html, per Kerr LJ for the majority, para. 41 (reaffirming that individuals must have an opportunity to rebut general presumptions of safety).

²¹⁴ Hainmueller, J., Hangartner, D., and Lawrence, D., *When lives are put on hold: Lengthy asylum processes decrease employment among refugees*, *Science Advances* 2(8), 2016, available at: <https://advances.sciencemag.org/content/2/8/e1600432>; MAC, *Annual report December 2021* (n 33).



same limited access to asylum support as is currently given to failed asylum-seekers. [Clause 16(2)].²¹⁵ Although those ultimately admitted into the UK asylum process will then become eligible for full NASS support, the marginalisation and stress caused by an indefinite preliminary period of near-destitution is likely to have a negative effect on their mental health and eventual integration, with increased long-term costs to their host community.

D. Potential departures from fundamental principles of refugee decision-making: Clauses 18 and 25

162. UNHCR is concerned by the clauses of the Bill that direct decision-makers, including judges, that they “shall take account” of the late production of evidence “as damaging” a person’s credibility and “must have regard to the consideration that “minimal weight” should be given to that evidence.

18 Asylum or human rights claim: damage to claimant’s credibility

- (1) Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004²¹⁶ is amended in accordance with sections (2) to (6).

(...)

- (4) After subsection (6) insert –

“(6A) This section also applies to the late provision by the claimant of evidence in relation to the asylum claim or human rights claim in question, unless there are good reasons why the evidence was provided late.

- (6B) For the purposes of subsection (6A), evidence is provided “late” by the claimant if -
(a) it is provided pursuant to an evidence notice served on the claimant under section 16(1) of the Nationality and Borders Act 2021, and
(b) it is provided on or after the date specified in the notice.”

(...)

163. It is a fundamental principle of refugee status determination that credibility must be assessed in the round, taking into account all of a person’s individual and contextual circumstances. This encompasses: the personal background of the applicant, his or her age, nationality, ethnic origin, gender, sexual orientation and/or gender identity, education, social status, religion, and cultural background; his or her past and present experiences of ill-treatment, torture, persecution, harm, or other serious human rights violations; and the relevant situation in the country of origin or other relevant country.²¹⁷

164. UNHCR reiterates that there are many reasons for a delay in producing evidence. Refugees, asylum-seekers and victims of trafficking may often be suffering the symptoms of trauma and other mental health problems associated with their experiences; be bewildered or disoriented by the new environment of the country of asylum; feel anxious, desperate, or frightened; lack trust in the authorities; or experience feelings of shame. Timely disclosure may also depend on access to good-quality legal advice, the training and competencies of interviewers or interpreters, the timescales of

²¹⁵ “Part 2, Section 15 Clarification of basis for support where asylum claim inadmissible

(2) If paragraph 1 of Schedule 11 to the Immigration Act 2016, which repeals section 4 of the 1999 Act, is not yet in force on the day this section comes into force, in subsection (2)(b) of that section, after “was rejected” insert “or declared inadmissible (see sections 80A and 80B of the Nationality, Immigration and Asylum Act 2002)”.

²¹⁶ Available at: <https://www.legislation.gov.uk/ukpga/2004/19/section/8>

²¹⁷ UNHCR, *Handbook* (n 162), para. 41.



any initial procedure, or circumstances in the applicant's country.²¹⁸ It is essential that if this provision comes into effect, all of these considerations are given due weight in the assessment of whether the applicant has given "good" reasons for any delay.

Note: for a discussion of the expedited appeals outlined in Clauses 22 and 23 of the Bill, please see paragraphs 167 – 177.

25 Late provision of evidence in asylum or human rights claim: weight

- (1) This section applies where –
 - (a) evidence is provided late by a claimant in relation to an asylum claim or a human rights claim, and
 - (b) the evidence falls to be considered by a deciding authority for the purpose of determining –
 - (i) the claim, or
 - (ii) where a decision in respect of the claim is the subject of a relevant appeal, the appeal.
- (2) Unless there are good reasons why the evidence was provided late, the deciding authority must, in considering it, have regard to the principle that minimal weight should be given to the evidence.
- (...)

165. UNHCR has similar concerns about **Clause 25**, which would require decision-makers, including judges, to consider giving "minimal weight" to evidence that is provided after a deadline set by the Secretary of State (either in an evidence notice or a Priority Removal Notice), unless there are good reasons for the lateness.²¹⁹

166. A rule prescribing that particular evidence *should* be given *minimal weight* would run counter to fundamental principles governing the assessment of evidence, including that "everything capable of having a bearing has to be given the weight, great or little, due to it",²²⁰ and that evidence must be approached objectively, with an open mind²²¹, and assessed in the round, rather than in isolation.²²² Moreover, the effect of delay on the weight of "late" evidence will necessarily vary depending on the nature of that evidence. For example, there is no reason that the probity of much third-party evidence, and in particular evidence from independent medical or country experts, should be affected by an applicant's delay.²²³ Although the provision allows decision-makers a degree of flexibility by directing them to have "regard to" the principle that minimal weight should be given to the evidence, rather than requiring them always to apply it, UNHCR is

²¹⁸ See UNHCR, *Beyond Proof. Credibility Assessment in EU Asylum Systems (Beyond Proof)*, pp. 33, 36, 97-103, 199-203 and 227, available at: <https://www.unhcr.org/uk/protection/operations/51a8a08a9/full-report-beyond-proof-credibility-assessment-eu-asylum-systems.html>; and paras. 4 and 198 of the UNHCR *Handbook* (n 162).

²¹⁹ **Clause 25(2)**: "Unless there are good reasons why the evidence was provided late, the deciding authority must, in considering it, have regard to the principle that minimal weight should be given to the evidence." Late evidence is then defined at **Clause 25(4) and (5)** as evidence provided after the deadline set in an evidence notice or priority removal notice.

²²⁰ *Karanakaran v Secretary of State for the Home Department*, [2000] EWCA Civ 11, para. 18, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2000/11.html>. A similar approach is taken in Australia, Germany, and the Czech Republic. UNHCR, *Beyond Proof* (n 218), pp. 240-241.

²²¹ UNHCR, *Beyond Proof* (n 218), p. 38.

²²² *SM (Section 8: Judge's process) Iran*, [2005] UKAIT 00116, available at: <https://tribunalsdecisions.service.gov.uk/utiac/38086>; the requirement to make credibility assessments in light of all of the evidence, rather than by assessing each material fact in isolation is broadly reflected in State practice, including in the Netherlands, Australia, and in Europe more generally. UNHCR, *Beyond Proof* (n 218), pp. 46-47

²²³ See *Devaseelan v. Secretary of State for the Home Department*, [2002] UKIAT 000702, available at: https://www.refworld.org/cases,GBR_AIT,40487ac32.html on distinguishing late-produced evidence of "facts personal to the appellant" from "Evidence of other facts – for example country evidence", which "may not suffer from the same concerns as to credibility."



concerned that the provision could have the effect of discouraging decision-makers from approaching the evidence with an open mind and giving the evidence the weight due to it in all of the circumstances, as heretofore reflected in UK law. This would be inconsistent with international best practice and could create a risk of refoulement.

E. Restrictions on rights of appeal: Clauses 22, 23, 26 and 27

167. The provision of a meaningful appeal is a fundamental requirement in the context of refugee status determination, where the consequences of an erroneous decision can be particularly serious. It is imperative that all asylum cases in the UK are processed fairly with full access to an effective remedy which includes the right to appeal a (negative) decision.²²⁴
168. As noted above at paragraphs 95-98, an effective right of appeal against the deprivation of nationality is an essential safeguard against statelessness, both for the person deprived of their nationality and for their children. In addition, the question of whether a decision to deprive a person of their British citizenship will make them or their children stateless is normally a complex question of foreign law, regarding which expert evidence is required. Appeals against such decisions are therefore unlikely to be capable of a just resolution in an expedited procedure.
169. UNHCR therefore opposes the clauses of the Bill that would introduce accelerated appeal procedures for appeals against the refusal of a protection or human rights claim made “late”, and in appeals against asylum, human rights or deprivation of nationality decisions that are already pending when a “late” claim is subsequently refused or are brought by individuals in detention. UNHCR also opposes the removal of the right of appeal for asylum-seekers whose claims have been certified as “clearly unfounded”.

Accelerated appeals

22 Priority removal notices: expedited appeals

- (1) After Section 82 of the Nationality, Immigration and Asylum Act 2002 insert-

“82A Expedited appeal to the Upper Tribunal in certain cases

- (1) This section applies where –
- (a) A person (“P”) has been served with a priority removal notice,
 - (b) P has made a protection claim or a human rights claim on or after the PRN cut-off date but while the priority removal notice remains in force, and
 - (c) P has a right under section 82(1) to bring an appeal from within the United Kingdom (see section 92) in relation to the claim.
- (2) The Secretary of State must certify P’s right of appeal under this section, unless satisfied that there were good reasons for P making the claim on or after the PRN cut-off date (and P’s right of appeal may not be certified if the Secretary of State is satisfied that there were good reasons).
- (3) If certified under this section, P’s right of appeal under section 82(1) is to the Upper Tribunal instead of the First-tier Tribunal (and any appeal brought pursuant to such a right is referred to in this section as an “expedited appeal”).

²²⁴ “If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system” UNHCR ExCom, Conclusion No. 8 (XXVIII), 1977, para. (vi), available at: <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>



- (4) Tribunal Procedure Rules must make provision with a view to securing that expedited appeals are brought and determined more quickly than an appeal under section 82(1) would, in the normal course of events, be brought and determined by the First-tier Tribunal.
- (5) Tribunal Procedure Rules must secure that the Upper Tribunal may, if it is satisfied that it is the only way to secure that justice is done in the case of a particular expedited appeal, order that the appeal is no longer to be treated as if it were an expedited appeal.
(...)"
- (2) In section 13(8) of the Tribunals, Courts and Enforcement Act 2007 (decisions excluded from right to appeal to the Court of Appeal), after paragraph (b) insert –
“(bza) any decision of the Upper Tribunal on an expedited appeal within the meaning given by section 82A(3) of the Nationality, Immigration and Asylum Act 2002 (expedited appeal against refusal of protection claim or human rights claim.”

170. According to UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* one of the basic requirements in respect of an appeal is that the asylum-seeker be given a “reasonable time to appeal.”²²⁵ UNHCR notes that asylum-seekers are in many instances highly vulnerable and may experience significant difficulties in studying legal determinations, gathering evidence and preparing submissions in order to appeal their first instance decision. Furthermore, significant challenges can be faced by asylum-seekers in building trust with their legal representative and the confidence to fully present their claim.
171. Accelerated procedures may nonetheless be appropriate regarding manifestly unfounded or repeat claims, as long as they are sufficiently flexible and contain adequate safeguards. Applications and appeals should not be accelerated, however, for reasons that are unrelated to their merits.²²⁶ This could result in cases that are complex and not capable of being decided fairly in an accelerated process nonetheless being routed into it. This is in clear contrast to manifestly unfounded claims and repeat claims that do not raise significantly different protection needs; we note that the latter are already denied a right of appeal in the UK under the existing “fresh claim” procedure.²²⁷
172. UNHCR is concerned that the certification of the appeal is mandatory, based on the sole consideration of whether there was a delay in the claim being made without “good reasons”. Although delay in claim without good reasons may well be damaging to an applicant’s credibility, it should not be taken as determinative, for the reasons set out above at paragraphs 163 – 164, and it is possible that claims delayed even without good reason may be complex or have merit.
173. We are further concerned that the degree to which the appeal will be expedited is dictated by the requirement that the claim be both brought and determined more quickly than it would be if it were heard before the First-tier Tribunal. The current deadline for

²²⁵ UNHCR *Handbook* (n 162), para. 192(vi).

²²⁶ UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, para. (d) available at: <https://www.unhcr.org/%20refworld/docid/3ae68c6118.html>

²²⁷ See Paragraph 353 of the Immigration Rules, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-12-procedure-and-rights-of-appeal>; Section 82 of the 2002 Act (as amended by the 2014 Act), available at: <https://www.legislation.gov.uk/ukpga/2002/41/section/82>; UK Home Office, *Further Submissions*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502334/Further_Submissions_API_v9_0_EXT.pdf



bringing an appeal to the First-tier Tribunal is 14 calendar days,²²⁸ which is at the lower end of what has been considered permissible in other jurisdictions.²²⁹ Anything shorter risks making the right of appeal ineffective. The requirement that the appeal also be determined more quickly than it would be before the First-tier Tribunal, moreover, sets an arbitrary benchmark, unrelated to considerations of justice or efficiency. It also creates an inherent risk that appeals will be heard too quickly, given that part of the overriding objective of the First-tier Tribunal is “avoiding delay, so far as compatible with proper consideration of the issues”.²³⁰

174. Finally, since the Bill was published it has been amended to eliminate the Upper Tribunal’s power to remove an appeal from the accelerated procedure where it is satisfied that it is in the interests of justice to do. Instead, the power will only be available to the Upper Tribunal where it is “the only way to secure that justice is done”. This creates a strong presumption that appeals should stay in the expedited process, even where this is not in the interests of justice. In asylum appeals in particular this runs directly counter to the long-established principle that, “asylum applications are of such moment that only the highest standards of fairness will suffice.”²³¹
175. These concerns about the risk of potential miscarriages of justice in the proposed expedited procedure are increased by the fact that there will be no right of onward appeal to the Court of Appeal.

23 Expedited appeals: joining of related appeals

- (1) For the purposes of this section, an “expedited section 82 appeal” is an expedited appeal within the meaning of section 82A of the Nationality, Immigration and Asylum Act 2002 (expedited appeals for claims brought on or after PRN cut-off date).
- (2) For the purposes of this section, a “related appeal” is an appeal under any of the following—
 - (a) section 82(1) of the Nationality, Immigration and Asylum Act 2002 (appeals in respect of protection and human rights claims), other than one which is an expedited section 82 appeal;
 - (b) section 40A of the British Nationality Act 1981 (appeal against deprivation of citizenship);(...)
- (3) If a person brings an expedited section 82 appeal at a time when a related appeal brought by that person is pending, the related appeal is, from that time, to be continued as an appeal to the Upper Tribunal and accordingly is to be transferred to the Upper Tribunal.
- (4) If an expedited section 82 appeal brought by a person is pending, any right that the person would otherwise have to bring a related appeal to the First-tier Tribunal is instead a right to bring it to the Upper Tribunal.
- (5) A related appeal within subsection (3) or brought to the Upper Tribunal as mentioned in (4) is referred to in this section as an “expedited related appeal”.

²²⁸ First-tier Tribunal (Immigration and Asylum Chamber) Rules (n 143), Rule 19.

²²⁹ *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, European Union: European Court of Justice, para. 67, available at: <https://www.refworld.org/docid/5b589eef4.html>

²³⁰ First-tier Tribunal (Immigration and Asylum Chamber) Rules (n 143), Rule 2(2)(e).

²³¹ *The Refugee Legal Centre, R (on the application of) v Secretary of State for the Home Department*, [2004] EWCA Civ 1481, para. 8, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2004/1481.html>



(6) Tribunal Procedure Rules must make provision with a view to securing that the Upper Tribunal consolidates an expedited related appeal and the expedited section 82 appeal concerned or hears them together (and see section 82A(4) of the Nationality, Immigration and Asylum Act 2002).

(7) Tribunal Procedure Rules must secure that the Upper Tribunal may, if it is satisfied that it is the only way to secure that justice is done in the case of a particular expedited related appeal, order that the appeal is to be continued as an appeal to the First-tier Tribunal and accordingly is to be transferred to that Tribunal.

(. . .)

(9) In section 13(8) of the Tribunals, Courts and Enforcement Act 2007 (decisions excluded from right to appeal to the Court of Appeal), after paragraph (bza) (inserted by section 22) insert—
“(bzb) any decision of the Upper Tribunal on an expedited related appeal within the meaning given by section 23 of the Nationality and Borders Act 2021 (expedited appeals against refusal of protection claim or human rights claim: joining of related appeals),”.

176. All of the concerns expressed above with regard to Clause 22 are heightened with regard to Clause 23. This has the inevitable consequence that appeals will be accelerated where the refused claim was not made late and where there is therefore not even a rationale, however limited, for presuming on that basis that it is of limited merit. Not only will this increase the risk of miscarriages of justice – including those resulting in refoulement or statelessness – but on a practical level it is likely to have the perverse effect of discouraging appellants from putting forward all of their claims for remaining in the UK at the same time. Instead, a claimant with a pending appeal would be encouraged to wait until that appeal has been concluded before putting forward any other claims, so as not to risk the sudden and unjustified acceleration of the appeal.

177. UNHCR also notes with deep concern that, to the best of our knowledge, this is the first occasion on which British law will have allowed for an appeal against the deprivation of citizenship to be expedited. Given the inherent complexity of such appeals and, in particular, the limited consideration required to be given to the issue of statelessness prior to the appeal stage and the frequent need for expert evidence on complex provisions of foreign law, in UNHCR’s view, such appeals are unlikely to be suitable for expedition.

Note: for observations on Clause 25 “Late provision of evidence in asylum or human rights claim: weight”, see paragraphs 165 – 166 above.

Accelerated Detained Appeals

26 Accelerated detained appeals

- (1) In this section “accelerated detained appeal” means a relevant appeal (see subsection (6)) brought—
- (a) by a person who—
 - (i) was detained under a relevant detention provision (see subsection (7)) at the time at which they were given notice of the decision which is the subject of the appeal, and
 - (ii) remains in detention under a relevant detention provision, and
 - (b) against a decision that—
 - (i) is of a description prescribed by regulations made by the Secretary of State, and
 - (ii) when made, was certified by the Secretary of State under this section.



- (2) The Secretary of State may only certify a decision under this section if the Secretary of State considers that any relevant appeal brought in relation to the decision would likely be disposed of expeditiously.
- (3) Tribunal Procedure Rules must secure that the following time limits apply in relation to an accelerated detained appeal—
 - (a) any notice of appeal must be given to the First-tier Tribunal not later than 5 working days after the date on which the appellant was given notice of the decision against which the appeal is brought;
 - (b) the First-tier Tribunal must make a decision on the appeal, and give notice of that decision to the parties, not later than 25 working days after the date on which the appellant gave notice of appeal to the tribunal;
 - (c) any application (whether to the First-tier Tribunal or the Upper Tribunal) for permission to appeal to the Upper Tribunal must be determined by the tribunal concerned not later than 20 working days after the date on which the applicant was given notice of the First-tier Tribunal's decision.
- (4) A relevant appeal ceases to be an accelerated detained appeal on the appellant being released from detention under any relevant detention provision.
- (5) Tribunal Procedure Rules must secure that the First-tier Tribunal or (as the case may be) the Upper Tribunal may, if it is satisfied that it is the only way to secure that justice is done in a particular case, order that a relevant appeal is to cease to be an accelerated detained appeal.
- (6) For the purposes of this section, a “relevant appeal” is an appeal to the First-tier Tribunal under any of the following—
 - (a) section 82(1) of the Nationality, Immigration and Asylum Act 2002 (appeals in respect of protection and human rights claims);
 - (b) section 40A of the British Nationality Act 1981 (appeal against deprivation of citizenship);(...)
- (7) For the purposes of this section, a “relevant detention provision” is any of the following—
 - (a) paragraph 16(1), (1A) or (2) of Schedule 2 to the Immigration Act 1971 (detention of persons liable to examination or removal);
 - (b) paragraph 2(1), (2) or (3) of Schedule 3 to that Act (detention pending deportation);
 - (c) section 62 of the Nationality, Immigration and Asylum Act 2002 (detention of persons liable to examination or removal);
 - (d) section 36(1) of the UK Borders Act 2007 (detention pending deportation).(...)
- (9) Regulations under this section are subject to negative resolution procedure.

178. UNHCR opposes the Bill's introduction of an accelerated appeal procedure in cases where an appellant is detained under immigration powers. UNHCR is of the view that introducing amendments to the Nationality, Immigration and Asylum Act 2002,²³² in order to create accelerated detained appeals is neither appropriate nor necessary. This response is based on international standards relating to the use of detention and accelerated processing of asylum claims therein and UNHCR's previous experience with

²³² Available at: <https://www.legislation.gov.uk/ukpga/2002/41/contents>



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respect to the use of expedited processing, and it takes into account the current appeal framework in the UK.

179. In UNHCR's view, the general position is that the processing of asylum claims in detention is inherently undesirable and that accelerated asylum appeals procedures should not normally be applied in detention. The processing of asylum applications is complex, and consideration must be given to the significant negative impact that detention and accelerated processing can have on decision-making. In addition, studies have shown that detention has a distinctively deleterious impact on asylum detainees, and can cause constant stress, severe anxiety and depression leading to self-harm and suicide attempts. It therefore makes them less able to present their cases appropriately.²³³ Only in extremely limited circumstances, therefore, should detention be used in conjunction with accelerated procedures. UNHCR's Detention Guideline 4.1.1²³⁴ notes that any detention in connection with accelerated procedures should only be applied to cases that are determined to be 'manifestly unfounded' or 'clearly abusive,' as defined above. This is on the basis of such applications being so obviously without foundation as to not merit a full examination at every level of the asylum procedure.²³⁵ Such cases are, however, still entitled to the full complement of procedural standards and relevant protections outlined in UNHCR's Detention Guidelines.²³⁶
180. UNHCR repeats the concerns set out above with regard to the normal unsuitability of accelerated processes for appeals against the deprivation of nationality, given both the limited consideration required by UK law to be given to the risk of statelessness prior to the appeal stage and the frequent need to consider expert evidence of foreign law on this issue.
181. UNHCR also takes note of the Tribunal Procedure Committee's (TPC) decision of March 2019²³⁷ not to introduce specific rules in relation to cases where an appellant is detained. In their report, the TPC concluded that a set of specific rules would not lead to the results sought by the Government. They set out: *if a set of rules were devised so as to operate fairly, they would not lead to the increased speed and certainty desired.*²³⁸
182. The Bill, moreover, appears to set a low standard for when appeals brought from detention may be accelerated. The only criterion is that the Secretary of State "considers" that the appeal "is likely to be disposed of expeditiously". In the context of an adversarial judicial system such as exists in the United Kingdom, there is an inherent unfairness in one party to an appeal having the unilateral power to place the other in an expedited process.²³⁹ We also note with concern that the only criteria for referral into the

²³³ Jesuit Refugee Service, *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum-seekers and Irregular Migrants in the European Union*, June 2010, available at: <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf>; and UK Lesbian & Gay Immigration Group and Stonewall, *NO SAFE REFUGE: Experiences of LGBT asylum-seekers in detention*, October 2016, available at: http://www.stonewall.org.uk/sites/default/files/no_safe_refuge.pdf

²³⁴ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (Detention Guidelines)*, 2012, para. 23, available at: <http://www.refworld.org/docid/50348953b8.html>

²³⁵ UNHCR ExCom, ExCom 30 (n 1899).

²³⁶ UNHCR, *Detention Guidelines* (n 2344), Guideline 4.1.1.

²³⁷ Tribunal Procedure Committee, *Response to the consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants*, March 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf

²³⁸ *Ibid*, para. 74.

²³⁹ *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors*, [2015] EWHC 1689 (Admin), para. 60, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2015/1689.html>



accelerated process is the likelihood of an expeditious disposal, and that there is no explicit consideration of fairness or justice. As the Court of Appeal stressed in a decision in one of the earliest challenges to the Detained Fast Track:

*The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency.*²⁴⁰

183. All of the subsequent litigation surrounding the Detained Fast Track (DFT) reiterated this fundamental principle.²⁴¹ The Bill, however, would require the Secretary of State to consider only speed. Further, UNHCR's Quality Initiative Project and Quality Integration Project reports on the previous operation of the DFT procedure have noted that despite the ability to adjust timescales, in many instances caseworkers failed to do so despite an apparent need.²⁴²

Removal of the right of appeal for claims certified as "clearly unfounded"

27 Claims certified as clearly unfounded: removal of right of appeal

- (1) The Nationality, Immigration and Asylum Act 2002 is amended in accordance with subsections (2) and (3).
- (2) In section 92 (place from which an appeal may be brought or continued) –
 - (a) in each of subsections (2)(a) and (3)(a) unfounded or removal to a safe country) substitute "94(7) (removal to a safe country)";
 - (b) in each of subsections (6) and (8), for "94(1) or (7)" substitute "94(7)".
- (3) In section 94 (appeal from within the United Kingdom: unfounded human rights or protection claim) –
 - (a) After subsection (3) insert –
 - "(3A) A person may not bring an appeal under section 82 against a decision if the claim to which the decision relates has been certified under subsection (1).";
 - (b) in subsection (4), for "Those States" substitute "The States";
 - (c) for the heading substitute "Certification of human rights or protection claims as unfounded or removal to safe country".
- (4) The amendments made by this section do not apply in relation to a protection claim or human rights claim that was certified by the Secretary of State under Section 94(1) before the coming into force of this section."

184. The Bill would abolish the current out-of-country right of appeal for those whose claims are certified by the Secretary of State as clearly unfounded under Section 94(1) of the

²⁴⁰ *The Refugee Legal Centre* (n 231), para. 8.

²⁴¹ *The Lord Chancellor v Detention Action*, [2015] EWCA Civ 840, para. 49, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2015/840.html>

²⁴² UNHCR, *Quality Initiative Project Fifth Report to the Minister: UNHCR Representation to the United Kingdom in London*, March 2008, available at: http://www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Fifth_Report.pdf and UNHCR, *Quality Integration Project First Report to the Minister: UNHCR Representation to the United Kingdom in London*, August 2010, available at: http://www.unhcr.org.uk/fileadmin/user_upload/docs/Quality_Integration_Project_First_Report_FINAL_PDF_VERSION.pdf



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- Nationality, Immigration and Asylum Act 2002.²⁴³ Although such certifications are made on an individual basis, according to the current section 94(3) of that act, the Secretary of State must certify a claim as clearly unfounded if the claimant is “entitled to reside” in any of the safe States listed at section 94(4) of the same act “unless satisfied that it is not clearly unfounded”.
185. As noted above, 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, including accelerated appeals with sufficient safeguards.²⁴⁴ However, UNHCR reiterates that a meaningful and effective right of appeal is a fundamental requirement in the context of refugee status determination, where the consequences of an erroneous decision can be particularly serious. UNHCR therefore opposes any complete abolition of rights of appeal and urges the UK to adopt instead accelerated procedures with appropriate safeguards for manifestly unfounded cases.
186. As also noted above, UNHCR 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. The designation of a country as 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 in the country of origin, for some individuals, members of particular groups or relating to some forms of persecution, the country remains unsafe.²⁴⁵ The abolition of the right of appeal for asylum-seekers entitled to reside in designated safe countries could therefore create a risk of refoulement in individual cases.
187. It is also important that the general assessment of certain countries of origin as safe is based on reliable, objective and up-to-date information from a range of sources, and that the procedure for adding or removing countries from any list of safe countries of origin is transparent, open to legal challenge, and reviewable in light of changing circumstances.²⁴⁶
188. There are currently 17 States outside Europe designated as safe by the Home Secretary,²⁴⁷ and a further seven designated as safe for men only.²⁴⁸ The safeguards against mis-designation as, in general, safe are limited under current UK law and do not appear to meet the minimum standards set out above.²⁴⁹

²⁴³ Nationality, Immigration and Asylum Act 2002 (n 183).

²⁴⁴ UNHCR, *Discussion Paper Fair and Fast* (n 1899).

²⁴⁵ UNHCR, *Comments on PD 2004* (n 191). See also UNHCR ExCom, Executive Committee Conclusion No. 87 (L), General Conclusion on International Protection, 1999, 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.”

²⁴⁶ UNHCR, *Fair and Efficient Asylum Procedures* (n 1900), para. 39.

²⁴⁷ Albania, Bolivia, Bosnia Herzegovina, Brazil, Ecuador, India, Kosovo, Macedonia, Mauritius, Moldova, Mongolia, Montenegro, Peru, Serbia, South Africa, South Korea, and Ukraine. UK Home Office, *Certification of protection and human rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims)*, Version 4.0, 12 February 2019, p. 31, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919737/certification-s94-guidance-0219.pdf

²⁴⁸ Ghana, Gambia, Kenya, Liberia, Malawi, Mali, Nigeria and Sierra Leone. *Ibid.*

²⁴⁹ Countries may be added or removed from the list by order of the Home Secretary if she is “satisfied” that “(a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and (b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom’s obligations under the Human Rights Convention”, and before doing so, she “(a) shall have regard



F. The potential externalisation of the United Kingdom's international obligations through the transfer of asylum-seekers and refugees to third countries, with minimal legal safeguards: Clause 28 and Schedule 3

28 Removal of asylum-seeker to safe country

Schedule 3 makes amendments to –

- (a) section 77 of the Nationality, Immigration and Asylum Act 2002 (no removal while claim for asylum pending), and
- (b) Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004²⁵⁰ (removal of asylum-seeker to safe country).

SCHEDULE 3

REMOVAL OF ASYLUM-SEEKER TO SAFE COUNTRY

Amendments to section 77 of the Nationality, Immigration and Asylum Act 2002

- 1 In section 77 of the Nationality, Immigration and Asylum Act 2002 (no removal while claim for asylum pending), after subsection (2) insert—
- “(2A) This section does not prevent a person being removed to, or being required to leave to go to, a State falling within subsection (2B).
- (2B) A State falls within this subsection if—
- (a) it is a place where a person's life and liberty are not threatened by reason of the person's race, religion, nationality, membership of a particular social group or political opinion,
 - (b) it is a place from which a person will not be removed elsewhere other than in accordance with the Refugee Convention,
 - (c) it is a place—
 - (i) to which a person can be removed without their Convention rights under Article 3 (no torture or inhuman or degrading treatment or punishment) being contravened, and
 - (ii) from which a person will not be sent to another State in contravention of the person's Convention rights, and
 - (d) the person is not a national or citizen of the State.
- (2C) For the purposes of this section—
- (a) any State to which Part 2 or 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 for the time being applies—
 - (i) is to be presumed to be a State falling within subsection (2B)(a) and (b), and
 - (ii) is, unless the contrary is shown by a person to be the case in their particular circumstances, to be presumed to be a State falling within subsection (2B)(c)(i) and
 - (b) any State to which Part 4 of that Schedule for the time being applies is to be presumed to be a State falling within subsection (2B) (a) and (b);
 - (c) a reference to anything being done in accordance with the Refugee Convention is a reference to the thing being done in accordance with the principles of the Convention, whether or not by a signatory to it;
 - (d) “State” includes any territory outside of the United Kingdom.”

to all the circumstances of the State or part (including its laws and how they are applied), and (b) shall have regard to information from any appropriate source (including other member States and international organisations).” Nationality, Immigration and Asylum Act 2002 (n 183), Section 94.

²⁵⁰ Available at: <https://www.legislation.gov.uk/ukpga/2004/19/schedule/3>



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189. The Explanatory Notes describe this provision as “providing opportunity for extraterritorial processing models to be developed in future in line with the UK’s international obligations.”²⁵¹
190. As UNHCR has seen in several contexts, the offshoring of asylum processing often results in the forced transfer of refugees to other countries with inadequate State asylum systems, treatment standards and resources. It can lead to situations in which asylum-seekers are indefinitely held in isolated places where they are ‘out of sight and out of mind’, exposing them to serious harm. It can also de-humanise asylum-seekers. UNHCR has voiced its profound concerns about such practices, which have “caused extensive, unavoidable suffering for far too long”, left people “languishing in unacceptable circumstances” and denied “common decency”.²⁵² The High Commissioner underlined that “UNHCR fully endorses the need to save lives at sea and to provide alternatives to dangerous journeys and exploitation by smugglers. But the practice of offshore processing has had a hugely detrimental impact. There is a fundamental contradiction in saving people at sea, only to mistreat and neglect them on land.”²⁵³
191. It is UNHCR’s view that the very limited safeguards set out in the Bill would mean that any extraterritorial processing established on these terms would be in breach of the UK’s international obligations, not in line with them.
192. UNHCR is also concerned that although the Explanatory Notes refer to the purpose of these changes as the establishment of extraterritorial processing, nothing in the Bill confines their application to that purpose. The Bill would allow asylum-seekers to be removed while their claims were pending but is silent on what – if any – legal obligations the United Kingdom would consider itself to have towards them thereafter.
193. We are further concerned that the standard for considering a country “safe” is even lower here than in the context of inadmissibility provisions, discussed at paragraphs 140-145 above. There is no requirement that the destination State provide the possibility of applying for and receiving protection in accordance with the Refugee Convention. There is no requirement that refugees be offered a durable legal status, or indeed any of the other rights detailed in the Refugee Convention other than protection against refoulement. A “safe” State is here reduced to one in which the person will not be persecuted for a Refugee Convention reason or subjected to inhuman and degrading treatment in violation of Article 3, and from which they will not be removed to face such treatment elsewhere. Again, it is clarified that it is not necessary that the country in question be a signatory to the Refugee Convention, or even that it be legally a State.
194. The Refugee Convention does not prohibit transfer arrangements.²⁵⁴ In UNHCR’s view, they must be undertaken with the aim of strengthening, rather than limiting, access to protection for those in need of it and sharing, rather than shifting, responsibilities for doing so.²⁵⁵ They should be governed by a formal, legally binding and public agreement which sets out the responsibilities of each State involved, along with the rights and duties of the asylum-seekers affected. Further, the transferring State will be responsible for ensuring that international protection obligations are clearly assumed by the receiving

²⁵¹ *HL Bill 82 Explanatory Notes* (n 5), para. 22.

²⁵¹ UNHCR, *UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing*, 24 July 2017, available at: <https://www.unhcr.org/en-au/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html>

²⁵³ *Ibid.*

²⁵⁴ UNHCR, *Legal considerations regarding access to protection* (n 13), para. 2.

²⁵⁵ UNHCR, *Observations on the Proposal for amendments to the Danish Alien Act* (n 13), para. 8.

²⁵⁵ *Ibid.*



State in law and met in practice, prior to entering into sharing arrangements and effecting any transfer,²⁵⁶ as well as for monitoring conditions in the receiving State thereafter.²⁵⁷

195. We are deeply concerned that nothing in the Bill reflects the United Kingdom’s ongoing legal responsibilities towards asylum-seekers it transfers to “alternative safe countries” and that the low threshold for safety – which fails to include even the possibility of accessing a durable solution or any benefits of the Refugee Convention beyond non-refoulement – is effectively a rejection of this obligation.
196. UNHCR reiterates again in this context that the general assessment of certain countries as safe must be based on reliable, objective and up-to-date information from a range of sources, and that the procedure for adding or removing countries from any list of safe countries of origin is transparent, open to legal challenge, and reviewable in light of changing circumstances.²⁵⁸ None of these safeguards are included within the Bill. The only safeguard is that the list must be laid before Parliament in the form of a statutory instrument and be approved through the affirmative resolution procedure. This normally involves only a maximum of 90 minutes of debate by an ad hoc committee, quickly followed by a vote in Parliament without further debate. The last time Parliament voted against secondary legislation using the affirmative resolution procedure was in 1978.²⁵⁹

Schedule 3, Subsection 1, cont’d

“(2C) For the purposes of this section—

- (a) any State to which Part 2 or 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 for the time being applies—
- (i) is to be presumed to be a State falling within subsection (2B)(a) and (b), and
 - (ii) is, unless the contrary is shown by a person to be the case in their particular circumstances, to be presumed to be a State falling within subsection (2B)(c)(i) and (ii); [as above]

(...)

Rebuttable presumption of safety of specified countries in relation to Convention rights

5 (1) Paragraph 3 (presumptions of safety) is amended as follows.

- (2) In sub-paragraph (1), in the opening words, after “human rights claim” insert “(the “claimant”)”.

²⁵⁶ Ibid. para. 20.

²⁵⁷ The minimum standards that must, as a precondition, be guaranteed in law and met in practice include: admission to the receiving State; access to fair and efficient State asylum procedures, or to a previously afforded protective status by the receiving State; the legal right to remain during the State asylum procedure; an appropriate legal status if found to be in need of international protection; and standards of treatment commensurate with the Refugee Convention and international human rights law. UNHCR, *Legal considerations regarding access to protection* (n 13); UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements* (n 7); UNHCR, *Observations on the Proposal for amendments to the Danish Alien Act* (n 13), para. 23.

²⁵⁸ UNHCR, *Fair and Efficient Asylum Procedures* (n 190), para. 39.

²⁵⁹ Statutory Instruments (also called secondary legislation) subject to the affirmative resolution procedure must be voted on by both houses of Parliament, but without debate or amendment. They are normally scrutinised first by an ad hoc “Delegated Legislation Committee” made up of non-expert MPs, although, according to the UK Parliament website, “In some rare cases the SI is not referred to a committee, but is debated in the Commons Chamber if it is of particular interest.” The DLC may debate the proposed statutory instrument for up to 90 minutes, but most debates are much shorter. It will then agree a motion saying they have considered the regulation; there is normally no formal vote, but even if the vote were lost, this would have no legal effect. A minister will then table a motion in Parliament for the secondary legislation to be approved “forthwith”. If Parliament objects, the vote will be postponed until the following Wednesday. Parliament will then vote on the legislation, normally without debate. See Institute for Government, *Secondary legislation: how is it scrutinised?*, available at: <https://www.instituteforgovernment.org.uk/explainers/secondary-legislation> and UK Parliament, *Statutory instruments procedure in the House of Commons*, available at: <https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-commons/>



(3) After sub-paragraph (1) insert—

“(1A) Unless the contrary is shown by the claimant to be the case in their particular circumstances, a State to which this Part applies is to be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place—

- (a) to which a person can be removed without their Convention rights under Article 3 (no torture or inhuman or degrading treatment or punishment) being contravened, and
- (b) from which a person will not be sent to another State in contravention of their Convention rights.”

197. UNHCR welcomes the possibility for applicants to rebut the presumption of the safety of a particular country “in their particular circumstances” but is deeply concerned by the very significant limitations on this possibility:

- (i) It does not apply to the presumption that a person will not face threats to their life and freedom there for reasons of their race, religion, nationality, membership of a particular social group or political opinion or the presumption that they will not be refouled from there to face such treatment in another country. It only applies to the presumptions that a person can be removed to that country without their ECHR Convention rights under Article 3 (no torture or inhuman or degrading treatment or punishment) being contravened, and that they will not be sent from there to another State in violation of their ECHR rights.²⁶⁰ This is of particular concern due to ongoing, documented instances of both direct and chain refoulement from some EU countries that are listed as safe.²⁶¹
- (ii) There is no identified procedure in which an asylum-seeker would be able to exercise their right to rebut the presumption of safety in their case, as there is no right of appeal against a decision to remove a person to a “safe third country”.

G. Interpretations of key concepts of refugee law that could lead to international protection being wrongly denied to those who need it: Clauses 29-37

198. **Clauses 29-37** contain a series of “interpretations” of key terms of the Refugee Convention. According to the Explanatory Notes, because the Refugee Convention “contains broad concepts and principles, many of which are open to some degree of interpretation as to exactly what they mean in practice”, the UK now has the opportunity to “clearly define. . . some of the key elements of the Refugee Convention in UK domestic law”.²⁶²

199. We note with concern the Government’s approach to interpreting the Refugee Convention. Any treaty must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁶³ In the case of the Refugee Convention, as the UK Supreme Court has noted on more than one occasion, “There is no doubt that the Convention should be

²⁶⁰ It is essential to recognise that where Schedule 3 refers to “Convention rights” it is referring not to rights under the Refugee Convention, but to rights recognized under section 1 of the Human Rights Act 1988 [**Schedule 3(2)**] that is, to rights protected by the ECHR.

²⁶¹ UNHCR, *UNHCR concerned by Hungary’s latest measures affecting access to asylum*, 10 March 2021, available at: <https://www.unhcr.org/uk/news/press/2021/3/6048976e4/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum.html>; *Ibrahimi* (n 2022), para. 163; *Ilias and Ahmed* (n 2022), para. 163-164.

²⁶² *HL Bill 82 Explanatory Notes* (n 5), para. 321.

²⁶³ *Vienna Convention on the Law of Treaties*, Article 31(1), available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>



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given a generous and purposive interpretation, bearing in mind its humanitarian objects and the broad aims reflected in its preamble.”²⁶⁴ In addition, the Vienna Convention specifies a range of sources that “shall be taken into account” in interpreting a treaty; these all reflect the agreement of the parties, and include other agreements and instruments from the time the treaty was concluded, as well as subsequent agreements, State practice and international law.²⁶⁵ In other words, States cannot, under international law, unilaterally announce their own interpretation of the terms of the agreements they have made with other States.²⁶⁶ This, too, has been repeatedly recognised by the House of Lords and the Supreme Court of the UK.²⁶⁷

200. We respond below to some of the specific interpretations proposed in the Bill. Although some of these provisions are entirely new, others reflect the existing Qualification Directive and thus do not constitute a significant change from existing law. In both cases, the Bill presents an opportunity to ensure that the object and purpose of the Refugee Convention is properly reflected in UK legislation. It is also opportunity to clarify the principles to be followed by decision makers, which can help to ensure efficient decision making. For these reasons UNHCR sets out several of our previously expressed concerns with some provisions of the Qualification Directive which the UK intends to replicate in the Bill, as well as our concerns about the provisions that are new.

30 Article 1(A)(2): persecution

- (1) For the purposes of Article 1(A)(2) of the Refugee Convention, persecution can be committed by any of the following (referred to in this Part as “actors of persecution”)—
 - (a) the State,
 - (b) any party or organisation controlling the State or a substantial part of the territory of the State, or
 - (c) any non-State actor, if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including any international organisation, are unable or unwilling to provide reasonable protection against persecution.
- (...)

201. UNHCR supports the provision relating to actors of persecution in so far as it provides for the recognition of refugee status irrespective of the source or agent of persecution, including persecution emanating from non-State actors. UNHCR has concerns, however, that parties or organisations referred to under **30(1)(b)** should not ordinarily be

²⁶⁴ *ST Eritrea* (n 74), para. 31; *Secretary of State for the Home Department v. K (K and Fornah)*, [2006] UKHL 46, para. 10, available at: <https://www.bailii.org/uk/cases/UKHL/2006/46.html>

²⁶⁵ The Convention lists the sources of interpretation as: the treaty’s text, preamble and annexes; the context provided by other agreements made or instruments accepted at the time of the conclusion of the treaty; and “(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) Any relevant rules of international law applicable in the relations between the parties.” *Vienna Convention* (n 263), Article 31(2) and (3).

²⁶⁶ Although the European Convention on Human Rights allows States a “margin of appreciation”, this is found in the terms of the treaty itself, and is not a general principle of treaty interpretation. See, e.g. *Handyside v. United Kingdom* - 5493/72, Council of Europe: ECHR, [1976] ECHR 5, available at: <http://www.bailii.org/eu/cases/ECHR/1976/5.html>

²⁶⁷ As Lord Steyn explained in *Adan*, “The enquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions . . . as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state.” *R v. Secretary of State for the Home Department, Ex parte Adan and Others*, [2000] UKHL 67, available at: https://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html



considered capable of providing protection from persecution. In line with detailed comments below regarding protection from persecution (paragraphs 222-227) UNHCR recommends removing the words “including any international organisation” from **30(1)(c)**²⁶⁸. Furthermore, the term “demonstrated” should not be interpreted so as to increase the applicant’s burden of proof. Lack of State protection should be assumed if the standard of proof for a well-founded fear of persecution is met.²⁶⁹

31 Article 1(A)(2): well-founded fear

- (1) In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum-seeker’s fear of persecution is well-founded, the following approach is to be taken.
- (2) The decision-maker must first determine, on the balance of probabilities –
 - (a) whether the asylum-seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and
 - (b) whether the asylum-seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.
(See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant’s credibility).)
- (3) Subsection (4) applies if the decision-maker finds that—
 - (a) the asylum-seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and
 - (b) the asylum-seeker fears persecution as mentioned in subsection (2)(b).
- (4) The decision-maker must determine whether there is a reasonable likelihood that, if the asylum-seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—
 - (a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and
 - (b) they would not be protected as mentioned in section 31.
- (5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 32 (internal relocation).

202. Although the process by which a State identifies refugees is not directly regulated under the Refugee Convention, in light of the significant consequences of an erroneous decision, UNHCR’s Handbook on Refugee Status Determination emphasizes that asylum claims should be determined in “a spirit of justice and understanding”.²⁷⁰ The enormous evidentiary challenges refugees face in proving their asylum claims should be taken into account, the burden of proof should be shared, the applicant should be given the benefit of the doubt where appropriate, and full disclosure by the applicant

²⁶⁸ Here we note that exclusion from refugee protection under Article 1D is a different and specific provision for those “who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance”. Consideration of exclusion under Article 1D should not be confused with an assessment of protection available as part of the well-founded fear assessment under Article 1A(2).

²⁶⁹ UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted* (OJ L 304/12 of 30.9.2004) (*Annotated Comments on the QD 2004*), p. 28, available at: <https://www.unhcr.org/en-ie/43661eee2.pdf>

²⁷⁰ UNHCR *Handbook* (n 162), para. 202.



should be supported through a variety of approaches including trauma sensitive interviewing techniques.²⁷¹

203. In addition, although the definition of a refugee at Article 1 should be broken down into its constituent elements for the purposes of analysis, it ultimately contains only one holistic test.²⁷² It is conceptually problematic to separate the assessment of future risk from that of past and present facts, as the former is inevitably based on the latter. As set out in the UNHCR's guidance on the *Burden and Standard of Proof*:

*While by nature, an evaluation of risk of persecution is forward-looking and therefore inherently somewhat speculative, **such an evaluation should be made based on factual considerations which take into account the personal circumstances of the applicant** as well as the elements relating to the situation in the country of origin.*

The applicant's personal circumstances would include his/her background, experiences, personality and any other personal factors, which could expose him/her to persecution. In particular, whether the applicant has previously suffered persecution or other forms of mistreatment and the experiences of relatives and friends of the applicant as well as those persons in the same situation as the applicant are relevant factors to be taken into account. [emphasis added]²⁷³

There would also be practical difficulties in applying different principles to assessing the same facts at different stages of what is ultimately a single decision, as UK courts and the UK Home Office have long recognised.²⁷⁴

204. With regard specifically to the standard of proof, UNHCR has reiterated:

Given that in refugee claims, there is no necessity for the applicant to prove all facts to such a standard that the adjudicator is fully convinced that all factual assertions are true, there would normally be an element of doubt in the mind of the adjudicator as regards the facts asserted by the applicant. Where an adjudicator considers that the applicant's story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant's claim; that is, the applicant should be given the 'benefit of

²⁷¹ Ibid, para. 196 and UNHCR, *Beyond Proof* (n 21818), pp. 83-88 and 110-112; UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, HCR/GIP/16/12, 2 December 2016, para. 93, available at: <https://www.unhcr.org/uk/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html>

²⁷² UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 7, available at: <https://www.refworld.org/docid/3b20a3914.html>, citing *Horvath v. Secretary of State for the Home Department* [200] UKHL 37, available at: <https://www.bailii.org/uk/cases/UKHL/2000/37.html>, ("several of the Law Lords confirm the holistic nature of the test, including Lord Lloyd of Berwick, who indicates that "I accept of course that in the end there is only one question, namely, whether the applicant has brought himself within the definition of refugee in Article 1A(2) of the Convention." ... To the same end, Lord Clyde cautions against too "detailed analysis of its component elements" which "may distract and divert attention from the essential purpose of what is sought to be achieved" ...")

²⁷³ UNHCR, *Note on the Burden and Standard of Proof in Refugee Claims*, 16 December 1998, para. 18-19, available at: <https://www.refworld.org/pdfid/3ae6b3338.pdf>.

²⁷⁴ As summarised an ultimately endorsed by the Court of Appeal in *Karanakaran* (n 220) at para. 52, the majority of the Upper Tribunal had found in the leading case of *Kaja*: "that if there was a first stage (proof of present and past facts) followed by a second stage (assessment of risk) then any uncertainties in the evidence would be excluded at the second, and that this could not be right. In those circumstances, they considered that the introduction of an intervening stage was simply an unnecessary complexity". Counsel for both the Appellant and the Home Office were in agreement that "it would be quite impracticable to maintain a regime in which there was one approach to the evidential material relating to historic or existing facts for the purposes of the first part of the definition of "refugee" in the Convention, and a different approach to such material for the purpose of considering issues of protection and internal relocation." see, para. 99.



the doubt’.” In other words, the credibility assessment purposefully and positively accommodates and allows for doubt and uncertainty. A decision-maker may accept a fact as credible, even though he or she is not certain that it is true.²⁷⁵

205. These concerns are reflected in different countries in different ways, in accordance with their distinct legal traditions. In the United Kingdom, they have long been embodied an approach to the evaluation of evidence that is unique to the refugee context. This has been described interchangeably as a “low standard of proof”, a “real risk” or a “reasonable degree of likelihood”. This is as much an evaluative method and approach to the evidence as a “standard of proof”.²⁷⁶ It is, moreover, an approach that is applied throughout the determination of refugee status,²⁷⁷ consistent with the holistic nature of the refugee definition.
206. The current UK approach is further consistent with UNHCR’s recommendations set out above in that it provides for a “positive role for uncertainty”²⁷⁸ and ensures that all of the evidence is given the weight due to it, including evidence about which the decision-maker cannot say that it is “probably true”.²⁷⁹ This reflects both the difficulties asylum-seekers have in proving their claims (fulfilling an *ameliorative* role, in the words of the UK’s Upper Tribunal²⁸⁰) and the seriousness of the harm should the wrong decision be reached (the *precautionary* principle²⁸¹).
207. The difficulties of proof are as great, if not greater, when establishing past and present facts as when determining future risk. Indeed, many of the well-recognised barriers to the establishment of past and present facts relate primarily to an asylum-seeker’s difficulty in proving who they are and what has happened to them.²⁸² An ameliorative approach is thus equally necessary with regard to past and present facts as to future risk. Nor is there any reason to abandon a precautionary approach to the question of who an asylum-seeker is and what they fear, and then reintroduce it only when assessing future risk. An error at either stage is equally likely to have dire consequences.
208. The normal civil standard of “the balance of the probabilities”, by contrast, advances neither an ameliorative nor a precautionary approach to the evidence.²⁸³ Indeed, by resolving doubts in one direction rather than the other, a precautionary approach would

²⁷⁵ UNHCR, *Beyond Proof* (n 21818), p. 237, citing UNHCR, *Note on the Burden and Standard of Proof* (n 273), para. 8.

²⁷⁶ In the leading UK case of *Karanakaran*, Sedley, L.J. referred to the issue as the “correct *mode and* standard of proof,” not simply the “standard of proof” [emphasis added]. *Karanakaran* (n 220), concurring opinion of Sedley, L.J., para. 18.

²⁷⁷ *Karanakaran* (n 220), para. 52.

²⁷⁸ *Ibid.*, leading opinion of Brooke, L.J., para. 5.

²⁷⁹ *Ibid.*, paras. 55-56.

²⁸⁰ *KS (benefit of the doubt) v. Secretary of State for the Home Department*, [2014] UKUT 00552 (IAC), para. 58, available at: https://www.refworld.org/cases.GBR_UTIAC,548997324.html

²⁸¹ *Ibid.*, para. 59.

²⁸² As we noted in our observations on the New Plan for Immigration: “Asylum-seekers may often be forced to flee without their personal documents and may not have other documentary proof to support their oral or written [testimony]. In many cases, the persecution they have experienced and/or fear (such as arbitrary detention or torture) is officially denied by the authorities in their home countries, meaning that no records of it are generated and witnesses cannot come forward without risk of reprisal. In other cases, there will be no records or even corroborating witnesses because the harm suffered is considered too shameful to report to the authorities or to seek medical treatment for (such as in cases of rape or familial violence), and/or seeking treatment might in some circumstances have put the victim or a family member at risk of being reported to the authorities”. UNHCR, *Observations on the New Plan* (n 5), para. 65.

²⁸³ Although the Bill does not set out expressly that what is intended is the “normal civil standard”, that is how balance of the probabilities is generally understood. See, e.g. *MN, R (on the application of) v Secretary of State for the Home Department & Anor* [2018] EWHC 3268, at para. 43, describing the “balance of the probabilities” as “well-recognised in domestic law” and “simple to state”. Available at: <https://www.bailii.org/ew/cases/EWHC/QB/2018/3268.html>



be fundamentally inconsistent with the need to treat civil litigants in adversarial proceedings equally. That concern does not hold in the context of the adjudication of asylum claims, which is essentially humanitarian in purpose.

209. Arguably, if the UK were to abandon the approach to decision-making encapsulated in the phrase the “low standard of proof”, the *ameliorative* role it now performs could nonetheless be partially preserved through advanced training for decision-makers on the effects of trauma on memory (and, more generally, the normal variability of human memory),²⁸⁴ the reasons that corroborating evidence may not be available (which will often have to be sought through country of origin information, such as about surveillance of communications), the risks of imposing one’s own view of plausibility on events that occurred in a foreign country,²⁸⁵ and other factors that make proving asylum claims exceptionally difficult. However, over the 15 years in which it has worked in partnership with the Home Office to promote high-quality asylum decision-making, UNHCR has found that these decision-making skills are challenging to learn and maintain. Even if they are properly taught and applied, moreover, they each address a discrete aspect of the credibility assessment. There is no concept in UK law that draws them together – except “the low standard of proof”.
210. As UNHCR has noted previously, “the standard of proof for establishing a well-founded fear of persecution has been developed in the jurisprudence of common law jurisdictions. While various formulations have been used, it is clear that the standard required is less than the balance of probabilities required for civil litigation matters”.²⁸⁶
211. For all of these reasons, UNHCR is concerned that the approach proposed by the Bill will lead to refugees being denied asylum in error and opposes this clause.

32 Article 1(A)(2): reasons for persecution

- (1) For the purposes of Article 1(A)(2) of the Refugee Convention—
- (a) the concept of race may include consideration of matters such as a person’s colour, descent or membership of a particular ethnic group;
 - (b) the concept of religion may include consideration of matters such as—
 - (i) the holding of theistic, non-theistic or atheistic beliefs,
 - (ii) the participation in formal worship in private or public, either alone or in community with others, or the abstention from such worship,
 - (iii) other religious acts or expressions of view, or
 - (iv) forms of personal or communal conduct based on or mandated by any religious belief;
 - (c) the concept of nationality is not confined to citizenship (or lack of citizenship) but may include consideration of matters such as membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins or its relationship with the population of another State;
 - (d) the concept of political opinion includes the holding of an opinion, thought or belief on a matter related to a potential actor of persecution and to its policies or methods, whether or not the person holding that opinion, thought or belief has acted upon it.
- (...)

212. **Clause 32(1)** seeks to provide clarification on what constitutes race, religion, nationality and political opinion for the purposes of Article 1(A)(2) of the Convention by providing

²⁸⁴ UNHCR, *Beyond Proof* (n 2188), pp. 56-74.

²⁸⁵ *Ibid.*, pp. 76-77. See also *Y v. Secretary of State for the Home Department*, [2006] EWCA Civ 1223, para. 25, available at: https://www.refworld.org/cases,GBR_CA_CIV,47fdb420.html.

²⁸⁶ UNHCR, *Interpreting Article 1* (n 272), para. 10.



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examples taken from the European Qualification Directive,²⁸⁷ as currently transposed in the UK through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006.²⁸⁸

213. Whilst the Bill's guidance in interpreting race, religion and nationality is welcome, the examples provided should in no way be considered to be conclusive or exhaustive. The reasons for persecution are multifarious and may, moreover, change over time. UNHCR recommends that the Bill expressly clarifies that the examples provided in **Clause 32 (1)(a)-(d)** are neither conclusive, nor exhaustive.
214. UNHCR recommends that the UK consults the Guidelines on International Protection relating to religion-based claims²⁸⁹ as set out within the annexes to the UNHCR Handbook²⁹⁰ when deciding such claims. In UNHCR's understanding, the freedom to change one's religion is included in the concept of religion or conviction as outlined in **Clause 32(1)(b)**. This may give rise to a *sur place* claim.

32 Article 1(A)(2): reasons for persecution [cont'd]

- (2) A group forms a particular social group for the purposes of Article 1(A)(2) of the Refugee Convention only if it meets both of the following conditions.
- (3) The first condition is that members of the group share—
- (i) an innate characteristic,
 - (ii) a common background that cannot be changed, or
 - (iii) a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.
- (4) The second condition is that the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

215. The Bill proposes narrowing the definition of a particular social group from that currently found in UK jurisprudence. In UNHCR's view, this could exclude some refugees from the protection to which they are entitled.

216. As set out in UNHCR's Guidelines on International protection, "membership of a particular social group' should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms".²⁹¹ In the UK and other jurisdictions, the particular social group ground has

²⁸⁷ Council Directive 2004/83/EC of 29 April 2004 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (QD 2004), available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>. The Qualification Directive was recast in 2011 as Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>, but the UK did not participate in the recast Directive.

²⁸⁸ Available at: <https://www.legislation.gov.uk/ukxi/2006/2525/contents/made>

²⁸⁹ UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, HCR/GIP/04/06, 24 April 2004, available at: <https://www.unhcr.org/uk/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html>

²⁹⁰ UNHCR Handbook (n 162).

²⁹¹ UNHCR, *Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*,



proved critical in the protection of those with claims based on gender, sexual orientation, gender identity, status as former victims of trafficking, disability, mental-ill health, family and age.

217. Like **Clause 32(1)**, the above particular social group clauses are drawn directly from the 2004 Qualification Directive.²⁹² The Bill however introduces a new clause, **32(2)** to emphasise that *both* the conditions above (i.e. innate/common background/fundamental characteristics and distinct identity) must be satisfied for a group to meet the definition of a particular social group.
218. The two limbs represent two main schools of thought in international refugee law theory as to what constitutes a particular social group within the meaning of the Refugee Convention. The “protected characteristics approach” is based on an immutable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to change it. The “social perception approach” is based on a common characteristic which creates a cognizable group that sets it apart from society at large. This means that people may require protection because they are perceived to belong to a group irrespective of whether they actually possess the group’s characteristics. While the results under the two approaches may frequently converge, this is not always the case. To avoid any protection gaps, UNHCR therefore recommends that the Bill permit the alternative, rather than cumulative, application of the two limbs.²⁹³
219. This second approach has since been affirmed in *K and Fornah*²⁹⁴ and *DH (Particular Social Group: Mental Health) Afghanistan*²⁹⁵ as the proper interpretation of the Refugee Convention, which the House of Lords and Upper Tribunal affirmed as having primacy over the EU Qualification Directive. UNHCR’s Guidelines, as quoted by Lord Bingham with approval in *K and Fornah*, set out why such an approach is important in avoiding gaps in protection:

*If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.*²⁹⁶

220. UNHCR’s position, as previously expressed in a critique of the same provision in the EU Qualification Directive (recast), is that a person requires protection both in cases where he or she is a member of a particular group and in cases where he or she is perceived

HCR/GIP/02/02, 7 May 2002, para. 12, available at: <https://www.unhcr.org/uk/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> and in the annexes to the UNHCR *Handbook* (n 162).

²⁹² See above, n 287.

²⁹³ These recommendations are drawn from UNHCR’s published position concerning identical provisions in the EU Qualification Directive (recast), *UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551) (Comments on the QD 2009)*, 21 October 2009, available at: <https://www.refworld.org/docid/4c503db52.html>.

²⁹⁴ *K and Fornah* (n 264).

²⁹⁵ *DH (Particular Social Group: Mental Health) Afghanistan*, [2020] UKUT 223 (IAC), available at: <https://www.bailii.org/uk/cases/UKUT/IAC/2020/223.html>

²⁹⁶ UNHCR, *Guidelines on International Protection No. 2* (n 2911), as quoted in *K and Fornah* (n 264), para. 15.



to be such.²⁹⁷ UNHCR thus recommends that **Clause 32** be amended such that the two provisions **32(2)** and **32(3)** are *alternative* requirements for defining a particular social group rather than *cumulative*.

221. **Clause 32(4)** provides that a particular social group “[...] may include a group based on a common characteristic of sexual orientation [...]” Whilst sexual orientation is a welcome and appropriate example characteristic for a PSG, it stands alone in the Bill as the only example. The EU Directive (from where this clause is transposed), also includes the example of gender which is absent in the Bill. To avoid misinterpretation, UNHCR would encourage the addition of further examples of groups which can qualify as particular social groups, beyond the example of “sexual orientation”, such as those based on gender, age, disability, health status or status as a former victim of trafficking.

33 Article 1(A)(2): protection from persecution

- (1) For the purposes of Article 1(A)(2) of the Refugee Convention, protection from persecution can be provided by—
 - (a) the State, or
 - (b) any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.
- (2) An asylum-seeker is to be taken to be able to avail themselves of protection from persecution if—
 - (a) the State, party or organisation mentioned in subsection (1) takes reasonable steps to prevent the persecution by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution, and
 - (b) the asylum-seeker is able to access the protection.

222. **Clause 33**, Protection from Persecution, imports the “Actors of Protection” provisions of the Qualification Directive with some minor changes to wording. UNHCR has previously made recommendations with respect to the comparable provisions in the Qualification Directive and these are reiterated below.

223. **Clause 33(1)(b)** allows for protection from persecution to be provided by non-state actors, specifically “any party or organisation, including any international organisation, controlling the State or a substantial part of the territory of the State.” It is inappropriate, however, to equate national protection provided by States with the activities of a certain administrative authority, which may exercise some level of *de facto* – but not *de jure* – control over territory. Such control is often temporary and without the range of functions and authority of a State. Importantly, such non-State entities and bodies are not parties to international human rights treaties, and therefore cannot be held accountable for their actions in the same way as a State. In practice, this generally means that their ability to enforce the rule of law is limited.²⁹⁸ Specifically in respect of international organisations, such as organs and agencies of the United Nations, they enjoy privileges and immunities.²⁹⁹ For these reasons, and in line with UNHCR’s previous position with respect to the Qualification Directive and proposed Qualification Regulation 2016, UNHCR recommends deletion of the phrase “including international organisations” from

²⁹⁷ UNHCR, *Comments on QD 2009* (n 293), p. 5.

²⁹⁸ See UNHCR, *Guidelines on International Protection No. 12* (n 271), para. 41; UNHCR, *Comments on QD 2009* (n 293), p. 5

²⁹⁹ See UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466* (*Comments on the Qualification Regulation 2016*), p. 15, available at: <https://www.refworld.org/pdfid/5a7835f24.pdf>.

Clause 33(1)(b) and reiterates that generally, national protection can only be provided by the State, and not by non-State actors.³⁰⁰

224. UNHCR emphasises that the assessment to be made is whether the applicant’s fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm. UNHCR is therefore concerned that according to **Clause 33(2)(a)** protection shall be considered to be provided when the relevant actor (either States or non-state actors) “takes reasonable steps to prevent the persecution by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution” (emphasis added). Using the term “reasonable steps” introduces a high level of subjectivity into the determination. The taking of such steps, moreover, is not necessarily conclusive of the availability and effectiveness of protection. From the current construction it would be possible to consider that an actor has provided sufficient protection if reasonable steps have been taken, although the protection is neither effective nor durable. Further, UNHCR is concerned that the applicant faces a disproportionate burden if required to demonstrate that the measures taken by the actor of protection are insufficient or “unreasonable”.
225. In line with the stated aims under the New Plan for Immigration to set a clearer³⁰¹ standard for testing whether an individual has a well-founded fear of persecution, the UK should remove reference to the “reasonable steps” criterion in **33(2)(a)** which unnecessarily complicates an assessment of well-founded fear.
226. Compounding the issues identified above is an absence in **Clause 33(2)** of a reference to the concepts of effectiveness or durability of protection (aside from a reference to the effectiveness of the legal system). Such criteria are necessary in determining whether a person has a well-founded fear.³⁰²
227. Taking into account the two above concerns, **Clause 33(2)(a)** should be amended to clarify that protection is provided by the operation of an effective legal system as opposed to “taking steps” to prevent persecution or serious harm as the text currently stipulates. And that such protection be effective and durable. UNHCR recommends replacing existing **Clause 33(2)(a)** with the following text:

*Protection against persecution shall be **effective** and of a **durable nature**. Such protection may be considered to be provided when the actors referred to in 31(1)(a)-(b)³⁰³ are operating an effective legal system for the detection, prosecution and*

³⁰⁰ UNHCR, *Comments on the QD 2009* (n 293), p. 6 and UNHCR, *Comments on the Qualification Regulation 2016* (n 299), p.14. This is distinct from the issue of those excluded from the Refugee Convention under Article 1D.

³⁰¹ The New Plan for Immigration also says “higher standard” though “consistent with the Refugee Convention”. *New Plan for Immigration Policy Statement* (n 3), p. 18.

³⁰² Such criteria were added to the Recast Qualification Directive and welcomed by UNHCR. UNHCR, *Comments on the QD 2009* (n 293), pp. 4-5. With regard to the potential of other entities to provide effective protection, the CJEU confirmed in the UK case of *SSHD v O.A* that social/financial support provided families or clans is “inherently incapable of either preventing acts of persecution or of detecting, prosecuting and punishing such acts and, therefore, cannot be regarded as providing the protection required [under the Qualification Directive].” *Secretary of State for the Home Department v. O A.*, European Union: Court of Justice of the European Union, Case C-255/19, para. 46, available at: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=C6016A889BA6C7E54536442A2381EFBE?text=&docid=236682&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2544550>

³⁰³ Without prejudice to UNHCR’s recommendation that “international organisations” should be removed from 33(1)(b).



*punishment of acts constituting persecution or serious harm, and when the applicant has access to that protection.*³⁰⁴

34 Article 1(A)(2): internal relocation

- (1) An asylum-seeker is not to be taken to be a refugee for the purposes of Article 1(A)(2) of the Refugee Convention if—
 - (a) they would not have a well-founded fear of being persecuted in a part of their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence), and
 - (b) they can reasonably be expected to return to and remain in that part of the country.
- (2) In considering whether an asylum-seeker can reasonably be expected to return to and remain in a part of a country, a decision-maker—
 - (a) must have regard to—
 - (i) the general circumstances prevailing in that part of the country, and
 - (ii) the personal circumstances of the asylum-seeker;
 - (b) must disregard any technical obstacles relating to return to that part of that country.

228. **Clause 34**, ‘Internal Relocation’, imports the ‘Internal Protection’ provisions from the 2004 EU Qualification Directive. However, in contrast to the Directive which currently provides that EU Member States “may” determine that internal protection is available for an asylum-seeker, the Bill would appear to *require* decision makers to consider internal relocation opportunities.³⁰⁵ UNHCR is concerned with the proposed mandatory nature of this provision. The concept of an Internal Flight Alternative (IFA) is not contained in the Refugee Convention. It is neither a stand-alone principle nor an independent test in the determination of refugee status.³⁰⁶ Rather, IFA considerations are applied as part of an integrated assessment of a person’s well-founded fear of persecution, and of whether the person is “unable or, owing to such fear, is unwilling to avail himself of the protection of [her or his] country.”³⁰⁷

229. Mandatory IFA assessments may furthermore frustrate efficient decision making, as such assessments should not ordinarily be required in all cases. IFA assessments should, for example, not normally be necessary where the feared persecution emanates from State agents, as they are regularly able to act throughout the territory.

230. Clause **34(2)(b)** provides that in ascertaining whether an asylum-seeker can reasonably be expected to return a decision maker “must disregard any technical obstacles relating to return to that part of that country.” The effect of this provision, which currently exists in the 2004 Qualification Directive, is to deny international protection to persons who have no practically accessible protection alternative. In UNHCR’s view, this is not consistent with Article 1 of the 1951 Convention. An internal relocation or flight alternative must be safely and legally accessible for the individual concerned, at the time of the decision. Attempted predictions regarding whether the obstacles will be temporary or permanent detract from requisite legal certainty in the application of this concept. If

³⁰⁴ See UNHCR’s similar recommendation with respect to the Qualification Directive, UNHCR, *Comments on the Qualification Regulation 2016* (n 299), p.14.

³⁰⁵ **Clause 31(5)** reads: “The determination under subsection (4) [risk of future persecution] must also include a consideration of the matter mentioned in section 34 (internal relocation).”

³⁰⁶ UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, para. 2, available at: <https://www.unhcr.org/uk/publications/legal/3f28d5cd4/guidelines-international-protection-4-internal-flight-relocation-alternative.html>

³⁰⁷ UNHCR, *Interpreting Article 1* (n 272), paras. 15 and 35-37.



the proposed alternative is not accessible in a practical sense, an internal flight or relocation alternative does not exist and cannot be considered reasonable. UNHCR notes that this provision was removed from the Recast EU Qualification Directive, a change which was welcomed by UNHCR at the time.³⁰⁸

35 Article 1(F): disapplication of Convention in case of serious crime etc

(...)

(3) In that Article [1F(b) of the Refugee Convention], the reference to a crime being committed by a person outside the country of refuge prior to their admission to that country as a refugee includes a crime committed by that person at any time up to and including the day on which they are issued with a relevant biometric immigration document by the Secretary of State.

(...)

231. **Clause 35** replicates Article 12 of the Qualification Directive, with some changes to include UK-specific references to when a refugee is considered to be admitted for the purposes of Article 1F(b) of the Refugee Convention.
232. UNHCR has previously raised concerns that a similar interpretation provided for under the Qualification Directive is inconsistent with the wording of Article 1F(b).³⁰⁹ In the above clause of the Bill, the phrase “up to and including the day on which they are issued with a relevant biometric immigration document” is inconsistent with the geographical and temporal limitations in Article 1F(b). These require that the serious non-political crimes in question must have been committed (i) outside the country of refuge and (ii) prior to admission there as a refugee. It would not be correct to interpret the phrase “prior to admission ... as a refugee” as referring to the time preceding the recognition of refugee status or the issuing of a residence permit based on the granting of refugee status. Given that the recognition of refugee status is declaratory, not constitutive, “admission” in this context includes mere physical presence in the country of refuge. Such an interpretation is based on the rationale that crimes committed in the country of refuge are considered in the context of Article 33(2) of the Refugee Convention, rather than in the context of the exclusion clauses.³¹⁰
233. Whilst UK jurisprudence establishes that the length of a sentence is not determinative of whether a claimant should be excluded under 1F(b),³¹¹ current Home Office Guidance makes clear that the threshold for what *may* constitute a “serious crime” may be lower than the threshold for what constitutes a “particularly serious crime” under Section 72 of the Nationality, Immigration and Asylum Act 2002.³¹² The current Guidance concludes

³⁰⁸ UNHCR, *Comments on the QD 2009* (n 293), p.6.

³⁰⁹ UNHCR, *Annotated Comments on the QD 2004* (n 2699), p. 27.

³¹⁰ Individuals who commit serious non-political crimes within the country of refuge are subject to that country’s criminal law process and, in the case of particularly grave crimes, to Articles 32 and 33(2) of the 1951 Convention. See UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HCR/GIP/03/05), para. 16, available at: <https://www.unhcr.org/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html>

³¹¹ In *AH (Algeria) v Secretary of State for the Home Department*, [2012] EWCA Civ 395, para. 54, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2012/395.html>, Lord Justice Ward noted: “Sentence is, of course, a material factor but it is not a benchmark. In deciding whether the crime is serious enough to justify his loss of protection, the Tribunal must take all facts and matters into account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed.”

³¹² UK Home Office, *Exclusion (Article 1F) and Article 33(2) of the Refugee Convention (Exclusion Guidance)*, Version 6.0, 1 July 2016, p. 25, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/534985/exclusion_and_article_33_2_refugee_convention.pdf Nationality, Immigration and Asylum Act 2002 (n 183), Section 71.



that it may therefore “be appropriate to treat a crime for which a custodial sentence of 12 months or more on conviction might be regarded (if that crime had been tried in the UK) as a serious crime.”³¹³ UNHCR is already gravely concerned with the lowering of the “particularly serious crime” threshold triggering Article 33(2) of the Convention to custodial sentences of 12 months (see comments in relation to **Clause 36**, immediately below). Whilst the Bill does not specifically reference any custodial threshold for what may constitute a “serious crime” under 1F(b), UNHCR is concerned that lowering the threshold for “particularly serious crime” may, by association, lower the threshold for what constitutes a “serious crime”.

234. UNHCR has already raised concerns about increased penalties for irregularly arriving asylum-seekers (including a maximum sentence of four years’ imprisonment, or 12 months on summary conviction). When considered alongside the above concerns regarding the scope of Article 1F(b), UNHCR is of the view that considerations under **Clause 35** may risk the improper exclusion of asylum-seekers from refugee protection if they have been prosecuted for arriving in the UK irregularly.
235. On a more general note, UNHCR recommends that UK consults the UNHCR *Guidelines on International Protection on application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*,³¹⁴ when interpreting the exclusion clauses. It should be borne in mind that the grounds for exclusion are exhaustively enumerated in the Refugee Convention. While these grounds are subject to interpretation, they cannot be expanded in the absence of an agreement by all State Parties.

36 Article 31(1): immunity from penalties

- (1) A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.
- (2) A refugee is not to be taken to have presented themselves without delay to the authorities unless—
 - (a) in the case of a person who became a refugee while they were outside the United Kingdom, they made a claim for asylum as soon as reasonably practicable after their arrival in the United Kingdom;
 - (b) in the case of a person who became a refugee while they were in the United Kingdom—
 - (i) if their presence in the United Kingdom was lawful at that time, they made a claim for asylum before the time when their presence in the United Kingdom became unlawful;
 - (ii) if their presence in the United Kingdom was unlawful at that time, they made a claim for asylum as soon as reasonably practicable after they became aware of their need for protection under the Refugee Convention.
- (3) For the purposes of subsection (2)(b), a person’s presence in the United Kingdom is unlawful if they require leave to enter or remain and do not have it.
- (4) A penalty is not to be taken as having been imposed on account of a refugee’s illegal entry or presence in the United Kingdom where the penalty relates to anything done by the refugee in the course of an attempt to leave the United Kingdom.

³¹³ UK Home Office, *Exclusion Guidance* (n 312), p. 25.

³¹⁴ UNHCR, *Guidelines on International Protection No. 5* (n 310).



- (5) In section 31 of the Immigration and Asylum Act 1999 (defences based on Art.31(1) of the Refugee Convention) —
- (a) in subsection (2), for “have expected to be given” substitute “be expected to have sought”;
- (b) after subsection (4) insert—

“(4A) But this section does not apply to an offence committed by a refugee in the course of an attempt to leave the United Kingdom.”

(...)

236. As set out in our observations of May 2021, this definition of “coming directly” would be inconsistent with the established understanding of Article 31 of the Convention unless were interpreted in line with existing UK jurisprudence. This defines the term “directly” broadly and purposively, such that refugees who have crossed through, stopped over or stayed in other countries en route, may still be exempt from penalties.³¹⁵ In UNHCR’s view, to be consistent with the Convention, the word “stopped” here must continue to be understood as it has been by UK courts interpreting Article 31 of the 1999 Act: as referring to something more than a transitory stop en route to the country of intended sanctuary.³¹⁶ The UK High Court in *Adimi* introduced three benchmarks to interpret “coming directly”: 1) the length of stay in the intermediate country; 2) the reason for the delay; and 3) whether or not the refugee sought or found protection *de jure* or *de facto*.³¹⁷
237. We also oppose the blanket withdrawal of the defences based on Article 31 for those who commit an offence while attempting to leave the United Kingdom in order to claim asylum elsewhere, even though the House of Lords found that prosecution under those circumstances violated international law.³¹⁸ In UNHCR’s view, refugees who leave a country in contravention of exit rules and who are present without authorization may be protected from penalization under Article 31(1) of the 1951 Convention, particularly when they are transiting en route elsewhere to claim asylum, and despite the fact that they have not presented themselves to the authorities without delay when entering.
238. UNHCR also notes with concern that Section 31(2) of the Immigration and Asylum Act 1999 will be amended in line with this new definition. Section 31(1) of the 1999 Act provides that it is a defence to a limited number of immigration offences
- “for a refugee to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—*
- (a) *presented himself to the authorities in the United Kingdom without delay;*
- (b) *showed good cause for his illegal entry or presence; and*
- (c) *made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.*”³¹⁹
239. Section 31(2) of the 1999 Act currently makes this defence unavailable if a refugee has stopped in a country where they could reasonably have expected *to be given protection* under the Refugee Convention,³²⁰ rather than where they could have reasonably been expected *to apply* for such protection. Although it is difficult to imagine under what

³¹⁵ *Ex parte Adimi* (n 49), para. 18; *R v. Asfaw* (n 51), para. 15; *R. and Mateta* (n 53), para. 21(iv); *Decision KKO:2013:21, Finland* (n 45); also see UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 16), para. 39.

³¹⁶ *Ex parte Adimi* (n 49); *Asfaw* (n 51), para. 36; *Mateta* (n 53), paras. 12-15.

³¹⁷ *Ex parte Adimi* (n 49).

³¹⁸ *Asfaw* (n 51), para. 26 and 59.

³¹⁹ Immigration and Asylum Act 1999 (n 50), Section 31.

³²⁰ Immigration and Asylum Act 1999 (n 50), Section 31.



circumstances it would be reasonable to expect a person to apply for refugee status if they had no reasonable expectation of being given it, this provision should not be interpreted so as to make the fairness or effectiveness of the asylum system in the country in question irrelevant.

240. UNHCR's further concerns about the narrow application of the defence set out in Section 31 of the 1999 Act and its inconsistency with Article 31 of the Refugee Convention are addressed below at paragraph 247.

37 Article 33(2): particularly serious crime

- (1) Section 72 of the Nationality, Immigration and Asylum Act 2002³²¹ (serious criminal) is amended as follows.

[for ease of reference, the complete text of the proposed version of Section 72 is reproduced below, with the existing text that will be deleted struck through and the new text in italics]

72 Serious criminal

- (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from ~~protection~~ *prohibition of expulsion or return*).
- (2) A person ~~shall be presumed to have been~~ *is* convicted by a final judgment of a particularly serious crime ~~and to constitute a danger to the community of the United Kingdom~~ if he is—
- convicted in the United Kingdom of an offence, and
 - sentenced to a period of imprisonment of at least ~~two years~~ *12 months*.
- (3) A person ~~shall be presumed to have been~~ *is* convicted by a final judgment of a particularly serious crime ~~and to constitute a danger to the community of the United Kingdom~~ if he is—
- convicted outside of the United Kingdom of an offence, and
 - sentenced to a period of imprisonment of at least ~~two years~~ *12 months* and
 - he could have been sentenced to a period of imprisonment of at least ~~two years~~ *12 months* had his conviction been a conviction in the United Kingdom of a similar offence.
- (4) A person ~~shall be presumed to have been~~ *is* convicted by a final judgment of a particularly serious crime ~~and to constitute a danger to the community of the United Kingdom~~ if he is—
- convicted of an offence specified by order of the Secretary of State, or
 - he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a).
- (...)
- (5A) *A person convicted by a final judgment of a particularly serious crime (whether within or outside the United Kingdom) is to be presumed to constitute a danger to the community of the United Kingdom.*
- (6) A presumption under subsection ~~(2), (3) or (4)~~ *(5A)* that a person constitutes a danger to the community is rebuttable by that person.
- (...)

241. **Clause 37** of the Bill would lower the criminality threshold that may trigger the application of Article 33(2) of the 1951 Convention. This provision permits an exception to the principle of non-refoulement in cases where there are reasonable grounds for regarding

³²¹ Nationality, Immigration and Asylum Act 2002 (n 183), Section 72.



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- a refugee as a danger to the security of the country, or where a refugee, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.
242. At present Section 72 of the Nationality, Immigration and Asylum Act 2002 provides that a person will be presumed to have been convicted of a particularly serious crime and to constitute a danger to the community (and therefore no longer protected against refoulement) if they have been convicted of an offence and sentenced to at least two years' imprisonment.³²² The Bill would lower the trigger for consideration of refoulement to a sentence of 12 months' imprisonment, and foreclose any case-by-case consideration of the seriousness of the crime.
243. UNHCR is gravely concerned that this will exacerbate current practice, which misapplies Article 33(2) of the Refugee Convention. Article 33(2) aims to protect the safety of the country of refuge and hinges on the assessment that the presence of the refugee in question poses a serious actual or future threat that can only be countered by removing the person from the country of asylum. Because such a person remains a refugee, however, it is understood that their removal may nonetheless put them at real risk of persecution. For this reason, Article 33(2) has always been considered as a measure of last resort,³²³ and must be interpreted and applied restrictively, in line with the general principle of limiting exceptions to human rights guarantees. UNHCR therefore takes the opportunity to reiterate its concerns, stressing that the applicability of Article 33(2) requires a case-by-case approach to ensure that both criteria are met; 1) a conviction by a final judgement for a particularly serious crime, and 2) an individualised finding that the refugee constitutes a present or future danger to the community of the country.
244. Only crimes of a "particularly serious" and egregious nature should be considered to warrant exposing a person to the risk of persecution by making an exception to the non-refoulement principle. Introducing a threshold of a custodial sentence of 12 months or more would include a wide range of offences that seem incompatible with the definition of "particularly serious". Currently, too often those convicted of relatively minor crimes are put at risk of expulsion, a situation that would only worsen if the threshold for consideration is lower and the nature of the particular crime committed made irrelevant. In addition, by focusing on the length of sentence as the trigger for considering removal, the proposal risks exacerbating the effects of reported disparities in sentencing, potentially producing racially or ethnically discriminatory effects.³²⁴
245. For these reasons, UNHCR reiterates its calls to the UK government for the proper application of Article 33(2) of the Refugee Convention, underscoring its exceptional nature as a measure of last resort. Moreover, UNHCR further recalls that the provisions of Article 33(2) of the Refugee Convention do not affect non-refoulement obligations under regional and international human rights law, which permit no exceptions.

³²² Nationality, Immigration and Asylum Act 2002 (n 183), Section 72.

³²³ UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, para. 10, available at: <https://www.refworld.org/docid/3f5857d24.html>

³²⁴ *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, p. 33, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf



H. The increased criminalisation of seeking asylum: Clause 39 and 40

39 **Illegal entry and similar offences**

(1) The Immigration Act 1971 is amended in accordance with subsections (2) to (7).

(2) In section 24 (illegal entry and similar offences), before subsection (1) insert—

“(A1) A person who knowingly enters the United Kingdom in breach of a deportation order commits an offence.

(B1) A person who—

- (a) requires leave to enter the United Kingdom under this Act, and
- (b) knowingly enters the United Kingdom without such leave, commits an offence.

(C1) A person who—

- (a) has only a limited leave to enter or remain in the United Kingdom, and
- (b) knowingly remains beyond the time limited by the leave, commits an offence.

(D1) A person who—

- (a) requires entry clearance under the immigration rules, and
- (b) knowingly arrives in the United Kingdom without a valid entry clearance, commits an offence.

(E1) A person who—

- (a) is required under immigration rules not to travel to the United Kingdom without an ETA that is valid for the person’s journey to the United Kingdom, and
- (b) knowingly arrives in the United Kingdom without such an ETA, commits an offence

(F1) A person who commits an offence under any of subsections (A1) to (E1) is liable -

- (a) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or a fine (or both);
- (b) on summary conviction in Scotland, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both);
- (c) on summary conviction in Northern Ireland, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum (or both);
- (d) on conviction on indictment -
 - (i) for an offence under subsection (A1), to imprisonment for a term not exceeding five years or a fine (or both);
 - (ii) for an offence under any of subsections (B1) or (E1), to imprisonment for a term not exceeding four years or a fine (or both).”

(...)

(4) In section 25 (assisting unlawful immigration), in subsection (2)(a), after “enter” insert “or arrive in”.

246. UNHCR recognises that States have the legitimate right to control their borders and to address the smuggling and trafficking of persons. The criminalisation of “migrant smuggling”, however, must be distinct from penalties imposed on asylum-seekers or



refugees on account of their irregular entry or presence,³²⁵ and must remain consistent with obligations under international law, including the right to seek and enjoy asylum and the principle of non-refoulement.³²⁶ Central to these international obligations is Article 31(1) of the Refugee Convention, which, as noted above, prohibits States from imposing penalties for unlawful 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.”

247. UNHCR therefore notes with deep concern that UK law only permits defences to criminal prosecution based on Article 31(1) for a narrow range of immigration offences related to deception or the use of false documents.³²⁷ Nothing in UK law recognises Article 31(1) as a defence to other offences that may be committed by refugees in the course of seeking asylum, such as illegal arrival, entry or presence, or failure to produce a travel document without reasonable excuse.³²⁸ Over the past two decades, this omission has had little practical consequence, because refugees were seldom if ever prosecuted for illegal entry or presence alone; guidance issued by the Crown Prosecution Service recognised that it would not often be in the public interest to do so.³²⁹ However, the Bill’s introduction of new offences for arrival without entry clearance or an Electronic Travel Authorization (ETA) and the increased criminal penalties for illegal entry and presence, which are partly intended in part to encourage prosecutions,³³⁰ make it urgently necessary that Section 31 of the 1999 Act be expanded so as to comply with the UK’s obligations under Article 31(1) of the Refugee Convention.
248. At present, under Section 24(1)(a) of the Immigration Act 1971, a person commits a criminal offence if they knowingly enter the United Kingdom in breach of a deportation order or without leave. However, those who arrive at an approved port of entry have not entered the United Kingdom until they have passed through immigration control. If they claim asylum before attempting to pass through immigration control, they will not have

³²⁵ *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (Protocol Against Smuggling)*, 15 November 2000, Article 5, available at: <http://www.refworld.org/docid/479dee062.html>.

³²⁶ The obligation to ensure that any activities undertaken to address human trafficking or migrant smuggling do not prejudice the right to seek and enjoy asylum, nor the good faith implementation of international human rights law including the Refugee Convention, is found in Article 14 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000 (*Protocol Against Trafficking*), available at: <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>; Article 19 of the *Protocol Against Smuggling* (n 325); and Article 40 of *Council of Europe Convention Against Trafficking in Human Beings (Anti-Trafficking Convention)*, 2005, available at: <https://rm.coe.int/168008371d> all of which the UK is a signatory to. The ECHR has also acknowledged the challenges facing States in terms of immigration control, but stressed “that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto”. *N.D. and N.T. v. Spain* (Applications nos. 8675/15 and 8697/15, Council of Europe: ECHR (Grand Chamber), paras. 169-170, available at: <https://www.refworld.org/cases.ECHR.5e4691d54.html>

³²⁷ These are: Part 1 of the Forgery and Counterfeiting Act 1981 (forgery and connected offences); Section 24A of the Immigration Act 1971 (use of deception to obtain or seek to obtain leave to enter or remain or to secure avoidance, postponement or revocation of enforcement action); Section 26(1)(d) of the Immigration 1971 Act (falsification of documents); Sections 4(1) and 6(1) of the Identity Documents Act 2010. Section 31 of the Immigration and Asylum Act 1999 (n 50). UK courts have also recognised that the defence under UK law narrower than that set out in the Convention, see *Pepushi, R (on the application of) v Crown Prosecution Service*, [2004] EWHC 798 (Admin), paras. 31-33, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2004/798.html>

³²⁸ *R v. Fraydon Navabi and Senait Tekie Embaye*, [2005] EWCA Crim 2865, para. 28, available at: https://www.refworld.org/cases.GBR_CA_CIV.4702663c2.html; *R v Mirahessari*, [2016] EWCA Crim 1733, para. 17, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2017/1733.html>

³²⁹ Crown Prosecution Service (CPS), *Legal Guidance: Immigration*, June 2018, available at: <https://www.cps.gov.uk/legal-guidance/immigration>

³³⁰ *HL Bill 82 Explanatory Notes* (n 3), para. 398.



attempted to enter the UK unlawfully and cannot be prosecuted for this offence.³³¹ Nor will they have committed this offence if they have been rescued at sea and brought to the United Kingdom.³³²

249. The Bill would create new criminal offences of knowingly *arriving in* the United Kingdom without entry clearance or an ETA. This would make it a criminal offence for an asylum-seeker to travel to the United Kingdom without prior authorisation where that is required, even if they claim asylum immediately upon arrival and regardless of their mode of travel. Although the Explanatory Notes state that “This will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don’t technically “enter” the UK,”³³³ its potential reach is much wider. Given that there is no possibility under UK law of applying for a visa in order to claim asylum, no one from a country whose citizens normally need a visa to come to the UK would be able to seek asylum in the country without potentially committing a criminal offence.³³⁴ Ninety percent of those who are granted asylum in the United Kingdom are from countries whose nationals must hold entry clearance to enter the UK.³³⁵ Depending on how the ETA scheme is designed and implemented, asylum-seekers from countries whose nationals do not require a visa may also face criminal penalties for seeking asylum in the UK.
250. Even where penalisation is allowed by Article 31(1) (which, as noted above, is not contemplated here), any penalties must be proportionate to the offence and not operate in such a way as to undermine the right to seek asylum.³³⁶ The maximum sentence of imprisonment for unlawful arrival, entry or presence, however, will be 12 months on summary conviction or four years on indictment. Many sentences in this range are likely to be disproportionate. In the UK context, in which the length of sentence is taken as a strong indication of the seriousness of an offence, such sentences could also potentially serve as a bar to a subsequent asylum claim under Article 1F, as defined in the Bill to cover any offences committed prior to the issuance of a residence permit. This would create a direct and real risk of refoulement.
251. At **Clause 39(4)**, the Bill also significantly increases the criminalisation of providing assistance to asylum-seekers by creating a new criminal offence under Section 25 of the 1971 Immigration Act of assisting a person to arrive in in the UK in breach of immigration law.³³⁷ Because it is already a criminal offence to assist someone to enter, transit across or be in the UK in breach of immigration laws, this amendment would

³³¹ *Kakaei, R. v.*, [2021] EWCA Crim 503, para. 51, available at <https://www.bailii.org/ew/cases/EWCA/Crim/2021/503.html>

³³² *Bani v The Crown*, [2021] EWCA Crim 1958, para. 94, available at <https://www.bailii.org/ew/cases/EWCA/Crim/2021/1958.html>

³³³ *HL Bill 82 Explanatory Notes* (n 3), para. 394.

³³⁴ The list of visa nationals is found at Paragraph VN.1 of Appendix Visitor to the immigration rules. It contains 111 of the world’s 195 countries. <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-visa-national-list>

³³⁵ UK Home Office, *Immigration Statistics, year ending September 2021: Asylum and Resettlement – Applications, Initial Decisions, and Resettlement*, available at: <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-applications-decisions-and-resettlement>

³³⁶ Hathaway, J. C., *The rights of refugees under international law*, Cambridge University Press, 2005, p. 408 in Zimmermann, A. (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Oxford University Press, 2011, p. 1256.

³³⁷ Section 37(4); Section 25(1) of the Immigration Act 1971, available at: <https://www.legislation.gov.uk/ukpga/1971/77/section/25> makes it a criminal offence to knowingly facilitate the commission of breach of immigration law, and Section 25 specifies that an “immigration law” is one that effects the entitlement of non-nationals to (a) “enter”, (b) “transit across” or (c) “be in” a State. Section 37(4) of the Bill would add the words “or arrive in” after the word “enter”.



- criminalise providing assistance even to those refugees who claim asylum on arrival or who are rescued at sea and brought to the UK.³³⁸
252. Nor is this new offence targeted at smugglers, let alone smuggling gangs: it is not an element of the offence that the assistance was provided for gain or as part of a criminal enterprise. The most obvious target are refugees who assist each other to come to the United Kingdom to claim asylum, a target made even clearer by **Clause 40(4)**, which is intended to allow the criminal prosecution of asylum-seekers and refugees who assist each other to come to the United Kingdom even when that assistance takes the form of acts of rescue at sea. The Supreme Court of Canada found that penalising refugees in those circumstances not only clearly violated Article 31(1) of the Refugee Convention, but is also inconsistent with the Protocol against the Smuggling of Migrants by Land, Sea and Air (the Anti-Smuggling Protocol),³³⁹ of which the United Kingdom is a signatory and which mandates that migrants who are themselves the object of people smuggling activities cannot be liable to criminal prosecution for smuggling offences under the Protocol on that basis.³⁴⁰
253. Friends, family members and others providing assistance with purely humanitarian motives would also be at risk of prosecution,³⁴¹ something which the Supreme Court of Canada further found would be contrary to the spirit and intention of the Anti-Smuggling Protocol.³⁴² Even trafficking victims could face criminal penalties under this new provision, because Schedule 4(17) of the Modern Slavery Act 2015 expressly prevents those charged under section 25 of the Immigration Act 1971 from relying on the defence that they were compelled to commit the offence because they were victims of slavery or trafficking.³⁴³
254. The maximum sentence of imprisonment for this offence will rise from 14 years to imprisonment for life.³⁴⁴

³³⁸ For the same reasons as set out above at paragraph 248, such refugees will not have made an illegal entry to the UK, and will not have committed an offence under existing law. See *R v Naillie*, [1993] AC 674, available at: https://www.refworld.org/cases,GBR_HL_3ae6b6cf14.html and *Javaherifard (R, on the application of) v Miller*, [2005] EWCA Crim 3231, paras. 12-14, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2005/3231.html>

³³⁹ *B010 v. Canada* (n 87), paras. 61-62, www.refworld.org/cases,CAN_SC,56603be94.html An interpretation of Canadian law that made asylum-seekers “inadmissible” on the grounds that they had engaged in people smuggling by assisting each other to reach Canada was described as “not within the range of reasonableness” (para. 26) and “absurd” (para. 71). See also *R. v. Appulonappa*, Canada: Supreme Court, 2015 SCC 59, para. 43, www.refworld.org/cases,CAN_SC,56603caa4.html in which the Court stated that “art. 31(1) of the Refugee Convention seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a State cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety.”

³⁴⁰ *Protocol Against Smuggling* (n 3255), Article 5 (“Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol”) and Article 19 (Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law. In particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.)

³⁴¹ See, e.g. *Sternaj v. Director of Public Prosecutions* (n 88) in which a parent who had claimed asylum in the UK was prosecuted for facilitating the illegal entry of his two-year-old son, on whose behalf he also made an asylum claim.

³⁴² *B010 v. Canada* (n 87), para. 60.

³⁴³ Modern Slavery Act 2015, Section 45, and Schedule 4, available at <https://www.legislation.gov.uk/ukpga/2015/30/section/45/enacted> and <https://www.legislation.gov.uk/ukpga/2015/30/schedule/4/enacted>

³⁴⁴ **Clause 40(2).**



40 Assisting unlawful immigration or asylum seeker

- (1) The Immigration Act 1971 is amended as follows.
- (2) In section 25(6)(a) of the Immigration Act 1971 (assisting unlawful immigration to member State or the United Kingdom: penalties) for “imprisonment for a term not exceeding 14 years” substitute “imprisonment for life”.
- (3) In section 25A(1)(a) of the Immigration Act 1971 (helping an asylum seeker to enter the United Kingdom) omit “and for gain”.

255. In addition to the criminal offence of assisting unlawful entry to the UK under Section 25 of the 1971 Act, it is also a criminal offence under Section 25A of the 1971 Act to help someone enter or arrive in the United Kingdom, knowing or with reasonable cause to know that they intend to claim asylum, regardless of whether their entry or arrival is lawful. At present, it is an element of the offence that the help is provided for gain. As part of the Bill’s broad criminalisation of seeking asylum, this element will be deleted. This would make it a criminal offence for friends, family members or other refugees to help someone arrive in the United Kingdom to claim asylum under any circumstances, even if they were to arrive here lawfully.³⁴⁵ Again, the effect is not to crack down on human smuggling or criminal gangs, but on accessing asylum in the United Kingdom.³⁴⁶

40 Assisting unlawful immigration or asylum seeker [cont’d]

- (4) Before section 25C insert—

“25BA Facilitation offences: application to rescuers

- (1) A person does not commit a facilitation offence if the act of facilitation was an act done by or on behalf of, or co-ordinated by—
 - (a) Her Majesty’s Coastguard, or
 - (b) an overseas maritime search and rescue authority exercising similar functions to those of Her Majesty’s Coastguard.
- (2) In proceedings for a facilitation offence, it is a defence for the person charged with the offence to show that—
 - (a) the assisted individual had been in danger or distress at sea, and
 - (b) the act of facilitation was an act of providing assistance to the individual at any time between—
 - (i) the time when the assisted individual was first in danger or distress at sea, and
 - (ii) the time when the assisted individual was delivered to a place of safety on land.

³⁴⁵ There will continue to be an exemption for a person acting on behalf of an organisation which “aims to assist asylum-seekers, and does not charge for its services.” Section 25A(3), available at: <https://www.legislation.gov.uk/ukpga/1971/77/section/25A>

³⁴⁶ The Explanatory Notes justify the removal of the “gain” requirement as required by the difficulty of proving gain. *HL Bill 82 Explanatory Notes* (n 5), para. 408. CPS guidance, however, already addresses this issue: “Where there are difficulties in obtaining evidence of direct (financial) gain to support an offence under Section 25A, prosecutors should consider whether there might be sufficient evidence to infer gain. For instance, the defendant’s expenditure or lifestyle may be inconsistent with his apparent earnings or receipt of benefit. In this regard, expenditure on travel and hotels as part of the offending may be relevant. If no gain can be inferred from the evidence, a charge under s 25 may be appropriate.” See CPS, *Immigration Offences Annex*, 19 June 2018, available at: <https://www.cps.gov.uk/publication/immigration-offences-annex>



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- (3) For the purposes of subsection (2), the following are not to be treated as an act of providing assistance—
- (a) the act of delivering the assisted individual to the United Kingdom in circumstances where—
 - (i) the United Kingdom was not the nearest place of safety on land to which the assisted individual could have been delivered, and
 - (ii) the person charged with the offence did not have a good reason for delivering the assisted individual to the United Kingdom instead of to a nearer place of safety on land;
 - (b) the act of steering a ship in circumstances where the person charged with the offence was on the same ship as the assisted individual at the time when the individual was first in danger or distress at sea.
256. UNHCR welcomes this amendment, insofar as it creates limited exceptions for “rescuers” to the various facilitation offences outlined above. However, UNHCR remains concerned that only rescuers acting for or with HM Coast Guard or an “overseas maritime search and rescue authority” cannot be prosecuted.
257. All other rescuers at sea will continue to be liable to prosecution and conviction unless they provide evidence that they acted in the narrow window between when a person became in danger or distress at sea and when they were delivered to a place of safety on land, and that if the United Kingdom was not the nearest place of safety, they had good reason for delivering a rescued person there. Acts taken to prevent a person from becoming in distress at sea or to assist them to recover thereafter could presumably still be considered criminal offences. UNHCR is concerned that these limitations may risk deterring or delaying attempts at rescue, thereby increasing the risk of loss of life in the Channel.
258. UNHCR also disapproves of the exclusion from this defence of passengers who assist each other when in distress or danger at sea. As noted above, the Supreme Court of Canada has found that penalisation in such circumstances violates both Article 31(1) of the Refugee Convention and the intention of the Anti-Smuggling Protocol.
259. In addition, individual humanitarian acts of assistance to friends, family members or fellow refugees in any other circumstances would continue to be criminalised, as could humanitarian acts by organisations that are not deemed to “aim to assist asylum-seekers”. UNHCR therefore continues to recommend that the “for gain” element of the offence of assisting an asylum seeker to come to the United Kingdom be maintained.
- I. Increased risk of harm to children, including but not limited to Part 4**
260. Neither the Bill nor the Explanatory Notes contain any reference to how the new provisions will apply to asylum-seekers and refugees who are either unaccompanied children or children in families, although the Equality Impact Assessment states that unaccompanied asylum-seeking children will be exempt from the inadmissibility rules, but not from Group 2 status (although they will not receive a no recourse to public funds condition when leaving care).³⁴⁷ UNHCR welcomes the statements by the Immigration Minister that unaccompanied children would be exempt from both inadmissibility and

³⁴⁷ UK Home Office, *New Plan for Immigration: Overarching Equality Impact Assessment of policies being delivered through the Nationality and Borders Bill*, 16 September 2021, p. 12, available at: <https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment>



offshoring,³⁴⁸ but is deeply concerned that these commitments are not enshrined in legislation.

261. UNHCR notes that many of our reasons for opposing specific provisions in the Bill are further heightened in the case of children – whether unaccompanied or in families - given their specific needs and vulnerability.³⁴⁹
262. To secure effective access to the rights set out in the Convention on the Rights of the Child³⁵⁰ children must be properly identified. It follows that States have a duty to identify children as children and assess whether they are separated or unaccompanied as soon as their presence in the country becomes known to the authorities. It is accepted that identification measures to be carried out by States with respect to unaccompanied or separated children may include an age assessment.³⁵¹

PART 4

AGE ASSESSMENTS

48 Interpretation of Part etc

- (1) In this Part, “age-disputed person” means a person—
- (a) who requires leave to enter or remain in the United Kingdom (whether or not such leave has been given), and
 - (b) in relation to whom—
 - (i) a local authority,
 - (ii) a public authority specified in regulations under section 49(1)(b), or
 - (iii) the Secretary of State,has insufficient evidence to be sure of their age.
- (...)

263. Part 4 of the Bill introduces provisions which would significantly change the age assessment process for those claiming asylum as unaccompanied children in the UK. **Clause 48** introduces a definition of an ‘age disputed person’ as one about whom there is “insufficient evidence to be sure of their age”.

³⁴⁸ UK Parliament, Hansard: Nationality and Borders Bill, Volume 705: debated on Tuesday 7 December 2021, available at: <https://hansard.parliament.uk/Commons/2021-12-07/debates/E3398434-EA4E-4717-9BF5-92B8962F82D1/NationalityAndBordersBill?highlight=children%20inadmissibility#contribution-43C5DF13-7A15-42E9-B733-DD5569B98A42>

³⁴⁹ For further information on specific considerations and procedural safeguard for assessing children’s claims for asylum see: UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, available at: <https://www.unhcr.org/uk/publications/legal/50ae46309/guidelines-international-protection-8-child-asylum-claims-under-articles.html> For information on consideration of children’s best interest see UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child (Guidelines on Assessing and Determining the Best Interests of the Child)*, May 2021, available at: <https://www.refworld.org/docid/5c18d7254.html>

³⁵⁰ UNGA, *Convention on the Rights of the Child*, available at: <https://www.ohchr.org/EN/professionalinterest/pages/crc.aspx> See especially Articles 3 and 22 (bests interests of the child must be a primary consideration), Article 2 (non-discrimination), Article 6 (right to life survival and development), Article 12 (right to express their views freely) and Article 22 (appropriate protection and humanitarian assistance for asylum-seeking and refugee children).

³⁵¹ UN Committee on the Rights of the Child, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 31, available at: <https://www.refworld.org/docid/42dd174b4.html>



264. The Home Office already doubts age in a significant proportion of asylum claims by those claiming to be children (around 33% since 2017).³⁵² Of those whose age the Home Office doubts, a high proportion are subsequently assessed to be children (44% over the same period).³⁵³ **Clause 48** would lower the threshold for age-disputes from situations where authorities **doubt** someone's claimed age,³⁵⁴ to those where authorities have insufficient evidence to **be sure** of a person's age. In respect of this broader category of age-disputed young people, **Clause 49(4)** then imposes an increased evidentiary burden on local authorities to provide evidence to the Home Office regarding their age assessments and any decision not to age assess a person. UNHCR's view is that the implementation of these clauses would likely increase the proportion of age assessments initiated for those claiming asylum as children, including in situations where no doubts have been raised about a person's age. UNHCR's position is that age assessments should never be routine, as they prolong the asylum process, can exacerbate emotional or psychological distress,³⁵⁵ and risk physical harm (for some methods),³⁵⁶ all in pursuit of an outcome which is an estimate of age at best. Conducting age assessments where doubts have not been raised about a young person's age would also create unnecessary demands on the resources of both the SSHD and local authorities.

48 Interpretation of Part etc [cont'd]

(2) In this Part—

“decision-maker” means a person who conducts an age assessment under section 49 or 50;
“designated person” means an official of the Secretary of State who is designated by the Secretary of State to conduct age assessments under section 49 or 50

(...)

³⁵² The proportion is an estimate based on Home Office statistics for the number of disputed age cases against the number of unaccompanied children arriving in the UK from Q1 2017 to Q3 2021. It does not include figures for individuals who have been assessed by Immigration Officers as over 25 years old based on their physical appearance and demeanor (or over 18 years old under the previous policy), as these statistics are not published by the Home Office. UK Home Office, *Immigration Statistics, year ending September 2021: Asylum and Resettlement – Age disputes*, available at: <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#age-disputes>

³⁵³ From Q1 2017 to Q3 2021 there were 4,438 recorded resolutions in age dispute cases where the Home Office doubted a claimant's age. Of these 1,968 individuals were accepted as children (44%) and 2,470 individuals were assessed as adults (56%). Ibid.

³⁵⁴ Current statutory guidance from the Department for Education specifies that “Age assessments should only be carried out where there is reason to doubt that the individual is the age they claim.” and that “[a]ge assessments should not be a routine part of a local authority's assessment of unaccompanied or trafficked children.” Department for Education, November 2017, *Care of unaccompanied migrant children and child victims of modern slavery, Statutory guidance for local authorities*, para. 35, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656429/UASC_Statutory_Guidance_2017.pdf Current Home Office guidance on ‘Assessing Age’ sets out that a decision about a person's age needs to be taken where all the following criteria are met: their claimed age is doubted by the Home Office; they claim to be a child but are suspected to be an adult or they claim to be an adult but are suspected to be a child; and there is little or no reliable supporting evidence of the claimed age. UK Home Office, *Assessing Age*, 31 December 2020, p. 7, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947800/assessing-age-asylum-instruction-v4.0ext.pdf

³⁵⁵ In two studies with young asylum seekers in the UK, UNHCR reported the negative impact of age assessment procedures on children's mental health. See UNHCR, *Destination Anywhere: The profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019, section 4.1.3, available at: <https://www.unhcr.org/uk/publications/legal/5daf2cef4/destination-anywhere.html>; UNHCR, “A Refugee and Then...”: *Participatory Assessment of the Reception and Early Integration of Unaccompanied Refugee Children in the UK*, p. 26, available at: <https://www.unhcr.org/uk/publications/legal/5d271c6a4/a-refugee-and-then.html>

³⁵⁶ See paragraph 273-274.

**49 Persons subject to immigration control: referral or assessment by local authority etc**

- (1) The following authorities may refer an age-disputed person to a designated person for an age assessment under this section—
 - (a) a local authority;
 - (b) a public authority specified in regulations made by the Secretary of State.
- (2) Subsections (3) and (4) apply where—
 - (a) a local authority needs to know the age of an age-disputed person for the purposes of deciding whether or how to exercise any of its functions under relevant children’s legislation in relation to the person, or
 - (b) the Secretary of State notifies a local authority in writing that the Secretary of State doubts that an age-disputed person in relation to whom the local authority has exercised or may exercise functions under relevant children’s legislation is the age that they claim (or are claimed) to be.
- (3) The local authority must—
 - (a) refer the age-disputed person to a designated person for an age assessment under this section,
 - (b) conduct an age assessment on the age-disputed person itself and inform the Secretary of State in writing of the result of its assessment, or
 - (c) inform the Secretary of State in writing that it is satisfied that the person is the age they claim (or are claimed) to be, without the need for an age assessment.
- (4) Where a local authority—
 - (a) conducts an age assessment itself, or
 - (b) informs the Secretary of State that it is satisfied that an age-disputed person is the age they claim (or are claimed) to be,it must, on request from the Secretary of State, provide the Secretary of State with such evidence as the Secretary of State reasonably requires for the Secretary of State to consider the local authority’s decision under subsection (3)(b) or (c).

265. **Clause 48** makes provision for the SSHD to designate officials who will conduct age assessments. The Member’s explanatory statement to the amendment set out that this will provide for a National Age Assessment Board (NAAB),³⁵⁷ a decision-making body which the Explanatory Notes confirm will sit within the Home Office to conduct age assessments and will “largely” consist of “a team of qualified social workers”.³⁵⁸

266. When presented with an age-disputed person, **Clause 49** provides that local authorities must:

- (i) refer them for an age assessment to a ‘designated person’ (who would be part of the National Age Assessment Board - NAAB³⁵⁹),
- (ii) conduct an age assessment themselves; or

³⁵⁷ House of Commons, *Nationality and Borders Bill (Amendment Paper)*, 21 October 2021, pp. 73-74, available at: https://publications.parliament.uk/pa/bills/cbill/58-02/0141/amend/natbord_day_pbc_1021.pdf

³⁵⁸ *HL Bill 82 Explanatory Notes* (n 5), para. 26 and 495. The Explanatory Notes do not clarify the expected number, qualifications or functions of the NAAB members who are not qualified social workers.

³⁵⁹ The *HL Bill 82 Explanatory Notes* (n 5) make clear at paras. 497-499 that “designated persons” are officials designated by the SSHD and part of a National Age Assessment Board. These observations therefore refer to “designated persons” and the NAAB interchangeably.



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(iii) inform the SSHD that they are satisfied that the person is the age they claim, without the need for an age assessment.

267. **Clause 49(4)** requires local authorities to provide evidence which the SSHD reasonably requires to consider an age assessment conducted by local authorities or their decision *not* to conduct an age assessment.

50 Persons subject to immigration control: assessment for immigration purposes

(1) A designated person may conduct an age assessment on an age-disputed person for the purposes of deciding whether or how the Secretary of State or an immigration officer should exercise any immigration functions in relation to the person.

(2) An assessment under subsection (1) may be conducted—

(a) in a case where subsections (3) and (4) of section 49 do not apply, or

(b) in a case where those subsections do apply—

(i) at any time before a local authority has referred the age disputed person to a designated person under section 49(3)(a) or has informed the Secretary of State as mentioned in subsection (3)(b) or (c) of that section, or

(ii) if the Secretary of State has reason to doubt a local authority's decision under subsection (3)(b) or (c) of that section.

268. **Clause 50** would provide powers for the designated persons (the NAAB) to conduct age assessments when requested by local authorities, but also in the absence of a referral, or where SSHD has reason to doubt a local authority's age assessment or its decision not to conduct one. Assessments by the NAAB would be binding for immigration purposes.

269. UNHCR cautions that centralising decision making through the NAAB further risks age assessment becoming more routine and carried out by those who may have limited knowledge of and interaction with young people they are assessing. It is important therefore that the NAAB be multidisciplinary, and that assessments draw on the expertise of those who play a role in the young person's life at the local level such as social workers, health professionals, psychologists, teachers, foster parents, youth workers, advocates, and guardians.

51 Use of scientific methods in age assessments

(1) The Secretary of State may make regulations specifying scientific methods that may be used for the purposes of age assessments under section 49 or 50.

(2) The types of scientific method that may be specified include methods involving—

(a) examining or measuring parts of a person's body, including by the use of imaging technology;

(b) the analysis of saliva, cell or other samples taken from a person (including the analysis of DNA in the samples).

(3) A method may not be specified in regulations under subsection (1) unless the Secretary of State determines, after having sought scientific advice, that the method is appropriate for assessing a person's age.

(4) A specified scientific method may be used for the purposes of an age assessment under section 49 or 50 only if the appropriate consent is given.



- (5) The appropriate consent is—
 - (a) where the age-disputed person has the capacity to consent to the use of the scientific method in question, their consent;
 - (b) where the age-disputed person does not have the capacity to consent to the use of the scientific method in question, the consent of—
 - (i) the person’s parent or guardian, or
 - (ii) another person, of a description specified in regulations made by the Secretary of State, who is able to give consent on behalf of the age-disputed person.
 - (6) Subsection (7) applies where—
 - (a) the age-disputed person or, in a case where the age-disputed person lacks capacity, a person mentioned in subsection (5)(b), decides not to consent to the use of a specified scientific method, and
 - (b) there are no reasonable grounds for that decision.
 - (7) In deciding whether to believe any statement made by or on behalf of the age-disputed person that is relevant to the assessment of their age, the decisionmaker must take into account, as damaging the age-disputed person’s credibility (or the credibility of a person who has made a statement on their behalf), the decision not to consent to the use of the specified scientific method.
 - (8) Regulations under this section are subject to affirmative resolution procedure.
 - (9) This section does not prevent the use of a scientific method that is not a specified scientific method for the purposes of an age assessment under section 49 or 50 if the decision-maker considers it appropriate to do so and, where necessary, the appropriate consent is given.
270. **Clause 51(1) and (2)** provide that the SSHD may introduce regulations specifying “scientific methods” to be used for age assessment. She may not introduce regulations specifying methods unless she has determined, after seeking scientific advice, that they are “appropriate” (**Clause 51(3)**). What would make a method appropriate is not defined, and the Bill contains no criteria regarding the source(s) of the advice or any requirement that the scientific advice supports the SSHD’s determination that a particular method is appropriate.
271. **Clause 51(9)** appears to undercut **Clauses 51(1) – (3)** by setting out that decision-makers need not be constrained by the above list of ‘scientific methods’ – they may use any other scientific methods if they are considered appropriate and where consent is given. The standard against which a decision-maker would assess the appropriateness of a scientific method under 51(9) is absent from the Bill and there is no requirement for decision makers to consult scientific advice.



272. Medical age assessment methods are subject to a high margin of error.³⁶⁰ Their evidential value remains contested by UK courts³⁶¹ and in other jurisdictions,³⁶² and by medical professionals and associations.³⁶³ The margin of error of such processes, which can be up to several years, is critical given the age group of children primarily arriving in Europe (15 – 17 years old).³⁶⁴
273. In addition to being subject to a wide margin of error, medical methods used for age assessment can be potentially harmful (such as those that involve exposure to radiation through x-rays). The use of medical assessments raises ethical as well as best interests considerations, as there is no medical benefit to the child, and in light of the margin of error of the result. Indeed, dental x-rays have previously been ruled out for use in assessing age in the UK by the UK Home Office, citing the British Dental Association's views that they are "inaccurate, inappropriate and unethical".³⁶⁵
274. The Committee on the Rights of the Child further confirmed in 2017 that "States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead

³⁶⁰ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (n 3499). See also Council of Europe compilation of Member State practice from 2017 which concludes: "There is a broad consensus that physical and medical age assessment methods are not backed up by empirically sound medical science and that they cannot be assumed to result in a reliable determination of chronological age. Experts agree that physical and medical age assessment methods enable, at best, an educated guess" Council of Europe, *Age assessment: member states' policies, procedures and practices respectful of children's rights in the context of migration*, September 2017, para. 129, available at: <https://www.refworld.org/docid/59d203a14.html>

³⁶¹ The Upper Tribunal (Immigration and Asylum Chamber) has questioned the reliability of dental x-rays in establishing age, see *R (AS) v Kent CC*, [2017] UKUT 446 (IAC), paras. 22-120, available at: <https://tribunalsdecisions.service.gov.uk/utiac/2017-ukut-446>, and *R (ZM and SK) v Croydon*, [2016] UKUT 559 (IAC), paras. 77-80, available at: <https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-559>

³⁶² In *N.B.F. v Spain*, Communication number CRC/C/79/D/11/2017, available at: <https://opic.childrightsconnect.org/view/jurisprudence/entry/1449/> the Committee on Human Rights held that the margin of error for a particular wrist x-ray method used to assess minority remains wide and therefore the method cannot be the sole basis for age assessment procedures. See also UNHCR, *Observations by the UNHCR Regional Representation for Northern Europe on the members of parliament's legislative motion concerning age assessment of children seeking asylum in Norway ("Representantforslag 93 S (2015–2016) om nye og mer treffsikre metoder for alderstesting av barn som søker asyl")*, 8 November 2016, available at: <https://www.refworld.org/docid/582c24be4.html>; UNHCR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal "Age Assessment Earlier in the Asylum Procedure" ("Åldersbedömning tidigare i asylprocessen") Ds 2016:37*, available at: <https://www.refworld.org/pdfid/5937a8e14.pdf>; and for Lithuania, UNHCR, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum (UNHCR observations on the use of age assessments in identification)*, 1 June 2015, available at: <https://www.refworld.org/docid/55759d2d4.html>

³⁶³ See for example Mostad P., and Tamsen, F., *Error rates for unvalidated medical age assessment procedures*, *International Journal of Legal Medicine* 133(2), 2019, pp. 613–623, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6373353/> The study found that of approximately 10,000 individuals subjected to a particular age assessment procedure (combined dental x-ray and bone imaging) in Sweden in 2017 children had a 33% change of being misidentified as adults by the procedure. In the UK the Royal College of Paediatrics and Child Health (RCPCH) notes that "The use of radiological assessment is extremely imprecise and can only give an estimate of within two years in either direction, and the use of ionising radiation for this purpose is inappropriate." and that "dental x-rays, bone age and genital examination will currently not add any further information to the assessment process" See Royal College of Paediatrics and Child Health, *Refugee and unaccompanied asylum seeking children and young people - guidance for paediatricians*, available at: <https://www.rcpch.ac.uk/resources/refugee-unaccompanied-asylum-seeking-children-young-people-guidance-paediatricians>

³⁶⁴ See for example IOM, UNHCR and UNICEF, *Refugee and Migrant Children in Europe - Accompanied, Unaccompanied and Separated: Overview of trends January to December 2020*, 9 July 2021, p.3, available at: <https://data2.unhcr.org/en/documents/details/87693>

³⁶⁵ *British Dental Journal, Home Office rules out X-rays for asylum-seekers*. *Br Dent J* 221 539, 2016, available at: <https://doi.org/10.1038/sj.bdj.2016.803>



to unnecessary legal processes”.³⁶⁶ Besides the effect of invasive techniques, or methods using radiation, medical assessments can exacerbate emotional or psychological distress, and at worst, re-traumatise children and young people who have experienced violence.

275. UNHCR is consequently not in favour of medical processes to assess age and is therefore concerned that the Bill effectively provides for the introduction of an unlimited range of ‘scientific methods’ (including medical methods) with very limited safeguards. To protect the best interests of children, medical age assessment methods, if used, must only be used as part of a holistic and multidisciplinary approach (e.g. alongside evidence from social workers, psychologists and teachers), when they are the least invasive methods and as a last resort.
276. **Clause 51(4)-(5)** specifies that appropriate consent must be given before the use of ‘scientific methods’ on a young person. However, the freedom with which this consent is given may be undermined by **Clause 51(7)**, which specifies that an age disputed person’s refusal to undergo a particular procedure must be taken into account as damaging to their credibility unless they have “reasonable grounds” – undefined - for refusing (**Clause 51(6)**).
277. It is important to highlight that 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. This could include procedures, as the Bill proposes, for “examining or measuring parts of [their] body”. UNHCR is concerned that these provisions may result in children and young people being coerced into undergoing medical age assessment procedures which have no medical benefit to them. It follows that reasons for a person’s refusal to undergo a particular procedure or assessment should be properly explored and their refusal should not result in an automatic finding against their credibility. Furthermore, refusal to undergo age assessment procedures should not have any adverse impact on their asylum claim.
278. The Bill introduces a new standard of proof for accepting that an individual is a child – “the balance of probabilities” – both at the assessment and appeal stages. This standard of proof is higher than the current standard used where age is determined as part of an asylum appeal, which is a “reasonable degree of likelihood”.³⁶⁷ By raising the standard of proof the Bill’s provisions would increase the risk of children being incorrectly assessed as adults. Given the difficulty in accurately assessing age, the challenges children face in collecting and providing evidence (including challenges recounting their experiences at interview)³⁶⁸ and the particular risks for children wrongly assessed as adults in the immigration system (see para 264), the benefit of the doubt and therefore lower standard of proof, a “reasonable degree of likelihood”, should instead be applied.

52 Regulations about age assessments

- (1) The Secretary of State may make regulations about age assessments under section 49 or 50, which may in particular include provision about—

³⁶⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *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*, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 4, available at: <https://www.refworld.org/docid/5a12942a2b.html>

³⁶⁷ *Rawofi (age assessment – standard of proof)*, [2012] UKUT 00197(IAC), para. 14, available at: <https://tribunalsdecisions.service.gov.uk/utiac/2012-ukut-197>

³⁶⁸ UNHCR, *Guidelines on International Protection No. 8* (n 349), paras. 71-73.



- (a) the processes to be followed, including—
 - (i) the information and evidence that must be considered and the weight to be given to it,
 - (ii) the circumstances in which an abbreviated age assessment may be appropriate,
 - (iii) protections or safeguarding measures for the age-disputed person, and
 - (iv) where consent is required for the use of a specified scientific method, the processes for assessing a person's capacity to consent, for seeking consent and for recording the decision on consent;
- (b) the qualifications or experience necessary for a person to conduct an age assessment;
- (c) where an age assessment includes use of specified scientific methods—
 - (i) the qualifications or experience necessary for a person to conduct tests in accordance with those methods, and
 - (ii) the settings in which such tests must be carried out;
- (...)

279. **Clause 52** would allow the SSHD to make regulations about age assessment including regarding the process, qualifications for assessors, scientific method and how a person's non-cooperation may impact their credibility. UNHCR recommends that any regulations and procedures pertaining to age assessment include the following principles and safeguards, some of which are repeated from above:³⁶⁹

- (i) Age assessment should only be carried out when there is a doubt regarding the minority of the applicant, as a last resort and not as a matter of routine;
- (ii) The best interests of the child must be a primary consideration;
- (iii) A holistic assessment of capacity, vulnerability and needs that reflect the actual situation of the young person is preferred to reliance on age assessment procedures aimed at estimating chronological age;
- (iv) Where conducted, age assessments must be carried out in a safe, child- and gender-sensitive manner with due respect for human dignity;
- (v) Age assessment should not be carried out immediately following arrival to allow time for the child to build trust and properly recollect information which can be used when establishing their age;
- (vi) The assessment should be undertaken by qualified, trained professionals. It should be comprehensive and multidisciplinary in nature, balancing a range of physical, psychological, developmental, environmental and cultural factors and taking into account documentary evidence. (Since no single method currently available can determine the exact age of a person, a combination of methods assessing not only the applicant's physical development but also their maturity and psychological development can reduce the age range in question);

³⁶⁹ The principles are drawn from the following documents. UNHCR, *Guidelines on International Protection No. 8* (n 349), see also UNICEF, *Age Assessment: A Technical Note*, January 2013, available at: <https://www.refworld.org/docid/5130659f2.html>; UNHCR observations on the use of age assessments in identification (n 362); *M.S. v. Slovakia and Ukraine (Appl. No 17189/11)*, Council of Europe: ECHR, available at: <https://www.refworld.org/cases,ECHR,5ef0853c4.html>; UNHCR, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, July 2017, available at: <https://www.refworld.org/docid/59633afc4.html>; and Separated Children in Europe Programme, *SCEP Statement of Good Practice*, 4th Revised Edition (revised version forthcoming), March 2010, available at: <https://www.refworld.org/docid/415450694.html>; UNHCR ExCom, *Conclusion on Children at Risk*, ExCom Conclusion No. 107 (LVIII) (2007), available at: <https://www.unhcr.org/uk/excom/exconcl/4717625c2/conclusion-children-risk.html>



- (vii) Information on the procedure and legal consequences should be provided in a “child-friendly” manner and language which children understand;
 - (viii) Medical age assessments are highly contested and are subject to a high margin of error; UNHCR is consequently not in favour of medical processes to assess age. If used, States should use the least invasive option, and as a measure of last resort. They should be part of a holistic and a multi-disciplinary approach (medical, social, cultural, psychological) Best Interest of the Child assessment;
 - (ix) Medical assessments should not take place without the consent of the child;
 - (x) Refusal to undergo age assessment procedures should not have any adverse impact on the asylum eligibility assessment and should not result in any automatic decision concerning the age assessment itself;
 - (xi) Age assessment procedures for individual children should be clearly documented, including reasons for doubting the declared age and undertaking the assessment, the methodology used, the outcome and the possible margin of error;
 - (xii) There must be a procedure to appeal against an age assessment decision as well as the necessary support to do so. This should include access to legal assistance and counselling;
 - (xiii) Applicants should be treated and receive services as children until the conclusion of the assessment of age, and/or while they appeal this decision, including the appointment of a guardian, unless this would be clearly unreasonable;
 - (xiv) Where admission into asylum or other processes are placed on hold until the determination of age, age assessment should take place within a reasonable specified time frame to avoid undue delay in these processes;
 - (xv) Where an age assessment remains inconclusive, the applicant should be given the benefit of the doubt and assumed to be a child. This should include cases where the margin of error allows for the possibility that the individual is under 18 years old; and
 - (xvi) Should the age assessment conclude that the young person is not a child, the applicant should be provided assistance and protection based on a comprehensive assessment of their protection needs and vulnerabilities.
280. **Clauses 53 and 54** make provision for an appeal right for young people to challenge age assessments of local authorities and the proposed NAAB before the First-tier Tribunal. **Clause 56** amends the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (civil legal services) to allow legal aid in appeals relating to age assessments. This is welcome. Given the inherent complexity in assessing age for undocumented young people it is important that any legal remedy pursued allows for proper consideration of complex evidence by appropriately trained specialist decision makers.³⁷⁰ Young people assessed as adults must receive clear information about their right to appeal in a language they understand and have access to legal assistance. UNHCR recommends that those appealing age decisions should be treated as children until such time as the appeal is determined.

³⁷⁰ Studies in the UK have found that some judicial age assessments may not be any more accurate or reliable than those carried out by local authorities. Coram Children’s Legal Centre, *Happy Birthday?: Disputing the age of children in the immigration system*, 2013, available at https://www.childrenslegalcentre.com/wp-content/uploads/2017/04/HappyBirthday_Final.pdf



UNHCR

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

J. The potential for visa penalties to delay or prevent refugee family reunion and resettlement: Clause 69

69 Removals from the UK: visa penalties for uncooperative countries

- (1) The immigration rules may make such visa penalty provision as the Secretary of State considers appropriate in relation to a specified country.
- (2) A country may be specified for the purposes of this section if, in the opinion of the Secretary of State—
 - (a) the government of the country is not cooperating in relation to the return to the country from the United Kingdom of any of its nationals or citizens who require leave to enter or remain in the United Kingdom but do not have it, and
 - (b) as a result, there are nationals or citizens of the country that the Secretary of State has been unable to return to the country, whether or not others have been returned.
- (...)
- (5) “Visa penalty provision” is provision that does one or more of the following in relation to applications for entry clearance made by persons as nationals or citizens of a specified country—
 - (a) requires that entry clearance must not be granted pursuant to such an application before the end of a specified period;
 - (b) suspends the power to grant entry clearance pursuant to such an application;
 - (c) requires such an application to be treated as invalid for the purposes of the immigration rules;
 - (d) requires the applicant to pay £190 in connection with the making of such an application, in addition to any fee or other amount payable pursuant to any other enactment.(...)
- (9) Visa penalty provision may—
 - (a) make different provision for different purposes;
 - (b) provide for exceptions or exemptions, whether by conferring a discretion or otherwise;
 - (c) include incidental, supplementary, transitional, transitory or saving provision.

281. In UNHCR’s view, the prompt, safe and dignified return of those who are not in need of international protection and have no other basis for remaining in a host State promotes the integrity of the asylum system. In this regard, UNHCR urges States to cooperate with each other regarding the return and readmission of their nationals who have no basis for remaining in another State. However, we are concerned that as drafted, these visa penalties could also fall on individuals in need of international protection or who are seeking to join family members in the United Kingdom through refugee family reunion or other human rights routes. We therefore urge the United Kingdom to consider expressly exempting all such applications from the visa penalty scheme.