

## Written evidence submitted by the UNHCR, the UN Refugee Agency (NBB34)

### Introduction

1. The Nationality and Borders Bill<sup>1</sup> follows almost to the letter the Government's New Plan for Immigration Policy Statement,<sup>2</sup> issued on 24 March 2021, in some cases adding further restrictions on the right to claim asylum and on the rights of refugees. UNHCR must therefore regretfully reiterate 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 Convention<sup>3</sup> and with the country's long-standing role as a global champion for the refugee cause.
2. We set out below our main areas of concern, reflecting our supervisory role with regard to the 1951 Convention and its 1967 Protocol (together, "the Refugee Convention").<sup>4</sup> 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

3. The Bill is based on the premise that "people should claim asylum in the first safe country they arrive in".<sup>5</sup> This principle is not found in the Refugee Convention and there is no such requirement under international law.<sup>6</sup> On the contrary, in international law, the primary responsibility for identifying refugees and affording international

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

<sup>2</sup> Available at: <https://www.gov.uk/government/consultations/new-plan-for-immigration>

<sup>3</sup> *Nationality and Borders Bill Explanatory Notes*, para. 68 and 292, available at: <https://bills.parliament.uk/bills/3023/publications>; UNHCR's *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>

<sup>4</sup> Under the 1950 Statute of the Office of the High Commissioner (UN General Assembly, 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* 189 UNTS 137 (1951 Convention), [www.refworld.org/docid/3be01b964.html](http://www.refworld.org/docid/3be01b964.html).

<sup>5</sup> 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, 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." <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, page 5, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/947897/inadmissibility-guidance-v5.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf); and Explanatory Notes (n 3), para. 21, 23 and 145.

<sup>6</sup> See UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, para. 11, available at: [www.refworld.org/docid/3fe9981e4.html](http://www.refworld.org/docid/3fe9981e4.html).

protection rests with the State in which an asylum-seeker arrives and seeks that protection.<sup>7</sup>

4. 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. 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.<sup>8</sup> 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.
5. 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 developing countries.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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

6. 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

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<sup>7</sup> 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*, 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](http://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>

<sup>8</sup> *Refugee Convention*, (n 4), Preambular Paragraph 4. UNGA, ‘*Report of the United Nations High Commissioner for Refugees, Part II: Global compact on refugees*’ A/73/12 (Part II), 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](http://www.unhcr.org/gcr/GCR_English.pdf)

<sup>9</sup> UNHCR, *Refugee data finder*, available at: <https://www.unhcr.org/refugee-statistics/>

<sup>10</sup> UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, para. 44, 49, available at: [www.refworld.org/docid/5d8a255d4.html](http://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).

<sup>11</sup> 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](https://ec.europa.eu/eurostat/databrowser/view/demo_pjan/default/table?lang=en)) shows that out of 42 European countries, the UK is 21<sup>st</sup> 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.

out in detail below, these penalties target those who had entered the UK irregularly or who had made dangerous journeys; those who have not come directly to the UK – regularly or irregularly - from a country or territory where their life or freedom was threatened; those who have delayed claiming asylum or overstayed; and those who arrive in the UK without entry clearance and claim asylum immediately.

7. 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. 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 10(1)-(3)**]
  
8. 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.
  
9. 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.<sup>12</sup>

10. 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.<sup>13</sup> This would deliberately impede their integration and naturalisation, rather than facilitating it as required by Article 34 of the Refugee Convention.
11. 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.<sup>14</sup> 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.<sup>15</sup> 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.
12. 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.<sup>16</sup> 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

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<sup>12</sup> The Bill specifically mentions the possibility of discrimination in terms of the length of periods of limited leave, [Clause 10(5)(a)]; the requirements for settlement, [Clause 10(5)(b)]; and whether family will be given leave to enter or remain in the United Kingdom, [Section 10(5)(d)]; but these are given as examples only of a more general power to discriminate. Clause 10(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.

<sup>13</sup> *Explanatory Notes* (n 3), para. 19.

<sup>14</sup> *Ibid.*

<sup>15</sup> 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 2), 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*, 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](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).

<sup>16</sup> *Explanatory Notes* (n 3), para. 19.

the refugee”<sup>17</sup> and that refugees should “benefit from a family reunification procedure that is more favourable than that foreseen for other aliens”.<sup>18</sup>

13. 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:

*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.*<sup>19</sup>

14. 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”.<sup>20</sup> 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.<sup>21</sup>
15. 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.<sup>22</sup> The express intention is to deny them many of those rights.

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<sup>17</sup> UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <https://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html>.

<sup>18</sup> *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, para. 75, available at: <https://www.refworld.org/cases/ECHR,53be80094.html>. See also paras. 23-25, *FH (Post-flight spouses)* [2010] UKUT 275, 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.

<sup>19</sup> Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25185&lang=en>

<sup>20</sup> For this reason, a processing time of over three years was found to be unlawful. *Tanda-Muzinga* (n 18), para 82, <http://hudoc.echr.coe.int/eng?i=001-145358>

<sup>21</sup> We note that at paragraph 12 of its *Nationality and Borders Bill European Convention on Human Rights Memorandum*, 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*, 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 M.A. v Denmark* (Application no. 6697/18, EctHR (Grand Chamber), para. 151, available at: <http://hudoc.echr.coe.int/fre?i=001-211178>

<sup>22</sup> *Explanatory Notes* (n 3), para. 146.

## Practical consequences of Group 2 status

16. 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,<sup>23</sup> 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.
17. The initial challenges refugees in the UK face in re-entering the workforce are also well-documented:<sup>24</sup> their skills, qualifications and work experience may not be recognised, and they will have had no opportunity for work or training while awaiting a decision on their asylum claims. Multiple studies have shown, moreover, that precarious status itself is a barrier to integration and employment.<sup>25</sup> Yet, in spite of these challenges, the Bill will specifically empower the Secretary of State to attach a “No Recourse to Public Funds” condition on 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”.<sup>26</sup>
18. 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

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<sup>23</sup> 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](https://www.euro.who.int/_data/assets/pdf_file/0004/386563/mental-health-eng.pdf)

<sup>24</sup> 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>

<sup>25</sup> 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, 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.” Home Office, *Indicators of Integration framework 2019*, Third Edition, Pg. 52, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/835573/home-office-indicators-of-integration-framework-2019-horr109.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835573/home-office-indicators-of-integration-framework-2019-horr109.pdf)

<sup>26</sup> *Explanatory Notes*, (n 3), para. 19. 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 21), para. 11.

litigation. They include difficulty accessing shelters for victims of domestic violence,<sup>27</sup> denial of free school meals where these are linked to the parents' benefit entitlement,<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

19. 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.<sup>32</sup> 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.<sup>33</sup>
20. 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

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<sup>27</sup> [https://www.nrpfnetwork.org.uk/information-and-resources/policy/support-for-victims-of-domestic-abuse; Nowhere to Turn 2021. Women's Aid, p. 25 available at:https://www.womensaid.org.uk/wp-content/uploads/2021/07/Nowhere-to-Turn-2021-WIP-4-copy\\_FINAL.pdf](https://www.nrpfnetwork.org.uk/information-and-resources/policy/support-for-victims-of-domestic-abuse;Nowhere%20to%20Turn%202021.%20Women's%20Aid.%20p.%2025%20available%20at: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).

<sup>28</sup> <https://guidance.nrpfnetwork.org.uk/reader/practice-guidance-families/eligibility-for-other-services/#136-free-school-meals>

<sup>29</sup> *Access Denied: The cost of the 'no recourse to public funds' policy*, the Unity Project, available at: [https://static1.squarespace.com/static/590060b0893fc01f949b1c8a/t/5d0bb6100099f70001faad9c/1561048725178/Access+Denied+-](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)

[+the+cost+of+the+No+Recourse+to+Public+Funds+policy.+The+Unity+Project.+June+2019.pdf](https://www.ippr.org/files/2021-09/locked-out-of-a-livelihood.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>

<sup>30</sup> Morris and Qureshi (n 29), 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.")

<sup>31</sup> Public Funds, <https://www.gov.uk/government/publications/public-funds--2/public-funds>

<sup>32</sup> 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. <https://www.gov.uk/government/publications/fees-for-citizenship-applications/fees-for-citizenship-applications-and-the-right-of-abode-from-6-april-2018>

<sup>33</sup> Where the parents' nationality requires registration of births abroad, the children will be stateless.

afterwards.<sup>34</sup> This risk has been recognized by the Council of Europe,<sup>35</sup> 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.<sup>36</sup>

21. 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 Notes<sup>37</sup> and the ECHR Memorandum<sup>38</sup> – 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**

22. 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).<sup>39</sup> It is not.
23. 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

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<sup>34</sup> Over 90% of refugee family reunion grants are for women and children. Home Office statistics show that from 2015 – Q2 2021 there were 34,562 family reunion visa grants to women and children of a total of 37,841 grants. Home Office, Family Reunion Visa Grants, Year Ending June 2021, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1011729/family-reunion-visa-grants-datasets-jun-2021.xlsx](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1011729/family-reunion-visa-grants-datasets-jun-2021.xlsx). See also, UNHCR, *Position on Safe and Legal Pathways*, 8 February 2019, para. 24, available at: <https://www.refworld.org/docid/5ce4f6d37.html>.

<sup>35</sup> Parliamentary Assembly of the Council of Europe, Resolution 2243(2018) (n 19), para. 2.

<sup>36</sup> 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](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)*, available at:

[https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research%20Brief\\_TPV\\_SHEV\\_Aug\\_2018.pdf](https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research%20Brief_TPV_SHEV_Aug_2018.pdf); Sue Hoffman, *Temporary Protection Visas & SIEV X*, Sievx.com, 6 February 2006, available at:

<http://sievx.com/articles/challenging/2006/20060206SueHoffman.html>; Sue Hoffman, *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>.

<sup>37</sup> *Explanatory Notes* (n 3), para. 145: “The purpose of this [Clause 10] 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.”

<sup>38</sup> *ECHR Memorandum* (n 21), para.12, describing the three purposes of Clause 10 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.”

<sup>39</sup> *Explanatory Notes*, (n 3) para. 19 and *ECHR Memorandum* (n 21), para. 12.

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.<sup>40</sup> 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; 3) whether or not the refugee sought or found protection *de jure* or *de facto*.<sup>41</sup>

24. 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.
25. The Bill is inconsistent with Article 31(1) in five 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 10(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 10(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 10(5)(d) and Clause 10(6)(a)]**;
  - (iv) It creates a new offence of “arriving” in the UK without a visa (where one is required), **[Clause 37]**, to which there would be no defence based on article 31(1);<sup>42</sup> 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 Convention”) for offences committed while seeking to leave the UK **[Clause 34(4)]** - something that the House of Lords found would be inconsistent with the Refugee Convention.<sup>43</sup> 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.
26. 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 34(4) of the Bill** does not amend that section to bring it into line with Article

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<sup>40</sup> UNCHR, *Observations on the New Plan for Immigration* (n 2), para. 13.

<sup>41</sup> *R v. Uxbridge Magistrates Court and Another, Ex Parte Adimi*, [1999] EWHC Admin 765; [2001], p.773. Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999.

<sup>42</sup> The UK’s “Defences based on Article 31(1) of the Refugee Convention” are found at section 31 of the Immigration and Asylum Act 1999, 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.

<sup>43</sup> *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), para. 26 and 59, available at: [https://www.refworld.org/cases.GBR\\_HL\\_4835401f2.html](https://www.refworld.org/cases.GBR_HL_4835401f2.html)

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).<sup>44</sup>

27. Finally, at Clause 34, 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 interpretation 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.<sup>45</sup>

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

28. 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.
29. 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.

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<sup>44</sup>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 43), para. 77.

<sup>45</sup> *Adimi* (n 41); [2001] Q.B. 667, United Kingdom: High Court (England and Wales), para. 18, available at: [www.refworld.org/cases,GBR\\_HC\\_QB.3ae6b6b41c.html](http://www.refworld.org/cases,GBR_HC_QB.3ae6b6b41c.html); *R v. Asfaw* (n 43), para. 15 and 36; *R. and Koshi Pitshou Mateta and others* [2013] EWCA Crim 1372, United Kingdom: Court of Appeal (England and Wales), 30 July 2013, para. 12-15 and 21(iv), available at: [www.refworld.org/cases,GBR\\_CA\\_CIV.5215e0214.html](http://www.refworld.org/cases,GBR_CA_CIV.5215e0214.html); *Decision KKO:2013:21*, Finland: Supreme Court, 5 April 2013, available at: [www.refworld.org/cases,FIN\\_SC.557ac4ce4.html](http://www.refworld.org/cases,FIN_SC.557ac4ce4.html); also see UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 10), para. 39.

30. 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”.<sup>46</sup> 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.<sup>47</sup>
31. However, the UK’s inadmissibility rules have a far broader reach. **[Clause 14]** 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 applicant 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 accordance with the Refugee Convention.<sup>48</sup> 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”) it appears it may arguably be sufficient that in general there is the possibility of applying for refugee status in that State.
32. 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 14, Section 80C(2)-(6)]**
33. 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

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<sup>46</sup> These enact into legislation the immigration rules on inadmissibility that have been in effect since 11:00pm on 31 December 2020. See Paragraphs 345A-345D of the immigration rules, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

<sup>47</sup> UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 10), para. 1.

<sup>48</sup> 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 14 of the Bill, while the five connections to such a State that would trigger inadmissibility are listed at Section 80C.

‘connection’ and trigger inadmissibility,<sup>49</sup> 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.<sup>50</sup>

34. In a significant and highly problematic departure from international practice and UK caselaw,<sup>51</sup> 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” third State. The ‘connection’ requirement therefore appears to be meaningless in terms of ensuring the reasonableness and appropriateness of actual transfers.
35. The result of a finding of inadmissibility is that, unless the Secretary State decides there are “exceptional circumstances”, the claimant will be denied access to the UK asylum system for a “reasonable period” (currently defined as six months by Home Office policy, but not defined in the Bill), while the UK seeks to transfer them to “any other safe country”.<sup>52</sup> In the first six months after the implementation of the inadmissibility provisions of the immigration rules (which are echoed in these statutory provisions), the asylum claims of over 4,500 people were put on hold by the issuance of notices of potential inadmissibility, but the UK only sought to transfer seven of them.<sup>53</sup>

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<sup>49</sup> Mere transit of a safe third country has been found to be an insufficient connection to ground a finding of inadmissibility under European law. *LH v Bevándorlási és Menekültügyi Hivatal* Case C-564/18 (19 March 2020), 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>

<sup>50</sup> 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).”

<sup>51</sup> *RR (Refugee - Safe Third Country) Syria v. Secretary of State for the Home Department*, [2010] UKUT 422 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 13 November 2010, available at: [https://www.refworld.org/cases,GBR\\_UTIAC,4cffa9892.html](https://www.refworld.org/cases,GBR_UTIAC,4cffa9892.html) (“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.”) 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, employed in practice. UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, p. 60, available at: <https://www.refworld.org/docid/4bab55752.html>

<sup>52</sup> **Section 80B(6).**

<sup>53</sup> <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2021/how-many-people-do-we-grant-asylum-or-protection-to> As the UK does not yet have any transfer or readmission agreements with “any other safe country”, the effect of the current inadmissibility rules has been to place asylum-seekers in limbo for six months. This has already placed additional pressure on asylum accommodation, and it is likely to have had adverse effects on the mental and physical health and future integration prospects of asylum-seekers and their families. These adverse effects are likely to be increased by the possibility set out in the Bill of providing asylum-seekers in the “inadmissibility process” with reduced financial support and accommodation in “basic” reception centres that are designed to facilitate expedited processing and removal

36. Nor would it be only those whose claims are declared inadmissible who would be at risk of transfer to a third country. **Schedule 3**<sup>54</sup> 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”,<sup>55</sup> there is nothing in the language of the Bill itself that would limit removals to such a purpose.
37. 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 14. 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.<sup>56</sup> There is no requirement that the territory be a State or a party to the Refugee Convention,<sup>57</sup> 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 of violations of their rights under the ECHR, but provides no such opportunity with regard to the risk of persecution or onward refoulement or expulsion prohibited under the Refugee Convention.<sup>58</sup>
38. Transferring asylum-seekers or recognised refugees<sup>59</sup> to territories with which they have no prior connection and without an individualised consideration of safety, access to fair and efficient asylum procedures and to international protection, or reasonableness 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 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

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<sup>54</sup> 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.

<sup>55</sup> *Explanatory Notes* (n 3), para. 21.

<sup>56</sup> Section 77(2B) (created by Schedule 3 of the Bill).

<sup>57</sup> Section 77(2C)(c) and (d) and Schedule 3(5).

<sup>58</sup> 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*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011, para. 104, available at: [https://www.refworld.org/cases\\_ECJ\\_4ef1ed702.html](https://www.refworld.org/cases_ECJ_4ef1ed702.html); *M.S.S. v. BELGIUM AND GREECE - 30696/09* [2011] ECHR 108 (21 January 2011), 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>

<sup>59</sup> 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.

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.

### **The Bill would criminalise seeking asylum**

39. The Bill would make it a criminal offence for an asylum-seeker who requires entry clearance (a visa) to arrive in the United Kingdom without it, even if they claimed 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,"<sup>60</sup> 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.<sup>61</sup> Ninety percent 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.<sup>62</sup>
40. The maximum sentence for this offence 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. There would be no defences based on Article 31(1) of the Refugee Convention for any of these offences.
41. 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, something the Canadian Supreme Court has found violates Article 31 of the Refugee Convention.<sup>63</sup> Friends, family members and others with purely humanitarian motives would also be criminalised.<sup>64</sup> Even trafficking victims could face criminal penalties under this new provision.<sup>65</sup> The maximum sentence of imprisonment for this offence will rise from 14 years to imprisonment for life.<sup>66</sup> Finally, it would no longer be an element of the criminal offence of assisting an

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<sup>60</sup> *Explanatory Notes* (n 3), para. 388.

<sup>61</sup> 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>

<sup>62</sup> <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-applications-decisions-and-resettlement>;  
<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-visa-national-list>

<sup>63</sup> *R. v. Appulonappa*, 2015 SCC 59, Canada: Supreme Court, 27 November 2015, para. 43, available at: [https://www.refworld.org/cases\\_CAN\\_SC.56603caa4.html](https://www.refworld.org/cases_CAN_SC.56603caa4.html) and *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, available at: [www.refworld.org/cases\\_CAN\\_SC.56603be94.html](https://www.refworld.org/cases_CAN_SC.56603be94.html).

<sup>64</sup> See, e.g. *Sternaj v. Director of Public Prosecutions*, [2011] EWHC 1094 (Admin), United Kingdom: High Court (England and Wales), 12 April 2011, available at: [https://www.refworld.org/cases\\_GBR\\_HC\\_QB.535e75c54.html](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.

<sup>65</sup> 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, 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>

<sup>66</sup> Clause 38(1).

asylum-seeker to come to the UK to claim asylum (lawfully or unlawfully) that the assistance was provided “for gain”.<sup>67</sup>

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

42. 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 process<sup>68</sup> and narrowing the definition of “particular social group”,<sup>69</sup> creating accelerated appeal procedures for reasons unrelated to the merits of the claim,<sup>70</sup> directing decision-makers (including judges) to consider giving “minimal weight” to evidence<sup>71</sup> or make adverse credibility findings<sup>72</sup> 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.<sup>73</sup>

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

43. Finally, 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.<sup>74</sup>
44. The Bill is premised on the claim that the asylum system is “broken”<sup>75</sup> and in need of “urgent” reform.<sup>76</sup> 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 just last year, 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.<sup>77</sup> These reforms – and others which UNHCR

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<sup>67</sup> Clause 38(2).

<sup>68</sup> Clause 29.

<sup>69</sup> Clause 30.

<sup>70</sup> Clause 21(1) and Clause 24(3)

<sup>71</sup> Clause 23(2).

<sup>72</sup> Clause 17 and Clause 20.

<sup>73</sup> Clause 35.

<sup>74</sup> According to the Explanatory Notes, only 40% of asylum applicants in 2019 arrived clandestinely. *Explanatory Notes* (n 3), 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.

<sup>75</sup> See the speech of the Home Secretary introducing the Bill (n 5).

<sup>76</sup> *Consultation Response* (n 15), pp. 4 and 10.

<sup>77</sup> <https://www.gov.uk/government/collections/tribunals-statistics>.

proposed in February of this year<sup>78</sup> - 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**

45. 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 653 thus far in 2021.<sup>79</sup> 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 resettle in the future.<sup>80</sup> To put this in context, there are 26.4 million refugees worldwide today, while another 48 million people are displaced within their own country.<sup>81</sup> 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.
46. 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."<sup>82</sup>

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<sup>78</sup> UNCHR, *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>

<sup>79</sup> <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets>

<sup>80</sup> 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 15), p. 7.

<sup>81</sup> UNHCR, *Refugee data finder* (n 9)

<sup>82</sup> *Explanatory Notes* (n 3), para. 13.

## Annex: Detailed legal observations

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.

### Key areas of concern

- A. The creation of an unlawful two-tier system in which most refugees are denied rights guaranteed by the Refugee Convention and essential to their integration (para. 47-62).
  - B. The unprecedented breadth and consequences of the concept of "inadmissibility" (para. 69-101)
  - C. Potential departures from well-established principles of refugee status determination (para. 102-106)
  - D. Restrictions on rights of appeal (para. 107-123)
  - E. 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 (para. 124-132)
  - F. Interpretations of key concepts of refugee law that could lead to international protection being wrongly denied to those who need it (para. 133-180)
  - G. The increased criminalisation of seeking asylum (para. 181-188)
  - H. Risks to children (para. 189-201)
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- A. 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

### Part 2, Clause 10 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.

47. Clause 10 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 10(1)-(3)**]

48. 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.

49. 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.

- (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).
- (...)

50. 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);
- (iii) and facilitating all refugees’ integration and naturalisation (Article 34).

51. 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.

52. In UNCHR’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 did not meet the additional criteria to qualify for “Group 1” status [**Clause 10(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 (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.”<sup>83</sup>

53. 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 very 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.<sup>84</sup>
54. 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 10(5)(a)**]; the conditions for qualifying for settlement [**Clause 10(5)(b)**]; and whether members of their family will be given leave to enter or remain in the United Kingdom [**Clause 10(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.<sup>85</sup> **Clause 10(6)** would give the Secretary of State the same power to discriminate against the family members of Groups 2 refugees.
55. 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.<sup>86</sup> This would deliberately impede their integration and naturalisation, rather than facilitating it as required by Article 34.
56. 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.<sup>87</sup> The structure of this sentence leaves

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<sup>83</sup> *ECHR Memorandum* (n 21), para. 66.

<sup>84</sup> 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, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 12, para. 34 available at: <https://www.supremecourt.uk/cases/uksc-2010-0149.html>. For further detail, see our *Observations on the New Plan for Immigration* (n 3), para. 5.

<sup>85</sup> 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.

<sup>86</sup> *Explanatory Notes* (n 3), para. 19.

<sup>87</sup> *Ibid.*

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 can be returned or removed” [emphasis added].<sup>88</sup> In the first scenario described here, leave would simply not be renewed, while in the second, it would be curtailed.

57. 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.
58. 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”.<sup>89</sup> UNHCR’s governing Executive Committee, of which the UK is a member, has repeatedly highlighted the need to protect the unity of the refugee family and has adopted a series of Conclusions that reiterate the fundamental importance of family reunification.<sup>90</sup> Among the 42 out of 44 States of the

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<sup>88</sup> *New Plan for Immigration Policy Statement* (n 2), 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 15) p. 10.

<sup>89</sup> UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: <https://www.unhcr.org/protection/travaux/40a8a7394/final-act-United-nations-conference-plenipotentiaries-status-refugees-stateless.html>. 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*, December 2011, HCR/1P/4/ENG/REV. 3, Annex 1 and para. 182, available at: <https://www.refworld.org/docid/4f33c8d92.html>

<sup>90</sup> The Executive Committee is elected by the UN Economic and Social Council and consists of representatives of Member States and of specialist agencies. While not legally binding on State Parties its Conclusions are adopted by consensus by the States which are Members of the Executive Committee of UNHCR and represent statements of opinion that are broadly representative of the views of the international community. In Conclusions adopted in 1981, for example, the Executive Committee stated: “It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.” UNHCR ExCom, Family Reunification No. 24 (XXXII) - 1981, 21 October 1981, No. 24 (XXXII), available at: <https://www.refworld.org/docid/3ae68c43a4.html>. In a further set of Conclusions adopted in 1998, 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.<sup>91</sup>

59. 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”.<sup>92</sup>
60. 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.<sup>93</sup> 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,<sup>94</sup> 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.<sup>95</sup>
61. 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,<sup>96</sup> the EU’s Directive on Family Reunification exempts refugees from the minimum residence requirements for family reunion that may be imposed on other migrants,<sup>97</sup> 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

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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, No. 85 (XLIX), available at: <https://www.refworld.org/docid/3ae68c6e30.html>

<sup>91</sup> *Case of M.A. v Denmark* (n 21), para. 69.

<sup>92</sup> *Tanda-Muzinga* (n 18), para. 75; *Mugenzi c. France*, Requête no 52701/09, Council of Europe: European Court of Human Rights, 10 July 2014, 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 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>).

<sup>93</sup> *Explanatory Notes*, para. 19.

<sup>94</sup> See para. 105, *MM (Lebanon) v SSHD* [2017] UKSC 10, available at: <https://www.supremecourt.uk/cases/uksc-2015-0011.html>.

<sup>95</sup> See *FH (Post-flight spouses)* (n 18), 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.

<sup>96</sup> *Tanda-Muzinga* (n 18), para 82, <http://hudoc.echr.coe.int/eng?i=001-145358>

<sup>97</sup> *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>

allowing them to rebuild their lives in their new homes”.<sup>98</sup> 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.*<sup>99</sup>

62. 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.”<sup>100</sup>

### Misapplication of Article 31

63. 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.
64. 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.<sup>101</sup> The UK High Court in

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<sup>98</sup> Council of Europe Commissioner for Human Rights, *Realising the right to family reunification of refugees in Europe*, page <https://rm.coe.int/prems-052917-gbr-1700-realising-refugees-160x240-web/1680724ba0> We note that at paragraph 12 of its *European Convention on Human Rights Memorandum* (n 21), 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. *M.A. v Denmark* (n 21), para. 151.

<sup>99</sup> Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25185&lang=en>

<sup>100</sup> *M.A. v Denmark* (n 21), para. 148. This general observation is borne out by the example of United Kingdom litigation: by the time the Court of Appeal heard found that the denial of entry clearance to a refugee’s post-flight spouse 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 18), 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

<sup>101</sup> UNCHR, *Observations on the New Plan for Immigration* (n 3), para. 13.

*Adimi* introduced three benchmarks to interpret “coming directly”: 1) the length of stay in the intermediate country; 2) the reason for the delay; 3) whether or not the refugee sought or found protection *de jure* or *de facto*.<sup>102</sup>

65. 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.
66. The Bill is inconsistent with Article 31(1) in five 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 10(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 10(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 10(5)(d) and Clause 10(6)(a)**];
  - (iv) It creates a new offence of “arriving” in the UK without a visa (where one is required), [**Clause 37**], to which there would be no defence based on article 31(1);<sup>103</sup> 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 Convention”) for offences committed while seeking to leave the UK [**Clause 34(4)**] - something that the House of Lords found would be inconsistent with the Refugee Convention.<sup>104</sup> 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.
67. 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 34(4) of the Bill** does not amend that section to bring it into line 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).<sup>105</sup>

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<sup>102</sup> *Adimi* (n 41).

<sup>103</sup> The UK’s “Defences based on Article 31(1) of the Refugee Convention” are found at section 31 of the Immigration and Asylum Act 1999, 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.

<sup>104</sup> *Asfaw* (n 43), para. 26 and 59.

<sup>105</sup> 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

68. Finally, at Clause 34, 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 interpretation 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.<sup>106</sup>

## **B. The unprecedented breadth and consequences of the concept of “inadmissibility”**

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

(i) A national of a Member State of the European Union [**Clause 13**].

(ii) Persons with a “connection” to a “safe third State”. [**Clause 14**].

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

71. The Bill’s first mention of inadmissibility is at **Clause 11(1), page 14, line 5**,<sup>107</sup> which 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.<sup>108</sup>

72. 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 six months. Moreover, nothing in the Bill would require those whose claims drop out of the inadmissibility process to be rehoused outside of

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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.” *Asfaw* (n 43) para. 77.

<sup>106</sup> *Adimi* (n 41), para. 18; *Asfaw* (n 43), para. 15 and 36; *Mateta* (n 45), para. 12-15 and 21(iv); *Decision KKO:2013:21*, Finland (n 45); also see UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 10), para. 39.

<sup>107</sup> “(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)”.

<sup>108</sup> *Explanatory Notes* (n 3), para. 20.

this “basic” accommodation while their claim is being considered (a period that at present is between one and three years).<sup>109</sup> In addition, the Bill would empower the Secretary of State to remove the current six-month maximum for residence in a reception centre. **[Clause 11 (8)]**.<sup>110</sup> 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 increase refugees’ need for support in the future and delay their integration.

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<sup>109</sup> According to a Freedom of Information request made by the Refugee Council to the Home Office, in 2020 33,016 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. <https://refugeecouncil.org.uk/latest/news/thousands-seeking-asylum-face-cruel-wait-of-years-for-asylum-decision-fresh-research-shows/>

<sup>110</sup> Section 25 of the Nationality, Immigration and Asylum Act 2002, 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”.

**Part 2, Clause 13 Asylum claims by EU nationals: inadmissibility**

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

“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.

73. The Bill contains two separate provisions with regard to safe countries of origin. The first makes asylum claims by nationals of Members 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 326F<sup>111</sup> 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:*

*(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;*<sup>112</sup>

*(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.*<sup>113</sup>

The Bill would enact this rule into legislation, with two significant changes. The first is that phrase “Exceptional circumstances may include in particular” would be replaced with “exceptional circumstances include”, and the Explanatory Notes clarify that the list of exceptions is now intended to be “exhaustive”.<sup>114</sup> The second is that the reference to the applicant satisfying the Secretary of State as to the existence of exceptional circumstances has been deleted.

74. 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.<sup>115</sup> As such, 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 a safe country of origin does not establish an absolute guarantee of safety for nationals of that country, however,

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<sup>111</sup> Available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

<sup>112</sup> 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 . . .” *European Convention on Human Rights*, available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)

<sup>113</sup> 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.

<sup>114</sup> *Explanatory Notes* (n), para. 182.

<sup>115</sup> These are defined as claims that are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Refugee Convention or to any other criteria justifying the granting of asylum. See UNHCR ExCom, *Conclusion on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) -1983, (ExCom 30) para. (d), available at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html> and UN High Commissioner for Refugees (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>.

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.<sup>116</sup>

75. It is fundamentally inconsistent with these principles that the Bill would require that all claims from citizens of Member States of the EU be treated as inadmissible unless the State itself had declared that it was derogating from its obligations under the ECHR, or there was a formal legal procedure at the European level, in which European institutions identified a “clear risk” of violations of fundamental rights there. If the Bill is interpreted in the way indicated by the Explanatory Notes, there would be no consideration of the applicant’s individual circumstances or of the State’s actual ability or willingness to provide protection; in fact, the view of any decision maker in the UK would be irrelevant. This would be consistent with the elimination of the reference in Paragraph 326F to the *individual applicant* satisfying the Secretary of State as to the existence of exceptional circumstances. By eliminating the possibility of rebutting a presumption of safety, the Bill (if applied in this way) would violate the Refugee Convention.<sup>117</sup>
76. 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.<sup>118</sup> Contrary to these principles, there is no express provision in the Bill

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<sup>116</sup> See UNHCR, *UNHCR Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and withdrawing refugee status* (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, p. 41 (Comment on Article 30), available at: <http://www.unhcr.org/refworld/docid/42492b302.html>. See also 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.”

<sup>117</sup> 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, 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. *Canada: Immigration and Refugee Board of Canada, European Union (EU) Member States: Application of the "Protocol on Asylum for Nationals of Member States"*, 12 October 2007, ZZZ102549.E, available at: <https://www.refworld.org/docid/474e89551e.html>. As the 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.” *ZV (Lithuania) v Secretary of State for the Home Department* [2021] EWCA Civ 1196, para. 21, available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1196.html>. Under the current inadmissibility rules for EU nationals, the exceptional circumstances under which a claim might be considered “may include, in particular” a formal derogation under Article 15 ECHR or proceedings under Article 7 TFEU. Paragraphs 326E and 326F, available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>. This language makes it explicit that other exceptional circumstances are possible, in accordance with condition (d) of the Spanish Protocol. *Id.* at para. 25. The shift in language in the Bill to “include” is intended to remove that flexibility: the Explanatory Notes confirm at paragraph 182 that Sections 80A(4) and (5) contain “an exhaustive list of exceptions”. This would eliminate the opportunity to rebut the presumption that an EU Member State is safe. As the UK Court of Appeal has noted, if the inadmissibility rules did not allow for presumptions of safety to be rebutted, they would violate the Convention. *ZV (Lithuania)*, para. 39 (finding that a *rebuttable* presumption of safety did not violate the Convention).

<sup>118</sup> UNHCR, “*Asylum Processes (Fair and Efficient Asylum Procedures)*” in *Global Consultations on International Protection* (31 May 2001), available at: <https://www.refworld.org/docid/3b36f2fca.html>, p. 9, para. 39.

for any consideration of any evidence concerning the actual circumstances in European Members States by the Secretary of State or any other body within the United Kingdom. If the Bill were to be interpreted in line with the Explanatory Notes, the only relevant consideration would be whether the country itself or the Council of the European Union had taken one of a very narrow range of exceptional legal steps.

77. The risk of refoulement would be exacerbated in such cases by the fact there would be no right of appeal against the decision.

### **Part 2, Clause 14 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.
- (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.
- (...)

78. As noted above at paragraph 30, 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.

79. 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; and
- (iv) The tenuousness of the connection to a “safe” State that would allow for a declaration of inadmissibility.

## **Part 2, Clause 14 Asylum claims by persons with connection to safe third State: inadmissibility**

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

- (1) 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.
80. 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.
81. UNCHR 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.<sup>119</sup> 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.<sup>120</sup> There is no indication that such an individualised

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<sup>119</sup> 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>

<sup>120</sup> 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, 21 October 2009) (*Comments on the Qualification Directive 2009*), p. 35. available at: <https://www.refworld.org/docid/4c503db52.html>.

assessment would be required here. This omission becomes particularly concerning when seen in the context of the rest of Clause 14, 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.

82. 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.<sup>121</sup>
83. "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)]**
84. 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,<sup>122</sup> and these must be met in both law and practice.<sup>123</sup> 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; 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.<sup>124</sup> 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.<sup>125</sup>
85. 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"

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<sup>121</sup> 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. *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>.

<sup>122</sup> UNHCR, *Summary Conclusions on the Concept of "Effective Protection"* (n 6).

<sup>123</sup> UNHCR, *Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)(Comments on the Procedures Directive*, available at <https://www.unhcr.org/uk/protection/operations/4c640eee9/unhcr-comments-european-commissions-proposal-directive-european-parliament.html>, p. 33.

<sup>124</sup> UNHCR *Observations on the Proposal for amendments to the Danish Alien Act* (n 7), para. 23.

<sup>125</sup> UNHCR, *Improving Asylum Procedures*, (n 51), p. 59.

as “manifestly safe . . .with well-functioning asylum systems”.<sup>126</sup> 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.<sup>127</sup> They are further borne out by Schedule 3 of the Bill, discussed below at paragraphs 124-132, which would make un rebuttable 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.<sup>128</sup>

#### **Clause 14, 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 it is unlikely to be possible to remove the claimant to a safe third State within a reasonable period of the declaration of inadmissibility,
  - (b) if the Secretary of State determines that there are exceptional circumstances in the particular case that mean the claim should be considered, or
  - (c) in such other cases as may be provided for in the immigration rules.

86. UNCHR 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)].**

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<sup>126</sup> *New Plan for Immigration Policy Statement* (n 2), p.18.

<sup>127</sup> See, e.g. *M.S.S. v. Belgium and Greece - 30696/09* [2011] ECHR 108 (21 January 2011), available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103050&filename=001-103050.pdf&TID=cwvzdogrzt>; Judgment of the Court (Grand Chamber) of 21 December 2011 in *N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 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>; Judgment of the Court (Grand Chamber) of 17 December 2020, *European Commission v Hungary*, Case C-808/18, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0808>; *R.R. and others v Hungary (application no. 36037/17)*, Council of Europe: European Court of Human Rights, 2 March 2021, available at: [https://www.refworld.org/cases\\_ECHR\\_604265c74.html](https://www.refworld.org/cases_ECHR_604265c74.html); *CASE OF ILIAS AND AHMED v. HUNGARY (Application no. 47287/15)* (Grand Chamber), ECLI:CE:ECHR:2019:1121JUD004728715, Council of Europe: European Court of Human Rights, 21 November 2019, available at: [https://www.refworld.org/cases\\_ECHR\\_5dd6b4774.html](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>

<sup>128</sup> See n 126, above.

87. 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 92-93, below). According to **Section 80C(6)**, they could nonetheless be transferred to a different “safe” State, but **Schedule 3** (discussed below at paragraphs 124-132) defines such a State, and does not require that it offer any opportunity to apply for refugee status.
88. 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.*<sup>129</sup>
89. 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, employed in practice.<sup>130</sup>
90. 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 it is “unlikely to be possible to remove the claimant within a reasonable period of the declaration of inadmissibility”, if 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,<sup>131</sup> 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

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<sup>129</sup> *RR (Refugee - Safe Third Country) Syria v. Secretary of State for the Home Department*, [2010] UKUT 422 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 13 November 2010, available at: [https://www.refworld.org/cases,GBR\\_UTIAC,4cffa9892.html](https://www.refworld.org/cases,GBR_UTIAC,4cffa9892.html).

<sup>130</sup> *Improving Asylum Procedures* (n 51), p. 60.

<sup>131</sup> See p24: *Inadmissibility: safe third country cases*, Version 5.0, 31 December 2020, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/947897/inadmissibility-guidance-v5.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf).

reasonableness,<sup>132</sup> with the consequence that “inadmissible” claims could still be denied consideration in the UK even when this would be unreasonable.

91. The Bill does not define what a “reasonable period” is, but the Secretary of State’s policy under the inadmissibility provisions of the immigration rules is normally to treat it as six months. As noted above at paragraph 35, the practical consequence has been an additional six months of delay and expense, during which 4,500 asylum-seekers have had their asylum claims put on hold, seven found to be inadmissible, and none confirmed removed from the UK.

#### **Clause 14, 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).

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<sup>132</sup> See, e.g.: *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11, para. 54-60, available at: <https://www.supremecourt.uk/cases/docs/uksc-2015-0129-judgment.pdf>

(...)

92. 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. 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 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.

93. 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”,<sup>133</sup> 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 14, Section 80C(2-4)**]. Under Condition 5, they would not even have had to travel through such a country. [**Section 80C(5)**].
94. 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.
95. 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.<sup>134</sup> 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.<sup>135</sup>

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<sup>133</sup> *New Plan for Immigration Policy Statement* (n 2), p. 18.

<sup>134</sup> UNHCR, *Comments on the Procedures Directive 2009* (n 123), p. 34

<sup>135</sup> *Joined Cases C-924/19 PPU and C-925/19 PPU*, Judgement of the Court of Justice of the European Union (Grand Chamber), 4 May 2020, 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 to Guatemala all asylum-seekers who had passed through that country was abandoned by the Biden Administration within weeks

96. 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 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.
97. For all of these reasons, an assessment of inadmissibility should be done through a formal procedure,<sup>136</sup> 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.<sup>137</sup>
98. 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.
99. 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.
100. The proposed inadmissibility system would have several further practical consequences that threaten to undermine refugees' health and wellbeing, delay or impede their integration, and impose unnecessary costs on the public purse. 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

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of taking office. U.S. Dept. of State Press Release, *Suspending and Terminating the Asylum Cooperative Agreements with the Governments of El Salvador, Guatemala and Honduras* (February 6, 2021), available at: <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>

<sup>136</sup> UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate* (The Glossary), 2020, [www.refworld.org/docid/5a2657e44.html](http://www.refworld.org/docid/5a2657e44.html), p. 15. See also: UNHCR, *UNHCR Discussion Paper Fair and Fast* (n 115), pp. 3-4.

<sup>137</sup> United Kingdom: Supreme Court, *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, 19 February 2014, available at: [www.refworld.org/cases,UK\\_SC,5304d1354.html](http://www.refworld.org/cases,UK_SC,5304d1354.html), per Kerr LJ for the majority, para 41.

any third State. The result is months of avoidable delay, at additional cost in terms of 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.<sup>138</sup>

101. In addition to housing in “basic” accommodation centres, as discussed above at paragraphs 71-72, the Bill would give those waiting in the inadmissibility process the same limited access to asylum support as is currently given to failed asylum-seekers. [Clause 15(2)].<sup>139</sup> Any potential financial savings are likely to be lost through the additional six months lost before the claim can be considered. Although those ultimately admitted into the UK asylum process will then become eligible for full NASS support, the marginalisation and stress caused by the additional 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.

### **C. Potential departures from fundamental principles of refugee decision-making**

102. UNHCR is concerned by the clauses of the Bill that direct decision makers 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.

#### **17 Asylum or human rights claim: damage to claimant’s credibility**

- (1) Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004<sup>140</sup> is amended in accordance with sections (2) to (5).

(...)

- (2) 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.”

(...)

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<sup>138</sup> Jens Hainmueller, Dominik Hangartner and Duncan Lawrence (2016), *When lives are put on hold: Lengthy asylum processes decrease employment among refugees*, *Science Advances* 2(8), available at: <https://advances.sciencemag.org/content/2/8/e1600432>

<sup>139</sup> “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)”.

<sup>140</sup> <https://www.legislation.gov.uk/ukpga/2004/19/section/8>

103. 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; as well as the relevant situation in the country of origin or other relevant country.<sup>141</sup>
104. 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 competencies of interviewers or interpreters, the timescales of any initial procedure, or circumstances in the applicant's country.<sup>142</sup> 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 Clause 21 of the Bill, please see paragraphs 109-113.**

### **23 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.
- (...)

105. UNCHR has similar concerns about **Clause 23**, which would require decision-makers, including judges, to consider giving "minimal weight" to evidence that is provided after

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<sup>141</sup>UNHCR *Handbook* (n 89), para. 41.

<sup>142</sup> See UNHCR, *Beyond Proof. Credibility Assessment in EU Asylum Systems*, 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 89).

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.<sup>143</sup>

106. 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”,<sup>144</sup> and that evidence must be approached objectively, with an open mind<sup>145</sup>, and assessed in the round, rather than in isolation.<sup>146</sup> 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.<sup>147</sup> 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 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 refolement.

#### **D. Restrictions on rights of appeal**

107. 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.<sup>148</sup>
108. UNHCR therefore opposes the clauses of the Bill that would introduce accelerated appeals procedures for appeals against the refusal of a claim made “late” and for appeal

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<sup>143</sup> **Clause 23(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 23(4) and (5)** as evidence provided after the deadline set in an evidence notice or priority removal notice.)

<sup>144</sup> *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 142), pp. 240-241.

<sup>145</sup> UNHCR, *Beyond Proof* (n 142), p. 38.

<sup>146</sup> *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 142), pp. 46-47

<sup>147</sup> *Devaseelan v. Secretary of State for the Home Department* [2002] UKIAT 000702Devaseelan [40(5)], 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.”

<sup>148</sup> “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>

brought by an asylum-seeker in detention, as well as the removal of the right of appeal for asylum-seekers whose claims have been certified as “clearly unfounded”.

### Accelerated appeals

#### **21 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”).

(4) Tribunal Procedure Rules must make provision with a view to securing that expedited appeals are determined more quickly than an appeal under section 82(1) would, in the normal course of events, be determined by the First-tier Tribunal.

(5) Tribunal Procedure Rules must secure that the Upper Tribunal may, if it is satisfied that it is in the interests of justice in the case of a particular expedited appeal to do so, order that the appeal is no longer to be treated as if it were an expedited appeal.

(6) (...)

(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.”

109. 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."<sup>149</sup> 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.
110. Accelerated procedures may nonetheless be appropriate regarding manifestly unfounded or repeat claims, as long as they are sufficiently flexible and contain adequate safeguards to ensure that they can be determined fairly and justly. Applications and appeals should not be accelerated, however, for reasons that are unrelated to their merits.<sup>150</sup> 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.<sup>151</sup>
111. 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 104-106, and it is possible that claims delayed even without good reason may be complex or have merit.
112. We are further concerned that the degree to which the appeal will be expedited is dictated by the requirement that the claim be resolved more quickly than it would be if it were heard before the First-tier Tribunal. This is 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".<sup>152</sup>
113. These concerns about the risk of potential miscarriages of justice in the proposed expedited procedure are increased by the fact that there will no right of onward appeal to the Court of Appeal.

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<sup>149</sup> UNHCR, *Handbook* (n 89), p. 38, para 192(vi).

<sup>150</sup> UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, (d) available at: <https://www.unhcr.org/%20refworld/docid/3ae68c6118.html>

<sup>151</sup> 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>; 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/502334/Further_Submissions_API_v9_0_EXT.pdf)

<sup>152</sup> First-tier Tribunal (Immigration and Asylum Chamber) Rules, Rule 2(2)(e), available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/926550/consolidated-fft-iac-rules-20200721.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926550/consolidated-fft-iac-rules-20200721.pdf)

**Note: for observations on Clause 23 “Late provision of evidence in asylum or human rights claim: weight”, see paragraphs 105-106 above.**

### Accelerated Detained Appeals

#### **24 Accelerated detained appeals**

- (1) The Nationality, Immigration and Asylum Act 2002 is amended as follows.
- (2) In the heading to section 106, after “Rules” insert “:genera;”.
- (3) After section 106 insert –

#### **“106A Accelerated detained appeals**

- (a) In this section, “accelerated detained appeal” means an appeal under section 82 brought –
  - (a) by a person who -
    - (i) was detained under a relevant detention provision (see subsection (5)) 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 prescribed description, and
    - (ii) when made, was certified by the Secretary of State under this section.
- (b) The Secretary of State may only certify a decision under this section if the Secretary of State considers that any appeal brought under section 82 in relation to the decision would likely be disposed of expeditiously.
- (c) 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 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 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 the notice of appeal to the Tribunal;
  - (c) any application (whether to the 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 Tribunal’s decision.
- (d) Tribunal Procedure Rules must also secure that the Tribunal or (as the case may be) the Upper Tribunal may, if it is satisfied that it is in the interests of justice to do so in the case of a particular accelerated detained appeal, order that the appeal is no longer to be treated as an accelerated detained appeal.

(...)”

114. UNHCR opposes the Bill’s introduction of an accelerated appeal procedure in cases where an appellant is detained in an Immigration Removal Centre. UNHCR is of the view that introducing amendments to the Nationality, Immigration and Asylum Act 2002,<sup>153</sup> 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, UNHCR’s previous experience with respect to the use of expedited processing and takes into consideration the current appeal framework in the UK.
115. 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.<sup>154</sup> Only in extremely limited circumstances, therefore, should detention be used in conjunction with accelerated procedures. UNHCR’s Detention Guideline 4.1.1<sup>155</sup> 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.<sup>156</sup> Such cases are, however, still entitled to the full complement of procedural standards and relevant protections outlined in UNHCR’s Detention Guidelines.<sup>157</sup>
116. UNHCR also considers the Tribunal Procedure Committee’s (TPC) position of March 2019<sup>158</sup> to not introduce specific rules in relation to cases where an appellant is

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<sup>153</sup> The Nationality, Immigration and Asylum Act 2002 is available at: <https://www.legislation.gov.uk/ukpga/2002/41/contents>.

<sup>154</sup> Jesuit Refugee Service, European Regional Office, *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum-seekers and Irregular Migrants in the European Union* (The DEVAS Project), 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](http://www.stonewall.org.uk/sites/default/files/no_safe_refuge.pdf)

<sup>155</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, (Detention Guidelines), para. 23, available at: <http://www.refworld.org/docid/50348953b8.html>

<sup>156</sup> ExCom 30 (n 115)

<sup>157</sup> *Detention Guidelines* (n 155); Guideline 4.1.1

<sup>158</sup> 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, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/807891/dft-consultation-response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807891/dft-consultation-response.pdf).

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.*<sup>159</sup>

117. 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.<sup>160</sup> We also note with concern that the only criteria for referral into the 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.*<sup>161</sup>

118. All of the subsequent litigation surrounding the Detained Fast Track (DFT) reiterated this fundamental principle.<sup>162</sup> 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.<sup>163</sup>

### Removal of the right of appeal for claims certified as “clearly unfounded”

#### **25 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) –

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<sup>159</sup> Ibid. Para. 74.

<sup>160</sup> *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin) (12 June 2015), para. 60, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2015/1689.html>

<sup>161</sup> *The Refugee Legal Centre, R (on the application of) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 (12 November 2004), para.8. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2004/1481.html>

<sup>162</sup> *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>

<sup>163</sup> 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](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](http://www.unhcr.org.uk/fileadmin/user_upload/docs/Quality_Integration_Project_First_Report_FINAL_PDF_VERSION.pdf)

- (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.”

119. 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 Nationality, Immigration and Asylum Act 2002.<sup>164</sup> 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”.
120. 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 appeal process with sufficient safeguards.<sup>165</sup> 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.
121. 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

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<sup>164</sup> Available at: <https://www.legislation.gov.uk/cy/ukpga/2002/41/section/94>.

<sup>165</sup> UNHCR, *Discussion Paper Fair and Fast* (n 115).

groups or relating to some forms of persecution, the country remains unsafe.<sup>166</sup> 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.

122. 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 must be transparent, open to legal challenge, and reviewable in light of changing circumstances.<sup>167</sup>
123. There are currently 17 States outside Europe designated as safe by the Home Secretary,<sup>168</sup> and a further seven designated as safe for men only.<sup>169</sup> 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.<sup>170</sup>

**E. 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**

**26 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 2004<sup>171</sup> (removal of asylum-seeker to safe country).

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<sup>166</sup> See UNHCR, *UNHCR Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and withdrawing refugee status* (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, p. 41 (Comment on Article 30), available at: <http://www.unhcr.org/refworld/docid/42492b302.html>. See also 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.”

<sup>167</sup> UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)* (n 118), p. 9, para. 39.

<sup>168</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919737/certification-s94-guidance-0219.pdf)

<sup>169</sup> Ghana, Gambia, Kenya, Liberia, Malawi, Mali, Nigeria and Sierra Leone. Ibid.

<sup>170</sup> 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 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).” Section 94 of the Nationality, Immigration and Asylum Act 2002, available at: <https://www.legislation.gov.uk/ukpga/2002/41/section/94>

<sup>171</sup> <https://www.legislation.gov.uk/ukpga/2004/19/contents>

### 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 (ii);
- (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.”

124. The Explanatory Notes describe this provision as “providing opportunity for extraterritorial processing models to be developed . . . in line with the UK’s international obligations.”<sup>172</sup>

125. As UNHCR has seen in several contexts, 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-

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<sup>172</sup> Ibid, para. 21.

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”.<sup>173</sup> 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.”<sup>174</sup>

126. 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.
127. 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.
128. 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 80-85 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.
129. The Refugee Convention does not prohibit transfer arrangements.<sup>175</sup> 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.<sup>176</sup> 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 State in law and met in practice, prior to entering into sharing arrangements

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*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>

<sup>174</sup> Ibid.

<sup>175</sup> UNHCR, *Legal considerations regarding access to protection* (n 7), para. 2.

<sup>176</sup> UNHCR *Observations on the Proposal for amendments to the Danish Alien Act* (n 7), para. 8.

<sup>176</sup> Ibid.

and effecting any transfer,<sup>177</sup> as well as for monitoring conditions in the receiving State thereafter.<sup>178</sup>

130. 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.
131. 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.<sup>179</sup> 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.<sup>180</sup>

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<sup>177</sup> Ibid. para. 20.

<sup>178</sup> 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; legal right to remain during the State asylum procedure, and 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 7), and 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 7), para. 23.

<sup>179</sup> UNHCR, “*Asylum Processes (Fair and Efficient Asylum Procedures)*” (n 118), p. 9, para. 39.

<sup>180</sup> 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. *Secondary legislation: how is it scrutinised?*, Institute for Government, available at: <https://www.instituteforgovernment.org.uk/explainers/secondary-legislation>; *Statutory instruments procedure in the House of Commons*, available at: <https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-commons/> [accessed 13 August 2021].

### 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*

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(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”)”.

(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.”

132. 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.<sup>181</sup> This is of particular concern due to ongoing,

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<sup>181</sup> It is essential to recognise here 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.

documented instances of both direct and chain refoulement from some EU countries that are listed as safe.<sup>182</sup>

- (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”.

**F. Interpretations of key concepts of refugee law that could lead to international protection being wrongly denied to those who need it**

133. Clauses 27-35 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”.<sup>183</sup>
134. 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.”<sup>184</sup> 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 given a generous and purposive interpretation, bearing in mind its humanitarian objects and the broad aims reflected in its preamble.”<sup>185</sup> In addition, the Vienna Convention specified 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 subsequent agreements, State practice and international law.<sup>186</sup> In other words, States cannot, under international law, unilaterally announce their own interpretation of the

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<sup>182</sup> *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 127), para. 163, *Ilias and Ahmed* (n 127), para. 163-164.

<sup>183</sup> *Explanatory Notes* (n 3), para. 315.

<sup>184</sup> 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>

<sup>185</sup> *ST Eritrea, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 12, para 31, available at: <https://www.supremecourt.uk/cases/uksc-2010-0149.html>; *Secretary of State for the Home Department v. K* [2006] UKHL 46 (*K and Fornah*), para. 10, available at: <https://www.bailii.org/uk/cases/UKHL/2006/46.html>

<sup>186</sup> The Convention lists these sources as: the treaty’s preamble and annexes; other agreements made or instruments accepted at the time of the conclusion of the treaty, “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, Article 31 (2) and (3).

terms of the agreements they have made with other States.<sup>187</sup> This, too, has been repeatedly recognised by the House of Lords and the Supreme Court of the UK.<sup>188</sup>

135. 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.

### **28 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.
- (...)

136. 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 28(1)(b) should not ordinarily be considered capable of providing protection from persecution. In line with detailed comments provided regarding protection from persecution (paragraphs 157-162) UNHCR recommends removing the words “including any international organisation”

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<sup>187</sup> 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 [1976] ECHR 5 (7 December 1976), available at: <http://www.bailii.org/eu/cases/ECHR/1976/5.html>

<sup>188</sup> 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*, United Kingdom: Court of Appeal (England and Wales), 23 July 1999, available at: [https://www.refworld.org/cases,GBR\\_CA\\_CIV,3ae6b6ad14.html](https://www.refworld.org/cases,GBR_CA_CIV,3ae6b6ad14.html)

from 28(1)(c)<sup>189</sup>. 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.<sup>190</sup>

### **29 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).

137. 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

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<sup>189</sup> 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).

<sup>190</sup> *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)* (UNCHR, *Annotated Comments on QD 2004*), p. 28, available at: <https://www.unhcr.org/en-ie/43661eee2.pdf>

decision, UNHCR's Handbook on Refugee Status Determination emphasizes that asylum claims should be determined in "a spirit of justice and understanding".<sup>191</sup> 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 should be supported through a variety of approaches including trauma sensitive interviewing techniques.<sup>192</sup>

138. 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.<sup>193</sup> 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]<sup>194</sup>*

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.<sup>195</sup>

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<sup>191</sup> UNHCR Handbook (n 89), para. 202.

<sup>192</sup> Ibid, para. 196 and UNHCR, *Beyond Proof* (n 142), pp. 83-88, 110-112, available at: ; UN High Commissioner for Refugees (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*, 2 December 2016, HCR/GIP/16/12, para. 93, available at: <https://www.unhcr.org/uk/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html>

<sup>193</sup> 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*, 6 July 2000, (2000) 3 W.L.R. 379, 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." (p. 390) 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" (p. 395).")

<sup>194</sup> 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>.

<sup>195</sup> As summarised an ultimately endorsed by the Court of Appeal in *Karanakaran*, 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". *Karanakaran* (n 144) at para. 52 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

139. 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 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.*<sup>196</sup>

140. 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 to 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".<sup>197</sup> It is, moreover, an approach that is applied throughout the determination of refugee status,<sup>198</sup> consistent with the holistic nature of the refugee definition.

141. The current UK approach is further consistent with UNHCR's recommendations set out above in that it provides for a "positive role for uncertainty"<sup>199</sup> 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".<sup>200</sup> This reflects both the difficulties asylum-seekers have in proving their claims (fulfilling an *ameliorative* role, in the words of the UK's Upper Tribunal<sup>201</sup>) and the seriousness of the harm should the wrong decision be reached (the *precautionary* principle<sup>202</sup>).

142. 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.<sup>203</sup> An ameliorative

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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." *Ibid* para 99.

<sup>196</sup> UNHCR, *Beyond Proof* (n 142), p.237, citing UNHCR, *Note on the Burden and Standard of Proof* (n 203) para. 8.

<sup>197</sup> 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 144), concurring opinion of Sedley, L.J., para. 18.

<sup>198</sup> *Karanakaran* (n 144), para. 52.

<sup>199</sup> *Ibid.*, leading opinion of Brooke, L.J., para. 5.

<sup>200</sup> *Ibid.*, para. 55-56.

<sup>201</sup> *KS (benefit of the doubt)* [2014] UKUT 00552 (IAC), para. 58, available at: <https://tribunalsdecisions.service.gov.uk/utiac/2014-ukut-552>

<sup>202</sup> *Ibid.*, para. 59.

<sup>203</sup> 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.101 In many cases, the persecution they have experienced and/or fear (such as arbitrary detention or torture) is officially

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.

143. The normal civil standard of “the balance of the probabilities”, by contrast, advances neither an ameliorative nor a precautionary approach to the evidence.<sup>204</sup> Indeed, by resolving doubts in one direction rather than the other, a precautionary approach would 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.
144. 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),<sup>205</sup> 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,<sup>206</sup> 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”.
145. 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”.<sup>207</sup>
146. 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 of the Bill.

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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”. *Observations* (n 3), para. 65.

<sup>204</sup> 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>

<sup>205</sup> UNCHR, *Beyond Proof* (n 142), pp. 56-74.

<sup>206</sup> *Ibid.*, pp. 76-77. See also *Y v. Secretary of State for the Home Department*, [2006] EWCA Civ 1223, United Kingdom: Court of Appeal (England and Wales), 26 July 2006, available at: [https://www.refworld.org/cases,GBR\\_CA\\_CIV,47fdfb420.html](https://www.refworld.org/cases,GBR_CA_CIV,47fdfb420.html).

<sup>207</sup> UNHCR, *Interpreting Article 1* (n 193), para. 10.

### 30 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.
- (...)

147. Clause 30, Subsection 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 examples taken directly from the EU Qualification Directive, as currently transposed in the UK through the 2006 Regulations.<sup>208</sup>
148. 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 30, Subsections (1)(a)-(d) are neither conclusive, nor exhaustive.
149. UNHCR recommends that the UK consults Guidelines on International Protection relating to religion-based claims<sup>209</sup> as set out within the annexes to the UNHCR Handbook<sup>210</sup> 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 30(1)(b). This may give rise to a *sur place* claim.

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<sup>208</sup> The Immigration (European Economic Area) Regulations 2006, available at: <https://www.legislation.gov.uk/ukSI/2006/1003>

<sup>209</sup> UNHCR *Guidelines on International Protection: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 24 April 2004, available at: <https://www.unhcr.org/uk/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html>.

<sup>210</sup> UNHCR *Handbook* (n 89).

### **30 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.

150. 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 the protection to which they are entitled.

151. 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".<sup>211</sup> In the UK and other jurisdictions, the particular social group ground has proved critical in the protection of those with claims based on gender, sexual orientation, gender identity, status as former victims of trafficking, disability or mental-ill health, family and age.

152. Like Clause 30(1), the above particular social group clauses are drawn directly from the EU Qualification Directive.<sup>212</sup> The Bill however introduces a new clause, 30(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.

153. 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

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<sup>211</sup> *Guidelines on International Protection: '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*, HCR/GIP/02/02, 7 May 2002, para. 12.

<sup>212</sup> 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 available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF>.

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.<sup>213</sup>

154. This interpretation has since been affirmed in *K and Fornah*<sup>214</sup> and *DH (Particular Social Group: Mental Health) Afghanistan*<sup>215</sup> 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 in *K and Fornah* by Lord Bingham with approval, 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.*<sup>216</sup>

155. 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 to be such.<sup>217</sup> UNHCR thus recommends that Clauses 30(1) be amended such that the two provisions 30(2) and 30(3) are *alternative* requirements for defining a particular social group rather than *cumulative*.
156. Clause 30(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 those based on gender, age, disability, health status or status as a former victim of trafficking.

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<sup>213</sup> These recommendations are drawn from UNHCR's published position concerning identical provisions in the EU Qualification Directive (recast)

<sup>214</sup> *Secretary of State for the Home Department v. K* [2006] UKHL 46 (18 October 2006) (n 185).

<sup>215</sup> *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) (03 June 2020), available at: <https://www.bailii.org/uk/cases/UKUT/IAC/2020/223.html>

<sup>216</sup> <https://www.unhcr.org/uk/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> as quoted in *K and Fornah* (n 185), para. 15.

<sup>217</sup> UNHCR Comments on Recast Qualification Directive FINAL - <https://www.unhcr.org/4c5037f99.pdf>

### **31 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.

157. Clause 31, 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.

158. Clause 31(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.<sup>218</sup> Specifically in respect of international organisations, such as organs and agencies of the United Nations, they enjoy privileges and immunities.<sup>219</sup> For these reasons, and in line with UNHCR’s previous position with respect to the Qualification Directive,<sup>220</sup> UNHCR recommends deletion of the phrase “including international organisations” from Article 7(1)(b).

159. 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

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<sup>218</sup> See UNHCR Guidelines No. 12, , para. 41. UNHCR, *Comments on the QD 2009* (n 120), p.5, available at: <https://www.unhcr.org/4c5037f99.pdf>

<sup>219</sup> See UNHCR, *Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466* (UNHCR, *Comments on the Qualification Regulation 2016*), p. 15, available at: <https://www.refworld.org/pdfid/5a7835f24.pdf> and.

<sup>220</sup> UNHCR, *Comments on the QD 2009* (n 120), p.6 and UNHCR, *Comments on the Qualification Regulation 2016* (n), p.14.

31(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” as taken by actors of protection introduces a high level of subjectivity into the determination and 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”.

160. In line with the stated aims under the New Plan for Immigration to set a clearer<sup>221</sup> standard for testing whether an individual has a well-founded fear of persecution, the UK could remove reference to the “reasonable steps” criterion in 31(2)(a) which unnecessarily complicates an assessment of well-founded fear.

161. Compounding the issues identified above is an absence in Clause 31(2) of a reference to the concepts of effectiveness or durability of the protection to be provided (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.<sup>222</sup>

162. Taking into account the two above concerns, Clause 31(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 31(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)<sup>223</sup> **are operating** an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to that protection.”<sup>224</sup>*

## 32 Article 1(A)(2): internal relocation

<sup>221</sup> The New Plan for Immigration also says “higher standard” though “consistent with the Refugee Convention”. *New Plan for Immigration Policy Statement* (n 2), p. 18.

<sup>222</sup> Such criteria were added to the Recast Qualification Directive and welcomed by UNHCR. UNHCR, *Comments on the QD 2009* (n 120), 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].” *CJEU Case C-255/19, Secretary of State for the Home Department v. O A.*, 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>

<sup>223</sup> Without prejudice to UNHCR’s recommendation that “international organisations” should be removed from 31(1)(b).

<sup>224</sup> See UNHCR’s similar recommendation with respect to the Qualification Directive, UNHCR, *Comments on the Qualification Regulation 2016* (n), p.14.

- (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.

163. Clause 32, ‘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.<sup>225</sup> 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.<sup>226</sup> 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.”<sup>227</sup>

164. 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.

165. Clause 32(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

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<sup>225</sup> Clause 31(1) reads that “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” an internal relocation opportunity which meets relevant criteria exists

<sup>226</sup> *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) IFA, para.2, available at: <https://www.unhcr.org/uk/publications/legal/3f28d5cd4/guidelines-international-protection-4-internal-flight-relocation-alternative.html>

<sup>227</sup> UNHCR, *Interpreting Article 1* (n 193), para. 15 and 35-37.

temporary or permanent detract from requisite legal certainty in the application of this concept. If 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.<sup>228</sup>

### **33 Article 1(F): disapplication of Convention in case of serious crime etc**

(...)

(3) In that Article [1F(b) of the 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.

(...)

166. Clause 33 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.
167. UNHCR has previously raised concerns that a similar interpretation provided for under the Qualification Directive is inconsistent with the wording of Article 1F(b).<sup>229</sup> 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 limitation in Article 1F(b) requiring that serious non-political crimes 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.<sup>230</sup>

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<sup>228</sup> UNHCR, *Comments on the QD 2009* (n 120), p.6.

<sup>229</sup> UNCHR, *Annotated Comments on QD 2004* (n 190), p. 27.

<sup>230</sup> 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 *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>

168. Whilst UK jurisprudence establishes that the length of a sentence is not determinative of whether a claimant should be excluded under 1F(b),<sup>231</sup> 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.<sup>232</sup> The current Guidance concludes 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.”<sup>233</sup> 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 34, 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”.
169. 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 33 may risk the improper exclusion of asylum-seekers from refugee protection if they have been prosecuted for arriving in the UK irregularly.
170. 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*,<sup>234</sup> 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.

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<sup>231</sup> In *AH (Algeria) v Secretary of State for the Home Department* [2012] EWCA Civ 395, 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.”

<sup>232</sup> Home Office Guidance, *Exclusion (Article 1F) and Article 33(2) of the Refugee Convention*, Version 6.0, 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/534985/exclusion_and_article_33_2_refugee_convention.pdf); Section 72, Nationality, Immigration and Asylum Act 2002, available at: <https://www.legislation.gov.uk/ukpga/2002/41/section/72/2002-11-07>.

<sup>233</sup> Home Office Guidance, *Exclusion* (n 232), p. 25.

<sup>234</sup> *Guidelines on International Protection No. 5* (n 230).

### 34 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.
  - (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.”
- (...)

171. As set out in our observations of May 2021, this interpretation 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.<sup>235</sup> 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.<sup>236</sup> 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; 3) whether or not the refugee sought or found protection *de jure* or *de facto*.<sup>237</sup>

172. 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.<sup>238</sup> 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.

173. 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."<sup>239</sup>

174. 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, rather than where they could have reasonably been expected *to apply* for such protection.<sup>240</sup> Although it is difficult to imagine under what 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.

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<sup>235</sup> *Adimi* (n 41), para. 18, available at: [www.refworld.org/cases\\_GBR\\_HC\\_QB\\_3ae6b6b41c.html](http://www.refworld.org/cases_GBR_HC_QB_3ae6b6b41c.html); *R v. Asfaw* (n 43), para. 15; *R. and Mateta* (n 45), para. 21(iv); *Decision KKO:2013:21, Finland* (n 45); also see UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 10) para. 39.

<sup>236</sup> *Adimi* (n 41); *Asfaw* (n 43), para. 36; *Mateta* (n 45), para. 12-15.

<sup>237</sup> *Adimi* (n 41).

<sup>238</sup> *Asfaw* (n 43), para. 26 and 59.

<sup>239</sup> Section 31, Immigration and Asylum Act 1999, available at: <https://www.legislation.gov.uk/ukpga/1999/33/section/31>

<sup>240</sup> *Ibid.*

175. UNCHR'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 182.

### **35 Article 33(2): particularly serious crime**

- (1) Section 72 of the Nationality, Immigration and Asylum Act 2002 (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—

- (a) convicted in the United Kingdom of an offence, and  
(b) 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—

- (a) convicted outside of the United Kingdom of an offence, and  
(b) sentenced to a period of imprisonment of at least ~~two years~~ *12 months* and  
(c) 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—

- (a) convicted of an offence specified by order of the Secretary of State, or  
(b) 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.

(...)

176. Clause 35 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 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.
177. 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.<sup>241</sup> 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.
178. 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 refugee in question poses such a serious actual or future threat that it 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,<sup>242</sup> 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.
179. 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.<sup>243</sup>

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<sup>241</sup> Section 72, Nationality, Immigration and Asylum Act 2002, available at: <https://www.legislation.gov.uk/ukpga/2002/41/section/72/2002-11-07>.

<sup>242</sup> 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>.

<sup>243</sup> *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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf).

180. 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.

#### **G. The increased criminalisation of seeking asylum**

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

(D1) A person who commits an offence under subsection (A1), (B1) or (C1)

- (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 subsection (B1) or (C1), 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”.

181. 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,<sup>244</sup> and must remain consistent with obligations under international law, including the right to seek and enjoy asylum and the principle of non-refoulement.<sup>245</sup> 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.”
182. 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.<sup>246</sup> 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 entry or presence, or failure to produce a travel document without reasonable excuse.<sup>247</sup> 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.<sup>248</sup> However, the focus in the Plan and the Bill on increasing the criminal penalties for illegal entry – and adding a new penalty for arrival without entry clearance – make it urgently necessary

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<sup>244</sup> *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, <http://www.refworld.org/docid/479dee062.html>, Article 5.

<sup>245</sup> The obligation to ensure that any activities undertaken to address human trafficking or migrant smuggling does 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 (“the Palermo Protocol”), available at: <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>; Article 19 of the *Protocol against the Smuggling of Migrants*; and Article 40 of *Council of Europe Convention Against Trafficking in Human Beings*, 2005, available at: <https://rm.coe.int/168008371d> (“the Anti-Trafficking Convention”), all of which the UK is a signatory to. Further, the European Court of Human Rights also acknowledged the challenges facing States in terms of immigration control, while also stressing “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”. European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v. Spain*, 13 February 2020, paras. 169-170, available at: <http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756>.

<sup>246</sup> 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, available at: <https://www.legislation.gov.uk/ukpga/1999/33/section/31> UK courts have also recognised that the defence under UK law narrower than that set out in the Convention. *Pepushi, R (on the application of) v Crown Prosecution Service* [2004] EWHC 798 (Admin), para. 31-33, available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2004/798.html>

<sup>247</sup> *R v. Fraydon Navabi and Senait Tekie Embaye*, [2005] EWCA Crim 2865, United Kingdom: Court of Appeal (England and Wales), para. 28, available at: [https://www.refworld.org/cases/GBR\\_CA\\_CIV\\_4702663c2.html](https://www.refworld.org/cases/GBR_CA_CIV_4702663c2.html); *Mirahessari, R v* [2016] EWCA Crim 1733, para. 17, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2017/1733.html>;

<sup>248</sup> Crown Prosecution Service, *Legal Guidance: Immigration*, June 2018, <https://www.cps.gov.uk/legal-guidance/immigration>

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.

183. 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 attempted to enter the UK unlawfully and cannot be prosecuted for this offence. Nor is it clear whether they will have committed this offence if they have been rescued at sea and brought to the United Kingdom.<sup>249</sup>
184. The Bill would create a new criminal offence of knowingly *arriving in* the United Kingdom without entry clearance. This would make it a criminal offence for an asylum-seeker to travel to the United Kingdom without valid entry clearance (a visa) where entry clearance is required, even if they claimed 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,"<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup>
185. Even where the requirements of Article 31(1) are not met and penalties are in theory permissible, they must be proportionate to the offence and not operate in such a way as to undermine the right to seek asylum.<sup>253</sup> The maximum sentence of imprisonment, however, will be raised from six months to four years, a clearly disproportionate sentence, even if all of the requirements of Article 31 were met (which is not contemplated here). Such a sentence could also potentially serve as a bar to a subsequent asylum claim under Article 1F, as defined in the Bill to cover offences committed in the country of refuge. This would create a direct and real risk of refoulement.
186. At **Clause 37(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

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<sup>187</sup> *Kakaei, R. v* [2021] EWCA Crim 503 (08 April 2021), para 51, available at <https://www.bailii.org/ew/cases/EWCA/Crim/2021/503.html>. The Court of Appeal left open the question of whether it would be a criminal offence under Section 24 to seek to enter the United Kingdom by being rescued at sea.

<sup>250</sup> *Explanatory Notes* (n 3), para. 388.

<sup>251</sup> 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>

<sup>252</sup> <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-applications-decisions-and-resettlement>;  
<https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-visitor-visa-national-list>

<sup>253</sup> J C Hathaway, *The rights of refugees under international law* (Cambridge University Press, 2005), p. 408. Noll in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011), p. 1256.

1971 Immigration Act of assisting a person to arrive in in the UK in breach of immigration law.<sup>254</sup> 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 criminalise providing assistance even to those refugees who claim asylum on arrival or who are rescued at sea and brought to the UK.<sup>255</sup> 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 is refugees who assist each other to come to the United Kingdom to claim asylum, something the Canadian Supreme Court has found violates Article 31(1).<sup>256</sup> Friends, family members and others with purely humanitarian motives would also be criminalised.<sup>257</sup> 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.<sup>258</sup>

187. The maximum sentence of imprisonment for this offence will rise from 14 years to imprisonment for life.<sup>259</sup>

### 38 Assisting unlawful immigration or asylum seeker

- (1) 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”.
- (2) In section 25A(1)(a) of the Immigration Act 1971 (helping an asylum seeker to enter the United Kingdom) omit “and for gain”.

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<sup>254</sup> Section 37(4). Section 25(1) of the Immigration Act 1971 (<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”.

<sup>255</sup> For the same reasons as set out above at paragraph 183, such refugees will not have made an illegal entry to the UK. See *R v Naillie* [1993] AC 674 and *Javaherifard (R, on the application of) v Miller* [2005] EWCA Crim 3231, available at: <https://www.bailii.org/ew/cases/EWCA/Crim/2005/3231.html>

<sup>256</sup> *R. v. Appulonappa*, 2015 SCC 59, Canada: Supreme Court, 27 November 2015, para. 43, [www.refworld.org/cases/CAN\\_SC,56603caa4.html](http://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’. *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, [www.refworld.org/cases/CAN\\_SC,56603be94.html](http://www.refworld.org/cases/CAN_SC,56603be94.html).

<sup>257</sup> See, e.g. *Sternaj v. Director of Public Prosecutions*, [2011] EWHC 1094 (Admin), United Kingdom: High Court (England and Wales), 12 April 2011, available at: [https://www.refworld.org/cases,GBR\\_HC\\_QB,535e75c54.html](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.

<sup>258</sup> 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>

<sup>259</sup> **Clause 38(1).**

188. Finally, 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.<sup>260</sup> Again, the effect is not to crack down on human smuggling or criminal gangs, but on accessing asylum in the United Kingdom.<sup>261</sup>

#### **H. Risks to children**

189. 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).<sup>262</sup> UNHCR urges the UK to clarify how the various provisions will apply to children and how their best interests will be properly considered, noting that many of our reasons for opposing the provisions in the Bill are further heightened in the case of children given their specific needs and vulnerability.<sup>263</sup>

#### **Age Assessment**

190. The Bill contains placeholder Clause 58, Age Assessment, providing the SSHD with powers to introduce regulations about the process for assessing age.

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<sup>260</sup>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>

<sup>261</sup> The Explanatory Notes justify the removal of the "gain" requirement as required by the difficulty of proving gain. *Explanatory Notes* (n 3), para. 401. 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 s25 may be appropriate." CPS, *Immigration Offences Annex*, 19 June 2018, available at: <https://www.cps.gov.uk/publication/immigration-offences-annex>

<sup>262</sup> *New Plan for Immigration: Overarching Equality Impact Assessment of policies being delivered through the Nationality and Borders Bill*, p. 12, available at: <https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment>

<sup>263</sup> 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*, <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*, May 2021, available at: <https://www.refworld.org/docid/5c18d7254.html> [accessed 18 August 2021]

## 58 Age assessments

(...)

(2) The regulations may in particular include provision—

- (a) about the test to be applied by immigration officers for determining whether a relevant person may be a child;
- (b) conferring functions on the Secretary of State and on local authorities relating to decisions as to whether a relevant person is a child;
- (c) setting out the general principles and procedures to be applied in any case where it is to be decided whether a relevant person is a child;
- (d) about the use of scientific methods in deciding whether a relevant person is a child;
- (e) for appeals against a decision about a relevant person's age to be made to the First-tier Tribunal.

(...)

191. The Explanatory Notes to the Bill contain further detail on what is to be expected in a substantive amendment to be introduced as the Bill progresses through the parliamentary process. UNHCR's comments below are based on the Government's stated intentions based on the placeholder above and the Explanatory Notes.

192. To secure effective access to the rights set out in the Convention on the Rights of the Child<sup>264</sup> children must be properly identified. It follows that States have a duty to identify children as children and also 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.<sup>265</sup>

193. Incorrect assessments of children as adults, or adults as children both present safeguarding risks for children, however these risks are not necessarily equal. Given the more serious risks for children who are wrongly diverted to adult reception and immigration processes (including detention) - where child-specific safeguarding and other age-appropriate support is lacking - the benefit of the doubt must be applied to

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<sup>264</sup> UN General Assembly, *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).

<sup>265</sup> UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 31, available at: <https://www.refworld.org/docid/42dd174b4.html>.

those claiming to be children. In carrying out age assessments, UNHCR recommends the principles and safeguards below be taken into account:<sup>266</sup>

- (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) 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;
- (iii) Where conducted, age assessments must be carried out in a safe, child- and gender-sensitive manner with due respect for human dignity;
- (iv) 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;
- (v) The assessment should be comprehensive and multidisciplinary assessment undertaken by qualified, trained professionals which balances a range of physical, psychological, developmental, environmental and cultural factors, taking into account documentary evidence;
- (vi) Information on the procedure and legal consequences should be provided in a “child-friendly” manner and language which children understand;
- (vii) 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. Medical assessments should not take place without the consent of the child.
- (viii) 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;
- (ix) 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 possible margin of error.
- (x) 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 to understand their right to a legal remedy.
- (xi) Applicants should be treated and receive services as children until the conclusion of the assessment of age, including the appointment of a guardian, unless this would be clearly unreasonable;
- (xii) 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;

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<sup>266</sup> UN Children's Fund (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 the identification of separated or unaccompanied children seeking asylum*, Case No. CIK-1938/2014 – Lithuanian Supreme Court, available at: <https://www.refworld.org/pdfid/55759d2d4.pdf>; *M.S. v. Slovakia and Ukraine (Appl. No 17189/11)* before the European Court of Human Rights 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*, March 2010, 4th Revised Edition (revised version forthcoming), available at: <https://www.refworld.org/docid/415450694.html>; UNHCR ExCom Conclusion No. 107 (2007), available at: <https://www.unhcr.org/uk/excom/exconc/4717625c2/conclusion-children-risk.html>.

- (xiii) Where an age assessment remains inconclusive, the applicant should be given the benefit of the doubt and assumed a child. This should include cases where the margin of error allows for the possibility that the individual is under 18 years old;
  - (xiv) 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.
194. Currently, age assessments conducted in the UK must be compliant with extensive UK case law,<sup>267</sup> which reflects many of the principles outlined above. This requires that assessments must, inter alia, be holistic and be conducted by experienced professionals (two trained social workers), with decision makers obliged to give reasons, and if in doubt, to recognise the young person as a child.<sup>268</sup>
195. In the case of *BF(Eritrea)*, decided since the Bill's introduction, the Supreme Court upheld the Government's current policy on initial age assessments that allows immigration officials to treat as adults those whose
- "[...] physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age and no other credible evidence exists to the contrary."*<sup>269</sup>
196. Despite the decision in *BF(Eritrea)*, UNHCR's position remains that policy or legislation which allows asylum-seekers to be treated as adults based on brief assessments of physical appearance and demeanor by immigration officials creates a considerable risk of children being subjected to adult procedures and of a violation of their rights under the Convention on the Rights of the Child and the Refugee Convention.<sup>270</sup> UNHCR has concerns about how unaccompanied children assessed as adults would be able, in practice, to challenge such assessments and/or whether they would be provided with full information and advice about their entitlement to subsequently approach their local authority of dispersal, ask to be supported as a child and receive a full age assessment.
197. UNHCR is therefore especially concerned with the Government's proposal to empower, through legislation (the Bill), front-line immigration officers to determine whether a person may be a child based on physical appearance and demeanor and to lower the

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<sup>267</sup> Case law includes but is not limited to: *R (B) v Merton* [2003] EWHC 1689 (Admin), available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2003/1689.html>; and *R(A) v Croydon* and *R(M) v Lambeth* [2009] UKSC 8, available at: <https://www.supremecourt.uk/cases/uksc-2009-0106.html>.

<sup>268</sup> The Association of Directors of Children's Services (ADCS) has published detailed guidance to assist social workers in undertaking age assessments in England in accordance with UK law. See ADCS, *Guidance to assist social workers and their managers in undertaking age assessments in England*, 2015, [https://adcs.org.uk/assets/documentation/Age\\_Assessment\\_Guidance\\_2015\\_Final.pdf](https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf). There is similar guidance in Scotland (<https://www.gov.scot/publications/age-assessment-practice-guidance-scotland-good-practice-guidance-support-social/>) and Wales (<https://www.wlga.wales/SharedFiles/Download.aspx?pageid=62&mid=665&fileid=2462>).

<sup>269</sup> In *BF(Eritrea)*, the Supreme Court decided that the SSHD had met the simple negative obligation "not to give policy direction to recipients [in this case, immigration officers] to do something contrary to their legal duty." Whilst the court did consider some of the safeguards present for children being assessed (such as the "benefit of the doubt" principle and the requirement for two immigration officers to make a decision) the court did not decide the case on this basis. *R (on the application of BF (Eritrea)) (Respondent) v Secretary of State for the Home Department (Appellant)* [2021] UKSC 38, available at: <https://www.supremecourt.uk/cases/docs/uksc-2019-0147-judgment.pdf>.

<sup>270</sup> See especially UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims* (n 263).

current threshold. In UNHCR's view this cannot be considered an age assessment, which would satisfy the principles set out in paragraph 193, above. Decisions based on young people's "demeanour and physical appearance" are widely recognised as being culturally subjective and unreliable<sup>271</sup> and research conducted by UNHCR has shown the significant negative impact on children misidentified as adults by the policy.<sup>272</sup>

198. The Bill proposes the provision of regulation about the use of "scientific methods" for age assessment. Whilst the Government's Plan does not detail areas of particular interest under "scientific methods", UNHCR takes this opportunity to re-emphasise that medical age assessment methods are subject to a high margin of error.<sup>273</sup> Their evidential value remains contested by UK courts<sup>274</sup> and in other jurisdictions,<sup>275</sup> and by medical professionals and associations.<sup>276</sup> 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).<sup>277</sup>

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<sup>271</sup> UNHCR's submission to the Joint Committee on Human Rights' call for evidence on the United Kingdom's record on Children's Rights, available at: <https://www.unhcr.org/uk/protection/basic/58120917e/unhcrs-submission-to-the-joint-committee-on-human-rights-call-for-evidence.html>.

<sup>272</sup> UNHCR, *A Refugee and Then*, available at <https://www.unhcr.org/uk/publications/legal/5d271c6a4/a-refugee-and-then.html>.

<sup>273</sup> UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (n 263). See also Council of Europe compilation of members 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, available at: <https://www.refworld.org/docid/59d203a14.html>.

<sup>274</sup> The UK 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, available at: <https://tribunalsdecisions.service.gov.uk/utiac/2017-ukut-446>, and *R (ZM and SK) v Croydon* [2016] UKUT 559 (IAC), available at: <https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-559>.

<sup>275</sup> In *N.B.F. v Spain*, Communication number CRC/C/79/D/11/2017, 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. Available at: <https://opic.childrightsconnect.org/view/jurisprudence/entry/1449/> 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"* ("Åldersbedømming tidigare i asylprocessen") Ds 2016:37, available at: <https://www.refworld.org/pdfid/5937a8e14.pdf>; and for Lithuania, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, available at: <https://www.refworld.org/docid/55759d2d4.html>.

<sup>276</sup> See for example Petter Mostad and Fredrik Tamsen, *Error rates for unvalidated medical age assessment procedures*, *International Journal of Legal Medicine* 133(2), 2019, pp. 613–623. 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 Pediatrics 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 RCPCH, *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>.

<sup>277</sup> See for example IOM, UNHCR' and UNICEF, *Refugee and Migrant Children in Europe - Accompanied, Unaccompanied and Separated*, available at: <https://data2.unhcr.org/en/documents/details/87693>.

199. In addition to being subject to a high margin of error, medical methods used for age assessment can be potentially harmful (such as those that involve exposure to radiation through x-rays). For this reason, 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".<sup>278</sup> 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 to unnecessary legal processes".<sup>279</sup>
200. The explanatory note to the Bill explains that **Clause 58(2)(b)** relates to the introduction of the National Age Assessment Board (NAAB) a decision-making function within the Home Office (primarily consisting of "expert social workers") with responsibility for conducting age assessments, thereby centralising age assessment decision-making. UNHCR cautions that a centralised approach risks becoming formulaic and so the NAAB should be multidisciplinary and assessments must continue to draw on the expertise of those who play a role in the child's life (e.g. health professionals, psychologists, teachers, foster parents, youth workers, advocates, guardians and social workers).
201. **Clause 58(2)(e)** makes provision for an appeal right for young people to challenge age assessments of local authorities and the proposed NAAB before the First- tier Tribunal. 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.<sup>280</sup> 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.

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<sup>278</sup> 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>.

<sup>279</sup> UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 4, available at: <https://www.refworld.org/docid/5a12942a2b.html>.

<sup>280</sup> 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](https://www.childrenslegalcentre.com/wp-content/uploads/2017/04/HappyBirthday_Final.pdf).