



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Legislative Scrutiny: Illegal Migration Bill (HC 1241)

Wednesday 29 March 2023

3.30 pm

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Members present: Joanna Cherry (Chair); Lord Alton of Liverpool; Lord Dholakia; Lord Henley; Dr Caroline Johnson; Baroness Kennedy of The Shaws; Baroness Meyer; Bell Ribeiro-Addy

Questions 12 - 21

Witnesses

I: Sir Stephen Laws, Senior Fellow, Policy Exchange; Professor Cathryn Costello, Andrew W Mellon Professor of International Refugee and Migration Law, University of Oxford; Dr Peter Walsh, Senior Researcher, Migration Observatory.

Examination of Witnesses

Sir Stephen Laws, Professor Cathryn Costello and Dr Peter Walsh.

Q12 Chair: Good afternoon and welcome to today's meeting of the Joint Committee on Human Rights. We are a cross-party committee and also a Joint Committee, which means that we have members from both the House of Commons and the House of Lords.

Today, we have our second oral evidence session as part of our legislative scrutiny of the Illegal Migration Bill. We have two panels of witnesses. We will be hearing, in panel 1, from academics and policy experts and, in panel 2, from representatives of the United Nations High Commissioner for Refugees.

Without further ado, I am going to introduce our first panel of witnesses, who are joining us online this afternoon. First, we have Sir Stephen Laws, who is a senior research fellow at Policy Exchange. Secondly, we have Professor Cathryn Costello, who is the Andrew W Mellon professor of refugee and migration law and a fellow of St Antony's College at the University of Oxford. Thirdly, we have Dr Peter Walsh, who is a senior researcher at the Migration Observatory and a departmental lecturer in migration studies at the University of Oxford.

I should have said in relation to Sir Stephen that we are particularly pleased to have him as a former First Parliamentary Counsel, meaning that he was head of the Office of the Parliamentary Counsel and responsible for drafting government legislation. That is some interesting background expertise for us to draw on this afternoon.

I am going to start our questioning session, then we will move round the table and take questions from colleagues and a couple of our Members of Parliament who are joining us online. Could I start by directing my question to Dr Walsh? Can you tell us what percentage of people who seek asylum in the United Kingdom arrive via the small boat crossings that we are seeing across the channel?

Dr Peter Walsh: If we look at 2022, the UK received roughly 89,000 asylum applicants, 40,000 of whom, which is 45%, had arrived by small boat.

Chair: So 45% of the 89,000 who arrived in 2022 came by small boats. What about the other 55%? What sort of routes did they utilise?

Dr Peter Walsh: The data are somewhat patchy here but, broadly speaking, there are four main routes that people take before claiming asylum. Each route gets different treatment, both in existing legislation, so the Nationality and Borders Act and the Rwanda plan, and under the prospective legislation of the Illegal Migration Bill.

The first category is irregular entry. Those are individuals who are not going through normal ports of entry. That includes small boats and those arriving via lorry. We know that, last year, 45% arrived via small boats. We do not have data on the number of asylum applicants who arrived via

lorry. We can imagine that it is probably in the low thousands. That 45% is the lower bound, really, for the size of the irregular entry group, and that group is definitely in scope for the provisions of the Illegal Migration Bill.

The second category is of those who either arrive through regular passenger transit routes with improper documentation—for example a fake passport—or arrive at an airport or a seaport on a valid visa or a visa waiver and then immediately claim asylum. There is some uncertainty about whether this group would be penalised, and that would be due to using deception to obtain the visa. Existing data suggest that this group makes up a minority of asylum applicants. In 2022, 14% of asylum claims were made at regular ports of entry, so a relatively small number.

The third category is of those known as sur place asylum claimants. They arrive on a valid tourist, student or work visa, conditions deteriorate in their country of origin, and they claim asylum while still legally present. This group does not appear to be penalised by any of the existing or proposed measures. The group is fairly small. We do not know exactly how large, but a rough calculation suggests that it is around 1,000 a year—no more than a few percent of the total of asylum applicants—and it has been that way for the past few years.

The final category is of visa overstayers. They can come in on any kind of visa, they overstay, and then they claim asylum without having status. This may be on coming into contact with immigration enforcement. This group does not appear to be in scope of the provisions of the Illegal Migration Bill, but could become group 2 refugees under the Nationality and Borders Act, which refers to irregular entry or presence, whereas the Illegal Migration Bill focuses on irregular entry. We do not have data on how big that group is.

Those are the four broad categories and they would make up the remaining 55%.

Chair: That is very thorough, thank you. Just looking at things on a broader canvas globally, how does the number of asylum applications made in the United Kingdom compare to those made in other countries?

Dr Peter Walsh: If we compare the UK with our EU neighbours and we take 2022, which was a fairly typical year, the UK ranked fifth in the absolute number of people claiming asylum. It received 89,000 people claiming asylum. Germany is typically first placed and received more than two and a half times as many asylum applicants—around 244,000. In second place was France with 157,000, in third place Spain with 118,000, and in fourth place Austria with 109,000.

Some people also ask for these numbers to be adjusted by population size, because it gives a rough indicator of a country's ability to host asylum seekers. When we do that, we see that, in 2002, the UK received

just over one asylum applicant per 1,000, in a resident population of about 67 million.

Chair: In 2022 it was one per 1,000?

Dr Peter Walsh: That is right. It was just over one applicant, at 1.3. When you adjust for population size, the UK falls from fifth in the absolute ranking to 21st compared with our EU neighbours.

Chair: How would Germany adjust for population size? We have looked at how many per 1,000 and adjusted it for population size, which takes Britain down to 21st on the table. If Germany is in first place for population size, where does it go?

Dr Peter Walsh: It comes in at ninth place, so it is roughly three people claiming asylum per 1,000 of the resident population of Germany.

Baroness Meyer: What about France?

Dr Peter Walsh: France is in 15th place, which is one higher than the UK, with 2.3 per 1,000. Spain is in 14th place. Some of the top of the list is dominated by countries with small populations. In Cyprus, 25 people per 1,000 of the population claimed asylum in 2022.

Chair: So in 2022, France had 157,000 asylum seekers and Britain had 89,000.

Dr Peter Walsh: That is correct.

Chair: What percentage of asylum seekers who arrive in the United Kingdom by small boats coming across the channel successfully claim asylum here?

Dr Peter Walsh: Most people—90%—who have claimed asylum after arriving in a small boat are still awaiting an initial decision on their claim. If we look at all those who claimed in the five years from 2018 to 2022 and have received an initial decision as of 31 December last year, 87% of those initial decisions were grants of asylum or other permission to stay.

I want to add a caveat here, which is that the Home Office uses a different figure. It gives the figure of 61% being successful, but there is an argument to be made that the calculation should be made my way. When the Home Office does the calculation, it includes as a category of refusal that it calls third-country refusals. That is where it says, "You arrived from a safe third country such as France. We're not going to hear your claim and we're going to try to remove you". It counts that as a refusal, even though an initial decision has not been made.

In recent history, we have seen that a good number of those third-country refusals end up being admitted to the UK asylum system. The Home Office has not been able to remove them within a reasonable period, which is usually six months, so they are readmitted and then they will have a decision on their claim. It is when you exclude those third-

country refusals, which is reasonable to do, that the success rate so far on those 10% of applications has been 87%.

The big question, of course, is whether the rest will have success rates that high. We do not know whether the 10% who have had their claim determined will be representative of the success rate of all small boat arrivals who claim asylum, so there is that caveat.

Chair: Taking your success rate for the last five years, how does it compare with the success rate for those arriving by other routes?

Dr Peter Walsh: With existing data, we do not know what the success rates are for any of the other four categories of arrival, with the exception of small boats. We have data on all asylum claims and decisions, which include those arriving via small boat and any other means. If we look at 2022, the success rate was 76% at initial decision. Of about 19,000 decisions, about 14,000 were grants of asylum or other status. The success rate for small boat arrivals has been higher than for all applicants, at least so far, although, of course, that could change over time as more small boat arrivals are processed.

Chair: Thank you, that is very interesting.

Baroness Meyer: You talked about the number of immigrants compared to the number of people living in this country. Do we have statistics looking at density of population, for instance the number of immigrants arriving in France, whose population density is half that of the UK's? Do we have those figures as well?

Dr Peter Walsh: They can be calculated. I do not have them to hand, but, if you like, I can certainly resolve to go away and make those calculations.

Chair: That would be very interesting, if you do not mind us imposing upon you to do that.

Dr Peter Walsh: No, not at all. My sense is that population density is perhaps not the best indicator, because the best indicators for countries' ability to host refugees are infrastructure rather than just simple space. Cities with higher population density are, somewhat counterintuitively, better able to host increasing populations, because of all the infrastructure that is already there—schooling, healthcare and so forth.

Q13 Lord Alton of Liverpool: When you kindly provide the note that my colleague Baroness Meyer has just asked for, as well as population density you could perhaps give us some information about infrastructure in comparable recipient countries, if that is not imposing too much on you.

I know that your colleagues will be answering questions a little later on, but can I ask you about safe and legal routes, Dr Walsh? Over the weekend, for instance, we saw Tim Loughton MP talking about the importance of creating a new structure, perhaps with a cap of 20,000 a

year. It does not really matter what the number is, in some senses; it is the principle of creating a new safe and legal route. It is a point that is regularly canvassed in both Houses whenever we have considered things such as the Nationality and Borders Act. It has been rejected previously by the Government. Can you tell the committee what exactly a safe and legal route is?

Dr Peter Walsh: “Safe and legal route” is an umbrella term that usually refers to sanctioned immigration schemes that provide access to the UK for humanitarian reasons. That means that people are able to come to the UK with legal permission. They take various forms, and the UK has a number of these that I would be happy to elaborate on. It is quite a broad definition, but that is really what we are referring to.

Lord Alton of Liverpool: If you took a case of a woman who had been sprayed with chemicals in a country such as Iran, is there a safe and legal route for someone such as that to come to the United Kingdom by way of?

Dr Peter Walsh: No, not with any high chance of success. The main safe and legal route that people refer to is refugee resettlement, but this is for individuals in either urban centres or refugee camps registered with the UN, and it is a lottery.

Lord Alton of Liverpool: So the answer is no.

Dr Peter Walsh: The chance of being resettled to the country that you desire is extremely low through that route, because the demand for being resettled vastly outstrips the supply. Less than 1% of those registered as refugees with the UN are resettled, and you do not have any choice in the country that you move to. There is virtually zero chance. They would have to come to the UK and avail themselves of the ordinary, regular asylum system, and there is no legal way to come to the UK for the specific purpose of seeking asylum, which compels irregular routes.

Lord Alton of Liverpool: What percentage of refugees arrive in the United Kingdom through safe and legal routes?

Dr Peter Walsh: I have some figures on that here. In 2022, roughly 287,000 people were granted permission to enter or stay in the UK under safe and legal routes, and the vast majority—94%—of those were under the Ukraine schemes and the Hong Kong BN(O) schemes.

That has changed quite dramatically over time. Before those routes, it was typically the case that more people would come under the asylum application process. If we take 2019, before the pandemic, and before Hong Kong and Ukraine, about 15,000 out of 28,000, or 54%, came through the regular asylum application process as opposed to refugee resettlements and refugee family reunion.

That has dramatically shifted now. If we look at 2022, just 6% have been given status under the asylum application process. The remaining 94%

have come under safe and legal routes and mostly under the Hong Kong and Ukraine routes.

Lord Alton of Liverpool: Thank you for being so helpful with those figures, but can I just push you on one further point? What percentage does the Afghan scheme make up? What sort of numbers have come in under it? Do you think that it has been a success?

Dr Peter Walsh: That makes up 2% of all of those who came last year. Apart from those who moved initially following the evacuation of Kabul, it has not really gotten off the ground. There are also challenges in the statistics, which are currently being compiled, so it is quite difficult to get a handle on exactly how many people have been granted status under the Afghan route. I estimate that, not in 2022 but since they opened, about 12,500 have been granted permanent status under either the Afghan relocation and assistance policy or the resettlement scheme.

There are some indications that, apart from the low numbers who have come under the resettlement scheme, we also see quite large numbers of Afghans travelling to the UK by small boat. This really feeds back into the point that I was making earlier about the inability of refugee resettlement. You would have to expand it very substantially and, even then, it is not clear that it targets the same population who are desperate to reach the UK and, to do so, would claim asylum perhaps after an irregular arrival.

Lord Dholakia: Dr Walsh, can I just pursue one of the questions that Lord Alton asked? There are no such things as safe and legal routes to enter this country at present. Is it possible, where no structures exist, to go to the British embassy, the British Council or the British high commission to seek admission to this country as a refugee?

Dr Peter Walsh: That option is not currently open, but it is a proposal that is quite popular among refugee and human rights NGOs, to allow people either to apply for a humanitarian visa at a British consulate abroad, which would enable them to come to the UK without needing to take a dangerous route, where they could then claim asylum on arrival, or to claim asylum abroad and then have their claim processed there. That raises some additional practical questions about where they are going to live and be accommodated while that is being processed, but that route that you have described does not exist currently.

Q14 **Dr Caroline Johnson:** I wanted to ask about the deterrent effect. The Government were quite keen to deter the number of people coming across in small boats, and no one wants to see people dying in the channel. Do you think the Bill, as drafted, will deter people coming across the channel? If so, why do you think so, and, if not, why not?

Dr Peter Walsh: We have just been doing some work on this deterrence question. There is quite a bit of research in this area, and I would be happy to send over a summary, but, in short, the available evidence suggests that the deterrent effect of asylum policies tends not to be very

large. There are three main findings from this research. There is one important caveat, by the way, which is that it is based on countries that have restricted asylum in much more moderate ways than the Illegal Migration Bill proposes.

Of the three main findings from this research, the first is that the reasons why people leave their countries of origin are typically beyond the control of destination countries such as the UK, and typically do not have much to do with immigration policy. Instead, war, conflict and inequality are the big drivers of asylum migration, at least statistically.

The second finding is that prospective asylum seekers do not always have accurate or detailed knowledge of what policies they will face when they arrive. The information that they have is often inaccurate or misleading. For a deterrent policy to work, those who it is targeting would need to have knowledge. The qualitative research, mainly with asylum seekers to the UK and other countries, suggests that the knowledge of asylum policy is not that detailed.

Thirdly, the decision of what country to go to depends on other factors in addition to policy. Policy does not seem to figure very strongly in this calculus, but the presence of family members, a perception of the UK as a welcoming, tolerant and democratic country, and the English language are things that tend to be more powerful drivers.

Because the provisions of the Bill are more radical than we have seen in comparable states in Europe, we do not know exactly what effect it will have, so that remains an open question.

Professor Cathryn Costello: You have just heard an accurate summary of the evidence base. The scholarship that exists in quantitative political science, when it looks at whether detention in particular serves as a deterrent, has tended to find not. That is based on very rigorous empirical studies around the world.

The qualitative work that has been done in the UK, including by the Home Office, tends to just confirm the picture that asylum flows always vary, particularly because of country of origin conditions. When it comes to country of reception conditions, the economy matters. If your economy really tanks, your asylum numbers might fall. Asylum policy in particular does not seem, in general, to have a huge impact on numbers of people claiming asylum, for the reasons that you just heard.

Dr Caroline Johnson: What would deter people from crossing the channel?

Professor Cathryn Costello: That is a very good question. We know that, by a certain point in these journeys, which are often long and protracted, people are extremely desperate. If you think about the most dangerous maritime crossing in the world, which is the central Mediterranean route, individuals are, by the time they get to Libya, often in extremely dire straits and feeling like that incredibly dangerous journey

is still worth it. They are often indebted, because they have had to make a very protracted, dangerous journey.

There are certainly interventions that one could do in France to assist asylum seekers and to improve things on the French side, if the UK was really willing to put resources in there, but there are serious structural problems with the French asylum system.

There was a period not that long ago, following the ZAT case, where individuals in northern France who had close family members in the UK were enabled to travel to the UK. I can share some information on that. There definitely would be ways of deflecting people into a safe route and offering them safer access to the UK. That would clearly deter people from turning to smugglers, as would encouraging people to avail of the protections that are available in France, but that has been tried on a number of occasions.

These are complex problems and you would have to take seriously the complex drivers and the high level of desperation at these points in a journey where people are often extremely indebted and think, "This last leg of the journey is extremely dangerous".

This is not a new problem. Maybe we did not have hearings on the issue or radical Bills such as this coming into force, but we previously had to think carefully about how to deter people from stowing away in lorries as a route to the UK, which is also life-threatening and dangerous, maybe even more so than getting on a small boat across the channel. What started to happen with small boat crossings is partly because it is now much more difficult to stow away or to travel by that means to the UK, because detection has gotten better. It is a complex empirical problem, but, in general, deterrent asylum policy does not work.

Dr Caroline Johnson: Sir Stephen, the Home Secretary says that people should claim asylum in the first safe country that they reach, but there seem to be some people who dispute that position. Does the convention require people to claim asylum in the first safe country?

Chair: Could I ask you also to comment on Caroline's question about the deterrent effect? I would like to hear your views on that.

Sir Stephen Laws: First of all, I emphasise that I am not a policymaker but a lawyer. I am here to talk about how laws work. Looking at how laws work, the Bill has a chance of contributing to reducing the number of people using unsafe and illegal routes across the channel. There are a number of factors that will determine whether it will succeed.

Nearly every piece of legislation is only ever one component of a wider policy project, and the Bill is no exception. The prospects of success of a piece of legislation cannot be assessed in isolation. It always needs to be set in the right context. Sufficient resources need to be diverted to its implementation and, where it is directed at stopping patterns of

behaviour, as here, to facilitating the acceptable alternative, of which safe and legal routes are part.

The broad approach seems to be right. If the use of these routes is going to be diminished, it is essential to reduce the attraction and to attack the demand side of the illegal trade that is bringing people across. The Home Secretary wants to stop the illegal business of the traffickers and smugglers. Experience of using law to try to stop illegal trades and businesses is that it is not enough just to attack the supply side. That does not mean, though, that this does not have to work in combination with the supply side, through using resources to promote the objectives and encouraging other ways of operating.

There is another important aspect of this. If you have a large-scale activity that is unlawful, particularly one where the state, in some ways, looks as if it is facilitating it, because, quite rightly, it picks up people at risk in the channel and brings them here, that undermines the faith of people in the rule of law and in democracy, so you need to do something to try to stop it.

All legislation, in my experience, is an exercise in trial and error. There is always a demand for evidence-based policy, and it is right that policies should look at the evidence, but predicting how legislation will operate on complex patterns of human behaviour is inherently difficult and susceptible, among other things, to chaos theory. Very small discrepancies in the evidence can lead to very large discrepancies in the outcomes. This has to be a trial, but it is not the first trial of legislation in this area, and the nature of the risks of failure are clear.

The central issue is whether the level of flexibility included in the Bill is too much, because, if it does not work, one of the reasons may be that it allows too much flexibility and discretion to prevent it being undermined and thwarted by litigation. It would be nice, in a world that I would like, if the Government could insert the ideal amount of flexibility, to enable them to react to the inherent unpredictability of legislative effects, and to strike an appropriate balance between an effective, pragmatic policy for stopping illegal entry by means of dangerous routes, and recognising that it might be useful and fair to be able to make some exceptions in hard cases.

The second of those, striking a fair balance, is extremely difficult, because, in the legal structures that we have created, if the Government allow themselves a discretion, they open up the possibility of frustrating, in the technical sense that it would put an end to it, or delaying the process. If, as I fear it might be, it is thwarted by delays and litigation, it will not work.

Professor Cathryn Costello: I have one point of clarification about the scope of the legislation. As drafted, the Bill would also bar asylum claims from people who come to the UK safely but irregularly. Of the 55% last year who did not come on small boats, some came through very safe means: they got on a plane or a ferry without their papers in order.

Normally, it is very difficult to do that, because of carrier sanctions legislation, which we could also discuss, but, if they get through in that way, arrive safely in the UK and claim immediately at a port of entry such as an airport or a ferry port, they would also be deemed inadmissible.

That is quite important to note in the discussion. We just need to bear in mind that the scope of the legislation is far wider than simply the so-called small boat arrivals.

Dr Caroline Johnson: The second question I wanted to ask Sir Stephen was whether you need to come directly from the country of origin, or whether you can pass through safe countries and then choose, as it were.

Sir Stephen Laws: You have to come directly from a state where you are at risk. There is a very learned and complex argument setting out why that is in two papers written for Policy Exchange—one by Professor Finnis and Simon Murray in 2020, and another last year to which they, I and others contributed on what we called plan B. I am not sure that we have the time or that I have the capacity to explain it, because it requires a lot of explanation, but the nub of it is that the travaux préparatoires for the conventions are unequivocal that that was what was intended, and I am convinced by that.

Dr Caroline Johnson: Do you know what proportion of people who successfully claim asylum in the UK have travelled through safe countries on their way here, and what proportion have arrived here directly?

Sir Stephen Laws: No, I do not. What I would say, though, is that, in those papers and in the subsequent paper that Professor Ekins and I wrote, we suggested that the appropriate policy should be confined to small boat crossings. I recognise that, once you start doing that, you create a definitional problem for yourself of how small a small boat is, which, in itself, then exposes you to challenge.

The advantage of confining the issue to the major mischief that is to be addressed, which is people crossing via small boats in a dangerous way, is that you do not have the problem about deciding whether they came directly from a safe state, because, if there is any issue about people coming from a safe state, it is probably about people who stop over or pause. People who arrive in a small boat on the south Kent coast have manifestly come directly from a safe state. That seems to me to be obvious, but I am a former parliamentary drafter and, therefore, literal minded. When someone says “directly from a safe state”, I think it means directly from a safe state.

Dr Caroline Johnson: France is safe.

Sir Stephen Laws: It is, yes.

Q15 **Chair:** I want to come in there, Sir Stephen, because your view of the travaux préparatoires is not shared by experts assembled by the UNHCR in 2001, who took the opposite view that you did not have to come directly. As I understand it, that was also the interpretation of Article 31

made by the High Court in a case called *Adimi* and by the House of Lords in another case called *Asfaw*.

Sir Stephen Laws: There was a very powerful dissent in *Asfaw* from two of the Lords.

Chair: There was quite a powerful assent from Lord Bingham though.

Sir Stephen Laws: Yes. I prefer the view of the minority. The High Court, the Supreme Court or the House of Lords not being the authoritative place for proposing what the treaty means, it is legitimate for the UK Government to take the other view and to proceed accordingly.

Professor Cathryn Costello: For clarification, “coming directly” appears only in Article 31 of the refugee convention, which is, in general, a provision that aims to protect refugees from penalisation. Then it has a slight restriction, which says that refugees—who are still refugees, with all the rights in the convention—may be penalised for infractions of migration law if they do not come directly from countries where their lives are threatened.

It is, overall, a protective provision in a protective instrument. To posit the interpretation that Sir Stephen has put forward, as have the legal scholars who have written for Policy Exchange, none of whom is a scholar of public international law, goes against not only the travaux of the refugee convention but the entire system of international co-operation on which the 1951 convention is premised.

It has absolutely no basis in international law, and it would also completely undermine the global system on which refugee protection is based. It is an absolute legal distortion to take these two words in a protective provision in a protective instrument and turn them into an absolutely fictitious notion that refugees are under a duty to stay in the first country of asylum. There is no such obligation on refugees as a matter of international law. The system could not work if there were.

In fairness, Sir Stephen, I have written one of the longest reports that exist on Article 31. We examined exhaustively the state practice in 41 countries, all of which had ratified the convention. No court in any one of those 41 countries espouses the view that is embedded in the Policy Exchange papers that Sir Stephen was recommending to the committee. It is not a serious legal argument.

Dr Peter Walsh: In response to the factual question about the number of successful asylum claimants who have come from safe third countries, it is typically assumed that the majority travel through other countries, given the difficulty in reaching the UK by plane. We do not know exactly how many, but it would probably be a decent majority.

Dr Caroline Johnson: If it was required that people claimed asylum in the first safe country that they got to, what effect would that have on the overall protection system?

Sir Stephen Laws: There is some evidence that lots of other countries are adopting restrictive views on who they are required to grant asylum to. I do not really think that it makes much difference whether you say asylum seekers would all be concentrated in the adjoining state or accumulate in the most attractive final destination. What is important is that there should be international co-operation on how the need or the desire for migration is handled across the board. That might be facilitated by states accepting that they are not bound by obligation to accept everyone, wherever they come from, and reaching an agreement on how they should be distributed.

Q16 **Baroness Meyer:** Sir Stephen, in the Policy Exchange paper that you co-wrote, you said that the new Bill should impose a duty on the Home Secretary to remove persons from the UK if they unlawfully arrived here, yet Clause 2 places a duty on the Home Secretary to make arrangements for the removal of persons who enter the UK unlawfully. What is the practical difference between those two duties?

Sir Stephen Laws: I would like to think that it is none, but I would feel happier if the Bill said "secure the removal" rather than "make arrangements for removal". There is a form of drafting known as backhanded drafting, which means trying to say something by what you do not say rather than what you do say, and I am against it. The person who introduced me into the law used to describe it as an offence against the rule of being too clever by half, by which he meant, backhandedly, not clever at all.

I am sort of confident that courts, when confronted with backhanded drafting, do not try to draw silly distinctions between what is said and what is obviously meant, but I am conscious that, for example, Section 2 of the Human Rights Act is understood by many to say that you have to take something into account, but, having taken it into account, although it does not say so, you can then, if you think it appropriate, disregard it. The courts have more or less accepted that, although in a very limited respect.

There is an example of courts finding something that was intended as a bit of backhanded discretion to not follow ECHR jurisprudence, and so I would be happier if it said what it means, which is that the Secretary of State must make sure that they leave.

Baroness Meyer: You also said that the duty to remove should apply to those who arrived or attempted to arrive by small boats from a safe country such as France. Why did you reach this view, and why only small boats?

Sir Stephen Laws: We were arguing for quite wide ousters. We thought that it was more appropriate to confine what Dr Walsh said is a radical measure to the immediate mischief that we needed to tackle, which was the dangerous and unlawful crossing of the channel.

Q17 **Baroness Kennedy of The Shaws:** This has already been answered and

goes back to Professor Costello. It is about Article 31 of the refugee convention, which, as you were describing—and I commend you for your restraint—is about getting international public law right and understanding what it would mean for us to decide that you had to stay in the first country that you go through. That would mean that most refugees were in places that were perhaps as unwelcoming as their own country.

Let us have a look at Article 31 of the refugee convention. It prohibits penalisation of refugees for their illegal entry or presence. We have had Sir Stephen claim that, because it says “only if they come directly from where they’ve been persecuted”, this gives a let-out to the Government in this new piece of legislation and, therefore, they can claim that they are not in contravention of law.

I really would like you to, in some detail, explain what you have just said to us about how this is a protective mechanism within a protective provision, because I am not sure that people understand that. You are a true expert. I remember your reputation in Oxford and around the world on this subject, so I really would like you to explain to us all what you mean by that.

Professor Cathryn Costello: I think I said that Article 31 is a protective provision in a protective instrument. Other rights that refugees claim under the refugee convention would also be imperilled by this legislation, so it is important to think about that. Protection against penalisation is one of many rights in a convention that is about the status of refugees. We are also talking about putting non-refoulement at risk, for example.

Both of those provisions, non-refoulement in Article 33 and non-penalisation, apply to all asylum seekers as presumptive refugees, irrespective of their legal status in the territory. That has to be the case, because whether you are a refugee does not depend on the migration law of the country where you happen to find yourself. The international system would not work otherwise. Human beings have to have a right to flee, to leave any country and to seek asylum.

Article 31 is central to reflecting the fact that states may have immigration laws. They can also implement them and can even penalise some refugees if they had a status and they left it. There is a prohibition on penalisation of refugees who come irregularly, unless they are among that category who left a place where they had protection already. That is what “coming directly” is. It is an otherwise blanket prohibition on penalisation, but then there is a little bit of a clawback for states’ migration control powers.

In general, the idea that the drafters had was driven by an understanding among people in the room, including refugees who had fled across various countries. It is often difficult to flee and hard to find protection. The then UN High Commissioner for Refugees had fled across occupied territories during the Second World War. He was a Dutch freedom fighter. He said, “Of course, when we say ‘coming directly’, we don’t mean that you can’t pass through several countries on your search for protection”.

This reading of Article 31 has figured in case law around the world. I mentioned case law in 41 countries that I am familiar with, including in the UK, which says that Article 31 is, in general, a protective provision, unless refugees have not come directly and did not have good cause for breaching migration law.

There is an acceptance that the idea in the refugee convention is that, unfortunately, refugees generally do have good cause to break immigration controls, because we have never lived in a world where refugees are invited to the countries that end up offering them asylum.

It has always been the case that some—and at certain points in history, as nowadays unfortunately, almost all—refugees have to travel irregularly in order to claim asylum, which is why this protection is more vital than ever. That is also a statement that has been made by British judges in interpreting Article 31. “Coming directly” is only in that provision of the convention.

The Bill, as drafted, violates Article 31 in three ways. It penalises everyone, irrespective of how they come. Its understanding of “coming directly” is not the understanding in international law. “Coming directly” in international law acknowledges that refugees often have complex flight routes and sometimes get stuck in places, because they are often traveling in clandestine ways. It is based on a factual rather than a blanket assessment of the refugee’s individual circumstances.

UNHCR described the interpretation put forward in the Bill as a fundamentally incorrect definition of “coming directly”. In other words, not only is it an antithesis to the purpose of Article 31 to distort it in this way, but there is a very clear distortion of the established understanding of “coming directly”.

I said that there are three aspects that violate Article 31. First, it penalises everyone, and in doing so, because it completely bars individuals from having their refugeehood acknowledged, that breaches lots of other rights in the refugee convention, not just Article 31. Secondly, it has a fundamentally incorrect interpretation of Article 31. Thirdly, it sweeps up family members within its scope, without any assessment of whether they have come directly, if I have read the Bill correctly. As we all know, the Bill is quite complex, but that would be my analysis in relation to Article 31.

Q18 Lord Dholakia: Dr Walsh, under the Bill, what would happen to a person who was covered by the Home Secretary’s duty to remove but could not be removed for any reason?

Dr Peter Walsh: The Bill raises two quite substantial practical challenges, irrespective of the legal challenges that will take place. The first is where to detain people. You would have to detain them if you are threatening them with removal. The last time that I checked, the detention estate was about 2,500 individuals, so that would have to be

substantially scaled up. If it cannot be, individuals would probably have to be held in hotels, private rental accommodation or some other place.

The other very big challenge is removing individuals. We have had quite similar rules on the books for about two years now, and 20,000 individuals, mostly arriving via small boat, have been considered for inadmissibility because they have come via a safe third country. Only 21 had been removed as of 30 September last year. That is a real big part of the challenge. If people cannot be removed, they will either be detained or be accommodated for long periods, living in a kind of limbo. That is the risk.

Lord Dholakia: Do you know what the longest period is that an asylum seeker has been in this country without being deported?

Dr Peter Walsh: I do not. I do know that there is a person in immigration detention now, and it is not clear whether they claimed asylum before, who has been held for something like four and a half years. That is the person who has been held for the longest, and there are a few people like that.

Lord Dholakia: At present, how many people have had their asylum claims refused and are awaiting removal? What happens to those people pending their removal?

Dr Peter Walsh: We have data on this, and it is about 59,000 people. These are individuals who filed their asylum claim in the 12 years from 2010 to 2021. That is the only period for which data are really reliable. As of June last year, there were 59,000 applications that had been refused—this number does not include family members and takes into account refusals at the First-tier Tribunal, so an appeal has failed—where the individual has not been recorded as having left the UK.

There is a caveat to these data, which is that some departures may not have been recorded, for various technical reasons, so that probably represents something like the upper bound of the number of refused asylum seekers who have not left the country. This is because the returns of asylum seekers are substantially down. We are returning fewer than we used to. About 10 years ago, around 10,000 refused asylum seekers left the country or were forcibly removed. That is down to just over 1,500 in recent years.

What happens to them while they are awaiting removal? They continue to receive asylum support and accommodation for the most part, but, because removals are so few, there is a risk that some could remain in the UK indefinitely.

Sir Stephen Laws: As I understand the Bill, if someone could not be removed, the primary question might be, "What's the position as far as the Government are concerned?" because they would be in breach of their duty. The detention powers mean that, when it reaches the stage where the Secretary of State has to conclude that they cannot be

removed within a reasonable period, he or she must arrange their release. That is comparable to the test the House of Lords required in the Belmarsh case, where people were being detained pending extradition, under which you had to release them if there was no prospect of their being removed from the country within a reasonable period.

Professor Cathryn Costello: I would emphasise that the Bill seems quite extraordinary in this respect. Because individuals are completely barred from the asylum system, there also will not be decisions being made that people are not refugees. In a way, the Bill generates a situation where returns to countries of origin are then ruled out, even on the text of the Bill as I understand it. That seems just a very strange position.

Many states try to do border asylum procedures very quickly so that they can make decisions that somebody is not a refugee and try to remove them quickly, but that is not what the Bill is doing. It is really a recipe for indefinite limbo.

Also, the UK used to be part of the Dublin system, and then there was a whole network of agreements for safe third-country returns with some safeguards. Even in that system, returns were difficult, but now there are no arrangements in place with France or with any European countries for safe third-country returns, so the feasibility of return is really in question.

It is also important to note that the Dublin system always had a provision in it that, at a certain time, if return was not feasible, the state in question takes charge of the asylum claim. That is really a condition for the legality of safe third-country practices. The refugee convention does not rule out safe third-country practices, but they have to be implemented very carefully in order to enable refugee protection.

That is also missing in the Bill, because, as I read it, there is this fantasy that everybody is going to be removed swiftly, even though we know that there is nowhere to send them to in reality. Even if they are being sent somewhere else, the Bill does not require any checks that the other country has an asylum system. In fact, UNHCR has pointed out that there is a discrepancy between the Bill and the Explanatory Memorandum.

The Explanatory Memorandum invites us to imagine that this is about ensuring that people can have their asylum claims assessed elsewhere, but there is nothing in the text of the Bill to ensure that that is part of the analysis either. For those reasons, again, it is very hard to see any of these safe third-country mechanisms as compatible with the refugee convention and other international human rights norms.

- Q19 **Lord Henley:** Can we move on to modern slavery? These questions are for Sir Stephen and Professor Costello. The Bill, as you know, disapplies various modern slavery protections for those who enter or arrive in the United Kingdom irregularly on the basis that they represent a threat to public order. Would the disapplication of those protections be compatible with our obligations under the ECHR and under the Convention on Action

against Trafficking in Human Beings?

Sir Stephen Laws: As Professor Costello has pointed out, I am not an international lawyer, and so an answer to the question about the convention is probably not something that she or anyone else will accept I am competent to provide.

The pragmatic reason for excluding the modern slavery provisions is that they are a source of delay that prevents the removal and deterrence of the unlawful trade that is being carried on. Pragmatically, I find it difficult to understand why it is thought that it would be better to have these provisions applied to keep people in the United Kingdom, where they might disappear into the underground economy or remain under the control of the people who have trafficked or smuggled them into the country, meaning they would be very likely to be subjected to modern slavery, whereas removal to a third country is likely to release them from any modern slavery that they are engaged in.

The answer to why they are being disapplied is for the pragmatic reason that it will be impossible to deter and attack the demand side of the illegal trade if the delays that modern slavery legislation causes continue. Professor Costello will probably want to comment on why international law makes pragmatism inappropriate.

Professor Cathryn Costello: I am not sure that I would characterise an approach based on unimplementable policies as pragmatic.

The committee should be aware of three important pieces of information. First, GRETA, the Council of Europe committee charged with interpreting the convention, has issued a very seriously worded statement with its concerns about the Bill today, signalling that it sees the Bill as incompatible with the duties under the Council of Europe convention.

I will make one very clear and succinct legal point. Framing irregular arrivals as a public order problem under the convention seems to me to be legally incorrect because the convention understands that among irregular migrants are often people who either are currently being trafficked or are at high risk of trafficking. To interpret the public order exceptions in the convention as being triggered simply by virtue of the fact that there are irregular arrivals, even if it is a dangerous irregular route, cannot be what "public order" means under that convention, just as a matter of legal logic. That is one very clear problem with the Bill.

Secondly and more deeply, remember that the modern slavery protections are rooted in Article 4 of the European Convention on Human Rights. Protection against forced labour and trafficking is an absolute human right so there is no public order exemption from those protections in general. States have to work around whatever policy and public order challenges they face, but they also have to respect human rights.

Thirdly, remember that the system of anti-trafficking conventions and laws is based around three separate duties: to prevent trafficking, to protect the victims of trafficking and to prosecute traffickers. The Council

of Europe Convention has a whole set of complex provisions in order to do that. On the prevention side, it is quite clear that this Bill, if adopted, would be likely to increase the number of people living in limbo, increase fear among asylum seekers coming to the UK and encourage people to go underground, where they are at a higher risk of exploitation and trafficking.

The Bill is increasing trafficking risk. It may lead to this dangerous route becoming more dangerous because it would become clandestine. At the moment, people cross the channel in broad daylight and claim asylum on arrival. If they thought they were going into immediate detention, that might be very different.

On the protection front, the convention requires states to give potential victims some time and to identify victims. We have some data from last year about the numbers of people who arrived on small boats who were in fact identified as victims of trafficking. It seems like it is quite a significant percentage and about the same as the percentage one would find in the normal asylum-seeking population. There are victims of trafficking who are being trafficked into the UK on this particular route.

Finally, the duty to prosecute cannot be met unless there is some serious law enforcement activity on both sides of the channel to gather evidence and bring cases. As Sir Stephen was saying, there is an idea that, if we were to remove the victim from the UK, they would somehow be away from the clutches of traffickers. That is not the system that has been established to deal with trafficking claims.

I mentioned the GRETA committee's intervention. There have also been two reports prepared by the modern slavery policy and evidence centre, based at the Bingham Centre, which have also been circulated to the members of the committee, on the legality of the Bill. Those draw out some of the points I have made, but also look empirically at the available evidence of the fact that there are victims of trafficking among the irregular arrivals using these routes.

Lord Henley: I put this again to both of you: Are there any other countries that do this?

Professor Cathryn Costello: If by "do this", you mean a blanket removal of protection for an entire category of people based on irregular arrivals, my understanding, from the research I have seen, is that there are none.

We have asked the question directly to the GRETA committee, which supervises the practice of all states, and the answer we anticipated was no, but it may come in a very direct form. Certainly, we have not identified a single state that operates in this way.

Baroness Meyer: Is that not the case with the United States?

Professor Cathryn Costello: We were talking about state parties to the Council of Europe Convention on Action against Trafficking in Human Beings.

Lord Henley: The United States does.

Professor Cathryn Costello: Not to my knowledge, no. There is a specific visa regime for victims of trafficking in the US, which acknowledges that victims of trafficking often have irregular status. I am not claiming expertise on US anti-trafficking practice.

Q20 **Chair:** Professor Costello, you referred to GRETA, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings. It has issued a statement today. You also mentioned the two reports produced by the Bingham Centre with a legal analysis on the particular point about the impact of the Illegal Migration Bill on the United Kingdom's international obligations in relation to human trafficking and slavery.

I note that the statement issued by GRETA today, as well as expressing concern about the substantive breaching of obligations, says it is concerned that "the Illegal Migration Bill is being examined under an urgent procedure" in this Parliament, which "will not allow for proper consultations with the opposition, stakeholders, experts or civil society". Is that a concern that you share?

Professor Cathryn Costello: Yes, absolutely. The Bill throws up a whole host of extremely complex legal questions, but also, as the discussion today has identified, extremely complex empirical questions about what sort of impact the legislation is likely to have.

The idea that people can be removed swiftly is clearly a fantasy because we know there are no underlying agreements in place. If you did want to have a serious conversation about how to enable refugees to reach the UK legally, you would have to look at a whole range of policy options and think about the very different populations we have in mind. There are people who might already be in northern France; there are people who have fled Afghanistan since the Taliban takeover and are in Iran. This is a complex policy problem, and the legislation is not serious about how to deal with it.

Yes, I absolutely agree. Frankly, the legislation is so full of legal quandaries that one could write a textbook about it, and nobody has the time. I do not claim to have read it in enough detail even though I have known for several days that I was going to give this testimony. I am not the only one who has been on the back foot in trying to take it seriously as a piece of legislation.

I will just make one more point. It also contains some absolutely striking Henry VIII clauses. From Parliament's point of view, if this Bill were passed, it would confer extraordinary and sweeping legislative powers on the Secretary of State to legislate on matters of massive human rights sensitivity, and then try to oust judicious scrutiny of the exercise of those

powers. Anybody concerned about British democracy and the rule of law should also be seriously concerned about the Bill.

Chair: Yesterday and the day before, the Bill was heard in the Commons before a Committee of the whole House. We had six hours yesterday and six hours on Monday. Many MPs, both Front Bench and Back Bench, from all parties lodged all sorts of amendments attempting to address some of the complex legal issues around the Bill.

The Minister summed up on both days—13 minutes one day and 15 minutes the next day. It is not possible to address the issues of empirical and legal complexity you have described with ministerial responses to hundreds of amendments that last for less than half an hour. Given its complexity, is spending 12 hours in a Committee of the whole House with brief responses from the Minister to hundreds of amendments a satisfactory way to go about the legislative scrutiny of such a Bill?

Professor Cathryn Costello: I have been relying on my expertise in international law but, as somebody who taught British constitutional and administrative law for over a decade in Oxford, I find it an astonishing situation to be in, given that this legislation has ramifications not only for the rule of law in the UK but for international legality and the system of co-operation on which international refugee law rests.

I know you are going to hear from the UNHCR later, but I have never read such strongly worded commentary on national legislation in my career as the UNHCR commentary on this Bill. It describes it as an asylum ban, and that characterisation is correct. The idea that the UK can still hold its head high and co-operate with other states on refugee issues would be seriously imperilled.

We also know there is a tendency for bad policy to travel. In a way, this Bill is a bad replica of Australian practices. The contagion effect of legislation like this is also something I would worry about, along with the damage to the UK's international reputation.

Chair: Sir Stephen, can I bring you in on that? I was asking about the comments from GRETA, which is concerned about this Bill being examined under the urgent procedure, which it says will “not allow for proper consultations with the opposition, stakeholders, experts or civil society”. Do you have any views on that comment?

Sir Stephen Laws: I cannot remember a single Bill I worked on in my career where somebody did not suggest that it would be better to do nothing because we could not do it properly. Very often that person was the drafter. Change sometimes requires you to take a risk and see what happens.

That is not to say I am in favour of fast or expedited procedures. Committee stage on the Floor of the House involves more people, which is a good thing, and less time, which is probably a bad thing. For those reasons I find it difficult to be appalled by this. Most legislation passes in

a way that is less than ideal, but Parliament has control of how it is done and should exercise that control.

What I put my hand up for was really to agree, perhaps for the first time, with Professor Costello about something. This Bill should not be full of very wide powers to make subordinate legislation, not least because, in this context, taking very wide powers to make subordinate legislation is bound to come under challenge in the courts. It would be much better if the Government set out what they intend in the Bill.

For example, there is a rather disguised power in Clause 3(5) to (7), which I think—I was checking it as we came on air—is a negative resolution power. That is an extraordinarily risky and inappropriate thing for the Government to have done.

I have a rigmarole I go through when people mention Henry VIII clauses. A Henry VIII clause is a clause that takes a power to amend an Act of Parliament. That is not normally the reason to object to it. The reason to object is if it takes a power to do very wide things. A Bill to change a number in an Act, such as a fee or something, is a Henry VIII power if the fee is in the Act. What is objectionable is when the use of the power spreads into areas that Parliament thinks are politically salient and where it ought to have more say. There are powers like that in the Bill, and they should not be there.

Chair: Thank you, that is very helpful.

Q21 Baroness Kennedy of The Shaws: I would really like Sir Stephen to be more specific when he says, “There are powers there and they shouldn’t be there”. What are the areas he sees as being trodden on that should properly be looked after by parliamentarians? It seems to me that anything to do with human rights must be in that category. Parliamentarians should decide that in a democratic way, surely, if you are removing human rights.

Sir Stephen Laws: There are no rules about it. It is right to say that parliamentarians ought to decide, and of course they have the opportunity to decide when the powers are conferred.

I have said this in lots of other contexts as well. The test is whether the way the power can be exercised involves something that will be so politically salient that Parliament wants the more complex version of scrutiny it gives to Acts of Parliament, rather than the less detailed scrutiny it gives to statutory instruments.

It is for Parliament to decide. There are no rules you need to lay down as to when Parliament should decide it needs to consider them and when it should not. Parliament should make that decision for itself.

Baroness Kennedy of The Shaws: Clause 13 would prevent the First-tier Tribunal granting immigration bail to a person subject to removal in the first 28 days of detention and would also oust judicial review in all but very limited circumstances for this period. Are those changes really

needed?

Sir Stephen Laws: Are we talking about new paragraph (3A), the part about legal proceedings?

Baroness Kennedy of The Shaws: Yes.

Sir Stephen Laws: New sub-paragraph (5) says it does not “affect any right of a person to apply for a writ of habeas corpus or for any other prerogative remedy”. Prerogative remedies are not prerogative remedies any more, which is a bit puzzling, but is that not all the remedies you get on judicial review? I am afraid I do not know what the effect of Clause 13 is.

Baroness Kennedy of The Shaws: I strongly suspect that some lawyer said that habeas corpus, one of those great things us British folks religiously commit ourselves to, was endangered. Therefore, they have had to write in that habeas corpus is not going to be interfered with. They are certainly interfering with the opportunities people will have to judicially review the decisions that are being made.

Sir Stephen Laws: Judicial review leads to prerogative remedies. I do not know what it is trying to say.

Chair: Can I just come in here? I speak as a Scots lawyer. Of course, habeas corpus is an English concept—not any the worse for it, I might add. As I understand it, applications for habeas corpus tend to focus on the existence or the absence of a power to detain, whereas judicial review claims can focus more widely on the way in which the power has been exercised. There is a reduction here in the scope of remedies people can exercise even if they still have habeas corpus. Is that right?

Baroness Kennedy of The Shaws: That was what I wanted to home in on. We are seeing a serious reduction in rights that we have taken for granted as a part of our system for a very long time.

Sir Stephen Laws: As I say, I do not know what the words “prerogative remedy” is supposed to include, but, whatever it is, it saves it from the exclusion.

Professor Cathryn Costello: This is indicative of the many legal complexities. What has been excluded is a bail hearing for the first 28 days. At a bail hearing, people can be released conditionally. There is a lot of evidence that conditional release is entirely appropriate in these situations.

That is also a requirement for detention to be lawful. It is only in that context that the necessity of the detention in the individual case can be tested. I do not think even 28 days’ detention with no hearing could be lawful under international law.

It is also counterintuitive. A habeas corpus hearing can make a very limited determination, only that there was no power to detain, not that

the power was inappropriately exercised, and so there cannot be a conditional release on a habeas corpus action. That has to go to the High Court, which is much more complex and expensive.

I wanted to circle back to the extraordinary nature of the Henry VIII clauses to bring two to the committee's attention very quickly. It is envisaged that one of the key actions required if the exercise of a power has any hope of being lawful is to have an appeal with a suspensive effect to prevent removal.

In any event, the type of appeal that is envisaged is extremely restricted. I am not sure it is at all effective under the standards of international law. The particular appeal in relation to serious and irreparable harm leaves "serious and irreparable harm" undefined and then creates a Henry VIII clause saying that the Secretary of State can define the meaning of "serious and irreparable harm". To me that is extraordinary because "serious and irreparable harm" is a standard that is about non-refoulement under international human rights law.

If that power is to be exercised appropriately, it has to be exercised interpreting the statutory power in the light of binding international legal commitments, as the British courts would always generally ensure, even if we are talking about unimplemented conventions such as the Convention on the Rights of the Child and so on. That does not seem to be possible under the scheme as envisaged.

The second concerning Henry VIII clause—there are many more in the Bill—concerns the legal status of interim measures granted by the European Court of Human Rights. That also seems to be very concerning. The legal effect of an international court order would be left to the individual Secretary of State to determine.

Sir Stephen Laws: I agree with Professor Costello about the first of those. It is not only inappropriate but unwise.

On the Rule 39 power, I find that difficult because it seems to me to be starting from the wrong place: that Rule 39 measures have some validity under the European Convention on Human Rights. I do not believe they do. They were invented by the court, and they are not something we ought to pay any attention to.

Saying that we will decide what effect they have seems to me to be the wrong approach. I am in favour of saying they have no effect. They seem to me to be unjustified by the European Convention on Human Rights and completely contrary to the principle of subsidiarity agreed in the Brighton declaration, so we will have to disagree about that one, but we agree about the other one.

The Brighton declaration favoured the European Convention on Human Rights being applied with a level of subsidiarity. That was added in a protocol, but I cannot remember what number it was—it was something like 16 or 17. The principle of subsidiarity is that local courts should

decide things, and that the European Court of Human Rights is not a court of appeal or there to supervise local courts. It is there as a separate international system. In the case of the Rule 39 measures, the local courts decided it was not necessary to provide a pre-emptive interlocutory remedy. Exercising a jurisdiction I do not think it has, the European Court of Human Rights tried to overrule that, which is not consistent with subsidiarity or with what it is allowed to do under the convention. The UK Government are not bound by anything in the convention that requires them to take any notice of Rule 39 measures.

Baroness Kennedy of The Shaws: Not only will Professor Costello, I suspect, take issue with that, but I certainly would. Professor Costello, is there anything you would like to say about the idea that it is not within the powers of the European Court, especially when it comes to the liberty of persons being moved to somewhere such as Rwanda, to say, "Hold on a minute; let court proceedings make decisions in this kind of case"?

Professor Cathryn Costello: Regional human rights courts, not only the European Court of Human Rights but others, as well as UN treaty bodies, have all developed their interim measure jurisdiction. In some cases they have done that by very clearly relying on their own rules, and in some cases they have been more creative. Courts often have to do that when their own rules are not that clear.

It is clear that the European Court asserts that its Rule 39 interim measures are binding on states, and most states accept that. If the UK does not like that, it can try to change that at the multilateral level. The problem is the idea that a single Secretary of State, by means of a ministerial order, can determine the legal effect of a court that is established by a multinational treaty.

We could have a discussion on the merits of whether supernational courts should have interim ruling jurisdiction. I think they should have. Maybe there are reasons why they should not have accrued this jurisdiction, but they have. It is not only the ECHR. These questions can also go to UN treaty bodies, which can issue rulings, and states also respect those rulings in general.

This is a discussion that is going to take place in relation to another very important Bill. This has been snuck into a Bill on so-called illegal migration. It will have separate debate in relation to the Bill of Rights Bill. That is really where it belongs.

Baroness Kennedy of The Shaws: I want us to go back to the substance of this question. It was about the fact that it would not be possible for somebody who has been detained under this Bill to challenge it in any way through the courts. That is removing what would normally be possible.

Liberty is one of the great things we hold dear in this nation, whoever you are. That was what habeas corpus was built on: you have a body in detention. There has to be an opportunity for that person to say, "I

shouldn't have my liberty taken away". A court should be the place that decides that.

Here, there is going to be an ouster of the opportunity to challenge the decision to detain. We can argue about whether that is at all appropriate, but I am going to ask both of you whether it is compliant with the European Convention on Human Rights that someone cannot, through the courts, challenge a detention and the removal of their liberty in that way.

You can apply for bail in the most incredible criminal cases—homicide or terrorism cases. We give people the opportunity to do that. They might be refused, but they have the opportunity. Here, the opportunity is being removed.

Professor Cathryn Costello: Yes, I agree. This is extremely serious. I do not see how it is compatible with international human rights law. Again, it is not only about the European Convention on Human Rights; it is also about the ICCPR and a whole range of other human rights instruments, which permit some detention of irregular arrivals in order to prevent an effectuation of irregular entry under very limited conditions. Those limited conditions are not met anyway.

If, on top of how sweeping the detention powers are, we also have a lack of judicial scrutiny, that just exacerbates the human rights violation that is being contemplated.

Baroness Kennedy of The Shaws: The Bill removes the current time limits for detaining women and children. There has always been a special concern about detaining children in particular. Is that compatible with the UK's human rights obligations under, for example, Article 5, the right to liberty, or Article 8, the right to respect for private and family life? Maybe you think that is all for the birds, Sir Stephen. I do not know. Do you?

Sir Stephen Laws: First, Parliament has the ability to pass this Bill if it wants to. Secondly, there needs to be a practical solution, which at the moment is being thwarted by the legal system, to a serious problem in the channel. I wish there were other solutions. I would like to hear what they are. What I have been hearing is that the Government are prevented, by international law, from seeking to solve this problem. That cannot be right. It is a serious problem.

Baroness Kennedy of The Shaws: No. The question is whether this is the proper solution. It is not about finding a solution. The Government can find a solution and should not be prevented from doing that. It is a question of whether this is one when it contravenes so many issues of law and rights that have been acknowledged by our country in its signature to many treaties and conventions and in our own law, which we have introduced into the United Kingdom. It is very serious.

Sir Stephen Laws: I am not in favour of us withdrawing from the European Convention on Human Rights, but we should be able to come

up with solutions to the problems we have and those points should go to the European Court of Human Rights, for it to decide what it thinks of them. To do that, we need to exclude our domestic human rights regimes.

We know the Strasbourg court is responsive to political pushback. The only way we can find out what we can do is to go to the European Court of Human Rights with what we would like to do and see whether we can discover what it is we can do and what would work.

It is not enough to say, "We don't like this solution. The Government must think of another one". If you want the Government to think of another one, come up with what they could do that would work. I would support that.

Chair: Hang on a second. This committee's role is to scrutinise the legislation for its human rights compliance. We do not really have the wherewithal, as the Joint Committee on Human Rights, to come up with a solution. I see what you are saying, Sir Stephen, but we are here to see whether the solution the Government have come up with is human rights compliant. You are saying, "It very well may not be, but we need to leave it to the Strasbourg court to decide that".

Sir Stephen Laws: Yes.

Chair: I am afraid we are going to have to wind up the session now because we have another evidence session. Are you happy with that, Lady Kennedy?

Baroness Kennedy of The Shaws: Yes, we have a general sense of Sir Stephen's position: you have to be pragmatic, and it does not matter if you contravene international law, human rights law or whatever.

Baroness Meyer: He did not say that. That is a little bit one-sided.

Baroness Kennedy of The Shaws: He has made it very clear that he thinks that crushing the demand is an essential part of doing this.

Chair: We need to discuss this as a committee when we come to write our report. We are in danger of losing our quorum for our second panel; we have somebody here from UNHCR, and I do not want to do that.

I thank all three of our witnesses very much indeed for a really interesting and extremely stimulating session. We are grateful to all three of you for doing it at such short notice and being prepared to go into such detail. We really appreciate that. I know there are a few things we are going to follow up on with you, Dr Walsh. Thanks very much to all three of you.