House of Commons
House of Lords

Joint Committee on Human Rights

Legislative Scrutiny: Illegal Migration Bill: Government Response to the Committee's Twelfth Report

Eighth Special Report of Session 2022–23

Ordered by the House of Commons
to be printed 6 September 2023

HC 1790
Published on 7 September 2023
by authority of the House of Commons

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Eighth Special Report

The Joint Committee on Human Rights published its Twelfth Report of Session 2022–23, *Legislative Scrutiny: Illegal Migration Bill* (HC 1241/HL Paper 208) on 11 June 2023. The Government response was received on 2 August 2023 and is appended below.

Appendix: Government Response

Thank you for your Committee's comprehensive report on the Illegal Migration Bill, published on 11 June 2023. While the Government does not agree with many of the Committee's conclusions and recommendations, I nonetheless value the insight the Committee has provided and its constructive challenge. You will have seen that the Bill received Royal Assent on 20 July; I welcome Parliament's endorsement of the Bill as put forward by the Government.

The Government has considered the Committee's recommendations. This letter sets out the Government's response to each recommendation.

Channel crossings, "illegal" entry and the Illegal Migration Bill

23. It is clear that there is a global migration crisis: tens of millions of people are currently displaced and are fleeing their home countries to escape war and persecution. It is difficult for us to imagine their desperation. In recent years, the number of people coming to the UK to seek asylum has increased. Many of those people have risked their lives by crossing the Channel in small boats, and sadly many people have lost their lives while making that journey. It is right that the Government should seek to prevent further loss of life at sea. Many of those who make dangerous journeys do not have the options of a safe and legal route into the UK. We welcome the Government's commitment to safe and legal routes and encourage them to specify what these new routes will be as soon as reasonably practicable.

The UK has a proud history of providing protection for those who genuinely need it through our safe and legal routes. The UK is one of the largest recipients of UNHCR referred refugees globally, having resettled 28,000, through UNHCR resettlement schemes between 2015 and 2022; this places the UK second only to Sweden in Europe. However, the volume of illegal small boat arrivals has overwhelmed our asylum system. We have a duty to house those arriving illegally. But that is now costing £6 million a day and £3.6 billion a year. With over 45,000 people making the dangerous Channel crossings last year, this simply is no longer sustainable.

If people know there is no way for them to stay in the UK, they won't risk their lives and pay criminals thousands of pounds to arrive here illegally. It is therefore only right that we stop the boats and break the business model of the criminal gangs exploiting vulnerable people - ultimately enabling the Government to have greater capacity to provide a safe haven for those at risk of war and persecution.

Following on from the Home Secretary's letter of 2 June, the Bill had undergone further parliamentary scrutiny and was passed by both Houses, receiving Royal Assent on 20 July. This new legislation will deliver the bold action needed to tackle the scale of illegal migration in the UK.

Our inquiry and views on the Bill

52. All but one piece of evidence we received opposed the Illegal Migration Bill. There was disagreement about whether the Bill would achieve its stated aims of deterring illegal entry, breaking the business model of people smugglers and saving lives. The majority of those who provided evidence believed the Bill would fail to achieve its aims. Instead, they said it could lead to people attempting to come to the UK through more dangerous routes, which could both benefit people smugglers (who could charge more for their services) and lead to more people tragically losing their lives on those routes. Others highlighted that the Bill could dissuade people from applying for asylum when they arrive in the UK, meaning they would be undocumented and at greater risk of exploitation.

53. Some of those who provided evidence expressed the view that a more effective means of deterring individuals from making dangerous journeys would be to provide more safe and legal routes for people to come to the UK, negotiating returns agreements with European countries and quickly processing weak claims.

54. We also heard that the Bill is likely to have a disproportionate impact on vulnerable groups, including victims of trafficking and modern slavery, children, and LGBTQIA+ people. Given this, it is unfortunate that the Home Office has failed to publish the relevant impact assessments before the Bill concluded its Commons Stages. Those impact assessments are crucial to enable effective and full scrutiny of the Bill, and to enable an assessment of its impacts on vulnerable groups, and of how the Government has reached the conclusion (contrary to the weight of evidence that we have heard) that the Bill will achieve its stated aims, what other alternative methods it has considered to stop people making dangerous journeys, and why it deemed the Bill to be preferable to those alternatives.

55. We also heard that the Bill could damage both the global system of refugee protection and the UK's reputation as a compassionate country for those fleeing war and persecution and. The only way to solve the global migration crisis is through international co-operation. The Government should make clear what measures it is pursuing on the international stage to ensure and preserve the efficient working of the global refugee protection system.

The Committee provided a range of comments and recommendations in relation to all provisions in the Act, and we are grateful to all those who provided evidence to the Committee. It is the Government's firm view that this new law is vital towards stopping dangerous, unnecessary and illegal journeys to the UK, and removing the incentive for people to take these routes in the first place.

The Government has carried out and published the following impact assessments which I know Committee members will have seen:

- Equality Impact Assessment: 3381 (parliament.uk)

- Economic Impact Assessment: Impact Assessment (parliament.uk)
- Child's Right Impact Assessment: Impact Assessment (parliament.uk)

The UK has good and longstanding migration relationships with other countries, and since 2021 the UK has signed new migration agreements with Georgia, Albania, Serbia, Nigeria, India and Pakistan. For the majority of countries though, returns can be effected without the need of a formal agreement.

The Government also has a strong track record of international collaboration with both state and non-state actors such as the UN High Commissioner for Refugees, the World Bank, Non-Governmental Organisations, other donors, and through our direct engagement with major refugee hosting countries. The UNHCR has a global mandate to protect and safeguard the rights of refugees and to support internally displaced populations and people who are stateless or whose nationality is disputed. The Government will continue to work with UNHCR, as we have done many times before, to respond to displacement crises globally, and to offer safe routes to protection in the UK.

The duty to make arrangements to remove people from the UK

107. Clause 2, taken together with clauses 4 and 5 (which provide for the inadmissibility of asylum and human rights claims and removal from the UK), penalises refugees who come to the UK irregularly and indirectly, including children and victims of modern slavery, by denying them access to the asylum system and making them liable to removal. This is, in effect, a near-ban on asylum and humanitarian protection. Extinguishing the right of asylum for refugees arriving in the UK breaches the object and purpose of the Refugee Convention with which we are bound, in good faith, to comply.

The Government takes its international obligations very seriously, and our approach is not incompatible with international law, including the Refugee Convention. But radical solutions are required to stop these dangerous small boats crossing the Channel.

This legislation is formed around the central premise that those in need of protection should claim asylum in the first safe country they reach – that is the fastest route to safety. We are not alone in taking this approach. Those coming in small boats are coming to the UK from safe countries. It is unnecessary for them to risk their lives traveling to the UK, making these dangerous journeys, and paying people smugglers, when they could and should seek protection in these countries.

The Government has concluded that this radical approach is necessary to prevent and deter this activity. The UK cannot accommodate all those that may wish to come to the UK, it is right that we take action to safeguard our system for those most in need, not those who attempt to jump the queue and could have sought protection elsewhere.

122. Clause 2 penalises refugees in clear breach of the Refugee Convention and Article 31 of the Refugee Convention by providing for a blanket denial of access to the asylum system for those who come to the UK irregularly and indirectly. It is clear that the drafters of the Refugee Convention recognised that refugees might travel through multiple countries prior to seeking asylum. Article 31 does not authorise the Government to deny the protections of the Convention to any refugee who enters the UK indirectly.

This is the unequivocal legal position as set out by the UNHRC and confirmed by our domestic courts. Clause 2 should be removed from the Bill as it violates the UK's legal obligations under the Refugee Convention (see Annex, Amendment 2).

We disagree with this interpretation of the drafters of the Refugee Convention's intentions. The Convention says that refugees should not be penalised if they have come directly from a country from where their life and liberty was at risk. By implication, the Convention was constructed in such a way that did not intend for people to travel from one safe country to the next without seeking protection at the first opportunity. This legislation has been drafted in line with our good faith interpretation of the Refugee Convention.

123. Further, if clause 2 remains in the Bill, the definition of "coming directly" in clause 2(5) must be amended to reflect the position in law and not the Government's misconstruction of Article 31 (see Annex, amendment 3). The Nationality and Borders Act 2022 will also require amendment to reflect the proper interpretation of Article 31.

Parliament has agreed what is now section 2 of the Act in the form put forward by the Government. We do recognise there may be cohorts it would be appropriate to except from the provisions of the Act, either temporarily or permanently. For this reason, the Act provides a power to make regulations to except people from the duty and disapply any of the other provisions of the Act.

124. Failing the removal of clause 2 from the Bill, exemptions must be introduced to exclude certain categories of person from the duty in clause 2, such as those who have additional vulnerabilities, including victims of trafficking and slavery, survivors of torture, pregnant women, and accompanied children (see Annex, Amendment 4). This would not resolve the clause's incompatibility with the UK's obligations under the Refugee Convention

We do not agree that section 2 is incompatible with our obligations under the Refugee Convention. However, it is acknowledged that we may need to use the regulation making power in section 4 to except certain categories of person from the duty and/or disapply the other provisions of the Act. Categories of person that may need to be excepted are currently under consideration, and regulations will be laid in due course if required.

133. We welcome the Prime Minister's recent reaffirmation of his 'deep and abiding' commitment to the ECHR and the ECtHR made at the Reykjavik summit. However, clause 53 gives Ministers legislative permission to act in direct violation of the UK obligations under the ECHR. Where a Minister chooses to ignore an interim measure and therefore breach Article 34 of the ECHR, clause 53 also prevents the courts from having regard to interim measures when considering proceedings under this Bill. This clause therefore permits deliberate breaches of our obligation to comply with interim measures of the ECtHR. Clause 53 must be removed from the Bill (see Annex, Amendment 5)

The Government takes its international obligations very seriously. What is now section 55, provides a clear framework for ministers to exercise discretion over whether to suspend the duty to remove if a Rule 39 interim measure is indicated. This would depend on the individual facts of each case. Nothing in section 55 requires the UK to breach its

international obligations. In any case, there are very limited circumstances where non-compliance with an interim measure would not amount to a breach of Article 34 of the ECHR.

139. It is difficult to see how the removal of unaccompanied child refugees under clause 3 could comply with the legal obligations to have regard to the need to safeguard and promote the welfare of children in the UK, and to treat the best interests of the child as a primary consideration except in very specific circumstances, such as family reunification. Clause 3 should therefore be removed from the Bill (see Annex, amendment 6). Failing this, clause 3 must be circumscribed to allow the Secretary of State only to exercise the power in circumstances where removal is clearly in the best interests of the child (see Annex, amendment 7). The Bill's impact on children more broadly is discussed in detail in Chapter 7.

Following amendments brought forward by the Government at Commons Report stage, section 4 now expressly sets out the circumstances in which the power to remove unaccompanied children may be exercised ahead of them reaching adulthood. This includes reunion with the child's parent, where the person is to be removed to a safe country of origin, where the person has not made a protection claim or human rights claim, or in other circumstances specified in regulations made by the Secretary of State.

The Act extends, under the new section 80AA, the list of safe states to which section 80A of the Nationality, Immigration and Asylum Act 2002 applies to include EU member states (as now), EEA countries (Iceland, Liechtenstein, Norway), Switzerland and Albania. An unaccompanied child from one of these countries may be returned to their country of origin before they are 18. Any such decision would be taken on a case-by-case basis. Treating asylum claims from EU nationals in this way is not new. This has been a longstanding process in the UK asylum system, that is also employed by EU member states. EU member states are not the only countries that are safe countries.

Where an unaccompanied child is to be removed from the UK, we will ensure that adequate reception arrangements are in place where the child is to be removed to. In making such a decision, the Home Office will also continue to comply with its duties under section 55 of the Borders, Citizenship and Immigration Act 2009 to make arrangements to safeguard and promote the welfare of children in the UK in discharging its immigration functions.

Taking these measures will send a clear message that children cannot be exploited by organised criminal gangs to cross the Channel in small boats for the purpose of starting a new life in the UK.

We therefore disagree with these suggested amendments.

147. Clause 4, alongside clauses 2 and 3, forms the basis for the automatic denial of the right to asylum for the vast majority of asylum seekers entering or arriving in the UK, irrespective of the merits of their claims. The blanket denial of access to the asylum system for persons who enter or arrive in the UK irregularly and indirectly is a clear breach of the object and purpose of the Refugee Convention. In circumstances where removal is not possible or is protracted, the lack of status and permanent denial of access to the asylum system for refugees is likely to breach the Refugee Convention, in particular, the duty to naturalise and assimilate refugees as far as possible in Article 34. The denial of access to a fair and effective asylum system may also violate Article

13 ECHR. Clause 4 should be removed from the Bill to allow asylum seekers the right to claim asylum and in doing so have the merits of their case considered (see Annex, Amendment 8).

As stated above, the Government rejects the suggestion that this approach is incompatible with the Refugee Convention. The Government also disagrees with the Committee's characterisation that the Act applies a 'blanket denial' of access to the asylum system. The UK cannot accommodate all those that may wish to come to the UK, and it is right that we take action to safeguard our system for those most in need. The Act aims to tackle the current system which rewards those who attempt to jump the queue and could have sought protection in any number of safe countries they may have travelled through. An individual who does not meet the four conditions in section 2, including where they have not entered the UK illegally, will still be able to access the asylum system. Parliament has endorsed the provisions in what are now sections 2, 3, 4 and 5.

152 In circumstances where an individual's human rights claim is declared inadmissible by virtue of clause 4(2), the UK's failure to undertake any scrutiny of the merits of an arguable case and the denial of any remedy with suspensive effect may breach Article 13 ECHR on the basis that there are no effective guarantees to protect the individual from returning to face a real risk of rights violations. As above, clause 4 should be removed from the Bill (see Annex, Amendment 8).

The drafting of section 5 specifies that references to human rights claims within that section relate to claims that removal of a person from the UK to a country of which the person is a national or citizen, or a country or territory in which the person has obtained a passport of other document of identity would be unlawful. Any other HR claims are not declared inadmissible.

If an individual is removed to a safe third country, they would have the opportunity to raise if they would have a real risk of serious and irreversible harm if removed to that country. That would include any claims raised about risk of refoulement. An individual would not be removed to that country if it was found that there was such a risk.

If an individual is from a section 80AA listed country, if there were considered to be exceptional circumstances, they would not be removed there, and they would instead be removed to a safe third country.

There are appropriate safeguards in place to prevent such an ECHR breach, therefore we do not agree that this clause should be removed.

153. The UK cannot divest itself of its obligations under the Refugee Convention or the ECHR simply by declaring applications inadmissible and thereby refusing to process them. The prohibition against refoulement, the prohibition against penalisation, and the requirement to facilitate the naturalisation and assimilation of refugees are binding obligations on the UK under the Refugee Convention, irrespective of whether or not a person's status as a refugee has been formally recognised by the UK. Declaring asylum and human rights claims inadmissible does not alter the UK's obligations under the ECHR which protects individuals from being returned or removed to another country where they face a real risk of serious harm.

As stated above, the Government rejects the suggestion that this approach is incompatible with our Refugee Convention and ECHR obligations.

As already set out, the provisions provide appropriate safeguards to prevent individuals from being returned or removed to a country where they would face a real risk of serious and irreversible harm.

160. Whilst the states listed in clause 57 (EEA plus Switzerland and Albania) may be considered to be safe 'in general', this does not guarantee their safety for all individuals, particularly those who are members of a particular social group such as female VOTs. It must be possible for such individuals who face a real risk of persecution upon return to make a protection or human rights claim which must be considered on its merits in order to guard against the risk of refoulement. Clause 5 should be amended to remove the requirement for "exceptional circumstances" and instead provide that where persons from EEA countries, plus Albania and Switzerland, make a protection or human rights claim, this claim must be admissible and subject to proper consideration unless it is 'clearly unfounded' (see Annex, Amendment 9). An individual must not be removed from the UK and returned to an EEA country or Switzerland or Albania unless and until their claim has been properly considered and decided.

The Secretary of State is satisfied that these countries meet the test for inclusion in these provisions.

161. Further, there must be clear criteria set out on the face of the Bill for the inclusion of states as 'safe'. Any country which has a significant successful grant rate for asylum claims, such as Albania, should not be included on a list of safe states. Albania should be removed from the list of safe states in clause 57 owing to the significant rates of successful asylum claims (see Annex, Amendment 10). Clause 57 should be amended to include criteria for designating countries as 'safe' which is based on strict and objective criteria based on reliable information, which includes, at a minimum, that: designated states must have signed and ratified the core UN human rights treaties as well as the Refugee Convention; that individuals must have access to a fair and effective asylum system and to free legal advice and representation; that states must have adequate domestic human rights laws and an effective and accessible justice system. (see Annex, Amendment 11).

There are already clear criteria set out on the face of the Act for the inclusion of a State as a safe state for the purposes of section 80A of the Nationality, Immigration and Asylum Act 2002. New section 80AA of that Act sets out the test that must be satisfied for a State to be added to the list, and the Secretary of State is satisfied that Albania meets that test. In this regard, the Government notes the conclusion of the Home Affairs Select Committee in its second report of session 2022/23 as follows: "Albania is a safe country and we have seen little evidence that its citizens should ordinarily require asylum." That test clearly sets out the criteria that must be met, and the information and sources that should be considered in order to come to a conclusion on the safety of a country for these purposes. Furthermore, the provisions already set out that if there are exceptional circumstances as a result of which the Secretary of State considers that the claim ought to be considered, it will be considered in the UK. For individuals that meet the conditions of the duty to remove to apply, and are a section 80AA listed national, a similar safeguard is set out in

section 6(4) of the Illegal Migration Act. If the Secretary of State considered that there are exceptional circumstances which prevent their removal to that country, they will instead be removed to a safe third country.

169. The designation of third states as safe "in general", in the absence of any individualised assessments of risk, is not an adequate safeguard against refoulement. The approach in the Bill runs a very real risk of breaching the prohibition on refoulement, especially for specific groups such as women and girls, religious minorities, LGBTQI+ individuals, and torture survivors. If clause 5 remains in the Bill, it must be amended to ensure that any removals of individuals to 'safe third states' must be subject to individualised assessments of risk to guard against refoulement and onward refoulement (see Annex, Amendment 12).

If an individual makes a protection claim on any basis, be that due to their gender, religious belief, sexual orientation or gender identity, or risk on return, they will not be removed to that country, unless it is a country listed under section 80AA of the 2002 Act. If such a claim is raised, the individual would instead be removable to a safe third country. Where we were to seek to remove a third country national to any of these countries listed in Schedule 1, they would have the opportunity to raise if they would have a real risk of serious and irreversible harm if removed to that country.

That would include any claims raised about risk of refoulement. An individual would not be removed to that country if it was found that there was such a risk.

If an individual of a section 80AA listed country were to raise a protection or human rights claim against their country of nationality or citizenship, they would be removable to that country, unless the Secretary of State considers that there are exceptional circumstances why they cannot be removed there. If there were considered to be exceptional circumstances, they would not be removed there, and they would instead be removed to a safe third country. There are therefore adequate safeguards in place to ensure an individual will not be removed back to a country where they have a well-founded fear of persecution, or relocated to a safe their country where they would be at real risk of serious and irreversible harm if removed to that country.

174. Clause 6 provides the Secretary of State with the power to add new countries to the Schedule by regulations. There is a test for the addition of new countries, or parts of countries, which requires the Secretary of State to be satisfied that (a) there is in general no serious risk of persecution and (b) removal will not contravene the ECHR. This test is subjective and simply requires the Secretary of State to be satisfied of these criteria, having regard to all the circumstances and information from any appropriate source.

The test for the addition of new countries, parts of countries, or inclusion of countries for descriptions of a person are not novel. These provisions draw on existing immigration law for the test for assessing the safety of these countries. Furthermore, as already set out, there are other provisions in place to provide an additional safeguard if an individual raises a claim of a real risk of serious and irreversible harm if removed to that country

175. The subjective nature of the test for safety of third states is not an adequate safeguard against refoulement. If clause 6 remains in the Bill, it must be amended to provide that the designation of new third states as 'safe' must be subject to strict and

objective criteria based on reliable information, which includes, at a minimum, that: designated states must have signed and ratified the core UN human rights treaties as well as the Refugee Convention; that individuals must have access to a fair and effective asylum system and to free legal advice and representation; that states must have adequate domestic human rights laws and an effective and accessible justice system (see Annex, Amendment 13).

We do not agree these amendments to the test are necessary. As set out above, this test draws on existing immigration law for assessing the safety of a country. In coming to a decision as to the safety of a country, the test clearly places a requirement to consider information from all appropriate sources as to whether a country or territory should be regarded as generally safe, therefore we do not agree this is merely a subjective test.

179. In order to comply with Article 3 ECHR (freedom from torture or inhuman or degrading treatment), it is imperative the Government does not leave asylum seekers, and those whose claims have been held inadmissible, in a state of destitution. The Bill should provide that everyone with an inadmissible claim should be automatically granted support.

We do not agree that those whose asylum claims have been declared inadmissible should be provided with support automatically. Support should be provided based on need. The Act provides that individuals whose asylum claims are declared inadmissible under the Act will be eligible for support under section 4(2) of the Immigration and Asylum Act 1999.

Powers of detention and bail

190. Fourthly, the power to detain unaccompanied children pending removal or pending a decision on whether to grant them leave to remain would no longer be subject to the 24- hour time limit (and other protections) currently provided in Schedule 2 of the Immigration Act 1971. The Refugee and Migrant Children's Consortium noted that this time limit was established by law "because widespread evidence showed the long-lasting damage that detention has on children's lives." We note that the Government have stated that the detention of unaccompanied children will be "for the shortest possible time in appropriate detention facilities with relevant support provisions in place" but they have not provided any detail on what would amount to "appropriate" facilities or conditions. We also note that, following Government amendments to the Bill at Report Stage, the power to detain unaccompanied children under the Bill may only be exercised in the circumstances specified in regulations to be made by the Secretary of State. These regulations may include a time limit on such detention, but we are troubled that the Bill neither requires this nor establishes what other restrictions on detention will be put in place. These regulations would be subject to the negative resolution procedure. We agree with the conclusion of the House of Lords Delegated Powers and Regulatory Reform Committee that, given the importance and sensitivity of the subject matter, if regulations are made concerning the detention of children the affirmative resolution procedure should apply. Clause 10 should be amended accordingly (see Annex, Amendment 14)

We recognise the particular vulnerability of unaccompanied children. Unaccompanied children are not subject to the duty to remove and the power to remove them will only be

exercised in limited circumstances, so for the most part unaccompanied children will not be detained under the provisions of the Act for the purposes of removal, and will instead be transferred to local authority care.

The Act provides that the statutory detention powers may only be exercised to detain an unaccompanied child in circumstances prescribed in regulations made by the Secretary of State; these circumstances will likely include, but are not limited to, for the purpose of family reunion or where removal is to a safe country of origin. The Act also allows the Secretary of State to make regulations specifying time limits to be placed on the detention of unaccompanied children for the purpose of removal, if required. In response to non-government amendments agreed at Lords Report stage, the Act now provides for the First-tier Tribunal to grant immigration bail to an unaccompanied child after eight days detention (as opposed to 28 days that applies in other cases) where they are being detained for the purposes of removal.

Children will be detained in appropriate accommodation and provision will be made for education (in the case of children) and any relevant support needs. The Home Office will work closely with the Department of Education to ensure there are proper provisions for children in detention and will build upon our current detention facilities to ensure they are appropriate and provide safe and secure accommodation for children. All persons entering detention are medically screened on arrival and have access to round the clock healthcare. This will continue to be the case. The existing Adults at Risk in Immigration Detention Policy will be updated in line with this Bill and will continue to act as a safeguard for vulnerable persons in detention.

Regarding the recommendation made by the Delegated Powers and Regulatory Reform Committee in respect of clause 10, the Government agreed with that Committee's recommendation that the regulation-making powers in clause 10 should be subject to the affirmative procedure and amendments to that effect where tabled by the Government for Lords Report stage. In the event, those amendments were not made as, under the procedural rules of the House of Lords, the amendments were pre-empted by other non-government amendments agreed by the House.

192. We are extremely concerned by the expansion of powers of immigration detention under the Bill, and the apparent intention to use detention as a matter of course for all those who satisfy the clause 2 conditions. Detention for immigration purposes, particularly when those being detained are likely to be genuine victims of persecution or human rights violations, should be a measure of last resort only.

The scheme is designed to be operated both quickly and fairly. Voluntary return will always be an option for all. Detention under the Act will be either pending a decision that someone meets the conditions of the scheme/the duty applies, or for the purpose of removal. The Act provides, in line with the current common law position, that an individual may only be detained for a period that is reasonable, with reference to the specific statutory purpose for which they are detained.

There are no exemptions from immigration detention for any particular groups of people. Our aim is to ensure people are not held in detention for longer than is absolutely necessary

to effect their removal from the UK, and we regard an individual's dignity and welfare as being of the utmost importance. We have in place policies and procedures to safeguard vulnerable people, including the adults at risk in immigration detention policy.

Looking specifically at potential victims of modern slavery, when decisions are currently made regarding continued detention, potential victims of modern slavery are considered under the existing adults at risk in immigration detention policy.

The existing adults at risk policy will be updated to take account of the provisions in this Bill and will act as a safeguard when detention decisions are made in respect of such persons. This statutory policy requires that evidence of a person's vulnerability be balanced against immigration factors when determining whether or not detention is appropriate in their particular case.

Additionally, the provision of 24-hour, seven days a week healthcare in all immigration removal centres ensures access to medical professionals and levels of primary care in line with that available in the community.

Following amendments made during ping-pong, there is now a 72-hour limit (extendable to seven days on the authorisation of a minister) on the detention of pregnant women.

193. Given the current capacity of the immigration estate and limited scope for removals to third countries, we share concerns that detaining greater numbers could give rise to the need to use unsuitable facilities, with risks for human rights. Abandoning many of the limitations and safeguards against inappropriate or unjustified detention, particularly for children, families and pregnant women, increases the likelihood that these rights will be infringed. If these detention powers remain within the Bill, it should be amended to retain existing limitations and safeguards regarding the detention of vulnerable groups (see Annex, Amendment 14).

See the response above to the recommendations at paragraphs 190 and 192 of the Committee's report. However, to add that we only detain persons for immigration purposes in places that are listed in the Immigration (Places of Detention) Direction 2021 in accordance with long-standing provisions in the Immigration Act 1971 (paragraph 18 of Schedule 2). Ahead of commencement of the new powers, we will update the Direction in line with the new detention powers.

202. The common law approach to immigration detention, established in the case of Hardial Singh, currently operates to ensure that immigration detention complies with Article 5 ECHR. This recognises that it must be for the courts to determine the legal boundaries of administrative detention. The Bill would alter that approach, leaving it to the Secretary of the State to decide what amounts to a reasonable period of immigration detention. We are extremely concerned that this change would result in an immigration detention system that is not consistent with Article 5 ECHR. The Bill should be amended to ensure that there is independent, judicial oversight of individual liberty and compliance with Article 5 ECHR (see Annex, Amendments 15 and 16).

Section 11 of the Act clarifies the time period that the Secretary of State may detain individuals for, by placing two of the common law Hardial Singh principles on a statutory footing. The Hardial Singh principles provide that a person may only be detained for a period that is reasonable in all the circumstances and if, before the expiry of the reasonable

period, it becomes apparent that the Secretary of State will not be able to examine, effect removal or grant leave within a reasonable period, the Secretary of State should not seek to continue the detention.

Article 5(1)(f) of the ECHR does not prevent courts giving discretion to state authorities to decide whether there is a sufficient prospect of removal to justify detention. Giving discretion to the Secretary of State (as to whether there is a sufficient prospect of removal within a reasonable timescale to justify detention) is Article 5 compliant. It is a matter for the Home Secretary rather than the courts to decide matters as it will be the Home Office which is in full possession of all the relevant facts and best placed to decide whether continued detention is reasonable in all the circumstances. It will continue to be the case that a person's detention will be subject to judicial oversight. During the first 28 days of detention, there will be no restriction on the ability to apply for a writ of habeas corpus (or the equivalent procedure in Scotland). Once the first 28 days of detention have elapsed there is no restriction on the ability of the courts to assess the lawfulness of detention. As set out in the ECHR memorandum, the Government's position is that this section is compatible with Article 5 ECHR.

211. Protection from arbitrary detention and upholding the right to liberty in the UK depends on judicial supervision. Depriving those detained under the Bill the opportunity to make a bail application to a Tribunal, or a judicial review application in the High Court, even if it is only for the first 28 days of detention, would severely restrict judicial supervision. It would prevent those who are unnecessarily or unlawfully detained from being able to secure release on bail or challenge the lawfulness of that detention. We are unconvinced that allowing for applications for habeas corpus is enough to ensure that this proposal is compatible with Article 5 ECHR, which guarantees the right to have the lawfulness of detention decided speedily by a court. Clause 12 must be amended to ensure that those subjected to immigration detention retain the ability to challenge their detention in the courts and seek bail (see Annex, Amendments 17 and 18).

The scheme is predicated on operating swiftly and restricting access to the First-tier Tribunal granting immigration bail for the first 28 days of detention (eight days in the case of unaccompanied children where they are detained for the purposes of removal) will allow for an assessment of inclusion within the duty to remove, any challenges or barriers to be considered and removal arrangements to be put in place.

During the first 28-days, there will be no restriction on the ability to apply for a writ of habeas corpus (or the equivalent procedure in Scotland). Individuals will still be able to apply to the Secretary of State for bail under Schedule 10 to the Immigration Act 2016, although it will not be possible to challenge a decision by the Secretary of State to refuse bail by way of judicial review. In line with Article 5(5) ECHR, there will be no restriction on an individual's ability to access damages in respect of unlawful detention in relation to the 28-day period.

Given that individuals will be able to challenge their detention through the courts from the outset of their detention, via habeas corpus, the Government considers that these provisions are compatible with Article 5(4). The Government notes that the Hardial Singh principles were formulated pursuant to an application for habeas corpus and their application is, therefore, not restricted to claims for judicial review.

Children: age assessments, and support and accommodation for unaccompanied children

228. Whilst we understand that the Government does not wish to incentivise the trafficking of children, without the usual safeguards of appeals and full judicial review, and without judicial reviews being suspensive in terms of removal, this legislation seriously risks children being treated incorrectly as adults as well as them being removed from the UK to unsuitable conditions. This is clearly not in the best interests of any child and is likely to breach the child's rights under Articles 6, 8, and 13 of the ECHR. Clause 55 should be removed from the Bill (see Annex, Amendment 20).

The age assessment provisions aim to disincentivise adults from falsely claiming to be children and avoid the safeguarding issues which arise if an adult is wrongly accepted as a child and accommodated with younger children to whom they could present a risk. Our age assessment process already has in-built safeguards to ensure our ongoing compliance with the duty under section 55 of the Border, Citizenship and Immigration Act 2009 and this duty is how Article 3 of the UNCRC is given expression within UK law.

Home Office guidance makes clear that age assessments are only conducted if there is reason to doubt an individual's claimed age. There is a wide margin of error in the individuals favour built into initial age decisions which consider whether an individual is significantly over 18. Initial decisions on age, based on appearance and demeanour, are used as a first step to ensure that arrivals are routed into the correct process. It is only those individuals whose physical appearance and demeanour very strongly suggests they are significantly over 18 and have been independently assessed as such by two immigrations officers, who will be treated as adults without a more substantive assessment. Where there is any doubt, an individual will be treated as a child pending further assessment of their age, usually through a Merton- compliant assessment conducted by social workers. The Supreme Court recently considered the Home Office's initial age decision policy in the case of R(BF Eritrea) v SSHD [2021] UKSC 38 and unanimously found it to be lawful.

Only those who have been assessed to be over 18 will be treated as adults and removed under the duty set out in the Act. Those who have been assessed to be adults and wish to challenge a decision on age will be able to do so via judicial review which will not suspend their removal and can continue from outside the UK after they have been removed. The judicial review will be considered by the courts on conventional public law principles, such as rationality, procedural fairness or Wednesbury unreasonableness. The Home Office will ensure that the appropriate support and facilities will be in place in the country of removal so the individual can effectively participate in their judicial review from abroad. Where decisions are found to be unlawful following a successful judicial review, each case will be assessed on its own merits and a further age assessment may be required.

The Government is satisfied that the provisions in section 56 are capable of being applied compatibly with Articles 6, 8 and 13 of the ECHR and concluded that it is important to make this change to prevent lengthy age disputes preventing removal of those who have been assessed to be adults and frustrating the aims of the Bill. As noted in the supplementary ECHR memorandum for the Illegal Migration Bill, whilst the Government is satisfied that the provision is capable of being applied compatibly with Article 6 ECHR, the Minister was unable to make a statement under section 19(1)(a) of the Human Rights Act 1998 for this provision.

235. We remain concerned about 'scientific methods' being used to assess age in light of the continued opposition from relevant professional organisations and doubts over the accuracy of such measures. We remain unconvinced there is any justification for the use of scientific methods instead of a holistic assessment. We agree with the Government that the Secretary of State's power to penalise children for not complying with these methods should only be made where there is evidence that the methods involved are consistently accurate and could be applied in a manner that does not breach the individual's rights under Articles 3 or 8 ECHR. Any such regulations would have to be carefully drawn to ensure that the circumstances and experiences of the individual child, as well as their best interests, are fully considered before determining whether a child has reasonable grounds for refusing to comply and applying any penalty. The Home Office should also issue guidance as soon as possible setting out what would constitute reasonable grounds for refusing consent. Moreover, any penalisation (and the reasons for it) would have to be challengeable in court.

Determining the age of a young person is an inherently difficult task. We are aware that there is no single age assessment method (scientific or not) which can determine an individual's age with precision – however we believe that considering a wider range of evidence will enable more informed and robust decisions.

The Age Estimation Science Advisory Committee's (AESAC), in their report, recommended that scientific methods are used as part of a holistic assessment to show whether a claimed age is possible and whether the science supports that age or an alternate age more strongly. They recommend that, based on the scientific evidence currently available, scientific methods should not be used to determine a specific age or age range. AESAC continue to recommend that the science is layered with an existing Merton compliant age assessment (social worker led assessment) and the results are read alongside the outcome of the Merton. The science will be part of a holistic age assessment process and will not be used in isolation.

Regulations to be made under this power are intended to disincentivise individuals from deliberately misrepresenting their ages to undermine the objectives of the Act. Taking the regulation-making power in the Act future-proofs the legislation by allowing the Secretary of State to set out the circumstances in which refusal of consent without good reason may result in an assumption that the individual is an adult when the scientific methods in question further develop. We will ensure that any advances in the scientific field are reviewed by the AESAC and the Secretary of State will not make regulations to this effect until satisfied that the scientific methods in question are sufficiently accurate to mean that applying the automatic assumption in cases of refusal to consent will be compatible with the ECHR, in particular Article 8 (right to private and family life). This is in line with our duty under section 55 of the Borders, Citizenship and Immigration Act 2009 as it is intended to safeguard genuine children by ensuring adults are not placed in accommodation and other services alongside them.

Guidance relating to the introduction and implementation of scientific age assessment will be provided to age assessment practitioners and published in advance of the commencement of the use of scientific methods. This will include specific guidance regarding reasonable grounds for refusal to consent to such methods.

239. The definition of an unaccompanied child should be brought into line with the current approach in the Immigration Rules (see Annex, Amendment 21).

We note the proposed amendment by the Committee on this issue which we understand is actually amendment 22.

We consider that the proposed amendment widens the scope of the Bill to include a larger cohort of unaccompanied children. We do not think that was the intention of the Committee. We also consider the wording in section 4(5) and (6) provides clarity on which unaccompanied children are in the scope of Act and therefore disagree with the proposed amendment.

255. The Bill is currently unclear about both the nature of the accommodation to be provided to unaccompanied children by the Home Office or the standards and safeguards applicable to that accommodation. Inadequate accommodation could breach the children's Article 8 rights to a private or family life, or potentially even their Article 3 rights to be free from torture and inhuman or degrading treatment, depending on the severity of the inadequacy. The Bill should be amended to ensure that the safeguards provided by the Children Act 1989 to children in local authority care are replicated for children in Home Office accommodation in England (see Annex, Amendment 22).

Section 16 of the Act provides the Home Office with the power to provide or arrange accommodation and support for unaccompanied children. However, we are unable to provide more specific details at this time with regards to how this accommodation will look and operate in practice as we are currently continuing to work through the operational processes.

Our policy intention is to ensure that whilst time in this accommodation is expected to be short (given the power in section 17 to transfer unaccompanied children into local authority accommodation), we will be seeking to meet standards which are appropriate for the accommodation so that children are sufficiently supported and safeguarded. The Home Office is working closely with the Department for Education and relevant stakeholders on the appropriate standards which should apply.

The Home Office is not taking on "corporate parent" status when accommodating unaccompanied children or taking over responsibility from local authorities for housing these young people. It will remain with the local authority where a child is located to assess its statutory duties under the Children Act 1989 in relation to that child. We therefore disagree with the suggested amendment.

258. The Home Secretary is bound by the UK's international law obligations under the UNCRC. The Bill as currently drafted fails to make clear the support that should be provided to unaccompanied children in the UK in care of the Home Office in accordance with the UNCRC. The Bill should be amended to set out the type of support that the Secretary of State should provide to unaccompanied children housed in Home Office accommodation. The power to provide such support should also be changed to a duty to provide such support in accordance with the binding obligations under the UNCRC (see Annex, Amendments 23 and 24).

We have been clear that any time spent in Home Office accommodation by an unaccompanied child will be temporary whilst they wait to be transferred to local authority accommodation.

We are unable to provide more specific details at this time about what types of support will be provided to unaccompanied children in Home Office accommodation as we are continuing to work through the operational plans. Further details will be provided at a later time but we do not agree that the Bill (as it then was) should be amended to set this out.

Likewise, we do not agree with the suggested amendment to place a duty (rather than a power) on the Secretary of State to arrange or provide accommodation for unaccompanied children. We have been clear that we expect local authorities to meet their statutory obligations to children from the date of arrival and for the Home Office to only step in with providing accommodation sparingly and temporarily. The best place for these young people is and will remain within local authority care.

We also do not agree on the need to amend the Bill to place a duty on the Secretary of State to provide or arrange for the provision of other types of support. The support that will be provided to unaccompanied children will be appropriate to their needs during their short stay in this accommodation.

260. In light of the inadequacies in the current provision of Home Office accommodation to unaccompanied children, it would be difficult for the Home Office to demonstrate that the transfer of a child from local authority care into Home Office accommodation would be in the child's best interests for the purposes of the UK's international law obligations under the UNCRC. It would also be difficult to demonstrate that it was compatible with existing domestic law provisions such as section 55 of the Borders, Citizenship and Immigration Act 2009. Unless the standards required of Home Office accommodation are amended to bring them in line with the requirements of the Children Act 1989, as we recommend above (see Annex, Amendments 23 and 24), clause 16 should be amended to remove the power to transfer a child from local authority accommodation into Home Office accommodation (see Annex, Amendment 25).

Section 17 of the Act provides a power (rather than a duty) for the Home Office to direct a local authority to cease accommodating an unaccompanied child and transfer them into accommodation provided for or arranged by the Home Office.

In making such a decision relating to this transfer, the Home Office will continue to comply with its duties under section 55 of the Borders Citizenship and Immigration Act 2009 to make arrangements to safeguard and promote the welfare of children in the UK in discharging its immigration functions.

At Lords Committee Stage, Lord Stewart of Dirleton provided an example where an unaccompanied child may transfer from local authority accommodation into Home Office accommodation where they would stay for a short period ahead of them being returned to their home country. As Lord Stewart also noted, we are continuing to work through the operational processes in relation to this power and continue to engage with stakeholders on the use of this power. We therefore disagree with the suggested amendment.

266. We are deeply concerned that the threat of removal from the UK when a child turns 18 will be harmful to the child's wellbeing and ability to live a healthy, happy childhood. It also gives them a powerful incentive to flee authorities' care, thereby making them extremely vulnerable to traffickers, exploiters, and criminal gangs. This is clearly not in the best interests of the child for the purposes of the UK's obligations under the UNCRC. We recommend that the duty to remove is not automatically applied when a child turns 18 (see Annex, Amendment 26).

We note the proposed amendment by the Committee on this issue which we understand is actually amendment 27.

We recognise the particular vulnerability of children who are often forced into making life-threatening journeys to the UK which are being facilitated by criminal gangs who have little regard for their safety. Unaccompanied children who arrive in the UK illegally will be provided with the necessary accommodation and support but they will not be able to stay and settle in the UK.

We could not accept an amendment that would undermine the central premise of the Bill that if you come to the UK via an illegal route, you will be removed, and will not be permitted to remain in the UK and build a life here. Taking these measures will send a clear message that placing the lives of children and young people into the hands of criminal gangs to facilitate their journey to the UK will not be accepted.

The only way to come to the UK for protection will be through safe and legal routes. This will take power out of the hands of the criminal gangs and protect vulnerable people, including children.

Modern slavery

285. Clause 21 breaches Article 10 of ECAT which provides that if the competent authorities have reasonable grounds to believe that a person has been trafficked, that person shall not be removed from its territory until the identification process has been completed. Clause 21 should be removed from the Bill (see Annex, Amendment 27). Failing that, the Bill should be amended to ensure that no removals take place until a conclusive grounds decision has been taken (see Annex, Amendment 28). Further, any returns of VOTs or VOSs must be subject to an individualised assessment of the impact of such return on the rights, safety and dignity of that person.

Contrary to the Committee's interpretation of the European Convention on Action Against Trafficking (ECAT), our view is that Article 13(3) can be read across to other relevant Articles, including Article 10(2). Where the criteria for the public order disqualification have been met, there is no obligation to make a Conclusive Grounds decision. This interpretation is also consistent with the position as set out under section 63 of the Nationality and Borders Act 2022.

The threat to public order from someone subject to the duty under section 2(1) arises from the exceptional circumstances relating to illegal entry into the UK, pressure placed on public services by the large number of illegal entrants and the loss of life caused by illegal and dangerous journeys. However, the process for removal and corresponding assessment of a serious harm suspensive claim to which this decision relates is individualised. Under the Act, an individual will not be removed to a country where they will not be safe.

290. Although there is no absolute right for victims of trafficking or slavery to be granted limited leave to remain, Article 14 of ECAT requires states to take into account the needs of the victim when making decisions regarding leave to remain. Such decisions should not be based solely on the means and method of entry into the UK and whether or not the victim is cooperating with an investigation. Clause 21 should be removed from the Bill (see Annex, Amendment 27).

The Government's view is that Article 13(3) of ECAT reads across to other relevant Articles, including Article 14. As above, decisions in relation to serious harm suspensive claims are individualised. Under the Act, an individual will not be removed to a country where they will not be safe.

296. It is, in our view, wholly inappropriate to categorise victims as a threat to public order by the mere fact that they arrived in the UK through an irregular route, particularly given the fact that victims are controlled by their traffickers. Under the NABA 2022, these provisions are already disapplied to certain potential victims of torture (VOTs), on grounds of public order, such as persons convicted of terrorist offences and foreign national offenders. There is clearly no justification for extending the disqualification to all VOTs and victims of slavery (VOSs) who enter or arrive in the UK irregularly, without coming directly to the UK, and without permission to be here.

It is inaccurate to describe the threat to public order as the "mere fact" that they have arrived through an irregular route. As the Government have set out in its ECHR Memorandum, and through the Parliamentary passage of the Bill, the threat to public order from someone subject to the duty under section 2(1) arises from the exceptional circumstances relating to illegal entry into the UK, pressure placed on public services by the large number of illegal entrants and the loss of life caused by illegal and dangerous journeys.

297. The Government's reliance on the "public order disqualification" to disapply protections and entitlements to all VOTs who enter irregularly and indirectly violates Article 13 of ECAT. It is also a breach of Article 26 of ECAT which provides for the non-punishment of victims of trafficking. This is also likely to breach the parallel obligations on the UK under Article 4 ECHR, which are interpreted in light of the requirements of ECAT, to identify and protect every victim of modern slavery. All potential victims of trafficking are entitled to a recovery period. This entitlement is unconditional. Clauses 22–24 must be removed from the Bill (see Annex, Amendments 29–31).

Article 26 of ECAT sets out that "each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."

None of the modern slavery provisions in the Act punish victims of modern slavery for involvement in unlawful activities or otherwise. They are in accordance with Article 26 and the other provisions of ECAT as well as with Article 4 ECHR. An individual with a positive reasonable grounds decision will be safely returned to their home country or a safe third country if the home country if unsafe for that person.

This is not a punishment or penalty. A process of return can and does currently take place following the Conclusive Grounds decision, or before if a public order disqualification is made under section 63 of the Nationality and Borders Act 2022.

299. ECAT does not allow states to disqualify potential victims of trafficking from any form of protection and assistance under the ground that they irregularly enter or arrive in a State Party. Article 12(6) states that measures should be adopted to ensure that support is not made conditional upon willingness to act as a witness. The disapplication of section 50A of the Modern Slavery Act 2015 (which provides potential victims of slavery or trafficking are entitled to assistance and support in certain circumstances) is a clear breach of the obligations to provide support to VOTs under Article 12 ECAT. This is also likely to breach the parallel obligations on the UK under Article 4 ECHR, which are interpreted in light of the requirements of ECAT, to identify and protect every victim of modern slavery. As above, clauses 22–24 must be removed from the Bill (see Annex, Amendments 29–31).

Article 13(1) of ECAT provides for the recovery and reflection period. Article 13(2) provides that during that period, a person is entitled to support under Article 12(1) and (2). However, as set out in ECAT under Article 13 (3), "The Parties are not bound to observe this [recovery and reflection] period if grounds of public order prevent it or if is found that victims status is being claimed improperly", and the effect of there being no recovery period means in our view that there is no requirement to provide support under Article 12(1) and (2). This is also consistent with the position under section 63 of the Nationality and Borders Act 2022. It is consistent with Article 4 ECHR. We have set out above the public order risk posed by those to whom the duty in section 2(1) applies. It is worth noting that potential victims of modern slavery in immigration detention who are due to be granted bail may be eligible for accommodation provided under paragraph 9 of Schedule 10 to the Immigration Act 2016. And regardless of NRM or legal status, individuals will still be able to receive free primary health care (GP treatment and emergency treatment) from the NHS.

We welcome the fact that Parliament has approved what are now sections 22 to 24 of the Act.

303. We are concerned that the modern slavery provisions of the Bill not only breach the UK's legal obligations towards VOTs and VOSs, but may also result in the increase in trafficking and slavery. These clauses must be removed from the Bill.

We disagree that this Act will result in an increase in trafficking and slavery. On the contrary, the objectives of the modern slavery provisions in the Act are to deter individuals arriving in the UK illegally (causing the risk to public order outlined above) and make the business model of trafficking defunct.

The Government is committed to tackling the heinous crime of modern slavery and is working in a number of ways, both in the UK and upstream, to prevent further trafficking. The modern slavery provisions in this Act are consistent with that principle.

For individuals who do not fall within section 22 of the Act, or to whom the exemption under that section applies, support provided through the National Referral Mechanism for potential and confirmed victims of modern slavery identified in the UK aims to protect individuals from further harm and prevent further trafficking and possible re-trafficking.

The exemption as set out in section 22 enables the UK to balance the threat to public order illegal entry poses with the importance of investigating and prosecuting traffickers; thus supporting the objectives of ECAT by assisting with tackling the criminality related to modern slavery.

The UK has strong relationships with a number of countries from where many victims originate and is working with them to provide a range of support for victims, including reintegration, as well as awareness raising and operational capacity building activity to prevent trafficking from occurring.

Entry, settlement and citizenship

309. In order to avoid the sort of Article 8-breaching scenarios which could arise in the absence of decisions being made on the facts of a particular case, applications for exceptions to the ban on Article 8 grounds must be capable of routine consideration by the Home Office on a case by case basis, taking into account the specific private and family life circumstances of the individual. Where it is decided that a re-entry ban is appropriate, the duration of that ban should be tailored to properly balance the individual's Article 8 rights and the public interest. Where failure to make an exception in an individual case would breach the ECHR, the Secretary of State must be under a duty rather than have a discretion to make such an exception

The Act makes it clear, migrants who enter the UK illegally will be permanently banned from being able to obtain any form of limited Leave to Remain, settlement, citizenship and from returning at a future date. However, it also contains powers which allow the Secretary of State to waive the bans in certain circumstances. These powers include the ability to waive a ban where continued imposition would breach the UK's obligations under the ECHR.

In general, Article 8 does not confer a right to entry, or to particular form of Leave to Remain or settlement in the UK. It is, nevertheless, recognised that there will be some instances where a blanket ban is not appropriate, meaning there will be a need for the UK to grant a form of leave so as to comply with our obligations under the ECHR. It is considered that a discretionary power is entirely appropriate and allows the provisions to be operated in a manner which is compatible with ECHR.

The detail of the process which will allow individuals subject to the bans to raise their circumstances and seek a waiver will be set out in due course.

312. The lifelong ban on re-entry or leave to remain should not be applied routinely to children. The Bill should be amended so that the circumstances of each child must be taken into account before a decision is taken to refuse them leave to remain in the UK or to deprive them of any right of re-entry (see Annex, Amendment 32)

We do not want parents or others to have an incentive to put children on small boats and make dangerous journeys to the UK.

The permanent bans, as provided for in the Act, make it clear to migrants thinking of coming to the UK illegally – be that by a small boat, in the back of a lorry or other unlawful means - that illegal entry has real, long-term and significant impacts on their future.

The Act already contains powers which allow the Secretary of State to waive the bans and grant Leave to Enter or Remain in certain circumstances.

318. We are concerned that the Government has amended clause 35 to remove the power for the Secretary of State to make exceptions in order to comply with other international agreements to which the UK is a party. This risks the UK being placed in breach of its international law obligations under international agreements other than the ECHR. We recommend that the grounds for making exceptions under clause 35 are restored to the version introduced in the Commons (see Annex, Amendment 33).

We consider that the circumstances in which a grant of citizenship would be an appropriate remedy are wholly covered by the ECHR. So, our view is that the addition of other international agreements is unnecessary.

321. The exception in clause 35 to the lifelong prohibition on being granted citizenship or naturalising is an important safety valve, but the compatibility of these provisions with the ECHR will depend on the treatment of the circumstances of individual cases as well as the extent to which the Secretary of State uses her power under clause 35 to make exceptions. Where the lifelong ban on citizenship would breach the UK's obligations under the ECHR, the Home Secretary should be under a duty to make an exception rather than have a discretion to do so.

As with the re-entry and settlement bans, we think that a discretionary power is entirely appropriate. Such a power will allow Ministers to make a decision on the full facts of a case. A number of nationality provisions, including naturalisation, are discretionary and UKVI have established processes for making consistent decisions in line with published guidance.

Legal proceedings

333. Making human rights claims "non-suspensive" can only be consistent with our human rights obligations if pursuing those claims from the destination state is viable. We are concerned that this has not been established for the states deemed safe for removals. The threshold required to establish a suspensive claim based on serious harm under the Bill, and the requirement for "compelling evidence" to support it, puts at risk of removal those who have genuine human rights reasons why they should not be removed. Furthermore, allowing the Secretary of State to redefine "serious and irreversible harm" by regulations opens up the possibility of increasing disparity between the protections against refoulement in domestic law and those to which the UK is committed in international law, including the ECHR. We urge the Government to reconsider its decision to make human rights claims non-suspensive, and the extremely high threshold imposed to establish serious harm suspensive claims. The meaning of "serious and irreversible harm" should not be open to amendment by regulations. Clause 39 should be removed from the Bill (see Annex, Amendment 34).

The Government is working at pace to implement the Act, including ensuring there is an effective process in place to enable non-suspensive claims and legal challenges to be pursued from overseas. By ensuring human rights claims are non-suspensive we will stop spurious attempts to frustrate removal.

Serious and irreversible harm, the threshold for establishing a serious harm suspensive claim, is designed to be a high threshold, reflecting the test applied by the European Court of Human Rights when considering whether to indicate an interim measure under Rule 39. A requirement for evidence of serious harm to be 'compelling' reflects that high threshold and is reasonable and necessary to ensure that the suspensive claims process is not open to abuse.

Section 39 sets out the basis for a domestic interpretation of serious and irreversible harm and provides a framework for decisions on serious harm suspensive claims.

As the jurisprudence develops it may be necessary to amend section 38. The regulation-making power in section 40 will enable such changes to be made to section 39 promptly, providing timely and up-to-date guidance to the courts. We have narrowed the scope of the regulation-making power such that it can't now be used to amend subsection (4) of section 39 to remove any example of serious and irreversible harm which is listed in that subsection on Royal Assent.

343. The Bill's introduction of extremely narrow suspensive claims does provide some protection against the most serious and immediate human rights abuses, but even this protection is meaningless if the procedural framework prevents effective access to these claims. The time limits placed on each stage of the claim process are so strict that it is hard to see how claimants, who are likely to be traumatised, vulnerable and held in detention, could prepare and present their case effectively. If the suspensive claim framework is to remain within the Bill, the time limits imposed must be made more generous. Furthermore, applications to extend those time limits must themselves have suspensive effect (see Annex, Amendment 35)

The Government considers it is reasonable to expect a person to bring a suspensive claim within the time periods set out in the Act. This will ensure that any suspensive claim can be dealt with quickly and will not delay the removal of an illegal entrant to a safe third country. The Act provides flexibility for the claim period to be extended where the Secretary of State considers it appropriate to do so. Furthermore, a person in receipt of a removal notice will be eligible for legal aid without the application of the merits criteria to support both the making of a suspensive claim and appealing any refused claim.

An application to extend the claim period must be made before the end of the claim period. A person will not be removed during this period, except where they have indicated they do not wish to make a suspensive claim.

349. By restricting the right to appeal against the refusal of a suspensive claim, and effectively denying the possibility of judicially reviewing the appeal decision, the Bill might speed up this narrow opportunity to suspend removal but it would also substantially increase the chances of errors remaining uncorrected. The risk to those who are removed despite having a human rights claim pending is extremely serious, and every chance to correct errors in decision-making should be available. We do not agree that appeal rights in suspensive claims under the Bill should be limited, but if they are it is important that there is effective judicial supervision of the Upper Tribunal. The Bill should be amended to remove the unnecessary ouster of judicial review (see Annex, Amendment 36)

The Act provides that a person may apply for permission to appeal to the Upper Tribunal where their suspensive claim has been certified as clearly unfounded. A claim may be certified as clearly unfounded where it is clearly without substance that it is bound to fail. The Government is satisfied that these provisions ensure there is sufficient judicial oversight of manifestly unfounded claims.

Currently, asylum claims that are refused as clearly unfounded do not have a right of appeal, so it is fair and proportionate that should the courts refuse permission to appeal in a matter that has been refused as clearly unfounded, that is the end of the matter and the decision cannot be reviewed by another court.

352. Interim remedies allow the courts to maintain the status quo while a claim is being considered. They are a vital tool to prevent litigants suffering the very harm they are bringing their claim to prevent. This is essential when the harm in question is a violation of human rights. They are also vital to ensure that justice can be done; to ensure that one party to litigation cannot prevent judicial consideration of the claim against them by removing the claimant from the jurisdiction. Denying the courts their ability to use interim remedies when justice demands it undermines the guarantees of Articles 2 and 3 ECHR. Clause 52 should be removed from the Bill (see Annex, Amendment 37)

The Act already provides for a person subject to the duty to challenge their removal through the suspensive claims and appeals process and prevents litigants suffering serious and irreversible harm. The appeal process provides access to justice in relation to a decision made by the Secretary of State on a suspensive claim. Furthermore, section 39(4) provides clear examples of harm to be considered as part of a serious harm suspensive claim.

Section 54 (interim remedies) is necessary to provide an effective safeguard against other types of legal challenges being brought in an attempt to thwart removal. This will ensure our ability to promptly remove those with no legal right to be in the UK is not undermined.

Electronic devices and credibility

366. The proposed new power to search for items capable of storing information in electronic form permits substantial interferences with the right to respect for private life with limited justification and minimal safeguards. Particularly concerning is that the power would allow strip searching, including of children, and searching through and copying any information held on a device such as a mobile phone. The Government has been unable to confirm that in their view this provision is compatible with Convention rights. We agree that the provision is unlikely to be compatible with Article 8. These powers represent a significant invasion of privacy. This provision should not have been added to the Bill at a late stage, preventing it being properly scrutinised by Parliament. It should be removed from the Bill (see Annex, Amendment 38)

The electronic devices provisions have been included in the Act to ensure that immigration officers and the Home Office have the necessary wider powers to tackle and prevent illegal migration. Electronic devices can provide evidence which could be used in criminal prosecutions, can help develop the intelligence picture on illegal migration and can assist in determining a person's immigration status or right to be in the UK. This may be used in determining whether a person meets the conditions in section 2. The Government is satisfied that these provisions are capable of being applied compatibly with the ECHR.

There are safeguards built into the legislation to ensure that only relevant information is used by the Home Office and immigration officers and to require an appropriate adult to be present when a child is searched in a way which requires them to remove any clothing other than an outer coat, jacket or glove. To the extent that there may be an interference with Convention rights, the Government considers this to be justified and a proportionate means of achieving a legitimate aim.

372. From a human rights perspective, we remain concerned that an asylum or human rights claimant's credibility should not be damaged by conduct that may be explained by something other than dishonesty or an attempt to conceal relevant information. Vulnerable asylum seekers may have other justifications for not wanting to hand over access to all their private information to a government official, not least an understandable lack of trust in authority. The Bill should be amended to make clear that the credibility of a claimant who has provided a reasonable excuse for their failure to provide a password etc requested by the Home Office will not be affected (see Annex, Amendment 39)

The credibility of claimant provisions add to the behaviours in section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which a decision maker should consider damaging to a person's credibility. A credibility assessment carried out in respect of section 8 of the 2004 Act is not by itself determinative of a claim. These provisions do not change that. Decision makers will still be required to consider the claimant's credibility in the round as they currently do as part of their decision-making process.

Safe and legal routes and the 'cap'

385. The Government is rightly concerned about the loss of life in the Channel. So are we. However, our role here is to scrutinise legislation for its compatibility with human rights law. In our view, it is clear that the Bill would deny the vast majority of refugees access to the UK's asylum system, despite the fact that there will have been, in many cases, no means for them to enter the UK by safe and legal routes. It prohibits the consideration of their protection or human rights claims irrespective of the merits of their cases. It permits them to be subject to detention without time limits, including pregnant women and children who are normally subject to special protections. It renders them liable to removal from the UK, either to their country of origin or to a 'safe third state' with which they may have no connection, without any individualised assessments of risk being undertaken. It also restricts their access to the courts and their ability to remain in the UK while they challenge removal on human rights grounds.

Individuals fleeing persecution should seek sanctuary in the first safe country they reach, rather than risking their lives or paying people smugglers to make the dangerous journey across the Channel. This is the fastest route to safety. Once there, they should register with the relevant authorities as a person in need of international protection.

Safe and legal routes for those in need are a vital part of the UK's global humanitarian protection offer. The UK's offer comprises global resettlement routes that allow people to come here from any country, via a UNHCR referral process, alongside family reunion and our country-specific schemes and routes. UNHCR will consider whether people have

resettlement needs; individuals cannot apply for resettlement. While resettlement referrals are open to all nationalities, UNHCR makes the decision as to who needs resettlement and who should be referred specifically to the UK.

We cannot help everyone, but we will consider what more we can do to expand existing routes or develop new pathways, provided there is sufficient accommodation and local authority capacity for integration support available. However, with the scale of disruption and the lamentable situations that too many people find themselves in globally, we will never be able to provide a route for all or that meets every eventuality.

386. We conclude that this Bill breaches a number of the UK's international human rights obligations and risks breaching others. The Home Secretary herself has been unable to certify that the Bill is compatible with Convention rights. We therefore urge the Government to consider our conclusions and recommendations in order to address the human rights incompatibilities within this Bill

The Committee provided a range of comments and recommendations in relation to the Bill's compatibility with international obligations. I would reiterate that the Government takes its international obligations very seriously and there is nothing in the Act which requires the Government to act incompatibly with those obligations. The Government concluded that radical solutions are required to put a stop to the small boats crossing the Channel and the approach adopted in these provisions is

therefore new and ambitious but taking such an approach does not mean that the Bill is not compatible with international law. Instead, it means that the Home Secretary, and later Lord Murray, were unable on introduction of the Bill to make a statement under section 19(1)(a) of the 1998 Act as it has a no better than even chance of being compatible under the ECHR. A range of bills have also had section 19(1)(b) statements in the past, including the 2003 Communications Bill under the last Labour Government.

A detailed ECHR analysis is provided in the two memorandums we published on 7 March and 26 April. I would refer the Committee to paragraph 47 of the 7 March memorandum and paragraphs 24 and 45 of the 26 April memorandum.

Yours sincerely,

Rt Hon Robert Jenrick MP