House of Commons
House of Lords

Joint Committee on Human Rights

Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement

Ninth Report of Session 2021–22

Report, together with formal minutes relating to the report

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Joint Committee on Human Rights

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Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, London SW1A 0AA. The telephone number for general enquiries is 020 7219 4710; the Committee's email address is jchr@parliament.uk.

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Part 3 of the Government's Nationality and Borders Bill will make a number of changes to immigration law and enforcement. The Government wants to deter refugees from seeking asylum in the UK having arrived through "irregular" routes. The legislation aims to do so, in part, by criminalising those that arrive in the UK through such "irregular routes" along with making it an offence to assist a person who arrives irregularly. The legislation and government policy together are also focused on deterring refugees travelling across the Channel to the UK on small boats by enabling maritime enforcement—including the ability to turn boats around at sea—known as "pushbacks". The legislation will also make changes to immigration removals and bail, increasing the statutory notice period for a removal while adding matters to be borne in mind when making decisions on bail.

Article 2 of the European Convention on Human Rights (ECHR), which is incorporated into UK law through the Human Rights Act 1998, protects the right to life. The UK is required to adopt laws and practices to safeguard the right to life; this includes the safety of lives at sea. The Channel crossing is a very dangerous route and small boat crossings already too often end in loss of life. The Government's legislation and policy intentions with regard to pushbacks at sea are likely to increase the danger of these crossings whilst failing to deter those who make the journey and the people smugglers who profit from them. We do not see how the Government's proposals as they stand are consistent with our human rights obligations. We recommend that the Bill is amended so that maritime enforcement cannot be imposed on any vessel that is not seaworthy or where there could otherwise be a risk to the safety of life and well-being of those onboard. Rather than pursue their policy on pushbacks, the Government should instead do everything it can to prevent more individuals losing their lives at sea.

We have further concerns connected to the maritime enforcement sections of the Bill, including the following:

- There are a number of instruments which place obligations on states to protect victims of slavery or trafficking and to investigate and prosecute those responsible for human trafficking or slavery. The Government's legislation could lead to situations where victims of slavery or human trafficking are not protected and where action is not taken to adequately investigate and prosecute the perpetrators of these crimes. Therefore, we do not see how the maritime enforcement parts of the Bill, combined with the Government's pushback policy can be in compliance with the UK's obligations to combat slavery and human trafficking.
- The UN Convention on the Rights of the Child requires actions concerning children to treat the best interests of the child as a primary consideration. It is difficult to see how it would ever be in the best interests of a child to be subject to pushback techniques at sea. We ask the Government to explain how it would ensure that such actions respected the rights of the child as well as all others on board.

- The Bill includes powers which would allow immigration officers to board, divert and detain a ship that is being (or has been) used in connection with immigration offences, including requiring the ship to be taken to any place (within the UK or elsewhere) and detained there, and requiring the ship to leave UK waters. Whilst these powers could be used in a way compatible with our human rights obligations, there are risks that human rights could be breached by, for example, endangering lives at sea or returning a ship to a place where those onboard are at risk. We ask the Home Secretary to provide further information on how these powers will be used, and to reflect if they are really necessary in their current form.

The Bill would also make it a criminal offence to arrive in the UK illegally. Whilst some legal routes to entry, such as through a resettlement scheme, do exist, these are extremely limited. The new offence is clearly inconsistent with our obligations under the United Nations Refugee Convention, including Article 31, which prohibits the penalisation of refugees for unauthorised entry. The Bill would also make it a criminal offence to facilitate illegal arrival into the UK, potentially criminalising those who rescue migrants from the Channel and bring them to the UK, once again in contravention of the right to life under Article 2 of the ECHR.

The Bill also proposes changes to immigration detention and removals. We welcome the statutory guarantee of at least five working days' notice before a person is removed, an increase on the 72 hours currently guaranteed in policy guidance, and the end of the use of 'removal windows'. These changes provide greater protection for the right of access to justice. They also improve human rights protections by reducing the chances of unjustified removal. However, the Bill should be amended to make plain that whenever notice of removal is provided, it must be sufficient to guarantee the right to access justice.

The Bill makes changes to the law governing the grant of immigration bail, adding additional matters to which Home Office decision makers and the First-tier Tribunal must have regard when making their decision on bail. These changes increase the risk that immigration detention will be used, and prolonged, where it is not necessary or proportionate. As such, we recommend that they are removed from the Bill.

1 Introduction

1. In recent years there has been an increased concern that people are entering the UK in small boats by crossing the Channel from France. News outlets have consistently reported that in 2021 more individuals have attempted to cross the Channel than in previous years.[1] The United Nations High Commissioner for Refugees has suggested that this increase is a result of the significant reduction and air and freight traffic during the COVID-19 pandemic.[2] Most of those individuals who arrive by boat do go on to claim asylum (98%).[3]

2. The Channel is the busiest shipping route in the world and those making the journey crossing often do so aboard vessels that are small, cramped and not seaworthy. The route is an incredibly dangerous one and there have been too many unfortunate cases where individuals, including children, have lost their lives during their journey. Every loss of life in the Channel is tragic and it should be a pressing priority for Government that further deaths in the Channel are prevented.

3. The Government's *New Plan for Immigration* notes that small boat crossings, and irregular entry more generally, is being "facilitated by serious organised criminals exploiting people and profiting from human misery", and one of the aims of the Nationality and Borders Bill (NBB) is to "break the business model of people smuggling networks." To this end Part 3 of the Bill, which is the focus of this report, contains various enforcement powers in relation to ships and vehicles and modifies existing immigration offences.

The Nationality and Borders Bill

4. The NBB was introduced to the House of Commons on 6 July 2021 and completed Committee Stage in the Commons on 4 November 2021. Dates for Report Stage and Third Reading are yet to be announced.

5. The NBB covers wide-ranging matters including (i) nationality (Part 1); (ii) treatment of refugees and asylum seekers (Part 2); (iii) enforcement of immigration law (Part 3); (iv) age assessments (Part 4); (v) modern slavery (Part 5); and miscellaneous provisions (Part 6). The provisions in the Bill give rise to several human rights considerations and, consequently, this is the second report from our Committee—following Legislative Scrutiny: Nationality and Borders Bill (Part 1)–Nationality—on the proposed legislation. This Report focuses on the enforcement provisions in Part 3 of the Bill. Our scrutiny of other aspects of the Bill is ongoing.

1 "Small boat Channel crossings in 2021 reach double 2020 total", The Guardian, 27 September 2021 "Number of Channel migrants to reach UK hits record 20,000", The Telegraph, 2 November 2021 "Channel migrants: Crossing numbers in 2021 double 2020's figure", BBC News, 27 September 2021

2 Oral evidence taken before the Home Affairs Select Committee on 30 September 2020, HC 705 (2019–21), Q230 [Rossella Pagliuchi-Lor]

3 Oral evidence taken before the Home Affairs Select Committee on 3 September 2020, HC 705 (2019–21), Q29 [Abi Tierney]

6. Part 3 of the Bill would:

- expand immigration officers and enforcement officers' maritime enforcement powers, including the power to direct that a vessel be taken to a place outside of the UK and to take action in relation to non-UK-flagged vessels in foreign waters and on the High Seas;
- introduce higher sentences for offences of entering the UK illegally or in breach of a deportation order;
- increase the punishment for people who facilitate illegal entry to the UK, who will face up to life imprisonment–and also extending that offence to people helping migrants in boats (not for gain) and not only people smugglers;
- introduce a new penalty for hauliers who have an unsecured vehicle and have failed to take the required actions to prevent unauthorised access, regardless of whether clandestine entrants are found on board or not;
- place the current policy on notice periods for people liable to removal from the UK on a statutory footing, with some amendments;
- increase the scope to deport Foreign National Offenders (FNOs) from the UK under the Early Removal Scheme (ERS); and
- add a new ground to the list of considerations for granting bail, namely a failure to cooperate with immigration processes (without reasonable excuse).

7. In this Report we have used the numbering of provisions in the Bill as amended in Committee. Part 3, therefore, includes clauses 39 to 47.[4]

Human Rights in issue

8. The provisions in Part 3 of the Bill engage several human rights in the European Convention on Human Rights (ECHR) and other international human rights treaties that bind the UK, including:

a) the right to life (Article 2 ECHR and Article 6 of the International Covenant on Civil and Political Rights (ICCPR));

b) the right to liberty (Article 5 ECHR);

c) the right to an effective remedy (Article 13 ECHR);

d) the right of access to justice in immigration decisions (Art 13 ICCPR)

e) the prohibition of slavery, including the obligation to protect victims of human trafficking or slavery and to investigate and prosecute the perpetrators (under Article 4 ECHR, Article 8 ICCPR, the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and the UN Protocol to Prevent,

4 Nationality and Borders Bill [Bill 187 (2021–2022)] as amended in Public Bill Committee

Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (UN Palermo Protocol));

f) the protection of refugees as set out in the Convention relating to the Status of Refugees 1951 (Refugee Convention);

g) the principle of non-refoulement, whereby a person cannot be returned to a country where they face a real risk of human rights breaches, contrary to the Refugee Convention, as well as Articles 2 (right to life), 3 (prohibition on torture and inhuman and degrading treatment) and 4 (prohibition on slavery) ECHR;

h) the prohibition on the collective expulsion of aliens (Article 4 of Protocol 4 ECHR (A4P4) as well as the need for individual decision-making to prevent a risk of refoulement under the Refugee Convention and Articles 2, 3 and 4 ECHR);

i) the duty to make the best interests of the child a primary consideration in decision-making (Article 3 of the UN Convention on the Rights of the Child (CRC)), and

9. The UK is also bound by various other international treaties that apply in the context of safety of life at sea, including:

a) the International Convention for the Safety of Life at Sea 1974 (SOLAS) (as amended),

b) the International Convention on Maritime Search and Rescue 1979 (SAR) (as amended),

c) the UN Convention on the Law of the Sea 1982 (UNCLOS), and

d) the International Convention on Salvage 1989 (Salvage Convention).

Our Inquiry

10. On 26 July 2021, we published a call for written evidence for individuals and organisations to respond to the questions in the Terms of Reference, to which we received 61 submissions. Alongside this, we also published an online survey, promoted on our website and through our Twitter account, so we could hear a wider range of views on the human rights implications of the Bill. Our survey closed on 17 September 2021 and we received 84 responses to the survey. An analysis of those responses is in Appendix 2 below. We have also held oral evidence sessions on the Bill, including one specifically considering Part 3 on 20 September 2021. We are grateful to all who have provided evidence to our inquiry.

2 Small boat crossings in the English Channel

Small boat crossings in the Channel

11. In recent years there has been an increased concern that people are entering the UK by crossing the Channel in small boats. The Government's March 2021 New Plan for Immigration notes that small boat crossings, and irregular entry more generally, is being "facilitated by serious organised criminals exploiting people and profiting from human misery".[5] The Channel crossing is a very dangerous route and small boat crossings endanger the lives of those individuals on board, the Border Force officials and organisations, such as the RNLI, who rescue those boats. As the Joint Council on the Welfare of Immigrants noted in their evidence to this inquiry, "The Channel is the busiest shipping route in the world and the migrants seeking to make irregular crossings of it are invariably forced to do so on small crafts which place them automatically at severe risk and in need of assistance."[6]

12. The danger of the route is demonstrated by the tragic stories of individuals who have lost their lives whilst making the crossing.[7] Whilst it is difficult to give a precise number who have lost their lives, the Institute of Race Relations has documented over 290 deaths at the British borders with France and Belgium since 1999 (this figure includes people who were not travelling to the UK by small boat).[8] We heard that many asylum seekers make dangerous journeys because they see no other option but to leave their home country. We also heard that asylum seekers rarely have any choice as to their destination or their means of travel, although that may not be the case for all asylum seekers. For example, we received oral evidence from Peter, an Ambassador from the VOICES Network, who told us how he had been brought to the UK on a small boat across the Channel. He explained that "Me coming to the United Kingdom was never planned, so I never knew I was going to end up in the United Kingdom. I never knew I was going to be on a boat with so many people for almost five hours in deep waters, which I was really scared of. It was never actually planned for me."[9]

13. Difficulty has arisen in determining whether UK or French authorities are responsible for assisting small boats in the Channel, with some suggesting France is not doing enough to stop unseaworthy small boats leaving French shores.[10] The narrowest part of the Channel, the Dover Strait, is just 21 miles and consists of both British and French territorial waters.[11] In the Dover Strait, which most small boats cross, there are no international waters between France and the UK. This means that as soon as vessels leave French waters, they enter UK waters.[12] However, the two countries have divided the Channel into search and

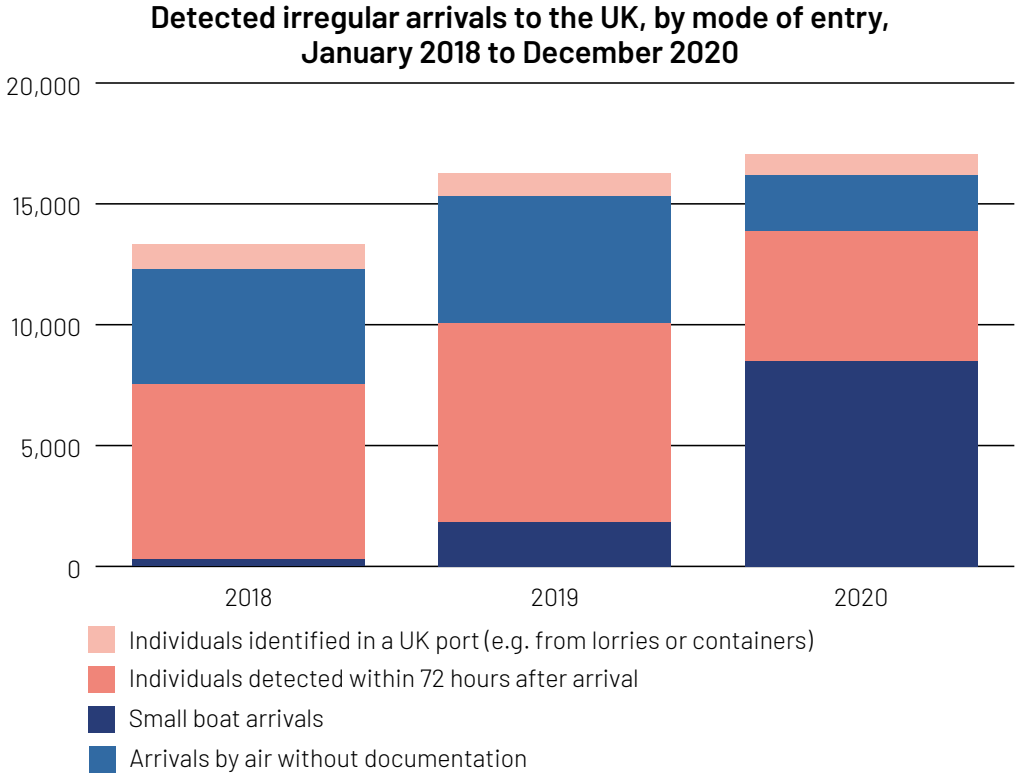
5 HM Government, New Plan for Immigration: Policy Statement, (March 2021), page 7
6 Joint Council for the Welfare of Immigrants (NBB0053)
7 "Channel crossings: Migrant dies as boat sinks", BBC News, 12 August 2021 "Four drowned migrants in English Channel were part of same Iranian family", The Independent, 28 October 2020 "Migrant attempting to reach the UK feared dead in Channel crossing", The Guardian, 3 November 2021
8 Institute for Race Relations, Deadly crossings and the militarisation of Britain's borders, 25 November 2020
9 Q3
10 "Three migrants missing, feared dead, after attempted Channel crossing", The Telegraph, 26 October 2021
11 Insight: Migrants crossing the English Channel, House of Commons Library, 4 November 2019
12 Is turning back migrants at sea compatible with international law?, House of Commons Library, 13 September 2021

rescue zones. If a small boat is within a country's search and rescue zone, that country is responsible for assisting the boat.[13] It is beyond this Committee's remit to consider the complexities of Anglo-French relations in this area, instead this report will focus on the nature and territorial scope of the UK's human rights obligations in relation to small boats crossing the Channel.

14. Of those people making small boat crossings who reach the UK, data shows that a majority go on to claim asylum. In oral evidence to the Home Affairs Select Committee on 3 September 2020, Abi Tierney, the Director General of UK Visas and Immigration (UKVI), stated that of the roughly 5,000 people who had crossed the English Channel in small boats from January to September 2020, 98% claimed asylum.[14]

15. The Government's *New Plan for Immigration* shows that since 2018 the proportion of individuals arriving in the UK in small boats as compared to other modes of entry has increased significantly:[15]

Recent increase in small boat crossing in the Channel



Source: NEW PLAN FOR IMMIGRATION – Policy Statement (publishing.service.gov.uk) at page 7

16. Prior to 2016, very few people arrived in the UK in small boats having crossed the Channel. Between July 2014 and May 2016 Home Office data states that there were nine

13 Insight: Migrants crossing the English Channel, House of Commons Library, 4 November 2019
14 Oral evidence taken before the Home Affairs Select Committee on 3 September 2020, HC 705 (2019–21), Q29 [Abi Tierney]
15 HM Government, New Plan for Immigration: Policy Statement, March 2021, page 7

confirmed incidents of migrants reaching the UK having crossed the Channel in a small vessel.[16] At that time a significantly larger proportion of migrants were arriving in the UK by lorry.

17. By 2018 the Home Office reported that 539 migrants had attempted to travel to the UK by small boats in that year.[17] In response to this increase the then Home Secretary declared small boat crossings a "major incident" on 28 December 2018. This resulted in the deployment of additional UK patrol vessels in the Channel and a series of coordinated actions by the UK and French authorities aimed at preventing further crossings.

18. The number of people attempting to enter the UK in small boats has continued to grow. The *New Plan for Immigration* states that in 2020, around 8,500 people were detected attempting to enter the UK clandestinely by small boat—up from around 1,800 in 2019.[18] There is currently no official statement on the number of people that have entered the UK in small boats in 2021, however, the Explanatory Notes to the Bill state that in the first six months of 2021, over 5,900 people crossed the Channel in small boats.[19] News outlets have provided running tallies of the number of Channel migrants detected in 2021, said to be based on data given to them by the Home Office. For example, on 10 October 2021, the BBC reported that more than 18,000 people have made the crossing from France to England in small boats so far this year.[20]

19. The UK is not the only country dealing with the unauthorised arrival of migrants by boat. Greece, Italy, and Spain have all received many more such arrivals in recent years. The UN reports that in 2020, Italy had around 34,000 sea arrivals, Spain 40,000, and Greece 10,000, compared to the UK's 8,500.[21]

Why have the number of Channel crossings increased?

20. In an oral statement to the House of Commons on 7 January 2019, the then Home Secretary, stated that "strengthened security at the French-UK border has meant that it has become increasingly difficult for stowaways illegally to enter the UK in trucks and cars, leading to more reckless attempts by boat."[22]

21. In evidence to this Committee the UK Representative to the United Nations High Commissioner for Refugees, Rossella Pagliuchi-Lor, also partly attributed an increase in Channel crossings to strengthened security at the French-UK border. She said:

> I can venture a hypothesis. As I said, the overall number [of people entering the UK irregularly] has not changed. It is pretty stable. What has happened

16 Independent Chief Inspector of Borders and Immigration, An Inspection of the Home Office's response to in-country clandestine arrivals ('lorry drops') and to irregular migrants arriving via 'small boats' (May 2019 - December 2019), November 2020

17 The last quarter of 2018 saw a four-fold increase in attempts by migrants to enter the UK by this method compared with the first nine months of the year. The Home Office reported that of the 539 migrants who attempted to travel to the UK on small boats in 2018, 434 of whom made their attempts in the last three months of the year. Independent Chief Inspector of Borders and Immigration, An Inspection of the Home Office's response to in-country clandestine arrivals ('lorry drops') and to irregular migrants arriving via 'small boats' (May 2019 - December 2019), November 2020

18 HM Government. New Plan for Immigration: Policy Statement, March 2021, page 7

19 Explanatory Notes to the Nationality and Borders Bill [Bill 141 (2021–22)-EN] para 6

20 "Channel crossings: More than 1,100 migrants cross in two days", BBC News, 10th October 2021

21 Migration Observatory, 'Q&A: Migrants crossing the English Channel in small boats', accessed 2 July 2021

22 HC Deb, 7 January 2019, col 86

> is simply that smuggling rings moved from moving people largely through trucks and other vehicles to using boats. One of the reasons is the securitisation of the border and the fact that there are far more controls on trucks and lorries than there were before. I think it has to do with Brexit. That has reduced the truck vehicular traffic. Covid has been fundamental, because for months there has been hardly any way. Of course, smuggling rings are nothing if not incredibly adaptable. They have moved their business from trucks and vehicular movement to boats, but this does not represent a change in either the nature of those who travel or the nature of the movement. It is simply from one to the other.[23]

Assisting small boats in the Channel

22. The overall provision of national maritime search and rescue operations and policies rests with the Department for Transport (DfT) through the Maritime and Coastguard Agency (MCA). The tasking of adequate resources to respond to maritime search and rescue, and the co-ordination of that response, is the responsibility of the MCA through HM Coastguard.[24]

23. In his evidence to the Home Affairs Select Committee, the Clandestine Channel Threat Commander, Dan O'Mahoney, explained the process for rescuing boats in the Channel:

> I can tell you that there is a very well-rehearsed and very professional operation that is delivered in UK waters. It is overseen by the Maritime and Coastguard Agency because all of the migrant vessels currently are classified as in distress, because they are unseaworthy and the people operating them do not have maritime experience. So, the Coastguard Agency co-ordinates that operation. They use a combination of assets from across Government: their own aerial surveillance aircraft, a civilian drone, and you may have seen that a Watchkeeper drone is now deployed over the Channel, from Defence. They use those to identify where the migrant vessels are and to direct resources on to them.
>
> Border Force currently have three declared assets, which are available to the Coastguard Agency to make those rescues: two coastal patrol vessels and a cutter. We have more vessels in reserve. The Coastguard Agency deploy to those vessels as a part of the safety of life at sea operation. I think it is also really important to emphasise that all of those assets that I have just mentioned are also engaged in intelligence gathering. So even before those migrant vessels arrive at the UK-France median line, we are looking at them to gather intelligence and information, as well as looking after the safety of the migrants. The same goes for when those migrants get on a Border Force vessel—we are basically looking after their welfare, but we are also looking for evidential opportunities to prosecute facilitators.[25]

23 Q14
24 Maritime and Coastguard Agency, Strategic Overview of SAR in the UK, last updated 5 November 2021
25 Oral evidence taken before the Home Affairs Select Committee on 3 September 2020, HC 705 (2019–21), Q14 [Dan O'Mahoney]

24. The UK search and rescue effort also relies heavily on voluntary organisations, such as the Royal National Lifeboat Institution (RNLI), or independent lifeboats. Assistance from voluntary organisations is requested, and tasked, through either the Police Service or HM Coastguard who will retain ultimate responsibility for the overall incident.[26]

What happens when individuals arrive in the UK?

25. Individuals attempting to cross the Channel by boat are almost always picked up at sea or on beaches around Kent. They are then transported to Tug Haven, a short-term immigration detention holding facility, where they undergo a temperature check, a search and are photographed and fingerprinted so basic identity checks can take place.[27] HM Chief Inspector of Prisons (HMCIP) have said the facilities at Tug Haven "resemble a building site".[28] Following this initial processing individuals are generally transported to the Kent Intake Unit (KIU) or the overflow site, Frontier House, in Folkestone. An initial interview will then take place.[29] Individuals granted immigration bail are then released and transferred to short-term Home Office accommodation. Those thought to pose a high risk of harm or who did not claim asylum may be transferred to an immigration removal centre. HMCIP reported that during an inspection in 2020 most individuals processed at the KIU were moved from there to another short-term holding facility, Yarl's Wood.[30]

26 Maritime and Coastguard Agency, Strategic Overview of SAR in the UK, last updated 5 November 2021

27 Her Majesty's Chief Inspector of Prisons, Report on an unannounced inspection of the detention of migrants arriving in Dover in small boats Detention facilities: Tug Haven, Kent Intake Unit, Frontier House, Yarl's Wood and Lunar House by HM Chief Inspector of Prisons (2–4 and 7–10 September 2020), para 1.16

28 Ibid para 1.16

29 Ibid Report on an unannounced inspection of the detention of migrants arriving in Dover in small boats Detention facilities: Tug Haven, Kent Intake Unit, Frontier House, Yarl's Wood and Lunar House by HM Chief Inspector of Prisons (2–4 and 7–10 September 2020), para 1.20

30 Ibid, paras 1.70 to 1.74

Operation Sovereign Borders the approach to boat crossings in Australia[31]

In September 2013 the Australian Government introduced Operation Sovereign Borders to ensure that "no one who arrives illegally by boat will settle in Australia".[32] This policy was introduced after more than 50,000 people had travelled illegally to Australia between 2008 and 2013. During this period, according to the Australian Government, more than 1,200 people had drowned attempting to reach Australia by sea.[33]

This "zero tolerance" policy included turning back boats in international waters and detaining people stopped at sea in offshore detention in camps in Papua New Guinea and the island of Nauru at the expense of the Australian government.

The Australian Government's policy is to turn back boats 'where safe to do so'. The tactics adopted include 'turnbacks', where vessels are returned to just outside the territorial seas of the country of departure (e.g. Indonesia), and 'takebacks', where Australia works with a country of departure (e.g. Sri Lanka and Vietnam) to return those aboard, either by plane or an at-sea transfer. As of September 2018, 33 vessels have been intercepted under Operation Sovereign Borders, with 827 people returned to their country of departure or origin.[34]

The Australian Government have stated that no lives have been lost during return operations under Operation Sovereign Borders.[35] However, the Kaldor Centre for International Refugee Law have highlighted reported risks to both the life and safety of passengers, crew and Australian Navy personnel and this Committee were told there were reported deaths of some individuals who had been left adrift at sea.[36] Reported risks have included passengers going overboard and acts of sabotage. Some people returned by Australia to their countries of origin have reportedly faced torture and imprisonment.[37]

On 11 November 2020 the Home Affairs Select Committee heard from Professor Natalie Klein from the University of New South Wales who said that although the number of people arriving in Australia clandestinely by boat had reduced under "Sovereign Borders", people had found alternative ways of entry and the number of people arriving by air—Covid aside—had increased significantly.[38]

31 It should be noted that Australia are not signatories to the European Convention of Human Rights (ECHR) or the Council of European Convention on Action against Trafficking (ECAT). They are, however, signatories to the various international maritime treaties described further below and other international human rights treaties.

32 Home Affairs Select Committee (CHA0060)

33 Home Affairs Select Committee (CHA0060)

34 Andrew & Renata Kaldor Centre for International Refugee Law, Factsheet: Turning back boats, last updated 2019, page 1

35 Home Affairs Select Committee (CHA0060)

36 Q2

37 Andrew & Renata Kaldor Centre for International Refugee Law, Factsheet: Turning back boats, last updated 2019, page 2

38 Oral evidence taken before the Home Affairs Select Committee on 11 November 2020, HC 705 (2019–21), Q442 [Professor Natalie Klein]

Pushbacks from Italy to Libya

The stretch of the Mediterranean Sea between North Africa and Italy and Malta, referred to as the central Mediterranean route, continues to be among the busiest and deadliest migration routes in the world. In 2016, the number of migrants detected on the route peaked at 181,436. This fell to 119,369 in 2017,[39] and continued to fall to 11,471 in 2019. In 2020 the number increased again to 34,154.[40]

In 2020, 1,550 refugees and migrants were reported dead or gone missing in irregular movements at sea from West and North Africa to Italy, Malta and Spain. 524 people died trying to cross the sea from Libya and a further 201 people, drowned trying to cross the sea from Tunisia.[41]

In 2008 Italy and Libya signed a Treaty on Friendship, Partnership and Cooperation aimed at preventing irregular migration from Libya to Italy. Under that agreement, in 2009 Italy began intercepting vessels in the Mediterranean Sea and returning them to Libya. Under the agreement Italy transferred three patrol boats to Libya on May 14, 2009 to be jointly operated by Libyan and Italian authorities.[42] In February 2017 Italy and Libya concluded a new memorandum of understanding. Under the new agreement, Italy provides support to the Libyan Coast Guard (LCG), which intercepts migrant boats trying to cross from Libya to Italy.[43]

There have been a number of high-profile incidents in the Mediterranean that have led to claims being brought against Italy. On 6 May 2009 the Italian Revenue Police and the Coastguard intercepted three vessels carrying approximately 200 people and returned them to Tripoli approximately 35 nautical miles south of Lampedusa. A group of eleven Somali nationals and thirteen Eritrean nationals, later brought claim against Italy in the European Court of Human Rights (ECtHR). *Hirsi Jamaa v Italy* is discussed in more detail below.

There is currently a case against Italy pending before the ECtHR, *SS and others v Italy*, relating to an incident on 6 November 2017, in which the Libyan Coast Guard intercepted an NGO vessel attempting to rescue 130 migrants from a sinking dinghy. At least twenty people on board died. Survivors were returned, or "pulled back", to Libya, where it is alleged that they endured detention in inhumane conditions, beatings, extortion, starvation and rape. The applicants, 17 survivors of the incident, claim Italy are responsible for the human rights violations given that the Libyan vessel was donated by Italy and the intervention was partly coordinated by the Maritime Rescue and Coordination Centre (MRCC), an Italian Government agency.[44]

Current Government policy regarding small boats in the Channel

26. On 9 September 2021 it was reported that the Home Secretary had "ordered officials to rewrite the UK's interpretation of maritime laws to allow Border Force to turn small boats around, forcing them to be dealt with by French authorities."[45] Forcing boats to turn

39 UNHCR, Italy Sea Arrivals Dashboard - December 2017 (January 2018)
40 UNHCR, Italy Sea Arrivals Dashboard - December 2020 (January 2021)
41 UNHCR, Routes towards the Western and Central Mediterranean Sea (January 2021)
42 Human Rights Watch, Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers (January 2009)
43 Annick Pijnenburg, From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the making in Strasbourg? European Journal of Migration and Law, vol 20 (2018), page 397
44 *SS and others v Italy* (Application No. 21660/18). Global Legal Action Network, Legal action against Italy over co-ordination of Libyan Coast Guard pull backs, accessed 17 November 2021
45 Priti Patel's plans for Channel 'pushbacks' will break law and put lives at risk, experts warn The Independent, 9 September 2021

around is commonly referred to as "pushbacks". Similar tactics have been used in countries including Australia, Greece and Italy. The approach to boat crossings in Australia and Italy is discussed below.

Are pushback tactics currently being used in the Channel?

27. On 22 September 2021 the Home Office Permanent Secretary, Matthew Rycroft CBE, told the Home Affairs Select Committee that pushback tactics had not yet been deployed. He added that he could not confirm when the tactics would be deployed, but they would only be used when "all the circumstances are in place for them to be deployed in a safe and legal way".[46] The Permanent Secretary also refused to clarify the legal basis for the tactics. In a letter to the Committee dated 21 October 2021, the Permanent Secretary wrote:

> I have since been advised that I must not waive legal professional privilege, so I am unable to say more than that the Government is satisfied that the maritime tactics it has developed are lawful.[47]

28. Although pushback tactics do not appear to have been adopted yet, Lucy Moreton, Professional Officer at the Immigration Services Union, told the Public Bill Committee that the announcement on 9 September 2021:

> [H]ad the unfortunate impact of endangering both border officers and migrants because suddenly migrants feared that they were going to be pushed back, even though they are in circumstances where they never would be—they are vulnerable, the vessel is vulnerable, it has vulnerable people in it and it is not in the right bit of the Channel. Because they are frightened of being approached by border officers, they are less willing to be rescued in circumstances where they deeply need rescuing. That was most unfortunate.[48]

Removal to safe third countries

29. The Government's intention to pushback boats in the Channel would result in the individuals traveling in those boats being returned to France. Under an EU law called the Dublin III Regulation, asylum seekers in EU countries can in some circumstances be transferred to the first EU member state in which they claimed asylum after leaving their origin country. However, on 31 December 2021, when the Brexit transition period ended, the UK ceased to be able to avail itself of EU laws such as the Dublin III Regulation.

30. To maintain the option to return an asylum seeker to their first EU country of entry the UK would have to enter into agreements with either individual member states, or

46 Oral evidence taken before the Home Affairs Select Committee on 22 September 2021, HC 625 (2021–22), Q265 [Matthew Rycroft CBE]

47 Home Affairs Select Committee, Letter from the Permanent Secretary following his appearance before the Committee on 22 September (21 October 2021)

48 Nationality and Borders Bill Committee, 21 September 2021, col 30

with the EU as a whole. Without such agreements, the UK will find it difficult to transfer asylum seekers to EU countries.[49]

49 Even if the UK secured agreements with individual member states, the UK would still have an obligation to conduct individual assessments for returns. The UK would need to satisfy itself not only that an individual would not face human rights abuses in the relevant EU member State, but also that they would not later be returned to a country where they faced a real risk of such treatment, contrary to Article 2, 3 or 4 ECHR and the Refugee Convention. This is known as the principle against onwards refoulement and is discussed in further detail below. See also *Sharifi and Others v Italy and Greece* (Application No. 16643/09)

3 Maritime enforcement and human rights

31. Maritime enforcement action in relation to boats at sea raises a number of different human rights issues, including: (i) the right to life, which is protected by Article 2 ECHR and Article 6 ICCPR, as well as specific rules relating to the safety of life at sea under UNCLOS, SAR and SOLAS; (ii) the protection of victims of human trafficking or slavery (under Article 4 ECHR, Article 8 ICCPR, ECAT and the UN Palermo Protocol); (iii) the principle of non-refoulement and the protection provided by the Refugee Convention (as well as Articles 2 and 3 ECHR); and (iv) the prohibition on collective expulsions (A4P4 ECHR) and the need for an individual assessment. However, overall we have not been provided with adequate detail of the Home Office's analysis as to the compatibility of the proposed maritime enforcement powers and pushback policy with human rights standards.

32. The Home Office's ECHR Memorandum does not directly address the compatibility of the maritime enforcement provisions in Part 3 of the Bill with human rights, including the right to life or the prohibition on torture (Articles 2 and 3 ECHR). Indeed, there has been much speculation as to the legality of proposed maritime enforcement activity.[50] However, within that Memorandum more generally, the Home Office does consider how Article 3 ECHR and the principle of non-refoulement could apply to the removal of an asylum seeker to a safe third country (at paragraphs 14–15), albeit in relation to provisions in Part 2 of the Bill and not pushbacks.

Right to Life: Duty to protect and save lives at sea

33. Article 2 ECHR provides "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally […]". Similar wording is found in Article 6 of the ICCPR.[51]

34. The right to life contains three obligations—(i) a positive obligation on the State to take appropriate steps to safeguard the lives of those within its jurisdiction; (ii) a prohibition of intentional deprivation of life; and (iii) a procedural obligation to carry out an effective investigation into alleged breaches of the right to life.

35. The positive obligation under Article 2 ECHR includes a duty on the State to take preventive operational measures, where the presence of a risk requires such action. Whilst this is an obligation of means, not of result, this obligation requires both an assessment of the nature and level of risk, as well as adequate preventive operational measures. It requires the authorities to do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. Such a situation could, for example, arise where a refugee imperils their own life through fears of a pushback by Immigration Officers.[52]

50 See for example, Government lawyers tell Priti Patel she is likely to lose fight over migrant boats, The Guardian, 10 November 2021

51 Article 6(1) ICCPR provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

52 See, for example, the case study of pushbacks from Australia, or the evidence of Lucy Moreton (see paragraph 28).

36. However, Article 2 ECHR does not guarantee to every individual an absolute level of security in any activity in which the right to life may be at stake, in particular when the person concerned bears a degree of responsibility for having exposed themselves to unjustified danger. That said, the European Court of Human Rights (ECtHR) has held that Article 2 may imply in certain well-defined circumstances a positive obligation on the part of the authorities to take preventive operational measures to protect an individual from themselves. In particular, this obligation can arise where an individual imperils their own life in view of State agents, including where that threat is an emotional reaction induced by the State agents' actions.[53]

37. The ECtHR has held that the positive obligations under Article 2 require States to adopt regulations for the protection of people's safety in public spaces, and to ensure the effective functioning of that regulatory framework. However, there is a choice of means for States as to how to achieve this positive obligation. The positive obligations under Article 2 ECHR mean that in the context of safety of life at sea, States need to have an adequate legislative and administrative framework in place to protect lives at sea, including checks that ships are seaworthy, and adequate systems for search and rescue operations at sea.[54]

38. Therefore, Article 2 ECHR positively requires the State to adopt laws and practices to safeguard the right to life. This would apply when adopting laws relevant to the safety of lives as sea, as well as in developing practices and policies relevant to the safety of life at sea, and how the authorities might react in any given case in order to ensure that the right to life and safeguarding life is given a central place in all actions.

39. The right to life also includes a prohibition on the use of lethal force by State agents. It may also be engaged where State agents fail to take all feasible precautions in the choice of means and methods, for example, when undertaking a security operation with a view to avoiding incidental loss of civilian life. This means that techniques used at sea (for example under any "pushback" or "maritime enforcement" operations) should not have the effect of causing loss of life and should be designed so as to minimise any risks to life. Article 2 ECHR does permit the use of force that is "absolutely necessary" in order, for example, to effect a lawful arrest of a person. In order for the use of force to be "absolutely necessary", it must be strictly proportionate to the situation and circumstances. There is no margin of appreciation granted to states when considering whether the use of force was "absolutely necessary". However, it is difficult to see how intercepting refugees in a way that would risk their lives would be "absolutely necessary" and therefore strictly

53 See for example, *Mikayil Mammadov v. Azerbaijan* (Application No. 4762/05). This concerned a case where the applicant's wife, an internally displaced person, set herself on fire in protest at a forced eviction. The Court held that, in a situation where an individual threatens to take his or her own life in plain view of State agents and, moreover, where this threat is an emotional reaction directly induced by the State agents' actions or demands, the latter should treat this threat with the utmost seriousness as constituting an imminent risk to that individual's life, regardless of how unexpected that threat might have been. In such circumstances, if the State agents become aware of such a threat sufficiently in advance, a positive obligation arises under Article 2 requiring them to prevent this threat from materialising by any means which are reasonable and feasible in the circumstances (see especially paragraph 115 of that judgment).

54 See, for example, *Leray, Guilcher, Ameon, Margye and Mad v France* (Application No 44617/98), relating to the positive obligations on France under Article 2 ECHR in relation to its contribution to a search and rescue mission following the sinking of a French ship in 1979 off the coast of Spain, as well as its positive obligations concerning the checks for the standards of sea-worthiness of the vessel.

proportionate.[55] Significant care would need to be taken by UK authorities to ensure that the safety of the lives of those on small boats is the primary consideration in any actions taken to intercept them—and to take them to safety.

40. Article 6 ICCPR also protects the right to life. In January 2021, the UN Human Rights Committee (the body responsible for monitoring the implementation of the ICCPR) found that Italy had failed to protect the right to life of more than 200 migrants, including 60 children, who died on board a vessel that sank in the Mediterranean Sea in 2013. The Committee found that Italy had failed to respond promptly to various distress calls made by those aboard the sinking vessel.[56]

Duties on the master of a ship to assist those in distress at sea

41. There are internationally binding obligations, relating to the right to life, in the form of rules to protect the safety of life at sea. These include specific duties to aid those in distress at sea, as well as duties on coastal states to organise search and rescue operations.

42. As the International Maritime Organisation (IMO) guidance "Rescue at Sea: a guide to principles and practice as applied to refugees and migrants" sets out: "The Master [of a ship] has an obligation to render assistance to those in distress at sea without regard to their nationality, status or the circumstances in which they are found. This is a longstanding maritime tradition as well as an obligation enshrined in international law. Compliance with this obligation is essential to preserve the integrity of maritime search-and-rescue services."[57] For example, this obligation is reflected in the SOLAS, UNCLOS and Salvage Conventions. The obligation also extends to requirements on States to facilitate and require such action by the Master of a ship in their laws.

43. SOLAS was first developed in 1914 following the sinking of the Titanic and has since been updated and amended to continue to help promote the safety of life at sea.[58] It contains minimum standards for the construction, equipment and operation of certain types of cargo and passenger ships, for which flag States are responsible. It contains an obligation on the master of a ship to assist other ships or survival craft in distress at sea.[59]

55 See paragraphs 51–55.

56 UNHCR, Italy failed to rescue more than 200 migrants, UN Committee finds, accessed 17 November 2021

57 International Maritime Organisation, Unsafe mixed migration by sea, accessed 18 November 2021

58 The current version is SOLAS 1974, as amended

59 See for example, regulation 10 (Distress messages - obligations and procedures) of Chapter V (Safety of navigation) of SOLAS 1974: "The master of a ship at sea, on receiving [a signal/information] from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress." Or Reg 33: "The master of a ship at sea which is in a position to be able to provide assistance on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly"

A similar obligation of assistance can be found in Article 10 (duty to render assistance) of the Salvage Convention 1989, which additionally requires States to adopt measures necessary to enforce such duties of assistance.[60]

44. Moreover, UNCLOS also provides at Article 98(1):

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

45. The UK currently reflects the international law 'duty to rescue' through the Merchant Shipping (Safety of Navigation) Regulations 2020, which require compliance with Chapter V of SOLAS, including the obligation to provide assistance to those in distress.[61] Failing to comply with this obligation is a criminal offence.[62]

46. **Not only are the Masters of all ships bound to assist those whose lives are at risk at sea, but the UK is also bound to adopt measures to ensure that this is done, both under its general human rights obligations to take positive actions to respect the right to life, as well as under specific duties under maritime law, including SOLAS and UNCLOS.**

Safety of Life at Sea: SOLAS, SAR and UNCLOS

47. SOLAS also places an obligation on coastal States to watch the coast and to rescue people in distress at sea around its coasts,[63] and SAR places obligations on States to ensure that arrangements are made for the provision of adequate search and rescue services in their coastal waters. SAR requires Parties to establish basic elements of a search and rescue service, including, the legal framework, the assignment of a responsible authority and the organisation of available resources. Parties are also encouraged to enter into SAR agreements with neighbouring States. In particular SAR requires States to "ensure that assistance [is] provided to any person in distress at sea … regardless of the nationality or status of such a person or the circumstances in which that person is found" and to "provide for their initial medical or other needs, and deliver them to a place of safety".[64]

60 Article 10 (duty to render assistance) of the 1989 International Salvage Convention provides: " 1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea. 2. The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1."

61 Regulation 5(2)(n)

62 Regulation 9(2)(d)

63 See, for example, Regulation 15 (Search and Rescue) of Chapter V (Safety of navigation) of SOLAS 1974: "a) Each Contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts. These arrangements should include the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, afford adequate means of locating and rescuing such persons. (b) Each Contracting Government undertakes to make available information concerning its existing rescue facilities and the plans for changes therein, if any"

64 Chapter 2.1.10 and Chapter 1.3.2, respectively, of the Annex to SAR

48. Moreover the 1982 UN Convention on the Law of the Seas (UNCLOS) also provides at Article 98(2):

> Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

49. Notwithstanding the possibility (in line with Article 25 UNCLOS) for coastal states to take measures to prevent non-innocent passage, coastal states are still obliged to establish laws and operational practices to rescue people in distress at sea, to organise search and rescue, to take all reasonable actions to protect and save lives at sea, and to legally require the masters of ships to save lives at sea.

50. **The UK is bound, both under its general obligations to take positive actions to respect the right to life, as well as under specific duties under maritime law, including SOLAS, SAR and UNCLOS, to organise and deliver an effective search and rescue service to protect and save lives at sea.**

Compatibility of a pushback policy with the right to life and international maritime law

51. As the Joint Council for the Welfare of Immigrants noted in their evidence, pushbacks have been known to endanger lives.[65] Moreover, a policy of pushbacks would likely be incompatible with the UK's obligations under international human rights law and maritime law:

> Proposals that the UK Border Force will undertake "pushback" operations in British waters to effectuate the mass expulsion of asylum seekers pose a very serious risk to life and are like to be incompatible with obligations under international human rights and maritime law… The Channel is the busiest shipping route in the world and the migrants seeking to make irregular crossings of it are invariably forced to do so on small crafts which place them automatically at severe risk and in need of assistance. There are no international waters in the Channel, so migrants being returned under the powers being proposed in this Bill would be "pushed back" directly into French territorial waters.[66]

65 Joint Council for the Welfare of Immigrants (NBB0053): "The risk to life under circumstances where a migrant vessel is left adrift while state actors refuse to provide the assistance required in enormous… There have been thousands of … deaths associated with "pushback" operations in the context of other European countries… An investigation carried out by the Guardian found that in just the last two years, European countries were responsible for "pushing backing" up to 40,000 migrants from their territorial waters, linked to the deaths of 2,000 people. In the circumstances, the policy would risk implicating border officials in civil liability under the right to life, Article 2 of the European Convention on Human Rights". Moreover, as Freedom from Torture (NBB0041) told us: "Over the last 20 years, 300 people including children have lost their lives whilst trying to cross the Channel in small boats. The recent death of an Eritrean refugee in the Channel in August 2021 highlights the continued risk to life that small boat crossings pose. In the absence of widely accessible safe and legal routes to protection, and in the context of an evolving humanitarian crisis in Afghanistan it is not unreasonable to predict that maritime arrivals will continue to be one of the only ways for refugees to enter the UK for years to come."

66 Joint Council for the Welfare of Immigrants (NBB0053)

52. Médecins Sans Frontieres (MSF) said they were "alarmed by the proposed new powers for the UK Border Force to direct vessels out of UK territorial waters. Pursuing a policy of forced returns and engaging in pushback tactics is dangerous, inhumane and is in breach of international law. It puts lives at risk at sea."[67]

53. **The right to life is inherently engaged when people cross the Channel—a busy shipping lane, often with rough waters—in small unseaworthy vessels. This engages the responsibility of the State from which such boats embark to have taken reasonable measures to prevent people coming to harm at sea, for example by establishing a legal and operational framework to safeguard lives at sea, including by ensuring the seaworthiness of vessels, and by establishing systems to rescue anyone in distress within their search and rescue areas. Part of this includes taking reasonable measures to prevent people placing themselves (and others) in life-endangering situations, as well as to take enforcement action against those involved in human trafficking or slavery. It also engages the responsibility of any other States within whose territorial waters or search and rescue areas such boats pass to take reasonable action to save lives.**

54. **Under international maritime law, both UK and French authorities should cooperate to safeguard lives within the Channel and within their respective search and rescue zones. Moreover, where such boats cross into UK territorial waters and the UK search and rescue zone, it then becomes the responsibility of the UK authorities to take all reasonable actions to protect the right to life of those on board.**

55. **Pushbacks are known to endanger lives at sea. This is even more so when dealing with people on small, unseaworthy vessels, in a busy shipping lane, often with rough waters, without appropriate life-saving equipment, as is the case for migrants in small boats in the Channel. The obligations on the UK in such circumstances are to take all reasonable actions to save lives at sea—by establishing a legal and operational framework to ensure that those at risk at sea are rescued; by ensuring that masters of ships take action to save those in distress at sea; and by ensuring that its state agents take all reasonable steps to rescue those at risk at sea. A policy of pushbacks fails to comply with the obligations to save those in distress, contrary to the right to life and international maritime law. Moreover, pushbacks would do the opposite of what is required to save lives. Pushbacks would create a situation where state actors were actively placing individuals in situations that would increase the risk to life. Under the current conditions, we cannot see how a policy of pushbacks can be implemented without risking lives, contrary to the UK's obligations under the right to life and international maritime law.**

Protection of victims of human trafficking or slavery (Article 4 ECHR, Article 8 ICCPR, ECAT and the UN Palermo Protocol)

56. There are a number of instruments placing obligations on states to protect victims of slavery or trafficking and to investigate and prosecute those responsible for human trafficking or slavery. These protections are principally contained in Article 4 ECHR (the prohibition on slavery), Article 8 ICCPR, ECAT, and the UN Palermo Protocol.

57. These obligations on States include a positive obligation to put in place an appropriate legislative and administrative framework to combat slavery and human trafficking; a

67 Sophie McCann (Advocacy Officer at MSF UK) (NBB0061)

positive obligation to take operational measures to protect victims of slavery or human trafficking; and a procedural obligation to investigate and prosecute perpetrators of slavery or human trafficking.

58. These obligations will apply in respect of victims of slavery or human trafficking within the UK's jurisdiction. This means that if there are victims or potential victims of slavery or human trafficking in UK territorial waters, or in boats that UK agents are exercising authority over, the UK authorities have duties to take steps to protect those victims (or potential victims), to ensure they are not placed in a situation where they will fall again into the hands of traffickers, and to investigate and take action against potential perpetrators.

59. **We are concerned that pushbacks under the proposed maritime enforcement powers could lead to situations where victims of slavery or human trafficking are not protected and where action is not taken to adequately investigate and prosecute perpetrators of slavery or human trafficking. We therefore do not see how a pushback policy under the proposed new maritime enforcement powers can be operated in compliance with the UK's obligations to combat slavery and human trafficking, under Article 4 ECHR, Article 8 ICCPR, ECAT and the UN Palermo Protocol.**

Litigation on pushbacks – *Hirsi Jamaa v Italy*[68]

> The case of Hirsi Jamaa v Italy concerned Somalian and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities within the Maltese SAR zone and sent back to Libya. The ECtHR found that the applicants had fallen within the jurisdiction of Italy for the purposes of Article 1 (obligation respect human rights) of the ECHR. The applicants had been under the continuous and exclusive de jure and de facto control of the Italian authorities between the period when the Italian authorities boarded the ships and when the applicants were handed over to the Libyan authorities.
>
> Italy was found to have violated the prohibition on torture and inhuman and degrading treatment (contrary to Article 3 ECHR) as the applicants were exposed to the risk of being subjected to ill-treatment in Libya, as well as a risk of repatriation to face ill-treatment in Eritrea and Somalia.
>
> The ECtHR also found a violation of the prohibition on collective expulsion (A4P4 ECHR), finding that the ECHR applied to a removal to a third State carried out outside national territory as Italy had, exceptionally, exercised its jurisdiction outside its national territory in the form of collective expulsion. The transfer of the applicants to Libya had been carried out without any examination of their individual situations, in breach of A4P4 ECHR. The case also found a violation of Art 13 ECHR because the applicants had been unable to lodge their complaints and to obtain a thorough and rigorous assessment of their requests before removal.

68 *Hirsi Jamaa and others v Italy* (Application no. 27765/09)

Non-refoulement: Refugee Convention, the prohibition on torture or degrading or inhuman treatment or punishment (Article 3 ECHR & Article 7 ICCPR), the right to life (Article 2 ECHR & Article 6 ICCPR) and the prohibition of slavery

60. A number of different provisions of international human rights law prevent a State from taking action that would return a person to a country where their life or freedom would be at risk. These provisions would apply to prevent maritime enforcement actions in the Channel against refugees.[69]

61. Article 33 of the Refugee Convention provides that a State "shall not expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened …". Therefore, were a refugee intercepted and returned to a country where either (i) his life or freedom would be threatened in that country; or (ii) that country would return him to another country where his life of freedom would be threatened, then this would breach the non-refoulement obligation in Article 33 of the Refugee Convention.

62. Article 3 ECHR prohibits the extradition or deportation of an individual to another State where he or she would face a real risk of being subject to torture or degrading or inhuman treatment or punishment.[70] As has been found in the case of Hirsi Jamaa v Italy, a State can violate Article 3 ECHR through pushbacks at sea.[71] Therefore, were the UK to return (or pushback) migrants to a country where they would either face mistreatment contrary to Article 3 ECHR, or where they would be further refouled to face mistreatment contrary to Article 3 ECHR, then any return or pushback action would itself be a breach of Article 3 ECHR. Article 2 ECHR (the right to life) also prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there.[72] This prohibition could be applicable to the use of pushbacks if there was a real risk of refoulement (or more likely onward refoulement) to face the death penalty. Similarly, the prohibition on slavery (Article 4 ECHR) prohibits the return of an individual to a place where they would face a real risk of being placed into slavery or trafficked.

63. It should be acknowledged that whilst UK territorial waters border with the High Seas in some places, the issue giving rise to the changes in the Bill relates to small boats crossing the Channel between France and England where the distance is so short there are no High Seas. Although we should not rule out the possibility of, for example, Belgian territorial waters being involved, we are not, at present, focussing on the territorial waters of any States other than the UK and France. In this context, it is only appropriate to acknowledge

69 See, for example, Justice Studio (NBB0034), at paragraph 3.3 "By returning vessels, potential asylum seekers not only risk being denied the right to make and process their claim, but may also face human rights abuses, including torture and slavery, upon their return to other third countries, which could, if not managed correctly, also lead to repatriation to their country of origin. The UK must therefore consider the role that they would play when returning vessels… as they run the risk of becoming complicit in the human rights abuses that may take place in these safe countries."

70 Article 7 ICCPR contains a similar prohibition, as does the UN Convention Against Torture (UNCAT)

71 In *Hirsi Jamaa and others v Italy* (Application no. 27765/09), the ECtHR found that Italy had violated Article 3 ECHR by pushing the applicants back to Libya, as they were exposed to the risk of being subjected to ill-treatment in Libya, as well as a risk of ill-treatment in countries to which they would be refouled (Eritrea and Somalia).

72 See, for example, *Al Nashiri v. Poland* (Application No. 28761/11); and *F.G. v. Sweden* (Application No. 43611/11). Article 6 ICCPR also contains similar provision

that, at least at present, France is not known to breach routinely or systematically Articles 2, 3 or 4 ECHR, and does not routinely return people to countries where they would face persecution. Therefore, absent a slip in standards in France, the situation of any people returned there is not, currently, akin to those being returned to Libya in Hirsi Jamaa. However, the MSF evidence suggests some conditions in France that raise concerns about human rights standards for refugees, noting for example:

> … our teams witnessed a violent evacuation of an informal settlement in Saint-Denis city, north of Paris. Three thousand refugees, asylum seekers and migrants were taken to temporary emergency shelters while around one thousand others, mainly Afghan asylum seekers, were left on the streets with nowhere to stay.[73]

64. **Pushbacks to France on the information currently available, would not necessarily breach the non-refoulement obligations under the Refugee Convention or the provisions of the ECHR prohibiting return on the grounds of Articles 2, 3 or 4 ECHR. However, that may not always be the case as it will depend both on conditions in France, and on whether the French asylum system continues to be adequate to ensure against refoulement contrary to the Refugee Convention and Articles 2, 3 or 4 of the ECHR. Moreover, the need for an individual assessment still applies.**

65. As has been noted above, the crucial concern with pushbacks is that they would endanger lives at sea and therefore breach the UK's substantive obligations to protect the right to life. As the Refugee Council point out in their evidence, the concern with pushbacks is their inherent risk to life:

> Whilst directing vessels in the Channel back towards France may not risk breaking international law in this respect [non-refoulement], the fact that many of the vessels are not designed for the dangerous waters in which they are travelling means that rescue must prevail over any plans to avoid allowing refugees and others to disembark on UK territory, particularly when the journey away from the UK coast increases the risks to life.[74]

73 Sophie McCann (Advocacy Officer at MSF UK) (NBB0061)
74 Refugee Council (NBB0021)

Litigation on pushbacks – Sharifi and Others v Italy and Greece[75]

The case of Sharifi and Others v Italy and Greece concerned 32 Afghan nationals, two Sudanese nationals and one Eritrean national, who alleged that they had entered Italy illegally from Greece and been returned to that country immediately, with the fear of subsequent deportation to their respective countries of origin, where they faced the risk of death, torture or inhuman or degrading treatment.

The ECtHR held that there had been a violation by Italy of A4P4 ECHR (prohibition on collective expulsion) for some of the applicants, as the measures in the Italian port had amounted to collective and indiscriminate expulsions. It also held that there had been a violation by Italy of Article 13 (right to an effective remedy) combined with Article 3 (prohibition of inhuman or degrading treatment) of the Convention and A4P4 on account of the lack of access to the asylum procedure or to any other remedy in the port of Ancona.

The ECtHR further held that there had been a violation by Greece of Article 13 combined with Article 3 on account of the lack of access to the asylum procedure there and the risk of deportation to Afghanistan, where they were likely to be subjected to ill-treatment, and a violation by Italy of Article 3, as the Italian authorities, by returning these applicants to Greece, had exposed them to the risks arising from the shortcomings of Greece's asylum procedure.

In addition, the Court reiterated that the "Dublin" system, an EU measure which determines which EU Member State is responsible for examining an asylum application lodged in one of the EU Member States by a third-country national, (or indeed any other system system) would not justify collective and indiscriminate returns, as it is for the State carrying out the return to ensure that the destination country offers sufficient guarantees in the application of its asylum policy to prevent the person concerned being removed to his country of origin without an assessment of the risks faced.

Prohibition on collective expulsions and the need for an individualised assessment

66. A4P4 ECHR provides: "Collective expulsion of aliens is prohibited". In the context of pushbacks at sea, the ECtHR found a violation of the prohibition on collective expulsion in A4P4 in the case of Hirsi Jamaa v Italy.

67. The UK signed Protocol 4 ECHR in 1963 but has not yet ratified the Protocol. However, as the Home Office accepts, the UK is nonetheless bound by the object and purpose of this Protocol.[76] The UK is moreover also bound by other international rules under the Refugee Convention and international human rights law that mean that an individualised assessment is required to ensure that a refugee is not returned to face persecution or human rights abuses, as confirmed in Sharifi v Italy and Greece. A person is a refugee under the Refugee Convention as a matter of fact rather than as a result of

75 *Sharifi and Others v Italy and Greece* (Application No. 16643/09)

76 Article 18 of the Vienna Convention on the Law of Treaties 1969 provides: "[A] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when…it has signed the treaty". See also the Home Office reply to queries from JCHR officials NBB0073 in which it states: "The Home Office accepts that as a result of the Vienna Convention on the Law of Treaties ("VCLT"), Article 18 and the UK's signature of Protocol 4 in 1963, the UK is obliged to refrain from acts which would defeat the object and purpose of Article 4 of Protocol 4. The Home Office observes that the Bill sets out proposed powers. The Home Office intends to use these powers in a way that is compatible with all of the UK's international obligations, and consideration will be given whether, consistent with operational sensitivities, a policy can be published in due course."

being found to be one by any immigration process. As Justice Studio said in their evidence, "the immediate push-back of vessels prohibits those on board from seeking asylum in the UK, and risks violating the 1951 Convention and the 1948 UNDHR".[77] While agreements between nations as to who should process asylum claims may be lawful, a failure to conduct an individual assessment of whether a State that is generally safe is in fact safe for an individual risks returning them in breach of the Convention's requirements or in breach of their human rights. As Rossella Pagliuchi-Lor UK Representative at United Nations High Commissioner for Refugees told us:

> In international law there would be a requirement to have at least an assessment, even a light assessment, to establish whether the person in question can return to any country, such as France or any other, and have access to procedures and standards of treatment, so on and so forth. There would have to be at least a light assessment to ensure not only that asylum is generally available but that it would be available to that person in particular. This is done also because there is a risk when you have this unregulated mechanism of informal pushbacks that these people end up falling between two chairs, not being admitted to the procedure in one country because they have been sent back from the other, and not being admitted to the procedure of this country because they came from the other. There is a real risk of that.

68. ***The Government should respect its obligations under refugee law and human rights law to undertake individual assessments of asylum seekers, as well as its obligations not to frustrate the object and purpose of Protocol 4 relating to collective expulsions. It is now 58 years since the UK signed Protocol 4 to the ECHR; the Government should act promptly to ratify it.***

The rights of the child

69. It is well known that the State has a specific duty under Article 3 of the UN Convention on the Rights of the Child to ensure that "in all actions concerning children… the best interests of the child shall be a primary consideration". The MSF evidence notes the difficult conditions facing children in France:

> The unaccompanied children who arrive in France have undergone long, arduous, often traumatising journeys, during which violence is routine… Once in France they are left to fend for themselves in unfamiliar territory and with no money. They are forced to live in makeshift shelters, in camps that are regularly evicted by the police, or on the streets. These children have extremely limited access to healthcare and other support. If they don't want to sleep rough, they must quickly get to grips with the complexities of France's administrative procedures to be able to negotiate their way through a system that is wholly inadequate for the task.[78]

70. **It is difficult to see how it would ever be in the best interests of the child to be subject to pushback techniques at sea.** ***The Government should explain what action***

77 Justice Studio (NBB0034). The 1948 UNDHR is the Universal Declaration of Human Rights

78 Sophie McCann (Advocacy Officer at MSF UK) (NBB0061)

it would take in respect of children on a small boat crossing the Channel—and in particular how it would ensure that such actions respected the rights of the child as well as the human rights of all people in board.

The right to an effective remedy (Article 13 ECHR)

71. The notion of an effective remedy under Article 13 of the ECHR requires the remedy to be capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. The ECtHR has consistently found a breach of Article 13 in circumstances where individuals have been pushed back/returned at a border without consideration of their individual cases in circumstances where this has also violated other articles of the ECHR such as Article 2 (the right to life) and Article 3 (freedom from torture and inhuman or degrading treatment or punishment), as well as Article 4 of Protocol 4 ECHR (prohibition on collective expulsion).

72. The Court has found violations of Article 13, taken in conjunction with Article 4 of Protocol 4, in cases where the applicants, who had at least an arguable complaint under Article 2 or 3 ECHR in respect of risks they faced upon their removal, had been effectively prevented from applying for asylum and had not had access to a remedy with automatic suspensive effect.[79] In other cases (i.e. where it is not alleged that there is a real risk of a violation of Articles 2 or 3 ECHR), the ECHR does not impose an absolute obligation on a State to guarantee an automatically suspensive remedy, but requires that the person concerned should have an effective possibility of challenging the expulsion decision by having a sufficiently thorough examination of his or her complaints carried out by an independent and impartial domestic forum.[80]

73. **In order to comply with the right to an effective remedy in Article 13 ECHR in respect of an asylum seeker, the UK would need to have processes in place to undertake an examination of an individual's personal circumstances, to take an individual decision in respect of that person, to enable that person to be able to challenge that decision, and to have a remedy with suspensive effect for potential violations of Articles 2 and 3 ECHR. The absence of those processes in the case of proposed pushbacks in the Channel is likely to risk violating Article 13 ECHR, in conjunction with other rights engaged.**

Jurisdiction

74. Article 1 ECHR provides that "the High Contracting Parties shall secure to everyone within their jurisdiction" the rights and freedoms set out in the ECHR.

75. A person is within UK jurisdiction when they are within UK territory (including UK territorial waters). Moreover, a person is within UK jurisdiction when that person is within the effective control of a State actor, such as a State vessel exercising authority over a vessel/individuals at sea.

79 See for example, *M.K. and Others v Poland* (Application Nos 40503/17, 42902/17 and 43643/17); *Sharifi and Others v Italy and Greece* (Application No. 16643/09); *Hirsi Jamaa and others v Italy* (Application no. 27765/09). Although note the differing view in *NS and NT v Spain* (Application Nos 8675/15 and 8697/15) that the applicants did not benefit from the protections in Article 13 and Article 4 of Protocol 4, given that they had placed themselves in an unlawful situation by using force to cross into Melilla as part of a large group.

80 See for example, *Moustahi v France* (Application No. 9347/14)

76. For example, in Medvedyev v. France, the ECtHR affirmed that the applicants (members of the crew on board a Cambodian-flagged ship on the high seas, intercepted by the French navy) fell under French jurisdiction having regard to the full and exclusive nature of the control exercised by France over that vessel on the high seas and over its crew. The Court examined the nature and scope of the actions carried out by the French officials in order to ascertain whether there was at least de facto continued and uninterrupted control exercised by France over that vessel and its crew.[81]

77. Similarly, in Hirsi Jamaa v Italy, the individuals were within the effective control of the Italian authorities, even when the vessel was on the High Seas and within Libyan territorial waters because the Italian authorities were exercising effective control over those individuals. The ECtHR made clear in that case that a State "cannot circumvent its "jurisdiction" under the Convention by describing the events in issue as rescue operations on the high seas".[82]

78. Therefore, the ECHR and other international human rights protections would apply to individuals within UK jurisdiction, including in UK territorial waters. Moreover, were UK vessels to exercise effective control over boats in the Channel (even outside of UK territorial waters) then the ECHR would apply.

81 *Medvedyev and Others v. France* (Application No. 3394/03). The applicants, crew members of a cargo ship registered in Cambodia and intercepted off the Cape Verde islands by the French navy under suspicion of transporting large quantities of drugs, were confined to their quarters under military guard until the ship's arrival in Brest. The Court found that as France had exercised full and exclusive control over the ship and its crew, at least de facto, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants had been effectively within France's jurisdiction for the purposes of Article 1 of the Convention.

82 *Hirsi Jamaa and others v Italy* (Application no. 27765/09)) See in particular, paragraph 79. The applicants, a group of Somali and Eritrean nationals, who had been attempting to reach the Italian coast on board three vessels, were intercepted at sea by Italian Revenue Police and Coastguard ships, transferred on to Italian military ships and taken back to Libya. Reiterating the principle of international law stating that a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying, the Court rejected the designation "rescue on the high seas" used by the Government to describe the events, and attached no importance to the allegedly low level of control exercised over the applicants by the agents of the Italian State. Indeed, the whole series of events had occurred on board Italian military ships, with crews made up exclusively of national servicemen. From the time of their arrival on board those ships until their handover to the Libyan authorities the applicants had been under the continuous and exclusive de jure and de facto control of the Italian authorities.

4 Maritime enforcement powers in the Nationality and Borders Bill

The current law

79. Under the Immigration Act 1971, an immigration officer, a police officer, or an enforcement officer can exercise certain powers over ships within UK territorial waters, in relation to UK-flagged ships, ships without nationality, foreign ships or ships registered under the law of a British Crown dependency or overseas territory.[83] However, authorisation from the Secretary of State is required before an immigration officer, a policeman, or an enforcement officer exercises those powers in relation to a foreign ship, or a ship registered under the law of a British Crown dependency or overseas territory.[84] Such authority may only be given in relation to a foreign ship if UNCLOS permits the exercise of those powers in relation to that ship.[85]

80. Where an officer has reasonable grounds to suspect that a specified immigration-related criminal offence is being, or has been, committed or the ship is otherwise being used in connection with the commission of an offence, they may: stop the ship; board the ship, and/or require the ship to be taken to a UK port and detained there.[86]

81. There are also related powers to search and obtain information; powers of arrest and seizure; powers to conduct protective searches of persons; and powers to search for nationality documents.[87]

Powers in the Nationality and Borders Bill

Clause 44 and Schedule 6: Enforcement powers in relation to ships

82. Clause 44 (maritime enforcement) introduces Schedule 6 to the NBB which amends Part 3A of the Immigration Act 1971 (maritime enforcement). It includes a new section 28LA (enforcement powers in relation to ships: United Kingdom), which entitles an immigration officer or enforcement officer to exercise powers in all waters and in respect of all ships.[88] It is questionable whether it would be compatible with international law for some of those powers to be exercised, for example, in relation to a foreign ship, or in foreign waters, at least without arrangements being in place with the relevant State. We note that the authority of the Secretary of State is required before such powers can be exercised in relation to ships other than UK-flagged ships, and in relation to any ship in foreign waters.

83 These powers are set out in Parts 1 (in respect of England and Wales), 2 (in respect of Scotland) and 3 (in respect of Northern Ireland) of Schedule 4A to the Immigration Act 1971

84 Sections 28M(3), 28N(3) and 29O (3) Immigration Act 1971

85 Sections 28M(4), 28N(4) and 28O(4) Immigration Act 1971. See also Adrian Berry, In the Footsteps of Sir Francis Drake: Home Office Plans for the Seas in the Nationality and Borders Bill, 15 September 2021

86 Paragraphs 2, 13 and 24 of Schedule 4A to the Immigration Act 1971

87 Paragraphs 3–6, 14–17 and 25–28 the Schedule 4A to the Immigration Act 1971

88 It purports to empower an officer to exercise powers in UK territorial waters (UK waters), on the high seas (international waters), and also in the territorial waters of another State (foreign waters). It also purports to empower an officer to exercise such powers in relation to UK flagged ships, foreign ships, ships without nationality and ships registered under the law of a UK Crown dependency or overseas territory.

83. The powers an immigration officer or enforcement officer is entitled to exercise in respect of those ships are set out in a new Part A1 of Schedule 4A to the Immigration Act 1971 (introduced by paragraph 10 of Schedule 6 to the NBB). It includes a power to stop, board, divert and detain a ship that is being (or has been) used in connection with a relevant offence, including requiring the ship to be taken to any place (within the UK or elsewhere) and detained there, and requiring the ship to leave UK waters.[89]

84. New Schedule A1 includes related powers to search and obtain information; powers of arrest and seizure; powers to conduct protective searches of persons; and powers to search for nationality documents. It empowers an immigration officer or enforcement officer to use reasonable force in carrying out these functions. Further, the Schedule provides that it is an arrestable offence to obstruct or to fail to comply with a requirement made by an officer.

85. **The maritime enforcement powers introduced by clause 44 and Schedule 6 to the Bill may be capable of being exercised compatibly with human rights. However, there are also significant risks that such powers can be exercised in a way that is not compatible with human rights. It would seem appropriate for the Home Secretary to specify more clearly how such powers will be exercised and how she will ensure that they are not exercised in a way that would violate human rights, for example the right to life.**

86. ***The Home Secretary should provide a detailed memorandum setting out clearly how maritime enforcement powers under amended Schedule 4A to the Immigration Act 1971 will be exercised, how human rights would be engaged by such maritime enforcement activity, and in particular how she will ensure that such powers are not exercised in a way that would violate human rights. She should also reflect on whether all these powers are needed or whether they can be subject to conditions to ensure that they are only used in a way that respects human rights, and in particular the right to life.***

87. ***Given the particular risks to life posed by using force at sea, we recommend that Schedule 4A to the Immigration Act 1971 be amended to specify that force must not be used if it would endanger life at sea. Additionally, we would suggest an amendment, ideally to all parts of Schedule 4A to the Immigration Act 1971, to read "The powers set out in this Part of the Schedule must not include any activity that could endanger life at sea."***

Compliance with international law when undertaking maritime enforcement

88. The Bill, as introduced, provided that the Secretary of State could only authorise action in respect of certain vessels if UNCLOS permitted the exercise of such powers in respect of that ship.[90] This is the same language as for the equivalent existing requirements in sections 28M, 28N and 28O of the Immigration Act 1971 (which introduce Parts 1–3 of Schedule 4A to that Act). The Explanatory Notes to the Bill as introduced consequently stated that: "Authority for the purposes of subsection 3 may be given only if the Secretary

89 The authority of the Secretary of State is required before any power can be used to require a ship to be taken to any place outside of the UK and detained there.

90 Schedule 5, paragraph 2, new section 28LA(4) of the Bill as introduced

of State considers the United Nations Convention on the Law of the Sea 1982 permits the exercise of Part A1 powers in relation to the ship and that action will be taken in line with International law".[91]

89. However, the Government introduced an amendment in Committee to delete this requirement. Therefore, as the Bill left Committee, the language of new section 28LA of the Immigration Act 1971 (which introduces new Part A1 of Schedule 4A to that Act), in Schedule 6 to the Bill, contrasts with the equivalent existing requirements in sections 28M, 28N and 28O of the Immigration Act 1971 (which introduce Parts 1–3 of Schedule 4A to that Act). Specifically, there is no longer any requirement in new section 28LA that the authority from the Home Secretary may only be given in relation to a foreign ship if UNCLOS permits the exercise of those powers in relation to that ship.

90. ***The Government should clarify why it felt it necessary to introduce this amendment to new section 28LA to remove the requirement in existing law for the Home Secretary to grant authorisations for maritime enforcement only where to do so would be compatible with international law, under UNCLOS. Alternatively, similar drafting to that which appears in section 28M(4), 28N(4) and 29O(4) of the Immigration Act 1971 should be added to new section 28LA in Schedule 6.***

91. Public authorities are bound by section 6 of the Human Rights Act to act compatibly with the UK's ECHR obligations, and this would apply equally to actions of immigration officers and enforcement officers in undertaking maritime enforcement activity, as well as to the decisions taken by the Home Secretary in authorising any such activity. Moreover, the Ministerial code requires Ministers to comply with the law, which includes international legal obligations binding on the UK.[92]

92. We further note in this regard that the Explanatory Notes to the Bill as introduced state "Any tactics employed to divert a ship will only be used where it was safe to do so, in line with international law, including UNCLOS, and a vessel would only be required to leave UK waters if there were no concerns about the vessel's ability to reach land or the welfare of those on board."[93]

93. **In any actions authorising or carrying out maritime enforcement, we expect Ministers and officials to comply with the law, including the UK's international legal obligations, such as its human rights obligations and obligations under international maritime law. We expect Parliament to be informed if there is any intentional or accidental deviation from compliance with international law, including international human rights law.**

Criminal and civil responsibility for maritime enforcement actions

94. Paragraph J1 of Part A1 of Schedule 4A to the Immigration Act 1971, introduced by paragraph 10 of Schedule 6 to the NBB, provides that an immigration officer or an enforcement officer is "not liable in any criminal or civil proceedings for anything done in the purported performance of functions under this Part if the court is satisfied that the act was done in good faith and there were reasonable grounds for doing it". This mirrors

91 Explanatory Notes to the Nationality and Borders Bill [Bill 141 (2021–22)-EN] para 458

92 Paragraph 1.3 of the Ministerial Code states: "The Ministerial Code should be read against the background of the overarching duty on Ministers to comply with the law and to protect the integrity of public life."

93 Explanatory Notes to the Nationality and Borders Bill [Bill 141 (2021–22)-EN] para 471

the provision in paragraphs 10, 21 and 32 of Part 1 of Schedule 4A to the Immigration Act 1971 (inserted by the Immigration Act 2016) in relation to existing maritime enforcement powers.

95. It is unclear why Government policy is that those who suffer harm as a result of immigration enforcement action at sea should not have recourse to an effective remedy. Such action could, for example, negligently cause a person's death or serious injury, even if such action was done in good faith and for ostensibly reasonable immigration enforcement grounds. However, this clause could mean that, for those cases caught by this provision, there is no way of holding Government (or their agents) to account for killing or injuring a person through negligence, including gross negligence—either in criminal or civil law. It is difficult to understand why there should be impunity in such circumstances, or how it would be compatible with the procedural obligations in Articles 2 and 3 ECHR and the right to an effective remedy in Article 13 ECHR. As Sonali Naik QC said in evidence to the Committee:

> In the civil context, there is a question as to whether individual officers could be sued under the common law for false imprisonment or negligence, but there is no immunity from suit in respect of liability for Human Rights Act damages. There would have to be a specific derogation for that. An ordinary reading of the Bill as it is proposed would be incompatible with the Human Rights Act because in those circumstances as described an act may violate an ECHR article and give rise to a claim for damages for just satisfaction, even if the officer was acting reasonably and in good faith. Again, it is incompatible with the ordinary provisions of our obligations under the HRA.[94]

96. **It is understandable that it should principally be the Government that is responsible, in a civil claim, for the actions of its officers, rather than the officers being personally liable. This is borne out through the usual operation of vicarious liability. Similarly, it would be the Government that would be responsible in any human rights claim for a breach of human rights caused by the actions of its officers. However, this clause could risk neither being liable for harm caused, even killing a person (where that was done as a consequence of immigration enforcement action). It would be better if this clause made it clear that this wasn't an attempt by the Home Office to absolve itself of civil liability, but rather specifically for the officers not to be liable personally.** ***We therefore recommend amending that paragraph to read "The Home Office, rather than an individual officer, is liable in civil proceedings for anything done in the purported performance of functions under this Part of this Schedule."***

97. Investigations, including criminal investigations, are part of the way in which the UK complies with its procedural Article 2 ECHR obligations to investigate deaths where there is the involvement of State agents (or indeed Article 3 ECHR obligations if the issue is, for example, mistreatment). It is therefore important that any changes to criminal legal liability do not impede the ability of the UK to comply with its procedural investigative obligations under Articles 2 or 3 ECHR.

98. **If a criminal offence has been committed whilst undertaking pushbacks or other maritime enforcement operations, it is difficult to understand why there should be a**

94 Q3

specific defence or immunity from prosecution for immigration officers or enforcement officers. For example, if a child is killed due to the actions of an immigration officer at sea, it is hard to comprehend why that immigration officer should not be subject to the normal thresholds to assess criminal responsibility (for example if there was gross negligence manslaughter or unlawful and dangerous act manslaughter). ***We therefore recommend that an amendment is made to remove any risk of immunity from prosecution for criminal offences committed by immigration officers or enforcement officers whilst undertaking pushbacks or other maritime enforcement operations.***

The appropriateness of applying enforcement powers to dinghies and small vessels.

99. Importantly, the amendments introduced by Schedule 6 to the NBB need to be read in light of the amendment in paragraph 8 of Schedule 6, which amends the definition of "ship" in section 28Q Immigration Act 1971, so as to include any "structure (whether with or without means of propulsion) constructed or used to carry persons, goods, plant or machinery by water". This makes it clear that enforcement action could not only be carried out in respect of seaworthy ships, but also in respect of any small vessel, including rafts and dinghies. As Aurelie Ponthieu, the co-ordinator of the forced migration team for Médecins Sans Frontières, said in her evidence to the Committee:

> I can say that there is no safe way to intercept and to stop any migrant boat at sea. We are talking about unseaworthy vessels. We are talking about people who do not have any navigation skills or materials. They very often do not have life jackets. If they have life jackets, these life jackets do not save their lives. We are talking about boats filled with children, pregnant women and people who are already in danger and in immediate need of rescue.[95]

100. **As previously recognised, the *primary obligation* in respect of those at sea must be safety of life. This is even more so when dealing with people on small, unseaworthy vessels, in a busy shipping lane, often with rough waters, as is the case for migrants in small boats in the Channel. A policy of pushbacks would risk failing to comply with the obligations to save those in distress at sea, and instead would risk a situation where state actors were actively placing individuals in situations that would have an increased risk to life. We cannot see how a policy of pushbacks can be implemented without risking lives, contrary to the UK's obligations under the right to life and international maritime law, especially if applied to fragile unseaworthy vessels.**

101. ***Paragraph 8 of Schedule 6 should be amended so that it reads: ""ship" includes every description of vessel (including a hovercraft) used in navigation, but does not include any vessel that is not seaworthy or where there could otherwise be a risk to the safety of life and well-being of those onboard".***

Power to seize and dispose of property

102. Schedule 6 also introduces a new section 28PA (power to seize and dispose of ships etc.) to the Immigration Act 1971. This provides a power to seize a ship, and any property relating to the operation or use of the ship, where the ship is in the UK (including UK waters) and where the immigration officer has reasonable grounds to suspect that the

95 Q2

ship was used in the commission of a relevant offence.[96] The authority of the Secretary of State is required to seize any property under this section. The Secretary of State may then return the ship (or other property) to its owner, dispose of the ship (or other property), or determine that the ship (or other property) should be retained for use in a function under the Immigration Acts. This power to seize and dispose of property necessarily interferences with Article 1 of Protocol 1 ECHR (the right to peaceful enjoyment of one's possessions), as is recognised in paragraph 62 of the Home Office's ECHR Memorandum. In that Memorandum, the Home Office sets out its efforts to ensure property is returned in a timely fashion to owners and explains that it considers that any interference with property rights is justified and strikes a fair balance between the wider public interest and the interest of a vessel owner.[97]

103. **The power to seize and detain property seems capable of being exercised compatibly with Convention rights, however it is noteworthy that it applies to a significant number of offences, including some where deprivation of property may not be a reasonable or proportionate outcome in an individual case. It will therefore be important that this power is exercised proportionately in practice. We therefore encourage the Home Secretary to issue guidance setting out how she will use this power and how she will ensure that it is only used when it is proportionate to do so.**

Practical implications of push backs

Will it ever be safe to use pushback tactics?

104. Various stakeholders have, as noted above, expressed concerns that pushback tactics could risk endangering the lives of those in small vessels. As Tony Smith CBE, former Director General of Border Force, told the Public Bill Committee, the kind of vessels crossing the Channel are "very vulnerable".[98] Given the vulnerability of vessels and obligations for Border Force to protect the safety of life at sea, some have questioned whether pushback tactics could ever safely be used against small vessels. For example, Lucy Moreton, Professional Officer at the Immigration Services Union, told the Public Bill Committee:

> On the issue of pushbacks, as things stand at the moment, given the instructions that we work under to ensure the safety of life at sea and the legality of it, it seems to us—the trade union, and the members who

96 Relevant offences are set out in an amendment to section 28Q (interpretation) of the Immigration Act 1971 and include: entry in breach of a deportation order (section 24(A1) of the Immigration Act 1971 as amended by this Bill), illegal entry (section 24(B1) of the Immigration Act 1971 as amended by this Bill), arrival without required entry clearance (section 24(C1) of that Act, a new offence created by this Bill); arrival without a valid ETA (section 24(D1) of that Act, a new offence created by this Bill); working illegally (section 24B); facilitation (section 25 of that Act, as amended by this Bill), assisting an asylum seeker to arrive in or enter the UK (section 25A of that Act, as amended by this Bill), facilitation of a breach of a deportation order (section 25B of the 1971 Act to the extent that section continues to apply); employing a person who does not have a right to work in the UK (section 21 Immigration, Asylum and Nationality Act 2006); and attempts to commit any of those offences.

97 As the Home Office's ECHR Memorandum sets out (at paragraph 62): "The Department seeks to ascertain the owners of vessels. Three vessels have been returned since 2018. The safeguards for a vessel owner are as follows. First, the Department may not dispose of the boat until 31 days has elapsed. Secondly, if the boat is flagged, the Department must notify the flag state (this will also assist in seeking to ascertain the owner). Thirdly, the Department will be required to take steps to ascertain the owner and, unless to do so would prejudice criminal investigations or proceedings, to notify the owner."

98 Nationality and Borders Bill Committee, 21 September 2021, col 56

> advise us—extremely unlikely to happen in practice. The restrictions are, quite rightly, very tight. No one wants to see a fatality from what is a very dangerous manoeuvre.[99]

105. There may be circumstances where, however, pushback tactics could be used in a manner that is safe and complies with the UK's human rights obligations. For example, if the vessel subject to the pushback was a large fishing vessel.

Unintended consequences

106. If pushback tactics are adopted there is a risk that those on board small vessels will be hesitant to engage with border officials, even when those officials are trying to bring them to safety. In his evidence to this Committee Daniel Ghezelbash noted examples from Australia and the Mediterranean of intercepted asylum-seekers jumping overboard, which in turn caused ships to capsize. He went on to note that: "There have also been a number of instances that I am aware of in Australia where there has been attempts at self-sabotage of the boats to stop the pushbacks taking place, which have resulted in significant loss of life."[100]

Safety and wellbeing concerns for border officials

107. Adopting pushback tactics may have significant adverse impacts on Border Force officials tasked with carrying them out. In evidence to the Home Affairs Select Committee, Professor Naomi Klein, University of New South Wales, noted that in Australia there had been "concerns on some occasions for the safety and the security of the Australian personnel who were operating at the time."[101] In 2014 several Royal Australian Navy personnel who had assisted in pushback operations noted the significant trauma they had been exposed to with three reporting they had been diagnosed with post-traumatic stress disorder (PTSD) and medically discharged from service.[102]

Will pushback tactics deter Channel crossings?

108. It is difficult to predict whether the adoption of pushback tactics in the Channel will make the route "unviable" and achieve the stated aim of deterring "illegal entry into the United Kingdom, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger."[103] It may be that the Channel route has become more popular as a result of increased deterrents at other available routes. The UNHCR has also suggested that the increase in Channel crossings is a result of the significant reduction in air and freight traffic during the covid-19 pandemic.[104] Stopping people smugglers profiting from "human misery" is, of course, an important and worthy goal, but any measure adopted must achieve this whilst also protecting the rights and humanity of asylum seekers.

99 Nationality and Borders Bill Committee, 21 September 2021, col 30
100 Q2
101 Oral evidence taken before the Home Affairs Select Committee on 11 November 2020, HC 705 (2019–21), Q443 [Professor Natalie Klein]
102 ABC News, Royal Australian Navy personnel open up about trauma of seeing asylum seekers die at sea, 3 December 2014
103 Explanatory Notes to the Nationality and Borders Bill [Bill 141 (2021–22)-EN] paras 1 and 38
104 Oral evidence taken before the Home Affairs Select Committee on 30 September 2020, HC 705 (2019–21), Q230 [Rossella Pagliuchi-Lor].

109. In their written evidence Migration Watch generally supported increased enforcement powers in the Bill, including pushbacks, describing them as "reasonable".[105] On the other hand, in his oral evidence to the Committee Enver Solomon, Chief Executive of the Refugee Council, questioned whether the provisions in the Bill would deter people smugglers. He said:

> The Bill does nothing about the push factors, the reasons why people have to flee persecution and terror to come here. The principle holds that we should do what we have always done, which is give people a fair hearing on UK soil. I am not convinced, in anything I have seen in this Bill, that it will do anything to put people smugglers out of business or to stop people being exploited by people smugglers.[106]

110. The Government's own Equality Impact Assessment (EIA) acknowledges that there is "limited evidence supporting the effectiveness" of the measures in the Bill of deterring asylum seekers from undertaking dangerous journeys facilitated by smugglers. The EIA further states that "increased security and deterrence could encourage [asylum seekers] to attempt riskier means of entering the UK."[107]

111. **We are concerned that even the Government's own Equality Impact Assessment suggests that increased enforcement powers may not deter individuals from crossing the Channel and may even encourage them to take "riskier routes". *The Government should do everything it can to prevent more individuals losing their life while trying to cross the Channel or attempting to enter the UK by other means.***

Potential alternatives to pushbacks

112. Some organisations told us that the only truly effective way to deter illegal entry and break the business model of people smugglers is to create safe and legal routes for asylum seekers. For example, Safe Passage UK said: "If the Government was serious about preventing refugees from having to risk dangerous journeys to reach sanctuary, they would instead open safe routes to the UK for refugees.[108] Other witnesses expressed their view that what is needed are fairer and faster systems for deciding asylum claims.[109] One novel idea was suggested by Donate4refugees in their written evidence; they said that the most effective way to deter Channel crossings would be to:

> Allow people to claim asylum at our frontier controls in France (ref: Treaty of Le Touquet, February 2003). They would claim asylum to UK officials at the border on French soil, complete the first stage of their application and, if their initial application for asylum is accepted by the Home Office in the UK, then the Home Office would transfer them to the UK on regular transport–ferry/Eurostar/Channel Tunnel. They could be given their Asylum Registration Card in France as their permission to travel. Upon safe arrival in the UK they would start the "normal" UK process of dispersal accommodation and asylum support to wait through their asylum decision.

105 Migration Watch UK (NBB0040)
106 Q8
107 Home Office, Nationality and Borders Bill: Equality Impact Assessment, September 2021
108 Safe Passage UK (NBB0065)
109 Q16

> This would severely reduce demand for smugglers and they would leave northern France due to lack of customers. (Supply/Demand)
>
> This would better control our borders as the Home Office would determine who gets to enter so they would be checked on border watch lists etc BEFORE crossing.[110]

113. **Given their positive duties to protect the right to life, the Government should not engage in pushback tactics that would endanger asylum-seekers crossing the Channel or implement policies that would contribute to asylum-seekers taking dangerous routes into the UK.** ***The Government should consider whether the stated aim of deterring people smugglers by making the Channel an "unviable" route while still fulfilling their obligations to protect life could be better served by alternative means. A range of alternative options have been provided in written evidence to this inquiry, such as creating more safe and legal routes for refugees or enabling asylum seekers to obtain visas to come to the UK from France to claim asylum.***

110 Donate4refugees (NBB0069)

5 Criminalisation of asylum seekers and those who help them

Changes to the offence of illegal entry

114. A number of the clauses in the Bill are focused, at least in part, on reducing the level of 'irregular' entry to the UK, including by those seeking asylum. These include clause 11 and clause 15 in Part 2 of the Bill, which are outside the ambit of this report, and clause 39 in Part 3. Clause 39 alters the criminal offences contained in section 24 of the Immigration Act 1971, which concerns "illegal entry and similar offences".

Illegal entry and arrival

115. Under the current law it is a criminal offence to "enter" the UK without leave. Clause 39 would also make it an offence for a person who requires entry clearance to "arrive in" the UK without a valid entry clearance (i.e. a visa). This would be a significant development because "entering" and "arriving" in the UK have different meanings in immigration law. Under section 11(1) of the Immigration Act 1971:

a) A person 'arriving' by ship or aircraft is deemed not to 'enter' the UK until they have disembarked from the ship or aircraft and, if at a port, until they have left the immigration control area;

b) If a person is detained or granted immigration bail, they will still not be considered to have 'entered' the UK even after they have left the immigration control area.

116. This interpretation of 'entering' the UK has significant ramifications for those who come to the UK to seek asylum. A person who claims asylum before they disembark from a ship or aircraft, and a person who arrives at a sea or airport and claims asylum before they have passed through immigration control, will, as a result of section 11(1), have done so before they enter the United Kingdom. In such circumstances, the asylum seeker will usually be granted what used to be known as 'temporary admission' to the UK but what is now formally 'immigration bail'—or alternatively they will be taken into immigration detention. This means that they will never 'enter' the United Kingdom without valid entry clearance and thus will not be committing an offence under section 24.

117. The Bill would change this by making arriving in the UK without entry clearance an offence. The Explanatory Notes state that "[t]his will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don't technically "enter" the UK."[111] The Government's commitment to prosecuting traffickers and people smugglers is understood, and forms part of a commitment to protecting the Article 2 rights of those crossing the Channel to seek refuge. However, the justification for the change to the law is focused on those who are intercepted at sea, not on traffickers and smugglers. Indeed, the change is more likely to affect those being trafficked or smuggled. As the UNHCR have said in their legal observations on the Bill:

111 Explanatory Notes to the Nationality and Borders Bill [Bill 141 (2021–22)-EN] para 388

> […] in spite of the Government's repeated references to deterring dangerous journeys and targeting criminal gangs, few of the Bill's punitive provisions are clearly related to the safety of a refugee's journey or how it was facilitated. Instead, they focus on punishing the asylum-seekers themselves.[112]

118. It is unclear why those who are smuggled should be criminalised and whether potential criminalisation would have any effect on their route into the UK. We received evidence explaining that many asylum seekers are forced to put themselves in the hands of people smugglers and, as a result, have little control over where they are going and how they are getting there. This includes those who cross the Channel. Elkhansaa, from the VOICES network, told us:

> When I came here, I did not have a clue where I was heading to. I just was looking for sanctuary and that agent was being paid. When we had just landed in the UK, he said, "You go and ask for asylum". I did not even know what asylum meant at the time and how things could go on.[113]

119. Furthermore, this change will do more than make it easier to prosecute those intercepted in territorial seas. The effect of clause 37 would be that a person fleeing persecution who arrived in the UK without a visa would commit an offence under section 24, even if they presented themselves immediately to an immigration official and claimed asylum.

120. Crucially, for this purpose and for asylum policy more generally, no visa for the purposes of claiming asylum exists and it is not possible to claim asylum without coming to the UK. UNHCR have commented on the implications of this:

> Given that there is no possibility under UK law of applying for entry clearance in order to claim asylum, no one from a country whose citizens normally need a visa would be able to come to the UK to seek asylum without potentially committing a criminal offence. Ninety percent of those who are granted asylum in the United Kingdom are from countries whose nationals must hold entry clearance (a visa) to enter the UK.[114]

121. Furthermore, it is an offence to obtain or seek leave to enter or remain through deception, so obtaining a visa for other purposes when the intention is to seek asylum is also prohibited. Overall, this means that the changes to immigration offences proposed in clause 39 would leave very little scope for an asylum seeker to arrive in the UK, other than under a resettlement scheme, without committing an offence under section 25. As Sonali Naik QC, immigration barrister at Garden Court Chambers, summed up:

> At present, asylum seekers who enter illegally are liable to prosecution, but asylum seekers who arrive at the port of entry and claim asylum immediately are not. The amendment in Clause [39] of the Bill to the Act removes that distinction. Therefore, it will criminalise genuine asylum seekers, even if they have no other option but to flee […][115]

112 UNHCR, UNHCR Observations on the Nationality and Borders Bill 141, 2021–22, October 2021, para 43
113 Q3
114 UNHCR, UNHCR Observations on the Nationality and Borders Bill 141, 2021–22, October 2021, para 39
115 Q7

122. The one 'legal route' theoretically open to refugees is to come to the UK via a resettlement scheme.[116] Resettlement schemes are an important element of how the UK meets its commitment to provide shelter to those fleeing persecution and human rights abuses. They cover only a limited number of refugees, however, and they do not represent an answer for those in immediate peril. Between the start of 2014 and the end of June 2021, 26,969 people were brought to the UK under a resettlement scheme (less than 4,000 per year), representing approximately one fifth of all the individuals granted asylum over that period.[117] Sonali Naik QC made the limitations of such schemes clear in her evidence to us:

> Take Afghanistan as a current and very acute example. We have many people who are fleeing Afghanistan and if they want to claim asylum in the UK, if they have family members here and so on, there is no mechanism by which that can currently happen. The Secretary of State's long-term commitment to resettle a number of refugees, 20,000 or whatever over however many years, will not deal with the immediate and acute risks of persons who are at risk of serious harm or persecution. There is no way that a resettlement programme can deal with those who are at immediate risk, and there is no legal route.[118]

123. Ultimately, we agree with the conclusion reached by Freedom from Torture in their written submission to us on clause 39 that "the effect of this clause is to criminalise the act of seeking asylum in the UK."[119]

Article 31 of the Refugee Convention

124. Setting up a system whereby refugees are unable to travel to the UK to claim asylum without committing a criminal offence is inconsistent with the overall purpose of the Refugee Convention 1951.[120] More specifically, it is inconsistent with Article 31 of the Refugee Convention.

125. Under Article 31 the UK has committed to "not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

116 A resettlement scheme is a scheme by which the UK, working together with the UNHCR, identifies refugees in refugee camps, informal settlements and host communities outside the UK and brings them to the UK for resettlement. Refugees are then matched to a local authority that can provide suitable accommodation and support. The refugees are given leave to come to the UK and on their arrival they are granted indefinite leave to remain and refugee status. In August 2021 there were three resettlement schemes in operation: The UK Resettlement Scheme (UKRS), Community Sponsorship Scheme, and Mandate Resettlement Scheme (For more detail, see the Home Office's UK Refugee Resettlement: Policy Guidance, August 2021).

117 Asylum Statistics, House of Commons Library Research Briefing, 13 September 2021

118 Q8

119 Freedom from Torture (NBB0041)

120 Which the UK has an obligation to implement in good faith under Article 26 of the Vienna Convention on the Law of Treaties.

126. In evidence to us, Raza Husain QC, barrister at Matrix Chambers, explained that the "non-penalisation of refugees, non-penalisation criminally and administratively of those who arrive irregularly, is at the very core of the Refugee Convention. It is central to its scheme."[121]

127. Article 31 does not prohibit the penalisation of refugees who do not "come directly" from their territory, or those who do not present themselves without delay and show good cause for their illegal entry or presence. Clause 34 in Part 2 of the Bill would introduce a very narrow interpretation of what "coming directly" means, based on what the Government have described as the "long-standing principle that asylum seekers should claim at the earliest opportunity in the first safe country they reach."[122] In oral evidence to us Rossella Pagliuchi-Lor, the UNHCR representative to the UK, stated that "[s]uch a principle does not exist in international law and, indeed, it could not exist in international law because it would undermine the very principle of co-operation on which the system is premised."[123] She explained that under the Refugee Convention "there is no obligation to seek asylum in the first country, but there is also no unfettered right to pick and choose where you want to be."[124] In any event:

a) Given the obligation on the UK to implement the Refugee Convention in good faith, we agree with the UNHCR that "[e]ven where the requirements of Article 31(1) are not met and penalties are in theory permissible, they must be proportionate to the offence and not operate in such a way as to undermine the right to seek asylum;[125] and

b) The proposed offence of arrival in the UK without valid entry clearance does not even seek to distinguish between those who have come directly from the country in which their life or freedom was threatened and those who have not.

128. The UNHCR's concern about the proportionality of any penalties is of particular relevance since clause 39 would not only expand offences of illegal entry, but also substantially increase the maximum penalties available for offences under section 24 of the Immigration Act 1971. Returning to the UK in breach of a deportation order would carry a maximum penalty of 5 years' imprisonment. Both entering without leave and arriving in the UK without a visa would carry a maximum penalty of 4 years–with a sentence of 12 months available on summary conviction.[126] Currently, each of the comparable existing offences have maximum penalties of 6 months' imprisonment. UNHCR has described the penalty of four years as "a clearly disproportionate sentence."[127] While we would not

121 Q7
122 Clause 34 of Part 2 of the Bill, proposes a new binding statutory interpretation of Article 31 of the Refugee Convention which includes the following: "A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country." (emphasis added)
123 Q10
124 Q12
125 UNHCR, UNHCR Observations on the Nationality and Borders Bill 141, 2021–22, October 2021, para 185
126 A summary conviction is a conviction in the Magistrates Court rather than the Crown Court. The Magistrates Court generally deals with less serious offences and imposes lower penalties. More than 90% of all criminal offences are dealt with in the Magistrates Court.
127 UNHCR, UNHCR Observations on the Nationality and Borders Bill 141, 2021–22, October 2021, para 185

expect the maximum sentence, or anything close to it, to be applied to a person who has arrived in the UK unlawfully simply to claim asylum, there remains a significant risk of imprisonment, which could amount to a disproportionate penalty.

129. The evidence provided to us was unanimous that the proposed changes in clause 39 are inconsistent with this core provision of the Refugee Convention. For example, Daniel Ghezelbash, Associate Professor at Macquarie University, Australia noted that:

> […] it is quite rare for liberal democracies to criminalise asylum in this way. Australia is known for its very harsh asylum policies, but we have never considered criminalising irregular entry. It can be unlawful under immigration law, but criminalisation is an extraordinary step that is in clear violation of Article 31 of the Refugee Convention.[128]

130. And Freedom from Torture concluded:

> Attempts to criminalise irregular refugee arrivals run against the letter and spirit of the 1951 Convention, which ensured that the impossibility of pre-authorised travel would be no barrier to seeking and accessing protection from persecution.[129]

131. We asked Rossella Pagliuchi-Lor of UNHCR whether clause 39 was compatible with Article 31. Her answer was unequivocal:

> Absolutely not. There is an article that established no penalisation of refugees on account of irregular entry. Penalising them is an obvious breach of it.[130]

Domestic law and practice

132. Domestic criminal law provides a defence that mirrors Article 31, which is set out in section 31 of the Immigration and Asylum Act 1999. However, this defence does not apply in respect of offences under section 24 of the 1971 Act–including those proposed under clause 39 of the Bill. It is hard to understand why the provision designed to give effect to Article 31 does not provide protection against criminalisation for illegal entry. Extending this defence, so that it applies in respect of section 24 offences, would remove a gap in the law that is inconsistent with Article 31 of the Refugee Convention. Since the Bill also proposes a narrower interpretation of Article 31, however, the section 31 defence alone would not prevent the new offence of illegal arrival in the UK being inconsistent with Article 31.[131]

133. The UNHCR has expressed "deep concern" about the limits of the section 31 defence:

> UNHCR therefore notes with deep concern that UK law only permits defences to criminal prosecution based on Article 31(1) for a narrow range of immigration offences related to deception or the use of false documents […] the focus in the Plan and the Bill on increasing the criminal penalties for illegal entry–and adding a new penalty for arrival without entry clearance–

128 Q7
129 Freedom from Torture (NBB0041)
130 Q13
131 Q13

> make it urgently necessary that Section 31 of the 1999 Act be expanded so as to comply with the UK's obligations under Article 31(1) of the Refugee Convention.[132]

134. We received evidence arguing that while there are many immigration offences on the statute book, these are, in practice, rarely prosecuted.[133] In the same vein, we note that Crown Prosecution Service (CPS) policy on immigration offences recognises that where no statutory defence applies, the Refugee Convention should nevertheless be taken into account when a decision is being made on the public interest in pursuing a prosecution.[134] While the policy does state that consideration must be given to whether Article 31 of the Refugee Convention applies, even when it does this means only that it is "less likely that a prosecution is required." The policy explicitly states that it will "not provide an automatic bar to prosecution" and that Article 31 must be weighed against other factors including the harm, disruption or economic loss that the offending has caused and whether "[t]he offending caused a significant investment of police or immigration resources."

135. CPS guidance may help to ensure that Article 31 is generally respected, and that asylum seekers will rarely be prosecuted even if the changes proposed in clause 39 were to become law. However, CPS guidance on the public interest in prosecution will not prevent asylum seekers being arrested by the police for committing offences. We were reminded in evidence that many of those who seek asylum in the UK have been through terrible hardship, and to face arrest and potentially a criminal charge on arrival has implications beyond the legal consequences. Aurelie Ponthieu, Co-ordinator Forced Migration Team at MSF:

> […] when we are talking about criminalising asylum seekers we are talking about people who have already been through very traumatic experiences. We are talking about survivors of torture and survivors of political violence. When people reach the UK they will already have been through many countries where they have been victims of violence and where they have been detained. They will arrive in a very vulnerable state, so on top of the legal implications of this provision, that would have very clear consequences in terms of their mental and physical health. I think it would be very problematic and very destructive.[135]

136. Furthermore, and crucially, reliance on prosecutorial discretion and CPS guidelines cannot be sufficient to ensure compliance with Article 31 of the Refugee Convention, given that statute expressly provides for offences that penalise refugees in breach of Article 31.

137. **The introduction of an offence of illegal arrival under clause 39 would effectively criminalise the act of seeking asylum in the UK. This is inconsistent with the UK's obligations under the Refugee Convention, including Article 31, which prohibits the penalisation of refugees for unauthorised entry. *To ensure that it does not violate the UK's obligations in international law, clause 39 should be amended to remove the***

132 UNHCR, UNHCR Observations on the Nationality and Borders Bill 141, 2021–22, October 2021, para 182

133 Migration Watch UK (NBB0040)

134 The Code for Crown Prosecutors requires them to be satisfied that a prosecution is in the public interest before it is pursued. CPS Legal Guidance, Immigration, 19 June 2018, provides that "In cases where a statutory defence is not available to a refugee, the purposive and humanitarian aims of the Refugee Convention as set out in *Asfaw* should be borne in mind when considering the public interest."

135 Q7

offence of arriving in the UK without valid entry clearance. The Bill should also provide for the amendment of section 31 of the Immigration and Asylum Act 1999 so that the defence it contains is available in respect of all offences relating to unauthorised entry, including offences under section 24 of the Immigration Act 1971.

Further ramifications

138. In addition to exposing asylum seekers to the criminal justice system in breach of Article 31, the criminalisation of claiming asylum would have further knock-on effects for those who arrive in the UK without visas. A criminal conviction can have implications for a refugee's future in the UK. As Sonali Naik QC told us:

> It will have significant consequences because then if those persons were prosecuted, even if they have obtained [refugee] status, they will have a criminal record. They will be deemed to be persons not of good character. It will impact on their ability to integrate and settle in the UK. Down the line, it will impact on their ability to acquire, if they wish to, British citizenship because they will be criminalised.[136]

139. More specifically, Article 33(2) of the Refugee Convention provides that the non-refoulement obligation, which is central to the protection provided to any refugee, does not apply if the refugee is someone who "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." This means that such a refugee can be returned without this violating the Refugee Convention (although they would not lose the other protections of the Refugee Convention, or protections provided by Article 3 ECHR). Currently, any person who has committed an offence and been sentenced to imprisonment for at least 2 years is presumed to have been convicted of "a particularly serious crime and to constitute a danger to the community".[137] Clause 37, in Part 2 of the Bill, proposes reducing this threshold to any sentence of 12 months or more. Particularly given that the Bill proposes increasing the maximum sentence for an offence of illegal arrival or entry to 4 years imprisonment (with a sentence of 12 months available on a summary conviction), there is a risk on the face of the Bill that an asylum seeker could lose their protection against refoulement under the Refugee Convention as a result of simply arriving in the UK to claim asylum.

140. In addition, in Part 5 of the Bill, which concerns 'Modern Slavery', clause 62(3)(f) would permit a victim of slavery or human trafficking to be deprived of their rights as such where they have been convicted of an offence and received a sentence of 12 months imprisonment or more. The question of whether or not this clause, in of itself, is compliant with the UK's human rights obligations to such victims under Article 4 ECHR (the prohibition on slavery) and ECAT falls outside the ambit of this Report. However, it is clear that, pursuant to clause 39 of the Bill, an offence of arriving in the UK without valid entry clearance could result in a sentence of 12 months or more and thus fall within clause 62(3)(f). The combined result of these two new clauses in the Bill risks depriving a person who is a victim of human trafficking or slavery of protection due to the fact that they arrived illegally, potentially as a result of that trafficking, contrary to the UK's protective obligations under Article 4 ECHR and ECAT. Moreover, due to this failure to adequately protect the victims of human trafficking and slavery, this in turn risks creating a situation

136 Q7
137 Section 72(2) of the Nationality, Immigration and Asylum Act 2002

where the UK is unable to comply with its obligations under Article 4 ECHR and ECAT to undertake adequate investigations and prosecutions of those responsible for human trafficking and slavery. As Raza Husain QC said in evidence to us:

> Clause [62] … sets a very low threshold for defining public order grounds, which preclude an individual who is a trafficking victim from support. If you have a 12-month sentence—this, remember, is what you could get on summary conviction; the maximum sentence is four years—for arriving to claim asylum, under Clause [39], it is absolutely unprecedented in our history that that has been criminalised. If you do that, that then rebounds not just in refugee law, but in trafficking law.[138]

141. **The potential for changes to immigration offences under clause 39 to impact on integration and settlement, on a refugee's protection against non-refoulement and on the protections provided to a victim of slavery or trafficking represent further reasons why amendment to the Bill is needed.**

Facilitation offences

142. The Bill would make changes to two separate offences: contained in section 25 and section 25A of the Immigration Act 1971.

Section 25, Immigration Act 1971

143. Under section 25 of the 1971 Act, it is currently an offence to facilitate the commission of a breach, or attempted breach, of immigration law by a person who is not a national of the UK. This includes cases in which the person breaching, or attempting to breach, immigration law is an asylum seeker.[139] The meaning of 'enter' in immigration law means, however, that an asylum seeker will not be 'entering' the UK illegally if they claim asylum before disembarkation or on arrival at a port (see above). Thus, under current law no crime will be committed under section 25 by piloting a boat across the Channel if the intention of those on the boat is to be intercepted and taken to port, or to head directly to a port, to claim asylum.[140]

144. This would be changed by clause 39(4) of the Bill, which would amend the section 25 offence to ensure that it covers facilitating the commission or attempted commission of the proposed new offence of 'arriving in' the UK without a visa. This means that the offence would be committed by someone piloting a small boat even if the intention of all of those on board was to claim asylum when rescued or at port on arrival. Furthermore, clause 40(1) would increase the maximum penalty for committing an offence under section 25 to

138 Q13

139 A recent judgment of the Court of Appeal has confirmed that an offence under section 25 of the 1971 Act can be committed in relation to the illegal entry of an asylum seeker, despite the existence of the separate offence of helping an asylum seeker enter the UK at section 25A - *R v Kakaei* [2021] EWCA Crim 503, upholding the decision in *R. v. Bina* [2014] EWCA Crim 1444.

140 This was recently confirmed in CPS legal guidance: Immigration: Organised Facilitation – Vehicles and Boats, 8 July 2021 which states: "in cases involving the use of a boat where the sole intention is to be intercepted by BF at sea and brought into port for asylum claims to be made, no breach of immigration law will take place. This is because those on board will be escorted and detained, granted immigration bail when considered appropriate and/or subsequently removed, with the likelihood of no entry in law being made. The same applies where the intention is to sail the boat to a designated port of entry in order to claim asylum. These issues were emphasised in the case of Kakaei [2021] EWCA Crim 503."

one of life imprisonment. While it is highly unlikely that such a severe sentence would be handed down to someone who altruistically assisted asylum seekers, it is alarming that a disproportionate sentence is theoretically applicable. It is notable that while the section 25 offence requires knowledge, or reasonable cause for believing, that the action is facilitating a breach or attempted breach of immigration law,[141] it does not require the defendant to be acting for financial gain. To this extent, the section 25 offence can be contrasted with the separate offence of helping an asylum seeker arrive in or enter the UK at section 25A.

Section 25A, Immigration Act 1971

145. Under section 25A of the 1971 Act it is an offence to knowingly facilitate the entry or arrival of a person who you know or have reasonable grounds to believe is an asylum seeker. At present, this offence only applies, however, to a defendant who has facilitated the arrival or entry (or attempted arrival or entry) of an asylum seeker "for gain". Furthermore, the section 25A offence "does not apply to anything done by a person acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services." Together these provisions protect from prosecution individuals and organisations who provide altruistic help to those seeking asylum and focus the offence on those who traffic asylum seekers into the UK or smuggle them in for gain.

146. Clause 40(2) of the Bill would make a small but potentially significant change to the offence by removing the requirement that the facilitation be "for gain". This would remove the need to prove that a defendant was seeking to gain from their facilitation, and thus make the offence easier to prosecute. It would also, of course, bring within the offence persons who help asylum seekers for altruistic motives. Importantly, however, the offence would retain the exemption for "anything done by a person acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services." This would exclude the possibility of charities and not-for-profit organisations whose purpose is supporting asylum seekers being prosecuted for their work. Despite the retention of this exemption, we received evidence from several such organisations concerned that their work might be criminalised.[142] The existence of the exemption for these organisations should be made clear if the Bill becomes law.

Implications of proposed changes

147. Despite the intention to maintain the exemption for organisations whose aim is to assist asylum seekers without charge, the proposed change to the section 25A offence in clause 40(2) has caused significant concern. General points have been raised about the potential breadth of the offence. The submission to us from Freedom from Torture noted its "apparent absurdity":

141 Given that persons crossing the Channel in small boats are generally doing so because there is no legal alternative for them to reach the UK, it can be assumed that a person who helps small boat passengers reach the shore of the UK would have, at least, "reasonable cause for believing" that they would be arriving without valid visas.

142 For example Wolverhampton City of Sanctuary (NBB0023): "We also have concerns about these proposals; for example if our charity volunteer gives assistance, such as providing free accommodation to a homeless and destitute person who has yet to seek asylum, will this be classified as facilitating irregular entry?"

> Indeed, on its natural reading, "facilitating" the arrival or entry of an asylum seeker would extend to lawyers and (some have suggested) even to immigration officials at the border.[143]

148. This does not seem to us to be a substantial concern, not least because the existing offence of facilitating entry or arrival "for gain" would also potentially cover lawyers (or even salaried immigration officials) if a stretched interpretation was adopted. What is far more troubling, and raises genuine fears in respect of Article 2 ECHR (the right to life), is the potential for the offence to cover the altruistic actions of persons saving lives at sea. By rescuing individuals crossing the Channel in dangerous small boats and bringing them to shore, there is little doubt that a person would be 'facilitating their arrival' in the UK. As a particularly stark example of the potential of this amendment, concerns have been raised in the media[144] and in Parliament[145] about the possibility of it resulting in the criminalisation of the actions of the Royal National Lifeboat Institution (RNLI).

149. While the Government has made clear that there is "no intention in this Bill to criminalise bona fide, genuine rescue operations by the [RNLI]", which is encouraging, the key question is not the intention of the Bill but the effect should it become law.[146] Given the exemption for persons acting on behalf of organisations that aim to assist asylum-seekers without charge, it is not clear whether the actions of the RNLI in rescuing migrants at sea would fall within the section 25A offence. The RNLI plainly intends to help asylum seekers if they find them during their rescue operations. Arguably, however, the RNLI's aim is not to assist asylum seekers but simply to save lives at sea.[147] We agree with submissions to us from Justice Studio, who said that "clarification is needed as to whether the primary and sole intent of the organisation must be to aid asylum seekers."[148]

150. There remains a risk that one interpretation of the offence could cover the actions of the RNLI, and the actions of any other organisation that rescues migrants. Moreover, on any reading, genuine life-saving activities by individuals not acting on behalf of such an organisation would be caught by the offence. If clause 40 of the Bill becomes law, it is inevitable that those life-saving activities would fall within the offence under section 25A of the 1971 Act, as long as their result was the arrival of an asylum seeker in the UK.

151. Furthermore, the offence under section 25 of the 1971 Act, which if clause 39 of the Bill was passed would cover the facilitation of an asylum seeker's arrival in the UK without a visa, does not contain any such exception for organisations that aim to assist asylum-seekers without charge. Thus, the same concerns arise in respect of the criminalisation of individuals engaging in altruistic life-saving activities but they also arise in respect of organisations such as the RNLI. There is nothing on the face of the Bill or the 1971 Act to prevent this offence being charged where an individual or an organisation, such as the RNLI, carries out life-saving activities that result in an asylum seeker arriving in the UK without a visa.

143 Freedom from Torture (NBB0041)
144 "RNLI vows to continue sea rescues despite prison fears for picking up migrants", Financial Times, 11 July 2021
145 For example: HC Deb, 20 July 2021, col 854
146 HC Deb, 20 July 2021, col 915
147 RNLI, Our philosophy, accessed 18 November 2021
148 Justice Studio (NBB0034)

152. It is recognised that prosecutorial discretion could and should prevent charges being laid when an offence has been committed in the course of genuine life-saving activity.[149] The common law also provides for a general defence of 'necessity', which may apply where a defendant has committed an offence to prevent the death or serious bodily harm of another person.[150] Nevertheless, on the face of the Bill there is plainly a risk that the changes made to the offences of facilitating illegal entry and facilitating the arrival of asylum seekers in the UK would criminalise life-saving activities.

The right to life

153. The amendments proposed in clause 39(4) and clause 40 raise considerable concern on human rights grounds because they would result in the criminalisation of those who provide altruistic assistance to asylum seekers, which could be hard to reconcile with the UK's obligations under the Refugee Convention. But even more starkly, these amendments raise serious questions of compatibility with the fundamental human right to life.

Safety of life at sea

154. Most obviously, legislation that could criminalise acts taken to save lives at sea is inconsistent with the specific, internationally binding rules to protect the safety of life at sea contained in the SOLAS, UNCLOS and Salvage Conventions, particularly the explicit duties to aid those in distress at sea.[151] As previously noted, UNCLOS imposes an obligation on states to require masters of ships flying their flag to *inter alia* "render assistance to any person found at sea in danger of being lost"[152] while the Salvage Convention explicitly requires the state to "adopt the measures necessary to enforce the duty" to "render assistance to any person in danger of being lost at sea".[153] Introducing the possibility that life-saving actions could result in criminal prosecution not only contradicts these requirements but is liable to actively dissuade individuals and organisations from taking such actions and complying with these duties.

155. The fact that the duty to render assistance in SOLAS is reflected in domestic legislation in the Merchant Shipping (Safety of Navigation) Regulations 2020 means that the Bill's amendments to the facilitation offences also appear to contradict existing UK law. This creates uncertainty which, at the very least, will damage compliance with the duty to render assistance and thus put at risk the right to life. Uncertainty also undermines one of the key requirements of the rule of law: that the law is accessible and so far as possible, intelligible, clear and predictable.[154]

ECHR and ICCPR

156. As discussed above, Article 2 ECHR positively requires the State to adopt laws and practices to safeguard the right to life. This extends to a positive obligation on States to

149 The CPS applies a test to ensure that prosecutions are only pursued when there is sufficient evidence available and, significantly for these purposes, when it is in the public interest to do so (the Code for Crown Prosecutors)

150 A full discussion of this defence appears in *In Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147

151 See Chapter 3 above

152 Article 98(1)

153 Article 10

154 This is the first of the defining elements of the rule of law identified by Lord Bingham in his book "The Rule of Law", Allen Lane, 2010.

have an adequate legislative and administrative framework in place to protect lives at sea.[155] Introducing legislation that is likely to have the effect of dissuading persons from taking action that could avoid a real and immediate risk to life, such as that which faces any person making a Channel crossing in an obviously unsuitable vessel, is inconsistent with this obligation.

157. A further element of the positive obligation under Article 2 ECHR is an operational obligation on all public authorities to take all reasonable steps to avoid a real and immediate risk to life of which they have, or ought to have, knowledge. While this operational obligation is binding on public authorities, not private actors, introducing a criminal offence that could dissuade anyone from taking action to avoid a real and immediate risk to life is hard to reconcile with this duty.

158. The obligations under Article 2 ECHR are mirrored by obligations under Article 6 ICCPR,[156] which has been found to have been violated by a failure by Italy to rescue migrants in distress.[157]

159. The implications of the Bill's proposed amendments to the criminal offences of facilitating a breach of immigration law and facilitating the arrival of asylum seekers are even more troubling when considered together with the proposed use of 'pushbacks' as a method of maritime enforcement. As discussed above, pushbacks pose a real risk to the lives of those crossing the Channel in small boats. Coupling actions that pose a danger to life with criminal penalties that could dissuade people from taking action to save lives puts the right to life itself fundamentally at risk.

160. **The proposed changes to the offences of facilitating a breach of immigration law, under section 25 of the 1971 Act, and facilitating the entry or arrival of an asylum seeker, under section 25A of the 1971 Act, pose an unacceptable risk of criminalising altruistic and life-saving actions. They are inconsistent with international obligations to protect and save lives at sea, and with the fundamental right to life under Article 2 ECHR. Concerns about irregular migration cannot justify legislation that puts lives at risk. *To ensure compliance with international human rights obligations, and in particular the right to life, clause 39(4) and clause 40(2) must be removed from the Bill.***

155 Paragraph 38 above

156 The right to life under Article 6 "includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats. …such due diligence require taking reasonable, positive measures that do not impose disproportionate burdens on States parties in response to reasonably foreseeable threats to life." *AS and others v Italy* CCPR/C/130/DR/3042/2017, para 8.3.

157 *AS and others v Italy* CCPR/C/130/DR/3042/2017

6 Removals and notice periods

Removals

161. Removing individuals who have no legal right to remain in the UK is a necessary element of effective immigration enforcement. The power to remove a person who requires leave to enter or remain in the UK, but does not have it, is contained in section 10 of the Immigration and Asylum Act 1999. This power extends to the removal of those who have been refused leave, including asylum seekers whose applications for refugee status or humanitarian protection have been rejected and individuals, including refugees, whose leave to enter or remain, including indefinite leave to remain, has been revoked.[158]

162. Removal comes at the end of the immigration process.[159] Initial immigration decisions can take a long time to process, particularly in asylum cases.[160] Any appeal that follows can take many more months or even years. This means that individuals and families facing removal may have spent a considerable period in the UK and formed social and community connections. Even for those who have no basis to stay in the UK, a sudden removal can be a distressing and traumatic experience.

163. Individuals may receive notification that they are liable to removal at the same time that they are first informed that their immigration claim or appeal has been unsuccessful. The constitutional right of access to justice, guaranteed by the common law, demands that anyone who is about to be removed is given an opportunity to take legal advice and to challenge the removal decision if that is appropriate.[161] In this regard, it is important to recall that Home Office decision-making is far from faultless. For example, over the past 5 years the average success rate for asylum appeals is over 40%.[162] Failing to give an individual an effective opportunity to challenge an immigration decision may well result in the wrong decision being made. The ramifications of an incorrect decision are most

158 See section 76 of the Nationality, Immigration and Asylum Act 2002. Under section 76(2), a person's indefinite leave can be revoked if they obtained it through deception. Under section 76(3), a person's indefinite leave to remain can be revoked if he "ceases to be a refugee as a result of (a) voluntarily availing himself of the protection of his country of nationality, (b) voluntarily re-acquiring a lost nationality, (c) acquiring the nationality of a country other than the United Kingdom and availing himself of its protection, or (d) voluntarily establishing himself in a country in respect of which he was a refugee." These conditions mirror those contained in Article 1(C) of the Refugee Convention 1951.

159 Currently, under section 77 of the Nationality, Immigration and Asylum Act 2002 no person can be removed from the UK whilst they have an asylum claim pending. It should be noted that clause 28 in Part II of the Bill proposes amending the law to allow for the removal of individuals while asylum claims are still pending, but this falls outside the ambit of this report.

160 The Government's website states that an asylum application "will usually be decided within 6 months" but "[i]t may take longer if it's complicated…". According to Home Office statistics, however, the number of asylum seekers waiting more than 6 months for an initial decision has risen from 3,626 in December 2015 to 42,206 in June 2021 (despite the total number of asylum applications remaining relatively stable over this period). A detailed recent report by the Refugee Council, based on Freedom of Information requests to the Home Office, found that in December 2020 there were more than 33,000 asylum applicants who had been waiting more than a year for an initial decision (see Refugee Council, Living in Limbo: a decade of delays in the UK asylum system, July 2021).

161 See Lord Steyn in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, at [26]: "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule, it is simply an application of the right of access to justice….". It is also consistent with the requirements of Article 13 of the ICCPR, which states that any alien must "be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

162 Home Office, Home Office Immigration Statistics, year ending June 2021, accessed 18 November 2021

severe when the individual's claim for the right to remain in the UK is based on refugee status or a risk of a serious human rights breach if they are returned, such as a violation of Article 2 (the right to life) or Article 3 (the prohibition on torture or inhuman or degrading treatment) ECHR. In these circumstances, the same rights of access to justice provided by the common law are also guaranteed under Article 13 ECHR (the right to an effective remedy).[163]

Current policy

164. In recognition of the need to ensure access to justice, individuals who are about to be removed under section 10 of the 1999 Act are given some notice of that removal. There is no statutory requirement, but Home Office guidance provides for minimum notice periods. This guidance has been amended on a number of occasions, notably including as a result of legal challenges arguing that it provided inadequate notice, inconsistent with the right of access to justice.[164] The current policy provides:[165]

a) In "normal enforcement cases" the person being removed must be given at least 72hrs before the removal. That 72hrs must contain at least 2 working days, and the final day before the removal must be a working day (unless there have been 3 working days' notice already).

b) In cases where the person being removed has no in-country right of appeal against the rejection of their immigration claim, they must be given an opportunity to access the courts before their departure is enforced and thus a minimum of 5 working days' notice–in recognition of the fact that this is likely to be their first opportunity for legal redress.[166]

c) Where a removal cannot take place, it may not be necessary to provide notice of removal again as long as the deferred removal takes place within 10 days.

165. The policy also provides for notification in respect of 'removal windows'.[167] This is a process by which a person is given notice of a 3 month period, or 'window', within which they can be removed, but not notice of when precisely within that period the removal will take place. While the latest version of the policy includes a section on 'removal windows' it also states that their use is currently suspended.[168] This follows legal challenges which argued that the use of removal windows resulted in decisions that were vital to an immigration or asylum claim, and could result in removal, being made during the window when no further notice was of removal would be given. The Court of Appeal concluded in the case of *FB (Afghanistan)* that the policy "incorporated an unacceptable

163 De Souza Ribeiro v France (Application no 22689/07)

164 *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710 and R (on the application of *FB (Afghanistan)) v Secretary of State for the Home Department* [2020] EWCA Civ 1338

165 Home Office, Immigration returns, enforcement and detention General Instructions; Judicial reviews and injunctions, 22 April 2021

166 This includes cases certified under section 94, section 94B or section 96 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), as well as cases in which an asylum claim has been declared inadmissible on the basis of a connection to a safe third country. None of these cases attract a statutory in-country right of appeal.

167 The policy provides that the person being removed must be notified at least 7 days before the removal window begins if not detained, or otherwise at least 72hrs before or 5 working days if they have no in-country appeal.

168 Home Office, Judicial reviews chapter 60 (publishing.service.gov.uk) Immigration returns, enforcement and detention General Instructions; Judicial reviews and injunctions, 22 April 2021, page 5: "With immediate effect and until further notice, the use of removal windows as set out in this instruction is suspended."

risk of interference with the right of access to court by exposing a category of irregular migrants, including those who have claims on article 2 and/or article 3 human rights and protection grounds, to the risk of removal without any proper opportunity to challenge a relevant decision in a court or tribunal."[169]

Clause 45 of the Bill

166. It is against this backdrop that Clause 45 of the Bill proposes giving the requirement to provide notice before removal a statutory footing. Clause 45 provides that removal under section 10 of the Immigration and Asylum Act 1999 is only permitted in accordance with section 10A to 10E.

167. The proposed new sections 10A to 10E of the 1999 Act would affect a number of changes to the current approach. They would require notification both of (a) the intention to remove and (b) the details of departure, including the date and time. Sections 10A to 10E do not, therefore, allow for notification of a 'removal window'. The Bill would end the use of the process that was criticised in *FB (Afghanistan),* which is to be welcomed.

168. The current 72 hour notice period would be extended so that a minimum five working day notice period would apply in all cases. This would increase the likelihood of persons being able to obtain legal advice and challenge the removal decision, in accordance with the right to access justice. However, the individual claimant will still need to identify and instruct a qualified immigration lawyer and it is likely that they will not be able to pay a lawyer without legal aid. In the 2017–2019 Parliament, the Joint Committee on Human Rights expressed its concerns about the impact of legal aid reform on the availability of legal aid lawyers generally, and in particular in relation to 'legal aid deserts' in certain areas—a concern which applies equally to asylum lawyers.[170]

169. The proposed new section 10B of the 1999 Act provides for situations where no further notice is needed when removal has been frustrated. It clarifies the existing policy by limiting the failed removals that would not require additional notice when rearranged to those caused by "matters reasonably beyond the control of the Secretary of State", such as "adverse weather conditions", "technical faults" or "disruption by the person to be removed or others". The proposed new section 10B would, however, also extend the period following a failed removal during which a person can be removed without an additional notice period. From the current period of 10 days it would be extended to 21 days.

170. Like the existing policy, the new section 10B protects against unnecessary additional delays and against persons liable to removal being able to exploit the requirement for notice to unreasonably delay immigration enforcement action. The changes are relatively consistent with the existing policy, although the current policy does not allow no further notice to be given "where there has been a significant change in circumstances." This includes where "further submissions (involving issues of substance which had not been previously raised and considered) have been received and refused since the earlier removal direction failed." This exclusion does not appear in the Bill. Furthermore, on an ordinary reading of "matters reasonably beyond the control of the Secretary of State", which would justify taking removal action without further notification, it could include a legitimate

169 *R (on the application of FB (Afghanistan)) v Secretary of State for the Home Department* [2020] EWCA Civ 1338

170 Joint Committee on Human Rights, Tenth Report of Session 2017–19, Enforcing Human Rights, HC669/HL Paper 171, para 83

legal claim or tribunal decision. It is hard to envisage a justified legal action that was resolved within 21 days of a failed removal. Nevertheless, it remains important to ensure that in such a case the individual's right to access justice is protected; that they would have an opportunity to consider their legal options again after a decision on their action has been provided.

171. The proposed new section 10D of the 1999 Act would alter the notice requirements where an individual has received a 'priority removal notice' (PRN). PRNs are introduced in clause 19 of Part 2 of the Bill, which does not fall within the scope of this Report. In summary, however, a PRN can be served on anyone liable to removal. When a PRN is served on a claimant it imposes a duty to provide, within a specific time frame, an exhaustive statement of all the grounds on which they claim to be entitled to enter or remain in the UK (including any information relating to being a victim of trafficking or slavery) and evidence in support of those grounds. Under the proposed new section 10D, a person who has failed to provide this information within the deadline imposed by the PRN can be removed without notice for a period of 21 days following the deadline's expiry.[171] The only requirement is that they are given notice of their departure details before they are removed.[172]

172. A failure to meet a PRN deadline may have other detrimental impacts on an asylum seeker's claim, most notably by impacting on the assessment of its credibility and on the weight to be given to supportive evidence.[173] There will be no detriment to credibility or the weight given to evidence, however, if the asylum seeker can show that there were "good reasons" for failing to meet the deadline. By contrast, the liability to removal without notice under the new section 10D in clause 40 applies regardless of whether there are "good reasons" for the delay. The changes imposed by the new section 10D could therefore result in an individual being removed without additional notice just because a procedural deadline has been missed for good reason. This puts the right of access to justice at risk.

Other ramifications

173. Under paragraph 3(4) of Schedule 10 to the Immigration Act 2016, a person in immigration detention who is subject to removal directions cannot be granted immigration bail during the 14 days before the date of removal, without the consent of the Secretary of State. Clause 45(8) of the Bill would extend this period to 21 days. This would mean a significantly increased chance that anyone served with removal directions whilst in detention will be required to spend an additional week detained. Whilst the First-tier Tribunal granting immigration bail shortly before removal is not usual, it is not impossible. This change in the law will result in some individuals spending time in immigration detention when they would otherwise be released on bail.

174. As discussed further below, immigration detention represents an interference with the right to liberty guaranteed by the common law and by Article 5 ECHR. Any increase in detention that is not reasonably justified risks incompatibility with Article 5.

175. **Overall, the Committee welcomes clause 45 as it provides a statutory guarantee of at least 5 working days' notice before a person is removed, an increase on the 72hrs**

171 Proposed new section 10D(2) of the Immigration and Asylum Act 1999
172 Proposed new section 10D(2) of the Immigration and Asylum Act 1999
173 See clause 21 and clause 25 respectively

currently guaranteed in policy guidance and does not permit the use of 'removal windows'. These changes provide greater protection for the right of access to justice and against unjustified removals to face human rights abuses taking place without legal challenge. It is important to recognise, however, that the Bill provides for a minimum period of notice, and that if more notice is required to ensure the recipient's right to access justice is respected then more must be provided.

176. **It is also important that the power to remove a person who has been issued a priority removal notice without providing a notice period is not used in cases where the right to access justice requires notice to be given. The power of the Secretary of State to remove a person without further notice being given where a removal has previously failed must not be used in cases where a removal has failed for legitimate reasons or where the claimant's right to access justice requires him or her to have additional notice. This power must not be relied upon to detain individuals on immigration grounds when detention is not necessary.** ***The Bill should be amended to make plain that the right to access justice must be respected in any decision on providing notice to an individual liable to removal. It should also be emphasised in the policy guidance that accompanies the power to detain that detention should not be maintained for 21 days in advance of a removal date where that detention is not necessary and proportionate in the individual case.***

7 Immigration Detention and Bail

Immigration detention

177. Approximately 13,000 people were taken into immigration detention in the UK in the year ending March 2021. Immigration legislation provides powers to detain foreign nationals for purposes including:

- for officials to examine a person's immigration status;[174]
- where there are reasonable grounds to suspect that a person is someone who may be removed;[175]
- where the Secretary of State is considering a deportation order against an individual;[176] and
- where a deportation order is in force against a person.[177]

178. Immigration detention amounts to a prima facie interference with the right to liberty, guaranteed under Article 5 ECHR. Article 5 permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."[178] However, Article 5 further requires that detention must not be arbitrary, must be used in accordance with procedures defined by law and that this law must be sufficiently clear and precise. Specific safeguards must be provided when individuals are deprived of their liberty, including the right to bring proceedings to challenge the lawfulness of their detention.

179. Under the common law, the Hardial Singh principles apply where the immigration authorities are seeking to remove a person from the UK and they set important constraints on the state's powers to detain for immigration purposes.[179] The Hardial Singh principles are:

- The Secretary of State must intend to remove the person and can only use the power to detain for that purpose;

174 Immigration Act 1971, Schedule 2, Paragraph 16 (1) states: "A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter."

175 Immigration Act 1971, Schedule 2, Paragraph 16 (2) states: "If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 18 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—(a) a decision whether or not to give such directions; (b) his removal in pursuance of such directions."

176 Immigration Act 1971, Schedule 3, Paragraph 2 (2) states "Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court] , he may be detained under the authority of the Secretary of State pending the making of the deportation order."

177 Immigration Act 1971, Schedule 3, Paragraph 2 (3) states "Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained."

178 European Convention on Human Rights, Article 5(1)(f)

179 *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB)

- The person being removed may only be detained for a period that is reasonable in all the circumstances;
- If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect removal within that reasonable period, he should not seek to exercise the power of detention;
- The Secretary of State should act with reasonable diligence and expedition to effect removal.

Furthermore, in order to be lawful, immigration detention must be in accordance with Home Office policy and be justified in all the circumstances of the individual case.

180. The Joint Committee on Human Rights conducted an inquiry into immigration detention during the 2017–19 Parliament.[180] The Committee had "serious concerns about the detention decision-making process at the Home Office." It recommended *inter alia* that "decision making about detention should be independent. Independent decision making will ensure that the initial decision to deprive a person of their liberty is robust and fully justified. The power to detain should not be wielded by the Department which is charged with removals and deportations."[181] This recommendation was rejected by the Home Office.[182]

181. While the numbers in detention have recently dropped significantly,[183] the organisation Bail for Immigration Detainees (BID) made clear in their written submissions to us that problems with the quality of decision making have not improved in the years since the JCHR's report on immigration detention was published:

> Detention decision-making is frequently incorrect or unlawful. In [the] last year, 77% of people detained were released back into the UK, detention having served no purpose whatsoever. The Home Office paid out [a] total of £9.3m compensation for 330 cases of wrongful detention in 2020/21 - up from £6.9m in 272 cases in 2019/20. This means that in the last 3 years, the government has paid out a total of £24.4 million to 914 people it was found to have locked up unlawfully.[184]

182. **We are disappointed that the Government have not used the Nationality and Borders Bill as an opportunity to introduce independence into the immigration detention decision-making process. *The Government must take action to ensure that people are not being detained unlawfully.***

180 Joint Committee on Human Rights, Sixteenth Report of Session 2017–19, Immigration Detention, HC 1484;HL Paper 278

181 Ibid, para 38

182 Joint Committee on Human Rights, Second Special Report of Session 2019–20, Immigration Detention: Government Response to the Committee's Sixteenth Report of Session 2017–19, HC216

183 We note that this appears to have been, at least in part, a consequence of Covid-19 – as immigration decreased and many in detention were released on immigration bail following Home Office review. See the Migration Observatory, Immigration detention in the UK, accessed 18 November 2021

184 Bail for Immigration Detainees (NBB0043)

Clause 47 and Immigration Bail

183. Where a person is in immigration detention, or is liable to be detained on immigration grounds, the Home Office must consider whether they should be released on immigration bail. Detention should be used only as a last resort.[185] A person detained on immigration grounds may also apply to the First-tier Tribunal for release on immigration bail. Where immigration bail is granted it must be subject to at least one condition, such as reporting requirements, restrictions on where the individual can live and the use of an electronic monitoring tag.[186]

184. Clause 47 of the Bill makes changes to the law governing the grant of immigration bail, adding additional matters to which Home Office decision makers and the First-tier Tribunal must have regard when making their decision on bail. Currently the Home Office and the First-tier Tribunal must have regard to:

a) the likelihood of the person failing to comply with a bail condition;

b) whether the person has been convicted of an offence (whether in or outside the United Kingdom or before or after the coming into force of this paragraph);

c) the likelihood of a person committing an offence while on immigration bail;

d) the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order;

e) whether the person's detention is necessary in that person's interests or for the protection of any other person; and

f) such other matters as the Secretary of State or the First-tier Tribunal thinks relevant.

185. This list does not include acts of non-cooperation with the immigration process. The Explanatory Notes state that "This means that there is a risk that acts of non-cooperation, which result in a delay to the individual's removal, could create a perverse incentive whereby they make a grant of immigration bail more likely. The risk follows that such a person released on immigration bail may abscond and frustrate removal altogether."[187]

186. Clause 47 would add to this list "whether the person has failed without reasonable excuse to cooperate with any process" for determining whether that person should be granted leave to enter or remain; for determining the details of that leave; for determining whether they should be removed; and for removing the person from the UK (i.e. every stage of the immigration process).

187. While we recognise that efficiency in the immigration system is of benefit to the Government and to those awaiting decisions on their immigration applications, we do not consider that administrative convenience is a sufficient justification for depriving a person

185 As accepted by the Government in Joint Committee on Human Rights, Second Special Report of Session 2019–20, Immigration Detention: Government Response to the Committee's Sixteenth Report of Session 2017–19, HC216, page 10; "Where detention is considered appropriate, the Detention Gatekeeper ensures that it is used as a last resort…"

186 HM Government, Immigration detention bail, accessed 18 November 2021

187 Explanatory Notes to the Nationality and Borders Bill [Bill 141 (2021–22)–EN] para 518

of their liberty. Detention should only be used if it is necessary and proportionate. This means that matters should only influence a decision to release a person from detention on immigration bail if they are relevant to the necessity and proportionality of that detention. The decision-maker is already required to consider whether a person is likely to comply with bail conditions (which will include a requirement to report and thus to not abscond) and to take into account any other matters they consider relevant. To the extent that a failure to co-operate with an immigration process is relevant to compliance with bail conditions, or is considered relevant to the need for detention in any other way, it can already be taken into account. The amendment requires non-cooperation to be taken into account in every decision. Therefore, it must be taken into account even if not relevant, which inevitably risks it being given weight without justification. This could result in arbitrary detention in breach of Article 5 ECHR.

188. Bail for Immigration Detainees (BID) noted in their written evidence to us that changes in part 2 of the Bill, which introduce the possibility for additional strict procedural time limits,[188] increase the likelihood that individuals may be deemed not to have co-operated with immigration processes and thus "are likely to find it harder to get released from detention."[189]

189. The Joint Committee on Human Rights has previously concluded that "Detention should only be used where necessary and proportionate and where alternatives are not available or would not meet the legitimate aims pursued."[190]

190. **The changes proposed in the Bill increase the risk that immigration detention will be used, and prolonged, where it is not necessary or proportionate.** ***We recommend that clause 47 be removed from the Bill to improve safeguards against detention in breach of Article 5 ECHR.***

188 Bail for Immigration Detainees (NBB0043)
189 Bail for Immigration Detainees (NBB0043)
190 Joint Committee on Human Rights, Sixteenth Report of Session 2017–19, Immigration Detention, HC 1484; HL Paper 278, para 28

Appendix 1: Amendments

The amendments set out below refer to the Bill as Amended in Public Bill Committee.[191]

Amendment 1

Schedule 6, page 95. line 25, at end insert—

"(4) Authority for the purposes of subsection (3) may be given in relation to a foreign ship only if the Convention permits the exercise of Part A1 powers in relation to the ship."

Member's explanatory statement: This follows the drafting in the equivalent paragraphs of sections 28M, 28N and 28O of the Immigration Act, and would ensure that enforcement action complies with international maritime law, similar to other enforcement action under Schedule 4A to the Immigration Act 1971.

Amendment 2

Schedule 6, page 98, leave out lines 6 to 11 and insert—

"(a) every description of vessel (including a hovercraft) used in navigation, but

(b) does not include any vessel that is not seaworthy or where there could otherwise be a risk to the safety of life and well-being of those onboard."

Member's explanatory statement: This would ensure that enforcement action such as pushbacks could not be taken against unseaworthy vessels such as dinghies.

Amendment 3

Schedule 6, page 98, line 20, at end insert—

"(1A) The powers set out in this Part of this Schedule must not be used in a manner or in circumstances that could endanger life at sea."

Member's explanatory statement: This would ensure the maritime enforcement powers cannot be used in a manner that would endanger lives at sea.

Amendment 4

Schedule 6, page 102, line 31, at end insert—

"(2) Force must not be used in a manner or in circumstances that could endanger life at sea."

Member's explanatory statement: This ensures that the use of force in maritime enforcement powers cannot be used in a manner that would endanger lives at sea.

191 Nationality and Borders Bill, Bill 187 (2021–2022) as Amended in Public Bill Committee

Amendment 5

Schedule 6, page 102, line 36, leave out "criminal or"

Member's explanatory statement: This would remove the immunity from criminal proceedings for "relevant officers" for criminal offences committed whilst undertaking pushbacks or other maritime enforcement operations.

Amendment 6

Schedule 6, page 102, line 36, leave out lines 36 to 40 and insert—

"J1 The Home Office, rather than an individual officer, is liable in civil proceedings for anything done in the purported performance of functions under this Part of this Schedule."

Member's explanatory statement: This would ensure that the Home Office is liable, rather than immigration officers and enforcement officers being personally liable for civil wrongs that may occur whilst undertaking pushbacks or other maritime enforcement operations.

Amendment 7

Clause 39, page 38, leave out lines 19 to 23

Member's explanatory statement: This would prevent 'arrival' in the United Kingdom without a valid entry clearance, rather than 'entry' into the United Kingdom without a valid entry clearance, becoming an offence.

Amendment 8

Clause 39, page 39, line 30, leave out subsection (4)

Member's explanatory statement: This would prevent the offence of facilitating a breach of immigration law being extended to include facilitating 'arrival' in the United Kingdom without a valid entry clearance in addition to facilitating 'entry' into the United Kingdom without a valid entry clearance.

Amendment 9

Clause 39, page 40, line 2, at end insert—

"(10) In section 31(3) of the Immigration and Asylum Act 1999 (defences based on Article 31(1) of the Refugee Convention), after paragraph (aa) insert—

"(ab) section 24 of the Immigration Act 1971 (illegal entry and similar offences)"."

Member's explanatory statement: This would extend the statutory defence based on Article 31 of the Refugee Convention to offences of illegal entry under section 24 of the Immigration Act 1971.

Amendment 10

191. Clause 40, page 40, line 7, leave out subsection (2)

Member's explanatory statement: This would maintain the current position that the offence of helping an asylum seeker to enter the United Kingdom can only be committed if it is carried out "for gain".

Amendment 11

Clause 45, page 43, line 12, at end insert—

"(6B) Nothing in this section, or in sections 10A to 10E, permits a person to be removed from the United Kingdom if that removal would violate their common law right to access justice."

Member's explanatory statement: This would make clear that the regime for providing notice to persons liable to removal remains subject to the common law right to access justice, which in the asylum context is mirrored by Article 13 ECHR.

Amendment 12

Page 49, line 3, leave out Clause 47

Member's explanatory statement: This would prevent it being compulsory for decision makers and tribunals to take into account whether a person has failed to cooperate with any immigration process when making decisions on immigration bail.

Appendix 2: Analysis of survey responses

On 26 July 2021, we published a call for written evidence for individuals and organisations to respond to the questions in the Terms of Reference. Alongside this, we also published an online survey, promoted on our website and through our social media account, so we could hear a wider range of views on the human rights implications of the Bill. Our survey closed on 17 September 2021 and we received 84 responses.

Although our self-selecting survey is unlikely to be fully representative, we were keen to hear varied points of view and provide a way for people with different opinions on the Bill or experiences of the issues it raises to engage with our work.

Compassion for refugees

Many people who responded to our survey had compassion for the plight of refugees, regardless of their views on the Nationality and Borders Bill. Comments included:

- "People fleeing conflict and persecution have the right to life and safety, to be treated with justice and dignity, the same as those of us lucky enough to be born in a country that is not at war."
- "People found to be trafficked as slaves into this country need protecting and a safe place to live for at least 3 years to pick up the pieces of a broken life. They are vulnerable and need safe housing for a while and then monitoring as they learn how to live again."

Need for reform of the UK's asylum system

We asked whether the UK's asylum system required reform to better protect human rights. Of those who responded to this question, 47 people (57%) told us that they 'completely agreed' that the asylum system required reform, with a further 5 (6%) 'somewhat' agreeing. Just 16 people (19%) completely disagreed, with a further 5 (6%) 'somewhat' disagreeing.

The UK's international obligations to refugees

We asked whether the Nationality and Borders Bill met the UK Government's human rights obligations to refugees. 23 people (27%) told us that they either 'completely' or 'somewhat' agreed that the Bill was compatible with the Government's obligations. However, 38 people (45%) said they 'completely' or 'somewhat' disagreed with this. Responses to our survey included:

- "I'm shocked that the government has such disregard for the Refugee Convention (which the UK actually helped to draft) and other pieces of international human rights legislation, which for 70 years have protected numerous vulnerable people from further abuse."
- "Criminalising those who enter the UK irregularly would be an act in contravention of basic humanitarian principles, if not also of the Universal Declaration of Human Rights."

- "In my view, the Nationality and Borders Bill is fundamentally incompatible with the UN Refugee Convention. It denies the possibility of giving indefinite leave to remain to people who have arrived in the UK by "irregular" means – indeed it seeks to criminalise such people as well as the people smugglers who bring them in."

Opposition to the Bill

Several respondents expressed concerns around aspects of the Bill, including: the criminalisation of people who make irregular journeys to the UK; the creation of a 'two-tier system' for refugees; proposals to return refugees to safe third countries; and the evidence requirements for asylum applications. One respondent told us:

- "The Nationality and Borders Bill completely disregards the UK's commitment to human rights. Punishing those desperate enough to flee their countries on dinghies with up to 4 years imprisonment goes against the rights to liberty and freedom from cruel/degrading treatment and punishment. Incarcerating those who seek asylum in this country directly contradicts the obligation to protect refugees, and incarcerating parents is not in the best interests of their children, many of whom have experienced trauma relating to war."

Support for the Bill

There was also support for the Nationality and Borders Bill from a large number of respondents, many of whom were sceptical of human rights-based criticisms of the Bill. We were told:

- "Those who are in real danger will still be able to claim asylum, and the legal system will protect the most vulnerable."
- "I want genuine asylum seekers not those who are economic migrants making traffickers wealthy with no regard for human life."
- "My human rights are adversely affected by mass migration which impinges on my right to decent housing and health care. Human rights are dependent on the law […] Illegal migration is a crime. Illegal immigrants should be in jail."

We are grateful to everyone who took the time to send us their views.

Conclusions and recommendations

Maritime enforcement and human rights

1. Not only are the Masters of all ships bound to assist those whose lives are at risk at sea, but the UK is also bound to adopt measures to ensure that this is done, both under its general human rights obligations to take positive actions to respect the right to life, as well as under specific duties under maritime law, including SOLAS and UNCLOS. (Paragraph 46)

2. The UK is bound, both under its general obligations to take positive actions to respect the right to life, as well as under specific duties under maritime law, including SOLAS, SAR and UNCLOS, to organise and deliver an effective search and rescue service to protect and save lives at sea. (Paragraph 50)

3. The right to life is inherently engaged when people cross the Channel—a busy shipping lane, often with rough waters—in small unseaworthy vessels. This engages the responsibility of the State from which such boats embark to have taken reasonable measures to prevent people coming to harm at sea, for example by establishing a legal and operational framework to safeguard lives at sea, including by ensuring the seaworthiness of vessels, and by establishing systems to rescue anyone in distress within their search and rescue areas. Part of this includes taking reasonable measures to prevent people placing themselves (and others) in life-endangering situations, as well as to take enforcement action against those involved in human trafficking or slavery. It also engages the responsibility of any other States within whose territorial waters or search and rescue areas such boats pass to take reasonable action to save lives. (Paragraph 53)

4. Under international maritime law, both UK and French authorities should cooperate to safeguard lives within the Channel and within their respective search and rescue zones. Moreover, where such boats cross into UK territorial waters and the UK search and rescue zone, it then becomes the responsibility of the UK authorities to take all reasonable actions to protect the right to life of those on board. (Paragraph 54)

5. Pushbacks are known to endanger lives at sea. This is even more so when dealing with people on small, unseaworthy vessels, in a busy shipping lane, often with rough waters, without appropriate life-saving equipment, as is the case for migrants in small boats in the Channel. The obligations on the UK in such circumstances are to take all reasonable actions to save lives at sea—by establishing a legal and operational framework to ensure that those at risk at sea are rescued; by ensuring that masters of ships take action to save those in distress at sea; and by ensuring that its state agents take all reasonable steps to rescue those at risk at sea. A policy of pushbacks fails to comply with the obligations to save those in distress, contrary to the right to life and international maritime law. Moreover, pushbacks would do the opposite of what is required to save lives. Pushbacks would create a situation where state actors were actively placing individuals in situations that would increase the risk to life. Under the current conditions, we cannot see how a policy of pushbacks can be implemented without risking lives, contrary to the UK's obligations under the right to life and international maritime law. (Paragraph 55)

6. We are concerned that pushbacks under the proposed maritime enforcement powers could lead to situations where victims of slavery or human trafficking are not protected and where action is not taken to adequately investigate and prosecute perpetrators of slavery or human trafficking. We therefore do not see how a pushback policy under the proposed new maritime enforcement powers can be operated in compliance with the UK's obligations to combat slavery and human trafficking, under Article 4 ECHR, Article 8 ICCPR, ECAT and the UN Palermo Protocol. (Paragraph 59)

7. Pushbacks to France on the information currently available, would not necessarily breach the non-refoulement obligations under the Refugee Convention or the provisions of the ECHR prohibiting return on the grounds of Articles 2, 3 or 4 ECHR. However, that may not always be the case as it will depend both on conditions in France, and on whether the French asylum system continues to be adequate to ensure against refoulement contrary to the Refugee Convention and Articles 2, 3 or 4 of the ECHR. Moreover, the need for an individual assessment still applies. (Paragraph 64)

8. *The Government should respect its obligations under refugee law and human rights law to undertake individual assessments of asylum seekers, as well as its obligations not to frustrate the object and purpose of Protocol 4 relating to collective expulsions. It is now 58 years since the UK signed Protocol 4 to the ECHR; the Government should act promptly to ratify it.* (Paragraph 68)

9. It is difficult to see how it would ever be in the best interests of the child to be subject to pushback techniques at sea. (Paragraph 70)

10. *The Government should explain what action it would take in respect of children on a small boat crossing the Channel—and in particular how it would ensure that such actions respected the rights of the child as well as the human rights of all people in board.* (Paragraph 70)

11. In order to comply with the right to an effective remedy in Article 13 ECHR in respect of an asylum seeker, the UK would need to have processes in place to undertake an examination of an individual's personal circumstances, to take an individual decision in respect of that person, to enable that person to be able to challenge that decision, and to have a remedy with suspensive effect for potential violations of Articles 2 and 3 ECHR. The absence of those processes in the case of proposed pushbacks in the Channel is likely to risk violating Article 13 ECHR, in conjunction with other rights engaged. (Paragraph 73)

Maritime enforcement powers in the Nationality and Borders Bill

12. The maritime enforcement powers introduced by clause 44 and Schedule 6 to the Bill may be capable of being exercised compatibly with human rights. However, there are also significant risks that such powers can be exercised in a way that is not compatible with human rights. It would seem appropriate for the Home Secretary to specify more clearly how such powers will be exercised and how she will ensure that they are not exercised in a way that would violate human rights, for example the right to life. (Paragraph 85)

13. *The Home Secretary should provide a detailed memorandum setting out clearly how maritime enforcement powers under amended Schedule 4A to the Immigration Act 1971 will be exercised, how human rights would be engaged by such maritime enforcement activity, and in particular how she will ensure that such powers are not exercised in a way that would violate human rights. She should also reflect on whether all these powers are needed or whether they can be subject to conditions to ensure that they are only used in a way that respects human rights, and in particular the right to life.* (Paragraph 86)

14. *Given the particular risks to life posed by using force at sea, we recommend that Schedule 4A to the Immigration Act 1971 be amended to specify that force must not be used if it would endanger life at sea. Additionally, we would suggest an amendment, ideally to all parts of Schedule 4A to the Immigration Act 1971, to read "The powers set out in this Part of the Schedule must not include any activity that could endanger life at sea."* (Paragraph 87)

15. *The Government should clarify why it felt it necessary to introduce this amendment to new section 28LA to remove the requirement in existing law for the Home Secretary to grant authorisations for maritime enforcement only where to do so would be compatible with international law, under UNCLOS. Alternatively, similar drafting to that which appears in section 28M(4), 28N(4) and 29O(4) of the Immigration Act 1971 should be added to new section 28LA in Schedule 6.* (Paragraph 90)

16. In any actions authorising or carrying out maritime enforcement, we expect Ministers and officials to comply with the law, including the UK's international legal obligations, such as its human rights obligations and obligations under international maritime law. We expect Parliament to be informed if there is any intentional or accidental deviation from compliance with international law, including international human rights law. (Paragraph 93)

17. It is understandable that it should principally be the Government that is responsible, in a civil claim, for the actions of its officers, rather than the officers being personally liable. This is borne out through the usual operation of vicarious liability. Similarly, it would be the Government that would be responsible in any human rights claim for a breach of human rights caused by the actions of its officers. However, this clause could risk neither being liable for harm caused, even killing a person (where that was done as a consequence of immigration enforcement action). It would be better if this clause made it clear that this wasn't an attempt by the Home Office to absolve itself of civil liability, but rather specifically for the officers not to be liable personally. (Paragraph 96)

18. *We therefore recommend amending that paragraph to read "The Home Office, rather than an individual officer, is liable in civil proceedings for anything done in the purported performance of functions under this Part of this Schedule."* (Paragraph 96)

19. If a criminal offence has been committed whilst undertaking pushbacks or other maritime enforcement operations, it is difficult to understand why there should be a specific defence or immunity from prosecution for immigration officers or enforcement officers. For example, if a child is killed due to the actions of an immigration officer at sea, it is hard to comprehend why that immigration officer

should not be subject to the normal thresholds to assess criminal responsibility (for example if there was gross negligence manslaughter or unlawful and dangerous act manslaughter). (Paragraph 98)

20. *We therefore recommend that an amendment is made to remove any risk of immunity from prosecution for criminal offences committed by immigration officers or enforcement officers whilst undertaking pushbacks or other maritime enforcement operations.* (Paragraph 98)

21. As previously recognised, the primary obligation in respect of those at sea must be safety of life. This is even more so when dealing with people on small, unseaworthy vessels, in a busy shipping lane, often with rough waters, as is the case for migrants in small boats in the Channel. A policy of pushbacks would risk failing to comply with the obligations to save those in distress at sea, and instead would risk a situation where state actors were actively placing individuals in situations that would have an increased risk to life. We cannot see how a policy of pushbacks can be implemented without risking lives, contrary to the UK's obligations under the right to life and international maritime law, especially if applied to fragile unseaworthy vessels. (Paragraph 100)

22. *Paragraph 8 of Schedule 6 should be amended so that it reads: ""ship" includes every description of vessel (including a hovercraft) used in navigation, but does not include any vessel that is not seaworthy or where there could otherwise be a risk to the safety of life and well-being of those onboard".* (Paragraph 101)

23. The power to seize and detain property seems capable of being exercised compatibly with Convention rights, however it is noteworthy that it applies to a significant number of offences, including some where deprivation of property may not be a reasonable or proportionate outcome in an individual case. It will therefore be important that this power is exercised proportionately in practice. We therefore encourage the Home Secretary to issue guidance setting out how she will use this power and how she will ensure that it is only used when it is proportionate to do so. (Paragraph 103)

24. We are concerned that even the Government's own Equality Impact Assessment suggests that increased enforcement powers may not deter individuals from crossing the Channel and may even encourage them to take "riskier routes". (Paragraph 111)

25. *The Government should do everything it can to prevent more individuals losing their life while trying to cross the Channel or attempting to enter the UK by other means.* (Paragraph 111)

26. Given their positive duties to protect the right to life, the Government should not engage in pushback tactics that would endanger asylum-seekers crossing the Channel or implement policies that would contribute to asylum-seekers taking dangerous routes into the UK. (Paragraph 113)

27. *The Government should consider whether the stated aim of deterring people smugglers by making the Channel an "unviable" route while still fulfilling their obligations to protect life could be better served by alternative means. A range of alternative options*

have been provided in written evidence to this inquiry, such as creating more safe and legal routes for refugees or enabling asylum seekers to obtain visas to come to the UK from France to claim asylum. (Paragraph 113)

Criminalisation of asylum seekers and those who help them

28. The introduction of an offence of illegal arrival under clause 39 would effectively criminalise the act of seeking asylum in the UK. This is inconsistent with the UK's obligations under the Refugee Convention, including Article 31, which prohibits the penalisation of refugees for unauthorised entry. (Paragraph 137)

29. *To ensure that it does not violate the UK's obligations in international law, clause 39 should be amended to remove the offence of arriving in the UK without valid entry clearance. The Bill should also provide for the amendment of section 31 of the Immigration and Asylum Act 1999 so that the defence it contains is available in respect of all offences relating to unauthorised entry, including offences under section 24 of the Immigration Act 1971.* (Paragraph 137)

30. The potential for changes to immigration offences under clause 39 to impact on integration and settlement, on a refugee's protection against non-refoulement and on the protections provided to a victim of slavery or trafficking represent further reasons why amendment to the Bill is needed. (Paragraph 141)

31. The proposed changes to the offences of facilitating a breach of immigration law, under section 25 of the 1971 Act, and facilitating the entry or arrival of an asylum seeker, under section 25A of the 1971 Act, pose an unacceptable risk of criminalising altruistic and life-saving actions. They are inconsistent with international obligations to protect and save lives at sea, and with the fundamental right to life under Article 2 ECHR. Concerns about irregular migration cannot justify legislation that puts lives at risk. (Paragraph 160)

32. *To ensure compliance with international human rights obligations, and in particular the right to life, clause 39(4) and clause 40(2) must be removed from the Bill.* (Paragraph 160)

Removals and notice periods

33. Overall, the Committee welcomes clause 45 as it provides a statutory guarantee of at least 5 working days' notice before a person is removed, an increase on the 72hrs currently guaranteed in policy guidance and does not permit the use of 'removal windows'. These changes provide greater protection for the right of access to justice and against unjustified removals to face human rights abuses taking place without legal challenge. It is important to recognise, however, that the Bill provides for a minimum period of notice, and that if more notice is required to ensure the recipient's right to access justice is respected then more must be provided. (Paragraph 175)

34. It is also important that the power to remove a person who has been issued a priority removal notice without providing a notice period is not used in cases where the right to access justice requires notice to be given. The power of the Secretary of State to remove a person without further notice being given where a removal has previously

failed must not be used in cases where a removal has failed for legitimate reasons or where the claimant's right to access justice requires him or her to have additional notice. This power must not be relied upon to detain individuals on immigration grounds when detention is not necessary. (Paragraph 176)

35. *The Bill should be amended to make plain that the right to access justice must be respected in any decision on providing notice to an individual liable to removal. It should also be emphasised in the policy guidance that accompanies the power to detain that detention should not be maintained for 21 days in advance of a removal date where that detention is not necessary and proportionate in the individual case.* (Paragraph 176)

Immigration Detention and Bail

36. We are disappointed that the Government have not used the Nationality and Borders Bill as an opportunity to introduce independence into the immigration detention decision-making process. (Paragraph 182)

37. *The Government must take action to ensure that people are not being detained unlawfully.* (Paragraph 182)

38. The changes proposed in the Bill increase the risk that immigration detention will be used, and prolonged, where it is not necessary or proportionate. (Paragraph 190)

39. *We recommend that clause 47 be removed from the Bill to improve safeguards against detention in breach of Article 5 ECHR.* (Paragraph 190)

Declaration of interests

Declaration of interests

Lord Brabazon of Tara

- No relevant interests to declare

Lord Dubs

- Former Chief Executive of the Refugee Council

Lord Henley

- No relevant interests to declare

Baroness Ludford

- Vice President of Justice
- Vice Chair of the All-Party Parliamentary Group on Migration

Baroness Massey of Darwen

- No relevant interests to declare

Lord Singh of Wimbledon

- No relevant interests to declare

Formal minutes

Wednesday 24 November 2021

Hybrid Meeting

Members present:

In the absence of the Chair, Joanna Cherry MP was called to the chair.

Lord Brabazon of Tara

Lord Henley

Angela Richardson MP

David Simmonds MP

Lord Singh of Wimbledon

Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement

Draft Report (*Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 190 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Ninth Report of the Committee to both Houses.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Adjournment

[Adjourned till 1 December at 2.40pm.

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the inquiry publications page of the Committee's website.

Wednesday 8 September 2021

Ngozi, Member, VOICES Network; **Elkhansaa**, Member, VOICES Network; **Peter**, Ambassador, VOICES Network — Q1–5

Raza Husain QC, Barrister, Matrix Chambers; **Enver Solomon**, Chief Executive, Refugee Council; **Madeleine Sumption**, Director, Migration Observatory — Q6–14

Wednesday 20 October 2021

Daniel Ghezelbash, Associate Professor, Macquarie University; **Sonali Naik QC**, Barrister, Garden Court Chambers; **Aurélie Ponthieu**, Coordinator Forced Migration Team, Médecins Sans Frontières — Q1–9

Elizabeth Ruddick, Senior Legal Adviser, United Nations High Commissioner for Refugees (UNHCR); **Rossella Pagliuchi-Lor**, UK Representative, United Nations High Commissioner for Refugees (UNHCR) — Q10–17

Published written evidence

The following written evidence was received and can be viewed on the inquiry publications page of the Committee's website.

NBB numbers are generated by the evidence processing system and so may not be complete.

1 Bail for Immigration Detainees (NBB0043)

2 Donate4refugees (NBB0069)

3 Freedom from Torture (NBB0041)

4 Home Office (NBB0073)

5 Joint Council for the Welfare of Immigrants (NBB0053)

6 Justice Studio (NBB0034)

7 Médecins Sans Frontières (NBB0061)

8 Migration Watch UK (NBB0040)

9 Refugee Council (NBB0021)

10 Safe Passage UK (NBB0065)

11 Wolverhampton City of Sanctuary (NBB0023)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90 HL 5
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331 HL 23
3rd	The Government's Independent Review of the Human Rights Act	HC 89 HL 31
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Part 4): The criminalisation of unauthorised encampments	HC 478 HL 37
5th	Legislative Scrutiny: Elections Bill	HC 233 HL 58
6th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People	HC 451 HL 73
7th	Legislative Scrutiny: Nationality and Borders Bill (Part 1) – Nationality	HC 764 HL 90
8th	Proposal for a draft Bereavement Benefits (Remedial) Order 2021: discrimination against cohabiting partners	HC 594 HL 91
1st Special Report	The Government response to covid-19: fixed penalty notices: Government Response to the Committee's Fourteenth Report of Session 2019–21	HC 545
2nd Special Report	Care homes: Visiting restrictions during the covid-19 pandemic: Government Response to the Committee's Fifteenth Report of Session 2019–21	HC 553
3rd Special Report	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill: Government Response to the Committee's First Report	HC 585
4th Special Report	The Government response to covid-19: freedom of assembly and the right to protest: Government Response to the Committee's Thirteenth Report of Session 2019–21	HC 586
5th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order): Government Response to the Committee's Second Report	HC 724
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765

Number	Title	Reference
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911

Session 2019–21

Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146 HL 37
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309) HL 72
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335) HL 125
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 HL 154
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120) HL 155
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127) HL 164
11th	Black people, racism and human rights	HC 559 (HC 1210) HL 165
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022 HL 180
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328 HL 252
14th	The Government response to covid-19: fixed penalty notices	HC 1364 HL 272
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375 HL 278
1st Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313

Number	Title	Reference
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317
6th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 4 (Unauthorised Encampments): Government Response to the Committee's Fourth Report	HC 765
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911