



House of Commons

House of Lords

Joint Committee on Human  
Rights

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**Legislative Scrutiny:  
Nationality and Borders Bill  
(Parts 1, 2 and 4) – Asylum,  
Home Office Decision-  
Making, Age Assessments,  
and Deprivation of  
Citizenship Orders**

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## Joint Committee on Human Rights

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## Summary

The UK has been a long-standing champion for the refugee cause. We are party to the 1951 UN Convention Relating to the Status of Refugees (the Refugee Convention). Those seeking asylum in the UK are also given protection by the European Convention on Human Rights (ECHR) (effectively incorporated into UK law by the Human Rights Act 1998) which, for example, prevents a person being removed from the UK to another country where there is a real risk they will suffer torture or inhuman or degrading treatment or punishment. As signatories of the United Nations Convention on the Rights of the Child we are committed to treating the best interests of a child as a primary consideration in any action that affects them. Parts 2 and 4 of the Government's Nationality and Borders Bill make a number of changes to the UK's asylum system which are inconsistent with these rights and international commitments, and as such, they concern us greatly. The new clauses on deprivation of British citizenship likewise fail to meet human rights standards. The Bill should be amended in order to give sufficient protection to human rights.

### Asylum provisions

The Bill will create two separate categories of refugee, based on how a person has come to the UK and presented themselves to the authorities, and allow for each category to be treated differently. This proposal, which would be given effect by Clause 11, is aimed at encouraging asylum seekers to use what the Government has deemed to be "safe and legal routes" and is supposed to be aimed at dissuading people smugglers more than refugees. Being placed in Group 2 would, nevertheless, be likely to amount to a penalty that is prohibited under the Refugee Convention. The Government says that refugees should claim asylum in the first "safe country" they reach. However, we heard evidence that there are simply not sufficient safe and legal routes available to those who seek refuge in this country. We also heard that asylum seekers often have little or no choice over their means of arrival in this country. Furthermore, the principle of differential treatment is fundamentally at odds with the Refugee Convention. The concept that refugees should claim asylum in the first country they reach undermines the very foundations of the international co-operation on which the Refugee Convention, and the rights conferred under it, stands. As such, Clause 11 should be deleted from the Bill.

Clause 15 of the Bill would make an asylum claim inadmissible if, in the view of a decision-maker, there was another safe country with which the individual had a "connection". The threshold for establishing a connection with a safe third state has been set too low and standards against which the safety of a third state is judged are insufficient. The Bill should be amended to ensure that claims would not be inadmissible if the third party state does not meet sufficient human rights standards including those required by the Refugee Convention. Those whose asylum claims have been declared inadmissible cannot be removed unless a return arrangement has been put in place with their destination. Asylum seekers' claims should not needlessly be put on hold when it is inevitable that they will need to be considered in the UK.

Schedule 3 of the Bill would allow for offshore processing of asylum claims. The proposal to 'offshore' asylum claims is inconsistent with the humanitarian and cooperative

principles on which refugee protection is founded. The Bill should be amended to remove the power to remove an asylum seeker from the UK while their claim is pending, unless compliance with human rights standards, including the Refugee Convention, in any future arrangements can be unequivocally guaranteed.

The Government says the Bill aims to ensure that all claims for asylum and humanitarian protection are made promptly and not at the last minute or in numerous separate claims, in a manner that frustrates an efficient processing and removal of the individual concerned. Clause 17 would have the effect of penalising those who provide late evidence to support their claim. However, the Bill fails to guarantee recognition of legitimate reasons for the production of late evidence including missing documentation, a lack of understanding of the asylum system, or an inability of victims of torture or sexual violence to be able to speak about their traumatic experiences so soon after they take place. The Bill should be amended to remove these provisions, or at the least to ensure that penalties do not impact on consideration of the substantive asylum claim. The provisions in clause 19 relating to accelerated appeals processes for those in immigration detention should also be amended to include clear safeguards to restrict their use to appeals that are clearly unfounded and without merit. Without such safeguards, the process poses too great a risk of unfair decisions resulting in exposure to human rights violations.

The Bill should also be amended to remove unnecessary and restrictive interpretations of the Refugee Convention, which risk its protections being denied without justification.

The Bill has been introduced in the context of a large and growing backlog of asylum cases awaiting decision. As of June 2021, there were 125,000 cases in the system. Data from September 2021 shows that of the 67,547 individuals waiting an initial decision on their asylum application, 44,018, or approximately 65%, had been waiting for an initial decision longer than 6 months.<sup>1</sup> Delays can have a significant adverse impact on the wellbeing and mental health of asylum applicants (which is protected by Article 8 ECHR), and whilst awaiting decisions they are generally not permitted to work or begin the family reunification process and cannot access the entitlements guaranteed in the Refugee Convention. There are elements in this Bill, such as the increase in complexity caused by the requirement in Clause 11 to consider if an asylum-seeker “came directly” to the UK, which are likely to cause more delays to the processing of applications. This is whilst the underlying causes of the backlog which include the resources and staff attrition rate, and the high proportion of successful appeals, are left without meaningful action.

## Age assessments

Determining the age of individuals seeking asylum or making an immigration application is crucial to how they are treated: whether they are within the ambit of the Children Act 1989 (and other UK legislation) which may require local authorities to provide support until the individual’s 25th birthday; whether they are provided with access to education or not; whether they are provided with asylum support from the Home Office and dispersed to another part of the UK; where they are accommodated/

<sup>1</sup> UK Visas and Immigration, Immigration Enforcement, Border Force and HM Passport Office, [Migration transparency data](#), accessed December 2021

detained; and how their asylum or immigration application is determined. At present, if the appearance and demeanour of the individual does not “very strongly suggest” that the individual is 25 years or older, s/he will be given the benefit of the doubt and provisionally treated as a child.

Part 4 of the Bill sets out provisions relating to the conducting of age assessments of age-disputed persons. The Bill will allow regulations to be made for the Secretary of State to permit the use of scientific methods for assessing a person’s age. Methods such as x-ray analysis and dental records are widely thought to lack the degree of accuracy required, and to be unethical due to the nature of procedures or the use of ionising radiation. Moreover, although not included in the Bill at present, the Government has indicated that they wish to reduce the threshold for the use of the benefit of the doubt. Taken together these proposals would greatly increase the risk of a child being wrongly assessed to be an adult. This would be at odds with our human rights obligations under the UNCRC and could engage Article 3 of the ECHR if that person is detained as an adult when they are, in fact, a child and experience particularly traumatic consequences.

### **Deprivation of citizenship orders**

The Bill also sets out the requirements of the Secretary of State to give notice of a deprivation of citizenship order. At present, the Secretary of State must give notice of a deprivation of citizenship order without exception. The Bill would amend the law to exempt the Secretary of State from giving notice in five circumstances, including on the grounds of national security, foreign relations, and public interest. The Bill also provides for retrospective effect in order to validate deprivation of citizenship orders which are currently unlawful because the notice provisions were not complied with. Whilst we acknowledge that giving notice of deprivation of citizenship orders will be challenging in some cases, we are concerned that administrative decisions with such severe consequences for individuals will not be communicated to the affected individual. In our view, Clause 9 should be deleted from the Bill. If it is retained, at a minimum, the Secretary of State should be required to take reasonable steps to give notice of deprivation of citizenship orders; that time limits for the right of appeal should only start running from the date of knowledge of the decision; and that the clause should not retrospectively validate any orders which are currently unlawful.

# 1 Introduction

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1. The foundations of the global refugee protection system can be traced to the upheaval caused in the aftermath of World War I, which saw a large number of refugees originating from Russian—later Soviet—territories. In 1933 nine states, including the UK, signed the Convention relating to the International Status of Refugees and undertook to assist Russian and Armenian refugees. The 1933 Convention is regarded as one of the earliest examples of states agreeing to codify human rights as matters of binding international law,<sup>2</sup> and included key principles such as *non-refoulement* (meaning no one can be returned to a country where they face a risk of harm) and entitlement to welfare and education for refugees. These principles would later be mirrored in the 1951 Convention Relating to the Status of Refugees (the Refugee Convention).

2. The United Nations High Commissioner for Refugees (UNHCR), the UN Refugee Agency, has recognised the UK’s “long-standing role as a global champion for the refugee cause”,<sup>3</sup> and the UK Representative to the UNHCR told this Committee that the UK has also been a “champion when it comes to advocating for asylum in other countries.”<sup>4</sup> Various schemes, including the Syrian Resettlement Programme, under which 22,000 Syrians were resettled in the UK, have enhanced the UK’s reputation in this field. The Home Secretary has reaffirmed that the Government “take pride in fulfilling our moral responsibility to support refugees fleeing peril around the world.”<sup>5</sup>

3. Despite the Home Secretary’s stated commitment to supporting refugees, in recent years she has also suggested that the UK’s asylum system is “fundamentally broken”,<sup>6</sup> and “collapsing under the pressures created by...illegal routes to asylum, facilitated by criminal smuggling gangs.”<sup>7</sup> However, Home Office data (set out in the graph below) shows that the number of asylum applications has remained fairly stable for the past 5 years.<sup>8</sup>

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2 James C Hathaway, *The Rights of Refugees*, (Cambridge: Cambridge University Press, 2005), p 23

3 UNHCR, *UNHCR Observations on the Nationality and Borders Bill* (October 2021) para 1

4 [Q10](#) [Rosella Pagliuchi-Lor]

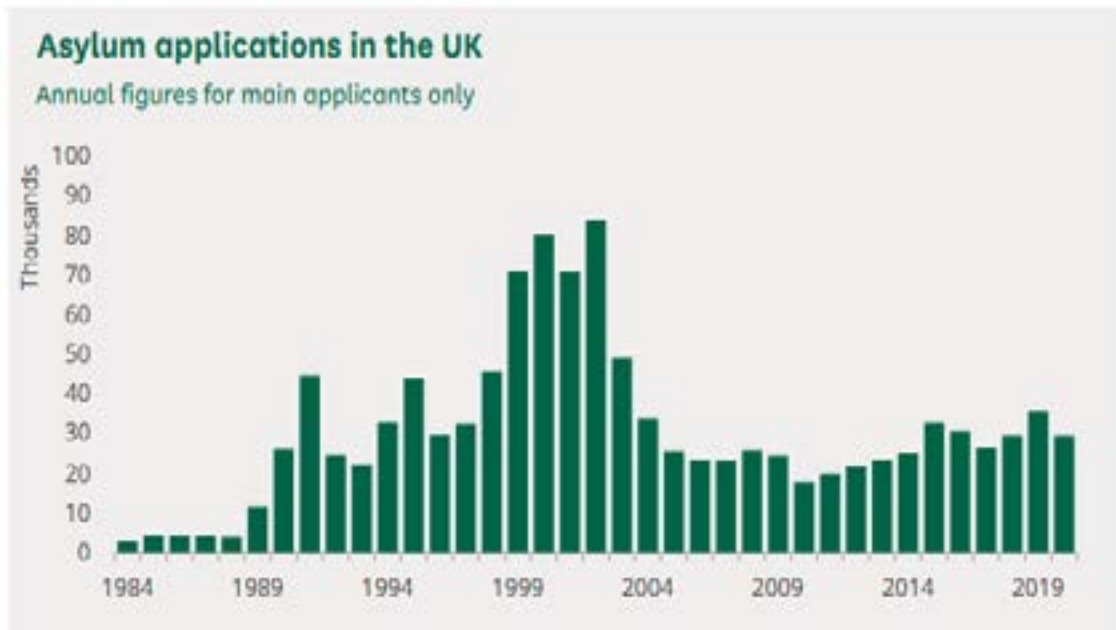
5 HM Government, *New Plan for Immigration: Policy Statement*, March 2021, CP 412

6 [‘Priti Patel pledges to fix ‘broken’ asylum system in UK’](#), BBC, 4 October 2020

7 [Priti Patel, 2021 Speech to Conservative Party Conference](#), (October 2021)

8 Home Office, [‘Asylum and resettlement datasets’](#), accessed December 2021

### Asylum applications in the UK<sup>9</sup>



4. The Government’s *New Plan for Immigration* sets out their vision for “fixing” the UK asylum system and states their ambition to “increase the fairness and efficacy” of the system “to better support those in genuine need of asylum”, “deter illegal entry into the UK” and “remove more easily from the UK those with no right to be here.”<sup>10</sup> The New Plan notes that small boat crossings, and irregular entry more generally, is being “facilitated by serious organised criminals exploiting people and profiting from human misery”. To that end Part 2 of the Nationality and Borders Bill (NBB) introduces extensive reforms to the UK asylum system. Part 4 of the Bill introduces more specific changes to the age assessment procedure to ensure adults cannot claim to be children.<sup>11</sup>

### *The Nationality and Borders Bill*

5. The NBB was introduced to the House of Commons on 6 July 2021 and completed its Commons stages on 8 December 2021. The Bill had its Second Reading in the House of Lords on 5 January 2022.

6. The NBB covers wide-ranging matters. The provisions in the Bill give rise to several human rights considerations and consequently we have already published three reports on different aspects of the Bill.<sup>12</sup> This Report focuses on Part 2 of the Bill, which relates to asylum, Part 4 which relates to age assessments and clause 9 in Part 1 which relates to Deprivation of Citizenship Orders (which was added to the Bill after our previous report on Part 1 had been published).

9 Nationality and Borders Bill, [Number 9275](#), House of Commons Library, July 2021

10 HM Government, [New Plan for Immigration: Consultation on the New Plan for Immigration: Government Response](#), July 2021

11 HM Government, [New Plan for Immigration: Policy Statement](#), March 2021, CP 412, p 22

12 Joint Committee on Human Rights, Seventh Report of Session 2021–22, [Legislative Scrutiny: Nationality and Borders Bill \(Part 1\) - Nationality](#), HC 764, HL Paper 90; Joint Committee on Human Rights, Ninth Report of Session 2021–22, [Legislative Scrutiny: Nationality and Borders Bill \(Part 3\) - Immigration offences and enforcement](#), HC 885, HL Paper 112; Joint Committee on Human Rights, Eleventh Report of Session 2021–22, [Legislative Scrutiny: Nationality and Borders Bill \(Part 5\) - Modern slavery](#), HC 964, HL Paper 135

7. Part 2 of the Bill:

- Introduces a broad power to treat refugees differently, depending on the nature of their arrival in the UK and timeliness of their asylum claim (Clause 11).
- Makes various changes to the rules regarding the type of accommodation provided to asylum seekers and refused asylum seekers who would otherwise be destitute (Clause 12).
- Puts on a statutory footing inadmissibility rules, which require claims from individuals who are EU nationals or have a connection with a safe third state to be rejected (Clauses 14 and 15).
- Introduces evidence notices and Priority Removal Notices (PRNs) which require claimants to submit evidence by specified deadlines. Where an individual fails to comply with the deadline without good reason, decision-makers are required to treat the evidence with less weight and treat late submission as damaging to the credibility of the applicant (Clauses 17 to 25).
- Introduces an accelerated appeals process for detained asylum seekers (Clause 26).
- Removes appeal rights for human rights and protection claims certified as clearly unfounded (Clause 27).
- Amends existing legislation to allow for asylum seekers to be removed from the UK, including while their claims are still pending. This would permit what is known as “offshore processing” (Clause 28 and Schedule 3).
- Instructs decision-makers on interpreting the definition of refugee within the Refugee Convention (Clauses 29 to 37).

8. Part 4 of the Bill:

- Enables local authorities to refer an age-disputed person to a “designated person” (Clause 49).
- Gives the Secretary of State the power to make regulations specifying scientific methods that may be used for the purposes of age assessments (Clause 51).
- Gives the Secretary of State the power to make regulations specifying how age assessments should be conducted (Clause 52).
- Provides a right of appeal to the First-tier Tribunal where an age assessment has been conducted (Clauses 53 and 54).

9. Clause 9 of the Bill puts on a statutory footing the grounds on which the Secretary of State may decide to avoid giving notice to a person subject to a deprivation of citizenship order.

10. In this Report we have used the numbering of provisions in the Bill as introduced in the House of Lords.<sup>13</sup>

## Our Inquiry

11. On 26 July 2021, we published a call for written evidence 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, which received 84 responses. We have also held oral evidence sessions on the Bill. We are grateful to all those who have provided evidence to our inquiry.

## Legal foundations

### *The Refugee Convention*

12. The UK is one of 149 nations that are party to the 1951 UN Convention Relating to the Status of Refugees (hereinafter ‘the Refugee Convention’), by which the international community provides protection to people who can no longer find it in their own country.<sup>14</sup>

13. The Refugee Convention is essentially a human rights instrument. It was drawn up in the aftermath of the Second World War and has its origins in the Universal Declaration of Human Rights 1948, which at Article 14 recognizes the right of persons to seek asylum from persecution in other countries.

14. The Refugee Convention has not been fully incorporated into domestic law but its provisions are binding on the UK as a matter of international law.<sup>15</sup> As a general principle, the UK is under a duty to implement all its international treaty obligations in good faith.<sup>16</sup> This is reflected in Article 26 of the Vienna Convention on the Law of Treaties, itself an international agreement which the UK has ratified. There is no formal international mechanism for individuals to make complaints about violations of the Refugee Convention, however, and neither is there an international body with enforcement powers, although the UNHCR does have a “supervisory function” in relation to the application of the Refugee Convention. We consider the opinion of the UNHCR on the Government’s proposals on asylum to be of significance, not least because the UK has committed, in Article 35 of the Refugee Convention, to “co-operate with the Office of the [UNHCR] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.”

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14 The Refugee Convention defines a refugee as someone who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country’.

15 It is noteworthy that the majority of the detail of the UK immigration and asylum system is set out in the Immigration Rules and [section 2 of the Asylum and Immigration Appeals Act 1993](#) provides that “Nothing in the immigration rules...shall lay down any practice which would be contrary to the Convention.”

16 In the context of the Refugee Convention this includes an obligation to “implement it in a manner which is reasonably efficacious” - see *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008, para 11

### ***European Convention on Human Rights***

15. While it contains no rights that explicitly refer to immigration or asylum,<sup>17</sup> the European Convention on Human Rights (ECHR)—brought into effect in domestic law through the Human Rights Act 1998 (HRA)—provides protections that run alongside those provided by the Refugee Convention. Most relevantly, it is a violation of Article 3 ECHR for a person to be removed from the UK to another country where there is a real risk they will suffer torture or inhuman or degrading treatment or punishment.<sup>18</sup> Likewise, it will violate the right to life to remove a person to face a real risk of being subject to treatment that violates Article 2 ECHR (notably, the death penalty)<sup>19</sup> and Article 4 ECHR would be violated if a person is removed where there is a real risk of slavery or forced labour. In rare situations where an individual may face a “flagrant denial of justice” in a destination country, Articles 5 (right to liberty) or 6 (right to fair trial) of the ECHR may also prohibit their removal.<sup>20</sup> Article 13 ECHR, the right to an effective remedy, guarantees independent and rigorous scrutiny of any claim that there are substantial grounds for fearing a real risk of treatment contrary to Articles 2 or 3.<sup>21</sup>

### ***UN Convention on the Rights of the Child***

16. Various provisions in the NBB touch on the rights of children and engage the rights set out in the UN Convention on the Rights of the Child (CRC). The Convention came into force in the UK in 1992. The CRC sets out the fundamental legal principles for safeguarding the rights of the child. In all actions concerning children, states should be guided by the overarching principles of non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6); and the right of the child to express his or her views in all matters affecting him or her, and to have those views taken into account (Article 12).

17. Although not directly incorporated into domestic law, the principles of the UNCRC guide domestic law and practice and are often referred to by the courts when interpreting obligations imposed by human rights and other legislation. Since November 2008, when the United Kingdom removed a reservation to allow it not to apply the Convention to decisions concerning children and young people subject to immigration control, the Government has accepted that all children, irrespective of their immigration status, must enjoy all the rights and protections of the UNCRC without discrimination, as specified under Article 2 of the Convention.<sup>22</sup>

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17 Protocol No.4 to the Convention does contain a right of free movement and prohibitions on expulsion of nationals and collective expulsion of aliens, but this protocol has never been ratified by the UK – although similar provisions in the International Covenant on Civil and Political Rights (ICCPR) are binding on the UK, such as Articles 12 and 13 ICCPR.

18 *Soering v UK* Application No. 14038/88, 7 July 1989

19 *Al Nashiri v Poland*, Application No. 28761/11, 16 February 2015, § 576. Removal to face the death penalty also engages Article 1 of Protocol 13, the abolition of the death penalty.

20 See *Harkins v. the United Kingdom (dec.)* Application No. 71537/14 [GC], §§ 62–65

21 See *M.S.S. v. Belgium and Greece* [GC], §§ 265–322

22 Joint Committee on Human Rights, First Report of Session 2013–14, [Human Rights of unaccompanied migrant children and young people in the UK](#), HC 196, HL Paper 9

## 2 The asylum system

18. During the course of this inquiry stakeholders, including the Joint Council for the Welfare of Immigrants, the Refugee Council and the Immigration Services Union, have raised various concerns regarding asylum decision-making at the Home Office, including the increasing backlog and the impact on applicants, the quality of decisions, the pressures exerted on staff and the overall working culture at the Home Office. Those stakeholders have also expressed the view that rather than remedy those issues the NBB may exacerbate delays and the complexity of decision-making.

### Asylum decision-making at the Home Office

#### Box 1: How are asylum claims processed?

Asylum claims can be lodged on arrival at a UK port of entry, in-country with a local Immigration, Compliance and Enforcement team, typically when the individual is encountered during an enforcement operation, or at 1 of the 3 asylum intake units located in Croydon, Kent and Bedfordshire.<sup>23</sup> The Asylum Intake Unit in Croydon registers the majority of claims. Claiming asylum at the port of entry means, in practice, informing a Border Force officer of an intention to seek asylum. UK Border Force is responsible for the initial processing of asylum claims at the UK border, and UK Visas and Immigration (UKVI) is responsible for initial processing within the UK and determining whether a person has refugee status.

Source: Asylum Information Database and European Council on Refugees and Exiles, [Short Overview of the Asylum Procedure: United Kingdom \[accessed 5 January 2022\]](#)

### Backlog of cases

19. There is a significant backlog of asylum cases awaiting a decision. As of June 2021, there were 125,000 cases in the system. This was the highest since the series began (in 2011) and over double the size it had been in 2014. There are three primary components of the caseload: people awaiting an initial decision, people who have appealed an initial refusal and are awaiting a decision on this, and people who have been refused asylum and are subject to removal action.

20. The largest category within the caseload is applicants awaiting an initial decision. The most recent statistics show that there were 67,547 people in this category as of September 2021. This is up from up from 6,800 in 2011, 21,475 in Dec 2016 and 40,032 in Dec 2019. The number of refused asylum seekers subject to removal action has been growing since 2014 and consisted of 39,500 people as of June 2020.<sup>24</sup> However, the number of asylum applications has been relatively stable, and actually decreased in each year from 2015 to 2017, and again between 2019 and 2020, while the ‘work in progress’ caseload grew.<sup>25</sup>

23 Independent Chief Inspector of Borders and Immigration, [An inspection of asylum intake and casework April-August 2017](#) (November 2017), para 5.11

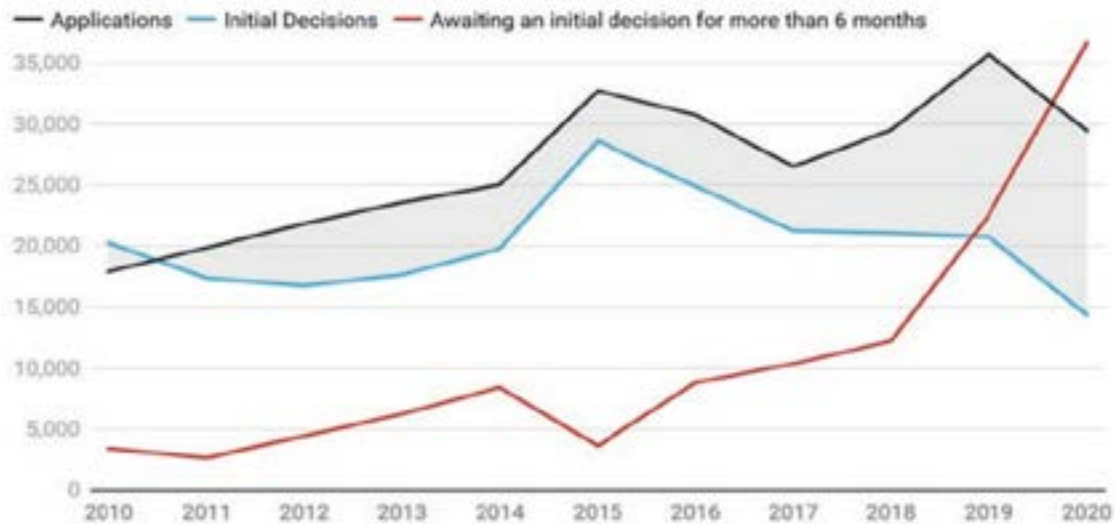
24 Asylum Statistics, Standard Note [SN01403](#), House of Commons Library, September 2021

25 Nationality and Borders Bill, [Number 9275](#), House of Commons Library, July 2021, p 9

### Time taken to make decisions

21. Alongside the increasing backlog, Home Office data shows that asylum applicants are also waiting longer for decisions. Data from September 2021, shows that of the 67,547 individuals waiting an initial decision on their asylum application, 44,018, or approximately 65%, had been waiting for an initial decision longer than six months.<sup>26</sup> In 2010, 4,073 applicants awaiting initial decisions had been waiting longer than 6 months. By 2020 this number had increased to 46, 793.<sup>27</sup> In 2019 the Home Office made the decision to no longer apply the customer service standard, introduced in 2014, that stated 98% of initial decisions on straightforward asylum claims should be made within six months from the date of claim.<sup>28</sup> As of June 2021 there is no published service standard.<sup>29</sup> In June 2021 the Independent Chief Inspector of Borders and Immigration recommended that a service standard should be published “as a matter of urgency”.<sup>30</sup>

22. The Refugee Council have noted that all cases over six months are grouped into one category and therefore the Home Office data “does not provide the complete picture” as to how long people are waiting for initial decisions.<sup>31</sup> Following a Freedom of Information request, the Refugee Council discovered that at the end of December 2020, 70% of people who had been waiting for more than six months for a decision had actually been waiting for more than a year and almost 5% had been waiting for more than three years.<sup>32</sup> The Home Office have confirmed that the average time to decide an asylum case is over a year.<sup>33</sup> The graph below shows how the number of people awaiting an initial decision for longer than six months increased between 2010 and 2020.<sup>34</sup>



- 26 UK Visas and Immigration, Immigration Enforcement, Border Force and HM Passport Office, [Migration transparency data](#), accessed December 2021
- 27 Refugee Council, [Living in Limbo: A decade of delays in the UK asylum system](#) (July 2021)
- 28 Electronic Immigration Network ‘[The Guardian: Home Office scraps six-month service standard for asylum claims](#)’ (15 May 2019)
- 29 Independent Chief Inspector of Borders and Immigration, [An inspection of asylum intake and casework April-August 2017](#) (November 2017), para 5.35.
- 30 Independent Chief Inspector of Borders and Immigration, [An inspection of asylum intake and casework April-August 2017](#) (November 2017)
- 31 Refugee Council, [Living in Limbo: A decade of delays in the UK asylum system](#) (July 2021)
- 32 Refugee Council, [Living in Limbo: A decade of delays in the UK asylum system](#) (July 2021), p 6
- 33 Oral evidence taken before the Home Affairs Committee on 22 September 2021, HC (2021–22) 625, [Q230](#) [Matthew Rycroft CBE]
- 34 Refugee Council, [Living in Limbo: A decade of delays in the UK asylum system](#) (July 2021)

## *Impact of delays on people awaiting decisions*

### **Box 2: Elkhansaa’s account of waiting for an initial decision**

Literally, my whole life is just on hold. I have been here for two years right now and everything is on hold. I have not had any decision yet, and I have been apart from my family and my children. They have grown up. I just feel like I have been left in limbo and this is affecting even my mental well-being. I am trying my best. I survive, but I cannot say that I am having the life that I used to have without family bonding and with the stress, fears and worries that I experience daily. It is a series of challenges every day – Elkhansaa, Oral Evidence: Legislative scrutiny of the Nationality and Borders Bill, Wednesday 8 September 2021.

23. Significant delay in asylum decision-making means that individuals awaiting decisions, some of whom will be found to be refugees, are not entitled to the rights set out in the Refugee Convention, including the right to work, study, claim housing and welfare benefits, and access to free healthcare. Delays may also have a significant impact on the applicant’s family life (as protected by Article 8 ECHR) as they would not be entitled to exercise family reunification rights pending their application being decided.

24. The Refugee Council, who provide frontline and therapeutic services for adults and children, have highlighted some of the adverse impacts on individuals who are awaiting decisions,

Asylum-seekers cannot apply for permission to work until they have been waiting for more than 12 months. Even then they can only apply for those occupations in the “Shortage Occupation List”, which is comprised of highly skilled occupations.

Uncertainty and delay can have specific impacts on vulnerable groups, such as victims of torture whose mental health deteriorates because of uncertainty and women stuck in abusive marriages, who are unable to leave their husbands because they were the principal asylum applicant.

Delay prolongs the separation of families, with family members left behind often living in insecure circumstances, unable to join their loved ones who have no family reunion whilst in the asylum application system.

Social workers have raised concerns about impact on separated children, including the damage to mental and physical health and deterioration in engagement with professionals and education provision.<sup>35</sup>

25. We also heard from Zoe Gardner, Policy and Advocacy Manager at the Joint Council for the Welfare of Immigrants, who highlighted the negative mental health impacts (which is protected by Articles 3 (prohibition of torture and inhuman or degrading treatment) and 8 (right to private and family life) of the ECHR) awaiting a decision can have on asylum seekers. She told us:

We see people come in who are bright, motivated, qualified and desperate for help, and we see them be completely broken down and become just a

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35 Greater Manchester Immigration Aid Unit, [New report: Wasted childhoods - the impact of COVID-19 asylum delays on children](#) (25 March 2021)

shell. Years later, they call us up and ask, “When am I going to hear?” We cannot give them an answer. It is absolutely unacceptable...<sup>36</sup>

26. This evidence demonstrates clearly that it important for asylum-decision making processes to be procedurally fair, efficient and consider the significant impact decisions may have on the rights of applicants.

### ***Reasons for the increasing backlog***

27. Home Office data shows that productivity has gone down in recent years, from a peak of around 18 principal stages (which includes substantive interviews and initial decisions) completed per staff member per month in 2015–16 to an equivalent figure of 7 in 2019–20.<sup>37</sup> The Refugee Council have noted that a decrease in productivity could be caused by staff turnover, but could also be because of a shift to focusing on more complex cases which would take longer to determine.<sup>38</sup>

28. In her evidence to this Committee, Zoe Gardner noted the resource constraints at the Home Office. She told us that:

It has been raised repeatedly, in expert reports from colleagues of mine within the sector of refugee protection, from the Independent Chief Inspector of Borders and Immigration, and from parliamentary committees like yours previously, that there is a lack of resourcing.<sup>39</sup>

29. Whilst there has actually been an increase in the number of asylum casework staff at the Home Office from 409 in 2014–2015 to 597 in 2019–20,<sup>40</sup> there has also been a high level of turnover (attrition rate). Lucy Moreton, Professional Officer at the Immigration Service Union (ISU), told us:

[Retention]... is absolutely horrific within the asylum decision-maker role at the moment...The majority of individuals do not remain beyond 12 months, and almost none of them remain beyond 24.<sup>41</sup>

30. She went on to explain that a high attrition rate has led to a lack of country-specific knowledge amongst caseworkers, which in turn protracts decision-making processes. She told us that it can take years to build up country-specific knowledge that allows for faster decision making. It is conceivable that this loss of expertise is contributing to a decrease in overall productivity.<sup>42</sup>

31. On 22 September 2021, Matthew Rycroft CBE, Permanent Secretary at the Home Office, told the Home Affairs Select Committee that the increased backlog was caused by “a combination of resourcing challenges, systems that have not had enough investment in terms of technology, and decision making...”<sup>43</sup> He went on to say that the Home Office was

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36 [Q20 \[Zoe Gardner\]](#)

37 UK Visas and Immigration, Immigration Enforcement, Border Force and HM Passport Office, [Migration transparency data](#), Immigration & Protection data: Q1 2021, table ASY\_04, accessed December 2021

38 Refugee Council, [Living in Limbo: A decade of delays in the UK asylum system](#) (July 2021)

39 [Q20 \[Zoe Gardner\]](#)

40 UK Visas and Immigration, Immigration Enforcement, Border Force and HM Passport Office, [Migration transparency data](#), Immigration & Protection data: Q1 2021, table ASY\_04, accessed December 2021

41 [Q20 \[Lucy Moreton\]](#)

42 [Q20 \[Lucy Moreton\]](#)

43 Oral evidence taken before the Home Affairs Committee on 22 September 2021, HC (2021–22) 625, [Q214](#) [Matthew Rycroft CBE]

seeking to invest in future technology and automation that would allow future decision makers to have a “greater set of tools at their disposal” but this was a “long term answer” which would not solve the acute issues now.<sup>44</sup>

### ***How could the backlog and delays be reduced?***

32. It is clearly important that the backlog of applications is cleared as soon as possible and asylum seekers are not left waiting years for decisions on their applications. We agree with Lucy Moreton that if the asylum system could process applications within six months this would “lead to the protection not only of the public purse but of the individuals who deserve protection and of the reputation of the UK internationally.”<sup>45</sup>

33. In their report *Living in Limbo: A decade of delays in the UK asylum system*, the Refugee Council have noted that the Home Office has successfully managed to reduce the backlog in the past, most recently in 2015, where an increase in the number of caseworkers appeared to lead to the number of initial decisions exceeding the number of asylum applications.<sup>46</sup> On 22 September 2021, Patricia Hayes, Second Permanent Secretary of the Home Department, told the Home Affairs Select Committee that the Home Office “aim to have 1,000 caseworkers in post by the end of this financial year.”<sup>47</sup> Whilst this commitment is welcome, it is not clear it is sufficient alone to reduce the backlog.

34. In February 2021 the UNHCR recommended some areas where efficiency of asylum decision-making could be improved:

- a) Introduce an effective triaging and prioritization system – this would enable cases to be triaged according to the details recorded through an improved screening process, and allow cases that can be quickly and easily determined to be prioritised. The UNCHR highlighted the Swedish track triaging system, for example, which was used to work through a significant backlog of asylum cases.<sup>48</sup>
- b) Introducing simplified asylum case processing procedures – simplified procedures would use pre-filled caseload specific templates for interviews and decisions that focus on core elements of the claim. It would also mean that where there is an intention to recognise the claim, a decision can be made on the papers alone without an interview.<sup>49</sup>
- c) Frontload the asylum system – improved registration processes would provide information crucial to identifying and referring individuals to appropriate protection interventions. This would require the investment of resources at the point of registration and screening to prevent delays and unnecessary challenges arising further down the line, be it through appeals, fresh asylum claims, human rights challenges or otherwise.<sup>50</sup>

44 Oral evidence taken before the Home Affairs Committee, 22 September 2021, HC (2021–22) 625, [Q233](#) [Matthew Rycroft CBE]

45 [Q20](#) [Lucy Moreton]

46 Refugee Council, *Living in Limbo: A decade of delays in the UK asylum system* (July 2021), p 12

47 Oral evidence taken before the Home Affairs Committee on 22 September 2021, HC (2021–22) 625, [Q236](#) [Matthew Rycroft CBE]

48 UNHCR, [UNHCR’s Guide to Asylum Reform in the United Kingdom](#) (23 February 2021), para 9

49 UNHCR, [UNHCR’s Guide to Asylum Reform in the United Kingdom](#) (23 February 2021), paras 10–17

50 UNHCR, [UNHCR’s Guide to Asylum Reform in the United Kingdom](#) (23 February 2021), paras 26 and 27

35. Home Office data shows that approximately 65% of asylum applicants awaiting initial decisions had been waiting more than six months and that the average time to make an initial decision is now more than a year. This is clearly concerning. Delays can have a significant adverse impact on the wellbeing and mental health of asylum applicants (which is protected by Articles 3 and 8 ECHR), and whilst awaiting decisions they are generally not permitted to work, begin the family reunification process and cannot access the entitlements guaranteed in the Refugee Convention. *To reduce the adverse impacts on individuals awaiting decisions the Home Office should give serious consideration to the UNHCR’s recommendations to introduce a triaging and prioritization system, simplify case processing procedures and frontload the asylum system and make clear how it plans to streamline and shorten the asylum decision-making process.*

36. *We support the Chief Inspector of Borders and Immigration’s recommendation that a new published service standard must be introduced as a matter of urgency. That service standard should set realistic targets which take into account the human rights of applicants and the severe impacts that lengthy waits for decisions can have.*

## Quality of Home Office decision-making

### *Home Office culture*

37. In her *Windrush Lessons Learned Review*, Wendy Williams identified a “culture of disbelief and carelessness” at the Home Office.<sup>51</sup> The term “culture of disbelief” describes the perceived tendency of decision-makers to start from the assumption that asylum applicants are not telling the truth. Wendy Williams’ conclusions have been mirrored by a number of other stakeholders. For example, in their 2020 Report, *Beyond Belief: How the Home Office fails survivors of torture at the asylum interview*, Freedom from Torture noted they “found many examples of caseworkers demonstrating open disbelief or scepticism through the phrasing and pattern of their questions” in interview which “suggests prejudgment of the credibility of the claimant’s account”.<sup>52</sup> This perception of the culture at the Home Office has existed for a significant period of time and was discussed by the Home Affairs Select Committee in their October 2013 report, *Asylum*.<sup>53</sup>

38. In her evidence to us Zoe Gardner stated that:

There is an absolute culture that it would appear comes from the top of the department in the Home Office, both at a ministerial level and in the Civil Service, of this department seeing itself as a gatekeeper. It is trying to catch people out, to prove that people are telling a lie and that they do not need the protection they say they do...<sup>54</sup>

39. She went on to suggest that a degree of independence from the Home Office may improve decision-making, noting that the National Referral Mechanism for trafficking victims has a degree of independence from the Home Office and her view that “decisions

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51 Wendy Williams, [Windrush Lessons Learned Review](#) (March 2020), HC 93, p 7

52 Freedom from Torture, [Beyond Belief: How the Home Office fails survivors of torture at the asylum interview](#) (June 2020), p 24

53 Home Affairs Committee, Seventh Report of Session 2013–2014, [Asylum](#), HC 71

54 [Q21 \[Zoe Gardner\]](#)

coming out of there are generally of a higher quality”.<sup>55</sup> In contrast, Lucy Moreton questioned whether independence from the Home Office would have any impact, as “the political pressures are not felt [by decision-makers] in quite the same way as they are at a more senior level within the Civil Service.”<sup>56</sup>

40. We acknowledge the merits of both views. We also accept that not all asylum applicants will be telling the truth. But to ensure both that decisions are fair and refugees in need of protection do not have their claim rejected, decision-makers must approach decisions with an open mind, not start from an assumption that the applicant is to be disbelieved. Decision-makers must also be insulated from overt political pressure.

### ***Getting it right first time***

41. Although it did not specifically address asylum applications, in her *Windrush Lessons Learned Review*, Wendy Williams recommended that the focus of Home Office decision-making should be respecting the principles of “fairness, rigour and humanity” and “getting the decision right first time”. The Home Office accepted this recommendation, and in response launched a new mandatory training package known as “Face Behind the Case”, which aims to help staff “take a more person-centric approach and to support decision-makers.”<sup>57</sup>

42. Despite the “Face Behind the Case” campaign, Home Office data from June 2021 shows that in the year ending September 2021, 48% of asylum appeals, which are heard by the First-tier Tribunal, Immigration and Asylum Chamber (FTTIAC), were successful.<sup>58</sup> The success rate of appeals has been steadily increasing over the last decade, with success rates up from 28% in 2010.

43. Although it is not clear what is causing the increased proportion of flawed initial decisions, and in turn higher successful appeal rates, the Chief Inspector of Borders and Immigration has highlighted that a focus on targets may have meant that decision-makers didn’t have time to consider “the face behind the case”.<sup>59</sup> This was reiterated by Lucy Moreton who told us:

...pressure is being placed on staff to make decisions, particularly in complicated cases. If you cannot take the time to have a proper think about it, do some proper research and write in a considered and measured way, you cannot do a job that you are proud of.<sup>60</sup>

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55 It is difficult to compare statistics in this area. In July 2021 it was reported that four out of five appeals lodged against decisions made by the National Referral Mechanism were successful, which is a higher success rate than asylum appeals in the data outlined below (see [‘Four out of five rejected trafficking claims were overturned in UK last year’](#), The Guardian, 2 July 2021). However, the Government have stated that in 2020 only 2% of decisions made under the National Referral mechanism were reconsidered. In comparison 61% of asylum initial decisions made between 2017 and 2019 were appealed (see Home Office, [‘How many people do we grant asylum or protection to?’](#), accessed December 2021).

56 [Q18 \[Lucy Moreton\]](#)

57 HM Government, [‘The Response to the Windrush Lessons Learned Review: A Comprehensive Improvement Plan’](#), CP 293, September 2020, para 101

58 [Home Office, Immigration statistics data tables, year ending September 2021: Asylum and resettlement summary tables, year ending September 2021, 25 November 2021](#)

59 Independent Chief Inspector of Borders and Immigration, [An inspection of asylum casework \(August 2020-May 2021\)](#) (November 2021), p2

60 [Q21 \[Lucy Moreton\]](#)

*“Compassion fatigue” amongst decision-makers*

44. In her evidence to us, Zoe Gardner expressed the view that poor quality decision-making may be occurring because Home Office staff “continuously hear these terrible stories” and as “a perfectly ordinary defence mechanism” have begun to “disbelieve them or tell [themselves] that they are exaggerated in some way—she referred to this as “compassion fatigue”. She went on to note the lack of support for staff provided by the Home Office.<sup>61</sup> These concerns were reiterated by Lucy Moreton, who emphasised that staff “need greater support in order to keep that essential element of humanity” in decision-making.<sup>62</sup>

45. **As recommended by Wendy Williams in her Windrush Lessons Learned Review, Home Office decision-making should be based on the principles of “fairness, rigour and humanity”.**

46. *The Home Office must establish why the proportion of initial decisions found to be flawed has been gradually increasing and what they plan to do to improve the quality of asylum decision-making. This plan must include providing adequate support and training to staff who are handling difficult cases on a day-by-day basis and may be suffering from ‘compassion fatigue’. The Home Office should promote a human rights culture where the rights and dignity of asylum applicants is at the heart of decision-making, as opposed to a culture in which staff are treated as and perceive of themselves as ‘gatekeepers’ of the asylum system.*

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61 [Q18 \[Zoe Gardner\]](#)

62 [Q18 \[Lucy Moreton\]](#)

## 3 Differential treatment

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### Differential treatment of recognised refugees

47. The Government’s legislative proposals for reforming the asylum system are set out in Part 2 of the Bill. The first proposal, in clause 11 would permit the Secretary of State or an Immigration Officer to treat persons who have been recognised as refugees (and their family members) differently depending on whether or not they have: (a) “come to the United Kingdom directly from a country or territory where their life or freedom was threatened” and (b) “presented themselves without delay to the authorities.” If they have entered or are present in the UK “unlawfully” (i.e. without leave to enter or remain) they must also be able to “show good cause for their unlawful entry or presence.”

48. The refugees who satisfy these requirements are referred to in the Bill as ‘Group 1 refugees’ and those who do not as ‘Group 2 refugees’. The different ways in which these two groups could be treated is not limited in any way by the Bill. Clause 11 does, however, provide examples of ways in which the two groups might be treated differently, covering: the period of leave to enter or remain they are granted; the requirements they must meet in order to obtain indefinite leave to remain; whether they should be denied any recourse to public funds; and whether family members are entitled to join them. Clause 11 would, therefore, make a significant and unprecedented change in the law, resulting in the UK treating accepted refugees less generously based on the journey they have taken to reach the UK and the timeliness of their asylum claim.

49. The policy paper that preceded the Bill, the Government’s ‘New Plan for Immigration’, gave a more detailed indication of what different treatment may look like, as it proposed that instead of fully fledged refugee status, Group 2 refugees would be granted ‘temporary protection’ for a period of no longer than 30 months “after which individuals [would] be reassessed for return to their country of origin or removal to a safe third country.” Temporary protection status “will not include an automatic right to settle in the UK, family reunion rights will be restricted and there will be no recourse to public funds except in cases of destitution.”<sup>63</sup>

### Different treatment – justifications

#### *Claiming asylum in first safe country*

50. One of the justifications for clause 11 set out in the Explanatory Notes to the Bill, is to discourage ‘forum shopping’ and encourage asylum seekers to claim asylum in the first safe country they reach. Indeed, much of the Government’s rhetoric and policy on asylum is premised on the assumption that “asylum seekers should claim at the earliest opportunity in the first safe country they reach”, which the Government has described as “a long standing principle”.<sup>64</sup>

51. In his evidence to this Committee the Minister, Tom Pursglove, repeatedly asserted that there is no reason for people to travel to the UK from safe countries, such as France.<sup>65</sup>

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63 HM Government, [New Plan for Immigration: Policy Statement](#), March 2021, CP 412

64 See, for example, [Letter from Chris Philp, Minister for Immigration Compliance and the Courts on changes to the Immigration Rules](#), to Yvette Cooper MP, Chair of the Home Affairs Select Committee, 22 December 2020

65 [Q41](#); [Q42](#); [Q47](#)

People fleeing persecution may have many legitimate reasons for wanting to come to the UK, however, such as family ties, speaking the language or feeling an affinity with the UK and its values. Moreover, many asylum-seekers do not have a choice where they end up or how they arrive. We heard from two witnesses, Elkhansaa and Peter, both asylum-seekers, that they had paid people smugglers to come to the UK and had no say in their mode of arrival or their final destination.<sup>66</sup>

### *The UNHCR's view*

52. In stark contrast to the Government's position, the UNHCR has described the assertion that asylum seekers must claim asylum in the first safe country they reach as based on a "misunderstanding".<sup>67</sup> Their response to the Government's 'New Plan' consultation paper stated plainly that:

Whilst international law does not provide an unrestricted right to choose where to apply for asylum, there is no requirement under international law for asylum seekers to seek protection in the first safe country they reach.<sup>68</sup>

53. The UNHCR elaborated in their more recent observations on the Bill itself that "Requiring refugees to claim asylum in the first safe country they reach would undermine the global, humanitarian, and cooperative principles on which the refugee system is founded."<sup>69</sup> And in her oral evidence to us Rossella Pagliuchi-Lor, the UNHCR's UK representative, reasonably pointed out that it was unlikely "any country close to the main countries of origin of refugees would have ever considered signing a convention if that meant that they would assume total and entire responsibility for all the refugees."<sup>70</sup>

### *"Forum shopping"*

54. The Government have also failed to provide any evidence that asylum-seekers are in fact "forum shopping". To the contrary, the Home Office's own study from 2002, which appears to be the most recent available, noted there was little evidence that respondents seeking to come to the UK had a detailed knowledge of UK asylum procedures, benefit entitlements, or the availability of work in the UK. There was even less evidence that the respondents had a comparative knowledge of how these conditions varied between different European destination countries.<sup>71</sup> Given that individuals have little knowledge of the asylum systems of the countries they end up in, it is not clear that differential treatment will actually dissuade individuals from coming to the UK via safe countries.

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66 [Q3 \[Elkhansaa and Peter\]](#)

67 [UNHCR, UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom \(May 2021\)](#)

68 [UNHCR, UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom \(May 2021\)](#)

69 [UNHCR, UNHCR Observations on the Nationality and Borders Bill \(October 2021\)](#), para 4. The observations also note that the UK, along with the rest of the UN General Assembly, recently reaffirmed these principles in the Global Compact on Refugees, 2018.

70 [Q10 \[Rossella Pagliuchi-Lor\]](#)

71 [Home Office Research Study 243, 'Understanding the decision-making of asylum seekers' \(July 2002\)](#)

### ***Promoting lawful methods of entry***

55. Another justification for clause 11 in the Explanatory Notes is that it will promote lawful methods of entry. The Government encourages people in need of protection to come to the UK via organised ‘safe and legal’ routes, essentially through refugee resettlement schemes, rather than making irregular journeys to the UK and then claiming asylum. Resettled people are granted refugee status or another form of humanitarian protection by the UK while abroad and then brought to live in the UK. The UNHCR conducts an initial assessment of individuals in their host state and refers them to the Home Office for resettlement in the UK.<sup>72</sup>

56. The Home Office guidance states that refugees can be resettled in the UK via the UK Resettlement Scheme, the Community Sponsorship Scheme or the Mandate Scheme (although no one has been resettled on this scheme since the beginning of 2020).<sup>73</sup> The Vulnerable Children Resettlement Scheme (VCRS), and the Syrian Vulnerable Person’s Resettlement Scheme (VPRS) came to an end in February 2021 when the Government had fulfilled its commitment to resettle 20,000 people through the VPRS.<sup>74</sup> The Afghan Citizens’ Resettlement Scheme (ACRS), confirmed on 18 August, is not yet open.<sup>75</sup>

57. Some stakeholders have pointed out that it is difficult to access resettlement schemes. In her evidence to us, Madeleine Sumption, Director of the Migration Observatory, told us that “legal routes do not really exist or are not accessible for most people”, that “resettlement is effectively a lottery” and “it is a tiny percentage of refugees who are resettled, less than 1% in a given year.” She went on: “It is not really possible for people to get in that queue and therefore substitute from the illegal to the legal routes...”<sup>76</sup>

58. The Government’s New Plan for Immigration contains a commitment to provide an unspecified number of refugee resettlement places, review support for eligible refugees to come to the UK through the points-based system and consider a new process to enable people in urgent need of protection to travel directly to the UK from their country of origin.<sup>77</sup> Whilst we welcome the commitment to safe and legal routes, we were disappointed that in his evidence to us on 1 December 2021 the Minister was unable to give any us any update or detail on how the Government will fulfil those commitments.

### ***Are ‘safe and legal’ routes sufficient?***

59. Despite the existence of some ‘safe and legal’ routes, there will always be individuals who have to leave their country of origin quickly to escape persecution, and without alerting the authorities who might be the source of persecution. Sometimes the persecuting authorities may have seized their passport – or it may not be possible to request a passport. Normally there will not be any refugee camp to go to. It is only in rare situations, usually hot spots relating to war zones and conflict, that the UNHCR will be present on the ground. Even then, it is understandable that individuals and families

72 [Home Office, UK Refugee Resettlement: Policy Guidance, August 2021](#)

73 [Home Office, ‘Asylum and resettlement datasets: Asylum applications, initial decisions and resettlement’, November 2021](#)

74 [UK Visas and Immigration, ‘Vulnerable Persons and Vulnerable Children’s Resettlement Schemes Factsheet, March 2021’, accessed December 2021](#)

75 [UK immigration routes for Afghan nationals, Number 9307, House of Commons Library, 15 October 2021](#)

76 [Q8 \[Madeleine Sumption\]](#)

77 [HM Government, New Plan for Immigration: Policy Statement, CP 412, March 2021](#)

fleeing conflict or persecution may strive to reach a place where they can start their lives again in safety, rather than waiting for the possibility of being chosen for resettlement. In other cases, there is no body coordinating support for refugees fleeing persecution and allocating individuals to UK resettlement schemes. In her evidence to us, Sonali Naik QC, barrister at Garden Court Chambers, highlighted the inadequacy of resettlement schemes in certain circumstances. She said:

There is no way that a resettlement programme can deal with those who are at immediate risk, and there is no legal route...Even if there are those resettlement schemes, it cannot replace the requirement to immediately offer protection to those who arrive on UK soil territorially. Afghanistan is the case in point.<sup>78</sup>

60. Given this context, the Refugee Convention explicitly envisages that refugees will often have to resort to irregular methods to flee their country of persecution. Article 31(1) specifically prohibits the imposition of “penalties on account of their illegal entry or presence on refugees who, coming directly from a territory where their life or freedom was threatened... enter or are present [in that State] without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry and presence”. Whilst encouraging safe and legal routes is a legitimate goal, the Government should also recognise that individuals not arriving by those routes should not be penalised.

### ***Basing access on need***

61. The Government have also defended clause 11 and other clauses within the Bill on the basis that “access to the UK’s asylum system should be based on need, not the ability to pay people smugglers.”<sup>79</sup> Yet by placing those refugees who come ‘directly’ to the UK in Group 1, and relegating all others to Group 2, clause 11 would favour those who are able to take flights to the UK from their country of origin over those who are forced to flee across land or sea. There is no obvious reason for this distinction being drawn. Both methods may involve the assistance of people smugglers and entry into the UK without legitimate documentation.

### **Compatibility of differentiation policy with international obligations**

62. The Refugee Convention protects the human rights of refugees by prohibiting their removal to face persecution and by providing them with refugee status in the country that has granted them asylum. It does not specify the precise status that should be granted to recognised refugees. Nevertheless, granting a favourable status to those who have come directly to the UK and not through irregular means, and a lesser status to those who have not, runs counter to the understanding underpinning the Refugee Convention. The UNHCR’s position is that it would be “inconsistent with the Refugee Convention and has no basis in international law.”<sup>80</sup>

63. In her evidence to this Committee, Rossella Pagliuchi-Lor told us:

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78 [Q8](#) [Sonali Naik QC]

79 The Rt Hon Priti Patel MP, [Home Secretary’s statement on the New Plan for Immigration](#), Oral statement to Parliament (24 March 2021)

80 UNHCR, [UNHCR Observations on the Nationality and Borders Bill](#) (October 2021), para 9

...this Bill creates a lesser class of refugees, refugees who would not have access to the full menu of rights that the 1951 convention foresees. I am afraid that there is not a “pick and choose” menu that one can decide on. There is in the convention only one refugee definition, which does not touch on the issue of how a person arrived or in which country if that person were to seek asylum, and one set of rights that accrue to a person who has been recognised as a refugee in a given country. There are no other options, and any attempts at curtailing rights is unavoidably in breach of the convention.<sup>81</sup>

### **Article 31 Refugee Convention**

64. Article 31 of the Refugee Convention specifically prohibits penalising persons who enter irregularly.

#### Article 31 - refugees unlawfully in the country of refuge

1. The Contracting States shall 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.

65. While clause 11 would not expressly impose a ‘penalty’, this term has been interpreted as covering administrative disadvantages.<sup>82</sup> The Bill would allow the Secretary of State to grant lesser status to a refugee who entered irregularly and envisages granting inferior leave, denying access to public funds and making family reunion more difficult. The Government’s view is that “nothing in [the] differentiation policy constitutes a penalty”, but we are not sure we agree.<sup>83</sup> Treating one group of refugees in an inferior manner appears likely to amount to a ‘penalty’ under Article 31. Indeed, despite the Government’s stated view, the policy appears to have been carefully drafted to avoid clashing with the restriction on penalties imposed by Article 31. The factors that would be used to distinguish between ‘Group 1’ and ‘Group 2’ refugees in the Bill are very clearly designed to track Article 31: whether or not the asylum-seeker (a) has “come to the United Kingdom directly”; (b) has “presented themselves without delay” and (c) can “show good cause for their unlawful entry or presence.”

66. While this approach does appear intended to ensure that inferior treatment is only imposed on those who do not enjoy the protection of Article 31, and thereby retain compliance with the Refugee Convention, it is far from clear that it succeeds in this regard.

### **Reinterpretation under clause 36**

67. While the Bill seeks to avoid clashing with Article 31 of the Refugee Convention— it also seeks to reinterpret its protections. In clause 36 of the Bill the Government sets out a new binding statutory interpretation of Article 31. This means that whether or not refugees are treated as “coming directly” for the purposes of the differentiation policy in

81 [Q10 \[Rossella Pagliuchi-Lor\]](#)

82 The Supreme Court of Canada, for example, has found that “obstructed or delayed access to the refugee process” amounts to a penalty under Article 31 (B010 v Minister of Citizenship and Immigration (2015) SCC 58)

83 [Letter from Tom Pursglove MP, relating to Part 2 \(Asylum\) and Part 5 \(Modern Slavery\) of the Nationality and Borders Bill](#), dated 25 November 2021

clause 11 will be determined in accordance with clause 36(1):

A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.

68. This interpretation of Article 31 is consistent with the Government's view that all asylum seekers should claim asylum in the first safe country they reach. It would not allow for the penalisation of asylum seekers who pass through *unsafe* states, but it could nevertheless, in practice, exclude from the protection of Article 31 almost any asylum seeker who travels to the UK by means other than air travel from the persecuting state.<sup>84</sup> The UK's immediate neighbours are all states that respect the rule of law and operate asylum systems that purport to comply with the Refugee Convention. It will therefore be very difficult for any asylum seeker who reaches the UK having passed through, for example, France, Ireland, Belgium, the Netherlands, Germany or any Scandinavian country to show that they could not 'reasonably be expected to have sought protection' there and therefore should be entitled to protection from penalisation under Article 31. Such a position is starkly inconsistent with the interpretation of Article 31 preferred by experts assembled by the UNHCR in 2001, who concluded, following analysis of the *travaux préparatoires*, that "the drafters [of the Refugee Convention] only intended that immunity from penalty should not apply to refugees who found asylum, or were settled, temporarily or permanently, in another country."<sup>85</sup>

69. Furthermore, the new test in clause 36 is inconsistent with the well-established interpretation of Article 31 made by the domestic courts in *R (Adimi and others) v CPS and Secretary of State for the Home Department*, when the contention that Article 31 allows the refugee no element of choice as to where he should claim asylum was expressly rejected.<sup>86</sup> Having taken into account the *travaux préparatoires* of the Refugee Convention, conclusions adopted by UNHCR's executive committee, and the analysis of well-respected academics and commentators, the Court of Appeal concluded "that some element of choice is indeed open to refugees as to where they may properly claim asylum [and] that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of [Article 31]..."<sup>87</sup> The Court of Appeal has more recently confirmed that "a

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84 Raza Husain QC, Barrister, Matrix Chambers pointed out that this was particularly unlikely to have been the intention when the Refugee Convention was first drafted in 1951: "If you think about the circumstances in the 1950s with no commercial air travel, it would have meant that any refugee arriving in the UK would have crossed land borders, and we did not think that such a refugee should be seen as a criminal sentenced to a maximum four years' imprisonment, with his claim regarded as inadmissible and the refugee being sent back to France." (Q7)

85 [Summary Conclusions: Article 31 of the 1951 Convention](#) (adopted at the expert roundtable organised by the UNHCR and the Graduate Institute of International Studies, 8–9 Nov 2001), para 10(c)

86 The new test is also inconsistent with the current domestic criminal law defence based on Article 31, which provides protection if a defendant "shows that he could not reasonably *have expected to be given protection under the Refugee Convention* in that other country" (section 31 of the Immigration and Asylum Act 1999). Clause 36(5) of the Bill would therefore amend this defence to apply only where the defendant is able to show that "he could not reasonably *be expected to have sought protection under the Refugee Convention* in that other country".

87 [\[2001\] QB 667](#). This interpretation was not questioned when it was discussed by the House of Lords in the subsequent case of *R v Asfaw* [\[2008\] UKHL 31](#), which considered the test currently applicable in domestic criminal law under the [Immigration and Asylum Act 1999 section 31](#). According to Lord Bingham: "It seems to me that *Adimi* is fully supported by such authority as there is, both before and since, and was rightly decided."

short stopover” in another country on the way to claiming asylum in the UK does not preclude reliance on Article 31 of the Refugee Convention.<sup>88</sup>

70. One further, specific way in which clause 36 seeks to reinterpret Article 31 is to remove its protections from a refugee who commits an offence while leaving the UK for another destination.<sup>89</sup> This would mean that an asylum seeker who is passing through the UK on the way to their destination would be denied the protection of Article 31. This would reverse the conclusion of the House of Lords, then the most senior court in the UK, in *Asfaw* when they held that Article 31 did apply to asylum seekers passing through the UK on their way to Canada.<sup>90</sup>

71. Thus, as a result of the effects of clause 36, the differentiation policy in clause 11 of the Bill will affect individuals who both the UNHCR and the domestic courts have concluded should be protected from being penalised by Article 31 of the Refugee Convention.

### *Illegal entry or presence*

72. The differentiation policy in clause 11 would place into Group 2 any refugee who is unable to “show good cause for their unlawful entry or presence” (even if they have ‘come directly’ to the UK). This might appear to be consistent with Article 31, which does not provide protection to any person who is unable to “show good cause for their illegal entry or presence”. Once again, however, the scope of clause 11 risks extending behind the established protections of Article 31 because of the government’s insistence that asylum seekers should claim asylum in the first safe country they reach. Given this interpretation, there is a risk that anyone who has passed through another state to get to the UK will be considered to not have a good cause for entering the UK without leave. All asylum seekers who have not been lucky enough to get one of the very limited number of places on a refugee resettlement scheme therefore risk being treated as having entered unlawfully without good reason, and thus being placed in Group 2.

**73. There is no requirement under the Refugee Convention for asylum seekers to claim asylum in the first safe country they reach. The Bill should not establish in domestic law an interpretation of Article 31 of the Refugee Convention that explicitly or implicitly says the opposite.**

**74. Clause 36(4) would require an interpretation of Article 31 that removes its protections from a refugee who commits an offence while leaving the UK for another destination. This is inconsistent with an interpretation of the Refugee Convention that accepts asylum seekers are not required to claim asylum in the first safe country they reach. It is also hard to see how the UK benefits from prosecuting individuals who want to leave the UK to claim asylum elsewhere.**

**75. Clause 36 requires amendment to ensure that it does not contradict the protection Article 31 provides to asylum seekers who have passed through other countries on their way to the UK or are passing through the UK on their way to their destination.**

88 [R v Mateta \[2014\] 1 WLR 1516](#), in which it was accepted that “[t]he main touchstones by which exclusion from protection should be judged are the length of the stay in the intermediate country, the reasons for delaying there and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape...”

89 See Clause 36(4)

90 *R v Asfaw* [\[2008\] UKHL 31](#)

### ***Other Refugee Convention protections***

76. The differentiation policy in clause 11 is also hard to reconcile with other guarantees in the Refugee Convention. Article 34, for example, obliges states to “as far as possible facilitate the assimilation and naturalization of refugees”. This obligation applies to refugees regardless of how they have come to be in that state. Under clause 11 the Secretary of State would be able to grant ‘Group 2’ refugees a lesser period of leave to remain, impose more onerous requirements to obtain indefinite leave to remain, place more exacting conditions on their leave to remain (including having no recourse to public funds) and grant lesser rights to family reunion. Each of these differences would introduce greater instability for a recognised refugee, which would impact on their ability to adapt and adjust to living in the UK and become part of UK society. Most obviously, the proposal in the New Plan for Immigration to give a recognised refugee no more than 30 months leave before they are required to go through the process of justifying their continued presence in the UK all over again appears to offer a minimal chance of “assimilation and naturalisation.”

77. Also relevant are Articles 23 and 24 of the Refugee Convention. Article 23 expressly provides that: “Contracting States shall accord refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals”. Article 24 provides similarly in respect of “social security”. Given that Group 2 refugees will have been recognised as refugees they would be ‘lawfully staying’ in the UK and it would be a breach of the Refugee Convention to make them any less eligible for public relief and assistance or social security<sup>91</sup> than a British national. And yet under clause 11, the Secretary of State would be entitled to deny these refugees recourse to public funds that are available to British nationals.

### ***Rights under the ECHR***

78. The differentiation policy would also directly engage human rights guaranteed under the ECHR. The Bill contemplates Group 2 refugees being granted lesser rights to family reunion. The Parliamentary Assembly of the Council of Europe’s Resolution on Family reunification of refugees and migrants in the Council of Europe member States concluded: “Hindrances to the protection of family life are not admissible under Article 8 of the European Convention on Human Rights to deter migrants or refugees and their family members.”<sup>92</sup> The potential restriction on refugee family reunion proposed in the Bill, based simply on the fact that an asylum seeker has entered irregularly, is said to be designed to encourage lawful entry. In the absence of adequate lawful routes of entry this policy is, however, likely to be interpreted as having the effect of “detering migrants or refugees” and therefore found to be incompatible with Article 8 ECHR and in breach of the Human Rights Act. Even if the purpose of the policy is considered legitimate, it is unlikely that the interference with Article 8 that it would cause would be considered to be a necessary and proportionate way of achieving that aim.

79. The differentiation policy also raises serious questions of compatibility with Article 14 ECHR—the prohibition on discrimination in the enjoyment of other Convention rights. The intention of clause 11 is to treat Group 1 and Group 2 refugees differently, and the Government’s ECHR memorandum published with the Bill accepts that “Clause [11] engages Article 8 ECHR as regards the granting leave to family members of refugees (so-

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91 Subject to minor limitations set out in Article 24(b)

92 [Resolution 2243 \(2018\)](#)

called family reunion), and restrictions on recourse to public funds.”<sup>93</sup>

80. Article 14 ECHR will not be breached by a difference in treatment that has a legitimate aim, if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.<sup>94</sup> The justifications given by the Government for the different treatment proposed in clause 11, as outlined above, are likely to be considered legitimate aims, but there is a real risk that the differentiation policy embodied in clause 11 would be considered a disproportionate method for achieving them:

- a) The test applied to exclude refugees from Group 1 is very broad and would sweep up individuals who have sought asylum as envisaged in the Refugee Convention.
- b) As there is no clear evidence that asylum seekers have a detailed knowledge of UK asylum procedures or benefit entitlements, or that they are able to contrast these with the procedures and entitlements in other potential destinations, it is unclear whether altering domestic policy would have the effect the Government intends.
- c) While the proposal in clause 11 seeks to reduce people smuggling it would not punish the smugglers but rather the desperate people relying on them. As noted above, we heard evidence that some refugees who enter the UK without leave do so because they have been brought here by people smugglers and not because they have chosen the UK.<sup>95</sup>
- d) The negative consequences of Group 2 status for each person affected are so significant, and the positive consequences for enforcing immigration law so uncertain, that they are arguably disproportionate to achieving the stated aims. Denying a recognised refugee settled status, family reunion and access to public funds just to dissuade others from travelling to the UK to claim asylum is hard to describe as proportionate.

### ***UN Convention on the Rights of the Child***

81. The Equality Impact Assessment does not specify whether children will be excluded from the differential treatment proposed in clause 11, and in particular the provision of lesser status to Group 2 refugees.<sup>96</sup> The UK has ratified the UN Convention on the Rights of the Child, which prohibits discrimination (Article 2) and requires public authorities to take into account the best interests of the child as a primary consideration (Article 3).<sup>97</sup> According to the UN Committee on the Rights of the Child, the prohibition on discrimination is “fully applicable to every child and his or her parents, regardless of the reason for moving, whether the child is accompanied or unaccompanied, on the move or

93 [ECHR memo](#), para 50. For recognition that these issues fall within the ambit of Article 8 ECHR see, for example, *Stec and Others v. the United Kingdom* (dec.) [GC] (2005) 41 EHRR SE 295, at [54] and specifically *Hode and Abdi v United Kingdom* [2012] ECHR 1871 (at [43]) in which the ECtHR confirmed that “if the domestic legislation in the United Kingdom confers a right to be joined by spouses on certain categories of immigrant, it must do so in a manner which is compliant with Article 14 of the Convention.”

94 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, (1985) 7 EHRR 471, § 72

95 See Oral Evidence, 8 September 2021, [session 1](#) and [session 2](#)

96 [Equality Impact Assessment](#)

97 This latter obligation is reflected in domestic law by section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the Secretary of State to ensure that any functions relating to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.

otherwise settled, documented or undocumented or with any other status”.<sup>98</sup>

**82. We are unable to see how the duty under the UNCRC to act in the best interests of the child and to avoid discrimination can be met if Group 2 refugee children are exposed to reduced status, restrictions on family reunion and restrictions on access to state support.**

## Practical implications

83. The introduction of a ‘two-tier’ asylum system will introduce further complexity to asylum casework. For every asylum determination made by the Home Office, there will also need to be a determination of whether the asylum claimant falls within ‘Group 1’ or ‘Group 2’. This is likely to increase the already growing backlog in asylum cases, as Elizabeth Ruddick, Senior Legal Associate, UNHCR UK explained to us:

[I]f you look at someone who is making a refugee decision now, they are deciding whether this person is a refugee. If the Bill comes into effect, once they have made that decision there is another decision. The person is a refugee, but did they come to the UK directly? Did they claim asylum as soon as reasonably practicable? If they entered unlawfully, is there a good reason for their unlawful presence? You are adding three more decisions on top of the refugee decision in every case where it has been decided someone is a refugee.<sup>99</sup>

84. Furthermore, asylum claimants must, quite properly, be able to appeal against the decision whether they are Group 1 or Group 2, because this is likely to have significant implications for their human rights. This will increase the burden on the tribunal system and ultimately the courts—and result in decisions needing to be reviewed and retaken. Lucy Moreton, Professional Officer at the Immigration Services Union agreed that “[n]othing in the Bill as it stands will achieve [making the asylum system faster]...this will just bog us down in legal challenge after legal challenge, which will go on for decades.”<sup>100</sup>

85. Even more alarmingly, the proposal in the New Plan for Immigration to provide Group 2 refugees with just two and half years of leave will result in their refugee status having to be reconsidered regularly. On each occasion, yet another decision will have to be taken on the individual’s immigration status, once again opening up the potential for appeals.

**86. Clause 11 would allow for individuals who have been recognised as refugees to be given inferior treatment, based on the way in which they came to the UK. We consider this to be inconsistent with the UK’s obligations under the Refugee Convention, which does not require asylum seekers to wait to be selected for resettlement programmes and does not require them to claim asylum in the first safe country they reach. The proposed differential treatment also appears likely to be inconsistent with the right to private and family life under Article 8 ECHR and the prohibition on discrimination under Article 14 ECHR. At a time when there is already an unprecedented backlog of**

98 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, para.21 and 22

99 [Q11](#) [Elizabeth Ruddick]

100 [Q20](#) [Lucy Moreton]

**asylum claims, these changes would make the asylum decision-making process longer, more complicated and open to further appeals.**

87. *Clause 11 should be removed from the Bill.*

### **Asylum accommodation**

88. Another form of different treatment that the Bill would introduce is in respect of the accommodation that would be provided to people awaiting an asylum decision and to those whose claims have been unsuccessful (including where claims have been deemed inadmissible). Under clause 12 the Secretary of State would be able to provide different types of accommodation to asylum seekers depending on the stage that their claim for asylum has reached and/or on their previous compliance with conditions imposed on them. The most obvious different type of accommodation would be in an ‘accommodation centre’, which clause 12 would allow to be used to house any asylum seeker or failed asylum seeker.

89. It is not inevitable that housing some asylum seekers in accommodation centres will result in dehumanisation and distress. We were somewhat worried, however, by the Explanatory Notes’ description of the planned accommodation centres as “basic” and designed “to increase efficiencies within the system and increase compliance.”<sup>101</sup> We have noted with concern the experiences of asylum seekers accommodated at former military barracks, which is the closest the current system has come to providing ‘accommodation centres’.<sup>102</sup> We received evidence on this issue from Bail for Immigration Detainees, who said that:

The use of this type of accommodation, especially when used indefinitely, is profoundly harmful. It amounts to a form of detention, only lacking the meagre safeguards that exist in the immigration detention system. Being housed indefinitely in accommodation centres will deny people the opportunity to integrate into the UK. Children may be forced to grow up in accommodation centres, isolated from the rest of society.<sup>103</sup>

90. Médecins Sans Frontières also addressed the impact of asylum seekers being housed in accommodation centres, based on their experience of working with people accommodated in reception centres on the Greek islands of Chios, Samos and Lesbos. They were concerned about what they see as proposals to “contain people in a prison-like environment, segregated from broader society, which is dangerous, retraumatising, deprives people of their liberty and agency, makes their suffering invisible and crushes hopes they had of building bright and stable futures.”<sup>104</sup>

**91. It is imperative that the Government learns from the poor treatment of asylum seekers housed in former military barracks. *If accommodation centres are to be used to house those awaiting asylum decisions and appeals or awaiting removal from the UK the conditions must ensure that residents are free to come and go, treated with respect, provided with adequate access to healthcare and legal advice and not prevented from mixing with the rest of society.***

101 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN], paras 20 and 158

102 For example, [‘200 Positive Cases at Kent migrant camp Napier Barracks’](#), The Times, 24 February 2021; [‘Home Office urged to stop housing asylum seekers in barracks’](#), The Guardian, 9 December 2021; and the High Court ruling in *R (NB and others) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin)

103 Bail for Immigration Detainees ([NBB0043](#))

104 Médecins Sans Frontières ([NBB0061](#))

## 4 Inadmissibility and offshore processing

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### Inadmissible asylum claims

92. Clause 15 of the Bill would amend the Nationality, Immigration and Asylum Act 2002 to bring into statute changes already made to the immigration rules, which largely came into force on 1 January 2021. These recent changes replace the Dublin III arrangements, an EU-wide agreement that allowed certain asylum seekers who came to the UK from other EU states to be returned without their claims being processed.<sup>105</sup> The changes go further, however, permitting the Home Secretary to declare any asylum claim as ‘inadmissible’ if made by a person who has a ‘connection’ to a ‘safe third State’.

### *Connection to a safe third state*

93. A ‘safe third state’ is one where the asylum claimant’s “life and liberty are not threatened...by reason of their race, religion, nationality, membership of a particular social group or political opinion”. This essentially covers the definition of persecution under the Refugee Convention. A safe third state must also be one from where the claimant will not be sent on in breach of the Refugee Convention or in contravention of their rights under Article 3 ECHR, and where they can apply for refugee status and receive protection if successful.<sup>106</sup>

94. An asylum claimant will be deemed to have a ‘connection’ with a safe third country if they satisfy any one of five conditions, which include where:

- the claimant has already made an asylum claim in that safe third state;
- the claimant has already been present in that state and it would have been ‘reasonable to expect’ them to have made an asylum claim; and also
- it would have been ‘reasonable to expect’ the asylum claimant to have made an asylum claim in a safe third country instead of the UK (even without having been there).<sup>107</sup>

95. The consequence of the asylum claimant’s application being declared inadmissible is that they will be treated like a failed asylum-seeker and can, at least theoretically, be removed from the UK. Significantly, the Bill would allow them to be removed not only to the third state with which they have a ‘connection’ but also to any other safe third state.<sup>108</sup> There is no right of appeal against this decision.

96. A prima facie inadmissible application may still be admitted, however, if the Secretary of State determines that there are exceptional circumstances meaning the claim should be considered. Other bases for considering prima facie inadmissible claims will be set

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105 [Regulation \(EU\) 604/2013](#) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

106 Proposed new section 80B(4) of the Nationality, Immigration and Asylum Act 2002

107 Proposed new section 80C of the Nationality, Immigration and Asylum Act 2002

108 Proposed new section 80B(6) of the Nationality, Immigration and Asylum Act 2002

out in the immigration rules. A Government amendment during Report stage in the House of Commons removed from the Bill the power for the Secretary of State to admit an inadmissible claim where she determines that removal to a safe third country within “a reasonable period of time” is “unlikely” but this power will instead be included in the Immigration Rules.<sup>109</sup> The current policy on the determination of what is a “reasonable period of time” provides that 6 months is a ‘long-stop’ for securing agreement from another country to accepting a person’s return.<sup>110</sup>

### *Human rights implications*

97. Excluding from a country’s responsibility asylum seekers who have passed through other safe countries again relies on the idea that asylum seekers must claim asylum in the first safe country they reach—and raises questions of compatibility with the overall scheme of the Refugee Convention as set out in Chapter 3 above.<sup>111</sup> Nevertheless, the UNHCR does accept that inadmissibility and transfer procedures can be arranged between countries without violating the Refugee Convention. For example, the previous Dublin III arrangements were capable of being operated in a manner that was consistent with the Refugee Convention and the ECHR.<sup>112</sup> However, the UNHCR has made clear that inadmissibility rules will only comply with the Refugee Convention in limited circumstances and with effective safeguards.<sup>113</sup> The UK cannot divest itself of all its obligations under the Refugee Convention simply by declaring an application inadmissible.

### *Connection*

98. Clause 15 focuses on the question of whether or not an individual claiming asylum has a connection with a safe third state. We received written submissions from Migration Watch UK which raised concerns that “the UK may be receiving, via illegal entry, a share of Europe’s unknown but likely high number of failed asylum claimants”.<sup>114</sup> It is not unreasonable to treat as inadmissible a claim from an individual who has already had their claim considered, and accepted or rejected, in another safe country that processes claims in accordance with the Refugee Convention. It might also be considered reasonable to treat a claim as inadmissible where the claimant has previously refrained from seeking international protection when they have had an effective opportunity to do so. Clause 15 goes further, however, because a ‘connection’ with a safe third state can be based on the asylum seeker simply having been in a safe third state when the Home Office considers it would have been ‘reasonable to expect’ them to have made an asylum claim. The Government’s stated position is that asylum seekers should always claim asylum in the first safe country they reach, so the reasonableness of an individual’s decision whether or

109 HC Deb, 7 December 2021, [col 289](#) [Commons Chamber]

110 See Home Office, [Home Office Guidance: Inadmissibility: safe third country cases](#), 31 December 2021: “The agreement by a third country to accept a person’s return must be obtained no later than 6 months from the date the person claimed asylum. If there is no such agreement, the person’s claim must be admitted for substantive consideration.”

111 As Rossella Pagliuchi-Lor commented in her evidence to the Committee: “If this is valid for the UK, it would also be valid for France. It would be valid for France to send people back to the next country, to Germany. But it is also not Germany. Austria? But it is not Austria either. Hungary? Hmm. You keep going back until everybody is essentially back to their own borders.” ([Q12](#))

112 Thus their proposed reintroduction in Clause 14 raises primarily practical rather than principled concerns. These practical concerns are discussed further in paras 107 to 113 below.

113 UNHCR, [UNHCR Observations on the Nationality and Borders Bill](#) (October 2021), paras 78 et seq

114 Migration Watch UK ([NBB0040](#))

not to claim asylum will presumably be tested against this assumption—despite it being inconsistent with international standards and the view of the UNHCR (see Chapter 3 above).

99. Yet this is not the lowest standard against which a person may be judged to have a ‘connection’ with a safe third state. It would be enough for the Home Office to conclude that “in the claimant’s particular circumstances, it would have been reasonable to expect them to have made a relevant claim to the safe third State”. This must be assumed to apply to situations in which the claimant has not been in the country with which they are considered to have a connection. The example given in the Explanatory Notes is “where the person has close family members in a safe third country and there was nothing preventing them making a claim there.”<sup>115</sup> This provision would go beyond rejecting asylum seekers who have travelled through other potential safe countries and extend to the receiving State deciding where an asylum seeker should have made their claim. There is no basis in the Refugee Convention to refuse to consider a claim because the receiving State decides that it would have been more reasonable for the claimant to have claimed elsewhere.

### *Safe third state*

100. The Bill provides protection against the possibility of an asylum seeker being sent to a country where they would face a breach of their rights (or an unacceptable risk of being sent on to face such a breach) through its definition of a “safe third State”. But this definition imposes a “low standard”, as the UNHCR described it.<sup>116</sup> Firstly, it does not specify what standard will be applied or what evidence will be required for the UK authorities to determine that the asylum seeker will not face a threat to their “life and liberty” in the receiving State, or that the receiving State will not send them on to face danger in another State.

101. Furthermore, for a country to be deemed safe the claimant’s “life and liberty” must not be “threatened in that State by reason of their race, religion, nationality, membership of a particular social group or political opinion”. This leaves open the possibility of a state where human rights other than the right to life or the right to liberty (such as the right not to be subjected to inhuman or degrading treatment under Article 3 ECHR) are abused being deemed to be ‘safe’—and indeed states where a claimant’s life and liberty would be at risk but not for one of the specified reasons being deemed to be safe. These reasons obviously mirror the grounds of protection set out in the Refugee Convention, but an asylum claimant should not be refused access to the UK because they have chosen not to remain in a country where their rights were not respected or their life and liberty were at risk for any reason.

102. Thirdly, for a state to be deemed safe, “a person” must be able to “apply to be recognised as a refugee in the receiving State and (if so recognised) receive protection in accordance with the Refugee Convention, in that State.” The Bill does not specify that *the individual concerned* must be able to apply to be recognised as a refugee and neither does it specify any requirements as to the quality of the asylum process in the safe third country. The Grand Chamber of the ECtHR has stated that “it is the duty of the removing State to examine thoroughly the question of whether or not there is a real risk of the asylum seeker

115 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN], para 597

116 UNHCR, [UNHCR Observations on the Nationality and Borders Bill](#) (October 2021)

being denied access, in the receiving third country, to an adequate asylum procedure”.<sup>117</sup> If a person who in fact meets the definition of refugee is unable to show that they do because of an inadequate system, that would undermine any theoretical guarantee of protection and safety from refoulement. As Freedom from Torture state in their written evidence to us:

Nowhere is it stipulated that there is a requirement to consider the adequacy of the refugee status determination procedures in a potential ‘safe third country’... If a refugee is not recognised as such because they are not afforded a proper opportunity to prepare and present their case, or appeal the refusal, then the fact that the country respects the principle of non-refoulement generally will be irrelevant.<sup>118</sup>

103. The Bill also allows for removal of inadmissible claimants to a safe third state other than the state with which they have a connection.<sup>119</sup> This could result in a person being removed from the UK to have their claim considered somewhere else not because there was actually a real connection between them and the removal destination, but simply because the UK chooses to shift the burden to another state. The UNHCR has described this as a “significant and highly problematic departure from international practice and UK caselaw”.<sup>120</sup>

**104. While an inadmissibility regime is not in itself inconsistent with the Refugee Convention and ECHR, there are numerous ways in which the clauses in the Bill do not provide the safeguards necessary to ensure compliance. The threshold for establishing a connection with a safe third state is too low. The standards against which the safety of a third state is judged are insufficient.**

***105. Clause 15 should be amended to ensure that claims cannot be declared inadmissible on the basis of the Home Office’s view that it would have been reasonable to expect the claimant to have claimed elsewhere. The clause also requires amendment to prevent asylum seekers being removed to countries other than the one with which they are considered to have a connection. The definition of safe third country must ensure that the state in question provides effective protection against human rights abuses and access to an effective asylum system that fully complies with the Refugee Convention.***

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117 [Ilias and Ahmed v Hungary](#) (App. No. 47287/16, 21 November 2019)

118 Freedom from Torture ([NBB0041](#))

119 Proposed new section 80B(6) of the Nationality, Immigration and Asylum Act 2002

120 UNHCR, [UNHCR Observations on the Nationality and Borders Bill](#) (October 2021) para 34

## *Practical implications*

106. While declaring an asylum claim inadmissible theoretically allows the Home Office to remove the claimant from the UK, in reality the Home Office requires cooperation from destination countries (whether on a case-by-case basis or through an overarching return agreement) to be able to remove people with inadmissible claims. The precise extent to which post-Brexit bilateral return arrangements are already in place is unclear, but appears to be very limited.<sup>121</sup> Until such arrangements are established more widely, and their terms reviewed, it is not possible to confirm whether or not they have the legal and practical safeguards necessary to comply with requirements under the ECHR and the Refugee Convention.

107. The Home Office has been issuing notices of intent to asylum seekers (indicating that their claim is being assessed as potentially inadmissible) under the Immigration Rules since January 2021. In evidence to us Madeleine Sumption of Migration Observatory informed us that in the first half of 2021 the Government “served around 4,500 notices of intent to asylum applicants” which meant they were served on around 30% of all asylum applicants.<sup>122</sup>

108. It is unclear why so many notices of intent have been issued to individuals where there are no arrangements in place with the relevant third country and where there is, therefore, no realistic prospect of return within a reasonable timescale. This state of affairs means that very few asylum seekers whose applications are found to be inadmissible will actually be removed from the UK.

109. Under the current policy individuals served with a notice of intent will not have their claims admitted until a decision has been taken on admissibility. After that decision individuals who are declared to have inadmissible claims will wait while steps are taken to find a safe third country to which they can be removed. Only after six months will it be accepted that these claims must be processed in the UK. Zoe Gardner explained that JCWI:

...have numerous clients now who belong to the 4,500 people who have been served with inadmissibility notices on arrival in the UK. That means that the Government give themselves six months to find somewhere else—anywhere else—to get rid of them to. All our clients who have so far been served with those notices have, after six months’ delay, now entered into the standard asylum procedure. I understand that five people have been removed. The Government do not have the agreements in place to remove people.<sup>123</sup>

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121 On 6 September 2021, Baroness Williams of Trafford, Minister of State for the Home Department, was asked for an update on the negotiation of bilateral return arrangements with EU states and could confirm only that the government was “in discussion with a number of EU member states and other third countries...and intend to open further talks with others” ([HL Deb, 6 September 2021, cols 600–601](#)). However, in answer to a written question ([UIN 53924](#), tabled on 23 September 2021), Home Office Minister Tom Pursglove stated on 18 October 2021 that “we have several bilateral agreements with key third countries that assist in expediting the return of individuals we consider inadmissible. This includes within the EU and other international partners”. A number of news sources have reported on difficulties in agreeing such return arrangements. For example, the Guardian reported in December 2021 that the European Commissioner for home affairs had said that “EU member states had ‘limited’ appetite for an agreement with the UK to manage asylum seekers and migrants...” ([‘EU has ‘limited’ appetite for post-Brexit migration deal with UK’](#), The Guardian, 20 December 2021).

122 [Q10](#) [Madeleine Sumption]

123 [Q27](#) [Zoe Gardner]

110. The current absence of arrangements with other States for the return of applicants, and the Home Office’s reportedly rigid adherence to the six-month period, only serves to delay timely consideration of a refugee’s asylum application, contrary to the requirements of human rights law and refugee law. As Rossella Pagliuchi-Lor of the UNHCR said to us:

Establishing a system that essentially declares inadmissible everybody who comes this way, without any possibility for a person to be admitted somewhere else—because, of course, since Brexit and with the type of Brexit that has been entered into, the UK is essentially outside any other comparative mechanism on asylum with Europe—will in reality create a massive queue of people who are inadmissible but cannot go anywhere else and eventually will be admitted under the procedure but only after having stayed for months and months in limbo. This will increase the costs, make the management of this asylum system all the more complicated and, of course, impact the individuals in question.<sup>124</sup>

**111. Suspending an asylum claim for 6 months when there is no real prospect of it being considered by another state amounts to an unjustified delay. It does not appear to be consistent with complying with the Refugee Convention ‘in good faith’. It also places the mental and physical health of vulnerable asylum seekers at risk, potentially resulting in violations of Article 8 or even Article 3 ECHR.**

**112. *The Bill should be amended to prohibit any asylum claimant being provided with a notice of intent or assessed as inadmissible unless a return arrangement has already been put in place with the relevant third country.***

## Offshore processing

113. Clause 28 and schedule 3 to the Bill concern the removal of asylum seekers to safe countries. Most significantly, Schedule 3 would remove the current prohibition on removing an asylum seeker from the UK while their claim is pending.<sup>125</sup>

114. Under the proposed change to the law, an asylum seeker could be removed from the UK to another State while their claim is pending as long as they would not face persecution or a breach of their Article 3 ECHR rights, or removal elsewhere in breach of the Refugee Convention or their Convention rights. There will be a rebuttable presumption that certain states, such as EU states, are safe for these purposes.<sup>126</sup>

115. The Explanatory Notes to the Bill make clear that these changes support “the future object of enabling asylum claims to be processed outside the UK and in another country. The purpose of such a model is to manage the UK’s asylum intake and deter irregular migration and clandestine entry to the UK.”<sup>127</sup> While the Home Office has confirmed that it has held “conversations with a number of partners”<sup>128</sup> no concrete plans for offshore processing have yet been made public.<sup>129</sup> In his oral evidence to us on 1 December 2021, the Home Office Minister Tom Pursglove told us that the model the Home Office was

124 [Q10](#) [Rossella Pagliuchi-Lor]

125 See section 77 of the Nationality, Immigration and Asylum Act 2002

126 See new sub-section (2C) to section 77 NIAA 2002, proposed in Schedule 3 of the Nationality and Borders Bill

127 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN]

128 [‘UK plans to process asylum seekers abroad falters’](#), Politics.co.uk, 24 November 2021

129 [‘Migrants to be held in Albania’](#), The Times, 18 November 2021

seeking to proceed with is: “one where individuals would be processed as part of the asylum system of the country that we had an agreement with, rather than people being offshore and processed as part of our asylum system.”<sup>130</sup>

### *Human rights compatibility*

116. The proposal to ‘offshore’ asylum claims is inconsistent with the “global humanitarian and cooperative principles on which refugee protection is founded.” Essentially the UK would be ‘outsourcing’ its Refugee Convention obligations, potentially to less wealthy nations.

117. The UNHCR has been highly critical of efforts to ‘offshore’ asylum processing. They have noted how “offshoring of asylum processing often results in the forced transfer of refugees to other countries with inadequate State asylum systems, treatment standards and resources. It can lead to indefinite ‘ware-housing’ of asylum-seekers in isolated places where they are ‘out of sight and out of mind’, exposing them to serious harm. It may also de-humanise asylum-seekers.”<sup>131</sup>

118. Removing asylum seekers to genuinely safe third countries to have their claims processed would not, however, violate the specific ‘non-refoulement’ provisions of the Refugee Convention, nor would it necessarily violate the ECHR. The UNHCR has confirmed that inter-State transfers of asylum seekers may be lawful if “governed by a formal, legally binding and public agreement which sets out the responsibilities of each State involved, along with the rights and duties of the asylum-seekers affected.” The duty to ensure that the rights of asylum seekers are respected will fall on the transferring State—in this case the UK.

119. Compatibility with the Refugee Convention or ECHR depends on the country proposing offshore processing thoroughly and proactively assessing whether the system of processing in the destination country provided practical and effective protection against refoulement (including return to face a violation of the ECHR). This would include ensuring that procedures for determining refugee status were conducted fairly, efficiently, and with appropriate safeguards. In this regard we were relieved by confirmation from the Minister that the UK “would only ever work with countries with effective asylum systems compliant with international law, including the Refugee Convention and relevant international human rights laws.”<sup>132</sup>

### *Conditions of processing*

120. It would be incompatible with the HRA to remove an asylum-seeker for offshore processing if doing so would result in a real risk of breach of his/her rights under Article 2 (the right to life), Article 3 (the prohibition on torture) or Article 4 (the prohibition on slavery) of the ECHR.<sup>133</sup> Removal to face an egregious breach of Article 5 ECHR, the right to liberty, would also be prohibited. This means that any arrangements for offshore

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130 [Q52](#) [Statewatch]

131 UNHCR, [UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom](#) (May 2021)

132 [Letter from Tom Pursglove MP, relating to Part 2 \(Asylum\) and Part 5 \(Modern Slavery\) of the Nationality and Borders Bill](#), dated 25 November 2021

133 Other human rights treaties which the UK has ratified, such as the UN Convention Against Torture, could also be violated.

processing could only possibly be compliant with the ECHR if the UK ensured before removal that the processing would occur in circumstances that complied with human rights standards (and did not give rise to a real risk of breach).

121. One prominent example of offshore processing is that conducted by Australia from 2001 onwards, where asylum seekers arriving by sea without visas were sent to Papua New Guinea and Nauru to be processed. Australia is not bound by the ECHR and therefore no ruling on the conditions for asylum seekers subject to offshore processing was made by a court like the ECtHR. Nevertheless, the conditions in the centres where asylum seekers were held and the impact on their mental and physical health were heavily criticised by the UN Committee Against Torture in 2014<sup>134</sup> and by many others.<sup>135</sup>

**122. The UK risks doing damage to the shared responsibility that underpins the Refugee Convention if it proceeds with plans for the offshore processing of asylum claims. *The Bill should be amended to remove the power to remove an asylum seeker from the UK while their claim is pending, unless compliance with human rights standards, including the Refugee Convention, in any future arrangements can be unequivocally guaranteed.***

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134 “The Committee is concerned at the State party’s policy of transferring asylum seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing in those centres, such as mandatory detention, including for children, overcrowding, inadequate health care, and even allegations of sexual abuse and ill-treatment. The combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering.” [CAT/C/AUS/CO/4–5](#), December 2014.

135 ([Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the Serious Allegations of Abuse, Self-harm and Neglect of Asylum-seekers in Relation to the Nauru Regional Processing Centre, and any like Allegations in Relation to the Manus Regional Processing Centre Referred to the Senate Legal and Constitutional Affairs Committee, 12 November 2016](#)); in 2018 Médecins Sans Frontières issued a report stating that “the mental health suffering on Nauru is among the worst MSF has ever seen, including in projects providing care for victims of torture” (Médecins Sans Frontières, [Report: Indefinite Despair](#), 2 December 2018); and UN experts in 2019 reported that the conditions in which people were held amounted to cruel, inhuman and degrading treatment ([‘Australia: UN experts urge immediate medical attention to migrants in its offshore facilities’](#), UNHCR, 18/6/19).

## 5 Interpretation of the Refugee Convention

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123. The Refugee Convention protects persons facing persecution against violations of their human rights. The scope of that protection depends on how the Refugee Convention is interpreted. Clauses 29 to 37 of the Bill would dictate how provisions of the Refugee Convention are to be interpreted.<sup>136</sup> The proposals to re-interpret the scope of Article 31 of the Refugee Convention (non-penalisation of refugees) have been discussed in Chapter 3 above. This chapter considers other interpretative clauses that raise human rights concerns.

124. While some of clauses 29 to 37 seek to insert into primary legislation elements of EU law that no longer apply following the UK's withdrawal from the EU, others go further and seek to set out in law the government's interpretation of concepts under international refugee law. Courts are bound to apply statute, therefore by including an interpretation of the Refugee Convention in primary legislation, the Government will prevent the courts reaching their own interpretations and drawing on other sources to do so. This may result in the UK being out of step with internationally accepted interpretations of the Refugee Convention, and thus providing less protection against persecution and human rights abuses.

**125. The Bill includes requirements as to how the Refugee Convention must be interpreted. This risks the UK being out of step with established interpretations of Refugee Convention obligations, reducing the protection against human rights abuses that the Refugee Convention provides.**

### Change to the standard of proof

126. Clause 31 would dictate the method that must be adopted when “any person, court or tribunal” considers whether an asylum applicant has a “well-founded fear” of persecution—the core of the test for refugee status. Most significantly, it makes changes to the applicable standard of proof:

- a) Currently the decision-maker need only be satisfied that there is a reasonable likelihood of persecution (as defined by the Refugee Convention).
- b) Under clause 31 the decision-maker would first determine whether on the balance of probabilities (i.e. is it more likely than not) (a) the applicant “has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion”; and (b) the applicant does in fact fear persecution. Only if the decision-maker decides both positively will he or she then consider whether there is a reasonable likelihood that they would be persecuted if they returned to their country of origin.

127. The change proposed in clause 31, though seemingly minor, would have two significant effects. Firstly, it would make it harder for asylum seekers to establish that they have a characteristic which could cause them to fear persecution and that they do in fact

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<sup>136</sup> This includes Clause 36 on immunity from penalties, which is discussed further above.

fear persecution. Secondly, it would introduce different standards of proof for different elements of the test for persecution.

### ***Increasing the burden on the asylum claimant***

128. The process by which a State identifies refugees is not regulated under the Refugee Convention, so it does not impose any specific standard of proof in asylum claims. Any process that poses an unacceptable risk of genuine refugees being denied asylum, however, or of individuals being returned to face a breach of their Article 2, 3, 4 ECHR rights or a flagrant denial of justice in breach of Article 5 or 6 ECHR, would not be lawful.

129. Many genuine asylum seekers already face significant challenges proving their claims. By definition, they will be fleeing persecution, often from the state itself and, therefore, frequently in no position to secure material evidence of their experiences. The UNHCR has emphasised that, in light of the potentially devastating consequences of an erroneous decision, “asylum claims must be determined through a process that... considers the enormous evidentiary challenges refugees face in proving their asylum claim and applies the 1951 Convention criteria in ‘a spirit of justice and understanding’”.<sup>137</sup>

130. These challenges are reflected in the traditionally ‘low’ standard of proof in asylum claims—only requiring an applicant to establish a ‘reasonable likelihood’ that the applicant falls within the definition of refugee—as set out by the UNHCR:

In general, the applicant’s fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.<sup>138</sup>

131. Consistently with this approach, the Supreme Court has stated in the context of the Refugee Convention that imposing a test of ‘balance of probabilities’ would be inappropriate where “life or liberty may be threatened”.<sup>139</sup> This is consistent with the similar approach taken to claims that removal would violate Article 3 ECHR, in which the claimant need establish only a ‘real risk’ of violation, not prove their claim on the balance of probabilities.<sup>140</sup>

### ***Damaging the decision-making process***

132. Domestic courts have already considered and rejected the approach, now proposed in the Bill, of breaking down the test for establishing persecution into constituent parts

137 UNHCR, [UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom](#) (May 2021) and UNHCR, [Handbook on Refugee Status Determination \(n 89\)](#), paras 202 and 196.

138 [UNHCR Handbook](#), 196–197, which adds: “It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof...Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.” (emphasis added) See also The UN High Commissioner’s [Note on Burden and Standard of Proof in Refugee Claims](#), 16 December 1998, paras 11–12, which explain that the applicant need only make a “credible” case.

139 *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 at [91]

140 Settled law since [Soering v UK \(1989\) 11 EHRR 439](#). The Government are not able to legislate away this approach to Article 3 without violating the ECHR and being brought before the European Court of Human Rights.

and applying discrete standards to each one. Such an approach was described by the High Court as “unhelpful and potentially misleading”, while treating it as a single question that should be looked at in the round was said to “clearly accord both with paragraph 51 of the UNHCR Handbook and with the spirit of the Convention.”<sup>141</sup>

133. In her evidence to the Committee, Zoe Gardner explained why the proposed split standard of proof is likely to cause problems in practice:

For example, a Tamil asylum seeker will have to prove that there is a reasonable likelihood that they were detained by the Sri Lankan state, but they will have to prove on the balance of probabilities that they were detained as a member of the LTTE. A gay asylum seeker fleeing homophobic violence will have to prove that there is a reasonable likelihood that they were beaten, but they will have to prove on the balance of probabilities that they were beaten because they were gay. That is absurd. It will complicate the system and make it far more difficult for people who are genuinely fleeing persecution to obtain the protection that they need. This Bill will make the quality of decision-making go down for sure.<sup>142</sup>

134. We have already raised concerns about a culture within the Home Office in which staff are treated as and perceive of themselves as “gatekeepers” of the asylum system.<sup>143</sup> Written evidence from Freedom from Torture suggests that the proposal in clause 31 “elevates the culture of disbelief to a statutory footing”.<sup>144</sup> We agree there is a risk that increasing the standard to which an asylum seeker must prove their claim will encourage suspicion and scepticism by decision makers. This could result in more people with justified fears of persecution being wrongly removed from the UK.

**135. The introduction of a split and raised standard of proof for establishing a well-founded fear of persecution runs contrary to well-established interpretation of the Refugee Convention and creates unnecessary additional complexity in asylum decision-making. In light of the difficulties that genuine asylum seekers already face proving their claims, it would increase the risk of individuals being wrongly refused asylum and removed to face violations of fundamental human rights. It is important that a legitimate desire to ensure that refugee status is not given to individuals who do not meet the definition of refugee does not support a ‘culture of disbelief’ that puts genuine refugees at risk.**

*136. Clause 31 should be amended to confirm that the standard of proof for establishing a well-founded fear of persecution remains a composite standard of ‘reasonable likelihood’.*

## Meaning of serious crime for Article 33(2)

137. Unlike the ECHR, which prohibits the removal of anyone to face a real risk of Article 3 treatment regardless of their status, the Refugee Convention does allow for exceptions to the principle that a person will not be returned to face persecution under Article 33 (‘non-refoulement’). Article 33(2) of the Refugee Convention provides that the non-refoulement

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141 *R (Rajendrakumar) v Secretary of State for the Home Department* [1996] Imm AR 97 at 109

142 [Q23](#) [Zoe Gardner]

143 See Chapter 2

144 Freedom from Torture ([NBB0041](#)) para 77

obligation does not apply if *inter alia* 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.<sup>145</sup> What amounts to a “particularly serious crime” or a “danger to the community” is not specified in the Refugee Convention.

### **Effect of clause 37**

138. Clause 37 of the Bill would amend existing domestic law which provides for when an asylum seeker or refugee will fulfil this exception in Article 33(2). Clause 37 would both:

- a) Reduce the length of imprisonment that renders an offence a ‘particularly serious crime’ from 2 years to 12 months; and
- b) Clarify that being sentenced for such an offence definitely means you have been “convicted by a final judgment of a particularly serious crime” (effectively overruling the Court of Appeal in *EN (Serbia)* in which it was established that there was only a presumption that can be rebutted on this point).<sup>146</sup>  
Compatibility with international obligations

139. The prohibition on refoulement is the central protection provided to refugees under the Refugee Convention. Article 33(2) provides an exception to that protection that the UNHCR states “like all exceptions to protections under international human rights treaties...must be interpreted and applied restrictively.”<sup>147</sup> A narrow interpretation and application of the Article 33(2) exception is consistent with its purpose, explained by the UNCHR to be “to protect the safety of the country of refuge” which “hinges on the assessment that the refugee in question poses a major actual or future threat.”<sup>148</sup>

140. A previous report from the Joint Committee on Human Rights considered the scope of Article 33(2) and noted that “[w]here a refugee who has already been recognised as such commits a serious non-political crime in the country of refuge, this should be dealt with through the ordinary criminal law process of that country; it is only in the case of “particularly grave crimes” that Article 33(2) applies” before concluding that: “Article 33(2) should be given a restrictive interpretation, not an interpretation which expands their scope and correspondingly weakens the principle itself.”<sup>149</sup>

141. The UNHCR has been clear in its view that the 12-month threshold proposed in the Bill “would include a wide range of offences that seem incompatible with the definition of ‘particularly serious.’”<sup>150</sup> Numerous submissions we received from stakeholders took

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145 Although they would not lose the other protections of the Refugee Convention, or, where applicable, the protections of the ECHR.

146 See footnote 149

147 UNHCR, [UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom](#) (May 2021) para 22

148 UNHCR, [Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees](#) (4 September 2003)

149 Joint Committee on Human Rights, Twenty-second Report, Session 2003–04, [The Nationality, Immigration and Asylum Act 2002 \(Specification of Particularly Serious Crimes\) Order 2004](#), HC 1212, HL Paper 190, paras 26 and 28

150 UNHCR, [UNHCR Observations on the Nationality and Borders Bill](#) (October 2021), para 179

the same view. Bail for Immigration Detainees told us that it was “irrational and grossly disproportionate to create a blanket assertion that every crime accruing a 12-month sentence is a ‘particularly serious crime’”.<sup>151</sup> The Law Society of England and Wales said:

Crimes carrying sentences of 12 months imprisonment vary and include a range of non-violent offences. This is therefore a very low threshold and would encapsulate offences that cannot reasonably be said to be particularly serious. The risk of removing an individual’s refugee protection on this basis and returning them to a country where they face persecution would be disproportionate. This risk is increased through the proposal to also make this non-rebuttable, as there can be no discretion for determining whether in an individual case the refugee has in fact committed a particularly serious crime.<sup>152</sup>

**142. Despite the presumption that a person who has committed such a crime amounts to a ‘danger to the community’ remaining rebuttable, the proposal to lower the threshold for what constitutes a ‘particularly serious crime’ to any offence receiving a 12-month sentence would not be consistent with the language of Article 33(2) or with the humanitarian purpose of the Refugee Convention. The combination of the new threshold with provisions expressly denying an individual the opportunity to prove that he has not committed a ‘particularly serious’ offence would ‘expand the scope’ of Article 33(2) and ‘correspondingly weaken the principle of non-refoulement itself’. *The Bill requires amendment to remove the lowering of this threshold.***

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151 Bail for Immigration Detainees ([NBB0043](#))

152 The Law Society of England and Wales ([NBB0068](#))

## 6 Procedural changes

143. As discussed in Chapter 2 the asylum system is suffering from an unprecedented backlog. The Bill includes provisions which would make changes to the way in which asylum claims are processed. They have been presented as an attempt by the government to ensure that all claims for asylum and humanitarian protection are made promptly and not at the last minute or in numerous separate claims, in a manner that frustrates an efficient processing and removal of the individual concerned.

144. We recognise that timely processing of asylum claims is important for asylum claimants and the government alike. However, we do not accept that procedural changes designed to speed up processing can be justified if they would result in flawed decision-making and ultimately people being returned to face torture or death. A flawed or unfair decision-making process will also violate the Article 13 ECHR guarantee of independent and rigorous scrutiny of any claim that there are substantial grounds for fearing a real risk of treatment contrary to Articles 2 or 3.<sup>153</sup> We also note that while applications that are submitted in a piecemeal fashion; applications that are delayed without justification; and appeals that are groundless can undoubtedly slow down the asylum decision-making process, these were not the key issues identified to us as causing the huge backlog in asylum claims (see further Chapter 3 above).

### Evidence Notices and Priority Removal Notices

145. Clause 17 would provide the Home Office with the power to give asylum seekers an ‘evidence notice’ (‘EN’) which requires the recipient to provide all the evidence in support of their claim (both for asylum and any claim that removal would violate their ECHR rights) before a specified date. This would extend the existing duty on claimants served with a ‘one-stop notice’ “to provide a statement setting out the reasons and grounds in support of that claim” so that it also covers providing all evidence in support of a claim.<sup>154</sup>

146. Clause 19 introduces the ‘priority removal notice’ (‘PRN’), which can be given to someone who is liable to immigration removal or deportation and requires them to provide the reasons and grounds for their claim that they should be permitted to stay, plus any evidence they have to support that claim, before a specified date. According to the Explanatory Notes, PRNs are intended to “reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action.”<sup>155</sup>

147. Key consequences of failing to comply with the deadline imposed by either notice without ‘good reason’ are:

- a) that the decision maker<sup>156</sup> will be obliged to “take account, as damaging [to] credibility” the fact that the relevant material was provided late;<sup>157</sup> and

153 See, for example, [M.S.S. v Belgium and Greece](#) [GC]

154 See sections 120(1)(a) and 120(2) of the Nationality, Immigration and Asylum Act 2002

155 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN], para 220

156 For an EN, the obligation to take into account lateness as damaging to credibility applies to both the immigration official considering the application and also to any tribunal establishing the facts on appeal. For a PRN, the obligation to take into account lateness as damaging to credibility applies only to the immigration official considering the application or “a person who is a competent authority of the United Kingdom for the purposes of the Trafficking Convention”.

157 See Clause 17 and Clause 20.

- b) that the decision maker “must, in considering [any evidence provided late], have regard to the principle that minimum weight should be given to the evidence.”<sup>158</sup>

148. A third consequence, applicable only to individuals who have received a PRN and failed to comply with the deadline imposed, had their claim rejected and have a right to appeal, is that their appeal will be expedited and heard by the Upper Tribunal (from which there is no onward appeal to the Court of Appeal) rather than the First-tier Tribunal. This removes a level of appeal which would normally be available.

### ***Legitimate reasons for delayed evidence***

149. Imposing tight deadlines on asylum claims is not expressly prohibited in any domestic or international law. However, it inevitably risks preventing those claims being prepared as carefully, and supported with enough effective evidence, as possible.<sup>159</sup> This was emphasised in the oral evidence we heard from Zoe Gardner:

The reason why evidence may be submitted late is documented in extensive scientific evidence. One of the key reasons is that people who have experienced trauma, particularly trauma such as that resulting from sexual violence, experience post-traumatic stress disorder. One of the many symptoms of that is avoidance. Memories made at times of extreme trauma in your life are stored differently in your brain, and it is very difficult to recollect and reproduce them in a chronological and consistent way. In particular, this goes to women and sexual minorities who have experienced the type of violence that brings about feelings of shame... The people who are coming here to seek asylum do not understand the process by which their claim is being assessed, and they do not know that they have to provide these pieces of evidence. Women who have been victims of FGM, domestic violence or sexual violence do not know that that can be part of their asylum claim. They may find it extremely difficult to explain and give an account of those experiences in detail, particularly when interviewers may be men, interpreters may be men. There are a huge number of very clearly scientifically documented reasons why people do not always provide all the evidence up front straightaway.<sup>160</sup>

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158 For both an EN and a PRN, the obligation “to have regard to the principle that minimum weight should be given to the evidence” applies to both the immigration official considering the application and also to any tribunal establishing the facts on appeal.

159 The UNHCR has noted in respect of delayed claims “the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances vary enormously from one asylum-seeker to another.” See the ‘Revised guidelines on applicable criteria and standards relating to the detention of asylum-seekers’ (26 February 1999), para 4.

160 [Q25](#) [Zoe Gardner]

150. Freedom from Torture noted that failings in the asylum process such as a poor quality interview or difficulty accessing quality legal advice may also contribute to delays in producing evidence.<sup>161</sup> Migrant and Refugee Children’s Legal Unit emphasised that children who are seeking asylum may face particular difficulties in providing prompt evidence,<sup>162</sup> while Rainbow Migration added that the proposed introduction of ENs and PRNs would “disproportionately affect LGBTQI+ people”.<sup>163</sup>

151. The proposals would not penalise individuals who are able to provide ‘good reasons’ for their failure to meet the deadline imposed on them. Many of the difficulties identified to us could amount to ‘good reason’ for delay, but without any clarification over what this term will and will not cover its scope remains uncertain and thus provides insufficient reassurance.<sup>164</sup> Furthermore, many of the factors that might prevent a person presenting their claim and/or supporting evidence, such as ignorance of asylum processes, trauma or shame, could also inhibit their ability to explain why they have not been able to meet the deadline imposed.

**152. It is crucial that decision-makers recognise the many legitimate reasons why asylum seekers may struggle to prove evidence in support of their claims within tight deadlines.**

153. We do, however, welcome the proposal to guarantee that those who receive a PRN also receive up to seven hours of additional publicly funded legal assistance. This can cover assistance regarding the lawfulness of the PRN; the individual’s immigration status; the lawfulness of the individual’s removal from the UK; and their immigration detention. This is obviously an important safeguard to ensure that asylum seekers’ claims are not processed without them receiving legal support. Simply providing funding for legal advice does not, however, guarantee that an asylum seeker will know how to, and be able to, access quality legal advice, particularly within a compact time frame. Numerous stakeholders commented that good legal advice is very hard to obtain. Bail for Immigration Detainees reminded us that “cuts to legal aid brought about in 2013...[have] had a devastating impact on the immigration legal aid market.”

**154. We welcome the proposal to provide additional legal aid to persons in receipt of priority removal notices. The Government must ensure, however, that there are sufficient qualified immigration practitioners with legal aid contracts available to**

161 Freedom from Torture ([NBB0041](#))

162 Migrant and Refugee Children’s Legal Unit ([NBB0051](#)): “Processes requiring children to raise all protection-related issues ‘upfront’ fly in the face of any understanding of the human experience of trauma, abuse and child development. Evolving levels of maturity will affect a child’s capacity to provide a clear, chronological, coherent and consistent account of what happened; they are often too afraid and mistrusting to disclose their experience immediately and it is common for abusers to coach them with a story to tell authorities.”

163 Rainbow Migration ([NBB0066](#)): “The reasons for this are twofold. The first is that as stated above, many people are unaware that they are able to claim asylum based on their sexual orientation, and so may claim well after their arrival in the UK for that reason, and often only once their existing leave is due to expire...The second reason is the well-recognised difficulty that many LGBTQI+ people have in disclosing their experiences. UNHCR have expressly stated this in their Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity...”

164 Rainbow Migration ([NBB0066](#)) reported that the Home Office have in the past not accepted as good reason for delay “a lack of knowledge that it was possible to claim asylum on the grounds of sexual orientation”, because the claimant was well educated and had research skills, and had used the internet to find partners.” They also reported that “[t]he Home Office rejected another person’s explanation that the reason they delayed claiming asylum was because it had taken time to accept his sexual orientation.” See further Rainbow Migration, ‘[Still Falling Short: The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity](#)’ (July 2018) page 21.

**provide this additional support.**

### ***Credibility and weight given to evidence***

155. The potential for delay in the provision of evidence to impact on the claimant’s credibility and on the weight given to the evidence provided could convert a procedural error, i.e. missing a deadline, into damage to the substantive asylum claim.

156. The law already provides for other procedural matters to be taken into account as damaging to credibility.<sup>165</sup> The Bill would add further matters that must be taken into account to the existing list. There is, of course, a possibility that delay in submitting a claim or supporting evidence is indicative of dishonesty or unreliability that reasonably undermines an asylum seeker’s credibility. It is also notable that under the proposal in the Bill the decision-maker is not expressly required to disbelieve the asylum seeker who fails to comply with a notice. Nevertheless, the obligation on the decision-maker to “take account as damaging to credibility” provides a clear indication to decision makers in asylum applications that the credibility of the applicant will always be damaged by their failure to provide material by the deadline set.

157. The courts have recognised that such an approach risks pre-judging the issue and undermining the obligation to carry out “a global assessment of credibility”. They have therefore held that the existing law needs to be interpreted so that the phrase “as damaging the claimant’s credibility” is read as “as potentially damaging the claimant’s credibility” or “when assessing any damage to the claimant’s credibility.”<sup>166</sup> It would be helpful for this interpretation to be made clear on the face of the statute.

**158. It is important that Home Office decision-makers and tribunals are free to carry out global assessments of credibility.**

159. Clause 25 of the Bill would introduce a new obligation ‘to have regard to the principle’ that evidence raised late should be given minimal weight. Like the proposals on credibility, this clause could interfere with effective and independent decision-making, but unlike the proposals on credibility it does not benefit from an interpretation from the courts to ensure that this does not happen.

160. The risk is enhanced by the way in which the obligation under clause 23 is expressed: when evidence is late “the deciding authority must, in considering it, have regard to the principle that minimal weight should be given to the evidence”. The most straightforward way for a decision maker to deal with this confusing obligation would simply be to apply minimal weight to the evidence, which may be entirely wrong in the circumstances—most obviously where the evidence is late but nevertheless compelling. As Freedom of Torture noted: “[t]his could include independent expert medical evidence—such as a medico-legal report—that often proves determinative in asylum appeals involving our clients.”<sup>167</sup>

161. The Northern Ireland Human Rights Commission explained to us their concerns over the effects of this clause:

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165 [Section 8 of the Asylum and Immigration \(Treatment of Claimants, etc\) Act 2004](#), which applies to a failure to make an asylum or human rights claim before being notified of an immigration decision or being arrested on immigration grounds.

166 [JT \(Cameroon\) v SSHD \[2008\] EWCA Civ 878](#)

167 [Freedom from Torture \(NBB0041\)](#)

[T]he application of a ‘minimal weight’ principle undermines the long-established principle that, cognisant of their inherent vulnerability, refugees and asylum seekers should receive the benefit of the doubt in their applications, which invariably includes the production of evidence whether it be testimonial, documentary or otherwise.<sup>168</sup>

**162. The combined effect of the provisions on credibility and weight, which emphasise procedural failure as damaging to the substantive asylum claim, is to increase the risk that genuine refugees will be denied asylum because they were wrongly disbelieved, or their evidence wrongly given minimal weight. This would expose people to persecution and human rights abuses.**

*163. The Bill should be amended to remove the provisions that emphasise damage to credibility and weight of evidence as a result of delay. If the Government is intent on penalising late submission of evidence, it should only introduce penalties that do not impact on consideration of the substantive asylum claim. At the very least, the Bill must be amended to clarify that a failure to meet a deadline ‘may’ be damaging to the applicant’s credibility or to the weight given to evidence, rather than that it must.*

## Accelerated detained appeals

164. In 2003 the Government introduced a ‘detained fast track’ (DFT) process. This process applied to asylum seekers who were held in immigration detention and whose claims it was thought, after the initial screening interview, could be decided quickly. The asylum interview would be conducted in detention, legal advice would be provided from a limited pool of lawyers with a contract to do DFT work and appeals would be conducted within a very tight time frame (approx. 7 working days) in a building adjoining the detention centre. In the case of *R (Detention Action) v First Tier Tribunal* the Court of Appeal found that inherent systemic or structural unfairness in the DFT system rendered it unlawful.<sup>169</sup> The Court of Appeal described the DFT timetable as “so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases”. It held that the DFT policy neither properly appreciated “the problems faced by legal representatives of obtaining instructions from individuals who are in detention”, nor did it “adequately take into account of the complexity and difficulty of many asylum appeals [and] the gravity of the issues that are raised by them”. The Master of the Rolls emphasised that “Speed and efficiency do not trump justice and fairness. Justice and fairness are paramount”.<sup>170</sup> The policy has been suspended since 2015.

165. Clause 26 of the Bill would introduce a statutory ‘accelerated detained appeals’ process, which is effectively a revised form of the DFT. This new process is designed to speed up decision making for detained asylum seekers, so that they can be removed from the UK, or released from detention, as soon as possible. The new system will give

168 Northern Ireland Human Rights Commission ([NBB0067](#)). This echoes the UNHCR response to the Government’s ‘New Plan’: “A rule prescribing that particular evidence should be given minimal weight would run counter to fundamental principles governing the assessment of evidence, including that “everything capable of having a bearing has to be given the weight, great or little, due to it”, and that evidence must be approached objectively, with an open mind, and assessed in the round, rather than in isolation. Moreover, the effect of delay on the weight of “late” evidence will necessarily vary depending on the nature of that evidence.”

169 [\[2015\] EWCA Civ 840](#), upholding the High Court ruling in *R (Detention Action) v First Tier Tribunal* [\[2015\] EWHC 1689 \(Admin\)](#)

170 *R (Detention Action) v First Tier Tribunal* [\[2015\] EWCA Civ 840](#), para 22

the asylum seeker just 5 working days from the decision on their asylum claim in which to lodge their appeal. The Tribunal must then make a decision on the appeal within 25 working days. Any application for permission to appeal to the Upper Tribunal must be determined within 20 working days of the tribunal’s decision. On the face of the Bill, the eligibility criteria for the accelerated detained appeals process are only that the appellant concerned is in detention and that in the opinion of the Secretary of State the appeal ‘would be likely to be disposed of expeditiously’.

166. It is noteworthy that the Government has previously proposed changes to tribunal rules that would effectively reintroduce a DFT process. These proposals were rejected by the independent Tribunals Procedure Committee on the basis that they “would not lead to the results sought by the Government. If a set of rules were devised so as to operate fairly, they would not lead to the increased speed and certainty desired.”<sup>171</sup> The Tribunals Procedure Committee also noted that (a) introducing a ‘fast track’ system would result in delays to those claims that fall outside the fast track and (b) current powers to accelerate cases involving detained claimants mean that they could already be dealt with quickly.<sup>172</sup> Clause 26 would, therefore, appear to impose on the Tribunals Procedure Committee a process that they have previously considered and rejected.

**167. If asylum seekers are to be detained, it should be for the shortest period possible. We also agree with the Court of Appeal that speed and efficiency must not trump justice and fairness.**

168. The UN Executive Committee of the UNHCR Programme has recommended that asylum seekers “should be given a reasonable time to appeal for a formal reconsideration of the decision”.<sup>173</sup> Furthermore, the ECtHR has held that applying unreasonably short time-limits to submit asylum claims and appeals, such as in the context of accelerated asylum procedures, can deprive an individual of the ability to present an asylum claim effectively and therefore render the state’s remedy practically ineffective, contrary to the requirements of Article 13 ECHR taken together with Articles 2 and 3 ECHR.<sup>174</sup>

169. The Joint Council for the Welfare of Immigrants (JCWI) emphasised the practical difficulties that would face those subjected to a detained fast track process:

Asylum seekers when they are in detention are in a state of heightened anxiety and fear due to the threat of removal and the triggering reminders of past detention or other situations of powerlessness such as trafficking, so it is particularly difficult for them to provide their full account. Detainees are frequently cut off from access to their telephones, the internet and the people they know, all key sources of evidence. Furthermore, this Bill extends the impact of accelerated detained appeals to people facing deportation from prisons as well. It is extremely difficult to get access to appropriate legal advice from prison settings, even more so than immigration detention facilities. Given this and the extremely accelerated timeframe permitted to submit appeals—five days—this policy is bound to result in serious

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171 Tribunal Procedure Committee [‘Tribunal Rules: Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007’](#) The Tribunal Procedure Committee was established under section 22 of, and Schedule 5 to, the [Tribunal, Courts and Enforcement Act 2007](#) (‘TCEA’), with the function of making procedural rules for the First-tier Tribunal and the Upper Tribunal.

172 Under the ‘Detained Immigration Appeals’ approach

173 UNHCR, [Determination of Refugee Status No. 8 \(XXVIII\) \(1977\)](#), para (e)(vii)

174 In [IM v France](#) App.No. 9152/09 a five-day limit for lodging an initial asylum application and a 48-hour time-limit for an appeal were found to violate these provisions. See also [MSS v Belgium and Greece](#) App.No. 30696/09

miscarriages of justice.<sup>175</sup>

170. The Government has indicated that changes will be made to the screening process used for the DFT, “drawing upon lessons learned”, but no details have been provided.<sup>176</sup> While it is possible that eligibility rules could be created to limit the accelerated detained appeals process to covering only those cases that are clearly and obviously unfounded, and without merit, this does not appear to be the current intention. The proposals do allow for the tribunal to transfer cases out of the DFT if it is in the interests of justice to do so, but a similar provision under the old DFT process resulted in this decision being taken at the same hearing as the appeal itself. This resulted in asylum seekers being placed in what the Public Law Project and Justice have described as the “Catch 22 position” of being forced to come to the tribunal to argue that they have not had time to prepare their appeal, but also being ready to argue that they had enough evidence for their appeal to be granted.<sup>177</sup> It is hard to see how a tribunal could proceed differently under the new system, and hear submissions on eligibility for the accelerated detained appeals process at a separate hearing, without undermining the contracted timeframe that is the purpose of the whole process.

**171. The proposed accelerated detained appeals process would significantly contract the timeframe for the asylum application and appeals procedure. This has implications for the ability of those genuinely fleeing persecution to be able to present their claims effectively, potentially denying them the sanctuary to which they are entitled in international law. In the absence of clear safeguards that would restrict the use of the accelerated detained appeals process to appeals that are clearly unfounded and without merit, we consider that the process poses too great a risk of unfair decisions resulting in exposure to human rights violations.**

***172. Clause 26 requires substantial amendment to limit the cases that are brought within the accelerated detained appeals process, to ensure that cases are removed from the process where the interests of justice and fairness requires it and to ensure that the process itself is not so accelerated as to risk unfair decision making and consequential human rights violations. If this is not possible, clause 26 should be removed from the Bill.***

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175 [Joint Council for the Welfare of Immigrants \(NBB0053\)](#)

176 [Letter from Tom Pursglove MP, Minister for Immigration, Compliance and Courts to The Rt Hon Harriet Harman MP, Chair of the Joint Committee on Human Rights, 25 November 2021](#)

177 [Written evidence submitted to the Nationality and Borders Bill Public Bill Committee, submitted by Public Law Project and JUSTICE \(NBB18\)](#)

## 7 Age assessments

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### Age assessments and human rights

173. On 25 October 2021, the Government tabled new clauses to form a new part of the Bill regarding age assessments. The new clauses have now been adopted during Committee stage in the Commons (clauses 48–56) and form a new Part 4.

174. Part 4 of the Bill sets out provisions relating to the conducting of age assessments of age-disputed persons. The use of age assessments may engage the right to private and family life (Article 8 ECHR) and potentially the right to be free from inhuman and degrading treatment (Article 3 ECHR) depending on the way in which a child is treated. Age assessments also engage the rights of the child as protected by the UN Convention on the Rights of the Child (UNCRC), which sets out the fundamental legal principles for safeguarding the rights of the child. In all actions concerning children, States should be guided by the overarching principles of non-discrimination (Article 2); the best interests of the child (Article 3); the right to life, survival and development (Article 6); and the right of the child to express his or her views in all matters affecting him or her, and to have those views taken into account (Article 12).

### Background

175. Upon entry to the UK, a number of children claiming asylum or making other immigration applications are unable to prove their date of birth with official identity documents, either because they have never had these documents or because they have had to destroy them. Some children may have had to travel using false documentation provided by smugglers or traffickers, which falsely identified the child as an adult. Age disputes may also arise due to a lack of understanding of the way in which dates of birth and calendars are calculated in other countries and cultures.<sup>178</sup>

176. Determining the age of individuals seeking asylum or making an immigration application is crucial as it determines how they are to be treated, including: whether they receive support from children's services or not; whether they are provided with access to education or not; whether they are provided with asylum support from the Home Office and dispersed to another part of the UK; where they are accommodated/detained; and how their asylum or immigration application is determined. This includes ramifications, with significant resource implications, that fall outside the responsibilities of the Home Office.

177. Adult asylum seekers and families are entitled to support, including accommodation and essential living needs, from the Home Office. However, for unaccompanied asylum-seeking children (UASC) (i.e those arriving without a parent or guardian), support should be provided by the local authority in which they are physically present. There are two legal duties of particular relevance. Section 17 of the Children Act 1989 imposes a general duty upon a local authority to safeguard and promote the welfare of children within their area who are in need. Section 20 of Children Act 1989 states that every local authority shall provide accommodation for any child in need within the area who requires

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178 Refugee and Migrant Children's Consortium, [Age assessment proposals in the New Plan for Immigration](#) (June 2021), p 1

accommodation as a result of there being no person who has parental responsibility for him/her. It is important to note that the duties upon the local authority to care for looked after children will, in many cases, go beyond the age of 18 and may continue until a young person's 25th birthday, and that these duties are a matter of law.

## How do the current age assessments work?

178. Where age is in dispute, an initial assessment will be undertaken by immigration officials. At present, Home Office guidance states that a decision should only be made to treat the claimant as an adult “if two officers—one at least of Chief Immigration Officer, Higher Executive Officer or Higher Officer grade—have independently assessed that the claimant is an adult because their physical appearance and demeanour very strongly suggests that they are 25 years of age or over”.<sup>179</sup>

179. If the appearance and demeanour of the individual does not “very strongly suggest” that the individual is 25 years or older, s/he will be given the benefit of the doubt and provisionally treated as a child. If the immigration officers do not believe that the individual is a child, s/he will be referred to a local authority for a holistic age assessment.

180. This test was introduced following the Court of Appeal in the case of *BF Eritrea*, in which the court had to determine whether the Home Office's former policy relating to initial age assessments of asylum-seeking children was lawful.<sup>180</sup> The Court of Appeal held that the former policy created a real risk of more than a minimal number of children being identified as adults and unlawfully detained. However, in July 2021, the decision of the Court of Appeal was overturned by the Supreme Court, finding that the Home Office's former policy was lawful. This finding of the Supreme Court now allows the Home Office to revise the current test contained in the age assessment policy.<sup>181</sup>

181. Following referral, if the local authority considers there is no doubt that the person in question is a child, they will not carry out an age assessment but simply accept them as a child. If the local authority considers that the age of the person is in doubt, it will conduct a ‘Merton compliant’ age assessment. This is an age assessment led by social workers, which must adhere to the principles and procedures set out in caselaw.<sup>182</sup> These assessments normally include a number of interviews which explore the person's background and also consider information obtained from others who have had contact with the individual. Broadly speaking, the courts have set out the following principles for an age assessment

179 Home Office, [Assessing age Version 4.0](#) (December 2020)

180 *R (on the application of BF (Eritrea)) v SSHD* [2019] EWCA Civ 872. BF arrived in the UK and claimed he was 16 years old. The immigration officers believed he was substantially over 18, describing him as someone who appeared to be in his mid-twenties. He was held in immigration detention. BF applied for judicial review of the decision to detain him on the ground that HO policy was unlawful (i.e. HO policy allowed a child to be treated as an adult if immigration officers considered the child's physical appearance very strongly suggested that the asylum-seeker was over 18). The claim was rejected by the Upper Tribunal but allowed by the Court of Appeal. The Court of Appeal found that the policy created a real risk of more than a minimal number of children being detained which could be avoided if the policy were better formulated. As a result, the HO amended their policy to “very strongly suggests that they are 25 years of age or over”.

181 *R (on the application of BF (Eritrea)) v SSHD* [2021] UKSC 38. The Supreme Court disagreed with the Court of Appeal. The Supreme Court held that directing immigration officers to treat a person as a child only if they believe then to be less than 25 appears to contradict the rules laid down by Parliament concerning the detention of adult immigrants (i.e. the regime set out in the 1971 Act). They concluded that the approach of the Court of Appeal would lead to a large number of erroneous identifications of adults as children, undermining the purpose of the 1971 Act.

182 *B v London Borough of Merton* [2003] EWHC 1689 (Admin)

to be lawful:

- a) An assessment cannot be made solely on the basis of appearance, and should be a holistic one taking account of the young person’s appearance, demeanour, background and credibility.
- b) Any assessment should take into account relevant factors from the child’s medical, family and social history, and the decision-maker should seek to elicit the general background of the applicant, including his family circumstances and history, his educational background and his activities during the previous few years. Ethnic and cultural information may also be important.
- c) There is a duty on the decision-makers to give reasons for a decision that an applicant claiming to be a child is not a child.
- d) The young person should be given an opportunity during the assessment to answer any adverse points the decision-maker is minded to hold against him.
- e) Age assessments must be conducted by experienced, trained social workers and all the safeguards to ensure fairness must be in place.
- f) If the decision-maker is left in doubt, the claimant should receive the benefit of that doubt.
- g) A young person has a right to be accompanied during the assessment by an appropriate adult. This should be someone who is independent from the assessment, and preferably should be an adult of the person’s own choosing.
- h) An applicant should be given a fair opportunity to deal with any important points adverse to their case.<sup>183</sup>

182. It is important to note the extreme vulnerability of looked after children. As Luke Geoghegan (Head of Policy and Research, Association of British Social Workers) told us in evidence to our inquiry: “Children who are looked after because of their unaccompanied asylum-seeking status are particularly vulnerable. They will all have suffered traumatic events. They have been separated from their parents. They have had to leave their countries, home and everything that is familiar to them. They may have witnessed or been subject to extreme violence. They may have been abused and they have had to function, perhaps for many months or years, without appropriate adult support and protection.”<sup>184</sup>

183. It is also important to note the impact that age assessments may have on children. The Refugee and Migrant Children’s Consortium notes that “the age assessment process itself can also cause a lot of anxiety, confusion and frustration to many vulnerable children and young people, and have a negative impact to their already poor mental health. It can prevent them from accessing school or college whilst their age is disputed, and isolate them from peers and prevent them from integrating and accessing educational opportunities. Many young people RMCC members work with do not understand the process, and feel humiliated and damaged by it. The process itself has the potential to be quite re-traumatising, and impact children and young people’s sense of identity.”<sup>185</sup>

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183 *B v London Borough of Merton* [2003] EWHC 1689 (Admin); *AW (A Child) (R, on the application of) v London Borough of Croydon* [2009] EWHC 3090 (Admin); *R (FZ) v London Borough of Croydon* [2011] 2011 EWCA Civ 59

184 [Q31](#) [Luke Geoghegan]

185 Refugee and Migrant Children’s Consortium ([NBB0047](#))

184. The complexity of undertaking age assessments should not be underestimated. As Luke Geoghegan told us: “Age assessment is a complex process. The most effective age assessment is multidisciplinary and may, for example, draw on the expertise of education professionals and other relevant professionals. Age assessment may also have to take place in less than ideal settings, such as a lorry park, where newly arrived children remain frightened, exhausted and without access to a range of multidisciplinary resources. Some of this age assessment may be continuative over an extended period and confirmatory. Those of you who have raised adolescents or teenagers will know that a normal part of development is for an individual to seem very adult one day and behaving like a child the next. In addition, the experience of being an asylum-seeking child can prematurely age a child. A child who is 15 and has travelled solo from, say, Afghanistan may well have to adopt the demeanour of a young adult, i.e. over 18, to survive. Conversely, a young person may regress to the appearance of a young child once they believe they are safe, or they may oscillate between these alternative presentations. The process of age determination takes time and is extremely skilled work.”<sup>186</sup>

#### Part 4 – Clauses 49–56

185. In the Explanatory Notes to the Bill, the Government states that it “wishes to strengthen and improve processes for assessing the age of those whose claimed age is doubted.”<sup>187</sup> The Government believes that the current test (set out at paras 179–180 above) “presents an unacceptable safeguarding risk”<sup>188</sup> as persons identified as old as 24 years old will be given the benefit of the doubt, treated as a child and placed alongside children. The Government intends to set “a more appropriate threshold for initial age assessments”.<sup>189</sup>

186. Clause 49 provides that:

- a) a local authority or other public authority may refer an age-disputed person to a designated person to conduct an age assessment; where the local authority needs to know the person’s age in order to decide how to exercise its functions under children’s legislation; or where the Secretary of State notifies the local authority that she doubts the age of the person, the local authority or other public authority must either:
  - i) refer an age-disputed person to a designated person to conduct an age assessment; or
  - ii) conduct an age assessment itself and inform the Secretary of State; or
  - iii) inform the Secretary of State that it is satisfied that the person is the age they claim to be without the need for an age assessment.
- b) The standard of proof is on the balance of probabilities.
- c) The decision of the designated person is binding on the Secretary of State, immigration officers, and the local authority, but is subject to a right of appeal.

186 [Q31](#) [Luke Geoghegan]

187 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN], para 597

188 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN], para 605

189 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN], para 606

187. Clause 50 provides for a designated person to conduct age assessments, for the purpose of deciding how the Secretary of State should exercise immigration functions, where no referral has been made or where the Secretary of State doubts the local authority's assessment. The decision of the designated person is binding on the Secretary of State and immigration officers.

188. Clause 51 allows for:

- a) the Secretary of State to make regulations specifying scientific methods that may be used for the purpose of age assessment. These may include:
  - i) examining or measuring parts of a person's body (e.g. imaging technology)
  - ii) analysis of saliva, cell or other samples, including DNA
- b) The Secretary of State must seek scientific advice before determining whether the scientific method is appropriate;
- c) The use of scientific methods may only be carried out if consent is given (either by the individual concerned or, where they do not have capacity, a parent, guardian or another person set out in the regulations);
- d) Where consent is not given and "there are no reasonable grounds for that decision", this will be taken into account when assessing the credibility of the age-disputed person;
- e) Other scientific methods can be used which are not specified in the regulations if the Secretary of State considers it appropriate and consent is given.

189. Clause 52 allows for the Secretary of State to make regulations about the details of how age assessments must be conducted including;

- a) the processes to be followed;
- b) qualifications of persons conducting age assessments;
- c) the content and distribution of age assessment reports;
- d) communication of decisions to the age-disputed person and notification of appeal rights;
- e) consequences of lack of cooperation by the age-disputed person and the possible damage to their credibility;
- f) the process for making referrals to a designated person; and
- g) the evidence required by the Secretary of State.

190. Clause 53 provides a right of appeal to the First-tier Tribunal (FTT) against an age assessment conducted by the decision-maker. Clause 54 makes procedural provisions for appeals, and allows for the FTT to grant interim relief until the appeal is finally determined.

191. Clause 55 provides that where new information comes to light after an age assessment or an appeal, the decision-maker may conduct a further assessment if the information

appears compelling.

192. Clause 56 amends the Legal Aid, Sentencing, and Punishment of Offenders Act 2012 to provide legal aid for appeals against age assessments.

## Relevant Law

193. In addition to the ECHR and UNCRC, there are various other statutory provisions and principles arising from case law which are relevant to age assessments.

### ***Section 55 Borders Citizenship and Immigration Act 2009***

194. Section 55 of the Borders, Citizenship and Immigration Act 2009 introduced a statutory duty on the Home Office to ensure that its immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. This statutory duty extends to all Home Office staff and those acting on behalf of the Home Office. This duty is intended to give effect to the United Nations Convention on the Rights of the Child (UNCRC) in immigration matters that affect children.<sup>190</sup>

195. The Supreme Court has held that the Home Office policy on age assessments complies with the section 55 duty.<sup>191</sup> This policy states that the Home Office must act in accordance with various principles, including: every child matters; the best interests of the child will be a primary consideration, but not the only consideration, when making decisions affecting children; ethnic identity, language, religion, faith, gender and disability are considered when working with a child and their family; children must be consulted and the wishes and feelings of children considered, wherever practicable, when decisions affecting them are made—where parents and carers are present, they will have primary responsibility for representing the child’s concerns; and children must have their applications dealt with in a way that minimises the uncertainty that they may experience.<sup>192</sup>

### ***Section 51 of the Modern Slavery Act 2015***

196. Section 51 of the Modern Slavery Act 2015 provides for how age dispute cases must be treated when a public authority has reasonable grounds to believe that the age-disputed person may be a victim of human trafficking. In such cases, if they are not certain of the person’s age but have reasonable grounds to believe that the person may be under 18, they must assume that the person is under 18 until an assessment of the person’s age is carried out by a local authority or the person’s age is otherwise determined.<sup>193</sup>

### ***Unlawful detention of children***

197. Unaccompanied children must not be detained other than in the very exceptional circumstances specified in paragraph 18B of schedule 2 to the Immigration Act 1971, i.e. in a short-term holding facility for a maximum of 24 hours, and only if directions are in force that require the child to be removed from the facility within 24 hours; or a decision

190 Home Office, [Assessing age Version 4.0](#) (December 2020), p8

191 *BF (Eritrea) v SSHD* [2019] EWCA Civ 872

192 Home Office, [Assessing age Version 4.0](#) (December 2020), p8

193 Home Office, [Assessing age Version 4.0](#) (December 2020), p9

on whether or not to give directions is likely to result in such directions. Further, the immigration officer must reasonably believe the child will be removed from the facility within 24 hours.

198. If a claimant is detained, but a court later finds, or the Home Office later accepts, that the claimant is a child, even if it reasonably believed that the individual was an adult, any period of detention whilst that person was in fact a child which was not in line with the restrictions in paragraph 18B of schedule 2 to the Immigration Act 1971, will be unlawful and may result in the Home Office being liable to pay damages for false imprisonment.<sup>194</sup>

199. Article 5 ECHR (the right to liberty and security) is engaged by the state detention of individuals. Article 5(1)(f) 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”. Article 5 includes a requirement that detention according to national law must not be arbitrary.<sup>195</sup> The Supreme Court has found that detention in line with the Home Office policy on Assessing Age is compliant with Article 5 as it arises from the application of a rule which draws a clear and legitimate distinction between the treatment of adults and children, and is based on a genuine and considered assessment by two immigration officers.<sup>196</sup>

### ***B v London Borough of Merton and subsequent case law***

200. Finally, the courts have set out guidance and minimum standards which must be applied by local authorities. The main principles were established in the case of *B v London Borough of Merton*,<sup>197</sup> and have since been developed in subsequent case law. These principles include the following:

- a) the assessment must be carried out by two trained social workers in cases where the claimant is an adult or a child is objectively borderline and therefore a more in-depth assessment of their age is necessary;<sup>198</sup>
- b) an interpreter must be provided if this is necessary;<sup>199</sup>
- c) the individual must be offered the opportunity to have an independent appropriate adult present;<sup>200</sup>
- d) except in clear cases (where it is obvious that a person is under or over 18 and there is normally no need for prolonged inquiry), those who are assessing age cannot determine age solely on the basis of the appearance of the claimant;<sup>201</sup>

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194 *R (Ali) v Secretary of State for the Home Department* [2017] EWCA Civ 138 (reported as *R (AA (Sudan)) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)* [2017] 1 WLR 2894

195 *Saadi v United Kingdom* [GC] (Application no. 13229/03) paras 61–74.

196 *BF (Eritrea) v SSHD* [2019] EWCA Civ 872, para 73

197 *B v London Borough of Merton* [2003] EWHC 1689 (Admin)

198 *AS v London Borough of Croydon* [2011] EWHC 2091, paragraph 19, *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, para 2, *J v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin), para 13

199 *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59

200 *A v London Borough of Croydon* [2009] EWHC 939 (Admin), *R (NA) v London Borough of Croydon* [2009] EWHC 2357 (Admin), para 50, *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, para 25

201 *B v London Borough of Merton* [2003] EWHC 1689 (Admin), paras 27, 37 and 38, *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, para 3

- e) during the interview, those who are assessing age must explain to the claimant the purpose of the interview<sup>202</sup> and seek to obtain the general background of the claimant, including the claimant’s family circumstances and history, educational background, and the claimant’s activities during the previous few years—ethnic and cultural information may also be important.<sup>203</sup>

### ***UN Convention on the Rights of the Child***

201. One of the key principles in protecting children’s rights during an age dispute is the “presumption of minority”, also referred to as the “benefit of the doubt”. The UN Committee on the Rights of the Child has made it clear that “anyone claiming to be a child should be treated as such” until their age has been assessed.<sup>204</sup> This principle is key to ensuring that children are not denied their rights. This presumption will ensure the age disputed person has access to child protection services, education, and appropriate housing and support.

202. Article 3 CRC requires that in all actions concerning children, the best interests of the child shall be a primary consideration. To ensure the best interests of the child are upheld, the UN Committee on the Rights of the Child recommends the following methodology with regard to assessing age:

“To make an informed estimate of age, States should undertake a comprehensive assessment of the child’s physical and psychological development, conducted by specialist paediatricians or other professionals [e.g. social workers] who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. . . The benefit of the doubt should be given to the individual being assessed. States should refrain from using medical methods . . . which may be inaccurate, with wide margins of error . . . States should ensure that their determinations can be reviewed or appealed to a suitable independent body.”<sup>205</sup>

203. The UK government made a public commitment to give due consideration to the UNCRC when making new policy or legislation.<sup>206</sup> In evidence to our inquiry, the Migrant and Refugee Children’s Legal Unit recommends that the Home Office comply with this by carrying out and publishing a formal Child Rights Impact Assessment (CRIA) on the Nationality and Borders Bill to add a child rights focused perspective to its usual

202 *B v London Borough of Merton* [2003] EWHC 1689 (Admin), para 55

203 *B v London Borough of Merton* [2003] EWHC 1689 (Admin), para 37

204 UN Committee on the Rights of the Child and UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration* (16 November 2017) para 32

205 UN Committee on the Rights of the Child and UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, [Joint general comment No. 4 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 \(2017\) of the Committee on the Rights of the Child on the obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return](#) (16 November 2017) para 4

206 Nadhim Zahawi MP, Written Ministerial Statement for Universal Children’s Day (20 November 2018) [HCWS21093](#)

equality impact assessment processes.<sup>207</sup>

## Lowering the threshold test for giving age-disputed persons the benefit of the doubt

204. Although the Government has indicated that it intends to lower the threshold test for giving age-disputed persons the benefit of the doubt, it has not set out the new threshold test in the Bill. Instead, the Secretary of State is given powers to make regulations setting out the details. It is not therefore clear what the new test will be. However, in its New Immigration Plan (presented by the Government to Parliament on 24 March 2021), the Home Office suggested that the test would be amended from “very strong” suggestion that the individual is over 25, to “significantly over 18”.<sup>208</sup> This may result in fewer age-disputed persons being given the benefit of the doubt and treated as children.

205. In evidence to our inquiry, the Association of British Social Workers warns that “any age assessment proposals must recognise that although there is a risk when adults are wrongly assessed and treated as a child, there is a much greater risk when a child has been wrongly assessed and treated as an adult. It is predominately children who are wrongly sent and dispersed as adults, sometimes to unsafe accommodation and detention”.<sup>209</sup> Further, they explain that “if an adult is wrongly assessed as a child, they will be accommodated in an environment where there are greater checks and safeguarding processes. It would arguably be more difficult for there to be a safeguarding concern due to the monitoring of children. Yet if a child is sent to adult accommodation, there are different processes in place and the lack of safeguarding here could cause serious problems.”<sup>210</sup>

206. Where a child is mistakenly identified as an adult, Article 3 ECHR may potentially be engaged depending on how the child is treated. For example, the European Court of Human Rights has held that reception conditions for asylum-seeking children must not create stress and anxiety with particularly traumatic consequences—such conditions may attain the threshold of severity required to come within the scope of Article 3 ECHR.<sup>211</sup>

**207. The Government has indicated that it intends to retain the benefit of the doubt for certain age-disputed persons, but that it intends to lower the threshold for giving the benefit of the doubt (which is currently extended to those who are assessed as being under 25 years old). Whilst the judgment of the Supreme Court in the case of BF Eritrea gives the Government leeway to lower this threshold, it must be borne in mind that there are severe consequences of mistakenly treating a child as an adult, which would amount to a denial of that child’s rights to education, support, and accommodation. Any lowering of the threshold increases the risk of wrongly identifying a child as an adult and unlawfully detaining a child in immigration detention. Whilst it is a burden on resources to give young adults the benefit of the doubt and treat them as children, a lower threshold may result in more children being placed into unsafe accommodation with inadequate safeguarding and no access to services such as education, to which they are legally entitled. Depending on the circumstances, treating a child as an adult may also result in trauma which may reach the threshold of violating Article 3 ECHR.**

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207 Migrant and Refugee Children’s Legal Unit (NBB0051)

208 HM Government, [New Plan for Immigration: Policy Statement](#), CP 412, March 2021

209 British Association of Social Workers (NBB0027) para 19

210 British Association of Social Workers (NBB0027) para 19

211 *Tarakhel v. Switzerland* [GC] (Application no 29217/12) para 104.

**It is imperative that the threshold test minimises as far as possible the risk that children will be misidentified as adults and denied their rights.**

### **The appointment of “designated persons” (i.e. the establishment of the National Age Assessment Board)**

208. The Government has indicated its intention to establish a National Age Assessment Board (NAAB) as the designated authority for the purpose of carrying out age assessments—his intention is contained within the New Immigration Plan and the explanatory statements to the new clauses on age assessments. The Government has indicated that the NAAB will be a new body established in the Home Office. The details of its operations will be contained in regulations made by the Secretary of State.

209. The Association of British Social Workers has raised a concern regarding the independence of this decision-making body from the Government, given its apparent establishment within the Home Office. The Migrant and Refugee Children’s Legal Unit also cite independence from the Home Office as a matter of concern and state that “any function that may affect children in the care of the state requires independent professional and regulatory social work oversight.”<sup>212</sup> Further, Luke Geoghegan told us in evidence that “the national age assessment board could be useful, but could simply add another layer of bureaucracy and delay to the process.”<sup>213</sup>

210. Independent decision-making is already problematic under the current system, as the decision-makers have an interest in the outcome of the assessment. The Council of Europe’s Group of Experts on Action against Trafficking in Human Beings noted persisting concerns among civil society in the United Kingdom that the “cost implications of assessing a young person to be a minor, may influence the age assessment decision-making process.” They also noted an incorrect age assessment “results in child victims not having access to education, being housed in shared accommodation with adults, or being placed in an adult prison or immigration detention.”<sup>214</sup>

**211. Whilst centralisation of age assessments may not necessarily be adverse for unaccompanied asylum-seeking children, it is difficult to scrutinise the Government’s plans for the new NAAB given the lack of detail contained within the Bill. It will be crucial for this new body to adhere to the guidance set out in case law and to ensure that the best interests of the child are core to its functioning.**

### **Allowing the Secretary of State to provide for the use of scientific methods**

212. In the Explanatory Notes to the Bill, the Government states that it “believes that decision-makers should be able to rely upon as wide an evidence base as possible before coming to an informed decision about someone’s age—this includes evidence derived from scientific methods of establishing age.”<sup>215</sup>

212 Migrant and Refugee Children’s Legal Unit (MiCLU) at Islington Law Centre ([NBB0051](#)) Para 3.5.5

213 [Q32](#) [Luke Geoghegan]

214 Council of Europe’s Group of Experts on Action against Trafficking in Human Beings, *Report concerning the implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings by the United Kingdom, Second Evaluation Round* (7 October 2016) para207–210,

215 [Explanatory Notes to the Nationality and Borders Bill](#) [Bill 141 (2021–22)-EN], para 609

213. There is widespread concern over the accuracy and safety of scientific methods of age assessment. The Royal College of Paediatrics and Child Health’s current guidance states: “The use of radiological assessment is extremely imprecise and can only give an estimate of within two years in either direction, and the use of ionising radiation for this purpose is inappropriate. The British Society for Paediatric Endocrinology and Diabetes are clear that it is not possible to accurately assess a child’s age based on physical examination or bone age assessment... dental x-rays, bone age and genital examination will currently not add any further information to the assessment process.”<sup>216</sup> The British Dental Association has also voiced its opposition to the use of dental x-rays.<sup>217</sup>

214. The British Association of Social Workers evidence noted that the two-year margin of error through x-rays “is no more accurate than age assessments carried out by social workers and other professionals” and that dental examination has similar problems. They continued that these methods “[do] not take into account any other factors like a full age assessment can, which is another reason why they are not adequate ways of assessing age.”<sup>218</sup> The Migrant and Refugee Children’s Unit also notes that in addition it is unclear what weight would be given to the social work component of the age assessment process, and the scientific test.<sup>219</sup>

215. The Council of Europe has made clear that: “There is a broad consensus that physical and medical age assessment methods are not backed up by empirically sound medical science and that they cannot be assumed to result in a reliable determination of chronological age. Experts agree that physical and medical age assessment methods enable, at best, an educated guess. In addition to the scientific weaknesses and inaccuracy of age assessment methods, several methods have been evidenced to have a harmful impact on the physical and mental health and wellbeing of the person undergoing age assessment ... the use of invasive medical exams should be reduced to a minimum and has to remain a measure of last resort.”<sup>220</sup> The report notes that the use of potentially harmful ionising radiation for the purpose of age assessment, involving exposure to radiation for non-medical purposes for no therapeutic benefit, is in conflict with medical ethics and potentially unlawful, and that examination of genital maturity should never be used as “this may amount to inhuman and degrading treatment [in breach of Article 3 ECHR]”.<sup>221</sup>

216. The UNHCR observes that, when assessing the weight to be applied to scientific methods of age assessment, decision makers should keep in mind that these can only estimate age and as a consequence there will always be a margin for error.<sup>222</sup>

217. The introduction of scientific methods to undertake age assessments may engage Article 8 (right to privacy, including bodily integrity), and may also engage Article 3 ECHR (right to be free from inhuman and degrading treatment) depending on the nature of the methods used. It is worth noting that there are two cases are pending before

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216 Royal College of Paediatrics and Child Health, *Refugee and unaccompanied asylum seeking children and young people - guidance for paediatricians* (last updated 9 December 2021)

217 Refugee Council, [‘Dentists warned not to use x-rays to attempt to judge age of young asylum seekers’](#), accessed 5 January 2022

218 British Association of Social Workers (NBB0027) para 27

219 Migrant and Refugee Children’s Legal Unit (MiCLU) at Islington Law Centre (NBB0051) para 3.5.6

220 Council of Europe, [Children’s Rights Division, Age assessment: Council of Europe members states policies, procedures and practices respectful of children’s rights in the context of immigration](#) (2017) para 129 - 131

221 *Ibid.*

222 UNHCR, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum* (1 June 2015), para 9.i.

the ECtHR dealing with the use of X-ray tests of the left wrist for the purpose of age assessment in Italy.<sup>223</sup> In their intervention in the latter case, the AIRE Centre, the Dutch Refugee Council and ECRE recommend that age assessment should never be undertaken as routine process and should be carried out by qualified experts respecting material and procedural guarantees under Articles 3 and 8 ECHR. According to the interveners, medical tests should be avoided, “due to their low evidential value, intrusiveness and a risk of a disproportionate interference in the child’s private life that may lead to a violation of Article 8 ECHR.”<sup>224</sup>

**218. The power for the Secretary of State to make regulations setting out specified scientific methods for assessing age is concerning. A number of medical organisations have voiced opposition to this policy on the basis that such methods are inaccurate and involve a wide margin of error. If this is the case, then the use of such methods may not improve the accuracy of decision-making when compared to a holistic assessment undertaken by a social worker. A holistic assessment would avoid the use of any physical (and potentially invasive) procedures which may not be appropriate, and may even cause trauma depending on the nature of the procedure and the experience of the individual concerned. We are not convinced there is any justification for the use of scientific methods.**

219. Further, the Bill provides that consent must be given by the age-disputed individual in order to carry out a scientific assessment. However, refusal to consent may be taken into account as damaging to the person’s credibility unless there are reasonable grounds for the decision to refuse consent.

**220. It is not clear to us what will constitute a reasonable ground for refusing consent. Clear guidelines must be published setting out the test that will be applied. Further, we are concerned that the threat of adverse inferences may apply pressure to the individual concerned to consent to an age assessment, particularly a young child, who may fear the consequences of refusing to consent to a procedure. There are many reasons why a child may not wish to be subject to a scientific procedure, but they may not be able to communicate the reasons for this. Even if they can articulate their reasons, it is not clear whether the Home Office will consider their concerns to be “reasonable”. We suggest that refusal to consent to scientific procedures should not be taken into account when assessing the credibility of an age-disputed person who may be a child.**

**221. The Government must ensure holistic assessments are undertaken and will not be able to rely upon scientific methods as a replacement for holistic assessments. The use of scientific methods as set out in any regulations in the future will need to be scrutinised to ensure that they do not breach the right to be free from inhuman and degrading treatment (Article 3 ECHR) and the right to privacy (Article 8 ECHR). If it is the case that scientific methods will not offer any greater accuracy than the current holistic methodology, the use of such methods may not constitute necessary and proportionate incursions of the right to privacy. Further, we suggest that where holistic assessments already exist as an alternative, it would not be in the best interests of the child to subject them to scientific procedures.**

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223 *Bacary v Italy* (Request no. 36986/17) and *Darboe and Camara v Italy* (Request no. 5797/17)

224 *Darboe v Italy* (Application no 5797/17), [written submission on Behalf of the Aire Centre et al, Interveners](#)

## 8 Deprivation of citizenship orders

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### Introduction

222. Clause 9 (Part 1) of the Nationality and Borders Bill was adopted into the Bill during Committee Stage in the Commons. This clause concerns the duty of the Secretary of State to give notice to an individual subject to a deprivation of citizenship order. Under existing law, a British Citizen<sup>225</sup> can be deprived of their citizenship if it is “conducive to the public good”<sup>226</sup> but only if this would not render the person stateless.<sup>227</sup> However, if an individual has acquired British citizenship by naturalisation, the test for depriving him/her of citizenship is slightly different. In these circumstances, a person may be deprived of his/her British citizenship (by naturalisation) if:

- a) The Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
- b) The Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

223. A person may also be deprived of citizenship if the citizenship was obtained through fraud, false representation or the concealment of any material fact.<sup>228</sup>

### Applicable human rights framework

224. The ECHR applies to persons within the jurisdiction of the UK (Article 1 ECHR). The ECHR only applies extraterritorially where the UK exercises “effective control” over an individual or territory.<sup>229</sup> If an individual outside the UK is not under the “effective control” of the UK, they cannot rely upon their Convention rights. Therefore, a person subject to a deprivation of citizenship order within the jurisdiction of the UK may rely on his/her Convention rights when challenging a deprivation of citizenship order. However, for persons who are deprived of their nationality outside of the territory or outside the “effective control” of the UK, the current position in domestic law is that the ECHR does not apply. The Court of Appeal has held that “depriving a national of British citizenship had the effect of divesting the United Kingdom of any authority or control over the person concerned. It was the antithesis of the exercise of control necessary to found jurisdiction under art.1.”<sup>230</sup>

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225 Note that British nationality law provides for six different types of British nationality status and that deprivation of citizenship powers apply to all six categories: British citizenship; British overseas territories citizen; British overseas citizen; British subject; British national (overseas); British protected person.

226 Defined as involvement in terrorism, espionage, serious organised crime, war crimes, or unacceptable behaviours. See UK Visas and Immigration, *Deprivation and Nullity of British Citizenship*, chapter 55.4.4 27 July 2017

227 British Nationality Act 1981, [section 40](#)

228 British Nationality Act 1981, [section 40\(3\)](#)

229 *Al-Skeini v UK (Application no. 55721/07)*

230 *S1, T1, U1 & V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560, followed in *L2 v Secretary of State for the Home Department*, Appeal No: SC/123/2013

225. The case law of the ECtHR has found that Article 8 may apply in cases even where deprivation of citizenship occurs outside of the jurisdiction. In *K2*, the ECtHR considered the admissibility of an application by a Sudanese applicant who was deprived of his British citizenship outside of the UK, having left the UK to participate in terrorist activity in Somalia. The ECtHR found that, “although the right to citizenship is not as such guaranteed by the Convention or its Protocols, the Court does not exclude that an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under Article 8.”<sup>231</sup> In determining arbitrariness, the Court considered whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by Article 8.<sup>232</sup>

### The duty to give notice of a deprivation of citizenship order

226. Clause 9 follows the decision of the High Court in *R (D4) v SSHD*<sup>233</sup> which was handed down on 30 July 2021. On 27 December 2019, the Secretary of State made a deprivation of citizenship order and placed a note of this on D4’s Home Office file – D4 knew nothing of this decision until the solicitors were informed on 14 October 2020. The High Court had to determine whether the Secretary of State had given lawful notice of the deprivation of citizenship order.

227. Section 41(1)(e) of the British Nationality Act 1981 confers power for the Secretary of State to make regulations “for the giving of any notice required or authorised to be given to any person under this Act”. The British Nationality (General) Regulations 2003<sup>234</sup> were made under this provision. They set out the methods by which notice is to be given. As originally made, they provided for notice to be sent to the person’s last known address. In 2018, the Home Secretary amended the Regulations to deal with cases in which the person’s whereabouts are unknown, there is no valid address for correspondence and no representative acting.<sup>235</sup> As amended, Regulation 10(4) provides that, in such a case, “the notice shall be deemed to have been given” when the Secretary of State makes a record of these circumstances and places the notice or a copy of it on the person’s file.

228. In this case, the Secretary of State had made a record of the deprivation of citizenship order on D4’s file and deemed that effective notice had been served. The High Court held that this method of giving of notice was null and void, as Regulation 10(4) was ultra vires on the ground that Parliament had not given the Secretary of State power to make regulations which allowed her to avoid the requirement to give notice. As noted by Mr J Chamberlain: “you do not give someone notice of something by putting the notice in your desk drawer and locking it. No-one who understands English would regard that purely private act as a way of giving notice”. Regulation 10(4) was held to be ultra vires and therefore void. The deprivation of citizenship order was made in breach of section 40(5) of the BNA and was therefore also void.<sup>236</sup> Clause 9 is, in part, a response to this judgment.

231 *Karashev v Finland*, App No 31414/96, Admissibility Decision (Final)

232 *K2 v United Kingdom* (2017) 64 EHRR SE18, paras 49–50 and 54–61.

233 *R (D4) v SSHD* [2021] EWHC 2179 (Admin). Note that this judgment is under appeal.

234 SI 2003/548

235 SI 2018/851

236 *R(D4) V SSHD* [2021] EWHC 2179 (Admin), para 68

## Clause 9 Part 1 NBB – amending the requirement to give notice of a deprivation of citizenship order

229. Clause 9 has three main functions:

- a) It places the duties on the Secretary of State to give notice into primary legislation (thereby avoiding any further declarations of ultra vires)
- b) It sets out five circumstances in which the Secretary of State can avoid giving notice to a person subject to a deprivation of citizenship order
- c) It deletes the ultra vires regulation (Regulation 10(4)) in response to the High Court’s judgment in D4 and validates any previous orders made unlawfully under this regulation.

230. At present, section 40(5) of the BNA requires that written notice of a deprivation of citizenship order must be given. There are no exceptions and there is no provision for “deemed notice”. Clause 9 would insert new section 40(5)(A) into the BNA which would exempt the Secretary of State from the duty to give notice in the following circumstances:

- a) Where the Secretary of State does not have the information needed to be able to give notice; or
- b) It would for any other reason not be reasonably practicable to give notice; or
- c) Notice should not be given:
  - i) in the interests of national security;
  - ii) in the interests of a relationship between the UK and another country, or
  - iii) otherwise in the public interest.

231. Clause 9 also retains a right of appeal against a deprivation of citizenship order, both for notice and without-notice cases.

232. Finally, Clause 9 provides for retrospective effect in order to validate deprivation of citizenship orders which are currently unlawful due to the ultra vires regulation.

## Concerns with clause 9

### *Removal of the requirement to give notice*

233. Parliament has in the past conferred power to make regulations allowing notice to be deemed served even when it has not, in reality, been received by the affected individual. The courts have found that the giving of notice can still be lawful even if the notice has not actually been received. Depending on the context, notice may be given lawfully if reasonable steps were taken in an attempt to give notice.<sup>237</sup> Such reasonable steps might, for example, require sending notice to the individual’s last known address or contacting family members. However, clause 9 goes much further than the concept of “deemed notice”, by removing any obligation on the Secretary of State to give notice in five specified

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237 R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36,

circumstances (set out at para 230 above).

234. Furthermore, the circumstances in which the Secretary of State is exempt from her duty to give notice are incredibly broad and give her a wide discretion to avoid the giving of notice. Taking each exemption in turn:

- a) Firstly, in our view, if the Secretary of State does not have the information needed to give notice, steps should be taken to obtain that information.
- b) Secondly, it is not clear in what circumstances it would be considered “not reasonably practicable” to give notice. In our view, wherever it is possible, the Secretary of State should make every effort to give notice.
- c) Thirdly, the three exemptions of “national security”, “foreign relations”, and “public interest” are far too broad and grant a dangerous discretion to the Secretary of State. There will almost always be issues of national security at play in deprivation of citizenship cases which could be used as a sweeping reason for avoiding the giving of notice. There is no legal definition which would constrain the Secretary of State’s determination of a “national security interest”. As Lord Hoffman stated in the case of *Rehman*, “the question of whether something is in the interests of national security is a matter of judgment and policy entrusted to the executive”.<sup>238</sup> It is not clear why giving an individual notice of the fact that they are subject to a deprivation of citizenship order would be contrary to the public interest or the interests of the UK’s foreign relations – these exemptions are undefined and unjustified.

**235. Whilst it is inevitable that serving notice of deprivation of citizenship orders will present challenges in some cases, it is disproportionate to remove the obligation to give notice entirely in the five specified circumstances. Bearing in mind the public law principle of fairness, it is questionable that an uncommunicated administrative decision of such a grave nature, with such severe consequences for the individual affected, should bind an individual who is being stripped of their rights. We suggest that Clause 9 should be deleted from the Bill. If Clause 9 is to be retained in the Bill, at a minimum, the Secretary of State should be required to take reasonable steps to give notice of deprivation of citizenship orders.**

### ***Right of appeal***

236. Clause 9 provides that the right of appeal against a deprivation of citizenship order is retained. Individuals who are subject to orders, either with or without notice, have the right to appeal to the First Tier Tribunal or Special Immigration Appeals Commission (SIAC). Appeals are non-suspensive, i.e. the deprivation of citizenship order continues to have effect whilst the appeal is underway.

237. In *R (Begum) v Special Immigration Appeals Commission*,<sup>239</sup> the Supreme Court held that an appeal may have to be stayed where an appellant who is abroad cannot play an effective part in his/her appeal (i.e. where delaying an appeal might make an appeal more (rather than less) effective): “where... the difficulty is of such an extreme nature that not merely is one party placed at a forensic disadvantage but it is impossible for the case

<sup>238</sup> *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, para 50

<sup>239</sup> *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, para 135

to be fairly tried, the interests of justice may require a stay of proceedings.” Although, importantly, the Court noted that the right to an effective appeal is not a trump card and must be weighed against national security concerns.<sup>240</sup> The Supreme Court also recognised that “an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under Article 8.”<sup>241</sup>

238. The right of appeal to the FTT is restricted by section 40A(2) BNA, which provides that the right of appeal to the FTT will not apply if the Secretary of State certifies that the decision was taken wholly or partly in reliance on information which should not be made public:

- a) in the interests of national security;
- b) in the interests of a relationship between the UK and another country, or
- c) otherwise in the public interest.<sup>242</sup>

239. This restriction on the right of appeal to the FTT will continue to apply. In circumstances where the right of appeal to the FTT is removed following a certification by the Secretary of State, a right of appeal lies to the Special Immigration Appeals Commission (SIAC).<sup>243</sup>

240. Notices of appeal to the FTT must be received within 14 days after the notice of the decision if the person is in the UK, and within 28 days if the person is outside of the UK.<sup>244</sup> Notice of appeals to SIAC must be given within 5 days if the appellant is in detention; 10 days if the appellant is at liberty in the UK; and 28 days if the appellant is outside the UK.<sup>245</sup> The time limit starts running on the date on which the appellant was served with notice of the decision. It is not clear how this will apply to without-notice cases; Clause 9 does not give any clarity as to what time limit will apply and when the clock will start ticking in the absence of any notice being given to the affected individual. In its updated ECHR memorandum, the Home Office states that it would “not object to an application to bring an appeal out of time, so long as the appeal is brought reasonably promptly”.<sup>246</sup> In circumstances where no notice is given, this is an odd proposition. It is worth noting that the courts have held that there are “rare cases” where the application of time limits “would impair the very essence of the right of appeal, and strict adherence to it would infringe Article 6 of the Human Rights Convention”.<sup>247</sup>

241. We asked the Minister, Tom Pursglove, whether he considered Clause 9 to be compatible with the right to a fair trial. The Minister responded:

What we are talking about here is high-harm individuals, for example terrorists, who disappear or perhaps go to ground and who the Home Office is unable to make contact with but for whom we have legitimate grounds by which to deprive them of their citizenship on the grounds of

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240 Ibid. para 91

241 Ibid. para 64

242 Section 40A(2) British Nationality Act 1981

243 Special Immigration Appeals Commission Act 1997, [section 2B](#)

244 The Tribunal Procedure (First Tier Tribunal)(Immigration and Asylum Chamber) Rules 2014, [rule 19](#)

245 The Special Immigration Appeals Commission (Procedure) Rules 2003, [rule 8](#)

246 Home Office, [Nationality and Borders Bill: European Convention on Human Rights - Supplementary Memorandum](#), November 2021, p 14

247 *National Bank of Greece v Christofi* [2019] 1 WLR 1435

national security, for example. The idea that this measure is targeted at the normal man or woman in the street is completely wrong and false, and it is irresponsible for individuals to go around peddling that information. A key point is that if such an individual were to come back on to the Home Office’s radar and make contact, they would be able to exercise their appeal rights in the normal way. This is very much geared at ensuring national security.<sup>248</sup>

242. We note that the Minister did not address the clause’s compatibility with fair trial rights.

**243. As the Supreme Court has noted, to comply with the procedural requirements of the ECHR, an appellant must be able to challenge the legality of the measure taken against him, and the right of appeal must be meaningful and effective. In circumstances where an individual does not know they are subject to a deprivation of citizenship order, the right of appeal is meaningless, particularly where time limits will be applied. Applying time limits to an appeal against an uncommunicated deprivation of citizenship order risks violating the right to a fair trial as protected by Article 6. If clause 9 is to be retained in the Bill, we suggest that it would be fairer and clearer to include provision that the time limits only start running from the date of knowledge of the deprivation of citizenship order.**

### **Retrospective effect of clause 9**

244. Clause 9 also includes a retrospective provision which provides that any failure to comply with the notification requirements in section 40(5), before the amendments to section 40 come into effect, does not affect the validity of any deprivation order made under that section. The Government is therefore legislating to retrospectively validate previous deprivation of citizenship orders which are unlawful. This will prevent people from challenging a deprivation of citizenship order on the ground that they were not provided with notice of this decision, as required by section 40(5) BNA 1981.

245. We note that a similar strategy was employed in 2013, when the then Government sought to retrospectively validate unlawful sanctions against jobseekers, which were invalid due to ultra vires regulations. The Government used the Jobseekers (Back to Work Schemes) Act 2013 to retrospectively validate the offending regulations through primary legislation. In doing so, the Government removed a ground of appeal from claimants who had already lodged appeals against their sanctions. The Court of Appeal subsequently declared that, pursuant to section 4 of the Human Rights Act (“HRA”), the 2013 Act was incompatible with Article 6(1) (right to a fair trial) of the ECHR, as it interfered with the pending legal proceedings of claimants who had lodged appeals against their sanctions before the 2013 Act came into force.<sup>249</sup>

**246. Article 6(1) of the ECHR requires that, in the determination of a person’s civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The enactment of retrospective legislation which affects the results of pending proceedings may infringe**

248 [Q50](#) [Minister Pursglove]

249 *R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and others v Secretary of State for Work Pensions* [2016] EWCA Civ 413

Article 6(1), unless there are compelling grounds of general interest. It is, *prima facie*, contrary to the rule of law for the state to interfere in current legal proceedings in order to influence the outcome of those proceedings in a manner favourable to itself. The Government is using Clause 9 to retrospectively validate unlawful deprivation of citizenship orders, following the High Court’s decision that the relevant regulation concerning the giving of notice is *ultra vires*. It is possible that there are pending legal proceedings challenging deprivation of citizenship orders on the ground that notice was given by making a record on the Home Office file. Clause 9 would effectively remove a ground of appeal from these claimants. If clause 9 affects the results of pending legal proceedings, this may infringe the fair trial rights of the appellants. *If clause 9 is to be retained, we suggest that it should not have retrospective effect, to avoid the risk of infringing Article 6 in the vent of pending legal proceedings.*

247. It is inevitable that cases concerning deprivation of citizenship orders may present practical difficulties with regard to serving notice. Individuals who leave the jurisdiction, travel to conflict zones, reside in refugee camps, and have no known means of communication, will be virtually impossible to locate and serve with notice. It is reasonable that the requirements for the Secretary of State to give notice to such individuals should take these challenges into account. However, there are three key problems with clause 9: it allows for far too much discretion by the Secretary of State to avoid giving notice of deprivation of citizenship orders; it renders the right of appeal meaningless, and it retrospectively validates unlawful deprivation of citizenship orders which may interfere with pending legal proceedings. Given the severe infringement of rights resulting from deprivation of citizenship orders, it is imperative that robust safeguards are in place when this extreme executive power is used. *As set out above, we suggest that Clause 9 is removed from the Bill.*

248. *If clause 9 is retained in the Bill we suggest it must be amended to:*

- a) *place obligations on the Secretary of State to take reasonable steps to give notice of deprivation of citizenship orders;*
- b) *remove the broad exemptions of “national security”, “foreign relations” and “public interest” which allow the Secretary of State to avoid giving notice;*
- c) *ensure the right of appeal is meaningful by providing that time limits do not run until the individual has been notified of the deprivation decision; and*
- d) *remove the retrospective validation of unlawful deprivation of citizenship orders.*

## Conclusions and recommendations

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### Asylum decision-making

1. Home Office data shows that approximately 65% of asylum applicants awaiting initial decisions had been waiting more than six months and that the average time to make an initial decision is now more than a year. This is clearly concerning. Delays can have a significant adverse impact on the wellbeing and mental health of asylum applicants (which is protected by Articles 3 and 8 ECHR), and whilst awaiting decisions they are generally not permitted to work, begin the family reunification process and cannot access the entitlements guaranteed in the Refugee Convention. *To reduce the adverse impacts on individuals awaiting decisions the Home Office should give serious consideration to the UNHCR's recommendations to introduce a triaging and prioritization system, simplify case processing procedures and frontload the asylum system and make clear how it plans to streamline and shorten the asylum decision-making process.* (Paragraph 35)
2. *We support the Chief Inspector of Borders and Immigration's recommendation that a new published service standard must be introduced as a matter of urgency. That service standard should set realistic targets which take into account the human rights of applicants and the severe impacts that lengthy waits for decisions can have.* (Paragraph 36)
3. As recommended by Wendy Williams in her Windrush Lessons Learned Review, Home Office decision-making should be based on the principles of “fairness, rigour and humanity”. (Paragraph 45)
4. *The Home Office must establish why the proportion of initial decisions found to be flawed has been gradually increasing and what they plan to do to improve the quality of asylum decision-making. This plan must include providing adequate support and training to staff who are handling difficult cases on a day-by-day basis and may be suffering from ‘compassion fatigue’. The Home Office should promote a human rights culture where the rights and dignity of asylum applicants is at the heart of decision-making, as opposed to a culture in which staff are treated as and perceive of themselves as ‘gatekeepers’ of the asylum system.* (Paragraph 46)

### Differential treatment

5. There is no requirement under the Refugee Convention for asylum seekers to claim asylum in the first safe country they reach. The Bill should not establish in domestic law an interpretation of Article 31 of the Refugee Convention that explicitly or implicitly says the opposite. (Paragraph 73)
6. Clause 36(4) would require an interpretation of Article 31 that removes its protections from a refugee who commits an offence while leaving the UK for another destination. This is inconsistent with an interpretation of the Refugee Convention that accepts asylum seekers are not required to claim asylum in the first safe country they reach. It is also hard to see how the UK benefits from prosecuting individuals who want to leave the UK to claim asylum elsewhere. (Paragraph 74)

7. *Clause 36 requires amendment to ensure that it does not contradict the protection Article 31 provides to asylum seekers who have passed through other countries on their way to the UK or are passing through the UK on their way to their destination. (Paragraph 75)*
8. We are unable to see how the duty under the UNCRC to act in the best interests of the child and to avoid discrimination can be met if Group 2 refugee children are exposed to reduced status, restrictions on family reunion and restrictions on access to state support. (Paragraph 82)
9. Clause 11 would allow for individuals who have been recognised as refugees to be given inferior treatment, based on the way in which they came to the UK. We consider this to be inconsistent with the UK's obligations under the Refugee Convention, which does not require asylum seekers to wait to be selected for resettlement programmes and does not require them to claim asylum in the first safe country they reach. The proposed differential treatment also appears likely to be inconsistent with the right to private and family life under Article 8 ECHR and the prohibition on discrimination under Article 14 ECHR. At a time when there is already an unprecedented backlog of asylum claims, these changes would make the asylum decision-making process longer, more complicated and open to further appeals. (Paragraph 86)
10. *Clause 11 should be removed from the Bill. (Paragraph 87)*
11. It is imperative that the Government learns from the poor treatment of asylum seekers housed in former military barracks. *If accommodation centres are to be used to house those awaiting asylum decisions and appeals or awaiting removal from the UK the conditions must ensure that residents are free to come and go, treated with respect, provided with adequate access to healthcare and legal advice and not prevented from mixing with the rest of society. (Paragraph 91)*

### Inadmissibility and offshore processing

12. While an inadmissibility regime is not in itself inconsistent with the Refugee Convention and ECHR, there are numerous ways in which the clauses in the Bill do not provide the safeguards necessary to ensure compliance. The threshold for establishing a connection with a safe third state is too low. The standards against which the safety of a third state is judged are insufficient. (Paragraph 104)
13. *Clause 15 should be amended to ensure that claims cannot be declared inadmissible on the basis of the Home Office's view that it would have been reasonable to expect the claimant to have claimed elsewhere. The clause also requires amendment to prevent asylum seekers being removed to countries other than the one with which they are considered to have a connection. The definition of safe third country must ensure that the state in question provides effective protection against human rights abuses and access to an effective asylum system that fully complies with the Refugee Convention. (Paragraph 105)*
14. Suspending an asylum claim for 6 months when there is no real prospect of it being considered by another state amounts to an unjustified delay. It does not appear to

be consistent with complying with the Refugee Convention ‘in good faith’. It also places the mental and physical health of vulnerable asylum seekers at risk, potentially resulting in violations of Article 8 or even Article 3 ECHR.(Paragraph 111)

15. *The Bill should be amended to prohibit any asylum claimant being provided with a notice of intent or assessed as inadmissible unless a return arrangement has already been put in place with the relevant third country.* (Paragraph 112)
16. The UK risks doing damage to the shared responsibility that underpins the Refugee Convention if it proceeds with plans for the offshore processing of asylum claims. *The Bill should be amended to remove the power to remove an asylum seeker from the UK while their claim is pending, unless compliance with human rights standards, including the Refugee Convention, in any future arrangements can be unequivocally guaranteed.* (Paragraph 122)

### Interpretation of the Refugee Convention

17. The Bill includes requirements as to how the Refugee Convention must be interpreted. This risks the UK being out of step with established interpretations of Refugee Convention obligations, reducing the protection against human rights abuses that the Refugee Convention provides. (Paragraph 125)
18. The introduction of a split and raised standard of proof for establishing a well-founded fear of persecution runs contrary to well-established interpretation of the Refugee Convention and creates unnecessary additional complexity in asylum decision-making. In light of the difficulties that genuine asylum seekers already face proving their claims, it would increase the risk of individuals being wrongly refused asylum and removed to face violations of fundamental human rights. It is important that a legitimate desire to ensure that refugee status is not given to individuals who do not meet the definition of refugee does not support a ‘culture of disbelief’ that puts genuine refugees at risk. (Paragraph 135)
19. *Clause 31 should be amended to confirm that the standard of proof for establishing a well-founded fear of persecution remains a composite standard of ‘reasonable likelihood’.* (Paragraph 136)
20. Despite the presumption that a person who has committed such a crime amounts to a ‘danger to the community’ remaining rebuttable, the proposal to lower the threshold for what constitutes a ‘particularly serious crime’ to any offence receiving a 12-month sentence would not be consistent with the language of Article 33(2) or with the humanitarian purpose of the Refugee Convention. The combination of the new threshold with provisions expressly denying an individual the opportunity to prove that he has not committed a ‘particularly serious’ offence would ‘expand the scope’ of Article 33(2) and ‘correspondingly weaken the principle of non-refoulement itself’. The Bill requires amendment to remove the lowering of this threshold. (Paragraph 142)
21. *Despite the presumption that a person who has committed such a crime amounts to a ‘danger to the community’ remaining rebuttable, the proposal to lower the threshold for what constitutes a ‘particularly serious crime’ to any offence receiving*

*a 12-month sentence would not be consistent with the language of Article 33(2) or with the humanitarian purpose of the Refugee Convention. The combination of the new threshold with provisions expressly denying an individual the opportunity to prove that he has not committed a ‘particularly serious’ offence would ‘expand the scope’ of Article 33(2) and ‘correspondingly weaken the principle of non-refoulement itself’. The Bill requires amendment to remove the lowering of this threshold. (Paragraph 142)*

### Procedural changes

22. It is crucial that decision-makers recognise the many legitimate reasons why asylum seekers may struggle to prove evidence in support of their claims within tight deadlines. (Paragraph 152)
23. We welcome the proposal to provide additional legal aid to persons in receipt of priority removal notices. The Government must ensure, however, that there are sufficient qualified immigration practitioners with legal aid contracts available to provide this additional support. (Paragraph 154)
24. It is important that Home Office decision-makers and tribunals are free to carry out global assessments of credibility.(Paragraph 158)
25. The combined effect of the provisions on credibility and weight, which emphasise procedural failure as damaging to the substantive asylum claim, is to increase the risk that genuine refugees will be denied asylum because they were wrongly disbelieved, or their evidence wrongly given minimal weight. This would expose people to persecution and human rights abuses. (Paragraph 162)
26. *The Bill should be amended to remove the provisions that emphasise damage to credibility and weight of evidence as a result of delay. If the Government is intent on penalising late submission of evidence, it should only introduce penalties that do not impact on consideration of the substantive asylum claim. At the very least, the Bill must be amended to clarify that a failure to meet a deadline ‘may’ be damaging to the applicant’s credibility or to the weight given to evidence, rather than that it must. (Paragraph 163)*
27. If asylum seekers are to be detained, it should be for the shortest period possible. We also agree with the Court of Appeal that speed and efficiency must not trump justice and fairness. (Paragraph 167)
28. The proposed accelerated detained appeals process would significantly contract the timeframe for the asylum application and appeals procedure. This has implications for the ability of those genuinely fleeing persecution to be able to present their claims effectively, potentially denying them the sanctuary to which they are entitled in international law. *In the absence of clear safeguards that would restrict the use of the accelerated detained appeals process to appeals that are clearly unfounded and without merit, we consider that the process poses too great a risk of unfair decisions resulting in exposure to human rights violations.*(Paragraph 171)
29. *Clause 26 requires substantial amendment to limit the cases that are brought within the accelerated detained appeals process, to ensure that cases are removed from the*

*process where the interests of justice and fairness requires it and to ensure that the process itself is not so accelerated as to risk unfair decision making and consequential human rights violations. If this is not possible, clause 26 should be removed from the Bill.* (Paragraph 172)

### Age assessments

30. The Government has indicated that it intends to retain the benefit of the doubt for certain age-disputed persons, but that it intends to lower the threshold for giving the benefit of the doubt (which is currently extended to those who are assessed as being under 25 years old). Whilst the judgment of the Supreme Court in the case of *BF Eritrea* gives the Government leeway to lower this threshold, it must be borne in mind that there are severe consequences of mistakenly treating a child as an adult, which would amount to a denial of that child's rights to education, support, and accommodation. Any lowering of the threshold increases the risk of wrongly identifying a child as an adult and unlawfully detaining a child in immigration detention. Whilst it is a burden on resources to give young adults the benefit of the doubt and treat them as children, a lower threshold may result in more children being placed into unsafe accommodation with inadequate safeguarding and no access to services such as education, to which they are legally entitled. Depending on the circumstances, treating a child as an adult may also result in trauma which may reach the threshold of violating Article 3 ECHR. It is imperative that the threshold test minimises as far as possible the risk that children will be misidentified as adults and denied their rights. (Paragraph 207)
31. Whilst centralisation of age assessments may not necessarily be adverse for unaccompanied asylum-seeking children, it is difficult to scrutinise the Government's plans for the new NAAB given the lack of detail contained within the Bill. It will be crucial for this new body to adhere to the guidance set out in case law and to ensure that the best interests of the child are core to its functioning. (Paragraph 211)
32. The power for the Secretary of State to make regulations setting out specified scientific methods for assessing age is concerning. A number of medical organisations have voiced opposition to this policy on the basis that such methods are inaccurate and involve a wide margin of error. If this is the case, then the use of such methods may not improve the accuracy of decision-making when compared to a holistic assessment undertaken by a social worker. A holistic assessment would avoid the use of any physical (and potentially invasive) procedures which may not be appropriate, and may even cause trauma depending on the nature of the procedure and the experience of the individual concerned. We are not convinced there is any justification for the use of scientific methods. (Paragraph 218)
33. It is not clear to us what will constitute a reasonable ground for refusing consent. Clear guidelines must be published setting out the test that will be applied. Further, we are concerned that the threat of adverse inferences may apply pressure to the individual concerned to consent to an age assessment, particularly a young child, who may fear the consequences of refusing to consent to a procedure. There are many reasons why a child may not wish to be subject to a scientific procedure, but they may not be able to communicate the reasons for this. Even if they can articulate

their reasons, it is not clear whether the Home Office will consider their concerns to be “reasonable”. *We suggest that refusal to consent to scientific procedures should not be taken into account when assessing the credibility of an age-disputed person who may be a child.* (Paragraph 220)

34. The Government must ensure holistic assessments are undertaken and will not be able to rely upon scientific methods as a replacement for holistic assessments. The use of scientific methods as set out in any regulations in the future will need to be scrutinised to ensure that they do not breach the right to be free from inhuman and degrading treatment (Article 3 ECHR) and the right to privacy (Article 8 ECHR). If it is the case that scientific methods will not offer any greater accuracy than the current holistic methodology, the use of such methods may not constitute necessary and proportionate incursions of the right to privacy. Further, we suggest that where holistic assessments already exist as an alternative, it would not be in the best interests of the child to subject them to scientific procedures. (Paragraph 221)

### Deprivation of citizenship orders

35. Whilst it is inevitable that serving notice of deprivation of citizenship orders will present challenges in some cases, it is disproportionate to remove the obligation to give notice entirely in the five specified circumstances. Bearing in mind the public law principle of fairness, it is questionable that an uncommunicated administrative decision of such a grave nature, with such severe consequences for the individual affected, should bind an individual who is being stripped of their rights. *We suggest that Clause 9 should be deleted from the Bill. If Clause 9 is to be retained in the Bill, at a minimum, the Secretary of State should be required to take reasonable steps to give notice of deprivation of citizenship orders.* (Paragraph 235)
36. As the Supreme Court has noted, to comply with the procedural requirements of the ECHR, an appellant must be able to challenge the legality of the measure taken against him, and the right of appeal must be meaningful and effective. In circumstances where an individual does not know they are subject to a deprivation of citizenship order, the right of appeal is meaningless, particularly where time limits will be applied. Applying time limits to an appeal against an uncommunicated deprivation of citizenship order risks violating the right to a fair trial as protected by Article 6. *If clause 9 is to be retained in the Bill, we suggest that it would be fairer and clearer to include provision that the time limits only start running from the date of knowledge of the deprivation of citizenship order.* (Paragraph 243)
37. Article 6(1) of the ECHR requires that, in the determination of a person’s civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The enactment of retrospective legislation which affects the results of pending proceedings may infringe Article 6(1), unless there are compelling grounds of general interest. It is, prima facie, contrary to the rule of law for the state to interfere in current legal proceedings in order to influence the outcome of those proceedings in a manner favourable to itself. The Government is using Clause 9 to retrospectively validate unlawful deprivation of citizenship orders, following the High Court’s decision that the relevant regulation concerning the giving of notice is ultra vires. It is possible

that there are pending legal proceedings challenging deprivation of citizenship orders on the ground that notice was given by making a record on the Home Office file. Clause 9 would effectively remove a ground of appeal from these claimants. If clause 9 affects the results of pending legal proceedings, this may infringe the fair trial rights of the appellants. *If clause 9 is to be retained, we suggest that it should not have retrospective effect, to avoid the risk of infringing Article 6 in the vent of pending legal proceedings.* (Paragraph 246)

38. It is inevitable that cases concerning deprivation of citizenship orders may present practical difficulties with regard to serving notice. Individuals who leave the jurisdiction, travel to conflict zones, reside in refugee camps, and have no known means of communication, will be virtually impossible to locate and serve with notice. It is reasonable that the requirements for the Secretary of State to give notice to such individuals should take these challenges into account. However, there are three key problems with clause 9: it allows for far too much discretion by the Secretary of State to avoid giving notice of deprivation of citizenship orders; it renders the right of appeal meaningless, and it retrospectively validates unlawful deprivation of citizenship orders which may interfere with pending legal proceedings. Given the severe infringement of rights resulting from deprivation of citizenship orders, it is imperative that robust safeguards are in place when this extreme executive power is used. *As set out above, we suggest that Clause 9 is removed from the Bill.* (Paragraph 247)
39. *If clause 9 is retained in the Bill we suggest it must be amended to:*
- a) *place obligations on the Secretary of State to take reasonable steps to give notice of deprivation of citizenship orders;*
  - b) *remove the broad exemptions of “national security”, “foreign relations” and “public interest” which allow the Secretary of State to avoid giving notice;*
  - c) *ensure the right of appeal is meaningful by providing that time limits do not run until the individual has been notified of the deprivation decision; and*
  - d) *remove the retrospective validation of unlawful deprivation of citizenship orders.* (Paragraph 248)

## Amendments

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### **Amendment 1: Clause 36: ensuring proper interpretation of protection provided by Article 31 of the Refugee Convention**

Page 37, line 18, leave out from “Kingdom” to “that country” and insert—

“for a substantial period and were given or could reasonably have expected to have been given protection under the Refugee Convention in that other country”

*Explanation: this amendment would give effect to the Joint Committee on Human Right’s recommendation that clause 36 be amended to ensure that it does not contradict the protection Article 31 provides to asylum seekers who have passed through other countries on their way to the UK.*

### **Amendment 2: Clause 36(4): confirming Article 31 of the Refugee Convention applies to asylum seekers passing through UK**

Page 37, line 37, leave out subsection (4)

*Explanation: this amendment would give effect to the Joint Committee on Human Right’s recommendation that clause 36 be amended to ensure that it does not contradict the protection Article 31 provides to asylum seekers who are passing through the UK on their way to their destination.*

### **Amendment 3: Clause 36(5): confirming that domestic law reflection of Article 31 is consistent**

Page 37, line 41, leave out subsection (5)

*Explanation: this amendment would ensure that the criminal defence in domestic law that is designed to reflect Article 31 of the Refugee Convention would remain consistent with amendments 1 and 2 above.*

### **Amendment 4: Clause 11: removing differentiation policy**

Page 13, line 31, leave out Clause 11

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that the power to treat recognised refugees differently depending on whether they came directly from a country where their life or freedom was threatened; presented themselves without delay to the authorities; and, where relevant, could show good cause for illegal entry or presence, should be removed from the Bill.*

### **Amendment 5: Clause 15: redefining safe third State**

Page 18, leave out lines 26 to 38 and insert—

“(a) there is not a real risk that the claimant will experience in that State:

(i) persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(ii) violations of their fundamental human rights;

(b) there is not a real risk that the claimant be sent from that State to another State:

(i) otherwise than in accordance with the Refugee Convention, or

(ii) in contravention of their rights under the Human Rights Convention; or

(iii) where there is a real risk of their fundamental human rights being violated.

(c) that State provides, in law and practice, and the claimant is entitled to avail himself of:

(i) appropriate reception arrangements for asylum seekers;

(ii) access to fair and efficient State asylum procedures;

(iii) the legal right to remain during the State asylum procedure;

(iv) where an asylum seeker is found to be in need of international protection, a grant of refugee status or other protective status that provides as a minimum all the rights and obligations set out at Articles 2–34 of the Refugee Convention.”

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that the definition of ‘safe third State’ must ensure that the state in question provides effective protection against human rights abuses and access to an effective asylum system that fully complies with the Refugee Convention.*

***Amendment 6: Clause 15: removing ability to send inadmissible claimant to state to which they have no connection***

Page 18, leave out lines 42 to 45

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that asylum seekers should not be removed to a safe third State other than the one with which they are considered to have a connection.*

***Amendment 7: Clause 15: clarifying when the Secretary of State must consider a prima facie inadmissible claim***

Page 19, leave out lines 1 and 2 and insert—

“An asylum claim shall not be declared inadmissible, and an asylum claim that has been declared inadmissible shall nevertheless be considered under the immigration rules –

(a) if no formal, legally binding and public return arrangements are in place between the United Kingdom and the State to which the claimant has a connection; and/or

(b) if it is unlikely to be possible to remove the claimant to a safe third State within a reasonable period of the declaration of inadmissibility;”

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that claims should not be assessed as inadmissible unless a return arrangement has already been put in place with the relevant safe third State.*

**Amendment 8: Clause 16: limiting bases of connection to safe third State**

Page 19, leave out lines 34 to 42

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that asylum claims should not be declared inadmissible on the basis of the Home Office's view that it would have been reasonable to expect the claimant to have claimed elsewhere.*

**Amendment 9: Clause 28: excising power to remove asylum seekers whose claims are pending**

Page 33, line 18, leave out Clause 28

*Explanation this amendment would give effect to the recommendation of the Joint Committee on Human Rights to take away the power to remove asylum seekers from the UK while their asylum claims are still pending.*

**Amendment 10: Clause 31: retaining recognised test for well-founded fear of persecution (1)**

Page 34, line 45, leave out subsection (2) and (3)

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that the standard of proof for an asylum seeker to establish a well-founded fear of persecution under the Refugee Convention should remain a composite standard of 'reasonable likelihood'.*

**Amendment 11: Clause 31: retaining recognised test for well-founded fear of persecution (2)**

Page 35, line 20, leave out paragraph (a) and insert—

“(a) they would be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and”

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that the standard of proof for an asylum seeker to establish a well-founded fear of persecution under the Refugee Convention should remain a composite standard of 'reasonable likelihood'.*

**Amendment 12: Clause 37: removing lowered threshold for “particularly serious crime”**

Page 38, line 16, leave out subsections (3) to (13)

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that the threshold in respect of what constitutes a “particularly serious crime” for the purposes of Article 33(2) of the Refugee Convention should not be lowered.*

**Amendment 13: Clause 18: removing damage to credibility arising from delay**

Page 22, line 26, leave out subsection (4)

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights to remove the direction for decision makers to treat the provision of evidence on or after the date specified in an evidence notice as damaging to credibility.*

**Amendment 14: Clause 21: removing damage to credibility arising from delay**

Page 25, line 29, leave out subsection (4)

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights to remove the direction for decision makers to treat the provision of evidence on or after the date specified in a priority removal notice as damaging to credibility.*

**Amendment 15: Clause 25: removing damage to weight of evidence arising from delay**

Page 30, line 14, leave out Clause 25

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights to remove the direction for decision makers to treat the provision of evidence on or after the date specified in an evidence notice or priority removal notice as damaging to the weight to be given to that evidence.*

**Amendment 16: Clause 26: ensuring accelerated detained appeals process only used where fair and just**

Page 31, line 37, leave out subsection (2) and insert—

“(2) The Secretary of State may only certify a decision under this section if the Secretary of State is satisfied that:

(a) any relevant appeal brought in relation to the decision would likely be disposed of expeditiously; and

(b) any relevant appeal brought in relation to the decision could be resolved within the time limits set out in subsection (3) without giving rise to unfairness or injustice.”

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights to limit the cases that are brought within the accelerated detained appeals process, to prevent unfairness or injustice arising.*

***Amendment 17: Clause 26: ensuring accelerated detained appeals process only used where fair and just***

Page 32, line 10, leave out subsection (5) and insert—

“Tribunal Procedure Rules must secure that the First-tier Tribunal or (as the case may be) the Upper Tribunal must, if it is concerned that fairness or justice in an individual case cannot be provided within the accelerated detained appeal process, order that a relevant appeal is to cease to be an accelerated detained appeal.”

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that clause 26 should be amended to ensure that cases are removed from the accelerated detained appeals process where the interests of justice and fairness require it.*

***Amendment 18: Clause 51: Use of scientific methods in age assessments***

Page 57, line 31, leave out subsections (6) and (7)

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that refusal to consent to scientific procedures to assess age should not be taken into account when assessing the credibility of an age-disputed person who may be a child.*

***Amendment 19: Clause 9: Notice of decision to deprive a person of citizenship***

Page 11, line 26, leave out Clause 9

*Explanation: this amendment would give effect to the recommendation of the Joint Committee on Human Rights that clause 9 should be removed.*

## Declaration of interests

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### **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**

- No relevant interests to declare

### **Baroness Massey of Darwen**

- No relevant interests to declare

### **Lord Singh of Wimbledon**

- No relevant interests to declare

# Formal minutes

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**Wednesday 12 January 2022**

Virtual Meeting

Members present:

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

Lord Brabazon of Tara

Joanna Cherry MP

Lord Dubs

Lord Henley

Baroness Ludford

Baroness Massey of Darwen

Angela Richardson MP

Dean Russell MP

David Simmonds MP

Lord Singh of Wimbledon

Draft Report, *Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4) – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders*, 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 248 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Twelfth 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.

[Adjourned till 26 January at 2.40pm.]

## Witnesses

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

### Wednesday 08 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 Ghezlbash**, 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](#)

### Wednesday 17 November 2021

**Ms Zoe Gardner**, Policy & Advocacy Manager, Joint Council for the Welfare of Immigrants; **Lucy Moreton**, Professional Officer, Immigration Services Union [Q18–27](#)

**Mr Stewart MacLachlan**, Senior Legal & Policy Officer, Refugee and Migrant Children's Consortium; **Luke Geoghegan**, Head of Policy and Research, British Association of Social Workers [Q28–35](#)

### Wednesday 01 December 2021

**Tom Pursglove MP**, Parliamentary Under Secretary of State, Home Office; **Dan Hobbs**, Director, Asylum, Protection and Enforcement, Home Office; **Dan O'Mahoney**, Clandestine Channel Threat Commander, Home Office [Q36–54](#)

## Published written evidence

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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 Aden and Co Solicitor ([NBB0031](#))
- 2 Amnesty International UK ([NBB0037](#))
- 3 Amnesty International UK; and Project for the Registration of Children as British Citizens ([NBB0072](#))
- 4 Anonymised ([NBB0024](#))
- 5 Anonymised ([NBB0018](#))
- 6 BIOT Citizens ([NBB0019](#))
- 7 Bail for Immigration Detainees ([NBB0043](#))
- 8 British Association of Social Workers ([NBB0027](#))
- 9 British Overseas Territories Citizenship Campaign ([NBB0014](#))
- 10 Central Asylum Yorkshire ([NBB0033](#))
- 11 Chagossian Voices ([NBB0056](#))
- 12 Donate4refugees ([NBB0069](#))
- 13 Duberry, Mr. Shelly Omarie (Businessman, Self employed Businessman/Entrepreneur) ([NBB0017](#))
- 14 ECPAT UK ([NBB0046](#))
- 15 European Network on Statelessness ([NBB0050](#))
- 16 Evangelical Alliance ([NBB0028](#))
- 17 Families Together Coalition ([NBB0054](#))
- 18 Farhangi, Mr Peter ([NBB0029](#))
- 19 Fran, Mr ([NBB0032](#))
- 20 Freedom from Torture ([NBB0041](#))
- 21 Gadhvi, Koosh ([NBB0010](#))
- 22 GlobalBritons ([NBB0026](#))
- 23 Greater Manchester Immigration Aid Unit ([NBB0064](#))
- 24 Helen Bamber Foundation ([NBB0038](#))
- 25 Home Office ([NBB0074](#))
- 26 Home Office ([NBB0073](#))
- 27 Humanists UK ([NBB0036](#))
- 28 Iona Community Fife Family Group ([NBB0060](#))
- 29 Jesuit Refugee Service UK ([NBB0055](#))
- 30 Joint Council for the Welfare of Immigrants ([NBB0053](#))
- 31 Joubert, Miss Shelley ([NBB0013](#))
- 32 Justice Studio ([NBB0034](#))

- 33 Leveque, Rosy ([NBB0015](#))
- 34 Love146 ([NBB0071](#))
- 35 McCann, Sophie (Advocacy Officer, MSF UK) ([NBB0061](#))
- 36 Migrant and Refugee Children’s Legal Unit (MiCLU) at Islington Law Centre ([NBB0051](#))
- 37 Migration Watch UK ([NBB0040](#))
- 38 Modern Slavery Policy and Evidence Centre ([NBB0049](#))
- 39 Morgan, Ms Jennifer (Tutor in Law and CILEx Lawyer, Cardiff University); Dr Paul McDonough (Lecturer in Law, Cardiff University); and Dr Bharat Malkani (Senior Lecturer in Law, Cardiff University) ([NBB0048](#))
- 40 Northern Ireland Human Rights Commission ([NBB0067](#))
- 41 Omoniyi, Mr Adebayo Joseph ([NBB0059](#))
- 42 Preston City of Sanctuary ([NBB0020](#))
- 43 Project for the Registration of Children as British Citizens; and Amnesty International UK ([NBB0039](#))
- 44 Quakers in Britain; and Quaker Asylum and Refugee Network ([NBB0042](#))
- 45 Rainbow Migration ([NBB0066](#))
- 46 Refugee Council ([NBB0021](#))
- 47 Refugee Council ([NBB0044](#))
- 48 Refugee Council ([NBB0045](#))
- 49 Refugee Law Initiative, School of Advanced Study, University of London ([NBB0030](#))
- 50 Refugee and Migrant Children’s Consortium ([NBB0047](#))
- 51 Reprieve ([NBB0076](#))
- 52 Reprieve ([NBB0063](#))
- 53 Sable International ([NBB0022](#))
- 54 Safe Passage UK ([NBB0065](#))
- 55 Shaw, Mr Michael (volunteer, Central Asylum Yorkshire) ([NBB0016](#))
- 56 Sprague, Ms. Tabitha ([NBB0058](#))
- 57 Statewatch ([NBB0052](#))
- 58 Sumption, Madeleine (Director, Migration Observatory) ([NBB0062](#))
- 59 JCHR legal advisers ([NBB0070](#))
- 60 The Law Society ([NBB0068](#))
- 61 We Belong ([NBB0057](#))
- 62 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
9th	Legislative Scrutiny: Nationality and Borders Bill (Part 3) – Immigration offences and enforcement	HC 885 HL 112
10th	Legislative Scrutiny: Judicial Review and Courts Bill	HC 884 HL 120
11th	Legislative Scrutiny: Nationality and Borders Bill (Part 5)— Modern slavery	HC 964 HL 135
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

<b>Number</b>	<b>Title</b>	<b>Reference</b>
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
7th Special Report	Legislative Scrutiny: Elections Bill: Government Response to the Committee's Fifth Report	HC 911
8th Special Report	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill (Parts 7 and 8): Sentencing and Remand of Children and Young People: Government Response to the Committee's Sixth Report	HC 983

### Session 2019–21

<b>Number</b>	<b>Title</b>	<b>Reference</b>
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

<b>Number</b>	<b>Title</b>	<b>Reference</b>
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
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