Written Evidence by Dr Helen O'Nions (IMB0027)

Introduction

I am writing this response as an academic and author of several works examining aspects of asylum policy, including *Asylum: A Right Denied* Routledge 2014. I am also vice-chair of the Nottingham and Nottinghamshire Refugee Forum and have met many clients who have waited months for their initial asylum interview. We do not recognise the Government's rhetoric suggesting that many are economic migrants seeking to take advantage of our generous welfare system. Most of our clients, including those with young children, are living in poverty. Our staff and volunteers are anxious about the future of refugee protection in Britain. The rhetoric and protests accompanying the Bill are also resulting in increased stress and anxiety for our clients. Many of those currently in hotels are outside the city, in rural areas without adequate support networks and opportunities for social and cultural interaction. They cannot access legal advice (either because it is not affordable or not accessible) and are now waiting years for decisions. The situation is untenable and completely unacceptable in the fifth richest economy which prides itself on a history of tolerance and compassion.

The following response relates to three of the points identified in the call for evidence.

2. The attempt to prevent the obligation under s3 of the Human Rights Act to interpret legislation 'so far as it is possible to do so' in line with the Strasbourg jurisprudence.

It is well established that s3 is the main mechanism for securing compliance with Convention rights in UK courts. Since the House of Lords decision in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 it has been accepted that reading into legislation to secure compliance has been a legitimate judicial endeavour. That said, it is clear that the courts are unlikely to reach an interpretation that undermines the clear intentions of Parliament (see for example the *dicta* of Lady Hale, recognising: "There are limits to the interpretive obligation. You cannot completely twist the statutory meaning and the statutory purpose in order to produce a compatible interpretation."[1]

It is therefore unclear why there is a need for Clause 1(5). The Bill does not exclude the possibility of a s4 declaration of incompatibility with Convention rights and the removal of the s3 obligation means that such declarations, rarely utilised by the courts, will be more likely. It may be surmised that this is intended to preserve judicial dialogue with parliament but, in reality it could lead to protracted legal disputes as a provision is unlikely to be deemed incompatible until it has reached the final authority of the Supreme Court. It also appears likely, given the section 19(1)b position outlined by the Home Secretary, that the executive will not use the section 10 power to remedy any identified incompatibility. Thus t1

[1] Joint Committee on Human Rights, Oral evidence: The Government's Independent Human Rights Act Review, HC 1161 3 February 2021

This suggests that ministerial statements regarding the Bill's likely compliance with human rights laws are misleading. The main mechanism for securing compliance, through rights-consistent interpretation, is effectively being ousted. This is indicative of a general provocative tone in the introductory statement and Hansard debates where the Home Secretary welcomes the prospect of conflict with 'lefty' lawyers and the courts.

There are judicial limits provided by the rule of law as identified by the Justice Secretary, Robert Buckland in Hansard. Common law constitutional principles cannot simply be voided by the wording of a statute. Further, the Human rights Act is a constitutional statute which necessitates express repeal.[2] Previous attempts to oust the jurisdiction of the Courts (also in the immigration context) have met with condemnation from senior judicial figures.[3] It may therefore reasonably be suggested that there is an underlying agenda to generate a high-level human rights conflict which the government will pose as *the public vs the courts* (furthering a trend that began with the Supreme Court decision in *Miller 1* and the refusal of the then Justice Secretary, Liz Truss, to condemn tabloid criticism of the judiciary).

3. Clause 2 of the Bill is the main provision allowing for those who do not enter the UK lawfully, i.e. the vast majority of asylum seekers, to be removed from the UK without consideration of their asylum or human rights claim. Clause 4 makes any claims for protection inadmissible. It acts as a trigger which subjects those to which it applies to mandatory detention and expulsion; and further prevents them from being able to ever enter and remain in the UK or claim British citizenship. This is a particularly draconian provision that is legally unsound. It is what led the UNHCR to view the proposals as 'an asylum ban'.

The justification for clause 2 relies on a shaky interpretation of Article 31 of the Refugee Convention which provides that refugees should not be penalized for their illegal entry providing they have come directly from their country of origin and show good cause. The Home Secretary has used this justification and several supporters of the bill have relied on it to say that lawful entry is a pre-requisite of refugee determination and protection.[4] This is incorrect.

Article 31 is actually a *sui generis* provision applying only to the imposition of criminal penalties. Nowhere else in the Convention is the right to seek asylum predicated on lawful entry. The Article 33 prohibition of refoulement, the cornerstone of the Refugee Convention, does not suggest it can only be claimed by those who arrive lawfully. The Convention would be a very weak instrument indeed if lawful entry was a prerequisite for refugee protection. The only asylum seekers entering the UK lawfully are those resettled or dependants and family members on family reunion visas (around 5,000 in 2022 – significantly fewer than in 2019).[5]

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[2] As per Lord Justice Laws in *Thoburn v Sunderland City Council* [2002] 3 WLR 247

[3] Clause 10 Asylum and Immigration (Treatment of Claimants) Act 2003 and the criticism of Lord Woolf; see also Lord Justice Denning in *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 58 re the constitutional importance of the rule of law.

[4] Hansard vol 729, 13th March 2023

[5] Home Office, How many people do we grant protection to? Nov 2022. Available at:

The definition of a refugee under Article 1A(2) of the Refugee Convention requires the refugee to be outside their country of origin. There is no option of obtaining a refugee visa. Indeed, visa requirements have previously been imposed by the government on nationals of countries benefiting from visa-free travel, notably Zimbabwe (2002) and El Salvador (2022), to make it more difficult for them to claim asylum.

It has been recognised since the case of *R v Uxbridge Magistrates Court, ex parte Adimi* [1999], that asylum-seekers will have to engage in some unlawful activity to gain access to a territory to claim protection. As Lord Justice Simon Brown famously stated "The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents".

Lord Justice Brown scrutinised the term the meaning of 'coming directly' using academic authority, the travaux preparatoire to the Convention, and the UNHCR's Executive Committee resolutions. He then rejected the argument that Article 31 allows the refugee no element of choice as to where he or she should claim asylum. He also cites the UNHCR guidelines which should be afforded 'considerable weight':

"The expression 'coming directly' in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits." [para.20]

This approach finds considerable support in the global consultation discussions.[6] The Home Secretary brings forward no authority to support her contrary interpretation.

The deliberate, misleading argument illegal entry prevents a person from being a refugee is not borne out by any evidence and is emphatically rejected by the UNHCR. Almost all asylum arrivals in the UK may be interpreted to have some element of illegality (the only exception being the comparatively small number who are resettled). The most recent Home Office statistics suggest that nationals of Iran, Sudan, Iraq, Afghanistan and Eritrea have well over an 80% chance of being recognised as refugees (Iran 82%, Afghanistan 98%, Syria 98%, Eritrea 98%, and Sudan 87%). Only Afghan nationals are able to enter the UK lawfully using one of the pathways under the Afghan resettlement scheme and the practical difficulties of doing so have been well-documented. The argument that these arrivals are economic migrants, rather than refugees, is completely unsubstantiated. As is the argument that everyone wants to claim asylum in the UK – with France and Germany taking more than twice as many applicants last year, and over three million Syrian refugees living in Turkey.

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https://www.gov.uk/government/statistics/immigration-statistics-year-ending-september-2022/how-many-people-do-we-grant-protection-to

[6] Feller, Turk and Nicholson (eds.) Refugee Protection in International Law. UNHCR Global Consultations CUP 2003

Even Albanian nationals arriving by boat are more likely than not to be recognised as refugees according to the most recent Home Office statistics.

The reality therefore is that the clause 2 provision will result in the forcible detention of 'refugees' without access to effective challenge or scrutiny. It will lead to their removal and exclude them from re-entry in the future. It will also prevent them from gaining citizenship and pass this punishment to their children.

Clause 2 and 4 undermine the right to seek and enjoy asylum in Article 14 of the Universal Declaration of Human Rights. This is the primary reason why the Council of Europe's Commissioner for Human Rights has expressed concerns and why the UNHCR have condemned the Bill as a *de fact*o 'asylum ban'.[7]

Currently there are around 160,000 people (compared to 10,000 in 2010) waiting for a decision on their asylum case. Some are now waiting two years for a substantive interview, forced to constantly revisit their trauma so as not to provide inconsistent testimony. This is over four times longer than the delay in Germany and France. The Bill does nothing to tackle the backlog of applications. In fact, the increased use of detention and the difficulties in removing significant numbers either to France or to Rwanda suggest that the delays will increase still further. The asylum system is broken and the solution is to be found in a vastly improved and more efficient decision making process.

Clause 11 on detention.
Vulnerable persons will no longer be able to avoid detention through the operation of the Home Office 'adults at risk' policy which was revised following the Shaw reports highlighted the effects of immigration detention on vulnerable people.[8]

Council of Europe and UN guidelines establish that detention should be a last resort and that vulnerable groups, such as children, pregnant women and torture survivors, should 'not normally' be detained.[9] In response to the Bill, Medicines San Frontiers have highlighted the extreme impact of detention on refugees which exacerbates trauma leading to suicidal ideation and self-harm.[10]

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[7] Dunja Mijatović, letter to the House of Commons 24th March 2023. Available at: https://www.coe.int/en/web/commissioner/-/parliamentarians-should-uphold-the-united-kingdom-s-international-obligations-when-scrutinising-the-illegal-migration-bill-; UNHCR Statement on the Illegal Migration Bill. Available at: https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html

[8] Stephen Shaw Review into the welfare in detention of vulnerable persons 2016 Cmnd 9186; and 2018 follow up report, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf

[9] UNHCR Guidelines on Detention of Asylum Seekers 1999 Available at: https://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html

[10] Sophie McCann 'The UK's Illegal Migration Bill will have grave consequences for health and human

Case law establishes that the detention of vulnerable people can engage Article 3 (prohibition of inhuman and degrading treatment), 5 (liberty) and 8 (family and private life) of the ECHR. In *Saadi v UK* the ECtHR found that the detention of asylum seekers for administrative convenience was lawful under Article 5(1)e but only because it was exercised in good faith and was 'proportionate' to the legitimate aim of preventing unauthorised entry.[11] Proportionality in the case was strongly linked to the comparatively short period of detention (7-10 days). The proposed detention under clause 11 is neither proportionate nor in good faith. There have already been a significant number of compensation claims resulting from the unlawful detention of torture survivors.[12]

Whilst the Home Secretary contends that detention pending removal is lawful providing there is a 'reasonable prospect of removal', this has to be viewed in light of traditional legal safeguards, including the right to a review of detention. Given concerns about Rwanda's limited processing capacity it seems probably that many asylum seekers, including children, will be detained for far longer than 28 days. The use of detention is viewed as an exceptional measure in the UNHCR Global consultations and its legitimacy depends on a right to challenge the decision to detain.[13] If detention lacks these safeguards it will effectively be a punishment engaging Article 31.

Most of the caselaw concerning longer periods of detention relates to foreign criminals where there is a clear public interest justification. The detention of asylum seekers by contrast will require thorough scrutiny. The Bill at present makes no provision for this beyond habeas corpus applications, it is therefore likely to be deemed arbitrary and unlawful.

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welfare' BMJ 2023, 380. McCann draws on MSF evidence from Greece and the pacific island of Nauru where 60% of those detained expressed suicidal tendencies and 30% had attempted suicide, including children as young as nine.

[11] Helen O'Nions 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' European Journal of Migration and Law 2008 vol.10(2) 149-185

[12] For example, *Medical Justice and others v SSHD* [2017] EWHC 2461 (Admin)

[13] Guy Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection. A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations October 2001 https://www.unhcr.org/3bcfdf164.pdf