Written evidence from Amnesty International and Migrant Voice (HRA0052)

Amnesty International UK is a national section of a global movement of over seven million people who campaign for every person to enjoy all rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We represent more than 670,000 supporters in the United Kingdom. We are independent of any government, political ideology, economic interest or religion.

Migrant Voice is a national, migrant-led organisation working with migrants regardless of their status and country of origin, including refugees and asylum seekers. We develop their skills and confidence, empowering them to speak for themselves about their own lives and issues that affect their communities. Whether speaking out in the media or on public or political platforms, the aim is to create positive change for migrants – countering xenophobia, discrimination and unjust policies, strengthening communities, and bringing social justice – change which benefits the whole of UK society.

1. Migrant Voice and Amnesty International UK (AIUK) are grateful for the opportunity to raise the following concerns in connection with the first three of the issues identified in the Committee's call for evidence. We make this submission, having regard to the specific issues in respect of which the Committee has invited submissions, with a particular focus on matters concerning or relating to Home Office nationality, immigration and asylum functions.

2. We have read the Committee's submission of 4 March 2021 to the Chair of the Independent Human Rights Act Review (IHRAR). We broadly agree with that submission. We do not go further than that in recognition that the Committee's submission extends beyond the expertise, experience and focus relating to this, our joint submission.

3. Accordingly, we address the first three issues identified in the call for evidence under discrete headings. A unifying feature running through our submission is our concern that the HRA is significantly undermined by a failure of successive administrations, among others, to promote and sustain a culture of respect for human rights, including by harmful misrepresentations by Ministers of the HRA and its effect. It is a matter of profound regret that the Government's decision to commission the IHRAR appears to arise from and reflect a general lack of respect on the part of Ministers for the HRA and for the human rights and dignity of people.

HRA and people's capacity to enforce their human rights:

4. In February 2018, AIUK provided the Committee with a submission to its *Enforcing Human Rights* inquiry.[1] We draw attention to paragraphs 58 to 68 of that submission, which concern the human rights impact of barriers to people being able to establish their possession of, right to or eligibility for either British citizenship or leave to enter or remain. Status (citizenship or immigration status) was there described as 'foundational' because profound human rights questions rest upon having and being

[1] http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Human%20Rights%20Joint%20Committee/Enforcing%20Human%20Rights/written/78416.html

recognised to have a particular status. These questions include whether a person is subject to powers of detention or expulsion, whether a person has access to the means to maintain themselves in dignity together with their family and whether a person is exposed or made vulnerable to violence, exploitation or other abuse.

5. Two months later, the then Prime Minister and Home Secretary each offered apologies for what is now known as the Windrush scandal.[2] That concerned how many, particularly black and Asian, British people had come to be dispossessed of their citizenship rights and wrongly treated as if without lawful permission to be in the UK.[3] The last year has been dominated by a global pandemic, which among other things has highlighted the many vulnerabilities and deprivations that are inflicted upon people subject to immigration controls and powers.[4] Of especial prominence have been the impact of no recourse to public funds, the exercise of immigration powers of detention and the provision of accommodation to people seeking asylum.[5] Of increasing salience, with the availability and roll out of vaccination, is the deterrent effect of immigration policy upon access to healthcare.[6] These matters – as also the impact of EU withdrawal upon EU citizens and their family members living in the UK – emphasise the profound importance of status and status recognition in the 'foundational' sense to which AIUK's 2018 submission related. Additionally, the Windrush scandal lays emphasis on the intimate connection between citizenship and identity,[7] which in itself concerns human rights including in relation to respect for private life.[8]

6. Having regard to all that has been revealed by the Windrush scandal, the pandemic and EU withdrawal, it ought now to be clear, if it was not previously, that the capacity of many people, who come to the UK for purposes such as to work, study, join family and seek asylum, to enforce their human rights is relatively weak. In many ways, it has been made weaker over several years, Parliaments and administrations, which have:

    (i) curtailed or removed the means by which human rights may be enforced (such as rights of appeal,[9] legal aid,[10] access to judicial review[11] and personal data protections);[12]

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[2] That of the then Home Secretary was given in the House in response to an Urgent Question: *Hansard* HC, 16 April 2018 : Col 27 *per* Rt Hon Amber Rudd

[3] As AIUK summarised in submissions to the Committee's 2019-2021 inquiry into *Black people, racism and human rights*: https://committees.parliament.uk/writtenevidence/11496/pdf/

[4] As we have submitted to the Committee for its 2019-2021 inquiry into *Government's response to Covid-19*: https://committees.parliament.uk/writtenevidence/5047/pdf/ and https://committees.parliament.uk/writtenevidence/2597/pdf/

[5] These are each matters to which our first joint submission to the Committee's Covid-19 inquiry, *op cit*, refers; and the latter has become of especial salience in relation to the use of Napier and Penally Barracks, though concerns surrounding asylum accommodation (which like each of the other two matters long predate the pandemic) significantly include the use of hotel accommodation.

[6] This reasons for this are briefly described here: https://www.amnesty.org.uk/government-must-address-fear-and-mistrust-around-vaccination

[7] That connection is formally recognised in the 1989 UN Convention on the Rights of Children, Articles 7 & 8.

[8] *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin), paragraph 86

[9] Part 2 of the Immigration Act 2014, in particular, has removed appeal rights in respect of a wide range of immigration decisions.

[10] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 generally removed legal aid for non-asylum immigration matters.

(ii) increased executive power that may infringe human rights (including legislation intended to constrain the scope of certain rights);[13] and

(iii) imposed measures that have increased the degree of social exclusion and personal deprivation under which people live,[14] which may in turn cause or lead to breaches of people's human rights and debilitates their personal capacity to identify, access and maintain effective contact with mechanisms, representatives or organisations through which or with the support of which their human rights might be enforced.

7. The above does not dimmish the importance of the Human Rights Act 1998 or respect for human rights more generally. Rather, it emphasises their importance; and the grave risk to the dignity, safety and wellbeing of women, men and children who are either subject to immigration controls or are treated as so subject if there is further erosion of human rights protections. Among the reasons that risk is so severe in this area is that given in the unanimous opinion of the Appellate Committee of the House of Lords (comprising of Lord Bingham of Cornhill, Lord Hoffmann, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Haywood) in March 2007 when addressing a submission for the Home Secretary founded on an analogy drawn between housing and immigration policy.[15] The particular submission was that the courts should normally assume that domestic law struck the appropriate balance for the purposes of any interference with a person's right to respect for private and family life under Article 8(2). That unanimous opinion included:

> "*So here, it was said, the appellate immigration authority should assume that the Immigration Rules and supplementary instructions made by the responsible minister and laid before Parliament had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community. The analogy is unpersuasive. Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented.*"[16]

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[11] Home Office removals policy has sought to restrict of prevent access to judicial review, see e.g. *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin); [2011] EWCA Civ 1710 and *R (FB & Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338

[12] Paragraph 4 of Schedule 2 to the Data Protection Act 2018 provides a wide exemption from fundamental data protections for personal data used or held for immigration purposes.

[13] Section 19 of the Immigration Act 2014, for example, was introduced to confine the approach permitted to a court or tribunal in determining the application of Article 8 (the right to respect for private and family life) when considering decisions made under the Immigration Acts.

[14] The various measures of Part 3 of the Immigration Act 2014 have been especially significant in this regard.

[15] *Huang & Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11

[16] *Ibid*, paragraph 17

8. It is undoubtedly the case that the HRA does more greatly enable people to enforce their human rights in the UK, including in the areas we address here. It is equally the case that it is necessary but nonetheless insufficient to enable this fully and effectively for very many people. We have briefly touched on some of the reasons for that. Other reasons include matters we touch on under the following two subheadings, which concern misunderstanding and harmful representations of and relating to the HRA.

Impact of HRA on practice of public authorities:

9. In the Committee's IHRAR submission, it is noted that the HRA has had considerable positive effect on public authorities, fostering a 'human rights culture' among their staff that is beneficial to understanding, respect and application of human rights standards in their policy and practice.[17]

10. We make no criticism or disagreement with that analysis in noting here that we are considerably less sanguine about this impact in relation to policy and decision-making relating to nationality, immigration and asylum functions – whether that is the policy and decision-making of the Home Office or of other public authorities in carrying out activities and functions specifically relating to people who are or are thought to be subject to immigration controls. That is not to say that the HRA has no such positive impact in these areas.

11. However, we note that the presentation of the HRA, including by Ministers under successive administrations and of differing political parties, in relation to these areas is often harmful.[18] One of the ways by which this presentation does harm is by encouraging or licencing immigration officers and UK Visas and Immigration (UKVI) officials to view people's human rights as an irritation or obstruction to be overcome rather than as basic standards that are required to be respected in order to ensure the dignity of the people whose lives are so much affected by the acts and omissions of immigration officers and UKVI officials. That is in essence the very wrong identified by the Home Secretary in April 2018 concerning the Windrush scandal;[19] and among the wrongs that the current Home Secretary has repeatedly laid claim to be correcting.[20] Those claims are contradicted by evidence of how the Home Office continues to view and treat people subject to its powers.[21]

12. Nonetheless, the HRA remains a vital if insufficient constraint upon excessive and abusive exercise of power in the areas we address here. Not only would removing or limiting its application undermine that constraint, it would risk further encouraging or licencing attitudes and practices, in policy and decision-making, that are hostile to or careless of the people affected and their human dignity – that is particularly so if,

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[17] Committee's letter to the Chair of the IHRAR, 4 March 2021

[18] See AIUK *Enforcing Human Rights* submission *op cit*, paragraphs 39-45 & 49-53

[19] *Hansard* HC, 16 April 2018 : Col 28, where the then Home Secretary identified that excessive focus on policy and strategy "*sometimes loses sight of the individual.*"

[20] e.g. *Hansard* HC, 21 July 2020 : Cols 2020-2022 *per* Rt Hon Priti Patel, Home Secretary

[21] The acts and omissions that led nearly 200 people confined in Napier barracks contracting COVID-19 in a major outbreak, and the circumstances surrounding this, provide an especially recent and shocking example including by the contrast between the oral evidence of the Home Secretary and Permanent Secretary to the Home Affairs Committee on 24 February 2021 (Q94-Q106; Q116-Q127) and the further revelations in the media and by the Independent Chief Inspector of Borders and Immigration (who published key findings on 8 March 2021) that followed.

which appears to be the case, the motivation for removing or limiting the HRA's application is or includes a belief that it is an irritation or obstruction to be overcome.

Impact of HRA on relationship between courts, government and Parliament:

13. The IHRAR's Terms of Reference, commissioned by the Government, raises the question of whether "*the current approach risks "over-judicialising" public administration and draws domestic courts unduly into questions of policy.*" The answer to this question is 'no'. That the question is asked may suggest a profound misunderstanding of constitutional roles and/or the HRA.

14. Parliament is the sovereign lawmaker. The courts are the ultimate adjudicators in interpreting and applying the law. The HRA gives effect to the will of Parliament that the executive and all public authorities should be accountable before the courts for failure to respect and apply the UK's human rights obligations under the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), in particular the articles of the Convention and Protocols specified in the HRA. However, as the Committee has emphasised in its IHRAR submission:[22]

> "*The HRA does not… materially alter the relationship between domestic courts and the Government, but it does extend the grounds on which they may find the actions of public authorities unlawful to include breaches of the Convention.*"

15. The HRA does not, therefore, have any particular impact on the relationship between courts, government and Parliament. However, like any constraint on executive action, the HRA is liable to be a focal point for the expression of frustration or complaint by the executive (or those who would wish the executive to act in ways incompatible with that constraint). Legal aid, judicial review, lawyers and judges are for similar reasons focal points for the same or similar expression. They, just like the HRA, are integral to the UK's constitutional arrangements by which Parliament is the sovereign lawmaker and the courts are the final adjudicators in interpreting and applying the law; with access to justice being a fundamental constitutional principal demanding effective right of access to the courts including to ensure that people's treatment by the executive is properly in accordance with the law.

16. The relationship between courts, government and Parliament is as briefly summarised in the following two extracts from judgments of Lord Bridge and then Nolan LJ respectively. On the relationship between Parliament and the courts:

> "*In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.*"[23]

And on the relationship between the executive and the courts:

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[22] *Op cit*
[23] *X v Morgan-Grampian* [1991] AC 1, 48

> "*The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.*"[24]

17. The relationship between the courts and Parliament and between the courts and the executive are importantly not the same because the role and function of Parliament and the executive are not the same. This is as much true of the areas we touch on this submission as of any other area of law and policy. The importance of this in these areas is emphasised by that, to which we have referred above, said by the Appellate Committee of the House of Lords in March 2007. Yet, it is frequently in the areas of nationality, immigration and asylum that expression of frustration or complaint, to which we refer above, is made including by Ministers. We recall, for example, that two of the three cases, which sparked controversy sufficient for the Committee to conduct an inquiry into "*the case for the Human Rights Act*" in 2006, on which it produced its Thirty-Second Report of Session 2005-2006,[25] concerned these areas.

18. It is useful to reflect on that report. As regards the specific cases, the Committee concluded:

> "*...none of the three cases which sparked controversy – the Afghani hijackers' judgment, the Anthony Rice case and the failure to consider foreign prisoners for deportation – demonstrates a clear need to consider amending the Human Rights Act. The Lord Chancellor agrees and confirms it is the view of the Government as a whole that none of them justifies amendment or repeal of the HRA. We very much welcome the Lord Chancellor's assurance that there is now an unequivocal commitment to the Human Rights Act across the Government, but, in our view, public misunderstandings will continue so long as very senior Ministers make unfounded assertions about the Act and use it as a scapegoat for administrative failings in their departments.*"[26]

19. The Committee further concluded that:

> "*...a culture of respect for human rights is a goal worth striving for. ...It cannot be achieved exclusively through the courts, but needs shifts in public perception. This in turn requires wider knowledge of the benefits of the HRA. But... there remain unresolved questions about how far a culture of human rights is developing.*"[27]

20. We strongly agree with the Committee that a culture of respect for human rights is a goal worth striving for. Such a culture would greatly encourage and help public officials to fulfil the stated ambitions of, for example, the Home Secretary and her predecessors that the Home Office is transparent, learns from others' experience and places a primary focus on the people over whom it holds and exercises wide powers and its impact upon them. It would equally encourage and assist the department to fulfil its legal obligations, both those derived from international human rights

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[24] *M v Home Office* [1992] QB 270, 314
[25] *The Human Rights Act: the DCA and Home Office Reviews*, HL 278/HC 1796, November 2006
[26] *Ibid*, Summary, p3
[27] *Ibid*, Summary, p5

standards, including those incorporated by the HRA, and those with a purely domestic basis.

21. We are profoundly discouraged and concerned, therefore, at the Government's decision to commission this review with terms of reference that include no positive inquiry as to how a culture of respect for human rights might be secured and sustained; nor any specific inquiry into the current will or capacity of public authorities, including the Home Office, to manifest and promote such a culture. That the mindset at the department, promoted by Ministers, remains, for example, "*closed, defensive and secretive*"[28] and inimical to a rights-respecting culture appears to be more rather than less confirmed by what is increasingly reported in the media as to the Government's proposals for a new immigration bill[29] and by such matters as, for example, the increasingly disturbing revelations concerning the Home Office use of Napier barracks as a place to confine people seeking asylum.[30] It is, accordingly, clear that that what is required is not more enquiry into the value or workings of the HRA but rather more commitment and effort at the heart of Government for securing and sustaining a culture of respect for human rights and the HRA.

19/03/2021

[28] *Hansard* HC, 26 March 2013 : Col 1501 *per* Rt Hon Theresa May, then Home Secretary
[29] Most recently concerning the prospect that people seeking asylum may be sent from the UK to other countries or territories for their asylum claims to be processed.
[30] See fn 21 (above)