Written evidence from Freedom from Torture (NBB0041)

Background

1. The proposals within the Bill constitute the greatest threat to the UK's asylum system in a generation. Taken together they will limit access to protection in the UK, criminalise people seeking safety, increase the risk of *refoulement* to persecution, hold refugees in a prolonged limbo without deciding their application, curtail their rights both before and following recognition of status, isolate refugees in harmful 'camps' in the UK and offshore, condemn refugees to poverty and insecurity and cripple the asylum system with delays, inefficiencies and errors.

2. The Bill poses significant legal challenges in terms of compatibility with international law, specifically the Refugee Convention ("the Convention"), the European Convention on Human Rights (ECHR), and the Convention Against Torture (CAT). Ultimately, the Bill is a betrayal of the letter and spirit of the 1951 Refugee Convention, which was drafted in the wake of the holocaust, to ensure that the impossibility of pre-authorised travel would be no barrier to seeking and accessing protection from persecution. Many of the proposals in the Bill contravene international refugee and human rights law, threaten to undermine the global system of refugee protection and erode the UK's reputation as a leader in the protection of refugees. If this Bill is passed, every year thousands of refugees will be denied the opportunity to secure protection, and to recover from persecution because the UK has reneged on its commitment to assess or recognise the protection needs of those who arrive on its shores.

3. The evolving humanitarian crisis in Afghanistan has reminded the international community that when refugees are forced to flee, they are frequently left with no choice but to take any means possible. The small minority of refugees who seek protection in the UK rather than in EU countries often do so for good reasons, such as family and community ties, English language skills, and perceived connections with the UK based on British colonial history or military involvement in their country of nationality. In order to be operational, this Bill's proposals will need to be indiscriminate in nature, applying equally to Afghan families and all other refugees who reach the UK's shores irregularly. This is **unfair, inhumane and unlawful**.

4. For this reason, we consider this piece of legislation to be **an anti-refugee bill**: it will do nothing to enhance the protection the UK offers to refugees or to reduce the risks associated with irregular movement. In fact, by criminalising and excluding refugees, this Bill will increase the vulnerability and exploitation of those who will continue – in the absence of any other option - to move irregularly to seek protection. We agree that the asylum system is in need of reform but we foresee that this Bill will exacerbate rather than fix the significant pre-existing inadequacies across the asylum system. Nothing in this Bill will reduce the current backlog in pending asylum cases, increase decision making efficiency, or reduce the inequalities that asylum seekers experience while their claim is pending.

5. We do not view this Bill in isolation, but rather see it as part of a concerted attack by the UK Government to push through an array of legislation that reduces people's human rights and limits our ability to challenge any abuses that do occur. These proposed changes are far reaching, encompassing parts of the Policing Bill, restrictions on judicial review, and the current review of the Human Rights Act. When taken as a whole, the

potential intersecting impact of these pieces of legislation on the most vulnerable members of society will be incredibly harmful.

Summary

6. As noted in an authoritative legal opinion[1] commissioned by Freedom from Torture, the measures proposed in the Nationality and Borders Bill signify a departure from the basic rationale of the 1951 Refugee Convention[2] and, specifically, the Article 31 protection against penalisation and Article 33 prohibition of *refoulement*. We provide further detail in the sections below, on the specific likely breaches of international refugee and human rights law.

7. In its ambition to create a two-tier system, with access to the asylum procedure, to secure legal status and to the associated rights and entitlements determined by the refugee's method of entry, and preferential treatment for resettled refugees, the key asylum measures in the Bill constitute an attempt to return to the 'authorisation-based' approach to protection that the Refugee Convention sought to replace. The premise that underlies the Government's proposed approach – that a refugee is required to claim asylum in the first safe country they reach – is simply inconsistent with the intentions of the drafters of the Refugee Convention and with international law. Indeed, the non-penalisation of those arriving irregularly, as clarified under Article 31, is central to the intent of the Convention and forms "a key part of the Convention's commitment to access to asylum, without which the other guarantees in the Convention would be undermined."[3] This approach is justified on the grounds that pre-authorisation enables the government to focus its protection resources on those who need it most. The conflation of age and gender with vulnerability ignores the myriad and fluctuating nature of vulnerability, which can manifest through a range of indicators including those related to sexuality, mental health, an experience of torture, trauma or modern slavery, discrimination and exclusion. There is no hierarchy of need within the Convention and single men are entitled to its protection as much as any group.

8. In a unilateral attack on the core objective on the Refugee Convention, the Bill proposes to codify Article 31 within primary legislation – and to do so in a way which unduly narrows its proper scope as a matter of international law. To be effective, the protection of Article 31 must be extended to all asylum-seekers who have not found secure asylum (whether temporary or permanent) before reaching the UK, including those who have travelled irregularly and through other safe countries. It is wrong in law to describe such individuals as illegal migrants. It is doubly wrong to do so when the UK does not provide for a safe and legal route for their arrival. It is trebly wrong to penalise claimants arriving by unauthorised means on the basis that they ought necessarily to have claimed asylum in countries traversed *en route* to the UK. It bears repeating: **the non-penalisation of those arriving irregularly is central to the objectives of the Refugee Convention.[4]**

Is the Bill a legitimate response in order to achieve the Government's stated objectives?

9. The answer to this question is no. The proposals within the Bill effectively weaponise the asylum system in order to deter and disincentivise spontaneous arrivals and late or repeated claims for protection. This approach will not deliver the Government's stated objectives and will only undermine efforts to make the asylum system fair and compassionate.

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[1] If interested in seeing the full legal opinion, please contact Sile Reynolds (contact details at the end of the briefing)
[2] 1951 Convention relating to the Status of Refugees and its 1967 Protocol (collectively, the "Refugee Convention")
[3] Article 31 of the 1951 Convention Relating to the Status of Refugees, (UNCHR Legal and Protection Policy Research Series, July 2007) Dr Cathryn Costello, p 6
[4] ibid, p 5

10. With its focus on pull factors and a disproven assumption that a deterrent approach will work, the proposals in the Bill do nothing to 'break the business model' of smugglers, which is driven by the need for safety and the absence of alternative routes to protection. While smuggling is undoubtedly dangerous and no-one is advocating for refugees to take this route to safety, it is also clear that punishing the victims of smugglers is not only unfair but ineffective. Irregular arrivals will continue, and these proposals will only drive those who continue to arrive clandestinely away from the safety of an asylum determination system and into the hands of those who would exploit them further upon arrival in the UK. The only way to effectively address the flow of people in need of protection is to tackle the drivers: war, terror, conflict over limited natural resources and climate change. The UK must work collaboratively at a global level to tackle the issue of people smuggling.

11. The measures in this Bill are particularly cruel in a context where there is inadequate provision for alternative routes to arriving in the UK to claim asylum: people from almost all refugee-producing States require visas to come to the UK but there is no system of refugee visas in UK immigration law. The extraterritorialisation of UK border controls, including through carrier sanctions and visa restrictions, has contributed to the demand for smugglers and made journeys more dangerous. There is no indication that the Government is considering a resettlement programme or humanitarian visa regime on a scale that would come close to counterbalancing these measures. Even if the Government were to expand these alternative routes to safety, as UNHCR explains: "resettlement and other legal pathways cannot substitute for or absolve a State of its obligations towards persons seeking asylum at its borders, in its territory, or otherwise under its jurisdiction, including those who have arrived irregularly and spontaneously".[5] This means guaranteeing access to a fair hearing for those who arrive spontaneously, and for access to protection and the rights this brings for all those who meet the refugee definition.

12. These measures will not increase the fairness of the system to protect those most in need of asylum, but instead will disproportionately impact on the most traumatised and marginalised. By characterising those who arrive in small boats across the Channel as abusive and unfounded, the Government ignores the statistics showing that most of these people have a valid protection claim. Over half (55%) of the initial decisions in the year ending June 2021 were grants of asylum, humanitarian protection or alternative forms of leave. The grant rate rises to 59% after appeal. [6] The 'fast track' and 'one stop' measures are based on an assumption that late claims and appeals are, by their nature, unmeritorious and abusive. However, there are many reasons why traumatised people may delay disclosure, rely initially on fabricated accounts or present inconsistent or incoherent testimony. It is clinically recognised that an experience of torture or trauma, particularly where that engages feelings of shame – such as with sexual violence - will lead to avoidance behaviours and interfere with the person's ability to disclose. Traumatised individuals need time to process past events and to establish a sufficient level of trust and confidence to reveal the painful and shaming details of their experiences. These are precisely the vulnerable individuals who will be punished and denied protection by these measures.

The proposed reforms will actually weaken and undermine the UK's asylum system

[5] UNHCR, Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom, May 2021, para 5.
[6] Home Office, Immigration statistics, year ending June 2021, accessed here: https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2021/how-many-people-do-we-grant-asylum-or-protection-to#outcomes-of-asylum-applications

13. Bearing in mind the evidence which shows that these kinds of proposals do not have a deterrent effect, it is important to think about the numbers of people this will impact and the effect on the asylum infrastructure in the UK. Estimates suggest that up to **21,600 people** would potentially have their asylum claim deemed as inadmissible each year under the proposals within this Bill.[7] In the absence of readmission agreements, these measures will do nothing to ease the pressure on the asylum system but will instead generate additional work for an under-resourced department, will leave vulnerable people in limbo for an additional six months and will inflate the asylum backlog further. Estimates also suggest that up to **9,200 people** would be subject to the differential treatment proposed for Group 2 refugees, and their temporary protection status would need to be reviewed at regular intervals – anything from every 6 months to 2.5 years.[8] The administrative burden associated with this process would be great and will only build even more delay and inefficiency into the asylum system.

14. Costs associated with increased backlogs, inflated administration, wasteful accommodation contracts, border security, imprisonment, unlawful detention and diplomatic arrangements to facilitate offshore processing will fall to the taxpayer. While the voluntary sector, the NHS and the social care and welfare systems will pick up the pieces of the lives broken by prolonged uncertainty, isolation and the fear of return to torture and persecution.

What are the implications of a UK breach of international law?

15. The Refugee Convention is the only international agreement governing the treatment of people fleeing persecution and crossing borders in order to do so. If the UK abandons its commitment to this Convention, why should other signatories not do the same? Without the Convention we have only moral duty to enforce the principle of non-*refoulement* and protect refugees from return to torture and persecution. This moral duty is in crisis, with governments around the world, including the UK, abdicating responsibility for the assessment and protection of people fleeing persecution. In terms of the number of asylum applications per head of population, the UK ranks low on the charts (51,000 sought asylum or were resettled in 2019)[9], but its influence regionally and globally is significant. Departure from the Convention could have a domino effect on access to protection that would be devastating. Should France (150,000 asylum applications in 2019),[10] Greece (77,000 in 2019)[11], Turkey (currently hosts 3,700,000 refugees[12]) or Iran (hosts close to 1,000,000 refugees)[13] follow suit, then we would be looking at a return to the situation of the 1930s where closed borders and visa requirements left refugees to suffer and die.

JCHR scrutiny questions in detail

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[7] The impact of the New Plan for Immigration Proposals on asylum, Refugee Council briefing, June 2021, accessed here: https://media.refugeecouncil.org.uk/wp-content/uploads/2021/05/27161120/New-Plan-for-Immigration-Impact-Analysis-June-2021.pdf
[8] ibid
[9] The Migration Observatory, Asylum and refugee Resettlement in the UK, 11 May 2021, accessed here: https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/
[10] European Council on Refugees and Exiles, Statistics, France, 18 March 2021, accessed here: https://asylumineurope.org/reports/country/france/statistics/
[11] Asylum Information Database, Country report: Greece, 2019 update, accessed here: https://asylumineurope.org/wp-content/uploads/2020/07/report-download_aida_gr_2019update.pdf
[12] IOM, Turkey migrants' presence monitoring situation report, July 2021, accessed here: https://reliefweb.int/report/turkey/mpm-turkey-migrants-presence-monitoring-situation-report-july-2021
[13] The World Bank, Refugee population by country or territory of asylum – Iran, Islamic Republic, 2020, accessed here: https://data.worldbank.org/indicator/SM.POP.REFG?locations=IR

Question 2: Do proposed changes to the application and appeals process for asylum applicants provide adequate human rights protection, including provisions providing for credibility and the weight given to evidence to be affected by the timeliness of applications and supportive evidence?

Clause 16 provides for an evidence notice to be issued to a claimant requiring them to provide evidence in support of their claim before a specified date. If they fail to do so, the provision of evidence will be deemed 'late' and the claimant will be required to provide a statement setting out their reasons for providing that evidence 'late'. The consequences for not complying with the evidence notice without good reason are that a decision-maker may give minimal weight to that evidence.

Clause 17 creates a principle that if a person making an asylum or a human rights claim provides evidence late, or fails to act in good faith, this conduct shall be taken into account as damaging the claimant's credibility.

Clause 18 provides for a priority removal notice (PRN) to be served to anyone who is liable for removal or deportation. The subject of a PRN will be required to provide a statement, information and/or evidence within the time specified ('the PRN cut-off date') or their reasons for providing evidence after the date.

Clause 20 creates a principle that evidence that is not provided in compliance with the priority removal notice (PRN) may be damaging to a claimant's credibility.

Clause 21 creates an expedited appeal route for appellants where they have been served with a PRN and made a claim or provided reasons or evidence after the PRN cut-off date. Their right of appeal will be to the Upper Tribunal instead of the First-tier Tribunal where certified by the Secretary of State.

Clause 23 creates the principle that a decision-maker must have regard to the principle that evidence raised by the claimant late is given minimal weight, unless there are good reasons why the evidence was provided late.

16. An effective appeal process is a fundamental element of any process for determining the international protection needs of an individual applicant, and the consequences of depriving an individual of such a process are potentially devastating.

17. The proposals to 'fast track' claims and appeals under clauses 16-23 would, depending on the manner in which they are implemented, inhibit access to justice, risk inherent unfairness contrary to the common law and violate the procedural requirements of Articles 2, 3, 4, 8 and of Article 13 ECHR. Most importantly, they may give rise to a significant risk of *refoulement*.

18. There are ample mechanisms built in to the procedure to reduce the burden of handling repeat claims for asylum so any additional mechanisms must be balanced against the obligation not to *refoule* refugees. This obligation compels the government to consider any fresh claims up until the moment of return. The ECHR also obliges the Government to give 'anxious scrutiny' to any claims made under Article 3. The Government cannot propose to restrict access to the asylum process in the name of efficiency without breaching these obligations.

19. There are many reasons why it may not be possible for someone to present all relevant information in support of their claim at the earliest opportunity. These include failings

within the process, such as a poor quality interview[14] or difficulty accessing quality legal advice. The applicant may be too traumatised to recall coherently the events that led to flight, particularly if they are a survivor of torture, sexual violence or trafficking.[15]

20. These proposals penalise the most vulnerable and those who have been failed by the system, by seeking to reduce the weight that is given to any evidence that is submitted after the applicant has been through the one-stop process. This could include independent expert medical evidence – such as a medico-legal report - that often proves determinative in asylum appeals involving our clients.

21. The proportion of asylum appeals allowed in the year to June 2021 was 48%[16] and has been steadily increasing over the last decade (up from 29% in 2010). This means that the asylum appeal is a vital safeguard – particularly for the most vulnerable - as the Government often gets the decision wrong first time.

Clause 24 imposes a duty on the Tribunal Procedure Rules Committee to make rules for an accelerated timeframe for certain appeals made from detention.

22. This clause is, effectively, an attempt to reinstate the previously impugned and "structurally unfair" fast track rules (albeit with some amendments) creating a very real risk of systematic unfairness for all the reasons identified in the *Detention Action* litigation, resulting in the suspension of the Detained Fast Track in 2015.[17] In that case, it was found that the truncated timescales, coupled with detention, put appellants at a serious disadvantage. Survivors of torture and trauma were particularly disadvantaged due to the time required to instruct for and produce medical evidence.

23. The difficulties of proof faced by individuals seeking international protection, and the complexity of the immigration and asylum system, make claims for international protection unlikely to be suitable for just resolution on a short timescale. In the context of detention, it is even more difficult to implement sufficient procedural safeguards to prevent the systemic unfairness that arises from the difficulty of the detainee faces in accessing legal advice and gathering evidence.

24. We do not see how the Government will overcome these challenges, nor what safeguards they will put in place to prevent unlawful operation. The only procedural safeguard proposed by the Bill – requiring that the Tribunal Procedure Rules be amended so as to allow the Upper Tribunal to order than an appeal is no longer to be treated as an "expedited" or "accelerated" appeal is unlikely to be adequate. When considered alongside the accelerated one-stop process that will almost certainly worsen the quality of asylum decision-making, this proposal will only result in further judicial reviews when claims are wrongly, and unlawfully, refused in detention.

Question 3: Does introducing a two-tier system of rights for refugees meet the UK's obligations under refugee law and human rights law?

Clause 10 provides for a differentiated approach to the treatment of refugees based on Article 31(1) of the Refugee Convention and the interpretation set out in Clause 34 of the

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[14] Beyond Belief: how the Home Office fails survivors of torture at the asylum interview, Freedom from Torture, 2020 accessed here: https://freedomfromtorturestories.contentfiles.net/media/documents/Beyond_Belief_report.pdf

[15] Bogner, Herlihy and Brewin, Impact of sexual violence on disclosure during Home Office interviews, British Journal of Psychiatry, 2007 accessed here: http://pc.rhul.ac.uk/sites/csel/wp-content/uploads/2019/09/Bogner-Herlihy-Brewin-2007.pdf

[16] Home Office, Immigration statistics, year ending June 2021, accessed here: https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2021/how-many-people-do-we-grant-asylum-or-protection-to#data-tables

[17] *Detention Action v First Tier Tribunal (IAC), Upper Tribunal (IAC) and the Lord Chancellor* [2015] EWHC 1689 (Admin)

Bill. It introduces the concept of 'Group 1' and 'Group 2' refugees. A refugee is a Group 1 refugee if they have come to the UK directly from a country or territory where their life or freedom was threatened and they have presented themselves without delay to the authorities. If these are not met then a person will be a Group 2 refugee.

25. Clause 10 provides an overarching framework that will allow for the provisions on temporary protection status, as described in the New Plan for Immigration, to be implemented. Importantly, it does not base the distinction between Group 1 and Group 2 refugees on the categories of 'regular' or 'irregular' arrival but instead makes a distinction between those who are protected by Article 31 of the Refugee Convention and those who are not. This clause must then be read alongside clause 34, which narrows the protection available under Article 31. As we discuss below at para 37 in spite of the presentation in the Bill, the inadmissibility regime, which on the face of it appears to track the component parts of Article 31[18], is expressly designed to target unlawful entrants.[19]

26. This means that many refugees who, under international law should benefit from Article 31 protection from penalty, will find themselves in Group 2 "on account of" their unlawful entry, and are likely to be **denied the rights and protections under the Convention**. For this reason, and in light of the fact that clause 10 forms the backbone of the asylum reforms in this Bill, this clause is inconsistent with the basic rationale of the Refugee Convention, and is a breach of Article 31 and the UK's obligation to implement the Convention in good faith.

27. Under clause 10 a 'Group 2 refugee' is likely to be granted temporary protection status with limited leave to remain (up to 30 months), no automatic path to settlement limited family reunion rights and, possibly, no recourse to public funds. These measures will create a parallel and substantial community of refugees with nothing to distinguish them, in terms of fear of persecution, from those who have arrived through pre-authorised routes and been granted refugee status or indefinite leave to remain.[20] This community will be **denied their right to safety and stability**, and forced to live in the shadows, without access to the welfare safety net, separated from family members and in fear of forced return to persecution or death.

28. The ECHR Memorandum which accompanies the Bill argues that clause 10 is consistent with Article 31 of the Refugee Convention[21], and even claims that the conditions within Article 31 form the basis and justification for the clause 10 differentiation approach.[22] On the contrary, the proposed two-tier system is a regressive and unprincipled step that is inconsistent with the basic rationale of the Refugee Convention. One important reason is that Article 31 was intended as a <u>protection</u> against penalisation – primarily, though not exclusively, via the criminal law – for unlawful entry or presence. It was never intended to be used as the basis for systematically affording some refugees less protection than others. An individual's rights under the Convention – and the corresponding obligations of Contracting States – flow from the simple fact of meeting the Convention definition; they are not dependent on a formal recognition process, and certainly not one that favours

[18] The two groups are to be differentiated by reference to whether they meet three criteria: (i) having "come to the United Kingdom directly from a country or territory where their life and freedom was threatened (in the sense of Article 1 of the Refugee Convention)"; (ii) having "presented themselves without delay to the authorities"; and (iii) (where relevant) being able to "show good cause for their unlawful entry or presence".
[19] See the Secretary of State's Foreword to the New Plan for Immigration policy statement, HM Government, March 2021
[20] In the year ending September 2019, 62% of asylum claims were made by those who entered the UK without authorisation, including those who entered by small boat, lorry, or without visas, accessed here: https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/
[21] Paragraph 12, Nationality and Borders Bill, European Convention on Human Rights Memorandum, Home Office, July 2021
[22] Ibid, Paragraph 65

those who have travelled with prior authorisation. The primacy of this principle is critical to understanding why the proposals in this Bill are unlawful and inhumane.

29. There is a stark contrast between the rhetoric used to promote the reception and settlement packages offered to refugees arriving through pre-authorised routes[23], and the justification given for denying any form of integration to those who arrive spontaneously, despite both groups possessing the same protection and integration needs. **Article 34 of the Refugee Convention** calls on States to facilitate the naturalisation of refugees in recognition of the importance of citizenship as the end-point in the pursuit of a durable solution. In spite of this obligation, the temporary protection regime would intentionally maintain a sizeable community of refugees in a precarious state, with no hope of integration or naturalisation. Such an approach would be inconsistent with the good faith effort required of the UK by Article 34.

30. Against this background, the proposed move to a system where "authorised" refugees are privileged and protected, while the rights and protections granted to unauthorised arrivals are substantially eroded, is inconsistent with "one of the core objectives" and the basic rationale of the Refugee Convention itself.

31. The temporary protection regime is, additionally, very likely to be inconsistent with **Article 14 ECHR read with Article 8**. The constant threat of withdrawal of protection inherent in the temporary protection regime would profoundly impact on the enjoyment of a refugee's private and family life in the UK. The proposed limitation or removal of family reunion rights would only add to this harm. This harm would impact disproportionately on refugees who arrived without prior authorisation. This is a group that is analogous, in terms of the need for safety, stability, community and family unity, to those who arrive through a pre-authorised route. It is also a group that would fall under the "other status" category for the purpose of Article 14 in terms of being a personal, identifiable or acquired characteristic. The disproportionate impact felt by this group cannot be objectively justified bearing in mind how the statutory definition of Article 31 narrows its scope such that unauthorised arrivals will be indirectly penalised in a manner that is proscribed under the Refugee Convention. It is also worth bearing in mind the points we make in the summary at paragraphs 10-12 concerning the Government's policy objectives, and the likelihood that these measures will deliver any meaningful impact towards those goals.

32. For a torture survivor, repeated grants of limited leave would have such a harmful impact, including by denying them full access to healthcare and the stability required to rehabilitate, that it would almost certainly constitute inhuman and degrading treatment and be **contrary to Article 14 UN Convention Against Torture** (right to rehabilitation).

33. Attaching a No Recourse to Public Funds condition to temporary protection status is **contrary to Article 23 of the Refugee Convention** which instructs Contracting States to *'accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.*' This proposal could result in up to 3,100 more people per year living in poverty and driven into debt and exploitation.[24] The denial of security and the threat of impoverishment is likely to drive more people into conditions of **forced labour, trafficking and abuse**. This is particularly barbaric considering the forced nature of refugee displacement, the long period of

[23] See Chapter 2 of the New Plan for Immigration policy statement, HM Government, March 2021 and Operation Warm Welcome, accessed here: https://www.gov.uk/government/news/operation-warm-welcome-underway-to-support-afghan-arrivals-in-the-uk
[24] The impact of the New Plan for Immigration Proposals on asylum, Refugee Council briefing, June 2021, accessed here: https://refugeecouncil.org.uk/information/resources/new-plan-for-immigration-impact-analysis/

economic inactivity endured while waiting for an asylum decision and the disabling trauma resulting from the persecution and the delayed access to appropriate support and rehabilitation.

34. Between 1999 and 2008, the Australian government operated a system of Temporary Protection Visas (TPVs), similar to that proposed under clause 10, as a way of deterring irregular arrivals. In 2000, the first full year after TPVs were introduced, there were 2,939 arrivals. In 2001 arrivals rose to more than 5,000. TPVs did not 'break the business model' of smuggling to Australia and did not stop deaths at sea. Many of the women and children who drowned in October 2001 were the family members of TPV holders. [25] Ultimately, the policy was futile, as 90% of TPV holders were granted permanent protection.[26] It was also found, by the Australian Human Rights Commission, to contravene Australia's obligations under the UN Convention on the Rights of the Child.[27]

Clause 34 sets out the Government's interpretation of Article 31(1) of the Refugee Convention, outlining the circumstances in which refugees who have entered or are present in a country illegally, are immune from penalties. The clause amends the existing exception from penalty so that it only applies to individuals who can demonstrate that they could not reasonably have been expected to have sought protection under the Refugee Convention (as opposed to demonstrating that they could not reasonably have been expected to be given protection) in the country they stopped in.

35. The criteria for the application of Article 31 have necessarily been broadly interpreted in international and domestic case law, including the leading case of *Adimi* [2001] QB 667. The UK's Supreme Court has affirmed that all provisions of the Convention should be given "a generous and purposive interpretation, bearing in mind [the Convention's] humanitarian objects and the broad aims reflected in its preamble".[28] Importantly, our own courts have established both that the protection of Article 31 must be extended to all asylum seekers,[29] and that some element of choice is open to refugees as to where they may properly claim asylum.[30]

36. The "coming directly" requirement in Article 31 was never meant to preclude passage through a "safe", intermediate country. The critical question is not whether a person could - or even should - have sought asylum elsewhere, as **there is no requirement in international refugee law to seek protection in the first "safe" country.** Instead, the question is whether an asylum seeker or refugee had **already found secure asylum** (whether temporarily or permanently), such that there is no protection-related reason for their irregular onward movement. Thus, clause 34's replacement of the "coming directly" requirement in the Immigration and Asylum Act 1999 (granting immunity only if the applicant can show that they "could not reasonably have expected to be given protection…. in that country") with a clause (cl 34(5)(a)) that removes immunity if the applicant could reasonably be expected to have "sought" protection there, constitutes a unilateral narrowing of the protection offered by Article 31. Similarly, in what constitutes a serious misconstruction of Article 31, the Bill withdraws immunity for those who have

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[25] Asylum Seeker Resource Centre, What are Temporary Protection Visas? Accessed here: https://asrc.org.au/resources/fact-sheet/temporary-protection-visas/

[26] Temporary Protection Visas (TPVs) factsheet, Uniting Justice Australia, accessed here: https://www.unitingjustice.org.au/refugees-and-asylum-seekers/information-and-action-resources/item/931-temporary-protection-visas-tpvs-fact-sheet

[27] A Last Resort, National Inquiry into Children in Immigration Detention, Human Rights and Equal Opportunity Commission, April 2004

[28] *R (ST (Eritrea)) v Secretary of State for the Home Department* [2012] 2 AC 135, para 30.

[29] *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] Imm AR 560, 677 ("That article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt").

[30] *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] Imm AR 560. See also UNHCR Executive Committee Conclusion No.15 (1979); UNHCR's written evidence to the Home Affairs Committee's inquiry into Channel crossings, September 2020 para 5.

failed to make a claim "as soon as reasonably practicable", including *sur place* refugees who failed to make a claim before the expiry of their existing leave to remain.

37. The inadmissibility regime that we discuss below, as well as the two-tier system described above, constitute the "penalty" to which those who have entered unlawfully will be subjected. The inadmissibility regime is designed to, and will in practice, overwhelmingly apply to unlawful entrants. It can therefore be described as being imposed "on account of" their unlawful entry for the purpose of Article 31. These provisions will almost inevitably expose refugees who fall within the scope of that Article as a matter of international law to the penalty of differential treatment in breach of the UK's obligations under the Refugee Convention.

Clause 14 allows for an asylum claim to be considered inadmissible if the applicant has travelled through, or has a connection to, a safe third country where they could have claimed asylum. The Government will also seek to remove people seeking asylum to a safe country that agrees to receive them, even if they have no connection to it. If a return agreement cannot be secured within 'a reasonable timeframe' (six months), the asylum claim will be determined in the UK.

38. This clause puts on a statutory footing, changes that were made to the Immigration Rules[31] in December 2020. In the first six months of 2021, 4,561 people were issued with a 'notice of intent' informing them that their case is being considered for an inadmissibility decision. Of these, only seven were found to be inadmissible and none has been transferred to another country under the rules.[32] This means that almost one third of all adults who applied for asylum since the new inadmissibility rules were brought in have been held in this prolonged and meaningless limbo. It also means that, as an inevitable consequence of the unworkability of the inadmissibility regime, there will be an expansion in the scope for operation of the two-tier system discussed above.

39. The proposed amendments introduced under clause 14, defining a 'safe third State' (s80B(4)) and a 'connection' to a safe third State (s80C(1-5)) raise a very real risk of a breach of international law, despite the repeated but vague statements that implementation would be 'in accordance with the Refugee Convention'.

40. There is no reference in either clause 14 of the Bill, the Inadmissibility Guidance,[33] or the Immigration Rules to a requirement for the decision-maker to consider whether removing an asylum-seeker to a third country carries a real risk of indirect *refoulement*. While 'safe third country' arrangements are not unlawful *per se* as a matter of international law, the absence of adequate safeguards to prevent onward *refoulement* will result in **breaches of the UK's obligations under Article 33 of the Refugee Convention** (non-*refoulement*). To be effective, the prohibition on *refoulement* must be extended **to all refugees, including those whose status has not yet been formally recognised (i.e. all asylum seekers)**. The **prohibition also extends to "indirect" *refoulement***: that is, removal to a territory from which there is a real risk that they will be expelled to their country of origin. The absence within this Bill of any obligation on the UK to ensure that the 'safe third State's asylum procedure affords effective protection from direct or indirect

[31] Statement of Changes in Immigration Rules, Presented to Parliament pursuant to section 3(2) of the Immigration Act 1971, accessed here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/943127/CCS207_CCS1220673408-001_Statement_of_changes_in_Immigration_Rules_HC_1043__Web_accessible_.pdf

[32] Home Office, Immigration statistics, year ending June 2021, accessed here:https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2021/how-many-people-do-we-grant-asylum-or-protection-to#outcomes-of-asylum-applications

[33] Home Office, Inadmissibility: safe third country cases, Version 5.0, 31 December 2020, accessed here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf

refoulement is likely to create a risk of a breach of **Article 2** (right to life), **Article 3** (prohibition of torture and inhuman and degrading treatment) **and Article 4** (prohibition of slavery and forced labour) **of the ECHR**.[34] To avoid such a breach would require a positive duty to be placed on the UK to conduct an individualised assessment of each 'safe third State' rather than merely assuming compliance with Convention standards as this Bill appears to allow for.[35] Additionally, this must be a preventative duty if it is to avoid a breach of **Article 7 ICCPR** (the international analogue of Article 3 ECHR) and **Articles 2 and 16 of the UN Convention Against Torture**. It is not enough to provide a remedy after the event.[36]

41. 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' and whether the claimant will "enjoy sufficient protection" more generally in the third State. The Bill makes it clear that the 'safe third State' need not even be a signatory to the Refugee Convention. 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.

42. Furthermore, there is nothing in the Bill requiring the 'safe third State' to guarantee the Refugee Convention rights to which refugees are entitled even before they have been recognised as such. These include non-discrimination **(Article 3)**, freedom of religion **(Article 4)**, property rights **(Article 13)** and education (**Article 22(1)**). This constitutes a failure to implement the UK's obligations under the Refugee Convention in good faith. The UK cannot do indirectly (breach Convention rights) that which it is prohibited from doing directly.

43. Importantly, the Bill does not clarify for decision makers what standard they should apply in determining whether the criteria for a 'safe third State' are met. In the absence of clear guidance outlining the correct standard to be applied, there is a risk that they may determine the criteria on the balance of probabilities - therefore allowing removal even if there is a real risk of onward refoulement. Alternatively, they may consider only whether there is (for example) a formal legal prohibition on refoulement with no consideration of how it is observed in practice. Similarly, in defining a 'connection' to a safe third State, no standard is set for how to interpret a 'reasonable' expectation that someone could have made an asylum claim in that State, which could conceivably be a country in which the claimant has never set foot.

44. Treating the claims of asylum-seekers who have entered the UK unlawfully as *prima facie* inadmissible is a "penalty" for the purposes of **Article 31 of the Refugee Convention** and, therefore, a breach of that article (see paragraph 37). Under the Dublin system,[37] family unity, the best interest of the child and the time spent on the territory of the State all limited the extent to which irregular entry could be used to justify transfer. Some level of individualised assessment would be required as a safeguard in any safe third country arrangement. The provisions allow for the Secretary of State to consider a claim even where it has been declared inadmissible in two situations: when it is unlikely to be

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

[35] See *R v Secretary of State for the Home Department; ex parte Adan* [2001] 2 AC 477, accepting that the UK would be in breach of Article 33(1) if it returned an asylum-seeker to a country which applied an interpretation of the refugee definition which the UK considered to be wrong and which would result in the refusal of their claim and their return to the country of origin; *R v Secretary of State for the Home Department, ex parte Yogathas* [2003] 1 AC 920, again proceeding on the basis that the crucial question was the practical risk of onward *refoulement* (see particularly para 48).

[36] A and Ors (No 2) v Secretary of State for the Home Department [2006] 2 AC 221 (HL)

[37] European Union, Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 15 June 1990, accessed here: https://www.refworld.org/docid/3ae6b38714.html

possible to remove the applicant within a "reasonable period" (replicating the existing provision) and where there are "exceptional circumstances". The latter significantly raises the bar for applicants who have a good case for having their claim heard in the UK, including applicants with a family connection in this country that is not considered "exceptional".

45. Taken together, and understood in light of the broader proposals contained in the New Plan for Immigration, these clauses represent a fundamental departure from the letter and spirit of the Refugee Convention to which our Government has pledged its continued commitment. If the UK can take such an unprincipled approach to what are universally agreed human rights standards, then what prevents other countries following suit?

Question 5: What are the implications of extending the offence of helping an asylum seeker facilitate irregular entry to the UK so that it also covers those that may help asylum seekers for no benefit to themselves?

Clause 37 creates a new criminal offence of arriving in the UK without a valid entry clearance where required, in addition to entering without leave. This clause increases the maximum penalty for those returning to the UK in breach of a deportation order from 6 months to 5 years, and for entering without leave or arriving without a valid entry clearance from 6 months to 4 years.

Clause 38 amends the facilitation offences in sections 25 and 25A of the Immigration Act 1971 ("the 1971 Act"), raising the maximum penalty from 14 years' to life imprisonment and removing the requirement of facilitation being "for gain" in relation to section 25A.

46. Taken together, these clauses seek to criminalise anyone helping an asylum seeker to arrive or enter — other than individuals working within NGOs — even if they are acting for wholly altruistic reasons. These are dangerous proposals that strike at the heart of the spirit and purpose of the Convention, which, as the UN High Commissioner for Refugees observed on the eve of the 70th anniversary of the Convention, "reflects common values of altruism, compassion, and solidarity."[38] As others have observed, clause 38 would almost certainly have criminalised the likes of Sir Nicholas Winton for his live-saving actions in rescuing hundreds of children from the Holocaust on the Kindertransport in 1939.

47. Clause 38 has already become the subject of sustained criticism as a result of its apparent absurdity. Indeed, on its natural reading, "facilitating" the arrival or entry of an asylum seeker would extend to lawyers and (some have suggested) even to immigration officials at the border.[39]

48. The implications of these provisions are especially stark in the context of maritime refugee arrivals. Over the last 20 years, 300 people including 36 children have lost their lives whilst trying to cross the Channel in small boats.[40] The recent death of an Eritrean refugee in the channel in August 2021 highlights the continued risk to life that small boat crossings pose. In the absence of widely accessible safe and legal routes to protection, and in the context of an evolving humanitarian crisis in Afghanistan it is not unreasonable to

[38] Filippo Grandi. "Stand up for the Refugee Convention or millions will pay the price" (29 July 2021), accessed here: https://www.unhcr.org/uk/news/latest/2021/7/61029aad4/refugee-convention-millions-pay-price.html
[39] "An analysis of the Nationality and Border Bill", Aneurin Brewer, 21 July 2021, accessed here: https://www.lawgazette.co.uk/commentary-and-opinion/an-analysis-of-the-nationality-and-borders-bill/5109298.article
[40] C J McKinney for FreeMovement, 26 November 2020, accessed here: https://www.freemovement.org.uk/at-least-300-people-have-died-trying-to-cross-the-channel-since-1999/

predict that maritime arrivals will continue to be one of the only ways for refugees to enter the UK for years to come. While there may be "no intention in this Bill to criminalise bona fide, genuine rescue operations by the [Royal National Lifeboat Institution]",[41] the Bill does not provide any explicit reassurance and the amended offences, on their ordinary terms, risks doing just that. Beyond representing a significant regression from international standards, these provisions risk further endangering lives at sea.

49. The Bill gives rise to a direct inconsistency with international law, under which ship masters have an obligation to render assistance to those in distress at sea. In particular, Article 98(1) of the United Nations Convention of the Law of the Sea ("**UNCLOS**") provides that every State "shall require" the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, crew or passengers to "render assistance to any person found at sea in danger of being lost".[42] Article 2.1.10 of the International Convention on Maritime Search and Rescue 1979 (the "**SAR Convention**") explicitly obliges State Parties to "ensure that assistance be provided to any person in distress at sea […] regardless of the nationality or status of such a person or the circumstances in which that person is found."[43] The implication of these rules is that the UK cannot legally prohibit its vessels (in practice, ships' masters) from rescuing asylum seekers at sea.

50. The legal and humanitarian implications of clause 38 are matched by the far-reaching proposals under clause 37. Asylum seekers are not deemed to have "entered" the UK (and so opened themselves up to prosecution) until they disembark on UK territory. If they then disembark at a port, they do not "enter" until they have passed through immigration control. At the point at which they claim asylum, they are admitted to the UK while their claim is processed and they have not, therefore, entered the UK illegally. By criminalising "arrival", the Government would remove the protection given by the narrow definition of "entry" to people who have bypassed immigration procedures in order to claim asylum. This would also have the effect of making it easier to convict those who steer the boats that bring them to the UK.

51. As it is not possible to apply for entry clearance for the purpose of claiming asylum in the UK, and yet an asylum seeker must be physically in the UK in order to make a claim, the effect of this clause is to **criminalise the act of seeking asylum in the UK**.

52. The Bill does not define what is meant by 'arrival' so it is not yet clear how this clause will interact with the proposals under clause 41 and schedule 5 to enhance maritime enforcement powers. Clause 41 includes powers to require migrant vessels to leave UK waters and to allow forcible disembarkation subject to agreement by receiving states. These proposals expand the current maritime enforcement powers to allow for the diversion of migrant vessels in international waters away from UK shores and towards another location or country, and not necessarily the one from which they disembarked, to facilitate the investigation of any offences committed. These are wide-reaching powers with significant implications for access to protection and the risk of *refoulement*, particularly in light of the proposal under clause 12 to exclude the UK territorial seas from being considered a place of claim.

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[41] HC Deb (20 July 2021). Vo. 699. Mr Chris Philp MP, accessed here: https://hansard.parliament.uk/commons/2021-07-20/debates/D6FA6055-BA80-4980-AE15-910876BB1E19/NationalityAndBordersBill

[42] The UK acceded to UNCLOS on 25 July 1997. See also Reg V-33 of the International Convention for the Safety of Life at Sea 1974 ("SOLAS"), which obliges the "master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so…"

[43] The UK definitively signed the SAR Convention on 22 May 1980, thereby confirming its consent to being bound by this treaty.

53. Attempts to criminalise irregular refugee arrivals run against the letter and spirit of the 1951 Convention, which ensured that the impossibility of pre-authorised travel would be no barrier to seeking and accessing protection from persecution. These proposals risk contravening international refugee and human rights law and pose a significant threat to the global system of refugee protection that hinges on respect for established international standards and responsibility sharing.

Question 7: Do the proposed powers to remove asylum seekers to "safe countries" while their asylum claims are pending, with a view to supporting the processing of asylum claims outside the UK in future, comply with the UK's obligations under refugee law and human rights law?

Clause 26 includes provision for the removal of asylum seekers from the UK while their claim is pending, and creates a rebuttable presumption that specified countries are compliant with their obligations under the ECHR.

54. The proposal under clause 26, read with Schedule 3, to allow for the removal of asylum seekers from the UK while a claim is pending (to facilitate the offshore processing of asylum claims) is yet another wide-reaching power, with little detail provided to clarify where claimants may be sent, what might be the selection criteria for eligibility to be processed offshore, who would do the processing and what legal regime would apply, what conditions or safeguards might apply, and what would happen to those recognised as refugees through an offshore process.

55. Depending on how the Government intends to implement this proposal, there may be a significant risk of a breach of international law. Asylum-seekers cannot lawfully be removed for offshore processing if doing so would result in a real risk of breach of their rights under Article 2, 3 or 4 ECHR, including through inhuman or degrading treatment during the status determination procedure and the risk of return to torture, persecution or death. To prevent a violation of Article 3 ECHR and Article 33 of the Refugee Convention, procedural safeguards would need to be in place to ensure there was no risk of *refoulement*.

56. This is not the first time the UK Government has contemplated arrangements of this kind: in 2003, a UK proposal for the creation of offshore "transit processing centres" for asylum-seekers arriving in the EU was ultimately abandoned due to widespread opposition, including from the House of Lords Select Committee on the European Union.[44]

57. The UK is clearly taking a lead from the example of Australia, which has been sending people who come by boat to Nauru and Manus Island, Papua New Guinea since 2001.[45] It stopped sending people in 2008, but began doing this again in 2012. The Australian government has not sent anyone offshore since 2014. Most people who are technically subject to the model have been transferred to the mainland because the conditions offshore were so inadequate that they had to be returned for health and other reasons.

58. The evidence shows that the Australian model does not act as an effective deterrent to irregular marine migration.[46] The model did not 'stop the boats', with more asylum seekers arriving to Australia by boat during the first year of the policy than at any other point prior to offshore processing being implemented.[47]

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[44] House of Lords - European Union - Eleventh Report (parliament.uk), accessed here: https://publications.parliament.uk/pa/ld200304/ldselect/ldeucom/74/7408.htm#a28
[45] Refugee Council of Australia, accessed here: https://www.refugeecouncil.org.au/offshore-processing-facts/
[46] Kaldor Centre Report by M.Gleeson and N.Yacoub August 2021, accessed here: www.kaldorcentre.unsw.ed.au

59. The suffering inflicted on those processed offshore has been enormous, with overwhelming evidence of abuse, including sexual abuse, mental health trauma and death resulting from suicide and neglect. In 2016 UNHCR medical experts found the cumulative rates of depression, anxiety and PTSD among refugees in Manus and Nauru were the highest recorded in the medical literature to date, with more than 80% in both locations.[48] In 2018 Médecins Sans Frontières said the mental suffering on Nauru was among the worst it had seen, including in its projects that provide care for victims of torture.[49]

60. The system encountered significant and sustained international criticism and domestic litigation[50] and costs Australia more than $1 billion a year with hugely expensive processing contracts for private providers and fees to the host government.[51] The Office of the Prosecutor for the International Criminal Court considered allegations made against Australia, concluding that – while they did not fall within the Court's jurisdiction – the offshore detention regime did appear to have given rise to cruel, inhuman or degrading treatment.[52]

Offshore processing and consistency with ECHR obligations

61. Asylum-seekers who arrive in the UK are within its jurisdiction for the purposes of Article 1 ECHR. This means that asylum-seekers could not lawfully be removed for offshore processing if doing so would result in a real risk of breach of their rights under Article 2, 3 or 4 ECHR. Any exposure to torture, inhuman or degrading treatment, or the risk of trafficking, during the status determination process, or a risk that the process itself would result in return to the country of origin to face such treatment, might constitute a breach.

62. Additionally, asylum-seekers could not lawfully be removed for offshore processing if this would breach the UK's obligations under Article 8 ECHR. This might occur if removal interferes with an asylum-seeker's intention to join close family members whose claims were already being processed in the UK. A violation of the right to respect for private life might occur if, for example, a person had serious mental health issues which would be exacerbated by removal and would not be properly treated in the destination country, as may be the case for survivors of torture and trauma. Any interference with an asylum-seeker's procedural rights under Article 8 (taken with Article 13 ECHR, which guarantees the right to an effective remedy) may also constitute a breach. Asylum-seekers could also not be removed to an unlawful risk of breaches of their right to liberty and security of the person under Article 5 ECHR.

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[47] See further, Madeleine Gleeson, Senior Research Associate at the Kaldor Centre for International Law, Sydney Australia, giving evidence to the Home Affairs Select Committee (HASC) on 11th November 2020, accessed here: https://committees.parliament.uk/oralevidence/1195/pdf/

[48] *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 and Legal and Constitutional Affairs Committee*, UNHCR, 2016, accessed here: https://www.unhcr.org/58362da34.pdf

[49] *Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru*, Médecins Sans Frontières mental health project, Nauru, 2018, accessed here: https://www.msf.org/indefinite-despair-report-and-executive-summary-nauru

[50] As recently as January 2021, ten countries raised concerns about Australia's offshore processing arrangements in the context of Australia's third Universal Periodic Review by the UN Human Rights Council: see https://reliefweb.int/sites/reliefweb.int/files/resources/Australia-UPR-2101.pdf. See also the detailed analysis of Australia's non-compliance with international obligations in Gleeson, "Protection deficit: The failure of Australia's offshore processing arrangements to guarantee 'protection elsewhere' in the Pacific" (2019) 31 *International Journal of Refugee Law* 415.

[51] Refugee Council of Australia, 30 August 2021, accessed here: https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/6/

[52] Ben Doherty for the Guardian, Australia's offshore detention is unlawful says ICC, 15 February 2020, accessed here: https://www.theguardian.com/australia-news/2020/feb/15/australias-offshore-detention-is-unlawful-says-international-criminal-court-prosecutor

63. Asylum-seekers processed offshore could also remain within the jurisdiction of the UK – and therefore engage Article 1 ECHR - if it continued to exercise authority and control over them[53] including, potentially, through the involvement of UK State agents in the running of reception centres or the conduct of status determination procedures.

64. There is a risk that offshore processing would contravene obligations of non-discrimination and non-penalisation under Articles 3 and 31 of the Refugee Convention if, for example, the criteria for selection were based at all on common countries of origin or means of arrival in the UK.

65. It would, furthermore, breach Article 14 of the ECHR if the criteria for offshore processing indirectly discriminated against refugees from particular countries or with particular religious beliefs, or against refugees who had arrived in the UK without authorisation, unless the differential impact of these criteria were objectively justified. Similarly, when devising and applying the criteria for offshore processing it would be unlawful not to treat particular groups of asylum-seekers – for example, victims of torture or trafficking or those with serious mental health issues – as differently as their particular situation warranted. With this in mind, there is a very real risk that vulnerable asylum seekers, including women and children are subjected to offshore processing.

Compliance with non-refoulement obligations

66. Removal for offshore processing may contravene the prohibition on *refoulement* under Article 33 of the Refugee Convention if the destination country did not in practice, as well as formally, respect the prohibition on *refoulement* (to persecution or to breaches of Article 2/3 or 4 ECHR) and if the status determination procedures in the destination country, and the procedures for considering human rights claims, were not "fair and efficient". This can occur when refugees are subjected to extraterritorial processing in countries without the experience or resources to assess refugee status fairly, efficiently and with adequate safeguards, or to ensure practical and effective protection against *refoulement*.

67. Freedom from Torture clients have described the insecurity in which they or their family members have lived, while in countries in the region of origin that do not offer sufficient protection. According to our clients, inadequate security procedures have resulted in refugees being identified and targeted by representatives from the country of origin.

68. If the UK were to send asylum-seekers to be processed in a location which did not respect the full range of 1951 Convention rights to which refugees (and hence, as a practical matter, asylum-seekers) are entitled, this would constitute a failure to implement its obligations under the Convention in good faith. This would include the right to enjoy the benefit of the Convention without discrimination (Article 3); the right of free access to the courts (Article 16); and the right to the same treatment as nationals with respect to "elementary education" (Article 22(1)). Other rights must be afforded to all refugees who are physically present in the State's territory: these include rights relating to freedom of religion (including the religious education of children) (Article 4); non-penalisation (Article 31(1); and the right not to be subjected to restrictions on movement "other than those which are necessary" (Article 31(2)).

[53] See e.g. *M v Denmark* (1992) 73 DR 193, [196]; *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643.

69. If the Government's offshore processing arrangements involved recognised refugees being resettled somewhere other than the UK at the end of the process, it would be essential to ensure that that country was one that would guarantee respect for the full range of Convention rights (Articles 17, 18, 23 and 32); and that this was subject to regular review based on changing circumstances or updated evidence.

70. At present, the terms of the draft Bill do not include adequate protections to prevent a breach of ECHR and Convention rights. This concern is reinforced by the European Convention on Human Rights Memorandum published alongside the Bill. Despite setting out an understanding of the principle of non-refoulement (under Article 3 ECHR) [para 14] and summarising the effect of clause 26 [para 15], the Memorandum concludes (with no explanation or analysis) that "these provisions are compatible with Article 3 ECHR, in the light of the *Grand Chamber judgment in Ilias v Hungary (2020) 71 EHRR 6*" [para 15]. The Memorandum does not address the compatibility of clause 26 with the Refugee Convention.

71. Ultimately, and notwithstanding the humanitarian and financial concerns, the UK cannot practically replicate this system of pushbacks. Deploying naval vessels to return people to France is impossible without their agreement, which is not forthcoming.

72. Additionally, such a model does nothing to address why a small minority of asylum seekers travel onwards from France to seek protection in the UK. It is well evidenced that asylum seekers often have good reasons for claiming protection in the UK rather than remaining in an EU country, such as family connections, pre-established communities or English language abilities. Additionally, when people are under the control of smugglers or traffickers they frequently do not have a choice as to which country they eventually reach.

73. As UNHCR states "asylum-seekers and refugees should ordinarily be processed in the country of the State where they arrive", as "[t]he primary responsibility to provide protection rests with the State where asylum is sought."[54]

Question 8: Will the proposed instructions to decision-makers on how to interpret the Refugee Convention secure or restrict the protections that Convention guarantees?

Clause 29 requires applicants to prove the factual basis underlying their claim and the basis for their fear to the higher legal test of 'a balance of probabilities'. The second part of the test concerning whether the applicant's fear of future persecution is well-founded remains at the legal standard of 'reasonable degree of likelihood'.

74. Raising the standard of proof to '*a balance of probabilities'* will significantly increase the number of refugees wrongly sent back to face death or torture and, as such, risks **contravening Article 33 of the 1951 Convention**.

75. The current legal standard of '*reasonable degree of likelihood'* is a test grounded in an understanding of the nature of persecution for a Convention-based reason, the reality of an asylum seeker's experience of flight and the serious implications of setting evidentiary expectations too high. Our Proving Torture[55] research demonstrated how hard it already

[54] Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, UNHCR, May 2013, accessed here: https://www.refworld.org/docid/51af82794.html

[55] Freedom From Torture, Report: Proving Torture, Demanding the impossible Home Office mistreatment of expert medical evidence, November 2016, accessed here: https://www.freedomfromtorture.org/sites/default/files/2019-04/proving_torture_a4_final.pdf

is, even to this relatively low standard of proof, for survivors of torture to prove their claim.

76. The decision maker often has to make an assessment of the claim on the basis of fragmented, incomplete and confused information. This is complicated by the need to assess the plausibility of accounts given by people who are bewildered, frightened and desperate. Mental health problems arising from trauma and a very genuine fear of persecution can seriously affect consistency and coherence, and the ability to recall and present facts.

77. The Home Office has fostered a culture of disbelief which has encouraged its decision makers to deny protection to too many refugees on the grounds that they must be lying. This proposal **elevates the culture of disbelief to a statutory footing** which will raise the bar for anyone, genuine or otherwise, seeking protection in the UK.

Question 11: Is the Bill otherwise compliant with the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child, the European Convention Against Trafficking in Human Beings, and international refugee conventions that the UK has ratified?

Clause 11 allows for the use of certain types of accommodation to house certain cohorts of asylum seekers and refused asylum seekers, including the use of 'accommodation centres'. The clause allows the Secretary of State to increase the time period someone can spend in an accommodation centre (previously limited to 6 months).

78. The Secretary of State already has the power, and has been exercising the power, to accommodate asylum seekers differently according to the stage of their claim and compliance with conditions. This clause appears to make the use of accommodation centres the norm for those who arrive without prior authorisation, with little or no consideration of other relevant factors, such as vulnerability.

79. Our evidence demonstrates that institutional accommodation, including 'quasi-detention' such as the former barracks, is profoundly harmful to the health and wellbeing of asylum seekers. We are concerned that the proposed reception centres will share many of the characteristics with the contingency accommodation used during Covid.

80. Reliance on the model of accommodation used in Denmark, Sweden and Switzerland is cause for concern. Research in the Danish accommodation centres revealed high levels of isolation due to the remote location and conditions within the centres, with residents spending all day in their room, moving only to the shared kitchens to cook. Due to the lack of women-only spaces in almost all centres, some women residents chose to self-confine so as to avoid men in the aftermath of their own experiences of sexual or domestic violence.[56]

81. The stated policy objective of the reception centres proposal is to speed up the processing of claims and removals but there is no evidence that this will be achieved. Over the last two years, the Home Office has increasingly employed remote processes to facilitate and expedite casework. This includes remote asylum interviews and a 'push model' that has broken the geographic link between applicant and caseworker, and allows casework to be directed anywhere within the UK according to capacity. The Plan does not explain how the use of reception centres would contribute further to this goal.

[56]https://www.statewatch.org/media/documents/news/2019/mar/uk-dk-se-reimagining-refugee-rights-asylum-harms-3-19.pdf

82. Accommodating traumatised people in reception centres will act as a significant barrier to the disclosure of sensitive, personal or traumatic information which may be critical to the asylum claim or to an understanding of the needs and behaviour of the applicant. This sort of disclosure can take a long time and often relies on relationships of trust with the legal representative, friends, community members and support services which will be difficult to access under these proposals. This will inevitably mean that the wrong decision is made in asylum claims involving some of the most vulnerable people. This is not the way to build a system that is fair or efficient.

83. Accommodating asylum seekers in an isolated reception centre will have implications for all of the requirements under Section 149 of the Equality Act 2010. At present, UKVI does not collect data which relates to the majority of the protected characteristics for those in asylum accommodation, and where it does, this is often not kept in a format that can easily or accurately be analysed.

Impact on mental health and access to appropriate healthcare

84. People seeking asylum are an inherently more vulnerable population, with a high prevalence of trauma symptoms (including post-traumatic stress disorder [PTSD], anxiety and depression). It is impossible to manage serious mental health conditions, like PTSD, in institutional accommodation. No reference is made to the consideration of vulnerability, the risk of harm or the policy concessions[57] relating to claimants receiving treatment at Freedom from Torture or the Helen Bamber Foundation, to accommodate such claimants in specific locations or types of housing.

85. Research on the accommodation provided to survivors of modern slavery shows that the experience of isolation contributes to increased symptoms of depression and trauma and identifies links with increased rates of early mortality. [58] Prolonged isolation and uncertainty of this nature is stressful and destabilising, particularly for victims of trauma.

86. Clinical consultations[59] overseen by Freedom from Torture with residents of the Napier site demonstrated that the general wellbeing of residents was profoundly harmed by the experience. Clinicians identified residents with PTSD, depression, anxiety and suicidal ideation. Several reported exacerbation of trauma from past experiences, and suffering from flashbacks and nightmares. Residents reported that the accommodation reminded them of their past experiences of exploitation and abuse including imprisonment and violence. One person stated that: "*we're being housed like goats*" and another that: "*this is the same as when we were imprisoned in Libya, just without the physical violence*".

87. In addition to the trauma caused by this form of institutional accommodation, it is also inherently incapable of ensuring appropriate access to healthcare for residents. Six months after it opened, residents in Napier barracks still only had access to one privately contracted nurse and residents at the Penally site had to go through a member of the contractor's staff in order to access an NHS medical appointment. Some of the medical assessments we conducted for residents of the Crowne Plaza also reference difficulties in making adequate contact with GPs, including due to lack of interpreters.

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[57] Home Office, Allocation of accommodation policy, Version 6.0, 27 May 2021, accessed here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990240/allocation-of-accommodation-v6.0-gov-uk.pdf

[58] *Life Beyond the Safe House for Survivors of Modern Slavery in London: gaps and options review report*, Human Trafficking Foundation, 2015, accessed here: https://www.antislaverycommissioner.co.uk/media/1260/life-beyond-the-safe-house.pdf

[59] *Written evidence submitted to the Home Affairs Select Committee inquiry into Home Office preparedness for Covid-19 (Coronavirus) by Doctors of the World, the Helen Bamber Foundation, Forrest Medico-Legal Services and Freedom from Torture*, February 2020, accessed here: https://committees.parliament.uk/writtenevidence/22217/html/

88. Institutional accommodation is ill-suited to the identification of vulnerability or the treatment of trauma. The management of PTSD requires an environment where the subject feels secure and supported in order to be successful.[60] It is impossible to manage serious mental health conditions, like PTSD, adequately in the sort of institutional accommodation so similar in nature to detention that is currently being used, and proposed for further use, by the Home Office. Survivors of trauma need to be in an environment where stress and triggers to re-experiencing symptoms are minimised, where they have a level of control and autonomy, and where they can develop trust and feel respected by those with whom they interact. We know from our medical assessments of the residents at Crowne Plaza and those of partner organisations working with residents in the barracks, that existing Home Office processes consistently fail to identify mental health conditions and other vulnerabilities prior to routing into unsuitable contingency accommodation.

89. This suggests a failure of Home Office safeguarding mechanisms to correctly identify survivors of trauma, torture and trafficking. The Asylum Screening Form (ASF1) is one of the primary ways in which the Home Office identifies vulnerability in asylum applicants, at an early stage in the process. Applicants are asked to briefly describe any individual circumstances such as being pregnant, having a learning disability, being a victim of trafficking, having mental health problems, physical health problems, being a victim of domestic violence or 'other' reason.

90. This form is usually completed by applicants themselves, or with the help of a voluntary organisation such as Migrant Help. They would not normally have the assistance of a solicitor or a healthcare professional. The difficulty therefore is that at this early point in their asylum application they may not understand how their particular experiences or symptoms fit into this list of vulnerability characteristics. Trafficking victims in particular may not identify as such initially if they do not understand their experiences as falling within the scope of modern slavery. They may also not feel safe or supported enough to make a sensitive disclosure at this stage, particularly if their experience of torture or persecution are linked to feelings of shame or a fear of reprisals from fellow residents.

Residents of institutional accommodation often lack control and autonomy

91. The use of barracks during Covid has shown us how isolation from communities, placement in a male-only facility with large dormitories, very limited, or no perceived, privacy and substantially reduced access to specialist services all amplify the residents' sense of being **isolated, discriminated against, and punished**. Institutional accommodation located in remote sites far from a community or facilities and obliging long distances to travel on limited public transport, to access support services, shops, medication, education or places of worship make it difficult or impossible for most people to overcome the enforced isolation. The limitations associated with health issues and insufficient cash only exacerbate this isolation.

92. Comprehensive access to appropriate support services can only be delivered in the community. This need is even more urgent in relation to specialist services, including for torture and trauma rehabilitation, which are often not available in remote locations. Rather than expanding the use of harmful institutional accommodation, the government should make a full commitment to housing people seeking asylum in communities and urgently

[60] The Royal College of Psychiatrists has issued a Position Statement setting out why an environment that increases PTSD symptoms, such as in detention, is not a suitable therapeutic environment. The Quality Standards for healthcare professionals working with victims of torture in detention further discuss the mental health care needs of victims of torture and the impact of detention.

addressing the long-standing structural issues in the management and monitoring of contracted provision.

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