

Written evidence from Northern Ireland Human Rights Commission (NBB0067)

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Summary of Recommendations

The Commission recommends that:

- 3.4 Part 1 of the Bill should be amended to include the birthright commitment in the Belfast (Good Friday) Agreement to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements.**
- 4.4 Clause 10 is removed, and that no legal basis is afforded to a two-tier system of refugee and asylum law.**
- 4.8 Clause 11 is amended to give clear legal recognition to the principle that detention should only be used as a measure of last resort and that further provision is made for review of the legality of such detention.**
- 4.10 where detention is used (which is only used as a last resort) it is subject to robust oversight, inspection, and accountability mechanisms, which are themselves transparent to public scrutiny.**
- 4.14 Clause 14 is removed. In the event that Clause 14 is not removed it should, at least, be amended to include a requirement: to provide written reasons for a declaration; to permit the right to appeal; to ensure “reasonable” is defined carefully and the factors to be taken into account are stipulated clearly.**
- 4.17 Clauses 16 and 17 are amended to allow for the benefit of the doubt to be applied in all asylum applications and that no adverse findings regarding their credibility are made on account of the late submission of evidence.**
- 4.19 in view of the prevalence and impact of trauma upon those seeking asylum and refugee status, that adequate training in trauma-informed practice is provided to all officials working with children and adults within the immigration and asylum system.**
- 4.21 Clause 23(2) is removed and that the weight attached to relevant evidence is not decided by the stage at which it is provided.**
- 4.25 Clause 29 is amended so that the civil standard of proof is removed and does not form part of the adjudicative framework in relation to refugee and asylum claims. The Commission further recommends that provision is made within the Bill for all relevant material factors to be considered in relation to the determination of an applicant’s ‘well-founded fear’ of persecution.**
- 5.2 Clause 37 is removed or amended to give full effect to Article 31(1) of the Refugee Convention 1951.**
- 6.11 the Committee enquire of the Minister what consideration was given to Article 2 of the Protocol in drafting Clause 56 and seek assurances that nothing in Part 4 of the Bill is intended to diminish the rights and safeguards within the EU Trafficking Directive.**

- 6.12** Clause 56 is amended to clarify that no provision made in or under the Bill shall be inconsistent with Article 2 of the Protocol or otherwise cause a diminution of the rights, safeguards and equality of opportunity protected therein.
- 6.13** the Committee seek assurances from the Minister on how UK Government has built in consideration of Article 2 of the Protocol to the development and drafting of legislation and how continued compliance with this obligation will be ensured.
- 7.9** Clause 58 is amended to ensure that the best interests of the child will be the primary consideration in all age assessment procedures and that provision is made for the child's voice to be heard in all matters which concern him/her. This should also mean that all relevant information to the child in advance of, and during the age assessment itself.
- 7.10** Clause 58 is amended to ensure that the presumption of minority is placed on a clear statutory footing.
- 7.12** Clause 64 is amended to allow for the benefit of the doubt to be applied in all asylum applications and to the evidence adduced in support of such an application.
- 8.10** the Bill contains an express commitment that the UN CRC's four guiding principles (non-discrimination, best interests' principle, right to life survival and development, and the right to participate) will be upheld for children.
- 8.11** the Bill contains an independent free-standing clause which states expressly that in all actions, decisions, policies, laws, and regulations which are enacted and undertaken under the Bill, the best interests of the child are a primary consideration, in line with Article 3 UN CRC.
- 8.12** the Bill contains an independent free-standing clause which states that in all actions, decisions, policies, laws, and regulations which are enacted and undertaken under the Bill, that the child will be entitled to express their views in all matters which affect him/her, in line with Article 12 UN CRC.
- 8.13** a children's rights impact assessment be carried out in relation to the Bill's impact on children.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the Commission) pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). Further, the Commission, pursuant to section 78A(1) of the Northern Ireland Act 1998, monitors the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU Withdrawal Agreement. In accordance with these functions the following statutory advice is submitted to the Joint Committee on Human Rights in response to its call for evidence on the human rights compliance of the Nationality and Border Bill.
- 1.2 The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems.¹ The relevant regional and international treaties in this context include:
- European Convention on Human Rights (ECHR) 1950²
 - The Refugee Convention 1951³
 - International Convention on the Elimination of All Forms of Racial Discrimination 1965 (UN CERD)⁴
 - UN International Covenant on Economic, Social and Cultural Rights 1966 (UN ICESCR)⁵
 - The 1967 Optional Protocol to the Refugee Convention 1951⁶
 - UN Convention on the Elimination of All Forms of Discrimination Against Woman (UN CEDAW)⁷
 - UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UN CAT)⁸
 - UN Convention on the Rights of the Child 1989 (UN CRC)⁹
 - UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD)¹⁰

¹ The Northern Ireland Executive (NI Executive) is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom (UK) government's ratification. In addition, the Northern Ireland Act 1998, Section 26(1) provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... [s]he may by order direct that the proposed action shall be taken". The NIHRC further recalls that the Northern Ireland Act 1998, Section 24(1)(a) states that "a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act... is incompatible with any of the Convention rights".

² Ratified by the UK in 1951

³ Ratified by the UK in 1954.

⁴ Ratified by the UK in 1969.

⁵ Ratified by the UK in 1976.

⁶ Ratified by the UK in 1968.

⁷ Ratified by the UK in 1986

⁸ Ratified by the UK in 1988.

⁹ Ratified by the UK in 1991.

¹⁰ Ratified by the UK in 2009.

1.3 In addition to these treaty standards, there exists a body of ‘soft law’ developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN CRC Committee, General Comment 5¹¹
- UN CRC Committee, General Comment 6¹²
- UN Human Rights Committee, General Comment 20¹³
- UN Human Rights Committee, General Comment 15¹⁴
- UN CRC Committee, General Comment 14¹⁵
- UN Committee on the Protection of the Rights of All Migrant Workers and their Families, Joint General Comment 3¹⁶
- UN CEDAW Committee, General Recommendation 38¹⁷
- Concluding Observations of the UN ICESCR Committee¹⁸
- Concluding Observations of the UN CERD Committee¹⁹
- Concluding Observations of the UN CRC Committee²⁰
- UN CAT Committee, General Comment 4²¹
- UN CRC Committee, General Comment 24²²

1.4 In addition, the Commission advises on the commitment in Article 2(1) of the Protocol on Ireland/Northern Ireland of the UK-EU Withdrawal Agreement (the Protocol), as incorporated by section 7A, EU (Withdrawal) Act 2018, to ensure there is no diminution of rights protected in the ‘Rights, Safeguards and Equality of Opportunity’ chapter of the Belfast (Good Friday) Agreement as a result of UK’s withdrawal from the EU.²³

¹¹ CRC/GC/2003/5 ‘UN CRC Committee, General Comment 5 on General measures of implementation of the Convention on the Rights of the Child’, 27 November 2003.

¹² CRC/GC/2005/6, ‘UN CRC Committee General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin’, 1 September 2005

¹³ UN Human Rights Committee, ‘CCPR General Comment 20 on Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’, 10 March 1992.

¹⁴ UN Human Rights Committee, ‘CCPR General Comment 15 on the Position of Aliens Under the Covenant’, 11 April 1986.

¹⁵ CRC /C/GC/14, ‘UN CRC Committee, General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para 1)’, 29 May 2013, ,

¹⁶ CMW/C/GC/3-CRC/C/GC/22, ‘Joint General Comment 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and General Comment 22 of the UN CRC Committee on the general principles regarding the human rights of children in the context of international migration’, 16 November 2017.

¹⁷ CEDAW/C/GC/38, ‘UN CEDAW Committee General Recommendation 38 on trafficking in women and girls in the context of global migration’, 20 November 2020

¹⁸ E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016.

¹⁹ CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland’, 3 October 2016.

²⁰ CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 12 July 2016.

²¹ CAT/C/GC/4, ‘UN CAT Committee General Comment 4 on the implementation of Article 3 of the Convention in the context of Article 22’, 4 September 2018.

²² CRC/C/GC/24, ‘UN CRC Committee General Comment 24 on children’s rights in the child justice system’, 18 September 2019.

²³ Sections 78A-78E, Northern Ireland Act 1998.

- 1.5 The Commission welcomes the opportunity to respond to this call for evidence. The Commission is happy to provide additional oral or written evidence if this could provide further assistance to the Committee.
- 1.6 The Commission is concerned at the number of significant omissions from the Bill as drafted. In particular, the Commission notes as follows:
- The absence of any detail on future refugee resettlement targets and figures. This is noteworthy given the statement in the Bill’s Explanatory Note that “the Government intends to enhance resettlement routes to continue to provide pathways for refugees to be granted protection in the UK”.²⁴
 - The absence of any detail regarding future bi-lateral refugee/asylum agreements with other countries in furtherance of the Bill’s intention to remove asylum seekers to ‘safe third countries’ as per Clause 26 and Schedule 3. This detail is necessary in order to assess any future extraterritorial human rights obligations that might arise with such removals.
 - The absence of any express reference to the ‘principle of non-refoulement’.
 - The absence of any reference to NI. This is particularly concerning in view of the impact of Brexit on the island of Ireland and the specific issue of the birth-right commitment in the Belfast (Good Friday) Agreement 1998.²⁵
 - The apparent failure to carry out any human rights, children’s rights or equality impact assessments in advance of or to accompanying the Bill.
- 1.7 There is a broad range of issues, both legal and practical, which arise from this call for evidence. The Commission’s response is therefore organised thematically to reflect each Part of the Bill and replicates as far as is practicable the format of the Bill under scrutiny. This response also includes the Commission’s concerns regarding the broader human rights compliance of some of the Bill’s clauses. The final section of this response focuses on children’s rights and highlights specific obligations that must be considered throughout the Bill to safeguard and protect the rights of the child. This response follows, and is additional to, the Commission’s previous submission in response to the New Plan for Immigration.²⁶

2.0 International and Regional Human Rights Standards

- 2.1 International and regional human rights law sets out a comprehensive array of human rights which are directly relevant within a refugee and an asylum/immigration
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²⁴ Explanatory Note to the Nationality and Borders Bill as introduced in the House of Commons on 6 July 2021, para 58.

²⁵ See Article 1 (vi) Belfast (Good Friday) Agreement 1998.

²⁶ NIHRC, ‘Response to Public Consultation on the Home Office’s ‘New Plan for Immigration’’, (NIHRC, 2021).

context. The 1951 Refugee Convention and related 1967 Protocol set out the minimum standards expected of states in their treatment of refugees including the basic rights to which they are entitled to. These include the right to non-discrimination (Article 2), the right to freedom of religion (Article 3), the right to property (Article 13), the right of access to the Courts (Article 16), the right to employment (Article 17), the right to housing (Article 21), the right to education (Article 22), the right to social security (Article 24), the right to freedom of movement (Article 26), the right to identification documentation (Article 27) and the right to travel documentation (Article 28). Refugees and asylum seekers are further entitled to the full benefit of the rights as set out in the aforementioned international human rights treaties.

2.2 Of central importance to the protection of the human rights of refugees and asylum seekers is the principle of ‘non-Refoulement’. Article 33 of the Refugee Convention clarifies that this protects against the expulsion or forcible return of refugees to their country of origin in circumstances where their “life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion”.

2.3 This principle finds further expression in Article 3 of the UN CAT. The European Court of Human Rights (ECtHR) has stated, within the context of the prohibition against torture, inhuman or degrading treatment under Article 3 ECHR, that:

It is well-established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.²⁷

2.4 International treaty-monitoring bodies have also expressed concern regarding the negative portrayal of refugees and asylum seekers within the UK. In their 2016 concluding observations, the UN CERD Committee expressed concern regarding “the negative portrayal of ethnic or ethno-religious minority communities, immigrants, asylum seekers and refugees by the media in the State party, particularly in the aftermath of terrorist attacks, and at the rise of racist hate speech on the Internet.”²⁸

2.5 International treaty-monitoring bodies have also highlighted the significant human

²⁷ *Chahal v UK* 919960 ECHR 54, para 74.

²⁸ CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland’, 3 October 2016, para 15.

rights challenges faced by refugees and asylum seekers in accessing their rights across the UK, including in NI. For instance, in their 2016 Concluding Observations, the UN ICESCR Committee expressed concern that “refugees, asylum seekers and refused asylum seekers ... continue to face discrimination in accessing health-care services”.²⁹

- 2.6 The UN Committee on the Rights of the Child also expressed concern regarding the difficulties experienced by “asylum-seeking, refugee and migrant children and their families in accessing basic services, such as education and health care, and are at high risk of destitution”.³⁰
- 2.7 The Special Rapporteur on Extreme Poverty and Human Rights highlighted that “destitution is built into the asylum system” in the UK.³¹
- 2.8 In addition, the adverse socio-economic conditions have long been highlighted by numerous international experts, NGOs and civil society organisations including the British Red Cross³² and the Refugee Council.³³
- 2.9 From a regional perspective, the ECHR contains several significant substantive and procedural protections for refugees and asylum seekers. Chief among these is Article 3 ECHR which contains the prohibition against torture, inhuman and degrading treatment and punishment. Article 3 is an absolute right from which States are precluded from derogating. In *Soering v UK*, for example, the ECtHR stated that: “This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe”.³⁴
- 2.10 Article 3 has been interpreted to include the principle of non-refoulement. In the case of *Sufi and Elimi v UK* the ECtHR held that the removal of the applicants to Somalia would violate Article 3 ECHR because, not only would they be exposed to dire humanitarian conditions, but there would be a real risk of ill-treatment contrary to Article 3 ECHR.³⁵
- 2.11 Article 3 ECHR (often in conjunction with Article 2 which enshrines the right to life)

²⁹ E/C.12/GBR/CO/6, ‘UN Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016, para 55.

³⁰ CRC/C/GBR/CO/5, UN CRC ‘Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 12 July 2016, at para 75(f).

³¹ Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, (16 November 2018).

³² British Red Cross (2021), ‘Far from a home: why asylum accommodation needs reform’, (British Red Cross, 2021)

³³ Refugee Council (2021). “‘I sat watching life go by my window for so long’: The experiences of people seeking asylum living in hotel accommodation”, (Refugee Council, April 2021).

³⁴ *Soering v UK* (1989) ECHR 14, para 88.

³⁵ *Sufi and Elimi v UK* (2011) ECHR 1045, para 293.

further provides important guidance for States in their domestic approach to immigration and asylum enforcement. In particular, in relation to the removal of individuals from the State, the ECtHR stated that:

in the context of expulsion, where there are substantial grounds to believe that the person in question, if expelled, would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment in the destination country, both Articles 2 and 3 imply that the Contracting State must not expel that person.³⁶

- 2.12 Article 3 also extends to the dangers stemming from the actions of non-state or private actors in the destination country should an individual be expelled from the state.³⁷
- 2.13 States must also respect the right to personal and family life under Article 8 ECHR when considering the removal of an individual from the state.³⁸ Moreover, in cases involving children and young people under the age of 18, the ECtHR will consider the best interests of the child principle pursuant to Article 3 UNCRC in its determination of alleged interferences with family unification or reunification.³⁹
- 2.14 Domestically, the importance of the best interests of the child principle was considered in the case of *ZH (Tanzania) v Secretary of State for the Home Department*.⁴⁰ The Supreme Court held that the best interests principle was an inseparable determinative aspect of the proportionality assessment required by Article 8 ECHR. Their Lordships observed that listening to the views of the child pursuant to Article 12 UNCRC was important to understanding their best interests.⁴¹ Thus, in refugee and asylum matters which engage children and their rights, the UK must comply with these additional obligations.
- 2.15 Further protections exist under Article 13 ECHR which guarantees the right to an effective remedy and in Article 14 ECHR which enshrines the right to non-discrimination.

3.0 Part 1: Nationality

- 3.1 The Commission welcomes the positive developments within Part 1 of the Bill which regularise various historical anomalies within British nationality and citizenship law.

³⁶ *FG v Sweden* (2016) ECHR 299, para 110.

³⁷ *JK and Others v Sweden* (2016) ECHR 704, para 80.

³⁸ See *Uner v the Netherlands* (2006) ECHR 873.

³⁹ See *Jeunesse v the Netherlands* (2014) ECHR 2036.

⁴⁰ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

⁴¹ The Court stated that “In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration”, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, para 33.

The Commission is of the view, however, that the omission of any birthright commitment (as enshrined within the Belfast (Good Friday) Agreement 1998 is a mistake, the result of which prolongs the legal uncertainties which surround nationality and citizenship law for all of the people of NI.

3.2 The Belfast (Good Friday) Agreement recognises “the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose”.⁴² In 2008, the Commission submitted its advice on a Bill of Rights for NI, which included a recommendation that the right of people of NI to identify as British or Irish or both and hold the associated citizenship, “with no detriment or difference of treatment of any kind”, should be recognised.⁴³ In response, the UK Government recognised that “any Bill of Rights for Northern Ireland should enshrine in legislation the right of the people of Northern Ireland to identify themselves and be accepted as Irish or British or both”.⁴⁴

3.3 In April 2020, the Joint Committee of the NI Human Rights Commission and the Irish Human Rights and Equality Commission published research on how the birthright commitment in the Belfast (Good Friday) Agreement could be implemented. The report set out several recommendations on how it could be incorporated into UK immigration and nationality law without undermining or inadvertently risking the rights of a person who chooses to identify as British or Irish, or both.⁴⁵

3.4 **The Commission recommends that Part 1 of the Bill should be amended to include the birthright commitment in the Belfast (Good Friday) Agreement to identify, and be accepted, as Irish or British or both without any loss of rights or entitlements.**

4.0 Part 2: Asylum

4.1 The Commission notes the extensive nature of Part 2 of the Bill and the potential consequences for those seeking asylum across several significant areas. This part of the Bill will have an impact upon, amongst other things:

- The treatment and support of refugee’s and asylum seekers;
- The provision of accommodation;
- Issues of due process including admissibility of evidence and assessments of credibility;
- The process of removal of asylum seekers and related appeals; and

⁴² Agreement between the Government of the UK and the Government of Ireland, 10 April 1998, at Article 1(vi).

⁴³ NI Human Rights Commission, ‘A Bill of Rights for NI – Advice to the Secretary of State for NI’ (NIHRC, 2008), at 41.

⁴⁴ NI Office, ‘Consultation Paper: A Bill of Rights for Northern Ireland: Next Steps’ (NIO, 2009), at para 6.6.

⁴⁵ Alison Harvey, ‘A Legal Analysis of Incorporating into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998’ (NIHRC and IHREC, 2020).

- The interpretation of key provisions of the Refugee Convention 1951.
- 4.2 The Commission is concerned that many of the provisions proposed within Part 2 of the Bill will undermine long-established human rights protections for refugees and asylum seekers.
- 4.3 Clause 10 of the Bill places the differential treatment of on a statutory footing. It categorises refugees into two sub-groups (Group 1 and Group 2). Group 2 refugees will be subject to vastly inferior levels of legal protection.⁴⁶ The differential treatment is determined by the refugees’ mode of arrival into the UK, with the Bill drawing a clear and consequential delineation between legal and illegal modes of arrival. Clause 10(6) of the Bill enshrines differential treatment (between Groups 1 and 2) of family members. Such two-tier system of has no basis in international human rights or refugee or protection law. It is manifestly incompatible with the Refugee Convention 1951. According to the UN High Commissioner for Refugees, for example, “the right to seek and enjoy asylum does not depend on the regularity of arrival of an asylum-seeker to a country. In reality, asylum-seekers are often forced to arrive at or enter a territory without prior authorisation”.⁴⁷
- 4.4 **The Commission recommends that Clause 10 is removed, and that no legal basis is afforded to a two-tier system of refugee and asylum law.**
- 4.5 Clause 11 of the Bill provides for the establishment of different centres for accommodation for different asylum seekers. The accommodation will be influenced significantly by the stage of the asylum process and other conditions. This is supplemented in Schedule 3 of the Bill, which makes provision for the detention of asylum seekers outside of the UK pending the determination of their asylum application. International guidelines by the UN High Commissioner for Refugees are clear in their elaboration that “detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain”, and “that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position”.⁴⁸
- 4.6 The UN CAT Committee has also stated that “detention should always be an exceptional measure based on an individual assessment and subject to regular review”,⁴⁹ while the joint Committees of the Protection of All Migrant Workers and

⁴⁶ Nationality and Border Bill, Clause 10(5).

⁴⁷ UN High Commissioner for Refugees, ‘Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom’, (UNHCR, 2021), para 5.

⁴⁸ UN High Commissioner for Refugees, ‘Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (UNHCR, 2012), at 7 and 13.

⁴⁹ CAT/C/GC/4, ‘UN CAT Committee General Comment 4 on the implementation of Article 3 of the Convention in the context of Article

Members of Their Families and the UN CRC observed that:

children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.⁵⁰

- 4.7 The Bill, in its current format, fails to recognise or allow for the varied circumstances of people. There will likely be included: children; people with disabilities; people who have suffered physical, mental, emotional and sexual abuse; and people who have suffered gender-based violence. No provision is made to accommodate any of those vulnerabilities. The Commission is concerned that the Bill does not contain sufficient procedural protections and oversight mechanisms to ensure that the human rights of all asylum seekers are upheld within these detention facilities. Furthermore, it is concerned that detention will not be used as a last resort.
- 4.8 **The Commission recommends that Clause 11 is amended to give clear legal recognition to the principle that detention should only be used as a measure of last resort and that further provision is made for review of the legality of such detention.**
- 4.9 The Commission is concerned that the establishment of detention centres, which may include offshore facilities, heightens the likelihood for, and diminishes the safeguards against, human rights violations. The Bill does not contain any detail on how the rights of asylum seekers and refugees, such as health, education, family life and due process will be protected and facilitated. This should be noted particularly since the English High Court, in June 2021, held that detention facilities in Napier Barracks Kent, which was being used to accommodate asylum seekers, were dangerous and inadequate.⁵¹
- 4.10 **The Commission recommends that where detention is used (which is only used as a last resort) it is subject to robust oversight, inspection, and accountability mechanisms, which are themselves transparent to public scrutiny.**
- 4.11 Clause 14 permits the Home Secretary to determine an asylum claim to be

22', 4 September 2018, para 12.

⁵⁰ CMW/C/GC/3-CRC/C/GC/22, 'Joint General Comment 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and General Comment 22 of the UN CRC Committee on the general principles regarding the human rights of children in the context of international migration', 16 November 2017, para 5.

⁵¹ See *R(NB & Others) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin)

inadmissible if the applicant has a connection to a safe third country. There is no right of appeal from such a declaration.⁵² Clause 14 provides that a connection to a safe third country applies to:

- (a) those who were previously present in, and eligible to make a relevant claim to, a safe third country;
- (b) that it would have been reasonable to expect them to make such a claim;
- and
- (c) they failed to do so.

This is compounded by the fact that the Bill does not provide clarification of the factors to be taken into account in the consideration of reasonableness.

- 4.12 In the case of *R v Uxbridge Magistrates Court (ex parte Adimi)* Lord Justice Simon Brown, held that asylum seekers were not under a distinct legal obligation to seek asylum in the first country they arrived in. He observed that he was “persuaded ... that some element of choice is indeed open to refugees as to where they may properly claim asylum”.⁵³
- 4.13 The Commission stresses that Clause 14 has the potential to seriously undermine, if not remove altogether, the right to claim asylum and does so contrary to law.
- 4.14 **The Commission recommends that Clause 14 is removed. In the event that Clause 14 is not removed it should, at least, be amended to include a requirement: to provide written reasons for a declaration; to permit the right to appeal; to ensure “reasonable” is defined carefully and the factors to be taken into account are stipulated clearly.**
- 4.15 Clause 16 of the Bill requires an applicant to submit supporting evidence of their claim. It requires that, upon receipt of an ‘evidence notice’, an applicant must provide all relevant evidence in support of their asylum claim within a specified time. In Clause 17, failure to provide evidence within the timeframe can, unless good reasons are advanced, be relied upon to assess the applicant as lacking credibility. The Commission is concerned that this overturns the long-established public law principle that in the event of doubt, claimants should receive the benefit of that doubt. Moreover, the ECtHR has held repeatedly that, in view of the particular vulnerability of asylum seekers, they should receive the benefit of the doubt regarding the credibility of statements made or documents produced, in support of their claim.⁵⁴

⁵² Clause 14, Proposed insertion of section 80(B)(3).

⁵³ *R v Uxbridge Magistrates Court (ex parte Adimi)* [1999] EWHC Admin 765, para 18.

⁵⁴ *MA v Switzerland*, Application No 52589/13, Judgment of 18 November 2014, para.55. See also *RC v Sweden* (2010) ECHR 307, para 50, where the Court held that: “... it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof”.

4.16 Guidelines from the UN High Commissioner for Refugees guidelines further state that:

where, notwithstanding, an applicant's genuine efforts to provide evidence pertaining to the material facts, there remains some doubt regarding some of the facts alleged by him or her, the benefit of doubt should be given to the applicant in relation to the assertions for which evidentiary proof is lacking once the decision maker is satisfied with the general credibility of the claim.⁵⁵

4.17 **The Commission recommends that Clauses 16 and 17 are amended to allow for the benefit of the doubt to be applied in all asylum applications and that no adverse findings regarding their credibility are made on account of the late submission of evidence.**

4.18 The Commission is concerned further that there is real potential for Clauses 16 and 17 to exacerbate the trauma endured by many asylum seekers by circumscribing the parameters within which they can submit evidence in support of their claim. Recent investigations on the prevalence of mental illness in refugees and asylum seekers found that 31% of refugees and asylum seekers experienced Post Traumatic Stress Disorder (PTSD) (compared to 3.9% of the general population) while 31.5% suffered from depression (compared to 12% of the general population).⁵⁶ Furthermore, refugees and asylum seekers who have fled from armed conflicts and persecution in their countries report high rates of pre-migration trauma and high frequencies of mental health problems, particularly post-traumatic stress disorder and depression.⁵⁷

4.19 **The Commission recommends that, in view of the prevalence and impact of trauma upon those seeking asylum and refugee status, that adequate training in trauma-informed practice is provided to all officials working with children and adults within the immigration and asylum system.**

4.20 Clause 23(2) of the Bill provides that minimal weight should be attached to evidence advanced in support of an asylum claim if it is late, unless there are good reasons for its late submission. This provision will likely inhibit bona fide asylum applications and undermine the principle of non-refoulement. Domestic jurisprudence has long

⁵⁵ UN High Commissioner for Refugees, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', (UNHCR, 2019), 200.

⁵⁶ Blackmore et al, 'The prevalence of mental illness in refugees and asylum seekers: A systematic review and meta-analysis' (PLoS Med, 2020).

⁵⁷ Stenmark et al, 'Treating PTSD in refugees and asylum seekers within the general health care system. A randomized controlled multicenter study' (2013, Behaviour Research and Therapy, 51) 641-647.

been clear that in the context of asylum and immigration applications, “everything capable of having a bearing has to be given the weight, great or little, due to it”.⁵⁸ The application of a ‘minimal weight’ principle undermines the long-established principle that, cognisant of their inherent vulnerability, refugees and asylum seekers should receive the benefit of the doubt in their applications, which invariably includes the production of evidence whether it be testimonial, documentary or otherwise.⁵⁹

4.21 The Commission recommends that Clause 23(2) is removed and that the weight attached to relevant evidence is not decided by the stage at which it is provided.

4.22 Clause 29 of the Bill relates to the determination of whether an applicant has a well-founded fear of persecution in his or her own country. The UN High Commissioner for Refugees guidance states that an assessment of the “well-founded fear” criterion “needs to be fact-based, focusing on both the individual and the contextual circumstances of the case”, and further that “it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation.”⁶⁰ The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.”⁶¹

4.23 Jurisprudence from the ECtHR makes clear that once an applicant adduces evidence of possible ill-treatment contrary to Article 3 ECHR, the burden of proof should shift to the State to carry out an assessment sufficient to dispel any doubts regarding the credibility of asserted facts. This is particularly in light of the irreversible nature of the harm which could potentially follow.⁶²

4.24 Domestically, the Court of Appeal considered use of the balance of probabilities test in asylum applications to be unsuitable. See *Karanakaran v. Secretary of State for the Home Department* in which the Court observed that:

where this country’s compliance with an international convention is in issue, the decision-maker is, in my judgment, not constrained by the rules of evidence that have been adopted in civil litigation, and is bound to take into account all material considerations when making its assessment about the future.⁶³

⁵⁸ *Karanakaran v. Secretary of State for the Home Department*, [2000] EWCA Civ. 11, para 18.

⁵⁹ See *M.A. v Switzerland* (Application no. 52589/13) 18 November 2014, para 55.

⁶⁰ UN High Commissioner for Refugees, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, (UNHCR, 2019), 174.

⁶¹ *Ibid* at para 38.

⁶² See *NA v The UK* (2011) ECHR 1272, para 111.

⁶³ *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ. 11, para 101.

4.25 **The Commission recommends that Clause 29 is amended so that the civil standard of proof is removed and does not form part of the adjudicative framework in relation to refugee and asylum claims. The Commission further recommends that provision is made within the Bill for all relevant material factors to be considered in relation to the determination of an applicant’s ‘well-founded fear’ of persecution.**

5.0 Part 3: Immigration Offences and Enforcement

5.1 Clause 37 will criminalise asylum seekers who enter the UK without the documentation or advance clearance. This approach creates a tension with Article 31(1) of the 1951 Refugee Convention which states that:

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

5.2 **The Commission recommends that Clause 37 is removed or amended to give full effect to Article 31(1) of the Refugee Convention 1951.**

6.0 Part 4: Modern Slavery

6.1 Clause 56 of the Bill provides that if retained EU law relating to the EU Trafficking Directive⁶⁴ is incompatible with the Bill, the provisions of the Bill will take priority. The Bill’s explanatory notes suggest this is as a result of the UK’s withdrawal from the EU. The Commission however is concerned that neither the Bill nor the explanatory notes engage with or consider the compatibility of Clause 56 with Article 2 of the Ireland/Northern Ireland Protocol (‘the Protocol’). The UK Government is required to ensure that retained EU law that falls within scope of Article 2 does not result in a diminution of the rights, safeguards and equality of opportunity in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.

6.2 Article 2 of the Protocol states:

⁶⁴ Directive 2011/36/EU ‘Council Directive on preventing and combating trafficking in human beings and protecting its victims’, 5 April 2011.

The UK shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 [Belfast (Good Friday)] Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol.

- 6.3 Annex 1 of the Protocol sets out six EU equality directives referenced in Article 2 which have enhanced status.⁶⁵ The UK Government commitment is not only to ensure that there is no diminution of the rights contained in these Directives but also to ensure that NI equality law ‘keeps pace’ with any changes made by the EU to improve the minimum levels of protection available, on or after 1 January 2021.
- 6.4 For other EU obligations which underpin the rights, safeguards and equality of opportunity in Article 2, the commitment to ensure ‘no diminution’ is one of no regression, which is measured by the relevant EU standards as they were at the end of the transition period on 31 December 2020.
- 6.5 It is a breach of the non-diminution of rights guarantee, if:
- a right, safeguard or equality of opportunity protection as set out in the relevant chapter of the Belfast (Good Friday) Agreement 1998 is engaged;
 - the right, safeguard or equality of opportunity was underpinned by an EU obligation;
 - that right, safeguard or equality of opportunity is diminished on or after 1 January 2020; and
 - this diminution would have been inconsistent with the UK’s legal obligations as an EU Member State.
- 6.6 The parties to the Belfast (Good Friday) Agreement affirmed their commitment to “the mutual respect, the civil rights and the religious liberties of everyone in the community” set out a non-exhaustive list of rights, safeguards and equality of opportunity. These include “the rights of victims to remember as well as to contribute

⁶⁵ Directive 2000/43/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin’, 29 June 2000; Directive 2000/78/EC, ‘EU Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation’, 27 November 2000; Directive 2004/113/EC, ‘EU Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and Services’, 13 December 2004; Directive 2006/54/EC, ‘EU Council Directive on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation’, 5 July 2006; Directive 2010/41/EU, ‘EU Parliament and EU Council Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity’, 7 July 2010.; Directive 79/7/EEC, ‘EU Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security’, 19 December 1978.

to a changed society” and “the right to equality of opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity”.⁶⁶

- 6.7 Article 2 does not prescribe that the only means of achieving this aim is to ensure that existing underpinning EU obligations are retained. Rather, it requires that the substantive right is safeguarded against diminution. Any relevant change therefore must not result in a reduction of effectiveness, including how that right is claimed or enforced.
- 6.8 The EU Trafficking Directive sets out a number of provisions which are particularly aimed at criminalisation of trafficking offences,⁶⁷ non-prosecution and non-application of penalties to victims,⁶⁸ investigation and prosecution of offences⁶⁹ and supporting victims, including child victims, of trafficking.⁷⁰ In addition, the EU Charter on Fundamental Rights continues to have relevance in the application and interpretation of the UK-EU Withdrawal Agreement, including those provisions of EU law which are relevant to the application of Article 2 of the Protocol and in particular the EU Trafficking Directive.
- 6.9 The Commission considers that the EU Trafficking Directive underpins the relevant rights recognised in the rights, safeguards and equality of opportunity part of the Belfast (Good Friday) Agreement and therefore engages Article 2 of the Protocol.
- 6.10 The Commission is concerned that the framing of Clause 56, which disapplies the EU Trafficking Directive to the extent that other measures within Part 4 of the Bill are inconsistent with it, creates legal uncertainty. Clause 56 does not reflect transparently the UK Government’s internationally binding commitment in Article 2 of the Protocol to ensure that in NI there is no diminution of the rights, safeguards and equality of opportunity in the relevant part of the Belfast (Good Friday) Agreement as a result of the UK leaving the EU.⁷¹ The Commission advises that Section 7A of the EU (Withdrawal) Act 2018 incorporates the rights, obligations and remedies of the UK-EU Withdrawal Agreement, including Article 2 of the Protocol, and this provides statutory protection for the rights and safeguards within the EU Trafficking Directive

⁶⁶ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity.

⁶⁷ Articles 2-7, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

⁶⁸ Article 8, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

⁶⁹ Articles 9-10, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

⁷⁰ Articles 11-17, Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 5 April 2011.

⁷¹ Section 4(2)(aa), EU (Withdrawal) Act recognises that the scope of retained EU law does not extend to those EU obligations that are recognised and available in domestic law by virtue of Section 7A of the Act. Section 7A gives effect to the rights, obligations and remedies arising under the UK-EU Withdrawal Agreement.

in NI.

- 6.11 **The Commission recommends that the Committee enquire of the Minister what consideration was given to Article 2 of the Protocol in drafting Clause 56 and seek assurances that nothing in Part 4 of the Bill is intended to diminish the rights and safeguards within the EU Trafficking Directive.**
- 6.12 **The Commission recommends that Clause 56 is amended to clarify that no provision made in or under the Bill shall be inconsistent with Article 2 of the Protocol or otherwise cause a diminution of the rights, safeguards and equality of opportunity protected therein.**
- 6.13 **The Commission recommends that the Committee seek assurances from the Minister on how UK Government has built in consideration of Article 2 of the Protocol to the development and drafting of legislation and how continued compliance with this obligation will be ensured.**

7.0 Part 5: Miscellaneous

- 7.1 Clause 58 outlines the powers of the Home Secretary to enact regulations regarding the carrying out of age assessments, which may enable immigration officers to carry out such assessments.⁷² The Commission is concerned about the lack of detail within Clause 58 or elsewhere. Age assessments play a critical role in the level of protection a child or young person is afforded under international human rights, refugee and asylum law and must be underpinned by clear regulations and guidance.
- 7.2 Importantly, in evidence to the House of Lords Committee, the UN High Commissioner for Refugees reminded that:
- If a child is wrongly considered to be an adult, they may miss being supported by children's services; miss access to education or college; they may be dispersed to a different part of the country and might be accommodated or detained with adults.⁷³
- 7.3 The UN High Commissioner for Refugees advises that age assessment procedures should only be undertaken when a child's age is in doubt, not as a routine measure.⁷⁴ Furthermore, assessments should be conducted in a safe, child and gender sensitive

⁷² Clause 58 2(a).

⁷³ House of Lords European Union Committee, 'Children in Crisis: unaccompanied migrant children in the EU', (HoL, 2016), para 51.

⁷⁴ UN High Commissioner for Refugees and UNICEF, 'Putting the child at the centre: An analysis of the application of the best interests principle for unaccompanied and separated children in the UK' (UNHCR & UNICEF, 2019), at 59.

manner, with due respect for human dignity.⁷⁵ In General Comment 24, the UN Committee on the Rights of the Child observed that, in situations where there is doubt as to a child's age, "the least invasive method of assessment should be applied. In the case of inconclusive evidence, the child or young person is to have the benefit of the doubt".⁷⁶

7.4 Moreover Section 55 of the Borders, Citizenship and Immigration Act 2009 states that the Secretary of State, including those who carry out functions on their behalf, must have "regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". The statutory guidance which accompanies the legislation requires "the Secretary of State to make arrangements to ensure that immigration, asylum, nationality and customs functions are exercised having regard to the need to safeguard and promote the welfare of children in the United Kingdom".⁷⁷ There is also reference within the statutory guidance for the UK Border Agency which requires compliance with the best interests principle, the right of the child to participate and be heard and for children's applications to be dealt with within a timely fashion.⁷⁸

7.5 Age assessments are a sensitive, complex and intricate process. The UN CRC Committee has advised that decision-makers must:

not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.⁷⁹

7.6 At the domestic level, specific legal criteria have been established in relation to age assessments. For example, in *R(B) v Merton* the Court noted that age should not be determined "solely on the basis of the appearance of the applicant".⁸⁰ In the more recent case of *BF (Eritrea) v Secretary of State for the Home Department* the Court of Appeal held that government guidance relating to age assessments was unlawful on the ground that it did not sufficiently counteract the risk of children being detained as

⁷⁵ UN High Commissioner for Refugees, 'A Framework for the Protection of Children', (UNHCR, 2012)

⁷⁶ CRC/C/GC/24, 'UN CRC Committee General Comment 24 on children's rights in the child justice system', 18 September 2019, at para 34.

⁷⁷ Home Office, 'Every Child Matters', Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, (HO, 2009).

⁷⁸ Ibid, 15.

⁷⁹ CRC/GC/2005/6, 'UN CRC Committee General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin', 1 September 2005, para 31(i).

⁸⁰ *R(B) v Merton* EWHC 1689 (Admin), para 37.

adults. According to the Court of Appeal:

anyone claiming to be a child must be given the benefit of the doubt. That is not only because the detention of a child is now positively unlawful, and any policy must seek so far as possible to avoid the Secretary of State acting unlawfully.⁸¹

7.7 Children and young people are entitled to several procedural safeguards during an age assessment. Amongst others, the best interests' principle (Article 3 UN CRC) and the right of the child to be heard (Article 12 UN CRC) must be complied with. Children should also be provided with all relevant information regarding the assessment in a child-friendly and accessible manner and should have an 'appropriate adult' present during the assessment.⁸² This also extends to monitoring linguistic or translation issues.⁸³

7.8 The Commission raised previously a number of concerns about the Home Office's proposal for a National Age Assessment Board and made recommendations for its operation in NI.⁸⁴ The Children's Law Centre (NI) noted that the National Age Assessment Board would encroach on transferred matters under the devolved settlement.⁸⁵ Significantly, the UN High Commissioner for Refugees provided a submission to the consultation, advising that the proposals within the 'New Plan' regarding age assessments are not in line with international standards. The statement was as follows:

In UNHCR's view, policy or legislation which allows asylum-seekers to be treated as adults based on brief assessments of physical appearance and demeanour by immigration officials creates a considerable risk of children being subjected to adult procedures and of a violation of their rights under the Convention on the Rights of the Child and the 1951 Convention.⁸⁶

7.9 **The Commission recommends that Clause 58 is amended to ensure that the best interests of the child will be the primary consideration in all age assessment procedures and that provision is made for the child's voice to be heard in all matters which concern him/her. This should also mean that all relevant**

⁸¹ *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872, para 57.

⁸² *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59.

⁸³ *Ibid.*

⁸⁴ NI Human Rights Commission, 'NIHRC Response to Public Consultation on the Home Office's New Plan for Immigration', May 2021, at paras 46-49.

⁸⁵ Children's Law Centre, 'New Immigration Plan Abandons Children's Rights and Protections' 12 May 2021

⁸⁶ UN High Commissioner for Refugees, 'UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom' (UNHCR, 2021), para.25

information to the child in advance of, and during the age assessment itself.

7.10 The Commission recommends that Clause 58 is amended to ensure that the presumption of minority is placed on a clear statutory footing.

7.11 Clause 64 of the Bill enshrines a ‘good faith’ obligation which mandates the Secretary of State or relevant immigration officer (‘deciding authority’) to consider whether the applicant has acted in good faith in relation to their asylum application. This clause cannot be viewed in isolation from the Bill’s earlier clauses which relate to the claimant’s credibility. The Commission is concerned that Clause 64 possesses the capacity to override the long-standing jurisprudential line of authority which states that owing to the vulnerability of applicants, they should receive the benefit of the doubt in relation to their claim and the evidence adduced in support of it.⁸⁷

7.12 The Commission, in line with previous recommendations for Clauses 16 and 17, suggests that Clause 64 is amended to allow for the benefit of the doubt to be applied in all asylum applications and to the evidence adduced in support of such an application.

8.0 Part 6: Children’s Rights Considerations

8.1 Children and young people under the age of 18 years of age possess a number of distinct human rights under the UN CRC.⁸⁸ For example, an asylum-seeking child, whether accompanied or unaccompanied, has the right:

to receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.⁸⁹

8.2 The UN CRC also recognises that an asylum-seeking child enjoys the right to non-discrimination (Article 2), the right to life, survival and development (Article 6), the right to family life (Article 16), the right not be separated from their parents (Article 9), the right to family reunification (Article 10) and the right to be free from cruel, inhuman or degrading punishment or treatment and the arbitrary or unlawful deprivation of liberty (Article 37).

⁸⁷ See *RC v Sweden* (2010) ECHR 307.

⁸⁸ Article 1 of the UN CRC states that “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

⁸⁹ Article 22 UN CRC.

- 8.3 The Commission remains concerned about the express lack of reference to children’s rights throughout the Bill. In particular, the Commission is concerned that the Bill contains insufficient procedural safeguards for children.
- 8.4 All children, particularly unaccompanied children, are especially vulnerable throughout the immigration and asylum process. According to Amnesty International, family separation is a traumatic experience and “can leave children more vulnerable to exploitation and abuse and can create toxic stress which could harm children’s long-term development”.⁹⁰ These sentiments have been underscored by the House of Lords,⁹¹ the Joint Committee on Human Rights,⁹² the UN High Commissioner for Refugees⁹³ and the UN CRC Committee.⁹⁴
- 8.5 The ECtHR has also stated that the child’s vulnerability must be “the decisive factor and it takes precedence over considerations relating to [their] status as an illegal immigrant”.⁹⁵ The Court further observed that the State owes a duty of care towards “highly vulnerable members of society ... as part of its positive obligations under Article 3 of the Convention”.⁹⁶
- 8.6 Children are entitled to have their best interests taken as a primary consideration in all matters which affect them.⁹⁷ In the context of asylum and immigration, the UN CRC Committee has confirmed that it “must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children”.⁹⁸ They have further stated that: “Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations”.
- 8.7 In the case of *ZH (Tanzania) (FC) v Secretary of State for the Home Department*, the UK Supreme Court stated that the best interests principle:
- must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be

⁹⁰ Amnesty International, ‘Without my family: The impact of family separation on child refugees in the UK’, (AI, 2020), at 4.

⁹¹ House of Lords, European Union Committee, ‘Children in Crisis: unaccompanied migrant children in the EU’, (HoL, 2016).

⁹² Joint Committee on Human Rights, ‘Human Rights of Unaccompanied Migrant Children and Young people in the UK’, (JCHR, 2013).

⁹³ UN High Commissioner for Refugees (2019) ‘Putting the Child at the Centre: An Analysis of the Application of the Best Interests Principle for Unaccompanied and Separated Children in the UK’, (UNHCR, 2019)

⁹⁴ CRC/GC/2005/6, ‘UN CRC Committee, General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin’, 1 September 2005, para 3.

⁹⁵ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (Application no. 13178/03)* para 55.

⁹⁶ *Ibid.*

⁹⁷ UNCRC, Article 3.

⁹⁸ CRC/GC/2005/6, ‘UN CRC Committee General Comment 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin’, 1 September 2005, para 31.

followed unless countervailing reasons of considerable force displace them.⁹⁹

8.8 In relation to children's participatory rights under Article 12 UN CRC, the UN CRC Committee has stated that:

in determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account (Article 12 (1)). To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (Articles 13, 17 and 22 (2)).¹⁰⁰

8.9 Under the UN CRC, States are under an obligation to comply with the Convention's four guiding principles when developing and enacting laws and policies, including those in the area of asylum and immigration.¹⁰¹ These include the principles of non-discrimination (Article 2), the child's best interests principle (Article 3), the child's right to life, survival and development (Article 6) and the child's right to participate in matters which affect them (Article 12). As guiding principles, this means that all other convention rights, including those which relate to asylum and immigration such as Article 22 UN CRC, must be realised according to these principles.

8.10 **The Commission recommends that the Bill contains an express commitment that the UN CRC's four guiding principles (non-discrimination, best interests' principle, right to life survival and development, and the right to participate) will be upheld for children.**

8.11 **The Commission recommends that the Bill contains an independent free-standing clause which states expressly that in all actions, decisions, policies, laws, and regulations which are enacted and undertaken under the Bill, the best interests of the child are a primary consideration, in line with Article 3 UN CRC.**

8.12 **The Commission recommends that the Bill contains an independent free-standing clause which states that in all actions, decisions, policies, laws, and regulations which are enacted and undertaken under the Bill, that the child will be entitled to express their views in all matters which affect him/her, in line with**

⁹⁹ *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, para 46.

¹⁰⁰ *Ibid* at para 25.

¹⁰¹ CRC/GC/2003/5 'UN CRC Committee, General Comment 5 on General measures of implementation of the Convention on the Rights of the Child', 27 November 2003.

Article 12 UN CRC.

- 8.13 **The Commission recommends that a children's rights impact assessment be carried out in relation to the Bill's impact on children.**

01/10/2021