

IN THE MATTER OF:

NATIONALITY AND BORDERS BILL

JOINT OPINION

<u>Outline of Opinion</u>	<u>Page</u>
A. INTRODUCTION AND SUMMARY	2
B. INADMISSIBILITY	6
C. EU-BASED INADMISSIBILITY	28
D. TEMPORARY PROTECTION	30
E. OFFSHORE PROCESSING	44
F. EXPANDED “ONE-STOP” PROCESSES	59
G. FAST-TRACK APPEAL PROCESSES	65
H. CHANGES TO THE INTERPRETATION OF THE REFUGEE DEFINITION	72
I. PROTECTION AGAINST REFOULEMENT	84
J. ENTRY AND ARRIVAL OFFENCES	87
K. COSTS	92

A. INTRODUCTION AND SUMMARY

1. We have been asked by Freedom from Torture to advise on the consistency of various aspects of the Nationality and Borders Bill (the “**Bill**”) with international human rights law, international refugee law, and common law. The Bill was introduced to the House of Commons on 6 July 2021 and passed its Second Reading stage on 19 July 2021. The Bill follows from the Home Office’s “New Plan for Immigration” (“**New Plan**”), which was published in March 2021 in the form of a “**Policy Statement**”.¹ We have previously advised on the legality of various aspects of the Policy Statement. This Joint Opinion builds upon our earlier opinion and is once again confined to the issue of the legality, in the foregoing senses, of some of the key proposals set out in the Bill, rather than their expediency, efficacy or wisdom, upon which others have commented.
2. Given the scope of the Bill, we have not been able in the time available to comment on all aspects of it. The fact that a particular provision is not discussed in this Joint Opinion is not in any way to be taken as suggesting that we consider it to be lawful as a matter of international law and/or consistent with the common law.
3. In our view, this Bill represents the biggest legal assault on international refugee law ever seen in the UK. This is because (a) the principle at the heart of the Bill is the penalisation, both criminally and administratively, of those who arrive by irregular means in the UK to claim asylum and (b) the Bill seeks to reverse a number of important decisions of the UK Courts, including at the House of Lords and Court of Appeal level, given over the last 20 years, without offering any justification for doing so. These are decisions where the Secretary of State lost the legal argument and which concern questions of international refugee law rather than domestic statutory provisions.
4. As to (a) the Bill criminalises those who arrive without authorisation to claim asylum, with a maximum sentence of four years’ imprisonment; stipulates that their claim must be treated as inadmissible, with the prospect of being processed off-shore, or subject to delay, with adverse consequences for their rights to accommodation; if their claim is admitted and is successful, the individual is regarded as a “Group 2” refugee in respect of whom the Secretary of State is authorised to discriminate as regards family reunion

¹ UK Home Office, *New Plan for Immigration: policy statement*, (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS08_20091708-001_Sovereign_Borders_Web_Accessible.pdf).

rights, and the duration and terms of leave granted. There are at least seven reasons why this is wrong as a matter of international refugee law.

- 4.1. First, the idea that such persons should not be penalised is at the core of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (collectively, the “**Refugee Convention**”). It is central to the Refugee Convention’s commitment to access to asylum.
- 4.2. Second, this is because the basic rationale of the Refugee Convention was to replace previous authorisation-based regimes of the 1930s with a needs-based or definition-based model: this was “perhaps the most important innovation of the Refugee Convention.”² The Bill reverses that basic rationale. There are many examples in the 1930s of refugees who were not permitted access to asylum because their arrival had not been authorised, such as the 937 Jewish refugees who fled Hitler’s Germany on the SS St Louis, were turned away from Cuba, the US, and Canada, forced to sail back to Europe, where more than 250 were killed by the Nazis.³
- 4.3. Third, the Bill attacks the fundamental idea in the Refugee Convention that refugees are entitled to some element of choice as to where they claim asylum. This was recognised by drafters of the Convention (including the UK delegate), and has been confirmed by academics, by the United Nations High Commissioner for Refugees (“**UNHCR**”), and by seminal decisions of the Divisional Court and the House of Lords (see paragraph 35.2 below). Thus, contrary to an animating concern in the Bill, there is no requirement in international refugee law that an asylum seeker must claim asylum in the first safe country they reach. Indeed, that would have been nonsensical in circumstances prevailing in 1951, with no commercial air-travel. Any refugee arriving in the UK would have crossed land borders.
- 4.4. Fourth, this attack is inconsistent with the idea of “international co-operation” as identified in the Preamble to the Refugee Convention. Responsibility for receiving refugees was always intended to be shared. UNHCR recently stated

² Hathaway, *The Rights of Refugees under International Law* (2nd ed, 2021) p 485.

³ “The Jewish Refugees the US turned away” BBC (10 May 2017) (<https://www.bbc.co.uk/news/av/magazine-39857056>).

that requiring individuals to claim asylum in the first safe country they reach “would undermine the global humanitarian and co-operative principles on which refugee protection is founded.”⁴ These principles were affirmed by the UN General Assembly and the UK in the Global Compact on Refugees in 2018.

- 4.5. Fifth, the basis for the attack on irregular arrival is that refugees should use safe legal routes. But there are no such safe legal routes. There is no such thing as a refugee visa. Nor is travel by ordinary means a realistic option because of the logic of carriers’ liability. As Simon Brown LJ observed in *R (Adimi) v Uxbridge Magistrates Court & Anor* [2001] QB 667 (“*Adimi*”): “The combined effect of visa requirements and carriers’ liability has made it well-nigh impossible for refugees to travel to countries of refuge without false travel documents”.⁵
- 4.6. Sixth, nor are resettlement schemes an answer. Such schemes are complementary to the Refugee Convention, not a replacement for it. Consider the case of an Afghan national, who is number 5001 in the queue for resettlement, with the annual cap of 5000 having been reached. Or consider the case of number 4000, whose claim is held up by administrative delay or by an inability to access documents, because the Taliban have taken control of their home area. The analogy, pressed by the Secretary of State, of jumping a queue is false: there is either no queue, no adequate queue, or no safe queue.
- 4.7. Seventh, the attack on authorised arrival to claim asylum appears empirically unfounded, as well as legally unjustified. Approximately 65% of those who arrive other than through resettlement are granted asylum.⁶

5. For reasons which follow, our conclusions on specific features of the Bill that are addressed in the body of this Opinion are as follows:

- 5.1. The inadmissibility regime is (a) in breach of Article 31 of the Refugee Convention; and (b) in the absence of additional safeguards, in breach of (i) Article 33 of the Refugee Convention; (ii) Articles 2, 3 and 4 of the European

⁴ UNHCR, *Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom*, May 2021, para 4.5.21.

⁵ [2001] QB 667, 674B.

⁶ National Statistics, *How many people do we grant asylum or protection to?*, Updated 26 August 2021, para 3.3.

Convention on Human Rights (“**ECHR**

- 5.2. The EU inadmissibility regime would continue to be in breach of (a) the implicit duty under the Refugee Convention to determine a claim for refugee status (absent a safe third country); and (b) Article 3 of the Refugee Convention.
- 5.3. The two-tier system of protection, with those arriving through irregular means being granted temporary protection, would be inconsistent with (a) the basic rationale of the Refugee Convention; and (b) Article 34 of that Convention. It may also, depending on the final detail, be inconsistent with (a) Article 31 of the Refugee Convention; (b) Article 14 ECHR, read with Article 8 ECHR; and (c) other obligations under the Refugee Convention governing the expulsion of recognised refugees and/or the circumstances in which status may be ceased.
- 5.4. The offshore processing of asylum claims would risk breaching (a) Articles 2, 3 and 4 ECHR; (b) Articles 3, 31 and 33 of the Refugee Convention; and (c) the UK’s obligation to implement the Refugee Convention in good faith.
- 5.5. The “fast-track” proposals – comprising both the expanded “one-stop” processes and expedited/accelerated appeals processes – (a) risk inherent unfairness, contrary to the common law and the procedural requirements of Articles 2, 3, 4, 8 and 13 ECHR, and (b) give rise to an inevitable risk of *refoulement*.
- 5.6. The proposed amendments to the standard of proof in respect of the refugee definition, and to the definitions of “particular social group” and State protection, are inconsistent with the UK’s obligations under Articles 1A(2) and 33 of the Refugee Convention.
- 5.7. The proposals as to the circumstances in which an individual is (not) immune from penalties on the basis of their illegal entry or presence are inconsistent with Article 31 of the Refugee Convention.
- 5.8. The proposals as to the revocation of refugee status are inconsistent with Articles 1A(2) and 33 of the Refugee Convention.

- 5.9. The proposed criminalisation of unlawful arrival is in breach of Article 31 of the Refugee Convention and, alongside the amended offences of assistance (without gain) and facilitation, the UK’s obligation to implement the Refugee Convention in good faith.
 - 5.10. The proposals as to wasted costs orders risk breaching the common law right to access to justice and Articles 2, 3, 4 and 8 ECHR.
6. In this Joint Opinion, we use the term “**asylum-seekers**” to mean all those who seek recognition as refugees. We use “**refugees**” to mean all those who meet the definition in Article 1A(2) of the Refugee Convention, whether or not this has been formally recognised via a status determination process. That is because, as is now widely accepted, a person’s entitlement to the rights conferred by the Refugee Convention – and the corresponding obligations of Contracting States – does not depend on formal recognition, but arises by virtue of a person in fact meeting the Convention definition; for the purposes of international law, status determination is therefore a declaratory process.⁷ As will become clear, this has important implications for the lawfulness of the Government’s proposals. Finally, we use the term “**recognised refugees**” to refer to those who have been identified as such via a status determination process, whether conducted by the UK, UNHCR, or another Contracting State.

B. INADMISSIBILITY

The proposal

7. In order to understand the nature of the proposed new inadmissibility regime, it is necessary to consider three sources: the Policy Statement; the rules and policy introduced by the Secretary of State in December 2020; and the Bill.

The Policy Statement

8. The Policy Statement explained that the Government wished to “ensure those who arrive in the UK, having passed through safe countries, or who have a connection to a safe

⁷ See, amongst many other sources: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (“UNHCR Handbook”)*, para 28; Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd ed, 2007) p 51; Hathaway, *The Rights of Refugees under International Law* (2nd ed, 2021) pp 178-180; *G v G* [2021] 2 WLR 705.

country where they could have claimed asylum, will be inadmissible to the UK’s asylum system”; and to “seek rapid removal of inadmissible cases to the safe third country from which they embarked or to another safe third country”: p 18. It went on to note that the Secretary of State had “already taken steps to enshrine these principles in new immigration rules and [would] now place them on a statutory footing via legislation”: p 19. No further detail was provided.

The December 2020 inadmissibility regime

9. The inadmissibility regime introduced in December 2020 is set out in (i) changes to Chapter 11 of the Immigration Rules, which came into force on 31 December 2020; and (ii) new guidance entitled *Inadmissibility: Safe third country cases* (version 5.0, 31 December 2020) (the “**Inadmissibility Guidance**”).⁸
10. The key features of the regime are as follows:
 - 10.1. An asylum application “may be treated as inadmissible and not substantively considered if the Secretary of State determines that”, among other things, the applicant (Immigration Rules, para 345A):

“… could enjoy sufficient protection in a safe third country, including benefiting from the principle of *non-refoulement*, because (a) they have already made an application for protection to that country; (b) they could have made an application for protection to that country but did not do so and there were no exceptional circumstances preventing such an application being made; or (c) they have a connection to that country, such that it would be reasonable for them to go there to obtain protection.”
 - 10.2. A “safe third country” is defined as one where (Immigration Rules, para 345B):

“(i) the applicant’s life and liberty will not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion in that country;

⁸ UK Home Office, *Inadmissibility: Safe third country cases* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf).

- (ii) the principle of non-refoulement will be respected in that country in accordance with the Refugee Convention;
- (iii) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected in that country; and
- (iv) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention in that country.”
- 10.3. Unaccompanied asylum-seeking children are exempted from the inadmissibility regime (though families with children are not): Inadmissibility Guidance, p 7.
- 10.4. Where an application is treated as inadmissible, the Home Office “will attempt to remove the applicant to the safe third country in which they were present or to which they have a connection, or to any other safe third country which may agree to their entry”: Immigration Rules, para 345C. This final phrase contemplates that a person whose application is considered inadmissible may be removed to any “safe third country”, even if they have never set foot there.
- 10.5. If an application has been found to be inadmissible, but either (i) “removal to a safe third country within a reasonable period of time is unlikely”, or (ii) “upon consideration of a claimant’s particular circumstances the Secretary of State determines that removal to a safe third country is inappropriate”, she will admit the claim for consideration in the UK: Immigration Rules, para 345D. This rule is designed to prevent asylum-seekers being left in indefinite limbo, without any country agreeing to consider and determine their claim.
- 10.6. However, the scope of para 345D is considerably reduced by the terms of the Inadmissibility Guidance, which provides that:
- 10.6.1. The Home Office will make an initial decision about where a case appears to meet the criteria for inadmissibility: p 11. It will then issue the applicant with a “notice of intent”, informing them in general terms

that enquiries are to be made to determine whether their claim is inadmissible: p 13.

- 10.6.2. Having made these enquiries, the Home Office will make a further decision about whether the case still meets the criteria for inadmissibility. This will trigger attempts to secure a “safe” third country’s agreement to admit the person and process their claim. However, the Home Office will not make a formal inadmissibility decision unless and until an agreement has been reached: pp 14-15.
 - 10.6.3. If no agreement is in place after six months, the Home Office will admit the claim for consideration (without ever having formally determined that it was inadmissible) unless “removal is still a reasonable prospect and there are clear mitigating factors to justify the extension”: pp 15, 17.
 - 10.7. The result is that, by the time an inadmissibility decision is made, the key barrier to removal to the relevant “safe third country” would be a claim that this would violate the applicant’s rights under either the Refugee Convention or the ECHR. The inadmissibility regime does not cover these claims, though some may (in accordance with the pre-existing framework) be certified under Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the “**2004 Act**”) – which renders the right of appeal exercisable only from outside the UK.
11. We note that, in practice, the operation of this regime has always been contingent on the UK’s ability to negotiate return agreements with potential “safe third countries”. To date, its efforts to do so appear to have been unsuccessful.⁹ If this situation persists, the result will be to reduce the scope for operation of the inadmissibility regime while expanding the scope for operation of the temporary protection regime (discussed below).

⁹ See e.g. “EU countries rule out bilateral asylum deals in blow to Priti Patel’s immigration plans” *Independent* (25 April 2021), <https://www.independent.co.uk/news/uk/home-news/asylum-eu-deportation-home-office-b1836598.html?amp;> “EU countries snub Priti Patel’s plans to return asylum seekers” *The Guardian* (9 May 2021), <https://www.theguardian.com/uk-news/2021/may/09/eu-countries-snub-priti-patels-plans-to-return-asylum-seekers>.

The Bill

12. The Bill (cl 14) provides for the insertion into the Nationality, Immigration and Asylum Act 2002 (the “**NIAA 2002**”) of a new s 80B, entitled “Asylum claims by persons with connection to safe third State”, and s 80C, entitled “Meaning of ‘connection’ to a safe third State”. These provisions replicate the key aspects of the existing inadmissibility regime, with some notable alterations. In particular:
 - 12.1. The provisions authorise the Secretary of State to declare an asylum claim inadmissible in any case where a claimant “has a connection to a safe third State”: proposed s 80B(1). The definition of “safe third State” is materially identical to that set out at paragraph 10.2 above.
 - 12.2. The types of connection to a “safe third State” are also similar to those set out at paragraph 10.1, save that: (i) they omit any reference to a claimant being able to “enjoy sufficient protection” in the third State; (ii) they specifically include a situation where a claimant’s protection claim in a third State has been rejected; and (iii) they include a situation where it would have been “reasonable” for the claimant to seek asylum in a third State (instead of one where this was possible and there were no “exceptional circumstances” preventing them from doing so). The first two of these differences render the regime proposed by the Bill less protective; the third is more so.
 - 12.3. The provisions make it clear that references to protection (or similar) “in accordance with the Refugee Convention” do not necessarily require that the third State be a signatory to that Convention: proposed s 80B(8).
 - 12.4. The provisions expressly provide that there is no right of appeal against a declaration of inadmissibility (meaning that any challenge would be by way of judicial review): proposed s 80B(3). In our view, this was implicit in the existing regime in any event.
 - 12.5. Like the existing regime, the provisions also make it clear that a claimant could be removed to any “safe third State” even if it is not one with which they have a “connection”: proposed s 80B(6).

- 12.6. The provisions replicate the existing discretion for the Secretary of State to consider a claim even where it has been declared inadmissible in two situations: see paragraph 10.5 above. The first remains that it is unlikely to be possible to remove the claimant within a “reasonable period”: proposed s 80B(7)(a). The second has been narrowed to where there are “exceptional circumstances” which mean the claim should be considered: proposed s 80B(7)(b). This is a regressive change which materially increases the risk of claimants being (for example) removed to a “safe third State” even where they have existing family connections in the UK, simply because this situation is not considered “exceptional”.
13. The discussion below proceeds on the assumption that, should the Bill be passed, the Immigration Rules would be amended so as to remove any inconsistencies.

Issues arising

Overview

14. In our view, the key legal concerns arising from the proposed inadmissibility regime are:
 - 14.1. the absence of adequate safeguards against onward *refoulement*, resulting in inevitable breaches of the UK’s obligations under Article 33 of the Refugee Convention and/or relevant provisions of the ECHR;
 - 14.2. the absence of adequate safeguards against returning individuals to countries where they will be denied rights owed to them under the Refugee Convention while they await determination of their status, in breach of the UK’s duty to implement its treaty obligations in good faith; and
 - 14.3. the fact that the regime is intended to, and will in practice, penalise refugees based on their unlawful entry, in breach of the UK’s obligations under Article 31 of the Refugee Convention.

Article 33 of the Refugee Convention and Articles 2, 3 and 4 ECHR

15. One of the key pillars of the Refugee Convention is the prohibition on *refoulement*. Article 33(1) provides:

“No Contracting State shall expel or return (‘*refouler*’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

16. The principle of *non-refoulement* applies to all refugees unless they fall within the narrow exceptions identified in Article 33(2) of the Refugee Convention.¹⁰
17. For present purposes, the principle has two important aspects.
 - 17.1. The prohibition on *refoulement* applies to all refugees (and not only those whose status has been formally recognised); as a result, it must in practice be treated as applicable to all asylum-seekers.¹¹ Any other approach would deprive Article 33(1) of its content, as Contracting States could avoid allegations of breach by *refouling* individuals without considering whether they were refugees or not.¹²
 - 17.2. The prohibition extends to “onward”, “indirect” or “chain” *refoulement*: that is, to expulsion or removal to a territory where a person does not face the kinds of risks set out in Article 33(2), but from which there is a real risk¹³ that they will be expelled to their country of origin or to somewhere else where such a risk exists.¹⁴ The prohibition on indirect *refoulement* has been expressly recognised by the UK courts, including the House of Lords.¹⁵

¹⁰ Namely, refugees “whom there are reasonable grounds for regarding as a danger to the security of the country in which [they are], or who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to that community.”

¹¹ See e.g. *ST (Eritrea) v Secretary of State for the Home Department* [2012] 2 AC 135 at para 61; UNHCR, “Advisory Opinion on the extraterritorial application of non-refoulement obligations” (2007) 5 European Human Rights Law Review 484, 484; Goodwin-Gill and McAdam, p 248; Hathaway, p 342; Costello, “Article 31 of the 1951 Convention relating to the Status of Refugees” (UNCHR Legal and Protection Policy Research Series, July 2007), pp 14-15. Costello expressly (and rightly) notes that this includes asylum-seekers whose claims are considered inadmissible without being examined on their merits: p 16.

¹² See UNHCR, “Note on International Protection” (1993), para 11; Goodwin-Gill and McAdam, pp 232-233 (citing numerous conclusions of the UNHCR Executive Committee and UNGA Res. 52/103 (12 December 1997) para 5). The same is true of a number of other rights under the Refugee Convention: see Hathaway, pp 178-180.

¹³ See the judgment of the Full Court of the Federal Court of Australia in *V872/00A v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 185 – a standard endorsed by Hathaway, p 339. See also UNHCR, “Advisory Opinion on the extraterritorial application of non-refoulement obligations” (2007) 5 European Human Rights Law Review 484, 484 (referring to return to a country “from where he or she risks being sent to such a risk”).

¹⁴ See e.g. Goodwin-Gill and McAdam, pp 252-253, 3.3.1 (citing decisions and General Comments of the Committee Against Torture and the Human Rights Committee); Hathaway, pp 367-368.

¹⁵ See e.g. *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514, p 532D; *R v Secretary of State for the Home Department; ex parte Adan* [2001] 2 AC 477; *R v Secretary of State for the Home Department, ex parte Yogathas* [2003] 1 AC 920.

18. Similar principles apply under Articles 2, 3 and 4 ECHR. Specifically:

- 18.1. A Member State will violate Article 2, 3 and/or 4 ECHR if it removes or expels a person within its jurisdiction to a country where they will face a real risk of breach of those rights.¹⁶
- 18.2. The same is true if a Member State expels a person to a country where there is no such risk, but from which the person may be expelled to another country where such a risk does arise.¹⁷ In the case of *FG v Sweden*, the European Court of Human Rights (the “**ECtHR**”) described this as a concern as to the existence of “effective guarantees that protect the applicant against arbitrary *refoulement*, be it indirect or direct, to the country from which he or she has fled.”¹⁸
- 18.3. As a result, in cases involving the return of asylum-seekers, Member States “must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks he faces from the standpoint of Article 3 of the Convention.”¹⁹ In the recent case of *Ilias and Ahmed v Hungary*, the Grand Chamber repeated this statement of principle and further confirmed that:
 - 18.3.1. it is “the duty of the removing State to examine thoroughly the question of whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against *refoulement*”;²⁰
 - 18.3.2. “if … the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned”;²¹

¹⁶ See e.g. *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413; *FG v Sweden* (App. No. 43611/11, 23 March 2016), paras 111-116; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 286.

¹⁷ See e.g. *MSS v Belgium* (2011) 53 EHRR 28, para 342 (affirmed in *Ilias and Ahmed v Hungary* (App. No. 47287/16, 21 November 2019), para 129; *TI v UK* [2000] INLR 211).

¹⁸ *FG v Sweden* (App. No. 43611/11, 23 March 2016), para 117.

¹⁹ *Ibid* (emphasis added).

²⁰ *Ilias and Ahmed v Hungary* (App. No. 47287/16, 21 November 2019), para 134.

²¹ *Ibid*.

- 18.3.3. this duty in turn “requires from the national authorities applying the ‘safe third country’ concept to conduct a thorough examination of the relevant conditions in the third country concerned and, in particular, the accessibility and reliability of its asylum system”;²² and
- 18.3.4. this assessment must be carried out of the authorities’ own motion; must be up to date; must consider the safeguards the system affords “in practice”; and must involve the authorities seeking out “all relevant generally available information” rather than merely assuming compliance with Convention standards.²³
19. The upshot is that “[i]n order for States to observe their *non-refoulement* and human rights obligations, a precondition to exercising the safe third country mechanism is that the third State can provide the individual with ‘effective protection’”, including “measures of appeal and judicial review [which] permit examination of the merits and the legality of administrative decisions”.²⁴ For the same reasons, UNHCR has made it clear that the application of the “safe third country” principle requires an individual assessment of whether the country will “grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs”,²⁵ and the experts responsible for the Michigan Guidelines on Protection Elsewhere have concluded that “every transfer of protection responsibility must be predicated on a commitment by the receiving state to afford the person a meaningful legal and factual opportunity to make his or her claim to protection.”²⁶ In the UK, the House of Lords has recognised that breaches of the Refugee Convention and/or the ECHR will arise where, in practice, removal to a third country entails a real risk of onward expulsion in breach of Article 33 of the Refugee Convention or of Article 3 ECHR.²⁷

²² *Ibid.*, para 139.

²³ *Ibid.*, para 141.

²⁴ Goodwin-Gill and McAdam, p 393; see also p 396.

²⁵ UNHCR, “Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries” (April 2018), paras 4, 9; “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in tackling the migration crisis under the safe third country and first country of asylum concept” (23 March 2016), para 2.1; “Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers” (May 2013), para 3. See also UNHCR Executive Committee Conclusion No. 87, 8 October 1999, para (j) (affirming that the “safe third country” principle “should be appropriately applied so as not to result in improper denial of access to asylum procedures”); and Hathaway, p 374.

²⁶ “The Michigan Guidelines on Protection Elsewhere: Colloquium on challenges in international refugee law” (2007) 28 *Michigan Journal of International Law* 207, Guideline (4).

²⁷ 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

20. These conclusions reflect the fact that the duty of *non-refoulement* under the Refugee Convention is preventative in nature. That is in accord with international human rights law more generally, where certain rights which contain a prohibition are interpreted, in view of their importance, as containing a preventative component: a remedy after the event is generally recognised as insufficient. Thus:
- 20.1. The UN Human Rights Committee in its General Comment No. 20 (1992) on Article 7 of the International Covenant on Civil and Political Rights (the “**ICCPR**”) (the international analogue of Article 3 ECHR) stated (at para 8):
- “... [I]t is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.”
- 20.2. As is made clear in the paragraph that follows, this necessarily entails an obligation not to “expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end”.
- 20.3. The UN Convention Against Torture 1984 (separately) requires States to take measures to “prevent” torture, and cruel, inhuman or degrading treatment (Articles 2 and 16).
21. The classic test in *Soering v UK* (1989) 11 EHRR 439 (where the Plenary Court of the ECtHR for the first time read a *non-refoulement* obligation into Article 3 ECHR) is itself an application of that preventative duty, as Lord Bingham recognised in *A and Ors (No 2) v Secretary of State for the Home Department* [2006] 2 AC 221 (HL), para 33, citing the seminal passage from *Prosecutor v Furundzija* [1998] ICTY 3, 10 December 1998, para 148:

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).

“States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient merely to intervene after the infliction of torture, when the physical or moral integrity of human beings has already been irredeemably harmed. Consequently, States are bound to put in place all those measures that may pre-empt the perpetration of torture. As was authoritatively held by the European Court of Human Rights in *Soering*, international law intends to bar not only actual breaches but also potential breaches of the prohibition against torture (as well as any inhuman and degrading treatment).”

22. As noted at paragraph 12 above, the Bill defines a “safe third State” as one where “a person may apply to be recognised as a refugee” and as “one from which a person will not be sent to another State” otherwise than in accordance with the Refugee Convention and Article 3 ECHR. Unlike under the existing regime, inadmissibility is not conditional on a determination that the applicant could “enjoy sufficient protection” in the relevant country.
23. In our view, these criteria do not – even in combination with the Inadmissibility Guidance – provide meaningful protection against indirect or onward *refoulement*. In particular:
 - 23.1. Neither the Bill, the Immigration Rules, nor the Inadmissibility Guidance requires decision-makers expressly to consider the critical question of whether removing an asylum-seeker to a third State carries a real risk of indirect or onward *refoulement* under the Refugee Convention or the ECHR.
 - 23.2. The Inadmissibility Guidance does not identify the standard that decision-makers should apply in determining whether the criteria for a “safe third State” are met²⁸ or provide any guidance on the type of evidence to which they should have regard. Without this, there is a real possibility that decision-makers will:
 - 23.2.1. consider the “safe third State” criteria on the balance of probabilities – thereby sanctioning an individual’s removal even if there is a real risk of onward *refoulement* in breach of Article 33 of the Refugee

²⁸ The only mention of the standard of proof concerns decisions as to whether a person has travelled through and could have sought protection in a particular country – a decision officials are instructed to make on the balance of probabilities: p 18.

Convention and/or Articles 2-4 ECHR (see paragraphs 17.2 and 18.2 above); and/or

- 23.2.2. take an overly formalistic approach which considers only whether there is (for example) a formal legal prohibition on *refoulement* in place, without regard to whether and how it is observed in practice.²⁹
- 23.3. Neither the Bill, the Rules, nor the Inadmissibility Guidance requires consideration of the adequacy of the refugee status determination procedures in a potential “safe third State”.³⁰ If a person who in fact meets the refugee definition is not recognised as such – for example, because they are not afforded a proper opportunity to prepare and present their case, there is no mechanism for review or appeal,³¹ or the national authorities take a different view of some relevant aspect of the refugee definition³² – then the fact that the country respects the principle of *non-refoulement* generally will be irrelevant. The person will be treated as though they were not a refugee and may be returned to their country of origin to face a real risk of persecution.³³
- 23.4. Similarly, decision-makers are not asked to consider the adequacy of procedures in the potential “safe third State” for establishing whether a person faces a real risk of torture or ill-treatment if removed to their country of origin. As noted at paragraph 18 above, the need to do so has been expressly recognised by the Grand Chamber of the ECtHR.

²⁹ The importance of an assessment of how legal safeguards are observed in practice has been emphasised by both UNHCR (see e.g. UNHCR, “Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries” (April 2018), para 10; “Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers” (May 2013), para 3(viii)) and leading commentators (see e.g. Hathaway, p 370; Michigan Guidelines on Protection Elsewhere, Guideline 3). It was also recognised by the CJEU in the context of the Dublin Regulation in *NS* (Case Nos. C-411/10 and C/492/10, 21 December 2011), para 94; and by the High Court of Australia in the case of *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144: see French CJ at paras 44-45 and Kiefel J at paras 86-87.

³⁰ Para 345B(iv) requires only that “the possibility exists to request refugee status”.

³¹ See e.g. Foster and Pobjoy, “A failed case of legal exceptionalism? Refugee status determination in Australia’s ‘excised’ territory” (2011) 23 *International Journal of Refugee Law* 583, pp 600-603 (noting particularly the concerns raised by the UNCHR that the denial, for those processed in Australia’s “excised zones”, of access to independent merits review and to judicial review of a negative decision removed “important legal safeguards against *refoulement*”).

³² See *R v Secretary of State for the Home Department; ex parte Adan* [2001] 2 AC 477; Michigan Guidelines on Protection Elsewhere, Guideline (4) (“[t]he sending state must in particular satisfy itself that the receiving state interprets refugee status in a manner that respects the true and autonomous meaning of the refugee definition”); Foster, “Protection elsewhere: The legal implications of requiring refugees to seek protection in another state” (2007) 28 *Michigan Journal of International Law* 223, pp 246-249.

³³ This risk has been specifically recognised by UNHCR: see “Note on international protection” (3 July 1998), para 14.

24. The absence of safeguards is even more acute in respect of removals to States listed in or under Schedule 3 to the 2004 Act – including, primarily, EU Member States (though it can be expanded by the Secretary of State via statutory instrument). On this front the position is (and will remain) that, for the purposes of determining whether a person who has made an asylum or human rights claim may be removed there, the State “shall” be treated as one from which a person will not be *refouled* under the Refugee Convention. That presumption is irrebuttable, and there is no right of appeal (even out-of-country) on this basis. In addition, the Bill envisages inserting into Schedule 3 a presumption that, “unless the contrary is shown by the claimant to be the case in their particular circumstances”, a listed State is to be treated as a place “from which [they] will not be sent to another State in contravention of their [ECHR] rights”. In consequence, the only safeguard in such cases would be a claim for judicial review of the original inadmissibility decision (on the basis of any public law error in deciding that the criteria set out in the Immigration Rules were met).
25. For all of these reasons we consider that, without additional safeguards specifically addressing the risk of indirect or onward *refoulement*, the operation of the inadmissibility regime will result in breaches of the UK’s obligations under Article 33(1) of the Refugee Convention and Articles 2, 3 and 4 ECHR. If the regime does not build in a process of the kind described by the Grand Chamber in the case of *Ilias and Ahmed* (paragraph 18.3, above) – which is presently entirely absent – it will also be inconsistent with the procedural obligations imposed by Article 3 ECHR.

Respect for refugee rights in the proposed “safe third State”

26. Under the Refugee Convention, there are a number of rights to which refugees are entitled even before they have been formally recognised as such.³⁴ As well as protection against *refoulement* (discussed above), these rights include:
 - 26.1. the right to the enjoyment of their Convention rights without discrimination (Article 3);

³⁴ See e.g. Hathaway pp 178-181; UNHCR, “Reception of asylum-seekers, including standards of treatment, in the context of individual asylum claims” (4 September 2001), para 3. We note that, in the view of several eminent commentators (including both Hathaway and Costello), this list is more extensive and includes the rights predicated on refugees’ “lawful” presence in a Contracting State because this concept embraces presence once admitted to a refugee status determination procedure; cf. *R (ST (Eritrea)) v Secretary of State for the Home Department* [2012] 2 AC 135.

- 26.2. the right to treatment “at least as favourable as that accorded to … nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children” (Article 4);
 - 26.3. the right to treatment “as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances” in respect of property rights (Article 13); and
 - 26.4. the right to “the same treatment as is accorded to nationals with respect to elementary education” (Article 22(1)).
27. Nothing in the inadmissibility regime requires that a “safe third State” be one which guarantees these rights (either in law or, more crucially, in practice).³⁵ Rather, the “safe third State” criteria ask only whether, if “recognised” as a refugee, a person will “receive protection in accordance with the Refugee Convention, in that State”. In addition, and as noted above, the Bill (i) omits any reference to the enjoyment of “sufficient protection” generally, and (ii) makes it clear that the “safe third State” need not even be a signatory to the Refugee Convention – changes which enhance the risk of removal to a country where the relevant set of rights will not be secured.
28. In our view, removing asylum-seekers to third countries where it is (or ought to be) known that their rights pending the determination of refugee status will not be respected would amount to a failure to implement the UK’s obligations under the Refugee Convention in good faith. The UK cannot do indirectly (*i.e.* breach Refugee Convention rights) that which it is prohibited from doing directly.
29. The duty to implement treaty obligations in good faith is reflected in Article 26 of the Vienna Convention on the Law of Treaties (“VCLT”).³⁶ One aspect of the obligation, expressly recognised by the UK Court of Appeal, is that “signatories to the Convention must implement it in a manner which is reasonably efficacious.”³⁷ The obligation is breached, *inter alia*, if “a combination of acts or omissions has the overall effect of rendering the fulfilment of treaty obligations obsolete, or defeat the object or purpose of

³⁵ As to the importance of considering practice as well as legal formalities, see fn 27 above.

³⁶ The principle has also been recognised generally by the International Court of Justice: see e.g. *Nuclear Tests (Australia v France)*, ICO Rep (1974) 253, 268, para 46.

³⁷ *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008, para 11.

a treaty” – including where States seek “to do indirectly what it is not permitted to do directly”.³⁸

30. We consider that removal of asylum-seekers in the circumstances identified above would fall within this description. This view is endorsed by the experts responsible for the Michigan Guidelines on Protection Elsewhere,³⁹ for the reasons explained in detail in Professor Foster’s accompanying paper – which concludes that “a good faith application of Convention obligations requires that, in order to transfer a refugee to another State in accordance with the Refugee Convention, a State is under an obligation to ensure that the refugee will enjoy all the rights to which she is entitled under the Convention scheme.”⁴⁰ The conclusion is also endorsed by other leading commentators.⁴¹
31. There is a further potential basis on which it may be unlawful to remove asylum-seekers to third countries where their rights under the Refugee Convention would not be respected pending a decision on their refugee status: namely, the liability of a State in international law for aiding or assisting another State in the commission of internationally wrongful acts.⁴² Delivery of a refugee by the UK to a third State – particularly if accompanied by financial support for offshore processing – may contribute to the latter State’s violation of international law.⁴³ It is arguable that delivery with knowledge that the receiving State would fail to comply with its Convention obligations during the status determination process would be unlawful as a matter of international law. This argument has been endorsed both at the level of principle,⁴⁴ and in the related context of the

³⁸ Goodwin-Gill and McAdam, p 387.

³⁹ Michigan Guidelines on Protection Elsewhere, Guideline (8) (“any refugee transferred must benefit in the receiving state from all Convention rights to which he or she is entitled at the time of transfer”). As Foster explains, this is the view which underpins Guideline (3) (“Reliance on a protection elsewhere policy must be proceeded by a good faith empirical assessment by the state which proposes to effect the transfer … that refugees defined by Art 1 will in practice enjoy the rights set by Arts 2-34 of the Convention in the receiving state”).

⁴⁰ Foster, “Protection elsewhere”, pp 268-270.

⁴¹ See e.g. Goodwin-Gill and McAdam, p 387-390; Hathaway, p 829. See also Legomsky, “Secondary refugee movements and the return of asylum-seekers to third countries: The meaning of effective protection” (2003) 15 *International Journal of Refugee Law* 567, pp 619-620 (noting that there are particularly strong reasons for reaching this conclusion in respect of the Refugee Convention, whose object and purpose “would be thwarted if destination countries, while prohibited from violating the Convention provisions directly, were permitted to assist such violations by returning refugees to other countries knowing the latter would commit the prohibited acts”) and pp 633-643 and 640-644 (emphasising that this conclusion applies to the full range of rights to which refugees are entitled under the Convention) – though see the discussion in Foster, pp 271-274.

⁴² See Article 16 of the International Law Commission’s draft Articles on State Responsibility.

⁴³ Thus, for example, Legomsky concludes that “if a state delivers a refugee to another state that in turn violates his or her rights under international law, and the first state does so ‘with knowledge of the circumstances of the internationally wrongful act’, then the assumption here is that the first state thereby ‘aids or assists’ in the commission of that wrongful act. The delivery of the refugee into the hands of the second state has obviously facilitated the latter state’s violation of international law.”

⁴⁴ See Hathaway, p 827ff.

responsibility of States such as Australia and Italy for their role in establishing controls designed to deter migration to their shores.⁴⁵

32. Against that background, robust safeguards at both the institutional and the individual level would be required in order to ensure compliance with the UK's international obligations. These would include, at a minimum, amending the definition of a "safe third State" to encompass a requirement that the individual would receive "protection in accordance with the Refugee Convention in that State" not merely "if found to be a refugee", but also during the status determination process.

The obligation of non-penalisation under Article 31 of the Refugee Convention

33. The drafters of the Refugee Convention recognised that refugees fleeing persecution would often be unable to observe the administrative and legal formalities associated with movement between States.⁴⁶ They were concerned to ensure that this was no barrier to refugee status being recognised and to their being afforded the full range of rights and protections afforded by the Convention. Accordingly, Article 31(1) provides as follows:

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

34. The criteria for the application of Article 31 have been broadly and generously interpreted.⁴⁷ In the formulation identified in the leading case of *Adimi*: "where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by article 31": p 677.

⁴⁵ See e.g. Dastyari, "The ring of steel: Extraterritorial migration controls in Indonesia and Libya and the complicity of Australia and Italy" (2019) 19 *Human Rights Law Review* 435; Guiffre, "State responsibility beyond borders: What legal basis for Italy's push-backs to Libya?" (2012) 24 *International Journal of Refugee Law* 692.

⁴⁶ See e.g. Draft Report of the *Ad hoc Committee on Statelessness and Related Problems*; Proposed Draft Convention relating to the Status of Refugees (UN doc. E/AC.32.L.38, 15 February 1950), Annex I (draft Article 26) and Annex II (comments. p 57).

⁴⁷ The 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": *R (ST (Eritrea)) v Secretary of State for the Home Department* [2012] 2 AC 135, para 30. See also Goodwin-Gill, "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalisation, Detention and Protection" (October 2001), para 9.

35. In particular:

- 35.1. The protection of Article 31 must be extended to all asylum-seekers in order to be effective.⁴⁸ This has been expressly recognised by the UK courts.⁴⁹
- 35.2. The “coming directly” requirement does not preclude passage through, or even temporary stay in, a “safe” intermediate country.⁵⁰ The critical question is not whether a person could (or even should) have sought asylum elsewhere, but whether they had already found secure asylum (whether temporarily or permanently) such that there is no protection-related reason for their unlawful onward movement.⁵¹ Importantly, “[t]he drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country”.⁵² Thus, in the UK, courts have recognised that the Refugee Convention affords individuals “some element of choice” as to where they claim asylum.⁵³ This is the generally recognised position in international law: a refugee is under no obligation to seek asylum at any particular point in their flight.⁵⁴ As Simon Brown LJ said in *Adimi* (at p 678):

“[A]ny merely short term stopover en route to such an intended sanctuary cannot forfeit the protection of [Article 31] … [T]he main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or

⁴⁸ Goodwin-Gill, “Article 31”, paras 27, 106; Hathaway, pp 488-489.

⁴⁹ See e.g. *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”).

⁵⁰ See e.g. Goodwin-Gill and McAdam, pp 264-265, 3.3.5 (noting that this was expressly envisaged by the drafters of Article 31); Goodwin-Gill, “Article 31”, paras 103-104.

⁵¹ This reflects the fact that the inclusion of the “coming directly” criterion was in response to France’s concern that States should be able to return people who had been recognised as refugees and afforded protection elsewhere – at a time when there was no commercial air travel and refugees arrived over land – and not about people who had transited through other countries without feeling able to seek asylum: see Goodwin-Gill, “Article 31”, paras 17-25; Hathaway, pp 497-500.

⁵² “Summary of Conclusions” (*Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Feller, Türk and Nicholson (eds), 3.2, p 255). See also UNHCR Guidelines, explaining that the phrase “covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there” and make clear that “[n]o strict time limit can be applied to the concept”.

⁵³ See further Goodwin-Gill and McAdam, p 392 (endorsing this proposition as correct as a matter of international law).

⁵⁴ See e.g. 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; Goodwin-Gill and McAdam, p 392.

not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing.”⁵⁵

- 35.3. The “coming directly” requirement will also be satisfied where a person is in “secondary flight” – that is, where they are seeking protection from risks encountered in the country where they first sought and found refuge.⁵⁶
- 35.4. The requirement to present to the authorities “without delay” is not a strictly temporal one: UNHCR has described it as “a matter of fact and degree”⁵⁷ which must be assessed having regard to “the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances vary enormously from one asylum-seeker to another.”⁵⁸ Following from this, the phrase “without delay” cannot properly be tied to an external deadline (*e.g.* a requirement to make a claim prior to the expiry of an individual’s existing leave to remain).
- 35.5. Flight from a well-founded fear of persecution will constitute “good cause” for unlawful entry for the purposes of seeking asylum.⁵⁹ Accordingly, there is a close – and arguably inextricable – link between the “coming directly” and “good cause” criteria.⁶⁰
- 35.6. The protection of Article 31 extends to those who are in the UK in transit, while seeking to leave for a country of a refugee. Indeed, both *Adimi* and *R v Asfaw* [2008] 1 AC 1061 (“*Asfaw*”) concerned such cases, where the individuals intended to seek asylum in Canada, with the UK as a transit State.

⁵⁵ This analysis is specifically endorsed by Costello, p 20. See also the judgment of Newman J in *Adimi*, recognising that there was “a rational basis for exercising choice where to seek asylum”. The same approach has also been applied in the criminal context: see e.g. *R v Mateta* [2013] EWCA Crim 1372, where it was accepted by all parties before the Court of Appeal that Article 31 applied to asylum-seekers who had spent several months in Thailand, twenty days in Tanzania, a week in Kenya and twenty days in Spain on their way to the UK. Relevant factors included the periods during which they had been under the control of agents and the advice they had received from them. A similar approach has been taken in other Contracting States, including New Zealand, the Netherlands, Germany, and Finland: see Costello, pp 21-22.

⁵⁶ See Hathaway, pp 501-506.

⁵⁷ UNHCR, “Summary Conclusions: Article 31 of the 1951 Convention” (2001), para 10(f).

⁵⁸ UNHCR, “Revised guidelines on applicable criteria and standards relating to the detention of asylum-seekers” (26 February 1999), para 4.

⁵⁹ See e.g. Goodwin-Gill and McAdam, p 265, 3.3.5 (citing the UNCHR Executive Committee’s Conclusion No. 15 (1979), para (h)); Hathaway, pp 495-496; Costello, pp 30-31.

⁶⁰ See Hathaway, p 495.

36. The overall result is that many asylum-seekers, including those who have passed through, and even spent some time in, potential “safe third States”, will fall within the scope of Article 31 – meaning that the UK will be required not to impose penalties on them on account of their unlawful entry or presence.
37. A notable change included in the Bill – which has significant consequences for the consistency of the proposed measures with the UK’s international legal obligations – is to codify the scope of Article 31 in primary legislation. Towards this, cl 34 seeks to clarify the circumstances in which an individual is or is not immune from penalties on the basis of their illegal entry or presence. More specifically:
 - 37.1. “*Coming directly*”: At present, s 31(2) of the Immigration and Asylum Act 1999 (the “IAA 1999”) provides that refugees who have stopped in another country benefit from the immunity only if they can show that they could “could not reasonably have expected to be given protection under the Refugee Convention in that other country.” Cl 34(1) seeks to remove immunity from refugees who have stopped in another country and could reasonably be expected to have “sought” protection in that country, on the basis that they are deemed not to have come to the UK “directly”. Cl 34(5) amends s 31(2) of the IAA 1999 to align it with the wording used in cl 34(1).
 - 37.2. “*Without delay*”: S 31(1) of the IAA 1999 provides that it is a defence for a refugee charged with an immigration offence to show that, having come to the UK directly, she: (i) presented herself to the authorities without delay; (ii) showed good cause for her illegal entry or presence; and (iii) made a claim for asylum as soon as was reasonably practicable after her arrival. In addition to affirming the unavailability of the immunity for those who have failed to make a claim “as soon as reasonably practicable”, cl 34(2) seeks to remove the availability of the immunity from refugees with a *sur place* claim:
 - 37.2.1. that arose while they were lawfully present in the UK and who did not make the claim before the expiry of their existing leave to remain: cl 34(2)(b)(i); and

- 37.2.2. that arose while they were unlawfully present in the UK and who did not make a claim “as soon as reasonably practicable” after they became aware of the need for protection: cl 34(2)(b)(ii).
- 37.3. “*Entry or presence*”: Cl 34(4) seeks to remove immunity from refugees who intend to claim asylum in a third State, and transit through the UK *en route* to that State. It restricts the material scope of Article 31, as authoritatively declared by the Divisional Court in *Adimi* and the House of Lords in *Asfaw*, by providing that immunity will not apply where “the penalty relates to anything done by the refugee in the course of an attempt to leave the United Kingdom.”
38. As will be evident by comparison with the sources discussed at paragraphs 33-35 above, the removal of the protection from penalisation from refugees on the basis that they (i) “stopped” in another country and could reasonably be expected to have “sought” protection in that country or (ii) (in the case of those with a *sur place* claim) failed to make a claim before the expiry of their existing leave to remain or (iii) seek refuge in a third State and are in transit in the UK, is a misconstruction and in breach of Article 31 of the Refugee Convention.
39. The result is that the Bill renders breaches of Article 31 almost inevitable, in that penalties will be imposed on refugees who fall within the scope of that provision (properly interpreted) but fall outside the narrower definition the Secretary of State proposes to enshrine in primary legislation.
40. Importantly for present purposes, the term “penalties” has also been given a wide meaning, encompassing not only criminal sanctions but also administrative disadvantages or disbenefits. For example:
- 40.1. Leading academic commentators consider that measures such as “procedural bars to applying for asylum”⁶¹ or “treating claims as inadmissible”⁶² may constitute “penalties”, and that the term encompasses any “loss, disability or disadvantage” (including, for example, “the assignment of refugees … to

⁶¹ Goodwin-Gill, p 266.

⁶² Costello, p 37.

abbreviated procedures” or “the punitive denial of social or economic benefits”).⁶³

- 40.2. The Supreme Court of Canada has held, in the case of *B010 v Minister of Citizenship and Immigration* (2015) SCC 58, that “obstructed or delayed access to the refugee process” amounts to a penalty within the meaning of Article 31(1).
- 40.3. The legislation enacted by a number of Contracting States to give effect to Article 31 expressly or impliedly goes beyond criminal penalties.⁶⁴
41. For all of these reasons, we consider that treating the claims of asylum-seekers who have entered the UK unlawfully as *prima facie* inadmissible – resulting in significant delays to, and potentially depriving them of, access to the refugee status determination process in the UK – constitutes a “penalty” for the purposes of Article 31.
42. It might be said that the complexity of the criteria for inadmissibility (as set out at paragraphs 9-12 above) demonstrates that this penalty is not imposed “on account of” these individuals’ unlawful entry or presence. However, we consider that this argument is wrong for the following reasons:
 - 42.1. “On account of” is, even on its face, “a fairly loose expression”.⁶⁵ The requisite level of causal connection should, like all other component parts of Article 31, be given a broad and generous meaning (see paragraph 34 above).
 - 42.2. The inadmissibility regime is expressly designed to target unlawful entrants. The introduction to Chapter 4 of the Policy Statement (which covers the inadmissibility regime) explained that “[f]or the first time how somebody arrives in the UK will impact on how their asylum claim progresses”, and that “anyone who arrives into the UK illegally – where they could reasonably have claimed asylum in another safe country – will be considered inadmissible to the asylum system”: p 4.
 - 42.3. In practice, the inadmissibility regime will overwhelmingly, if not exclusively, apply to refugees who have entered unlawfully. This is because its criteria are

⁶³ Hathaway, pp 515, 518.

⁶⁴ See the examples given by Costello, p 33.

⁶⁵ Costello, p 38.

unlikely to catch those who arrived in the UK on a visa (who will likely have travelled directly here from their country of origin) and have no application at all to those who are resettled in the UK following a status determination process conducted elsewhere.

- 42.4. Exposure to the inadmissibility regime is therefore specifically intended to, and does in practice, target refugees based on the lawfulness of their arrival. In these circumstances, it can, in our view, properly be described as one imposed “on account of” their unlawful entry for the purposes of Article 31.
- 42.5. This conclusion is supported by the broad approach taken to causal phrases used elsewhere in the Refugee Convention and in other human rights instruments – such as “for reasons of”,⁶⁶ “on any ground such as”,⁶⁷ “on the basis of”,⁶⁸ and indeed, “on account of”⁶⁹ – all of which are generally accepted as encompassing an indirect as well as a direct connection between the treatment in issue and the proscribed statuses, grounds, or reasons.⁷⁰
43. The effect of the amendments is further compounded by their potential retrospective application. In this regard, we note that cl 27(5)-(6) of the Bill – which provides that cl 28-33 do not have retrospective effect and instead apply only to claims that were made on or after the day they come into force – is not expressly extended to cl 34. As a result, there is nothing within the Bill to prevent this amendment from being retrospectively deployed against asylum-seekers who have already entered the UK. Indeed, reading the Policy Statement, Bill, and Explanatory Notes together, this appears to be the fundamental intention.
44. For these reasons, the inadmissibility regime is in our view inconsistent with the UK’s obligations under Article 31 of the Refugee Convention.

⁶⁶ Article 1A(2) Refugee Convention.

⁶⁷ Article 14 ECHR.

⁶⁸ Article 1 Convention on the Elimination of All Forms of Discrimination Against Women.

⁶⁹ Article 33(1) – the scope of which is generally accepted as mirroring that of Article 1A(2).

⁷⁰ As to the Refugee Convention, see *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596, para 82 (“a material reason”); as to the ECHR, see e.g. *DH v Czech Republic* (App. Np. 57325/00, ECHR 2007-IV); as to CEDAW, see e.g. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 28 (19 October 2010), para 16.

C. EU-BASED INADMISSIBILITY

The current regime

45. The presumptive inadmissibility of asylum claims made *vis-à-vis* return to an EU Member State is already a feature of the UK's asylum system. The Immigration Rules, at paras 326C-F, provide that an asylum application from a Member State national is inadmissible except in limited situations broadly corresponding to those set out in Protocol (No 24) on Asylum for Nationals of Member States of the European Union (often referred to as the “**Spanish Protocol**”).⁷¹ These are where “there are exceptional circumstances which require the application to be admitted for full consideration”, and “may include in particular” where: (i) the Member State has derogated from the ECHR in a time of emergency, or (ii) the Member State is the subject of proceedings or a decision that it is in breach of Article 2 of the Treaty on the Functioning of the European Union (the “**TEU**”) (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights). There is limited, if any, guidance as to what other circumstances might be sufficiently “exceptional” for a claim to be admitted for consideration.
46. The rationale for this approach is a system-wide assumption of human rights compliance in Member States, which may of course not hold in the individual case yet would not be sufficient to defeat the assumption.
47. Thus, the current regime essentially involves the use of a list of strongly presumptive “safe” countries of origin to replace the inquiry under Article 1A(2) of the Refugee Convention with a different and more demanding inquiry: (i) is the applicant a national of a designated safe country? If so, (ii) has that country derogated from the ECHR or (ii) been accused of or actually breached Article 2 of the TEU? If not, (iii) are there other (as yet unspecified) “exceptional circumstances” that apply, such that the refugee should not be returned to that country?

⁷¹ Consolidated version of the Treaty on the Functioning of the European Union – PROTOCOLS – Protocol (No 24) on asylum for nationals of Member States of the European Union (Doc 12008E/PRO/24).

48. The net result is that a person who meets the refugee definition may be unable to access a process which recognises that they do – and so may not be able to access refugee protection.
49. Such an approach is inconsistent with the Refugee Convention because it “peremptorily refus[es] to permit the recognition of any EU national as a refugee.”⁷² Moreover, the Refugee Convention imposes an implicit obligation on State parties to determine whether or not an applicant has refugee status, unless the State party is prepared to confer all the rights set out in the Convention to the applicant or unless there is a safe third country to which the applicant may be returned. This follows from the incremental structure of rights accorded under the Refugee Convention⁷³ (discussed below at paragraph 76).
50. Finally, Article 3 of the Refugee Convention requires Contracting States to “apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.” The EU-based inadmissibility regime constitutes discrimination, in the application of Article 1A(2), on the basis of country of origin. Differential treatment as regards the basic admissibility of a claim cannot be justified by reference to notional standards (which vary considerably in practice) of human rights compliance in EU Member States. Accordingly, the UK’s regime is already in breach of the UK’s obligations under Article 3.

The Bill

51. As the UK has now left the European Union, there is no longer any obligation on it to retain the approach reflected in the Spanish Protocol. Despite this, the Bill retains this approach in full. Cl 13 provides for the insertion into the NIAA 2002 of a new s 80A, which provides that the Secretary of State “must declare an asylum claim made by a person who is a national of a member State inadmissible” unless there are “exceptional circumstances as a result of which [she] considers that the claim ought to be considered”. This includes the circumstances summarised at paragraph 12.6 above.
52. It is to be hoped that the Secretary of State and the courts would be prepared to treat as “exceptional” any case in which a claimant from an EU Member State could establish,

⁷² Hathaway, p 75.

⁷³ Hathaway and Foster, *The Law of Refugee Status*, 2nd ed. (2014, CUP), 25-27; Hathaway, pp 176-181; *Saad v Secretary of State for the Home Department* [2012] Imm AR 471, para 12 per Lord Phillips MR.

to the standard required in asylum claims generally, that they fell within the refugee definition in Article 1A(2) of the Refugee Convention.⁷⁴ If this does not occur, the result will be that there will inevitably be cases in which applicants who are capable of establishing that they are refugees are denied the opportunity to do so, and therefore denied the rights and protections to which they are entitled under the Refugee Convention.

53. In our view, there is no legal justification (as a matter of international refugee law) for failing – at an absolute minimum – to treat the inadmissibility of claims from EU Member States as a presumption, rather than as an absolute rule subject to the narrowest of exceptions.

D. TEMPORARY PROTECTION

The proposal and the present position

54. At present, and as a matter of generality, all asylum-seekers and refugees in the UK are treated the same. In particular:
 - 54.1. Asylum-seekers are not granted any form of leave to remain. They are instead placed on immigration bail under Schedule 10 to the Immigration Act 2016 (or detained pursuant to administrative powers under paragraph 16 of Schedule 2 to the Immigration Act 1971 (the “**1971 Act**”)). They have no entitlement to family reunion and no recourse to public funds. They are supported by the Government to the extent required to avoid destitution and/or breaches of Article 3 ECHR.⁷⁵
 - 54.2. Recognised refugees are granted five years’ leave to remain, at the end of which they become eligible for indefinite leave to remain (“**ILR**”). The grant of ILR at that point is not automatic: for example, it may be refused on the basis of an applicant’s “character, conduct and associations”.⁷⁶

⁷⁴ But see, e.g. the recent judgment of the Court of Appeal in *ZV (Lithuania)* [2021] EWCA Civ 1196, effectively limiting this to cases where “there are compelling reasons to believe that there is a clear risk that [the claimant] will be liable to persecution in the country of origin notwithstanding the level of protection of fundamental rights and freedoms to be expected in an EU member state”: para 34. We note, however, that this conclusion was based on the interpretation of the Immigration Rules in light of the Spanish Protocol – an interpretive exercise which arguably will not be decisive of the meaning of the new statutory provisions, should they ultimately be brought into force.

⁷⁵ Usually under ss 4 or 95 of the Immigration and Asylum Act 1999.

⁷⁶ Paragraphs 399T(i) and 399R(iii)(f) Immigration Rules.

55. The Government’s proposal (which, for the reasons set out below, can be discerned from the combination of the Policy Statement and the Bill) is to abandon this model in favour of what is effectively a two-tier asylum system. Thus, the Policy Statement suggested that:

- 55.1. Refugees who are resettled in the UK by prior agreement, having had their claims determined elsewhere (for example, by UNHCR in a refugee camp), would receive an immediate grant of ILR on arrival in the UK: Policy Statement, pp 4, 12.
 - 55.2. Another group of refugees – the parameters of which were not entirely clear (see paragraphs 56-58 below) – would be granted “temporary protection” for a period of no longer than 30 months, “after which individuals [would] be reassessed for return to their country of origin or removal to a safe third country”: p 20. Temporary protection status “will not include an automatic right to settle in the UK, family reunion rights will be restricted and there will be no recourse to public funds except in cases of destitution”: ibid. Those offered temporary protection “will be expected to leave the UK as soon as they are able to or as soon as they can be returned or removed”: ibid.
 - 55.3. It was unclear from the Policy Statement what form or duration of leave the Government proposed to grant refugees who fell into neither of these categories: for example, those who arrive in the UK on a valid visa and then successfully seek asylum.
56. As to the criteria for temporary protection, the Policy Statement said this (p 20):

“If an inadmissible person cannot be removed to another country, we will be obliged to process their claim. If they did not come to the UK directly, did not claim without delay, or did not show good cause for their illegal presence, we will consider them for temporary protection.”

57. The reference to “an inadmissible person” whose claim the Home Office is “obliged to process” is not straightforward. This is because, on an ordinary reading, a decision that a claim is “inadmissible” is a decision that the UK is not obliged to, and will not, process

it. However, the inadmissibility regime summarised at paragraphs 9-11 above does envisage a situation in which:

- 57.1. a person's claim will be treated as "inadmissible" because (for example) they "could enjoy sufficient protection in a safe third country"; but
- 57.2. the Home Office will nonetheless admit the claim because "removal within a reasonable period of time is unlikely", or because there are "exceptional circumstances in the particular case that mean the claim should be considered."
58. It appears, therefore, that the criteria for being considered for temporary protection would be as follows:
 - 58.1. The person "did not come to the UK directly, did not claim [asylum] without delay, or did not show good cause for their illegal presence". This appears on its face to track the component parts of Article 31 of the Refugee Convention (but see paragraphs 72-75 below).
 - 58.2. The person's claim for asylum has been treated as inadmissible due to a connection with a "safe third State".
 - 58.3. The claim has nonetheless been admitted because (for example) the Home Office was unable to reach an agreement for their removal.
59. This view is to some extent – though not wholly – borne out by the Bill.
60. The Bill does not make any specific provision for temporary protection in the form envisaged by the Policy Statement. It does, however, establish a framework for such provision to be made via changes to the Immigration Rules. Specifically, cl 10 authorises the Secretary of State or an immigration officer to treat two groups of refugees differently in respect of, *inter alia*, "the length of any period of limited leave to enter or remain which is given to the refugee", "the requirements that the refugee must meet in order to be given indefinite leave to remain", whether the refugee will have recourse to public funds, and "whether leave to enter or remain is given to members of the refugee's family" – that is, in respect of all the key features of the temporary protection regime described in the Policy Statement.

61. 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”. Again, on their face, these requirements appear to track the terms of Article 31 of the Convention – and hence to ensure that temporary protection is only imposed on those who do not enjoy the protection of that Article. However, and as explained at paragraphs 37-38 above, cl 34 of the Bill contains a statutory codification of the component parts of Article 31 (and particularly the “coming directly” requirement) which is narrower in scope than, and therefore inconsistent with, Article 31 as properly interpreted.
62. Unlike the Policy Statement, the Bill does not suggest that differential treatment will be limited, in the case of those who do not meet the three requirements above, to refugees whose claims were initially declared to be inadmissible but were ultimately processed in any event. This additional criterion may, however, be provided for in any Immigration Rules which ultimately give effect to the proposed temporary protection regime.

Issues arising

Overview

63. In our view, the key legal concerns arising from the Government’s proposed temporary protection regime are:
 - 63.1. its inconsistency with the basic rationale of the Refugee Convention;
 - 63.2. its inconsistency with the UK’s obligations under Article 31 of the Refugee Convention;
 - 63.3. its inconsistency with the UK’s duty under Article 34 to “as far as possible facilitate the assimilation and naturalisation of refugees”; and
 - 63.4. its inconsistency with Article 14 ECHR, read with Article 8 ECHR.
64. The result is that, if implemented as presently framed, these proposals are inconsistent with the UK’s legal obligations to refugees.

Object and purpose of the Refugee Convention

65. The Government’s intention to favour resettled refugees, while seeking to deter, penalise, or remove those who would need to arrive in or enter the UK by irregular means in order to claim asylum, would constitute a regressive and unprincipled step from the perspective of international refugee law. It is inconsistent with the object and purpose of the Refugee Convention.
66. Prior to 1951, international approaches to refugees were primarily “authorisation-based”, in the sense that their entitlement to relevant rights and benefits (including protection from *refoulement*) was contingent on prior recognition and documentation.⁷⁷ In drafting and ratifying the Refugee Convention, Contracting States, including the UK, recognising that unplanned and unauthorised arrivals were increasingly commonplace,⁷⁸ committed themselves to what may be termed a “needs-based” model, under which rights and corresponding obligations flow from the simple fact of being a refugee as defined.⁷⁹
67. The Refugee Convention – while it did not go so far as to provide expressly for a right of entry for the purposes of seeking asylum – prohibited Contracting States (by Article 31) from imposing penalties on account of illegal entry or presence (see paragraphs 33-35 above); extended protection against *refoulement* (under Article 33(1)) to all refugees, thereby closing what Professor Hathaway has described as a “critical protection gap”;⁸⁰ and afforded a range of other rights to refugees by virtue purely of their presence in a Contracting State, again regardless of how they had arrived (see the discussion at paragraph 26 above). The non-penalisation of those arriving irregularly is central to the scheme in the Refugee Convention. It is “in itself” one of the core objectives of the Refugee Convention⁸¹ 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.”⁸²
68. 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

⁷⁷ See Hathaway, pp 21-26, 177.

⁷⁸ See Hathaway, p 177.

⁷⁹ See Hathaway, pp 340-342, 485.

⁸⁰ Hathaway, p 485.

⁸¹ Costello, p 5.

⁸² Costello, p 6.

are substantially eroded, would be inconsistent with “one of the core objectives” and the basic rationale of the Refugee Convention itself.

69. This is particularly so in a context where safe and lawful routes to arriving in the UK to claim asylum are almost entirely lacking:⁸³ individuals 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. Moreover, the system of carriers’ liability (where carriers are liable to a charge of £2000 if a passenger does not hold the relevant document)⁸⁴ creates a further *de facto* obstacle to safe access to the UK. As Simon Brown LJ recognised in *Adimi* (at paras 1 and 3):

“The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. ... The combined effect of visa requirements and carrier’s liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.”⁸⁵

70. This impossibility is not a given. It is created by UK laws, and it is a key basis upon which the twin-track plan rests. Accordingly, and as UNHCR observed in its own observations on the Policy Statement, “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.”⁸⁶
71. Our concerns in this regard are not removed by the fact that the Bill does not, on its face, create a bright-line distinction between lawful and unlawful arrivals. Instead, and as explained at paragraphs 60-62 above, the Bill authorises the differential treatment of (on the one hand) those who meet criteria which appear to parallel the requirements for protection under Article 31, and (on the other hand) those who do not; but then sets out a statutory definition of those requirements which is excessively narrow. In context, and for the reasons explained further below, the overall result is to expose only those who

⁸³ An increasing trend across Contracting States: see Costello, p 7.

⁸⁴ Section 40 Immigration and Asylum Act 1999.

⁸⁵ Costello, p 7.

⁸⁶ UNHCR, Observations on the New Plan, para 5.

have entered the UK without authorisation to the potential, and indeed likely, prospect of being granted only temporary protection if their claims are ultimately allowed.

The non-penalisation obligation under Article 31 of the Refugee Convention

72. As noted above, Article 31 of the Refugee Convention precludes Contracting States from imposing “penalties, on account of their illegal entry or presence”, on refugees who are “coming directly” from a country where their life or freedom was threatened; who “present themselves without delay to the authorities”; and who “show good cause for their illegal entry or presence”.
73. As discussed at paragraph 40 above, the concept of a “penalty” encompasses an administrative penalty. In consequence, it would be unlawful for the Government to grant a refugee who falls within Article 31 temporary protection, rather than a more beneficial form of leave, on account of their illegal entry or presence⁸⁷ – or, as UNHCR has put it, to create a “sub-class of refugees” on this basis.⁸⁸
74. As is the case for the inadmissibility regime (see paragraph 42 above), the proposed temporary protection regime does not on its face turn on whether a refugee entered the UK unlawfully. However:
 - 74.1. It is clear that illegal entrants or those illegally arriving are the intended target of these measures. For example:
 - 74.1.1. In her Foreword to the Policy Statement, the Secretary of State suggested that the New Plan would “mark a step-change in the Government’s posture as we toughen our stance against illegal entry”, and would involve “steps to discourage asylum claims via illegal routes”: p 4. This was contrasted with a commitment to strengthening the UK’s support for “asylum via safe and legal routes”, including by offering an immediate grant of ILR to resettled refugees: pp 4, 12. This dichotomy is, implicitly, reflected in the distinction between those to

⁸⁷ See Edwards, “Tampering with refugee protection: The case of Australia” (2003) 15 *International Journal of Refugee Law* 192, pp 197-200, arguing that Australia’s temporary protection regime (which applied to refugees arriving without prior authorisation) is in breach of Article 31; Hathaway, pp 515, 518; Costello, pp 37-38.

⁸⁸ UNHCR, Observations on the New Plan, para 8.

whom the Secretary of State proposes to offer temporary protection and those to be offered immediate ILR.

- 74.1.2. The Secretary of State added that, under the Government's proposals, "whether people enter the UK legally or illegally will have an impact on ... their status in the UK if [their] claim is successful", and, where removal was not possible, "those who have successful claims – having entered illegally – [would] receive a new temporary protection status": p 4 (emphasis added).
- 74.1.3. The detail of the temporary protection proposal appeared in Chapter 4 of the Policy Statement, which was headed "Disrupting criminal networks and reforming the asylum system". Its introductory text identified temporary protection, like the inadmissibility regime, as one of a suite of measures designed to "break the business model of criminal networks behind illegal immigration": p 18.
- 74.2. It is equally clear that in practice the proposed temporary protection regime would overwhelmingly apply to unlawful entrants. First, the group of refugees whose differential treatment is authorised by cl 10 of the Bill (read with cl 34) is likely to consist overwhelmingly of unlawful entrants, as they will be unable to show that they have come "directly" to the UK in the narrowly prescribed sense of not having "stopped in another country" where they could "reasonably" have been expected to seek asylum (see paragraphs 33-37 above). Second, as noted at paragraph 42.3 above, unlawful entrants are much more likely to have their claim treated as inadmissible based on a link with a "safe third State" than either resettled refugees or refugees who first arrived in the UK with extant leave to enter (e.g. on a visa).
75. Against that background, and for the same reasons set out at paragraph 42 above, we consider that temporary protection would be afforded "on account of" refugees' unlawful entry or presence, and it would therefore be inconsistent with the UK's obligations under the Refugee Convention to apply the regime to any refugee who satisfies the other criteria in Article 31. Further, for the reasons discussed at paragraphs 33-39 above, this is bound to occur because Article 31 is given a statutory definition which narrows its scope by

comparison with a proper interpretation of the Refugee Convention. Again, as a matter of international law (as endorsed by the UK courts in *Adimi*), the “coming directly” requirement in Article 31 does not preclude a refugee having “stopped” in one or more “safe” third countries; the assessment should be a fact- and context-sensitive one, having regard (borrowing again from the language of *Adimi*) to “the length of stay in the intermediate country, the reasons for delaying there … and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing.”⁸⁹ In place of this holistic assessment, the Bill excludes from the protection of Article 31 any refugee who “stopped in another country … unless they can show that they could not reasonably be expected to have sought [asylum] in that country”. While Article 31 extends to those *leaving* the UK in the course of a *bona fide* attempt to seek asylum abroad, the Bill precludes that by cl 34(4). The result is that the temporary protection regime will inevitably be applied to refugees who are (as a matter of international law) within the scope of Article 31, in direct contravention of the UK’s obligations under the Convention.

The obligation to facilitate naturalisation under Article 34 of the Refugee Convention

76. Article 34 of the Refugee Convention provides, *inter alia*, that “[t]he Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees.” This imposes an obligation of means and not result, and requires States to “make a good faith effort to help all refugees meet the usual requirements for acquisition of the host state’s citizenship”.⁹⁰ Naturalisation is the end-point of the scheme of the Refugee Convention, which allocates rights according to the refugee’s level of attachment to the host State (rising from subjection to the jurisdiction to physical presence, lawful presence, and lawful stay). As UNHCR has explained, “[a] system that is designed to maintain a refugee in a precarious state intentionally frustrates, rather than facilitates, their integration and naturalisation.”⁹¹
77. In our view, there is a real risk that the temporary protection regime would, unless some form of ILR were made available after a reasonable period,⁹² be precisely this. A regime

⁸⁹ [2001] QB 667, 678E.

⁹⁰ Hathaway, pp 1215-1216.

⁹¹ UNHCR, Observations on the New Plan, para 11.

⁹² The Government’s intention on this front is presently unclear; as noted above, the Policy Statement says only that temporary protection “will not include an automatic right to settle in the UK” and that those offered temporary protection “will be expected to leave the UK as soon as they … can be returned or removed”, without addressing the situation of a person whose

whereby a recognised refugee was only ever entitled to rolling periods of temporary leave, even in circumstances where migrants with a comparable period of residence would be entitled to a more secure status with a path to naturalisation, would be inconsistent with the good faith effort required of the UK by Article 34 of the Refugee Convention. Such a regime would represent the “main situation in which a state’s duty to ‘facilitate’ naturalisation will be breached”, because it would engage “retrogression – making naturalisation more difficult for refugees – without a sound justification” (original emphasis).⁹³

78. Because the Bill implicitly leaves the detail of the temporary protection regime to be worked out via the Immigration Rules and associated policies, it offers no further comfort in this regard.

Potential inconsistency with Article 14 ECHR taken with Article 8 ECHR

79. In our view, there is also a real possibility that the proposed temporary protection regime would be inconsistent with Article 14 ECHR read with Article 8 ECHR.⁹⁴
80. The well-known four-part test (adapted to the context of indirect discrimination) is as follows.⁹⁵
81. **First**, do the facts fall within the ambit of one or more substantive ECHR rights? In our view a framework governing the grant of temporary protection (as compared with some other, more favourable form of leave) would fall within the ambit of Article 8 ECHR. In particular, the constant threat of the withdrawal of protection would have an immediate and profound impact on the enjoyment of a refugee’s private life in the UK, including their personal development and their ability to establish and develop relationships with others.⁹⁶ The proposed limitation or removal of family reunion rights would also have a direct impact on the enjoyment of a refugee’s right to family life – in circumstances where

has been living in the UK for some time without their refugee status having ceased and without their otherwise having become removable.

⁹³ Hathaway, p 1220.

⁹⁴ See, by way of analogy, Foster and Pobjoy, “A failed case of legal exceptionalism?”, pp 606-610, arguing – for similar reasons – that Australia’s offshore processing regime (which exposed unauthorised arrivals to an inferior status determination procedure) breached the non-discrimination guarantee in Article 26 ICCPR.

⁹⁵ See e.g. *R (DA) v Work and Pensions Secretary* [2019] 1 WLR 3289, para 136.

⁹⁶ See e.g. *Hode and Abdi v UK* (App. No. 22341/09, 6 November 2012), para 43; *Niemietz v Germany* (App. No. 13710/88, 16 December 1992), para 29; *Hoti v Croatia* (App. No. 63311/14, 26 April 2018), para 119; *Maslov v Austria* (2008) 45 EHRR 20, para 63.

a constellation of instruments, from the Final Act of the Conference of Plenipotentiaries⁹⁷ to conclusions of UNHCR Executive Committee,⁹⁸ confirm the fundamental importance of family reunion to refugees specifically.⁹⁹

82. **Second**, has the person affected been treated less favourably than others in an analogous situation? It is well established that the concept of less favourable treatment “may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group” – that is, classic indirect discrimination.¹⁰⁰ As noted at paragraphs 74-75 above, the proposed temporary protection regime would have a disproportionately prejudicial impact on refugees who arrived without (rather than with) authorisation. In our view, it is clear that all refugees – whatever their manner of arrival – are analogously situated in terms of the significance of the duration and terms of the leave they are granted and their needs for safety, stability, community, and family reunion: see *Hode and Abdi v UK* (App. No. 22341/09, 6 November 2012), para 50 (“**Hode and Abdi**”).
83. **Third**, is the reason for the treatment one of the grounds listed in Article 14 ECHR or some relevant “other status”? It is clear that being a refugee who arrived in the UK unlawfully (or indeed a refugee falling within the scope of Article 31 of the Refugee Convention) would amount to an “other status” for the purposes of Article 14 ECHR, as the ECtHR recognised in *Hode and Abdi*.¹⁰¹ Indeed, both the ECtHR and the UK courts have taken a broad and generous approach to this concept,¹⁰² and have been “reluctant” to treat this criterion as decisive against an applicant.¹⁰³ The touchstone is often described as a personal, identifiable, or acquired characteristic.¹⁰⁴ Being a refugee who arrived unlawfully (or who falls within the scope of Article 31 of the Refugee Convention) thus fits as comfortably within this description as (for example) being a potential victim of

⁹⁷ United Nations, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, Recommendation B.

⁹⁸ See e.g. UNHCR Executive Committee, Conclusion No. 24 and Conclusion No. 88.

⁹⁹ See *MA v Denmark* (App No 6697/18, 9 July 2021).

¹⁰⁰ See e.g. *Horvath v Hungary* (App. No. 11146/11, 29 January 2013), para 105.

¹⁰¹ *Hode and Abdi*, paras 47-48. This view is also endorsed by Foster and Pobjoy in the related context of Article 26 ICCPR, pp 608-609.

¹⁰² See e.g. *R (Stott) v Secretary of State for Justice* [2015] AC 51, para 81; *R (SC) v Secretary of State for Work and Pensions* [2019] 1 WLR 5687, para 65.

¹⁰³ See e.g. *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250, para 22.

¹⁰⁴ See e.g. *Stevenson v Secretary of State for Work and Pensions* [2017] EWCA Civ 2123, para 41.

trafficking,¹⁰⁵ being a former KBG officer,¹⁰⁶ or other statuses relating to past and unchangeable life experiences.

84. **Fourth**, is the disproportionate impact of the measure objectively justified? In our view, the critical consideration here will be that, because of the proposed statutory definition of the “coming directly” requirement, the temporary protection regime will not properly reflect the requirements of Article 31 of the Refugee Convention (see paragraphs 34-35 above). This is because, as is now well established, the content of Convention rights – and, in particular, the question of justification for the purposes of Article 14 ECHR – is often (and properly) informed by other relevant rules of international law applicable between the parties.¹⁰⁷ In this case, even having regard to the margin of appreciation afforded to the State, it would be difficult to justify a regime which indirectly penalised unauthorised arrivals in a manner which would be proscribed under the Refugee Convention if that penalty were imposed directly.¹⁰⁸

The obligation to afford rights attaching to presence, lawful presence, and lawful stay

85. As noted above, the Refugee Convention affords refugees different sets of rights at different levels of attachment to the host State. Any refugee granted leave to remain – even on a temporary basis – will, at a minimum, be “lawfully present” in the UK for the purposes of the Convention, and will accordingly be entitled to the rights associated with this and all lesser degrees of attachment. These include the rights summarised at paragraph 26 above (relating to non-discrimination, elementary education, and property rights), as well as the rights to:

- 85.1. treatment as favourable as possible, and in any event not less favourable than that accorded to similarly placed migrants, as regards the right to engage in self-employment (Article 18);

¹⁰⁵ *K and AM v Secretary of State for the Home Department* [2018] EWHC 2951 (Admin), para 38.

¹⁰⁶ *Sidabras v Lithuania* (2006) 42 EHRR 104.

¹⁰⁷ The leading case is *Demir v Turkey* (2009) 48 EHRR 54; see also *R (DA) v Work and Pensions Secretary* [2019] 1 WLR 3289.

¹⁰⁸ Indeed, the argument here would be *a fortiori* that in *Hode and Abdi*, para 55, where discrimination consistent with international obligations was nevertheless found to be unjustified. This view is supported by Hathaway’s conclusion that discrimination based on a refugee’s mode of arrival is contrary to Article 3 of the Refugee Convention, which prohibits discrimination in the application of that Convention: see pp 286-287. In our view, this is the case irrespective of whether the views summarised at paras 42 and 74 above regarding the meaning of “on account of” in the context of Article 31 are correct.

- 85.2. freedom of movement, including the right to choose their place of residence (Article 26); and
 - 85.3. protection against expulsion save on grounds of national security or public order (Article 32).
86. Failure to ensure that beneficiaries of temporary protection are afforded these rights would result in a breach by the UK of its obligations under the Refugee Convention.
87. In our view, those granted temporary protection will also be “lawfully staying” in the UK¹⁰⁹ – a higher level of attachment giving rise to a commensurately wider group of rights. Accordingly, the Government will also be required to grant those offered temporary protection the Convention rights relating (for example) to employment (Article 17), housing (Article 21), public relief (Article 23), and social security (Article 24).
88. Again, because the Bill does no more than establish the broad framework for the proposed temporary protection regime, it offers no comfort in this regard.

Obligations governing expulsion and cessation: Articles 1 and 32 of the Refugee Convention

89. The Policy Statement was ambiguous on the question of what would happen on expiry of a grant of temporary protection, suggesting only that “individuals will be reassessed for return to their country of origin or removal to a safe third country”: p 20. Again, nothing further can be gleaned from the Bill. In our view, it would be critical for the Government to recognise that persons granted temporary protection have been recognised as Convention refugees and must be treated accordingly. This means that return to their country of origin at the end of the initial 30-month period would constitute *refoulement* – and expulsion even to a “safe third country” would be unlawful under Article 32 of the Refugee Convention (subject to the national security or public order

¹⁰⁹ See Hathaway, pp 214-215; UNHCR, “Lawfully Staying” – A Note on Interpretation 3 May 1998; Weiss, *The Refugee Convention 1951: the Travaux Préparatoires Analysed with a Commentary*, p 266.

exception) – unless it were established, following careful consideration and (if necessary) a full appeal process, that:

89.1. The person had ceased to be a refugee by operation of Article 1C of the Refugee Convention. This occurs, *inter alia*, where a person:

89.1.1. has voluntarily re-availed themselves of the protection of the country of their nationality (Article 1C(1));

89.1.2. has voluntarily re-established themselves in their country of origin (Article 1C(4)); or

89.1.3. can no longer, “because the circumstances in connection with which [they were] recognised as a refugee have ceased to exist, continue to refuse to avail [themselves] of the protection of the country of their nationality” (Article 1C(5)).

89.2. Alternatively, evidence had come to light to show that the person falls to be excluded:

89.2.1. from refugee status under Article 1F of the Refugee Convention;¹¹⁰ or

89.2.2. (in the case of removal to the country of origin only) from protection against *refoulement* under Article 33(2) of the Refugee Convention.¹¹¹

90. As a matter of international law, the cessation of refugee status on the basis that “the circumstances in connection with which [the individual] was recognised as a refugee have ceased to exist” requires more than simply a re-evaluation of whether the individual meets the refugee definition in Article 1A(2) of the Refugee Convention. Rather, it requires the State to demonstrate that there has been “a fundamental, stable and durable change in the country of origin” that renders cessation appropriate.¹¹² UNHCR has

¹¹⁰ For example, because they have committed a crime against the peace, a war crime, a crime against humanity, or a “serious non-political crime outside the country of refuge prior to [their] admission to that country as a refugee”; or have “been guilty of acts contrary to the purposes and principles of the United Nations”.

¹¹¹ On the basis that there are “are reasonable grounds for regarding [them] as a danger to the security of the country in which [they are]” or that “having been convicted by a final judgment of a particularly serious crime, [they] constitute a danger to that community.”

¹¹² Goodwin-Gill and McAdam, p 143. See also UNHCR, “The cessation clauses: Guidelines on their application” (April 1999), paras 25-26 (noting that the clause requires “fundamental changes” which “must also be durable” and that “a strict approach should be maintained in deciding whether or not the changes can be qualified as durable”).

stressed that a “strict” approach to the cessation clauses is important “since refugees should not be subject to constant review of their refugee status.”¹¹³

91. If the decision-making process governing renewal (along with any appeal or review process) failed to reflect these fundamental principles – for example, if it turned on a fresh assessment of whether the individual meets the refugee definition in Article 1A(2), effectively circumventing the provisions of Article 1C(5) – it would give rise to breaches of the UK’s obligations under the Refugee Convention.

E. OFFSHORE PROCESSING

The proposal

92. The Government’s proposal with respect to the potential offshore processing of asylum claims has been set out at a high level of generality. The Policy Statement said only that:
 - 92.1. The Secretary of State would “take forward reforms to … make it possible for asylum claims to be processed outside the UK and in another country”: p 18.
 - 92.2. She would accordingly seek to “amend sections 77 and 78 of the Nationality Immigration and Asylum Act 2002¹¹⁴ so that it is possible to move asylum seekers from the UK while their asylum claim or appeal is pending. This will keep the option open, if required in the future, to develop the capacity for offshore asylum processing – in line with our international obligations”: p 19.
93. The Bill, by cl 26 and Schedule 3, effects the suggested amendment to s 77. In effect, it creates an exception to the (*prima facie*¹¹⁵) absolute bar on removing an asylum-seeker while their claim is “pending” – instead permitting removal to a country which meets a set of criteria which are similar, but not identical, to those for a “safe third State” (see paragraphs 10.2 and 12.1 above). These amendments make it clear that any offshore processing regime is intended to apply, not only to asylum-seekers whose claims have

¹¹³ UNHCR, “The cessation clauses”, para 2.

¹¹⁴ Section 77 precludes a person’s removal from the UK while their asylum claim is pending; section 78 makes the same provision with respect to appeals.

¹¹⁵ Exceptions do exist elsewhere under the current system – in particular, in relation to removal to states listed in or under Schedule 3 to the 2004 Act.

been declared inadmissible, but also to (at least some of) those whose claims have been admitted for consideration in the UK.

94. A State to which removal is permitted while an asylum claim is pending must be one:
 - 94.1. where the person's life or liberty are not threatened by reason of a Convention characteristic (as for a "safe third State");
 - 94.2. from which they "will not be removed otherwise in accordance with the Refugee Convention" (noting that this directs attention to the risk of onward *refoulement* more effectively than the equivalent criterion for a "safe third State", which is that "the principle of *non-refoulement* will be respected ... in accordance with the Refugee Convention");
 - 94.3. to which they can be removed without their Article 3 ECHR rights being contravened (this is not an express requirement for a "safe third State"); and
 - 94.4. from which they will not be sent to another State in contravention of their Convention rights (this is a more demanding criterion than for a "safe third State", which must only be one from which a person will not be removed in breach of Article 3 ECHR).
95. As noted at paragraph 24, the Bill also provides that States listed in or under Schedule 3 to the 2004 Act are (apparently irrebuttably) presumed to meet the first two of these criteria, and are presumed to meet the latter two "unless the contrary is shown by a person to be the case in their particular circumstances."
96. By contrast with a "safe third State", a State to which a person may be removed under s 77 of the NIAA 2002 with an asylum claim pending need not be one where they are able to claim asylum and, if recognised as a refugee, "receive protection in accordance with the Refugee Convention".¹¹⁶
97. No further detail is provided, in either the Policy Statement or the Bill, as to:

¹¹⁶ Compare s 80B(4) in cl 14 with s (2B) in Sch 3.

- 97.1. where the Secretary of State would contemplate sending asylum-seekers for processing;
 - 97.2. whether all or only some asylum-seekers would be processed offshore and, if so, what the criteria for selection would be;
 - 97.3. who would do the processing (for example, representatives of the UK, of the destination country, or of UNHCR) and where any right of review or appeal would lie;¹¹⁷
 - 97.4. what conditions or safeguards the UK would require as part of any offshore processing agreement; or
 - 97.5. where asylum-seekers recognised as refugees under offshore processing arrangements would be (re)settled.¹¹⁸
98. We note that 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.¹¹⁹ States which have implemented offshore processing arrangements, such as Australia, have encountered significant and sustained international criticism and domestic litigation (discussed as relevant below).¹²⁰
99. We also understand that, to date, the Government has not concluded any offshore processing agreements and that this proposal is therefore hypothetical at present. However, and as discussed further below, we are concerned that the proposed exception

¹¹⁷ Although the removal of the reference to the ability to seek and receive asylum in the State of removal may suggest an intention to have the claim processed by or on behalf of the UK.

¹¹⁸ Although, again, the removal of the reference to being afforded refugee protection in the receiving State may suggest an intention to return successful claimants to the UK.

¹¹⁹ See the discussion in Goodwin-Gill and McAdam, pp 409-411.

¹²⁰ 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>. The Office of the Prosecutor for the International Criminal Court has also 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: <https://www.theguardian.com/australia-news/2020/feb/15/australias-offshore-detention-is-unlawful-says-international-criminal-court-prosecutor>. 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.

to the bar on removal while an asylum claim is pending is not limited to removal for the purposes of offshore processing.

Issues which may arise

Overview

100. Given the lack of detail in the Government’s proposal, we are able only to identify issues which may arise in the conclusion and implementation of offshore processing arrangements. We note at the outset UNHCR’s position that “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.”¹²¹

101. In our view, the issues most likely to arise concern:

- 101.1. compliance with relevant obligations under the ECHR;
- 101.2. compliance with obligations of non-discrimination and non-penalisation under Articles 3 and 31 of the Refugee Convention;
- 101.3. compliance with the prohibition on *refoulement* under Article 33 of the Refugee Convention; and
- 101.4. ensuring respect for other Refugee Convention rights in the destination country, so as to ensure the implementation of the UK’s treaty obligations in good faith.

102. The satisfactory resolution of these issues, as a matter of international law, would depend primarily on the Government’s willingness to take a rigorous approach to the conclusion, terms, monitoring, and maintenance of any offshore processing agreements, and to ensure that individual asylum-seekers’ liability to offshore processing was subject to appropriately robust substantive and procedural safeguards.

Consistency with ECHR obligations relating to conditions in recipient country

103. Asylum-seekers who arrive in the UK are within its jurisdiction for the purposes of Article 1 ECHR. Accordingly, any arrangements for offshore processing would need to

¹²¹ UNHCR, “Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers” (May 2013), para 1.

be made and implemented in accordance with the Convention. This has a number of important consequences.

104. **First**, 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: see paragraph 18 above. Such a risk could arise out of:

104.1. Potential exposure to inhuman or degrading treatment, or the risk of trafficking, during the status determination process – whether due to the conditions to which asylum-seekers were exposed generally;¹²² the personal characteristics and vulnerabilities of the individual; or (most likely) a combination of the two.¹²³

104.2. A real risk that the status determination process would result in an asylum-seeker being removed to their country of origin to face a real risk of breach of their rights under Articles 2, 3 or 4 ECHR.¹²⁴ The comments at paragraphs 18-19 above in the context of the inadmissibility regime are also applicable here.

105. **Second**, asylum-seekers could not lawfully be removed for offshore processing if this would breach the UK’s obligations under Article 8 ECHR. This could occur if removal would unjustifiably interfere with one or more of:

105.1. An asylum-seeker’s right to respect for family life. This might occur if, for example, an asylum-seeker had arrived with a view to joining close family members whose claims were already being processed in the UK.

105.2. An asylum-seeker’s right to respect for private life, including the right to physical and psychological integrity. This 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. Because of the wide range of factors relevant to an Article 8 claim, a case of this kind may yield a different result than under Article 3 ECHR.¹²⁵

¹²² See e.g. *MSS v Belgium and Greece* (App. No. 30696/09, ECHR 2011); *NH v France* (App. No. 28820/13, 2 July 2020).

¹²³ See e.g. *Tarakhel v Switzerland* (App. No. 29217/12, ECHR 2014); *Ali v Switzerland and Italy* (App. No. 30474/14, 4 October 2016). The threshold of severity for a breach of Article 3 is sensitive to individual differences.

¹²⁴ See, in particular, *Ilias and Ahmed v Hungary* (App No. 47287/15, 21 November 2019).

¹²⁵ See e.g. *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279; *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40.

105.3. An asylum-seeker’s procedural rights under Article 8 ECHR, taken with Article 13 ECHR, which guarantees the right to an effective remedy. These include the right to be involved in decision-making which impacts on substantive Article 8 ECHR rights “to a degree sufficient to provide the requisite protection of [the individual’s] interests”,¹²⁶ and (by extension) the right to an effective appeal against a negative decision.¹²⁷ Accordingly, an asylum-seeker who claimed that their removal for offshore processing would breach Article 8 ECHR could not lawfully be removed pending determination of their appeal unless remote proceedings would be “effective”. The difficulties of ensuring this are highlighted by the Supreme Court’s judgment in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] 1 WLR 2380, finding that the Government’s “deport first, appeal later” regime was not compatible with Article 8 ECHR.

106. **Third**, asylum-seekers could not be removed to an unlawful risk of breaches of their right to liberty and security of the person under Article 5 ECHR: see further paragraph 126 below.
107. **Fourth**, if and to the extent that asylum-seekers being processed offshore remained within the “jurisdiction” of the UK for the purposes of Article 1 ECHR, the UK would remain responsible for guaranteeing their Convention rights on an ongoing basis.
108. The precise scope and limits of extraterritorial jurisdiction under the ECHR and the Refugee Convention is a complex topic which is beyond the scope of this Joint Opinion. In general terms, however, asylum-seekers processed offshore could remain within the jurisdiction of the UK if it continued to exercise authority and control over them¹²⁸ – including, potentially, via the involvement of UK State agents in the running of reception centres¹²⁹ and/or the conduct of status determination procedures.

¹²⁶ See *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] 1 WLR 2380, paras 51, 76-78 endorsing *R (Guadanaviciene) v Director of Legal Aid Casework* [2015] 1 WLR 2247; *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368.

¹²⁷ See e.g. *De Souza Ribeiro v France* (2012) 59 EHRR 10, para 83; *Kiarie* per Lord Wilson, paras 48-51.

¹²⁸ See e.g. *M v Denmark* (1992) 73 DR 193, para 196; *R (B) v Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643.

¹²⁹ This possibility has been expressly acknowledged by UNHCR, “Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers” (May 2013), para 4. Other UN bodies have found that Australia had effective control over asylum-seekers at some refugee processing centres in Nauru and Papua New Guinea and therefore remained responsible for guaranteeing their rights under relevant international legal instruments: see e.g. Committee Against Torture, “Concluding

109. In order to ensure compliance with the UK's obligations under the ECHR and the Refugee Convention, it would be necessary to ensure that:
- 109.1. Offshore processing arrangements were subject to rigorous minimum standards with respect to reception conditions, including in respect of vulnerable individuals such as those suffering from physical or mental illness.
 - 109.2. The offshore status determination process was fair and effective. Regard would need to be had to the full range of relevant factors, including applicable time limits, the identity of decision-makers, involvement in the decision-making process, the availability of legal assistance, the availability of interpreters, and rights of review or appeal.
 - 109.3. Claims (including informal claims) that removal for offshore processing would breach the UK's obligations under the Refugee Convention and/or the ECHR were properly considered by Home Office officials, and an effective remedy in cases of refusal provided.
 - 109.4. Removals were not effected pending the final determination of claims, including appeals (save where in the individual case a remote appeal process would be effective for the purposes of Article 8 ECHR). Again, the full range of relevant factors would need to be considered.
110. At present, the terms of the Bill do not include adequate protections of this kind. Only two of the four criteria for lawful removal relate to conditions in the destination State (the remainder relate to onward *refoulement*, discussed below); these refer only to freedom from persecution and breaches of Article 3 ECHR, and hence do not direct decision-makers to the risk of breaches of other ECHR rights within the receiving country. Although this will not prevent an asylum-seeker from proactively contending that their removal for offshore processing would be contrary to s 6 of the Human Rights Act 1998 (the “**HRA**”) due to conditions in the destination state, the efficacy of this safeguard is actively undermined by (i) the presumption of compliance with Article 3 ECHR established in respect of States listed in or under Schedule 3 to the 2004 Act (see 24 above), and (ii) the removal, via cl 35 of the Bill, of even out-of-country appeal rights

observations on the combined fourth and fifth periodic reports of Australia” (23 December 2014); Human Rights Committee, “Concluding observations on the sixth periodic report of Australia” (1 December 2017).

where a human rights claim is certified as “manifestly unfounded” (leaving judicial review as the only available remedy).

111. In our view the result is that, without the introduction of significant additional safeguards, the implementation of any offshore processing system under the framework established by the Bill would risk producing consistent violations of the UK’s obligations under the ECHR.

Refugee Convention and ECHR obligations relevant to criteria for offshore processing

112. Issues may also arise with respect to the criteria by which asylum-seekers were rendered liable to offshore processing. To be lawful, these would need to comply with:
 - 112.1. The obligation under Article 3 of the Refugee Convention to “apply the provisions of [the] Convention to refugees without discrimination as to race, religion or country of origin.” Thus, it would not (for example) be permissible to subject only arrivals from particularly common countries of origin to offshore processing.¹³⁰
 - 112.2. The obligation under Article 31(1) of the Refugee Convention not to penalise refugees “on account of their unlawful entry or presence” (discussed in detail above). Thus, it would not (for example) be permissible to subject only asylum-seekers who entered the UK without authorisation, or only asylum-seekers found to have passed through “safe third countries”, to offshore processing.¹³¹
 - 112.3. The broader obligation under Article 14 ECHR not to discriminate against individuals in the enjoyment of their Convention rights. Exposure to offshore processing is liable to fall within the ambit of Articles 2, 3, 4 and/or 8 ECHR and hence to engage Article 14 ECHR. Thus, for example, it would be unlawful to adopt criteria for offshore processing which indirectly discriminated against refugees from particular countries or with particular religious beliefs, or against refugees who had arrived in the UK without authorisation (see paragraphs 79-

¹³⁰ While the Refugee Convention does not specifically regulate status determination procedures, offshore processing is liable to affect the enjoyment of other Convention rights (see below) and would therefore fall within the scope of Article 3: see generally Hathaway, pp 280-281.

¹³¹ See e.g. Foster and Pobjoy, “A failed case of legal exceptionalism?”, p 606 – concluding that Australia’s then-current practice of exposing unauthorised arrivals to an inferior status determination process (which lacked key safeguards enjoyed by authorised arrivals) violated Article 31(1).

84 above), unless the differential impact of these criteria were objectively justified.¹³² 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 trafficking or those with serious mental health issues – as differently as their particular situation warranted.

Compliance with non-refoulement obligations

113. The scope of the prohibition on *refoulement*, including indirect or onward *refoulement*, is discussed above in the context of the new inadmissibility regime (see paragraphs 15-19). As with removal to a “safe third country”, removal for offshore processing may give rise to onward *refoulement* if:
 - 113.1. the destination country did not in practice, as well as formally, respect the prohibition on *refoulement*; or
 - 113.2. the status determination procedures in the destination country, and/or the procedures for considering human rights claims, were not fair and efficient.
114. Thus, Professor Hathaway notes that “[a]n especially serious operational risk [in respect of *non-refoulement*] can occur when refugees are forced to undergo extraterritorial processing in countries without the experience or resources reliably to assess refugee status and consequent duties of protection”.¹³³
115. In order to ensure compliance with the UK’s obligations under both the Refugee Convention and the ECHR, it would be crucial for the Government to ensure that offshore processing occurred only in countries where there was practical and effective protection against *refoulement*, and where status determination procedures were conducted fairly, efficiently, and with appropriate safeguards. It would be necessary for the UK to monitor these matters on a proactive and ongoing basis, and not simply at the point of the initial agreement.¹³⁴ In the specific context of Article 3 ECHR, it would be necessary to comply

¹³² See, by analogy, Foster and Pobjoy, “A failed case of legal exceptionalism?”, pp 606- 610, concluding that Australia’s offshore processing system for unauthorised arrivals constituted a breach of the equality guarantee in Article 26 ICCPR.

¹³³ Hathaway, p 327. See also the concerns articulated by Foster and Pobjoy, “A failed case of legal exceptionalism?”, pp 624-625 (regarding the likely deficiencies in status determination procedures undertaken pursuant to what was then a newly agreed regional processing arrangement with Malaysia, the consequent risks of the *refoulement*, and the resulting unlawfulness of transfers to Malaysia for processing).

¹³⁴ As to the need for ongoing review see Foster, “Protection elsewhere”, pp 284-285 (noting that “where a sending state has actual or constructive knowledge of significant violations of Articles 1-34 of the Refugee Convention by the receiving state, it can no longer in good faith assert that transfers can be made in accordance with the Convention”); Foster, “The implications

with the procedural obligations identified at paragraph 18.3 above, including the need to thoroughly and proactively consider whether the processing system in the destination country provided adequate protection against onward *refoulement*.

116. The Bill's criteria for removal with a pending asylum claim do direct decision-makers more expressly to the risks of onward *refoulement* than the criteria for removal to a "safe third State" under the inadmissibility regime (see paragraphs 23-25 above). However, further guidance will be required on critical issues like the standard of proof, the type of evidence to which decision-makers should have regard, and the significance of the fairness and efficiency of the status determination and human rights procedures in the recipient State (all discussed at paragraph 23 above in the context of removals under the inadmissibility regime). In addition, the efficacy of these safeguards is presently dramatically reduced by the use of an irrebuttable presumption of protection against Refugee Convention *refoulement* (and a rebuttal presumption of protection against onward *refoulement* contrary to the ECHR) in respect of states listed on or under Schedule 3 to the 2004 Act.
117. In our view, without additional safeguards (including less restricted access to appeal or review¹³⁵), any offshore processing regime established under this framework would give rise to a considerable risk of breaches of the prohibition on *refoulement*.

Consistency with other obligations under the Refugee Convention

Generally

118. As noted at paragraph 26 above, there are a number of rights to which refugees (and hence, as a practical matter, asylum-seekers) are entitled even before their status is formally recognised. Some of these must be afforded by any Contracting State to all refugees within their jurisdiction:¹³⁶ in addition to protection against *refoulement*, these

of the failed 'Malaysian Solution': The Australian High Court and refugee responsibility-sharing at international law" (2012) 13 *Melbourne Journal of International Law* 395, p 411.

¹³⁵ As to the importance of both an individualised assessment and a right of appeal or review, see Foster, "Protection elsewhere", pp 278-279.

¹³⁶ As under the ECHR, there are certain circumstances in which a person may be within a state's jurisdiction for the purposes of the Refugee Convention without being physically present in its territory. This includes where the person remains within the power or control of the state's agents – for example, because they are being held at an extraterritorial facility operated by the state: see the discussion at Hathaway, pp 185-188. See also: UNHCR, "Advisory Opinion on the extraterritorial application of non-refoulement obligations" (2007) 5 *European Human Rights Law Review* 484 (concluding that Article 33, in particular, applies wherever a refugee "come[s] within the effective control and authority" of a Contracting State); Foster, "Protection elsewhere", pp 261-262 (arguing that, pursuant to the principle reflected in Articles 4(1), 5 and/or 8 of the ILC Draft Articles

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.¹³⁷ these include rights relating to freedom of religion (including the religious education of children) (Article 4); freedom from 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)).

119. If the UK were to send asylum-seekers to be processed in a location in circumstances where it knew that these rights would not be respected, this would in our view constitute a failure to implement its obligations under the Refugee Convention in good faith and/or, depending on the circumstances, may result in liability for aiding or assisting in the commission of an internationally wrongful act: see paragraphs 28-31 above.
120. Similar considerations apply to respect for the full range of rights to which refugees are entitled on conclusion of the status determination process, once they are “lawfully present” in the territory of a Contracting State¹³⁸ (for example, rights relating to self-employment under Article 18 and protection against expulsion under Article 32) and subsequently once they are “lawfully staying” (for example, work rights under Article 17 and rights to public assistance under Article 23). The UK courts have expressly recognised the importance of these rights to those who are recognised as refugees.¹³⁹ If the Government’s offshore processing arrangements involved recognised refugees being resettled somewhere other than the UK, it would be essential to ensure that that country was one that would guarantee respect for the full range of Convention rights; and that this was subject to regular review based on changing circumstances or updated evidence.¹⁴⁰ This obligation is implicitly recognised by the inclusion, in the definition of a “safe third country” in the Immigration Rules, of the requirement that the country be

on State Responsibility, a Contracting State will remain liable for breaches of international obligations committed by immigration department officials making status determination decisions, even extraterritorially).

¹³⁷ See Hathaway, pp 193-196.

¹³⁸ We note that some commentators consider that the “lawful presence” requirement is satisfied once an asylum-seeker is admitted to the status determination process, rendering these rights available at an even earlier point: see e.g. Hathaway, pp 523, 542ff; Costello, pp 12, 44.

¹³⁹ See e.g. *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008, para 72; *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412, para 121.

¹⁴⁰ As to the need for ongoing review see fn 136 above.

one where the individual will “receive protection in accordance with the Refugee Convention in that country.”¹⁴¹

121. These conclusions are consistent with those of:

121.1. The High Court of Australia (its apex court) in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, finding that the lawfulness of the systematic removal of asylum-seekers to Malaysia was conditional not only on compliance with the prohibition on *refoulement*, but also on respect in the destination country for “protections of all the kinds which parties to the [Refugee Convention] are bound to provide to such persons.”¹⁴²

121.2. The Executive Committee of the UNCHR, which has concluded that:

“[a]s regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted … it should be established that the third country will treat the asylum-seeker[s] in accordance with accepted international standards … and will provide the asylum-seeker[s] with the possibility to seek and enjoy asylum.”¹⁴³

121.3. Leading experts and academic commentators.¹⁴⁴

122. The Bill does not include any requirements relating to respect for the rights of asylum-seekers and refugees under the Refugee Convention in the receiving State (see paragraph 26 above). In particular, the criteria for the exemption from the bar on removal do not replicate the element of the “safe third State” definition which requires that, if refugee status is granted, a person will receive protection “in accordance with the Refugee Convention” – although even this would be inadequate as it would not encompass protections applicable during the status determination process. Without further statutory

¹⁴¹ Although note that, for the reasons given at paragraphs 26-32 above, we consider this safeguard legally deficient insofar as it is limited by the words “if found to be a refugee”.

¹⁴² See the extensive discussion in Foster, “The implications of the failed ‘Malaysian Solution’”, p 417, endorsing this view as correct as a matter of international law.

¹⁴³ UNHCR Executive Committee Conclusion No. 85, para aa. “Asylum” includes the enjoyment of respect for “applicable human rights and refugee law standards as set out in relevant international instruments”: UNHCR Executive Committee Conclusion No. 82, para d(vi).

¹⁴⁴ See e.g. Hathaway, pp 825-820; Goodwin-Gill and McAdam, pp 389-90 (noting, inter alia, that the obligation to implement Convention obligations in good faith requires Contracting States to ensure that “if sent elsewhere… they have access to protection and durable solutions”); Michigan Guidelines on Protection Elsewhere, Guideline (8); Foster, “Protection elsewhere”, pp 270-271.

safeguards, any offshore processing within the framework of the Bill is liable to result in repeated breaches of the UK's obligations under the Refugee Convention.

In the context of administrative detention

123. Particular issues may arise if the Government's arrangements for offshore processing would see asylum-seekers subjected to detention or other restrictions on their freedom of movement in the destination country.

124. As noted above, the Refugee Convention protects those who fall within the scope of Article 31 against restrictions on movement "other than those which are necessary", and requires that these be brought to an end when "their status in the country is regularised¹⁴⁵ or they obtain admission into another country". Article 31 applies even to restrictions which fall short of detention: examples might include a requirement to stay within or near a particular area (such as a reception centre); electronic monitoring; or regular reporting.¹⁴⁶ One consequence is that the detention of refugees who fall within the scope of Article 31¹⁴⁷ will never be justified if less coercive measures would suffice.¹⁴⁸ Another consequence is that even these alternatives must be necessary in the individual case: as UNHCR puts it, "alternatives to detention [should not] become alternatives to release".¹⁴⁹ Indeed, the view of the UNHCR Executive Committee is that, for all refugees, detention should normally be avoided, and "may be resorted to" only "if necessary" for limited purposes (such as verifying identity, determining the elements on which a claim is based, or preserving national security or public order).¹⁵⁰

125. Refugees are also, like all persons, entitled to freedom from arbitrary detention under Article 9 ICCPR. The avoidance of arbitrariness requires, *inter alia*, that detention be both necessary and proportionate, in the sense that there be no "less invasive means of

¹⁴⁵ We note that some commentators consider that this occurs as soon as a refugee is formally admitted to a status determination procedure: see 138 above.

¹⁴⁶ See the discussion at Hathaway, pp 539-540.

¹⁴⁷ Save where Article 9 of the Refugee Convention, which permits the taking of "provisional measures" against a person "pending a determination that that person is in fact a refugee and that the continuance of such measures is necessary in the interests of national security."

¹⁴⁸ See Costello, p 45.

¹⁴⁹ UNHCR, "Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention" (2012), para 38. As put in the Michigan Guidelines on Refugee Freedom of Movement (2017) 39 *Michigan Journal of International Law* 1, "a refugee ... is presumptively exempt from any restriction on freedom of movement unless that restriction is shown to be necessary that is, that it is the least intrusive means available to secure a permissible objective." See similarly Costello, pp 45-46.

¹⁵⁰ See e.g. UNHCR Executive Committee Conclusion No. 44, para (b) (reaffirmed in Conclusion No. 85, para (cc)); UNHCR, "Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems" (4 September 2001), para 17.

achieving the same ends”.¹⁵¹ The UN Human Rights Committee has concluded that this precludes the detention of asylum-seekers, save for a “brief initial period” while their claim is recorded and their identity determined, unless there are “particular reasons specific to the individual” which render it necessary.¹⁵² Nor is it permissible to detain asylum-seekers for the purpose of deterring others.¹⁵³ Article 9 ICCPR also requires that those detained be able to take proceedings before a court to challenge the lawfulness of their detention,¹⁵⁴ including on the basis of compliance with the ICCPR.¹⁵⁵ Finally, it is unlawful for a State Party to the ICCPR to remove a person to another country where breach of their rights, including under Article 9 ICCPR, is a necessary and foreseeable consequence of that removal.¹⁵⁶

126. Article 5 ECHR will also apply while asylum-seekers are within the jurisdiction of the UK or another Contracting State to the ECHR. Article 5:

- 126.1. Prohibits detention which is arbitrary, in the sense that it is not, *inter alia*, closely connected with an authorised purpose under Article 5 and for no longer than is reasonably required for that purpose.¹⁵⁷ Additional protections against arbitrariness are required for those who are particularly vulnerable,¹⁵⁸ including a requirement that less coercive measures than detention have been considered and discounted.¹⁵⁹
- 126.2. Guarantees a detainee’s right to bring proceedings challenging the (procedural and substantive) lawfulness of their detention. A decision must be reached “speedily” and release ordered if detention is unlawful.¹⁶⁰

¹⁵¹ UN Human Rights Committee, General Comment No. 35 (2014), para 18.

¹⁵² *Ibid.*

¹⁵³ See e.g. UNHCR, “Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention” (2012), paras 3, 32.

¹⁵⁴ Article 9(4) ICCPR.

¹⁵⁵ UN Human Rights Committee, *Baban v Australia* (No. 1014/2001, 6 August 2003), para 7.2.

¹⁵⁶ See e.g. *GT v Australia* (Communication no. 706/1996, 4 November 1997).

¹⁵⁷ See e.g. *Saudi v United Kingdom* (App. No. 13229/03, 29 January 2008), para 74.

¹⁵⁸ See e.g. *Thimothawes v Belgium* (App. No. 39061/11, 4 April 2017); *Abdi Mahamud v Malta* (App. No. 56796/13, 3 May 2016).

¹⁵⁹ See e.g. *Rahimi v Greece* (App. No. 8687/08, 5 April 2011).

¹⁶⁰ Article 5(4) ECHR.

- 126.3. Prohibits the expulsion or removal of a person to face a breach of Article 5 ECHR, including (for example) detention without access to an independent and impartial tribunal for the purposes of review.¹⁶¹
127. The result is that, in order to ensure good-faith compliance with the UK's international legal obligations, the Government would need to ensure that any arrangements for offshore processing did not expose asylum-seekers to foreseeable breaches of their rights under Article 31(2) of the Refugee Convention, Article 9 ICCPR, and/or Article 5 ECHR. Once again, no safeguards of this kind are present in the Bill (which focuses solely on protection against persecution, Article 3 breaches, *refoulement*, and onward removal in breach of ECHR rights) – and in respect of some States the Bill also removes even out-of-country appeals on human rights grounds (which of course would include arguments based on breaches of Article 5 ECHR). Accordingly, without more, there is a significant risk that offshore processing arrangements made pursuant to the Bill would breach the UK's obligations as set out above.

Issues which may arise: Removal without offshore processing

128. The proposed amendments to s 77 NIAA 2002 do not expressly limit removal under the new exception to removal under an offshore processing arrangement. This may ultimately be of limited, if any, impact, as nothing in the Policy Statement suggested an intention to remove asylum-seekers whose claims are admissible in the UK to other countries save in the context of existing processes under Schedule 3 to the 2004 Act, or (in the case of countries not listed in or under that Schedule) of an established offshore processing regime. For the avoidance of any doubt, however, it should be noted that any *ad hoc* removal of an asylum-seeker whose claim is otherwise admissible in the UK to a third State under s 77 NIAA 2002 – without that claim having been determined, without any express agreement that it will be considered and determined in that other State, and without the kinds of assurances and safeguards identified in the section above – would almost undoubtedly breach the UK's obligations under the Refugee Convention and would generate a significant risk of breaches of the ECHR.

¹⁶¹ See *Harkins v UK* (App. No. 71537/14, 15 June 2017), paras 62-65. Since the present context involves the UK seeking to have a third state perform what would otherwise be its own obligations under international law, it is strongly arguable that the relevant standard is breach *simpliciter* of Article 5, rather than "flagrant breach".

F. EXPANDED “ONE-STOP” PROCESSES

The current “one-stop” regime and the new proposals

129. At present, the Secretary of State has power under s 120 of the NIAA 2002 to issue a notice requiring an individual to set out all the grounds on which they say they are entitled to remain in the UK.¹⁶² Failure to do so precludes an appeal on any ground not raised in response to the notice without a satisfactory reason.¹⁶³
130. The Policy Statement set out a general objective of streamlining and accelerating the process of applying for, appealing, and judicially reviewing applications for asylum. To this end, it envisaged the introduction of a “‘one-stop’ process to require all rights-based claims [to asylum] to be brought and considered together in a single assessment up front”: p 4. Applicants for asylum would be issued with a notice requiring them to “raise all protection-related issues upfront and have these considered together and ahead of an appeal hearing where applicable”: p 28. Where a matter was raised after the one-stop process, “new powers [would] mean that decision-makers, including judges, should give minimal weight to [new] evidence … unless there is good reason”: p 28.
131. These proposals are given effect by the Bill in three ways.
132. The first is the “evidence notice” regime contained in cl 16-17. In summary, this envisages that:
 - 132.1. Where a person makes a protection or human rights claim, they will be served with an “evidence notice” requiring them to provide, before a specified date, any evidence in support of that claim.
 - 132.2. If they fail to do so, they must provide a statement setting out the reasons for not providing the evidence before the specified date.
 - 132.3. In assessing the person’s credibility for the purposes of their claim, a decision-maker will be required – under s 8 of the 2004 Act – to “take account, as damaging to the claimant’s credibility”, of the provision of evidence after the

¹⁶² The decision whether to require those additional reasons is a discretionary one for the Secretary of State: *Lamichhane v Secretary of State for the Home Department* [2012] 1 WLR 3064, para 33.

¹⁶³ NIAA 2002, s 96(2).

date specified in the notice “unless there are good reasons why the evidence was provided late”.

133. No examples of what might be treated as a “good reason” are provided.
134. The second is the “slavery or trafficking information notice” regime. This is similar, but relates to information rather than evidence and is limited to the making of trafficking decisions by the Competent Authority. It envisages that:
 - 134.1. The Secretary of State may serve a notice of this kind on a person who has made a protection or human right claim. It requires the recipient to provide, before a specified date, any information the person has “that may be relevant for the purposes of making a reasonable grounds or a conclusive grounds decision.”
 - 134.2. If this information is provided on or after the specified date, the person must provide a statement setting out their reasons for not providing the information beforehand.
 - 134.3. When making a reasonable or conclusive grounds decision, “in determining whether to believe a statement made by or on behalf of the person, the competent authority must take [the late provision of the information] into account, as damaging the person’s credibility … unless there are good reasons why the information was provided late.”
135. The final and most onerous regime is the “Priority Removal Notice” (“PRN”) regime set out in cl 18-20. Under these provisions:
 - 135.1. The Secretary of State may serve a person who is liable to removal or deportation with a PRN, which requires them to provide by a specified date a statement setting out a wide range of matters including their reasons for wishing to remain in the UK; any grounds on which they should be allowed to stay or should not be removed; any matters which may be relevant to the making of a reasonable or conclusive ground decision in respect of human trafficking or modern slavery; and any evidence in support of those claims and matters. No indication is given of when the use of a PRN will be considered appropriate. The requirements of the notice are more extensive than either of the two

proposed regimes summarised above, as they relate (essentially) to all manner of claims and evidence.

- 135.2. If anything required by the PRN is provided after the specified date then a decision-maker – when determining a protection or human rights claim, or making a decision as to whether the person is a potential or actual victim of trafficking – “must take account, as damaging [the person’s] credibility, of the late provision of [that material], unless there are good reasons why it was provided late.” (emphasis added)
136. Finally, pursuant to cl 20, where evidence in relation to an asylum or human rights claim or appeal is provided “late” – that is, after the deadline given in an evidence notice or PRN – a decision-maker “must, in considering it, have regard to the principle that minimal weight should be given to the evidence” (emphasis added), unless “there are good reasons why the evidence was provided late”.
137. It is not clear whether “evidence notices” and “slavery or trafficking information notices” will be issued as a matter of course, or only in some case (and if so when).

Issues arising

Consistency with requirements of procedural fairness

138. Asylum-seekers enjoy a range of procedural rights under international and domestic law.
139. Pursuant to the ECHR, asylum-seekers are entitled to an effective remedy for breach of their Convention rights: see Article 13. Typically, the relevant substantive rights will be those contained in Articles 2, 3, 4 and/or 8 ECHR. Access to an effective remedy requires effective access to the procedures for determining an asylum claim, including the provision of information about those procedures to the applicant, and sufficient time for the applicant to make his or her case. Short time periods for both applications and appeals have repeatedly been held by the ECtHR to prevent access to an effective remedy.¹⁶⁴ Additionally, the courts of Contracting States must be able to examine the substance of

¹⁶⁴ See, e.g., *IM v France* (Application No. 9152/09, 2 February 2012) (a five-day time limit for lodging an application and a 48-hour window for appeal); *MSS v Belgium and Greece* (2011) 53 EHRR 2 (a requirement for asylum-seekers to self-report to police within three days of arrival, and five days to appeal against a deportation decision).

a complaint and afford proper remedies.¹⁶⁵ This requires “independent and rigorous scrutiny” of the claim.¹⁶⁶

140. Retained EU law similarly requires effective protection of the right to *non-refoulement* of refugees. That requires, among other things, an effective remedy against decisions on asylum applications.¹⁶⁷ The recent decision of the Supreme Court in *G v G* [2021] 2 WLR 705 confirms that this flows not simply from retained EU law, but also from the “objectives of” the Refugee Convention.¹⁶⁸
141. Procedural rights are both intrinsically and instrumentally important. In *R (Osborn) v Parole Board* [2014] AC 1115, Lord Reed observed in a classic passage at paras 67-71 that a fair procedure was important in at least three ways. First, instrumentally: “There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information ...” Putting the point the other way, an unfair asylum process is “liable to result” in the return of applicants to persecution. Second, a fair process respects the dignity of the individual. Third, it promotes the rule of law.
142. The consequences of the expanded “one-stop” procedures proposed in the Bill for procedural fairness will depend on a number of variables. These include:
 - 142.1. The stage in the claim or appeal process at which a notice is served. The earlier this occurs, the more difficult it is likely to be for individuals to comply – as they will be less likely (for example) to have had an opportunity to understand their rights, seek advice, build trust with advisors, and start identifying and assembling evidence. With respect to “slavery or trafficking information notices” and “evidence notices”, it appears that these will be issued at an early stage – when a person makes a protection or human rights claim – but this is not entirely clear. The Policy Statement provides inconsistent indications, appearing to suggest at some points that “one-stop” notices will be issued as soon as a

¹⁶⁵ *MSS v Belgium and Greece*, para 387.

¹⁶⁶ *Jabari v Turkey* (2001) 9 BHRC 1, para 50.

¹⁶⁷ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 39.

¹⁶⁸ See e.g. para 118; see further paras 135-140.

person makes a protection claim,¹⁶⁹ and at others that this will occur where an initial claim is rejected and any appeal is pending.¹⁷⁰

- 142.2. How extensive the requirements of the notice are. It appears that the requirements of a “slavery or trafficking information notice” are limited to information a person has which may be relevant to a reasonable or conclusive grounds decision. In contrast, the requirements of a PRN are far more onerous, covering all grounds for resisting removal and all evidence in support.
 - 142.3. How long or short the timeframe for compliance is. No information is presently provided about this variable in respect of any of the three proposed regimes.
 - 142.4. The breadth of the exception to the imposition of adverse consequences for non-compliance. Here, the test in each case is whether there are “good reasons” for the late provision of the required material. No indication has yet been given of what this might cover. It will be imperative that decision-makers take account not only of objective factors (such as lack of access to legal advice, lack of funding for an expert report, or practical difficulties in sourcing evidence within the time specified), but also subjective ones (such as individual vulnerabilities, or an initial lack of trust in advisors or authorities). There is a wealth of evidence – as recognised by UNHCR (see paragraph 35.4 above) – that factors of this kind commonly result in delays to the making of meritorious claims for protection and the marshalling of associated evidence.
 - 142.5. The seriousness of the consequences of a failure or inability to comply. Here, the primary consequence in all cases is that late provision of the required material must be taken into account as “damaging” to the person’s credibility. In cases involving “evidence notices” and PRNs, a further consequence is that the decision-maker must, in considering any late evidence, “have regard to the principle that minimal weight should be given to [it].”
143. In our view – and even if the “good reasons” exception is broadly construed – the nature and significance of the potential consequences raise serious concerns in terms of

¹⁶⁹ “People who claim for any form of protection will be issued with a ‘one-stop’ notice, requiring them to bring forward all relevant matters in one go at the start of the process”: p 28 (emphasis added).

¹⁷⁰ Additional legal advice is to be offered “to support people to bring their claims in one go, when they are notified about removal action”: p 28 (emphasis added).

procedural fairness, and the well-established requirement that decision-makers and judges independently assess the evidence and decide what weight to give to it. If construed narrowly, the proposed provisions give rise to a very real risk of substantive breaches of the *refoulement* obligation under the Refugee Convention and the ECHR.

144. On the terms of the Bill, the decision-maker is required to treat late evidence as damaging to an individual's credibility, even if there is no proper connection at all between the late provision of the evidence and the claimant's credibility. So, for example, if a decision-maker considered that the late provision of a document was the result of an oversight for which there was no good excuse, but did not consider anything in the surrounding circumstances to make it less likely that the claimant was telling the truth about their case, they would nonetheless be required (*i.e.* mandated) by statute to act as though such a connection existed. In our view, that seriously undermines the task of the decision-maker.
145. However, the Bill goes even further, and requires the decision-maker to "have regard" to the principle that late evidence should generally be given minimal weight. In our view, this provision may (and should) be read as entitling a decision-maker to "have regard" to the principle that the late evidence should (generally) be given minimal weight, but allows them to determine that, in the particular circumstances, the weight given to it should nonetheless be significant. Any other approach would require a decision-maker to give "minimal" weight to a piece of evidence which, though produced late without "good reason", was in their considered view highly reliable and directly relevant to (for example) the question of whether a claimant faced a well-founded fear of persecution on return.
146. In either case, then, the provisions in the Bill give rise to a real risk that decision-makers will artificially limit the weight given to what they would otherwise consider to be reliable and cogent evidence in support of an applicant's claim. This is directly inconsistent with the well-established requirement that decision-makers and judges independently assess the evidence and decide what weight to give to it: see e.g. *Karanakaran v Secretary of State for the Home Department* [2000] All ER 449, para 18 (per Lord Justice Sedley) ("**Karanakaran**"); *MN v Secretary of State for the Home Department* [2021] 1 WLR 1956, para 121. Evidence, including a person's own testimony, must be assessed objectively and in the round, and without any prescription

as to the weight it should be given. Statutory interference with this crucial process, of the kind contemplated by the expanded “one-stop” regimes, would give rise to an unjustifiable risk of *refoulement* in breach of the UK’s international and domestic law obligations and/or removal in breach of the ECHR. This risk will only be increased if “one-stop” notices are issued before a claimant has had a proper opportunity to obtain legal advice and to develop a relationship of trust with their advisor(s); if the timeframes for compliance are too tight to take account of the full range of tasks required; or if the “good reasons” exception is applied narrowly or inconsistently.

147. A claimant’s right to an effective remedy under Article 13 ECHR might also be breached by a “one-stop” process insofar as it prevents rigorous examination of a claim by an asylum-seeker that return to their country of origin would breach their rights under Articles 2, 3, 4 and/or 8 of the ECHR.
148. In our view, without substantive amendments to the proposed regimes and the introduction of clearer and more robust safeguards, these provisions are highly likely to result in breaches of the UK’s international legal obligations as well as the common-law requirements of procedural fairness – thereby exposing those with meritorious claims to removal and all the risks this entails.

G. FAST-TRACK APPEAL PROCESSES

The proposal

149. The Policy Statement proposed “an expedited process for claims and appeals made from detention”, “a quicker process for judges to take decisions on claims which the Home Office refuse without the right of appeal”, and “a new fast-track appeal process” intended for cases that are deemed to be “manifestly unfounded or new claims, made late”: pp 27-28. In relation to the former, the intention was to reinstate in statute an accelerated process that is “fast enough to enable claims to be dealt with from detention while ensuring that a person who is detained has fair access to justice”: p 29. The Policy Statement indicated that such a process was to have “clear timescales” but acknowledged that it “will need to provide safeguards to allow cases to be adjourned or transferred out of the accelerated process when it is in the interests of justice to do so”: p 29.

150. The Bill implements several important changes to both qualify and accelerate the passage of appeals and, in certain cases, to remove the right of appeal altogether.
151. **First**, cl 21 creates an expedited appeal process for appellants where they have been served with a PRN (see paragraph 135 above) and made a protection claim after the PRN cut-off date but while the PRN is still in force. Specifically, cl 21(1) inserts into the NIAA 2002 a new s 82A, which provides:
 - 151.1. Where an appellant in the above circumstances would otherwise have a right to appeal to the Tribunal, the Secretary of State must certify that right of appeal, unless satisfied that there were “good reasons” for the person making the claim on or after the PRN cut-off date. As above, the Bill does not provide any examples of what might be treated as a “good reason”.
 - 151.2. If certified, the right of appeal is to the Upper Tribunal only.
 - 151.3. Tribunal Procedure Rules (“TPRs”) must make provision to ensure that these expedited appeals are “determined more quickly” than a “normal” appeal. Neither the Bill nor the Explanatory Notes give any indication as to how this is to be achieved.
 - 151.4. TPRs must also empower the Upper Tribunal to order, if it is in the interests of justice to do so, that the appeal is no longer to be treated as an expedited appeal.
152. Cl 21(2) amends s 13(8) of the Tribunals, Courts and Enforcement Act 2007 (the “**TCEA 2007**”) to provide that a decision of the Upper Tribunal on an expedited appeal cannot be appealed to the Court of Appeal.
153. **Second**, cl 24 inserts into the NIAA 2002 a new s 106A, entitled “Accelerated detained appeals”. It provides that the Secretary of State may certify an immigration decision relating to a detained person as being subject to the “accelerated” procedure if: (i) it is of a “prescribed description”; and (ii) the Secretary of State considers that an appeal in relation to that decision “would likely be disposed of expeditiously”. “Prescribed description” is not defined in the Bill, nor expanded upon in the Explanatory Notes. The result of being certified is as follows:

- 153.1. an individual seeking to appeal against an “accelerated” decision must appeal to the Tribunal within 5 workings days of receiving notice of the decision;
 - 153.2. the Tribunal must make a decision on the appeal not later than 25 working days after the notice of appeal; and
 - 153.3. an application for permission to appeal to the Upper Tribunal must be determined not later than 20 working days after the date on which the individual was given notice of the Tribunal’s decision.
154. The proposed provision provides that the TPRs must secure that the Tribunal and Upper Tribunal are empowered, if satisfied that it is in the interests of justice to do so, to order that an appeal is no longer to be treated as an “accelerated detained appeal”: cl 24(4).
 155. ***Third***, cl 25 proposes to remove the right of appeal for “clearly unfounded” claims. At present, if an asylum claim is determined as being “clearly unfounded” and certified under s 94 of the NIAA 2002, the applicant is provided with an out-of-country right of appeal. Cl 25 amends ss 92 and 94 of the NIAA 2002 to remove both the out-of-country and in-country rights of appeal for “clearly unfounded” protection and human rights claims. According to the Explanatory Note (at para 285), these amendments are intended to remove the “perverse situation” whereby applicants with “clearly unfounded” claims are given a right of appeal, whereas those wishing to make asylum further submissions and who have low or unrealistic prospects of success (but are not entirely without merits) are not given such right to appeal (because they must show that their claim has a “realistic prospect of success” in order to be provided with a right of appeal). The Explanatory Notes also highlight (at para 285) the fact that applicants whose decisions have been certified under s 94 of the NIAA 2002 very rarely exercise their out-of-country appeal right and are far more likely to challenge the certification decision by way of judicial review.
 156. The Government’s European Convention on Human Rights Memorandum (“**ECHR Memorandum**”) does not address the human rights compatibility of the above proposals.

Procedural rights of asylum-seekers on appeal

157. 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. Reflecting this, and as part of the right to an effective remedy/judicial protection set out at paragraphs 139 – 141 above, the ECtHR has consistently applied Article 13 ECHR to mean that an appeal mechanism for refugee status determinations is absolutely necessary where there is danger of *refoulement*.¹⁷¹
158. While Article 16 of the Refugee Convention (which provides that refugees are to have free access to the courts of the Contracting States) does not impose specific procedural obligations, the UN Executive Committee of the High Commissioner's Programme recommends that status determination procedures satisfy certain basic conditions, including that, “[i]f the applicant is not recognised [as a refugee], he should be given a reasonable time to appeal for a formal reconsideration of the decision”.¹⁷²
159. Domestic courts have repeatedly recognised that the significance of protection appeals is such that “only the highest standards of fairness will suffice”: *R (Detention Action) v First-tier Tribunal* [2015] 1 WLR 5341, para 27 (“**Detention Action**”) (and see *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402 per Bingham LJ, p 414; *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219, para 8).
160. Within this, and as part of the broader obligations in respect of procedural fairness, English common law recognises a specific requirement that the applicant have sufficient time to put their case. This was made clear in a series of cases examining the legality of the earlier Fast-Track Rules (the “**FTRs**”), culminating in the Court of Appeal decision in *Detention Action*. In considering the inherent (un)fairness of a system, Lord Dyson MR explained (at para 27):
 - “(i) in considering whether a system is fair, one must look at the full run of cases that go through the system;

¹⁷¹ See, for e.g. *Gebremedhin v France* (App. No. 25389/05, 26 April 2007); *Ćonka v Belgium* (App. No. 51564/99, 5 February 2002).

¹⁷² See UNHCR, *Determination of Refugee Status No. 8 (XXVIII)* (1977), para (e)(vii).

- (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases;
- (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself;
- (iv) the threshold of showing unfairness is a high one “[b]ut this should not be taken to dilute the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals”;
- (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and
- (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts.”

161. Applying the above principles to the FTRs in place at that time, which provided two working days between a negative asylum determination and appeal, the Court of Appeal held (at para 45): (i) that “the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases”; and (ii) that the procedural safeguards (essentially, the possibility to apply for a transfer out of the fast track at the hearing in certain circumstances) were not sufficient in light of “the problems faced by legal representatives of obtaining instructions from individuals who are in detention”, alongside “the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention”.¹⁷³
162. More recently, in *FB (Afghanistan) v Secretary of State for Home Department* [2021] 2 WLR 839, the Court of Appeal emphasised the right to procedural fairness as protecting the fundamental right to access to justice at common law. As Hickinbottom LJ explained (at para 91):

¹⁷³ *R (Detention Action) v First-tier Tribunal* [2015] 1 WLR 5341, paras 38, 40-44.

“the right to access to justice is an inevitable consequence of the rule of law: as such, it is a fundamental principle in any democratic society which more general rights of procedural fairness are to a large extent designed to support and protect.”

163. In relation to the requirements of this principle, Hickinbottom LJ continued (at para 92):

“The right of access to justice means, of course, not merely theoretical but effective access in the real world (*UNISON* at [85] and [93]): it has thus been said that “the accessibility of a remedy *in practice* is decisive when assessing its effectiveness” (*MSS v Belgium and Greece* (European Court of Human Rights (“ECtHR”) Application No 30696/09) (2011) 53 EHRR 2 at [318], emphasis added). This means that a person must not only have the right to access the court in the direct sense, but also the right to access legal advice if, without such advice, access to justice would be compromised (*R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [5] per Lord Bingham of Cornhill; and *MSS* at [319]). For these rights to be effective, as the common law requires them to be, an individual must be allowed sufficient time to take and act on legal advice.”

164. Importantly, the right to justice “is not restricted to a right to access the court to pursue a good claim: it is a right to bring any claim or application, no matter how abusive or even repellent it might be”.¹⁷⁴

Issues arising

Consistency with requirements of procedural fairness

165. The introduction of “expedited” and “accelerated” appeals, and the wholesale removal of the right to appeal in certain cases, may give rise to: (i) breaches of applicants’ rights to an effective remedy/effective judicial protection under the ECHR and retained EU law (as set out above at paragraphs 139-140); (ii) breaches of applicants’ rights to procedural fairness, including the fundamental principle of access to justice, under the common law;

¹⁷⁴ *FB (Afghanistan) v Secretary of State for Home Department* [2020] EWCA Civ 1338, para 102 *per* Hickinbottom LJ.

and, as a result, (iii) an unacceptable risk of breaches of the UK's *non-refoulement* obligations under both the Refugee Convention and ECHR.

166. In particular, the reintroduction of the previously impugned and “structurally unfair” FTRs (albeit with some amendments) gives rise to a very real risk of systematic unfairness for all the reasons identified in the *Detention Action* litigation and companion cases. Although an expedited/accelerated decision-making process is not *per se* unlawful – and such processes are currently adopted, for example, where claims are found to be manifestly unfounded – there are real dangers in applying such processes more widely, and for reasons that are unrelated to the merits of a claim. 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.
167. In order to protect against these risks, the following minimum procedural safeguards would be required in relation to any expedited/accelerated procedure: (i) effective access to legal advice; (ii) sufficient latitude to decision-makers to adjourn/transfer out cases so as to avoid a situation in which a significant proportion of applicants cannot put their cases effectively; (iii) sufficient time to gather the information required to show that it would be “in the interests of justice” to adjourn/transfer out; and (iv) effective opportunities for making such orders in advance of the substantive appeal hearing, so as to avoid creating a *de facto* presumption against exercising the power to remove from the fast track. In the context of fast-track appeals from detention, it will be even more difficult to implement sufficient procedural safeguards to prevent the systemic unfairness that arises from the difficulty of the detainee in accessing legal advice and gathering evidence. Indeed, the UK is yet to devise a fast-track system that is fair in the manner required by international and domestic law.
168. At present, the Bill proposes a singular procedural safeguard in relation to the cl 21 and 24 fast-track processes — that is, requiring that the TPRs be amended so as to allow the (Upper) Tribunal to order that an appeal is no longer to be treated as an “expedited” or “accelerated” appeal. For the reasons set out above, and as in the *Detention Act* litigation, this limited protection is, in our view, likely to be inadequate to meet the “highest standards of fairness” required in the context of these appeals.

169. A failure to uphold procedural fairness and access to justice, the amendments give rise to a near-inevitability that unlawful decisions will go unchallenged and thus present an unacceptable risk of a breach of the UK’s *non-refoulement* obligations under both the Refugee Convention and the ECHR.

H. CHANGES TO THE INTERPRETATION OF THE REFUGEE DEFINITION

The proposal

170. Under the sub-heading “Interpretation of Refugee Convention”, cl 28-32 of the Bill apply for the purposes of determining whether an asylum-seeker is a refugee within the meaning of Article 1A(2) of the Refugee Convention. Specifically, these clauses set out the Government’s interpretation of the following concepts: persecution; well-founded fear; reasons for persecution; protection from persecution; and internal relocation.
171. A number of these clauses seek to insert into primary legislation key elements of the Protection Regulations (Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (S.I. 2006/2525) (the “**2006 Protection Regulations**”), which transposed EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the “**Qualification Directive**”) into domestic law and are set to be repealed under cl 27(4). These amendments are not addressed in any detail in this Joint Opinion. However, the Bill also goes significantly further, and seeks to amend several long- and well-established concepts under international refugee law.
172. *Definition of “persecution”:* Cl 28 replicates reg 3 and 5 of the 2006 Protection Regulations, which implemented Articles 6 and 9 of the Qualification Directive. Contrary to the indication in the Policy Statement, the Bill has not “clarified” the definition of “persecution” in any manner beyond the accepted framework.
173. *Standard of proof and well-founded fear:* The Policy Statement warned that “a clearer and higher standard for testing whether an individual has a well-founded fear of persecution” would be introduced: p 18. This proposal is implemented via cl 29, which

seeks to amend the standard of proof that an applicant must meet by imposing a heightened, two-limb test. The proposed test requires that:

- 173.1. the decision-maker must be satisfied, on the “balance of probabilities”, that the applicant (i) has a protected Convention characteristics and (ii) as a result of that characteristic, does in fact fear persecution (*i.e.* subjective fear); and
 - 173.2. only if satisfied in respect of the above, the decision-maker must determine, to the lower standard of “reasonable likelihood”, whether the applicant will be persecuted and not protected in her country of nationality or former habitual residence.
174. The ECHR Memorandum does not consider the human rights compatibility of this proposal.
175. *Reasons for persecution:* Cl 30 largely replicates reg 6 of the 2006 Protection Regulations, save for one fundamental amendment in relation to the definition of a “particular social group”. Specifically, cl 30 seeks to (re)impose a cumulative test, providing that a particular social group will only be recognised if it meets both of two conditions; namely, that (i) members of the group share an innate characteristic, common background that cannot be changed, or characteristic or belief so foundational to identity or conscience that a person should not be forced to renounce it (reflecting the “protected characteristics approach”) and (ii) the group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society (reflecting the “social perception approach”). The ECHR Memorandum does not consider the human rights compatibility of this proposal.
176. *Definition of “protection”:* At present, reg 4 of the 2006 Protection Regulations provides that protection “shall be regarded as generally provided” when State actors take reasonable steps to prevent persecution by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution, and the applicant has access to such protection. Cl 31 is intended to create a definition of protection from persecution in primary legislation. While the proposed provision largely replicates reg 4, a seemingly slight shift in language – from protection being “regarded as generally provided”, to an individual being “taken to be able to avail themselves of protection from persecution” if such a system exists and they are able to access it – appears to equate

sufficient protection with this defined, minimum standard. The ECHR Memorandum does not consider the human rights compatibility of this proposal.

177. *Internal relocation*: Cl 32 implements Article 8 of the Qualification Directive.

Issues arising

178. In our view, the key legal concerns arising from the Government’s proposed (re)interpretation of the refugee definition are:

- 178.1. the heightened standard of proof for certain aspects of the refugee definition,
- 178.2. the introduction of a cumulative test for establishing a “particular social group”, and
- 178.3. the equation of sufficient State protection with “an effective legal system” and an ability to access that system,

all of which are inconsistent with the proper interpretation of Article 1A(2) of the Refugee Convention and contrary to the UK’s obligations arising under that instrument.

179. While, in the Government’s view, “[t]he UK’s departure from the EU provides an opportunity to clearly define, in a unified source, some of the key elements of the Refugee Convention in UK domestic law”,¹⁷⁵ it is not an opportunity to amend long-established principles of international law. As an international treaty, the Refugee Convention has a single autonomous meaning. The general proposition that an international treaty should be accorded the “same meaning by all who are party to it”¹⁷⁶ is largely uncontroversial. The need for international uniformity is particularly evident in the context of the Refugee Convention; a treaty which, by its very design, is intended to facilitate a minimum level of protection to a refugee regardless of the State party in which they are seeking refuge. In *R v Secretary of State for the Home Department; ex parte Adan* [2001] 2 AC 477, the

¹⁷⁵ “Nationality and Borders Bill: Explanatory Notes”, para 315.

¹⁷⁶ *King v Bristow Helicopters* [2002] 2 AC 628, para 81: “In an ideal world the Convention should be accorded the same meaning by all who are party to it. So case law provides a further potential source of evidence. Careful consideration needs to be given to the reasoning of courts of other jurisdictions which have been called upon to deal with the point at issue, particularly those which are of high standing. Considerable weight should be given to an interpretation which has received general acceptance in other jurisdictions. On the other hand a discriminating approach is required if the decisions conflict, or if there is no clear agreement between them”.

House of Lords expressly considered the question, “is there an autonomous meaning of article 1A(2)?”. Lord Steyn answered in the following terms (at 515-517):

“It follows that the inquiry must be into the meaning of the Refugee Convention approached as an international instrument created by the agreement of contracting states as opposed to regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law. Thus the European Court of Justice has explained how concepts in the Brussels Convention must be given an autonomous or independent meaning in accordance with the objective and system of the convention... [citations omitted] ... Closer to the context of the Refugee Convention are human rights conventions where the principle requiring an autonomous interpretation of convention concepts ensures that its guarantees are not undermined by unilateral state actions. Thus the European Court of Human Rights has on a number of occasions explained that concepts of the European Convention for the Protection of Human Rights and Fundamental Freedoms I1953) (Cmd 8969) must be given an autonomous meaning ... The decisions articulating this idea are too numerous to cite ...

It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 [of the VCLT] and without taking colour from distinctive features of the legal system of any individual contracting state ... In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammeled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.” (emphasis added)

180. Although it is of course right that countries may seek to amend aspects of the refugee definition by domestic legislation, as a matter of international law it is a well-established

principle, codified in Article 27 of the VCLT, that a State cannot obviate its obligations under international law by reference to domestic legislation.¹⁷⁷

Heightened and bifurcated standard of proof (Cl 29)

181. In our view, the proposal to heighten the standard of proof for certain aspects of the refugee definition lacks any principled foundation and is unlawful as a matter of international law.

182. **First**, it is contrary to well-established principles and the long-accepted standard of proof, as recognised by UNHCR and domestic jurisprudence, including from the highest appellate courts. While the Refugee Convention does not prescribe the standard of proof that must be met by an asylum-seeker in order to be recognised as a refugee,¹⁷⁸ UNHCR has explained that:¹⁷⁹

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

[...]

196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the bare necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be

¹⁷⁷ Article 27 of the VCLT provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

¹⁷⁸ Hathaway and Foster, pp 110-111.

¹⁷⁹ UNHCR Handbook, pp 196-197.

successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.” (emphasis added)

183. The UN High Commissioner’s *Note on Burden and Standard of Proof in Refugee Claims*¹⁸⁰ (the “**Note on Burden and Standard of Proof**”) explains that the applicant need only make a “credible” case:

“11. ... Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed. [...]

12. ... Where the adjudicator considers that the applicant’s story is on the whole coherent and plausible, any element of doubt [about particular factual assertions] should not prejudice the applicant’s claim; that is, the applicant should be given the ‘benefit of the doubt’.”

184. Specifically in relation to proof of “fear”, the Note on Burden and Standard of Proof explains that:

“14. In this context, the term “fear” means that the person believes or anticipates that he/she will be subject to that persecution. This is established very largely by what the person presents as his/her state of mind on departure. Normally, the statement of the applicant will be accepted as significant demonstration of the existence of the fear, assuming there are no facts giving

¹⁸⁰ Office of The United Nations High Commissioner for Refugees Geneva, “Note on Burden and Standard of Proof in Refugee Claims” (16 December 1998), pp.2-3.

rise to serious credibility doubts on the point. The applicant must, in addition, demonstrate that the fear alleged is well-founded.” (emphasis added)

185. For more than 20 years the UK courts have applied a single standard of “reasonable likelihood” to all elements of the refugee definition: see, e.g., *Karanakaran*. In *Karanakaran*, the Court of Appeal explicitly rejected the application of the balance of probabilities standard to the assessment of refugee status. As Brooke LJ explained (at paras 101-102):

“101. ... where this country’s compliance with an international convention is in issue, the decision-maker is ... 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.

102. This approach does not entail the decision-maker ... purporting to find “proved” facts, whether past or present, about which it is not satisfied on the balance of probabilities. What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). ...”

186. Sedley LJ made a similar point (at para 16):

“The civil standard of proof, which treats anything which probably happened as having definitely happened, is part of a pragmatic legal fiction. It has no logical bearing on the assessment of the likelihood of future events or (by parity of reasoning) the quality of past ones.”

187. Contrary to the impression given in the Policy Statement and the approach pursued by the Bill, it is simply incorrect to say that the “reasonable likelihood” standard has only been applied to the objective component of the well-founded fear requirement: it has been applied to the question as to whether or not an individual satisfies the Article 1A(2) refugee definition as a whole. We are unaware of any decision which has sought to apply a differential standard to different elements of the refugee definition.

188. The adoption of a “reasonable likelihood” standard reflects the unique features of a decision regarding refugee status, the inherent difficulties faced by an applicant for international protection in establishing his or her claim, the gravity of the consequences of an erroneous decision, the vulnerability of the applicant, and the promotion of a welfare consideration, where the State is not supposed to be the antagonist of the individual: *R v Secretary of State for the Home Department ex Besnik Gashi* [1999] INLR 276.

189. The point was emphasised by the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596, which confirmed that the “reasonable degree of likelihood” threshold is less demanding than a balance of probabilities test because of the interests at stake:

“90. ... the test approved by the House of Lords [in *Sivakumaran*] was that there should be “a reasonable degree of likelihood” (Lord Keith at p 994) or “real and substantial danger” (Lord Templeman at p 996) or a “real and substantial risk” (Lord Goff at p 1000) of persecution for a Convention reason. This remains the test. The editors of Macdonald, Immigration Law and Practice 7th ed (2008) prefer the expression “real risk”, citing the Court of Appeal in *MH (Iraq) v Secretary of State for the Home Department* [2007] EWCA Civ 852, “a real as opposed to a fanciful risk”. “Risk” is in my view the best word because (as explained in the next paragraph) it factors in both the probability of harm and its severity.

91. ... Where life or liberty may be threatened, the balance of probabilities is not an appropriate test.” (emphasis added)

190. A similar standard has been adopted by the ECtHR in relation to potential violations of Article 3 ECHR in expulsion cases. As noted at paragraph 18.1 above, the court has held that an asylum-seeker must adduce evidence capable of showing a “real risk” of being subjected to treatment contrary to Article 3.¹⁸¹

191. **Secondly**, the bifurcation of the standard of proof places far too much emphasis on the subjective element of the “well-founded fear of being persecuted” requirement. Both

¹⁸¹ *Soering v UK* (1989) 11 EHRR 439, para 91; *JK v Sweden* (2017) 64 EHRR 15, para 94.

elements must necessarily be assessed together. The imposition of a different standard of proof for the subjective element *vis-à-vis* the objective elements gives rise to a real risk of perverse outcomes resulting in *refoulement*. If an individual has demonstrated that there is a “reasonable likelihood” that they will be persecuted on return, there is no conceivable basis upon which that individual could be returned, irrespective of whether they have established, on the balance of probabilities, that they possess a subjective fear. In 1966, Grahl-Madsen opined that “[t]he frame of mind of the individual hardly matters at all”¹⁸² and that an individual will be a refugee “irrespective of whether he jitters at the very thought of his return to his home country, is prepared to brave all hazards, or is simply apathetic or even unconscious of the possible dangers”.¹⁸³ According to Grahl-Madsen, “[j]ust as the nervous, the brave, and the foolhardy should be subject to the same gauge, ‘well-founded fear’ may exist, irrespective of whether the individual in question is a babe-in-arms, a lunatic, ignorant or well-informed, naïve or cunning”.¹⁸⁴ In our view, that is self-evidently right. The risk of perverse outcomes is particularly heightened in respect of child applicants and applicants suffering from certain cognitive disabilities, these individuals often facing substantial additional barriers in their ability to conceive of and/or articulate subjective fear.¹⁸⁵

192. In summary, it is very difficult – if not impossible – to envisage a scenario in which it would be lawful to return an individual who (i) had demonstrated that there is a “reasonable likelihood” that they would be persecuted on return (and hence satisfied the objective element of the “well-founded fear” requirement); but (ii) had not demonstrated on the balance of probabilities that they had a subjective fear of such harm. In these circumstances, the proposal for a bifurcated standard of proof – if and insofar as it is genuinely to be used to disqualify applicants from refugee status – is bound to result in violations of the UK’s obligations either under the Refugee Convention (in cases where the applicant is ultimately removed) or more generally (if removal is found to be barred under the ECHR but the person is wrongly denied refugee status).

¹⁸² A Grahl-Madsen, *The Status of Refugees in International Law* (1966) vol 1, 174.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ See e.g. Crock, Ernst and McCallum AO, “Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities” (2013) 24(4) *International Journal of Refugee Law* 735, 742-744; Motz, *The Refugee Status of Persons with Disabilities* (Brill, 2020), p 16.

Limited concept of “particular social group” (Cl 30)

193. The proposal in cl 30 to (re)impose a cumulative test for establishing the existence of a “particular social group” also lacks any principled foundation and is contrary to the UK’s obligations under the Refugee Convention.
194. The proposed approach has been rejected both by UNHCR and in domestic jurisprudence on the explicit basis that it “can give rise to protection gaps which is contrary to the obligations of signatories to the Refugee Convention.”¹⁸⁶
195. In the *Guidelines on International Protection: Membership of a Particular Social Group* (the ‘**PSG Guidelines**’),¹⁸⁷ UNHCR stated that it was “appropriate to adopt a single standard that incorporates both dominant approaches”, with the protected characteristics approach (referred to in the Bill as the “first condition”) and the social perception approach (referred to in the Bill as the “second condition”) coming together to form a disjunctive definition.¹⁸⁸ Although the PSG Guidelines have been misapplied as sanctioning a cumulative test, UNHCR has repeatedly emphasised that this is not the intention. In UNHCR’s view, there are no additional requirements to establishing a particular social group “other than those in the ‘protected characteristics’ or ‘social perception’ approaches” and to require any more “is likely to lead to erroneous decisions and a failure of protection to refugees in contravention of the [Refugee] Convention” (emphasis added).¹⁸⁹
196. Referring explicitly to the PSG Guidelines, UK courts have repeatedly confirmed that the criteria for establishing a particular social group must be read as alternative tests. In *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412, the majority view expressed in the House of Lords (albeit in obiter) was that a particular social group may be formed on the basis of either the protected characteristics approach or the social

¹⁸⁶ *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC), paras 50, 59 citing *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412, para 15 per Lord Bingham.

¹⁸⁷ UNHCR, “Guidelines on International Protection No. 2: “Membership of a Particular Social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/02) (7 May 2002).

¹⁸⁸ This definition is set out in the PSG Guidelines as follows: “[a] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society” (emphasis added). See also UNHCR, “UNHCR Comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM (2009)551, 21 October 2009)” (29 July 2010).

¹⁸⁹ See UNHCR, “Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioners and Reversal of the BIA’s decision”, filed in *Orellana-Monson v Holder* (7 May 2009), 16.

perception approach. As Lord Bingham explained (at para 16), if the definition is interpreted as meaning that a particular social group should only be recognised if it satisfies both criteria, then “it propounds a test more stringent than is warranted by international authority.”

197. More recently, and drawing extensively on the above decision, the Upper Tribunal in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) concluded that “there is clear, highly persuasive support in the majority’s views in the House of Lords in *K & Fornah* and the clarification provided by UNHCR to establish that the test for a PSG under the Refugee Convention is a disjunctive test”.¹⁹⁰ The Upper Tribunal emphasised (at para 59):

“In accordance with the objective of the Refugee Convention, the concept of a PSG should be interpreted in an inclusive manner by determining that it exists on the basis of either [...] the protected characteristics approach (‘eiusdem generis’) or social perception, rather than requiring both.”

198. In short, “[t]he difficulties created by the use of ‘and’ are ... not mere semantics”.¹⁹¹ Cl 30(2) is an attempt to reinstate an approach that has been rejected by UNHCR and domestic courts, in a manner which is inconsistent with the recognised interpretation and underlying objectives of the Refugee Convention, and the UK’s obligation to implement that instrument in good faith.

Equation of sufficient State protection with an effective legal system (Cl 31)

199. The presumption that an individual is able to avail themselves of State protection if there is an effective legal system and an ability to access that system is also inconsistent with the proper interpretation of Article 1A(2) of the Refugee Convention.
200. As Lord Clyde explained in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 (“**Horvath**”) (at 508H-509A):

“The Convention assumes that every state has the obligation to protect its own nationals. But it recognises that circumstances may occur where that protection

¹⁹⁰ *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC), para 57.

¹⁹¹ *Ibid*, para 59.

may be inadequate. The purpose of the Convention is to secure that a refugee may in the surrogate state enjoy the rights and freedoms to which all are entitled without discrimination and which he cannot enjoy in his own state.”

201. Sufficient protection requires a willingness and ability to provide a reasonable level of protection from the persecution of which an asylum-seeker has a well-founded fear. The existence of and ability to access an effective legal system is a necessary but insufficient condition. While recognising that “[no] complete or comprehensive exposition can be devised which would precisely and comprehensively define the relevant level of protection”, Lord Clyde explained in *Horvath* (at 510G-H) that:

“the person must be able to show that if he is not granted asylum he would be required to go to a country where his life and freedom would be threatened. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of [acts] contrary to the purposes which the Convention requires to have protected. More importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.”¹⁹² (emphasis added)

202. While the system and machinery should include “a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes,” and ensure that the “victims as a class must not be exempt from the protection of the law,”¹⁹³ the existence of a legal framework may not be sufficient. Illustrating this point, Collins J observed in *Secretary of State for the Home Department v Kacaj* [2002] INLR 354 (in a passage approved by the Court of Appeal in *Atkinson v Secretary of State for the Home Department* [2004] EWCA Civ 846) that:

“It may be said that it is no consolation to an applicant to know that if he is killed or tortured, the police will take steps to try to bring his murderers or assailants to justice. He is concerned with the risk that he may be killed or tortured and if the authorities cannot provide effective protection to avoid the

¹⁹² *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 510 per Lord Clyde, citing Goodwin-Gill, *The Refugee in International Law* (2nd ed, 1996), p 73.

¹⁹³ *Horvath*, 511 per Lord Clyde citing [2000] INLR. 15, 26 per Stuart-Smith LJ.

risk there will be a breach of the Convention if he is returned. Practical rather than theoretical protection is needed.”¹⁹⁴

203. The limited definition proposed under cl 31 risks detracting from the central question and the fundamental need (referred to in *Horvath*) to consider the particular circumstances of each case. As Professor Hathaway and Professor Foster explain (at p 314):

“The ultimate question in refugee law is not whether the home state has satisfied any particular standard – the home state’s responsibility not being the subject of the inquiry – but whether it is *in fact* able to protect against a risk of serious harm.” (emphasis in original)

204. In other words, the ultimate question is not whether a particular State has an effective legal system which an applicant is able to access. Notwithstanding the systemic sufficiency of any given legal system, there are countless reasons for which a particular individual may still be unable to avail themselves of sufficient protection and thereby possess a well-founded fear of persecution. As formulated, the language of cl 31 unduly restricts the meaning and assessment of State protection, and risks undermining the fundamental principle that “an actor provides for ‘protection’ only when this protection is effective to the extent that it precludes the fear or risk from being well-founded or real”.¹⁹⁵

I. PROTECTION AGAINST REFOULEMENT

The proposal

205. In relation to revocation, the Policy Statement set out the Government’s intention to:

“Reduce the criminality threshold so that those who have been convicted and sentenced to at least 12 months’ imprisonment, and constitute a danger to the community in the UK, can have their refugee status revoked and be considered

¹⁹⁴ *Secretary of State for the Home Department v Kacaj* [2002] INLR 354, para 21 cited in *Atkinson v Secretary of State for the Home Department* [2004] EWCA Civ 846, para 39. See also *AW (Sufficiency of Protection) Pakistan* [2011] UKUT 31, para 23.

¹⁹⁵ Hailbronner and Alt, “Articles 1–10,” in Hailbronner (ed.), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (2010) 1006, p 1051.

for removal from the UK (in line with UK Borders Act 2007 provisions)": p 18.

206. This proposal is implemented via cl 35 of the Bill, which amends s 72 of the NIAA 2002 – a provision which “applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention”. Article 33(2) contains the narrow exception to the Convention’s general prohibition on *refoulement* (discussed above) and applies to a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”
207. Notably, the proposed change in approach is mis-described in the Policy Statement – as Article 33(2) relates not to exclusion from (or revocation of) refugee status, but to the loss of protection against *refoulement*.¹⁹⁶ This is corrected in the Bill.
208. At present, s 72 of the NIAA 2002 establishes a presumption that a person has been convicted of a “particularly serious crime” and constitutes a “danger to the community of the United Kingdom” for the purposes of Article 33(2) if they have been convicted in the UK of an offence and sentenced to a period of imprisonment of at least two years. Both presumptions are rebuttable.¹⁹⁷
209. The Bill envisages the following changes to this scheme:
 - 206.1. Rather than a person being “presumed to have been” convicted of a “particularly serious crime” and constituting a danger to the community following a two-year sentence, a person “is” convicted of such an offence if sentenced to imprisonment of at least twelve months.
 - 206.2. A person who has been convicted of a “particularly serious crime” (so defined) is “to be presumed to constitute a danger to the community of the United Kingdom.”

¹⁹⁶ Accordingly, a person who had lost this protection but could not be removed or deported for other reasons – for example, because to do so would violate their rights under Article 2/3 ECHR – would still be entitled to the other important rights conferred on refugees by the Refugee Convention – at least those which accrue by reason of physical and lawful presence: see C-391/16 *M v Ministerstvo vnitra* [2019] 3 CMLR 30, para 107.

¹⁹⁷ With respect to being a danger to the community, this is expressly provided for in s 72(6). With respect to the seriousness of the offence, see *EN (Serbia) v SSHD* [2010] QB 633 (holding that an irrebuttable presumption would be incompatible with the Refugee Convention and that s 72 fell to be interpreted accordingly).

206.3. This presumption is expressly identified as rebuttable. No provision is made for rebutting the conclusion that a crime attracting a sentence of more than twelve months is “particularly serious”.

Issues arising

210. In our view, adopting such a prescriptive approach to the threshold for a “particularly serious crime”, and setting the bar for this as low as any twelve-month sentence, would amount to a clear violation of the Refugee Convention.
211. The circumstances in which a person who meets the definition of a refugee, and is not excluded from refugee status by virtue of Article 1F of the Convention, can lose their protection against *refoulement* are very narrow indeed. In our view, it is highly unlikely that an offence attracting a sentence of twelve months will amount a “particularly serious crime” within the meaning of Article 33(2). This is a measure of last resort, designed to protect the host State. The crime must be “particularly serious” because it authorises the return of the individual to a country in which they face a threat to their life or freedom. Academic commentators regard it as authorising *refoulement* only in “clear and extreme cases”.¹⁹⁸ The Court of Appeal has held that:

“45. ... The words “particularly serious crime” are clear, and themselves restrict drastically the offences to which the article applies.

[...]

47. ... I have no doubt that particularly serious crimes are not restricted to offences against the person. Frauds, thefts and offences against property, for example, are capable of being particularly serious crimes, as may drug offences, particularly those involving class A drugs. In addition, matters such as frequent repetition or a sophisticated system or the participation of a number of offenders may aggravate the seriousness of an offence.”¹⁹⁹ (emphasis added)

212. In that case, the Court made it absolutely clear that not “every crime that is punished with a sentence of two years’ imprisonment is particularly serious” (at para 69), and that an

¹⁹⁸ Hathaway, p 418.

¹⁹⁹ EN (Serbia) v Secretary of State for the Home Department [2010] QB 633.

irrebuttable presumption to this effect would be incompatible with the Refugee Convention (para 68). These conclusions reflect the correct position as a matter of international law.

213. In our view, lowering the bar still further – even if the resulting conclusion remains rebuttable in the individual case (which is presently unclear) – is therefore inconsistent with the UK’s obligations under Article 33(2) of the Refugee Convention, and risks resulting in the *refoulement* of individuals who are entitled under international law to protection against it.
214. In response to similar concerns raised during the consultation process, the Government’s Consultation Response suggests only that “there are some serious offences which will be captured by the revised threshold” (emphasis added). Self-evidently, even if some offences attracting a sentence of between twelve months and two years were properly characterised as “particularly serious” for the purposes of Article 33(2), this could be established on the individual facts of the case and action taken accordingly. The inclusion of all offences in this category via the revised threshold is a dangerously blunt instrument for addressing this scenario, and (again) is inconsistent with the UK’s international obligations.
215. Finally, we note that the revised threshold of a “particularly serious crime” aligns with the revised maximum summary conviction for the offence of unlawful entry/arrival (as introduced by cl 37 and set out in further detail below), thereby ensuring that the majority of asylum-seekers are not only criminalised for their pursuit of protection, but that this pursuit alone constitutes a “particularly serious crime”.

J. ENTRY AND ARRIVAL OFFENCES

The proposal

216. The Policy Statement clearly expressed the Government’s intention to “[i]ntroduce tougher criminal offences for those attempting to enter the UK illegally”, stating that “[i]t is unacceptable that people seeking to enter our country illegally … are not appropriately penalised for breaking the law” and that “[t]ougher penalties would … deter some people from undertaking these dangerous journeys altogether”: p 36. In addition, and emphasising the role of “criminal gangs and networks” in facilitating illegal immigration,

it also focused on the need to “break th[is] business model” by “strengthen[ing] existing facilitation offences to take tougher action against anyone willing to risk lives facilitating a migrant’s illegal entry into the UK”: pp 36-37.

217. The above aims are implemented via cl 37 and 38, which amend the 1971 Act to expand the offences and penalties set out therein.
218. Cl 37(2)(C1) amends s 24 of the 1971 Act (Illegal entry and similar offences) – which already makes it an offence to knowingly enter the UK without leave – to create a new offence of unlawful arrival (*i.e.* arrival without a valid entry clearance).
219. According to the Explanatory Notes (at para 386), “[e]ntering the UK without leave is no longer considered entirely apt given the changes in ways in which people have sought to come to the UK through irregular routes.” The Government appears to have maritime arrivals in mind, indicating that these amendments are intended to “allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don’t technically ‘enter’ the UK”.²⁰⁰
220. The actual effect, however, is significantly wider and more pernicious in its reach; under the terms of the proposal, any asylum-seeker who is unable to secure entry permission before fleeing persecution and who subsequently arrives in the UK will have committed an offence. This offence now carries a maximum penalty of twelve months’ (on summary conviction) or four years’ imprisonment (on conviction on indictment): cl 37(2)(D1). The Bill does not provide for any statutory defence to an individual who is later recognised as a refugee and as having had no alternative option when fleeing persecution.
221. In relation to the above offences, the Bill also removes the previous time limit to provide that proof that a person had leave to enter or a valid entry clearance (as the case may be) is to lie on the defendant for the entirety of the time that proceedings can be brought: cl 37(3)(c)(ii) and (d).
222. Further, and in relation to the facilitation offences:
 - 219.1. Cl 37(4) amends s 25 of the 1971 Act (Assisting unlawful immigration) by inserting the words “or arrive in” after “enter”, thereby expanding the offence

²⁰⁰ Explanatory Notes, para 388.

of facilitating the commission of a breach of immigration law²⁰¹ to include facilitating an individual's unlawful arrival in the UK. This amended offence carries a maximum penalty of life imprisonment: cl 38(1).

- 219.2. Cl 38(2) amends s 25A(1)(a) of the 1971 Act (Helping asylum seeker to enter) by removing the words "and for gain". As a result, a person will commit an offence if she knowingly facilitates the arrival or entry into the UK of an individual who she knows or has reasonable cause to believe is an asylum-seeker. This applies irrespective of whether the asylum-seeker has the appropriate entry permits (*i.e.* it applies equally to assisting a legal entrant). The sole statutory defence of acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services is unamended.
220. The ECHR Memorandum does not address the human rights compatibility of the new offence of unlawful arrival, nor the revised facilitation offences set out immediately above.

Issues arising

221. The key concerns arising from the new and revised offences are that:
- 221.1. the new offence of unlawful arrival is designed to, and will in practice, penalise refugees based on their mode of arrival, contrary to the basic rationale of the Refugee Convention, and in clear breach of the UK's obligations under Article 31 of the Refugee Convention;
- 221.2. the new offence of unlawful arrival, and the revised offences of assistance (without gain) and facilitation (of unlawful arrival), are entirely contrary to the spirit and purpose of the Refugee Convention.

The obligation of non-penalisation under Article 31 of the Refugee Convention

222. The offence introduced under cl 37(2)(C1) criminalises the very act of arriving to seek asylum in the UK. In order to understand the manner in which it does so, it is necessary

²⁰¹ "Immigration law" is defined at s 25(2) of the 1971 Act to mean a law which controls non-UK nationals' entitlement to enter, transit across, or be in the UK.

to consider (i) the distinction between “entry” and “arrival” and (ii) the current system for obtaining entry clearance into the UK.

223. The term “entry” is defined in s 11 of the 1971 Act (Construction of references to entry) as meaning disembarking and subsequently leaving the immigration control area. As the Court summarised in *Kapoor and Ors v R* [2012] 1 WLR 3569 (at para 23):

“it can be said a person arriving at an airport or port with immigration facilities shall be deemed not to enter the United Kingdom whilst waiting to pass through immigration or whilst detained, temporarily admitted or released whilst liable to detention.”

224. Therefore, an individual may arrive at the UK border and present themselves to immigration control (including for the purpose of seeking asylum) but is not deemed to have entered into the UK unless and until such time as they have passed through immigration control and in effect cross the border.
225. In order to obtain “entry clearance” under the current system a person must qualify for one of the visa categories provided for in the Immigration Rules. There is no visa category for an individual who wishes to enter the UK for the purpose of claiming asylum in the UK, nor is it possible to claim asylum in the UK from overseas; an asylum-seeker must be physically in the UK to make a protection claim.²⁰² In short, there is no legal way to travel to the UK specifically for the purposes of seeking asylum. Further to these legal difficulties, and to the extent that an asylum-seeker may in theory be eligible for a particular visa category, asylum-seekers face enormous practical obstacles to obtaining permission to arrive/enter into the UK prior to their flight from persecution. Reflecting this, the Policy Statement itself acknowledged that the majority of asylum-seekers arriving in the UK have done so irregularly.²⁰³

²⁰² Home Office, “Applications from abroad: policy” (20 September 2011), which provides: “As a signatory to the 1951 Refugee Convention, the UK fully considers all asylum applications lodged in the UK. However, the UK’s international obligations under the Convention do not extend to the consideration of asylum applications lodged abroad and there is no provision in our Immigration Rules for someone abroad to be given permission to travel to the UK to seek asylum.”

²⁰³ Explanatory Notes, p 8 (noting that, “[i]n the year ending September 2019, 62% of UK asylum claims were made by those entering illegally - for example by small boats, lorries or without visas.”)

226. In this context, the Bill proposes to criminalise the majority of asylum-seekers based on their journey – which, in all likelihood, was the only viable route available to them – and for failing to meet an impossible criterion.

The criminalisation of altruism and compassion

227. On its terms, cl 38 proposes to criminalise anyone facilitating an asylum-seeker to arrive or enter – other than individuals working within NGOs – even if they are acting for wholly altruistic reasons. Cl 37(4) does likewise. In doing so, these proposals are contrary to the spirit and purpose of the Refugee Convention, which, as the UN High Commissioner for Refugees observed on the eve of the 70th anniversary of the Refugee Convention, “reflects common values of altruism, compassion, and solidarity.”²⁰⁴ As many others have observed, cl 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. That the Crown Prosecution Service retains its discretion to prosecute any new offence is of little solace. Adapting the famous words of Lord Shaw to the present context, to remit the maintenance of the spirit of the Convention to the region of discretion is to shift its foundations “from the rock to the sand”.²⁰⁵
228. Cl 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.²⁰⁶
229. The absurdity of these provisions is especially stark at sea. While there may be “no intention in this Bill to criminalise bona fide, genuine rescue operations by the [Royal National Lifeboat Institution]”,²⁰⁷ the Bill does not provide any explicit reassurance and the amended offences, on their ordinary terms, risk doing just that. The Bill thus gives rise to a direct inconsistency with international law, under which ship masters have an

²⁰⁴ Filippo Grandi, “Stand up for the Refugee Convention or millions will pay the price” (29 July 2021), <https://www.unhcr.org/uk/news/latest/2021/7/61029aad4/refugee-convention-millions-pay-price.html>.

²⁰⁵ The original passage reads: “To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand”: *Scott v Scott* [1913] AC 417, 477.

²⁰⁶ Aneurin Brewer, “An analysis of the Nationality and Border Bill” (21 July 2021), <https://www.lawgazette.co.uk/commentary-and-opinion/an-analysis-of-the-nationality-and-borders-bill/5109298.article>.

²⁰⁷ HC Deb (20 July 2021). Vol. 699. Mr Chris Philp MP (<https://hansard.parliament.uk/commons/2021-07-20/debates/D6FA6055-BA80-4980-AE15-910876BB1E19/NationalityAndBordersBill>).

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” and “proceed with all possible speed to the rescue of persons in distress”.²⁰⁸ 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.”²⁰⁹ The implication of these rules is that the UK cannot legally prohibit its vessels (in practice, ships’ masters) from rescuing asylum-seekers at sea.

K. COSTS

The proposal

230. The Policy Statement included a proposal to “[e]ncourage the increased use of wasted costs orders in asylum and immigration matters”: p 28. Wasted costs orders (“WCOs”) are generally orders requiring that a legal representative personally pay a sum toward the other party’s costs.
231. The Government’s proposal would involve “introduc[ing] a duty on the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal to consider applying a WCO in response to specified events or behaviours, including failure to follow directions of the court, or promoting a case that is bound to fail”: p 29. Indeed, the Government indicated that it was also considering “introducing a presumption in favour” of a WCO in particular circumstances, and extending its scope to cover the court’s costs as well as those of the parties: *ibid.*
232. Pursuant to this proposal, the Bill provides (at cl 63) that TPRs must:

²⁰⁸ 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...”.

²⁰⁹ The UK definitively signed the SAR Convention on 22 May 1980, thereby confirming its consent to being bound by this treaty.

- 232.1. prescribe conduct that, absent evidence to the contrary, must be treated as “improper, unreasonable or negligent” for the purposes of the making of a WCO; and
- 232.2. require the Tribunal, where it is satisfied that such conduct has occurred, to consider whether to make such an order.
- 233. This requires, in effect, the creation of a rebuttable presumption in favour of a WCO where specified conduct occurs – but leaves it to the Tribunal to decide when the presumption should arise.

Issues which may arise

- 234. The primary concerns arising from these provisions centre on access to justice and on the procedural rights inherent in Articles 2, 3, 4 and 8 ECHR. As to the former, effective access to the courts and tribunals is a fundamental constitutional right, with which Parliament is taken not to intend to interfere (or to authorise interference) in the absence of express words or necessary implication.²¹⁰ As to the latter, and as noted at paragraph 139 above, the procedural aspects of Articles 2, 3, 4 and 8 ECHR encompass the right to an effective remedy. In some cases, access to legal advice and representation will constitute an essential component of these rights.²¹¹ In our view this is particularly likely in the context of asylum and human rights appeals before the Immigration Tribunals, where the law is complex and the stakes are high.²¹²
- 235. Legal representatives who act for appellants in the Tribunals – particularly on a publicly funded basis – already face a difficult, and often financially precarious, task. The risk of being exposed to personal liability for the costs of the Secretary of State, and potentially the Tribunal, in any but exceptional circumstances is liable to operate as a significant disincentive to taking on work of this kind. This otherwise self-evident risk is supported by the observations of Lord Hobhouse in *Medcalf v Mardell* [2003] 1 AC 120, to the effect that:

²¹⁰ See *R (Unison) v Lord Chancellor* [2017] 3 WLR 409.

²¹¹ See *Gudanaviciene v Director of Legal Aid Casework* [2015] 1 WLR 2247. Although the Court in *Gudanaviciene* was immediately concerned with Article 6 ECHR, which is not engaged in immigration proceedings, it is well established that Article 8 ECHR entails similar procedural protections: see e.g. *Kiarie*, paras 48-51. Critical factors include the complexity of the substantive legal issues, the significance of what is at stake, and the ability of the individual to cope with the demands of legal proceedings.

²¹² See e.g. *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 424, para 21.

- 235.1. “the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively” (at para 52);
- 235.2. “[u]npopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the Executive, the Judicial or by anyone else” (*ibid*); and
- 235.3. a punitive wasted costs jurisdiction “creates a risk of a conflict of interest for the advocate” (at para 55) – it “can, at best, only provide a distraction in the proper representation of his own client and, at worst, may cause him to put his own interests above those of his client” (at para 56).
236. At present, the Tribunal has (properly) recognised that “WCOs are likely to be rare where a legal representative is acting on instruction of their client”,²¹³ including in cases involving the alleged “pursuit of a hopeless appeal.”²¹⁴ If the rules enacted pursuant to cl 63 were to alter this substantive position – so as to prompt the Tribunal to make a WCO in circumstances where this would previously have been considered inappropriate – there is a considerable risk that this would disincentivise legal representatives (both solicitors and barristers) from accepting instructions in this area – particularly in difficult cases. If this effect were sufficiently widespread, appellants would experience increased difficulties and delays in accessing legal advice and representation, thereby impairing their fundamental right of access to justice. As regards asylum, moreover, this is a context where the State is not supposed to act as though it is the antagonist of the individual: rather, asylum proceedings are intended to promote a welfare concern.²¹⁵ The rebuttable nature of the presumption to be established would provide a safeguard, but may not be sufficient to mitigate the underlying disincentive (and would in any event be liable to generate satellite litigation which would cut against the Government’s stated objective of reducing delays in the system).
237. These concerns are only amplified by the fact that, as matters presently stand, the position in the Tribunals is that WCOs cannot be issued against Home Office Presenting

²¹³ Presidential Guidance Note No. 2 of 2018, para 1.6.

²¹⁴ *Ibid*, citing relevant authority.

²¹⁵ See *Besnik Gashi* [1999] INLR 276, per Thorpe LJ

Officers, who conduct the majority of appeals on behalf of the Secretary of State.²¹⁶ This position does not appear to be altered by the Bill. Although it includes an amendment to s 29 TCEA 2007, providing that a Tribunal “may, in particular, make an order in respect of costs … if it considers that a part or its legal or other representative has acted unreasonably”, this is unlikely to alter the current position, which is founded on the idea that – by application of the *Carltona* principle – “the Secretary of State and [Home Office Presenting Officers] are a single entity and may be regarded as a litigant in person.”²¹⁷

238. Accordingly, the impact of any expansion of the WCO regime would fall almost exclusively on appellants – exposing their representatives to risks and pressures of which their opponents would remain entirely free. This would raise real issues concerning equality of arms, which (in our view) forms an important part of the procedural rights guaranteed by (in particular) Article 8 ECHR.²¹⁸
239. Ultimately, in order properly to guard against the risk of unintended interferences with fundamental rights, any substantive expansion of the WCO regime is unwarranted and should be avoided.

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²¹⁶ Presidential Guidance Note No. 2 of 2018, para 1.5, citing the judgment in *Awuah (Wasted Costs Orders)* [2017] UKFtT 555 (IAC).

²¹⁷ *Ibid.*

²¹⁸ See *Gudanaviciene*, para 70 (noting that there is little distinction between the guarantees of Article 6(1) ECHR and the procedural aspects of Article 8) and para 46 (identifying equality of arms as a core part of Article 6(1)).